Are Browse-Wrap Agreements All They Are Wrapped Up To Be?

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I. INTRODUCTION .............................................................................................................. 2
II. CREATING STANDARDIZED ELECTRONIC CONTRACTS.................................
   A. Notice Requirements for Online Agreements .............................................
   B. Manifesting Assent to Online Contracts....................................................
III. ENFORCING BROWSE-WRAP TERMS.................................................................
   A. Mandatory Terms ..................................................................................
   B. Prohibitory Terms ....................................................................................
IV. THE FINAL FRONTIERS............................................................................................
   A. Warranties and Remedies ........................................................................
      1. Substantive Law Pertaining to Goods: Warranties and Remedies ..........
      2. Applicability of Browse-Wrap Agreements to Limitations on Damages in Goods Transactions ..........
      3. Substantive Law Pertaining to Services: Warranties and Remedies
      4. Applicability of Browse-Wrap Agreements to Limitations on Damages in Service Transactions ..........

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5. Conclusions About Limiting Terms in Goods and Services Contracts

B. Terms Pertaining to Consumer Information

1. Types of Information
2. Personally Identifiable Information
3. Nonpersonally Identifiable Information
4. Browse-Wrap and Assent to Privacy Policies

V. CONCLUSION

I. INTRODUCTION

Electronic agreements have become omnipresent in the digital commercial marketplace. Whether used to sell goods or services, or simply to define relationships, standardized electronic agreements have appeared in abundance in business-to-business or business-to-consumer transactions. Standardized electronic agreements, like their physical counterparts, offer the ability to address multiple concerns in a simple, efficient fashion. Although electronic contracts and electronic signatures have been accepted and promoted by federal and state governments, many fundamental aspects of contract law have been left for the courts to wrestle with when disputes arise.

Today, there are essentially two types of standardized electronic agreements: the click-through agreement and the browse-wrap agreement. A click-through agreement is usually conspicuously


2. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) (“Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.”); Terry J. Ilardi, Mass Licensing—Part 1: Shrinkwraps, Clickwraps and Browsewraps, 831 PLI/Pat. 251, 255 (June 2005).

3. This term encompasses a wide variety of marks people use to show assent.


5. For purposes of this Article, the authors consider opt-in agreements as a type of click-through agreement because an offeree has to manifest acceptance by electronically checking a box.
presented to an offeree and requires that person to click on an acceptance icon, which evidences a manifestation of assent to be bound to the terms of a contract. On the other hand, a browse-wrap agreement is typically presented at the bottom of the Web site where acceptance is based on “use” of the site. Litigation surrounding click-through agreements surfaced first, but browse-wrap litigation soon followed. Although neither agreement is particularly new (each has appeared well in advance of the ensuing litigation), few state and federal courts have addressed the enforceability of browse-wrap agreements and the terms therein. The dearth of settled law surrounding browse-wrap agreements creates uncertainty.

This Article discusses the development of browse-wrap contract law as it relates to contract formation and the enforcement of specific terms. This Article also identifies terms that have not yet led to published decisions and offers a schematic by which those terms may be considered.

6. See Ilardi, supra note 2, at 255.