2003

The Sense and Nonsense of Web Site Terms of Use Agreements

Sharon Sandeen
Mitchell Hamline School of Law, sharon.sandeen@mitchellhamline.edu

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/312
The Sense and Nonsense of Web Site Terms of Use Agreements

Abstract
This article examines the purpose, use and enforceability of TOUs. In so doing it looks beyond the common question of whether TOUs are enforceable to ask whether and under what circumstances TOUs are necessary. This article explores whether the nature of the Internet is so different from the brick-and-mortar world that TOUs are needed for web sites but not for retail stores. A review of many of the existing TOUs reveals that major differences exist in the number and nature of their provisions. On one extreme are the TOUs of companies like Disney, Barnes and Noble and Amazon that apparently seek to address all possible contingencies and risks. Other names for these agreements include "site license" and "conditions of use agreement." Similar licenses used in connection with the distribution and sale of software are often called "end-user-license agreements" ("EULAs"). Although this article focuses on licenses that are designed to govern the use of web sites, many of the same issues that are discussed herein are applicable to EULA's.

Keywords
Electronic commerce, License agreements, Websites

Disciplines
Commercial Law | Contracts | Intellectual Property Law
# THE SENSE AND NONSENSE OF WEB SITE TERMS OF USE AGREEMENTS

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I.</strong> INTRODUCTION</td>
<td>500</td>
</tr>
<tr>
<td><strong>II.</strong> A BRIEF HISTORY OF THE INTERNET, E-COMMERCE AND TERMS OF USE AGREEMENTS</td>
<td>504</td>
</tr>
<tr>
<td><strong>III.</strong> ANALYZING SPECIFIC PROVISIONS OF TERMS OF USE AGREEMENTS</td>
<td>508</td>
</tr>
<tr>
<td>A. REPRESENTATIONS, DISCLOSURES AND INSTRUCTIONS</td>
<td>508</td>
</tr>
<tr>
<td>B. USER RIGHTS AND OBLIGATIONS</td>
<td>517</td>
</tr>
<tr>
<td><strong>IV.</strong> THE ENFORCEABILITY OF TERMS OF USE AGREEMENTS</td>
<td>547</td>
</tr>
<tr>
<td><strong>V.</strong> CONCLUSION</td>
<td>552</td>
</tr>
</tbody>
</table>
THE SENSE AND NONSENSE OF WEB SITE TERMS OF USE AGREEMENTS

Sharon K. Sandeen

I. INTRODUCTION

Imagine that you are about to go shopping at your local grocery store and as you cross the threshold you spy a sign, posted somewhat inconspicuously above the door, which reads:

TERMS OF USE

You are entering a retail establishment owned by ACME Stores, Inc. Everything in this store is owned by ACME or presented on consignment by third parties under an agreement between ACME and various third parties. Your ability to visit this store and use the information and products that you witness herein is limited to the uses specified by this agreement. You are hereby granted permission to walk down the aisles of the store and to collect goods to be purchased provided that you promise to be careful and to pay for such goods as you exit. You hereby acknowledge that ACME owns everything in the store, including but not limited to all merchandise, store displays, color schemes, copyrights, trademarks, trade secrets and proprietary and confidential rights and that you will not copy, use, display, reverse engineer or otherwise infringe such rights without the express written permission of ACME. You also agree that ACME may use your image in advertising and that in the event of any lawsuit arising out of your visit to this store, ACME can only be sued where its principal place of business is located.

Imagine further that under applicable law the sign is not just a declaration of existing law but an attempt to change the effects of established

---

1 Associate Professor of Law, Hamline University School of Law, L.L.M., University of California, Boalt Hall School of Law, J.D., University of the Pacific, McGeorge School of Law, B.A., University of California. Berkeley. I would like to thank my research assistant, Kris Huether, for her invaluable assistance, and Anne Schmiege for her editorial oversight. I would also like to thank my colleague, Professor Linda Rusch, for providing her comments on multiple drafts of this article.

