Ensuring Enforceability: How Online Businesses Can Best Protect Themselves from Consumer Litigation

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ENSURING ENFORCEABILITY: HOW ONLINE BUSINESSES CAN BEST PROTECT THEMSELVES FROM CONSUMER LITIGATION

I. INTRODUCTION

Does this sound like a familiar tale? You are about to install your latest software purchase onto your computer when your screen is overtaken by a lengthy contract/licensing agreement that will not let you proceed without clicking on a box that ensures that you "agree" to its terms. Alternatively, have you simply tried to download a program from the Internet and found yourself face-to-face with a similar legal document that would require a considerable time investment to read and comprehend?

In such situations, you, the consumer, are faced with a choice. Do you take the time to learn exactly the terms to which you are agreeing, or do you throw caution to the wind, hoping that your decision not to read the contract does not come back to haunt you? If you choose the former, you may find that in clicking on that "I agree" box, you are consenting, among many other things, to arbitrate any disputes that may arise between you and the vendor. However, if you are like most consumers, you will probably decide that plodding through a bunch of legal terms is not worth your time, especially when you are excited about delving into your new program.

On the other hand, perhaps you have been on the business side of the dilemma, trying to create a contract that will bind its users. Do you include an arbitration clause, knowing that many consumers will barely skim your contract and may be unpleasantly surprised that you have already determined the manner in which their dispute will be heard? What will be your liability if a consumer (or, in the worst case scenario, a group of consumers in a class action) sues your business, claiming that the arbitration clause is unfair and has no place in such a standardized contract? How can you help protect your business from such lawsuits?

The answer is simple: businesses can protect themselves through knowledge. By becoming familiar with the state of the law regarding on-screen contracts and the arbitration clauses they may contain, businesses can help ensure that their contracts' terms will be binding on consumers. Even though businesses cannot make sure that consumers will actually read the entire contract, they can at least protect themselves
legally by knowing the law and conforming their contracts to the parameters laid out by the federal courts.

Therein lies the purpose of this Comment: to advise online businesses on how to best protect themselves from contract-related consumer lawsuits. Part II traces the development of the law regarding commercial contracts and the enforceability of arbitration clauses. Part III discusses why businesses, especially those that conduct business online, may find arbitration agreements to be an indispensable legal protection. In addition, Part III analyzes recent court treatment of standardized user agreements and the enforceability of the terms therein. Finally, Part IV synthesizes recent court decisions, and suggests some steps businesses can take in drafting contracts that may save them from costly litigation.

II. DEVELOPMENT OF THE LAW FAVORING ARBITRATION AGREEMENTS IN CONSUMER CONTRACTS

Before Congress passed the Federal Arbitration Act (FAA) in 1925, the judiciary had historically been hostile toward enforcing arbitration agreements in any form, as courts "jealously guard[ed] their dispute resolution monopoly." The FAA was passed with the aim to end this long-standing hostility, directing courts to enforce arbitration clauses in contracts the same way they would enforce any other contract term. In effect, the FAA creates a strong presumption in favor of arbitration, and over the years the courts have interpreted arbitration clauses in contracts—especially commercial/consumer contracts—in keeping with the spirit of the FAA.

Since the passing of the FAA, arbitration clauses have been appearing with greater frequency in commercial contracts; today, they are commonplace. Because consumer disputes are often factually

4. See McLaughlin, supra note 2, at 907; see also Shirley A. Wiegand, Arbitration Clauses: The Good, the Bad, the Ugly, 47 OKLA. L. REV. 619, 619 (1994).
5. See Wiegand, supra note 4, at 619.
ENSURING ENFORCEABILITY

simplistic, they may be resolved through arbitration with relative ease.6 Thus, businesses have increasingly used arbitration clauses in their agreements with consumers as a cost-efficient and time-saving method of dispute resolution.7

However, arbitration clauses that have proven most controversial are those that appear in consumer contracts of adhesion.8 In a contract of adhesion, "virtually all terms are authored by one party and offered to the other party strictly upon a 'take-it-or-leave-it' basis."9 Businesses generally use such contracts in "'mass' transactions," where it would be cost-prohibitive to contract individually with consumers.10

While some argue that arbitration clauses have no place in contracts of adhesion because of the one-sided nature of the agreement and the "relatively weak bargaining power" of the consumer, courts have found these arbitration clauses to be enforceable against consumers.11 This phenomenon is due in part to courts finding that the FAA, as applied to arbitration clauses in consumer contracts of adhesion, preempts conflicting state laws that attempt to restrict arbitrability.12 In addition, courts have imparted that both businesses and consumers benefit from arbitration agreements within standardized contracts, and that arbitration clauses are not inherently unconscionable or per se unfair to