2 As used herein, "ACME" is a fictional retail establishment. Use of the term is an ode to Roadrunner cartoons in which Wile E. Coyote uses a variety of Acme products in an attempt to catch the Roadrunner.
law. Would you cross the threshold if it meant you were contractually bound to accept less protection for physical injuries if you should slip and fall in the store? Would you cross the threshold if it precluded you from suing ACME in a local court of your choosing? Would you cross the threshold if doing so meant that you were authorizing ACME to use your image in its commercials? Would you cross the threshold if it meant that ACME could collect information about your buying habits and sell it to others? Would you cross the threshold if doing so meant you were exposing yourself to an increased risk of criminal liability?

As surprising as the foregoing scenario sounds, the fictional sign posted by ACME is not unlike the “terms of use agreements” (TOUs) that appear at the bottom of many web sites. When you “click” on those highlighted terms, you are linked to a standard-form contract in which web site operators (WSOs) attempt to define the legal relationship that exists between themselves and visitors to their sites. In many cases, TOUs are simply an effort to resolve uncertainties that exist in the law. In other cases, they seek to fundamentally alter well-established principles of law and, arguably, the legitimate expectations of consumers.

This article examines the purpose, use and enforceability of TOUs. In so doing it looks beyond the common question of whether TOUs are enforceable to ask whether and under what circumstances TOUs are necessary. Since the hypothetical sign of ACME is not common while TOUs have become ubiquitous, this article explores whether the nature of the Internet is so different from the brick-and-mortar world that TOUs are needed for web sites but not for retail stores.

A review of many of the existing TOUs reveals that major differences exist in the number and nature of their provisions. On one extreme are the TOUs of companies like Disney, Barnes and Noble and Amazon that apparently seek to address all possible contingencies and risks

---

3 Other names for these agreements include “site license” and “conditions of use agreement.” Similar licenses used in connection with the distribution and sale of software are often called “end-user-license agreements” (“EULAs”). Although this article focuses on licenses that are designed to govern the use of web sites, many of the same issues that are discussed herein are applicable to EULA’s.

4 Unless otherwise indicated, the legal issues to be discussed herein focus on the laws that are generally applicable in the United States and upon TOUs that were in use as of late 2002 and early 2003. Although significant international and state laws related to e-commerce will be mentioned as appropriate, no attempt is made herein to analyze the laws of every country of the world or of every state of the United States. Additionally, although various provisions of the Uniform Computer Information Transactions Act (UCITA) will be referenced on occasion, because UCITA has only been adopted in two states, it is not the focus of the analysis. Attorneys who are advising their clients about TOUs should become familiar with any state or foreign laws that may apply to their clients’ sites and consider how their clients’ business models and web sites can be designed to limit any problems that are posed by such laws.
whether they are likely or not. On the other extreme are the web sites of LL. Bean, Land’s End and Tower Records that do not have TOUs per se, but instead rely on default rules, online instructions, and the documentation that is produced as part of a sales transaction to govern the relationship with their customers. In between are the TOUs of Microsoft, eBay, Google and Sears that address some issues but not others.

As with any contract, there are a number of factors that will dictate the recommended complexity of a TOU. To answer the question of whether a specific provision of a TOU is needed requires an appreciation of the goals of the WSO, knowledge of the default rules that may apply to the operation of the site, and an understanding of the nature and location of the audience to whom the site is directed. The more interactive and content-rich a web site is, the more legal issues that will arise from its operation. For instance, a web site that allows third-party content to be posted must be concerned about potential liability flowing from such postings. If a web site is targeted to foreign consumers, the requirements of foreign laws and the possibility of being sued in a foreign country must be considered. Similarly, where a site is targeted to children, the requirements of the Children’s Online Privacy Protection Act must be met.