6. Brafford, supra note 3, at 333 (citations omitted).
7. Id.
8. See id. The controversy is as follows: "[S]ome consumer advocates assert that courts should presume that arbitration clauses in standardized consumer contracts are invalid because they are intrinsically coercive. On the other hand, companies maintain that the clauses are fair and greatly benefit both the consumer and the company." Id. (citations omitted); see also Wiegand, supra note 4, at 622 (stating that "the United States Supreme Court until recently has been reluctant to enforce pre-dispute arbitration agreements in certain types of disputes . . .").
10. See id. at 1431 n.258. Another more comprehensive definition of contracts of adhesion describes them as "(1) a printed form of many terms; (2) drafted by one party; (3) who routinely enters such transactions; (4) offered on a take-it-or-leave-it basis; (5) signed by the adherent; (6) who is not a repeat player; (7) whose principal contract obligation is the payment of money to the contract drafter." Id. (citing Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1174, 1177 (1983)).
11. See Brafford, supra note 3, at 335.
consumers. For example, Gilmer v. Interstate/Johnson Lane Corp. was a pivotal United States Supreme Court decision in which the Court held that a plaintiff, in claiming that an arbitration clause in an adhesion contract is unenforceable, cannot prevail by solely arguing that arbitration is inherently unfair to consumers or that its place in adhesion contracts is intrinsically coercive. Rather, the Court emphasized that arbitration is an effective means "to justly resolve conflicts" and found that the "argument that the arbitration agreement should be invalidated because the contracting relationship involved unequal bargaining power" was without merit.  

Three years later, in Badie v. Bank of America, a California intermediate appellate court held an arbitration clause in an adhesion contract binding on bank customers. In this case, Bank of America sent the compulsory agreement to its existing customers with their monthly statements, thereby binding the customers to submit any future disputes to arbitration. Supporting its opinion, the court stated: "[T]he law . . . views . . . [arbitration] as a mutually beneficial remedy that is of assistance to all concerned." Further, if consumers found the modified agreement unfair or otherwise undesirable, "consumers could choose to take their business elsewhere."  

A year later, in Allied-Bruce Terminix, Inc. v. Dobson, the Supreme Court "solidified [its] rationale in favor of arbitration." There, a consumer signed a standardized service contract that contained an arbitration clause. When a dispute arose regarding the service, the consumer sued; however, Allied-Bruce asked the trial court to enforce the agreed upon arbitration clause. The trial court refused to do so—as did the state supreme court—due to a state statute that made
"written, pre-dispute arbitration agreements invalid and unenforceable." 26

When the case made its way to the United States Supreme Court, however, the Court reiterated the supremacy of the FAA's policy favoring arbitration over state laws that restrict the use of arbitration clauses in consumer adhesion contracts. 27 Further, "[b]ecause of the supremacy . . . of the . . . [FAA], states cannot place an arbitration agreement on 'an unequal footing' and subject it to more stringent scrutiny than any other contract." 28 Thus, the state law restricting arbitration agreements was held invalid. 29 In making this decision, the Court strengthened the precedent that arbitration clauses, even in consumer adhesion contracts, will be treated like every other contract provision and will only be unenforceable if deemed unconscionable. 30

From the decisions discussed above, the trend is clear: the courts support the FAA's policy in favor of arbitration and are not averse to enforcing that policy in standardized consumer contracts. Courts continually reject the pre-FAA attitude toward arbitration agreements, which was clouded with a suspicion of injustice. 31 Moreover, courts consistently have found that the presence of arbitration clauses in adhesion contracts is not "oppressive" of consumers, and that such clauses are not per se unconscionable. 32 Rather, courts stress that adhesion contracts are still voluntary—if a consumer does not want to submit his dispute to arbitration, he can opt not to sign the business's contract in the first place. 33

As courts have willingly enforced the FAA's pro-arbitration policy and have found nothing in traditional contract law that prevents businesses from including arbitration clauses in consumer adhesion contracts, it seems that it would take an act of Congress to amend the FAA, should legislators disagree with the courts' analyses. 34 Such an

26. Id. (citing ALA. CODE § 8-1-41(3) (1993)).
27. See id. at 608–09.
28. McLaughlin, supra note 2, at 923 (citing Allied-Bruce, 513 U.S. at 280–82).
29. Id.
30. See Seferi, supra note 23, at 622–23. For a discussion of the "trend in the federal courts of rejecting state legislative efforts to impose special notice requirements about arbitration in contracts between consumers and sellers," see McLaughlin, supra note 2, at 924 & n.163.
31. See supra note 2 and accompanying text.
32. See Brafford, supra note 3, at 356 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626–28 (1985)).
33. See id.; see also supra note 21 and accompanying text.
34. See Brafford, supra note 3, at 356.
amendment has yet to be considered; therefore, as will be illustrated in
the next section, courts continue to apply the above-discussed standards
of review to a new breed of adhesion contracts—those that may be
found online.

III. THE ADVENT OF E-COMMERCE: THE ENFORCEABILITY OF
ARBITRATION CLAUSES IN USER AGREEMENTS

The emergence of the Internet and its endless communication
possibilities has had an immeasurable impact on the way the world
conducts business. As Internet access becomes more commonplace,
companies that have extended their business into (or originated it in)
the realm of e-commerce find that their customer base has the potential
to increase on a daily basis. Thus, the Internet's influence has thrust
business face-forward into the Twenty-First Century, vastly changing
the environment that used to be governed by the paper-written
contract. As modern business perpetuates, new ways of contracting with
consumers inevitably follow. The age of computer, software, and
Internet vending has presented new legal challenges for businesses.
On one hand, they must ensure that their rights are protected, while on
the other, they must make certain that the contracts they put forward
are enforceable. It is impossibly cost-prohibitive for these vendors to
contract individually with consumers; hence, the need for a standardized
form of contracting has materialized.

In response to this need, businesses have fashioned standard user
agreements that fit their particular product and have attempted to
protect them legally. Arguably, one of the most potent legal protections a business can incorporate into its user agreements is an

36. See Dawn Davidson, Comment, Click and Commit: What Terms Are Users Bound to When They Enter Web Sites?, 26 WM. MITCHELL L. REV. 1171, 1171 n.2 (2000) (citing Gail. L. Grant, Business Models for the Internet and New Media, 545 PLI/Pat 39, 41 (1999)).
37. See id. at 1171–72
38. See id. at 1187.
39. See Geroe, supra note 35, at 1069.
40. See generally Davidson, supra note 36. See also J.T. Westermeier & Jim Halpert, E-Commerce Legal Survival Kit, 650 PLI/Pat 421, 425 (2001) [hereinafter Survival Kit] (stating that in the Internet world, "[w]ebsite Terms of Use have become the principal legal strategy for managing the legal risks associated with e-commerce websites.").
41. Davidson, supra note 36, at 1186–87.
42. See Geroe, supra note 35, at 1069–70.
Arbitration clauses in user agreements essentially put the business in the legal driver's seat. Not only do these agreements allow a business to avoid judicial action for consumer disputes, but they also allow the business to choose the arbitrators as well as a convenient location for the arbitration. Further, the agreements could exclude the recovery of punitive damages, which could otherwise prove costly.

Perhaps the most important protective function arbitration clauses serve is the protection they lend from class action lawsuits. The threat of class action suits on the computer software industry is a growing concern, as "actions involving individual consumers are likely to involve damage claims that cannot be litigated cost-effectively unless they are prosecuted as class actions." Class actions are more cost-effective for individual consumers because "the legal fees can be spread over the class with payment of the plaintiffs' attorney fees coming out of the class settlement or judgment."

Recently, courts have had the occasion to analyze the enforceability of standardized user agreements and the arbitration clauses contained therein. The first two cases outlined below, ProCD, Inc. v. Zeidenberg and Hill v. Gateway 2000, Inc., discuss the enforceability of one of the standardized forms of contract used by businesses, namely, the "shrinkwrap" agreement. As will be discussed, the shrinkwrap agreement used in Hill contained an arbitration clause, and the court set

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44. See id.
45. Id. (citing Jean R. Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration, 74 WASH. U. L.Q. 637, 647 (1996)); see also Survival Kit, supra note 40, at 427 (stating that "[i]n light of the multiplicity of laws that may apply to . . . [a business's] website," a business should consider adding an arbitration agreement that chooses the applicable law and forum, which "will likely allow . . . [a business] to exercise greater control over claims in the various jurisdictions").
46. See generally Westermeier, supra note 43.
47. Id.
48. Id.
50. 86 F.3d 1447 (7th Cir. 1996).
51. 105 F.3d 1147 (7th Cir. 1997).
52. See infra Part III.A for a definition of shrinkwrap agreements.
an important legal precedent by addressing whether the consumer should be bound by such a clause. Building on this precedent, the courts in In re RealNetworks, Inc. and Specht v. Netscape Communications Corp. addressed the legal status of two more standardized forms of contract: the "clickwrap" agreement, and the "browsewrap" agreement. In both cases, the agreements had arbitration clauses, and the courts addressed the clauses' enforceability in light of their "on-screen" instead of "on-paper" status. The subsequent analysis of these four cases indicates the direction in which courts have been moving with regard to arbitration clauses in e-commerce user agreements. Accordingly, the lessons extracted from the cases may alert online businesses as to how to ensure the enforceability of such clauses and to ensure the protection of their interests.

A. ProCD, Inc. v. Zeidenberg

In 1996, the Seventh Circuit in ProCD addressed whether shrinkwrap agreements bound the consumer to the terms contained therein. "Shrinkwrap agreements are agreements printed on, or found within, a computer program package that is wrapped in cellophane, or 'shrink wrap' plastic." Consumers have been troubled by such agreements because they find out about the agreement only when they have the product in hand, which is problematic in cases where the product was purchased over the phone or online. Thus, the courts have been faced with the issue of when and how the contract between the vendor and consumer is formed and whether the terms stated in the shrinkwrap agreement are binding.

53. See infra Part III.B.
56. See infra Parts III.C and III.D for definitions of clickwrap and browsewrap agreements.
57. See generally Specht, 150 F. Supp. 2d 585; RealNetworks, 2000 U.S. Dist. LEXIS 6584.
58. 86 F.3d 1447 (7th Cir. 1996).
59. Id.
60. Davidson, supra note 36, at 1180 (citing Jerry C. Liu, et al., Electronic Commerce: Using Clickwrap Agreements, 15 COMPUTER L. 10, 10 (1998)).
61. Id. Shrinkwrap agreements constitute contracts of adhesion, whereby the business "dictates the terms of the agreement to the consumer, who must purchase the software subject to the license terms dictated by the company or decline to purchase (or return) the software." Mark H. Wildasin, Shrink Wrap, Click Wrap, and Now Browse Wrap: Did You Just Make a Contract?, THE METROPOLITAN CORP. COUNS., Oct. 2001, at 13.
In *ProCD*, the court held that "[s]hrinkwrap ... [agreements] are enforceable unless their terms are objectionable on grounds applicable to contracts in general." In reaching its decision, the court considered traditional contract law as codified by the Uniform Commercial Code, namely, the principles of offer and acceptance. The court noted: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance."