---

6 Microsoft, Information on Terms of Use, at http://www.microsoft.com/info/cpyright.htm (last visited Feb. 8, 2003); eBay, User Agreement, at http://pages.ebay.com/help/community/png-user.html (last visited Oct. 7, 2002); Google, Google Terms of Service, at http://www.google.com/terms_of_service.html (last visited Mar. 16, 2003); Sears, Terms & Conditions/Safety Notice, at http://www.sears.com (last visited Mar. 16, 2003). A common feature of all listed web sites is that they are accessible to web browsers without a need to pre-register. The absence of any registration process means that visitors to the sites are not required to affirmatively agree to the posted TOUs, but rather are said to consent to the terms of the TOUs simply by logging onto the site. There may, however, be points during the use of a site where a web site user will be asked to affirmatively “click-to-agree” to the terms of a general TOU or to the terms of an agreement that is intended to govern a more traditional transaction. For instance, on the eBay site, once a web site user decides that he wants to bid on or sell an item, he must go through a registration process.

7 As with the relationship that exists between ACME and its customers, many well-established principles of law already exist to govern the relationship between WSOs and their customers. For instance, established principles of contract law, including the Uniform Commercial Code, govern the sale of goods. Intellectual property laws protect copyrights, patents, trademarks, and trade secrets. Established jurisdictional rules and choice of law principles dictate where an injured customer can sue and what law will apply to the claims.
8 See discussion infra Section III.B.iii.
9 See discussion infra Section III.B.vi.
This article begins with a brief discussion of the history of the Internet and the apparent origins of TOUs. Although it is odd to speak of the "historic" use of TOUs when the commercial use of the Internet is barely a decade old, the origins of TOUs shed some light on the importance, or lack thereof, of several common provisions of TOUs. Significantly, because TOUs are an obvious extension of the "shrink-wrap" practices of the software industry, the question arises whether software licenses are a good model for TOUs both from the perspective of their content and enforceability.

The justifications for and uses of TOUs are brought into sharper focus in Section III of this article when nine common, but by no means uniform, provisions of TOUs are examined. Although the content and organization of TOUs can vary greatly, TOU provisions can generally be divided into two basic categories: (1) representations, disclosures and instructions; and (2) user rights and obligations. The foregoing categorization was devised in order to distinguish between those provisions that are merely informational, or reflect the representations and promises of the WSO, and those provisions that seek either to impose affirmative duties on web site users or modify the rights of such users. Arguably, the latter category requires the assent of web site users while the former category does not.

Finally, in Section IV of this article, the enforceability of TOUs is explored from three perspectives. First, traditional principles of mutual assent are discussed to determine whether the typical "browse-wrap" TOU is likely to constitute a binding agreement. Second, TOUs are examined through the lens of the doctrine of unconscionability to determine if they are enforceable.

---

11 Early rules governing the Internet prohibited it from being used for commercial purposes, but in 1991 the National Science Foundation (NSF) lifted the restriction on commercial use, thereby paving the way for e-commerce. See PBS, Life on the Internet: Timeline, at http://www.pbs.org/internet/timeline/timeline-txt.html (last visited Feb. 6, 2003). Online advertising is said to have started on October 27, 1994, when Hotwired, the online version of Wired magazine, signed up fourteen advertisers for its debut. See BARBARA K. KAYE & NORMAN J. MEDOFF, JUST A CLICK AWAY: ADVERTISING ON THE INTERNET 6 (2001).

12 As explained by the court in ProCD Inc. v. Zeidenberg, 86 F. 3d 1447, 1449 (7th Cir. 1996), "[t]he 'shrinkwrap license' gets its name from the fact that retail software packages are covered in plastic or cellophane 'shrinkwrap,' and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package."

13 Browse-wrap agreements are to be distinguished from the so-called "click-through" or "click-wrap" agreements. See Christina L. Kunz et al., Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent, 57 BUS. LAW., 401, 401 (2001). In [click- through] agreements, one party sets up a proposed electronic form agreement to which another party may assent by clicking an icon or a button or by typing in a set of specified words. Click-through agreements are distinct from "click-free agreements" (also known as "browse-wrap agreements"), in which the User does not manifest unambiguous assent to the posted terms. 