Applying these principles to the facts, the court found that ProCD, in its shrinkwrap agreement, "proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure." The buyer, Zeidenberg, had the opportunity to reject ProCD's offer, but declined to do so. Thus, the court deemed shrinkwrap agreements to be binding and concluded that such agreements may only be attacked if they are unconscionable, or if they otherwise violate established contract law.

The court presented a public policy rationale for its holding as well, stating that consumers will be protected by competition among vendors. Consequently, if a consumer is unhappy with the terms presented by one vendor, he may shop around for terms that are more favorable. Indeed, rival vendors may find that creating consumer-friendly user agreements is a veritable way to get ahead in the highly competitive e-commerce market.

The *ProCD* decision paved the way for businesses to use shrinkwrap agreements, ensuring that such agreements will be valid as long as those businesses follow established contracting principles. Thus, the court gave an affirmative nod to this cost-efficient method of contracting with consumers as a way to effectively protect businesses' legal interests.

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63. *ProCD*, 86 F.3d at 1449.
64. *Id.* at 1452.
65. *Id.*
66. *Id.*
67. *Id.* at 1453.
68. *Id.* at 1449.
69. *See id.* at 1453.
70. *See id.*
71. *See id.*
72. *See id.* at 1449.
73. *See id.*

The Seventh Circuit was again faced with an opportunity to rule on the validity of shrinkwrap agreements in *Hill v. Gateway 2000, Inc.* However, this time the agreement had a twist—it contained an arbitration clause. In *Hill*, plaintiffs purchased a computer from Gateway over the phone, and the computer arrived accompanied by a shrinkwrap agreement. The agreement, containing an arbitration clause, stated that if the computer was not returned within thirty days, the agreement's terms would be deemed accepted. Plaintiffs kept the computer, and more than thirty days later, they complained about the product's performance. Upon learning that they agreed to arbitrate any disputes, plaintiffs filed suit in federal court seeking relief from the agreement.

The court began its opinion by reiterating its holding in *ProCD* that shrinkwrap agreements are enforceable unless they violate general contract law. In response to plaintiffs' claims that the arbitration clause should not be enforceable because it did not stand out among the agreement's terms, the court stated that arbitration agreements "must be enforced 'save upon such grounds as exist at law or in equity for the revocation of any contract.' Additionally, the court stated that "[a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome." Therefore, the court reasoned that, as the "[t]erms inside Gateway's box stand or fall together," and "[i]f they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced."

Again reiterating the *ProCD* holding, the court found that Gateway, as the master of the offer, was able to dictate what constitutes

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74. 105 F.3d 1147 (7th Cir. 1997).
75. *Id.* at 1148.
76. *See id.*
77. *Id.*
78. *Id.*
79. *Id.* As it turned out, the Hills had not read the shrinkwrap agreement very closely. *Id.*
80. *Id.* The Hills filed suit as part of a large class of plaintiffs, comprised of others who had purchased Gateway 2000 computers like themselves. *Westermeier, supra* note 43, at 1.
81. *See Hill, 105 F.3d at 1148–49.*
82. *Id.* at 1148 (quoting 9 U.S.C. § 2 (1994)).
83. *Id.* (citations omitted).
84. *Id.*
ensuring enforceability

acceptance; therefore, by keeping the product past the thirty-day return period, plaintiffs were bound by all of the shrinkwrap agreement's terms, including the arbitration clause. Thus, the court compelled the parties to submit their dispute to arbitration. As a matter of policy, the court held that consumers benefit from "approve-or-return" devices implemented by vendors in that businesses do not have to pass on the costs of telephonic contract recitation at the point of purchase—a process that would most likely prove ineffectual anyway.

The Hill court's declaration that a user agreement's terms "stand or fall together" informs businesses using these standardized contracts that arbitration clauses they may include will not be treated any differently than other terms. Therefore, as long as the shrinkwrap agreement included with the product is legally enforceable, consumers will be bound to arbitrate their disputes according to the clause's terms.

C. In re RealNetworks, Inc.

The enforceability of arbitration clauses in "clickwrap" agreements was at issue in In re RealNetworks, Inc. Clickwrap agreements are similar to shrinkwrap agreements except that they appear on the computer screen before a user can install software or download a program off of the internet. In essence, clickwrap agreements are intended to prevent a user from proceeding unless he manifests his assent to the agreement's terms by typing "I agree" or clicking on such language.

85. See id. at 1149.
86. Id. at 1151. The court refuted any arguments that arbitration clauses in contracts of adhesion are unfair to the consumers they are imposed upon, stating: "Whatever may be said pro and con about the cost and efficacy of arbitration...is for Congress and the contracting parties to consider." Id. Thus, by implication, the court asserted that contracting consumers should be aware of the terms proposed by businesses in shrinkwrap agreements; alternately, if Congress finds that such agreements are per se unfair to consumers, then Congress should legislate on the issue. See id.
87. Id. at 1149. The court stated that such telephonic recitation "would anesthetize rather than enlighten many potential buyers." Id.
88. Id. at 1148.
89. See generally Westermeier, supra note 43. Hill instructs that the inclusion of an enforceable arbitration clause may help dispel the threat of class actions for online businesses, as well as other risks. Id. Therefore, there is a strong argument for the inclusion of "well-drafted" arbitration clauses in user agreements to protect online businesses' legal interests. Id.
91. Davidson, supra note 36, at 1182 (citing Liu et al., supra note 60, at 10.).
92. Id.
In this case, RealNetworks, a software provider that allows consumers to download its products from the Internet, was sued by a group of plaintiffs for trespass to privacy and property. However, before downloading RealNetworks' products, plaintiffs consented to a clickwrap agreement that contained an arbitration clause. Plaintiffs argued that the arbitration clause was unenforceable because, being on a computer screen and not paper, it was not "written" as required by the FAA.