Id. Such terms are derived from the term "shrink-wrap license."
likely to meet minimal levels of procedural and substantive fairness. Finally, a number of issues that are discussed throughout the article are reviewed in light of the principle that courts will refuse to enforce contractual provisions that conflict with public policy.

II. A BRIEF HISTORY OF THE INTERNET, E-COMMERCE AND TERMS OF USE AGREEMENTS

The Internet as we know it today, with its multitude of "cyber-places," web sites and communication capabilities, is the result of a convergence of a number of developments. First, and most obviously, is the development of the computer and telecommunications technologies that make Internet communications possible. Related to this was the establishment by the United States military in 1969 of a networked system of computers called "ARPANet" and the subsequent development of other government-subsidized computer networks.

---

14 Although in common usage the term "the Internet" has come to mean a place where people go to obtain information and communicate with others, technically it refers to an "international network of interconnected computers." See Reno v. ACLU, 521 U.S. 844, 849 (1997). The term is defined in several federal statutes as "the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world-wide network of computer networks that employ the Transmission Protocol/Internet Protocol or any successor protocol to transmit information." See, e.g., 47 U.S.C. § 231(e)(4) (2000).

15 As noted by Lawrence Lessig, cyberspace consists of a number of different "cyber-places" or "communities" where online interactions can occur: "Cyberspace is not a place. It is many places. The character of these many places is not identical." LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 63 (1999).


17 See PBS, Life on the Internet: Timeline, supra note 11 (referencing the development of ALOHANET, THEORYNET and USENET). One such network, a large government-subsidized network known as NSFNET, was subject to an "Acceptable Use Policy" promulgated by the National Science Foundation (NSF). See Leiner et al., supra note 16.

On the NSFNET Backbone – the national-scale segment of NSFNET – NSF enforced an "Acceptable Use Policy" (AUP) which prohibited Backbone usage for purposes "not in support of Research and Education." The predictable (and intended) result of encouraging commercial network traffic at the local and regional level, while denying its access to national-scale transport, was to stimulate the emergence and/or growth of
Another factor that led to the Internet of today is the general public’s use and acceptance of text-based electronic communications in the form of e-mail, newsgroups and chat-rooms.\textsuperscript{18} While the use of ARPANet and other government subsidized networks was initially limited to the defense, research and education communities, private industry and private citizens were not precluded from using similar technology to create their own networks. Thus, even before the Internet came into prominence, online service pioneers such as Prodigy, CompuServe and AOL enabled millions of people to engage in computer-based communications through the use of bulletin board systems.\textsuperscript{19}

With the development of each new computer network and improvements to network technologies and communication protocols, the speed and sophistication of Internet communications improved. Initially, the bandwidth and communication protocols of early computer networks limited messages to plain text.\textsuperscript{20} But eventually new protocols for exchanging data were developed to allow the transmission of graphic, video and audio files. Of particular significance was the development in 1991 of the hypertext transfer protocol (HTTP) and hypertext markup language (HTML).\textsuperscript{21} Developed at CERN\textsuperscript{22} by Tim Berners-Lee, the practical importance of HTTP and HTML was that they made the transferability and accessibility of information on the Internet easier and led to the creation of “the World Wide Web.”\textsuperscript{23} The decision by the National Science Foundation in 1991 to lift

\textsuperscript{18} Of course, text-based electronic communications are not new but began with the advent of the electronic telegraph in the late 1800’s. For a history of the telegraph, see Tom Standage, The Victorian Internet (1998).

\textsuperscript{19} For a summary of the state of technology and computer communications before 1995, see Eric Schlafter, Cyberspace, The Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions, 16 Hastings Comm. 

\textsuperscript{20} LESSIG, supra note 15, at 64 (“At the start of the Internet, communication was through text. Media such as USENET newsgroups, Internet Relay Chat, and e-mail all confined exchange to text – to words on a screen, typed by a person (or so one thought).”).

\textsuperscript{21} Id. at 103.

\textsuperscript{22} “CERN” is an acronym for the Centre Européen de Recherche Nucléar, now the European Organization for Nuclear Research.

\textsuperscript{23} Newton’s Telecom Dictionary defines the World Wide Web as: the universe of accessible information available on many computers spread through the world and attached to that gigantic computer network called the Internet. The Web has a body of software, a set of protocols and a set of defined conventions for getting at the information on the Web.
restrictions on the commercial use of the NSFnet backbone, and the subsequent cancellation of subsidies for the NSFnet system, are often hailed as the ultimate events leading to the widespread commercial use of the Internet.24

The first companies to take advantage of the commercial potential of the Internet and engage in "e-commerce"25 did so without many Internet-specific laws to guide them.26 The uncertainties that arose from the absence

---

The Web uses hypertext and multimedia techniques to make the web easy for anyone to roam, browse and contribute to.

Harry Newton, Newton's Telecom Dictionary (18th ed. 2002). Mr. Berners-Lee explained:

In 1980 I played with programs to store information with random links, and in 1989, while working at the European Particle Physics Laboratory, I proposed that a global hypertext space be created in which any network-accessible information could be referred [sic] to by a single "Universal Document Identifier" . . . The dream behind the Web is of a common information space in which we communicate by sharing information. Its universality is essential: the fact that a hypertext link can point to anything, be it personal, local or global, be it draft or highly polished. There was a second part of the dream, too, dependent on the Web being so generally used that it became a realistic mirror (or in fact the primary embodiment) of the ways in which we work and play and socialize.


See Leiner et al., supra note 16 ("NSF's privatization policy culminated in April, 1995, with the defunding of the NFSNET Backbone. The funds thereby recovered were (competitively) redistributed to regional networks to buy national-scale Internet connectivity from the now numerous, private, long-haul networks."). See also Jane K. Winn & Benjamin Wright, The Law of Electronic Commerce § 1.02 (4th ed. 2002).

The term E-commerce seems to have been coined in the mid-1990's when the Internet had just begun to capture the attention of the larger public." Winn & Wright, supra note 24, § 1.02. As used herein the term "e-commerce" refers broadly to the use of the Internet to advertise and promote business and to buy and sell goods and services over the Internet. It is to be distinguished from the terms "e-business" and "electronic commerce." Id.

Although the terms e-Business, E-Commerce, and electronic commerce are sometimes used interchangeably, they reflect different ideas about what impact new information technologies will have on a basic business operation. The idea of electronic commerce gained currency 20 or 30 years ago when networked systems of computers first were used to execute transactions. Electronic funds transfers, electronic clearing and settlement of securities trades, and electronic contracting transactions were among the first electronic commerce systems implemented . . . . The term e-Business was coined in the late 1990s and usually indicates a broader focus than the term E-commerce. If E-Commerce is about executing transactions more efficiently in broader marketplaces defined by new communications technologies, then e-Business is about a thorough restructuring of business operations within an organization to take full advantage of a wide range of new information technologies.

Id.

In the early 1990s, procedures were in place whereby individuals and companies could obtain domain names, but most of the law that now governs domain names was not developed until years later. See generally Winn & Wright, supra note 24, §
of such laws together with the technological and boundary-less nature of the Internet resulted in a variety of strategies to make the Internet environment more predictable. Because use of the Internet was initially limited to a small group of researchers and educators, so-called "netiquette" played a key role in controlling the early use of the Internet. As use of the Internet expanded, however, it became clear that other strategies were required. With the history of the software license as a backdrop, a desire to contract around uncertainties led to the use of TOUs. However, what began as relatively


LESSIG, supra note 15, at 39 ("The significance of the recent birth of e-commerce is that it takes place on an open, unsecured network. The challenge for commerce on the early Net was to develop architectures that, while sharing in the network advantages of the Internet, would restore some of the security that commerce requires."). For a summary of the uncertainties as they existed in 1993, see David Loundy, E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability, 12 COMPUTER/L.J. 101 (1993). See Mark A. Lemley, Shrinkwraps in Cyberspace, 35 JURIMETRICS J. 311, 313 (1995).