The court rejected plaintiffs' argument that the agreement was not "written," observing that the clickwrap agreement, upon being viewed on-screen, could be saved electronically for later viewing or printed and saved as a paper document. Therefore, the court concluded that arbitration clauses, when set forth as part of a clickwrap agreement, satisfy the FAA requirement that such clauses be in writing.

Plaintiffs also argued that RealNetworks' arbitration clause was "unenforceable because it . . . [was] both procedurally and substantively unconscionable." Procedurally, plaintiffs claimed that they did not receive fair notice of the arbitration clause because it was "buried" within the agreement and did not have its own heading. However, the court placed greater weight on the fact that the arbitration clause was in the same size font as the rest of the agreement. Accordingly, the court stated that there had been no relevant "caselaw [sic] that provides that an arbitration clause is unconscionable if the contract does not draw

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93. *RealNetworks*, 2000 U.S. Dist. LEXIS 6584, at *1. To support their claim, Plaintiffs alleged that "RealNetworks' software products secretly allowed RealNetworks to access and intercept users' electronic communications and stored information without their knowledge or consent." *Id.*

94. See *id.* at *2. The arbitration clause stated, in pertinent part: "Any and all unresolved disputes arising under this License Agreement shall be submitted to arbitration in the State of Washington." *Id.* at *3.

95. *Id.* at *5; see also *Chicago Judge Rejects Intervenor's Opposition to RealNetworks Arbitration*, MEALEY'S CYBER TECH. LITIG. REP., June, 2000.

96. *RealNetworks*, 2000 U.S. Dist. LEXIS 6584, at **8-9. The court examined when an on-screen agreement can be deemed "written" for legal purposes, and concluded that when the agreement is easily "printable and storable" it meets the "written" standard. *Id.* at *8.

97. *Id.*

98. *Id.* at *14. The court explained that "[p]rocedural unconscionability involves impropriety during the process of forming a contract, whereas substantive unconscionability pertains to those cases where a clause or term in a contract is allegedly one-sided or overly harsh." *Id.* (citing Pub. Employees Mut. Ins. Co. v. Hertz Corp., 800 P.2d 831, 833 (Wash. Ct. App. 1990)).

99. *Id.* at *15.

100. *Id.*
ensuring enforceability

Substantively, plaintiffs argued that the arbitration clause was unconscionable because it mandated a "geographically distant forum," failed "to provide for classwide arbitration," and because arbitration is cost-prohibitive. The court rejected these arguments as well, stating that past cases have found that these consumer concerns are not enough to render an arbitration clause unconscionable. Therefore, the court held that RealNetworks' on-screen arbitration clause was valid and enforceable against its customers.

The RealNetworks decision is invaluable for online businesses that find that clickwrap agreements are the most cost-effective way to legally protect themselves. The court's determination that arbitration clauses appearing on-screen in clickwrap agreements satisfy the requirement that such clauses be in writing opens the door for Internet companies to place arbitration clauses in their user agreements, confident that their legal interests are effectively protected.

D. Specht v. Netscape Communications Corp.

Recently, another on-screen user agreement containing an arbitration clause was examined in Specht v. Netscape Communications Corp. In this case, defendant Netscape, who provided a software program called "SmartDownload" that consumers could download free-of-charge, was sued by a class of plaintiffs on an invasion of privacy

101. Id. at *16.
102. Id. at **18–20.
103. Id. The court stated that "[a]rbitration provisions containing forum selection clauses," those "that do not provide for class action," as well as those "that expressly prohibit class actions" have previously been upheld. Id. The court also noted that "costs of arbitration do not prevent the enforcement of a valid arbitration agreement." Id. at **20–21 (citations omitted).
104. See id. at **20–21.
105. See Megan E. Gray & Brian A. Ross, Contracts Drafting Stronger Clickwrap Agreements, THE INTERNET NEWSLETTER, Sept. 2001, at 1 (stating that as "[w]eb site owners long ago realized that bargaining with and obtaining written agreements from their web site's potential users before granting them access to the site would be practically impossible . . . they began employing 'clickwrap' terms-of-use agreements").
Netscape moved the court to compel arbitration, claiming that plaintiffs were bound by the arbitration clause in the software's user agreement.\textsuperscript{109} Although on its face this case seems similar to \textit{RealNetworks}, distinctions between the user agreements and the implementation of consumer assent distinguish the two cases.\textsuperscript{110} While RealNetworks required its customers to manifest their assent to the user agreement by clicking on the appropriate box before they were able to download the software, Netscape's customers were not affirmatively required to indicate their assent to the user agreement before downloading the product.\textsuperscript{111} This critical distinction moved the court to liken Netscape's user agreement to a "browsewrap" agreement rather than RealNetworks's clickwrap agreement.\textsuperscript{112}