Throughout much of its history, an unwritten but very powerful set of informal norms has governed the Internet. These norms range from the mundane (the use of capital letters in electronic mail is considered the virtual equivalent of shouting; *asterisks* are used to underline or emphasize a word) to the fundamental (unsolicited advertising which intrudes on Net citizens is strictly forbidden). These norms are "enforced" in a variety of ways, including "frequently asked question lists" which inculcate new users into the culture of a particular subset of the Internet community and "flames" (angry responses to breaches of Internet etiquette, or "netiquette").

Id.

The use of software licenses can be traced back to the 1960's. At that time, the state of copyright and patent law was such that the software developers doubted whether either body of law would provide sufficient protection against the wholesale copying of computer code. Because much of the software being developed at the time was specially commissioned, the contract between a software developer and his client became the perfect vehicle for protecting the software. Typically, such agreements contained language that designated the software as a "trade secret" and required the licensee to maintain its confidentiality. See generally David Bender, Trade Secret Protection of Software, 38 GEO. WASH. L. REV. 909 (1970); Richard Raysman, Protection of Proprietary Software In the Computer Industry: Trade Secrets As an Effective Method, 18 JURIMETRICS J. 335 (1978); Michael C. Gemignani, Legal Protection for Computer Software: The View from '79, 7 RUTGERS COMPUTER & TECH. L.J. 269 (1979); Note, Computer Programs and Proposed Revisions of the Patent and Copyright Laws, 81 HARV. L. REV. 1541 (1968). See also Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. CAL. L.R. 1239 (1995)
meaningless notices on some e-mail messages and web pages has evolved into a lengthy morass of provisions.\textsuperscript{30}

III. ANALYZING SPECIFIC PROVISIONS OF TERMS OF USE AGREEMENTS

It is not possible in this article to detail all of the provisions of the TOUs that are currently in use, but the issues that are typically addressed can generally be segregated into two categories: (1) representations, disclosures and instructions; and (2) user rights and obligations. Within these two basic categories are a number of sub-categories, some of which are analyzed in detail in the discussion that follows.

A. Representations, Disclosures and Instructions

As is discussed in Section IV of this article, a lot of attention is focused on the issue of whether “browse-wrap” TOUs are enforceable. However, several common provisions of TOUs do not seek either to impose affirmative obligations on web site users or limit their pre-existing rights and, thus, they need not be included in an “agreement.” A summary of three of these provisions follows.


In addition to spawning a new way of communicating, the Internet has spawned many new ways of conducting business. One of the challenges facing WSOs who devise new Internet-based business models is the need to explain the nature and purpose of their services.\textsuperscript{31} Such explanatory

\textsuperscript{30} In \textit{Shrinkwrap in Cyberspace}, Lemley describes early uses of TOUs:

\textit{[O]ne law firm’s ‘home page’ on the World Wide Web restricts the ability of companies to link to the home page if the linking company charges its users for the privilege. Another law firm includes a ‘contract’ at the bottom of its electronic mail messages prohibiting the copying, distribution, and disclosure of the message [or] its contents and the ‘taking of any action in reliance on the contents’ of the message. Furthermore, large Internet access providers are including electronic ‘terms and conditions’ for the general use of their services and for access to specific databases.}