Netscape argued that their browsewrap agreement, including the arbitration clause, was nonetheless binding because the user's assent was manifested in two ways.\textsuperscript{113} First, Netscape argued that the act of downloading the software indicated the user's assent.\textsuperscript{114} The court rejected this argument, stating that "[t]he primary purpose of downloading is to obtain a product, not to assent to an agreement."\textsuperscript{115}

\textsuperscript{108} \textit{Id.} at 587. Plaintiffs claimed that, when they used SmartDownload, their private information about their file transfer activity was transmitted to Netscape in violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 (2000), and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000). \textit{Id.}

\textsuperscript{109} \textit{Specht}, 150 F. Supp. 2d at 585.

\textsuperscript{110} See \textit{id.} at 588–89; see also supra Part III.C.

\textsuperscript{111} \textit{Specht}, 150 F. Supp. 2d at 588. Recently, another court validated a \textit{RealNetworks}-type clickwrap agreement in \textit{i.Lan Sys., Inc. v. Netscout Serv. Level Corp.}, 183 F. Supp. 2d 328 (D. Mass. 2002). In its decision, the court tracked the development of the use of "money now, terms later" contracts in the software industry (starting with \textit{ProCD}), calling the practice a "practical way to form contracts, especially with purchasers of software." \textit{Id.} at 338. The court supported its validation of clickwrap agreements by stating: "If \textit{ProCD} was correct to enforce a shrinkwrap license agreement, where any assent is implicit, then it must also be correct to enforce a clickwrap license agreement, where the assent is explicit.... In short, i.Lan explicitly accepted the clickwrap license agreement when it clicked on the box stating 'I agree.'" \textit{Id.}

\textsuperscript{112} \textit{Specht}, 150 F. Supp. 2d at 594–95. "Browsewrap" agreements arise where the user is notified of a license/user agreement when he accesses a business's website, and where the user can click on the notice to display the full text of the agreement. \textit{Id.} at 594 (citing \textit{Pollstar v. Gigmania Ltd.}, No. CIV-F-00-5671, 2000 WL 33266437 (E.D. Cal. Oct. 17, 2000)). By viewing the browsewrap agreement, the user is allegedly bound to its terms; however, unlike the clickwrap agreement, the user has no way of indicating his assent to those terms before downloading the software. \textit{Id.}

\textsuperscript{113} \textit{Id.} at 595.

\textsuperscript{114} \textit{id.}

\textsuperscript{115} \textit{Id.} The court went on to compare Netscape's browsewrap agreement to a
Next, Netscape argued that a user assented to the agreement by downloading the software because the website contained language requesting that the user "review and agree" to the agreement's terms before downloading. The court's response, however, was that this language was merely an invitation, not a condition that would require the user's assent.

Consequently, the court found that Netscape's failure to obtain a clear manifestation of user assent to the agreement's terms was "fatal to its argument that a contract ha[d] been formed." Without such assent, there was no indication that the user had "adequate notice . . . that a contract . . . [was] being created" or that the agreement's terms would be binding. Therefore, the court held that Netscape's agreement was unenforceable and that plaintiffs were not bound by the arbitration clause therein. Because Netscape failed to institute a valid user agreement with a binding arbitration clause, the company fell subject to a class action suit—a fate that it was most likely trying to avoid.

The Specht decision should put online businesses on alert: if your website does not have a mechanism through which a consumer may clearly assent to the user agreement, that agreement, and the arbitration clause it contains, may be deemed unenforceable. Should this scenario occur, a business would be subject to costly litigation, and all of the protections granted by the arbitration clause would dissipate. Thus, Specht teaches online businesses that merely requesting that a consumer read and consent to the user agreement before downloading software, instead of requiring that the consumer do so before accessing it, may prove legally fatal to the contract the business is attempting to form.

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116. Id. Netscape's request reads: "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software." Id.
117. Id. at 596.
118. Id. at 595.
119. Id. at 596.
120. Id.
121. See Westermeier, supra note 43, at 1.
122. See Specht, 150 F. Supp. 2d at 596.
123. See Westermeier, supra note 43, at 1. As seen through this case, Netscape is now open to countless suits by similarly-situated plaintiffs—all of which could have been avoided had Netscape implemented an appropriate mechanism for garnering consumer assent. See id.
124. See Gray & Ross, supra note 105, at 6 (stating that "[i]deally, the web site should require that a user take some affirmative step, such as clicking an 'I agree' button, or typing 'I agree' . . . If the user does not accept the terms, he should not be permitted to complete the desired transaction . . . .")
IV. BUSINESS PROTECTIONS: MAKING SURE YOUR ONLINE CONTRACT PROVISIONS "STICK"

An analysis of the cases outlined in Part III indicates what online businesses should (and should not) do to ensure that their user agreements, including the ever-important arbitration clauses, will bind consumers and effectively protect the business. Each case may be read as giving businesses "clues" as to the important elements of a binding arbitration clause and user agreement, and how to make sure that those provisions "stick."

For example, ProCD instructs that shrinkwrap agreements contained in software packaging are enforceable, as long as the agreement itself does not violate well-established contract law. Therefore, if a business employs a shrinkwrap agreement, the business should make certain that the contract terms stated therein are clear. This ensures that the consumer will have no doubt what conduct constitutes acceptance of the agreement and the exact terms to which he is agreeing. Absent clarity in the construction of the shrinkwrap agreement, a court may be prone to find that no agreement exists or that the agreement imposed by the business is unconscionable.

Hill set an important legal precedent, stating that arbitration clauses in shrinkwrap agreements will be treated like any other contract provision. Thus, as long as the contract itself is enforceable, the arbitration clause will be enforceable as well. Looking at another court's treatment of Gateway's shrinkwrap agreement, however, alerts businesses to the importance of granting the buyer enough time to accept. In Klocek v. Gateway, Inc., the court "disagreed with [the] reasoning of ProCD and Hill," and "[held] that the act of keeping [the] computer longer than five days was insufficient under UCC § 2-207 to

125. See supra note 63 and accompanying text.
126. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996). The court imparted that the buyer would accept the shrinkwrap agreement's terms by using the product in accordance with said terms. Id. Therefore, the clarity of the terms is central to the buyer accepting the agreement, whereas it would be next to impossible for a buyer to assent without knowing what conduct manifests his assent. See id.
127. See id. at 1449.
129. Id.
show express agreement to additional, different terms . . . ."

The concern that the consumer should have enough time to accept the contract is rooted in the need for the consumer to have an opportunity to adequately review the contract’s terms. This need has manifested itself especially with clickwrap agreements, about which consumers have complained that having to decide whether to accept or deny the terms while viewing them on-screen inhibits their ability to properly review those terms. RealNetworks spoke to this issue, however, holding that clickwrap agreements, viewed on-screen, provide enough time for the consumer to review the contract terms as long as the agreement remained on the screen until the consumer either expressed agreement or disagreement with the terms. Further, the RealNetworks court observed that the clickwrap agreement in question was also easily printable and storable by the consumer. Therefore, the court held that the consumer had plenty of opportunity to review the contract terms before manifesting assent, making the contract binding.

In terms of the opportunity to review terms before assenting, RealNetworks instructs that it is critical to allow the consumer as much time as possible to make an informed decision. A "pop-up" window that disappears after a certain period of time, or one that makes it impossible for a user to print or save the agreement, will most certainly be detrimental to a consumer’s manifestation of assent, and accordingly, fatal to the formation of a binding contract.

Thus, businesses that employ clickwrap agreements should ensure that the agreement remains on the screen, allowing the consumer to

131. Gray & Ross, supra note 105, at 2. (emphasis added). Recall that the shrinkwrap agreement in question in Hill had a thirty-day accept or decline provision. Hill, 105 F.3d. at 1149.


133. See supra note 96 and accompanying text.

134. In re RealNetworks, Inc., No. 00-1366 2000 U.S. Dist. LEXIS 6584, *17 (N.D. Ill. Mar. 11, 2000). The court stated that "[t]he pop-up window containing the License Agreement does not disappear after a certain time period; so, the user can scroll through it and examine it to his heart's content." Id.

135. Id. at *8. The court stated that even though the agreement itself did not have a "print and save" button, the user could simply "select" the text of the agreement and save it on the computer, or choose to copy the text into a word processing program and proceed to print out a paper copy for further review. Id. at *9. The key is that all of these steps can be taken by the consumer before he manifests his assent to the agreement. See id.

136. See id. at *10.

137. See supra notes 134–35 and accompanying text.

review the terms at his own pace, until he agrees or disagrees with the contract terms. Also, it may be an added protection if the business "goes the extra mile" and actually places a "print" or "save" button next to the agreement. In this way, there can be little argument that the consumer did not have an adequate opportunity to review the agreement's terms.

Another issue raised in RealNetworks dealt with the enforceability of the arbitration clause contained in the clickwrap agreement. The users argued that the arbitration clause was "buried" within the contract, and therefore, compelling arbitration would be unconscionable. The court noted that "burying important terms in a 'maze of fine print' may contribute to a contract being found unconscionable ...." However, the court found that RealNetworks's arbitration provision was not buried, as the arbitration clause was in the same size font as the rest of the agreement.

The users also complained that RealNetworks was attempting to hide the arbitration provision because it did not have its own heading within the contract. The court rejected this argument, however, and found that a business does not necessarily have to "draw attention to" an arbitration provision to save it from being deemed unconscionable. Because the arbitration clause was just as viewable as every other contract term, it could not be considered "buried."

Businesses, in formulating their own clickwrap agreements, should take heed: arbitration clauses should at the very least be displayed in the same size font as the rest of the agreement. RealNetworks instructs that the agreement need not have its arbitration clause housed under its own heading; however, it might not be a bad idea for a business to do so anyway—just to be safe.

RealNetworks also tells businesses, thankfully, that they do not have to provide for class actions in their arbitration provisions. Indeed, one of the key advantages of including an arbitration clause is to avoid class action suits, allowing businesses to breathe easier, knowing that a

139. See supra notes 98–104 and accompanying text.
141. Id.
142. Id.
143. Id.
144. Id. at *16.
145. See id. at **15–16.
146. See id. at **19–20; see also supra notes 102–03 and accompanying text.
147. See supra notes 46–48 and accompanying text.
court has previously "upheld arbitration agreements that expressly prohibit class actions." 148

*Specht* has many lessons to teach those who conduct business online. In *Specht*, the court deemed Netscape's online agreement (and the arbitration clause it contained) unenforceable, and therefore not binding on its customers. 149 Netscape's online agreement was found unenforceable because the court found that users were not affirmatively required to indicate their assent to the agreement before using/downloading Netscape's product. 150 Rather, the court found that Netscape merely "invited" users to read the contract before using its product. 151

The court refused to assume that a user assents to an agreement without illustrating some sort of affirmative manifestation of that assent. 152 Because Netscape did not require that a user read the agreement, and because there was no mechanism set up through which the user could indicate that he agreed, the court found that there was no indication that users had an opportunity to review the contract terms, nor a way to show their assent—two factors vital to the formation of a binding contract. 153

The *Specht* court also stressed that Netscape's online agreement was unenforceable because there were no consequences related to a user rejecting their contract terms: a user could proceed to download and use Netscape's product whether or not he accepted their invitation to "agree" before doing so. 154 By this, the court seemed to suggest that for an online contract to be binding, there should be consequences associated with a user accepting or rejecting the contract terms; namely, if he accepts, he should have access to the product, and if he declines, he should not have access. Such clear consequences would help courts discern whether a user actually manifested his assent before using the

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148. *RealNetworks*, 2000 U.S. Dist. 6584, at *20; see also *supra* notes 102–03 and accompanying text.


150. *Id*. Because users were not required to indicate their assent to the agreement before using the product, the court called the agreement a "browsewrap" agreement. See *supra* notes 111–12 and accompanying text. Browsewrap agreements have not been completely invalidated by the courts; however, multiple courts have "expressed concern about . . . [their] enforceability," *Specht*, 150 F. Supp. 2d at 594.

151. *Id*. at 596. For the text of the "invitation," see *supra* note 116.

152. See *supra* notes 118–21 and accompanying text.

153. See *Specht*, 150 F. Supp. 2d at 596.

154. See *Kunz*, *supra* note 132, at 414 n.86 (citing *Specht*, 150 F. Supp. 2d at 595-96).
product, in that a user could not get access to the product without at least being exposed to the contract and clicking on the "I agree" box beforehand. Netscape's failure to distinguish users who agreed from those who disagreed with their contract terms ultimately led to the business having no contract at all—and therefore no legal protections, either. 155

Online businesses can learn from Netscape's contractual shortcomings. In order to better ensure that their agreements are enforceable, businesses should set up the onscreen viewing of their agreement in the following manner. First, before the user gets access to the product, the agreement should appear onscreen. 156 This will help guarantee that the user is at least exposed to the contract before he can use the product. Next, the business should make sure that the agreement remains on the screen until the user views the agreement (by scrolling through its entirety) and clicks on or types "I agree" at the end of the agreement. 157 Then, if the user does not agree, he should be denied access to the product. In doing this, the business ensures that the user has both an ample opportunity to review the agreement, and an explicit way to indicate his assent.

By taking these steps, a business will be taking huge strides in the direction of self-protection. As long as a user has an adequate opportunity to review the terms to which he is agreeing, and a clear, unambiguous method of manifesting his assent before gaining access to the product, a business can assume that its contract will be binding on the consumer—absent terms that a court would find unconscionable, of course. To that end, the traditional contract standards of reasonableness apply, and it is up to the business's counsel to draft the contract terms within these objective guidelines.

V. CONCLUSION

From the cases outlined in Part III, it is clear that the courts are willing to enforce businesses' arbitration clauses in their user agreements, as long as the agreements follow the well-established contracting principals that have been guiding business for hundreds of years. Only when businesses stray from the formula (i.e., Netscape's

155. See supra note 122 and accompanying text.
156. See Kunz, supra note 132, at 405 n.26.
157. Id. Kunz suggests that "the best course . . . of conduct for avoiding disputes about the validity of assent is to mandate that the User view all terms before being able to manifest assent." Id.
failure to obtain a clear manifestation of user assent to the agreement's terms) are the courts likely to deem user agreements, and the arbitration clauses they may contain, unenforceable.

It may also be concluded from the cases in Part III, as well as their predecessors discussed in Part II, that courts have been unwilling to deem arbitration clauses in businesses' adhesion contracts unconscionable as a matter of law. Although consumers have complained that the arbitration clauses in these standard form contracts are "unfair" because many mandate an inconveniently distant forum for arbitration, fail to provide for classwide arbitration, and are generally cost-prohibitive to consumers, courts have repeatedly found that these concerns are not enough to render an arbitration clause unconscionable. As suggested at the close of Part II,158 it may now be in Congress's hands to address these consumer concerns by amending the FAA, should legislators find such action necessary. Until that occurs, however, the courts will most likely continue to apply the established "pro-arbitration" precedent in their review of businesses' adhesion contracts.

For now, businesses that employ these adhesion contracts need only be concerned with the courts' rulings, and accordingly, the courts seem to be sending businesses the message that their arbitration clauses are a valid and enforceable means of avoiding class action lawsuits and other forms of costly litigation. As long as online businesses take steps to ensure that the user agreements that contain them are legally enforceable, arbitration clauses will continue to substantially protect their interests.

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