\textsuperscript{31} A similar challenge faced the software industry. \textit{See} Robert W. Gomulkiewicz & Mary L. Williamson, \textit{A Brief Defense of Mass Market Software License Agreements}, 22 \textit{Rutgers Computer & Tech. L.J.} 335, 346 (1996) (discussing the value of end user license agreements (EULAs) from the perspective of Microsoft’s attorneys). “EULAs place valuable information in the hands of end users.” \textit{Id.}
provisions often take the form of mere instructions, but in other cases they are more detailed and attempt to limit the legal obligations of the WSO. The e-Bay TOU provides a perfect example of the latter strategy. It states, in pertinent part:

eBay is a Venue. . . . eBay is not an Auctioneer. Although we are commonly referred to as an online auction web site, it is important to realize that we are not a traditional “auctioneer.” Instead, our site acts as a venue to allow anyone to offer, sell, and buy just about anything . . . . We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items. We cannot ensure that a buyer or seller will actually complete a transaction.33

The legal obligations that are imposed on individuals and companies are often dictated by how a given relationship or transaction is characterized.34 Although self-serving characterizations are not determinative of the laws that apply to a given situation, since many principles of law are based upon the expectations of the parties, a common sense solution to the question of how to characterize a relationship is to define it oneself. This is the apparent purpose of the explanatory provisions contained in eBay’s TOU. Given the appearance of the eBay site, and particularly before the limited functions of Internet auction sites were understood by the general public, it would be easy to believe that eBay is the owner of the goods being sold on its site. If such were the case, eBay could potentially be held liable for injuries stemming from the sale of defective products or from

32 See, e.g., Excite, Terms of Service, Overview, at http://www1.excite.com/home/companyinfo_excite/excite_terms/0,20406,,00.html (last visited Feb. 25, 2003) (“Excite is a multi-purpose service which allows you to use or access a wealth of products and services, including e-mail, search services, chat rooms and bulletin boards, shopping services, news, financial information and broad range of other content (collectively the ‘Excite Service’”).

33 eBay, Terms of Use, supra note 6, ¶¶ 3, 3.1.

34 Under well-established principles of tort law, for instance, a landlord has certain duties of care that must be met and which are difficult or impossible to contract away. See 4 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY & LITIGATION, ch. 39 (rev. 2d ed. 2002) (discussing principles of premises liability); 4 LEE & LINDAHL, supra, § 39:41 (discussing duties of landlords and tenants); 2 LEE & LINDAHL, supra, § 22:3 (discussing exculpatory contracts in leases). Similarly, if a transaction is characterized as a sale of goods, the Uniform Commercial Code (U.C.C.), rather than general principles of contract law, governs the transaction and limits the ways in which warranties can be disclaimed. See U.C.C. §§ 2-312 to -316 (2002).
misrepresentations made about the goods.\textsuperscript{35} It might also be held responsible for the failure of the goods to be delivered as promised. Another concern that apparently influenced the language of eBay’s TOU is the fact that traditional auction activities are regulated in many states.\textsuperscript{36} In an effort to avoid such laws, eBay explains how it is different from the sorts of traditional auction activities that are often subject to regulation.\textsuperscript{37}

While explanatory provisions like eBay’s can be used to educate consumers about the nature of a site, they are not necessary if the purpose of a site is already understood. Thus, before including detailed explanatory provisions in TOUs there should be a reasonable basis for believing that web site users will misapprehend the nature of the site. If such provisions are used, there is no need for them to be agreed to by web site users since they merely describe the nature and purpose of a web site and do not require web site users either to give up existing rights or to perform a specified obligation. However, as a representation by the WSO that may be relied upon by web site users, care must be taken to ensure that explanatory provisions do not contain promises that cannot be met.\textsuperscript{38}

2. Intellectual Property Notices

A common feature of most web sites and many TOUs are intellectual property notices. Some WSOs post simple intellectual property notices on the home pages of their sites. Others include links to separate intellectual property notice pages. Still others place the notice provisions in TOUs. For instance, the TOU of the Walt Disney Internet Group (WDIG) contains the following language:

All materials contained in any WDIG Site . . . are the copyrighted property of Disney Enterprises, Inc. or its

\textsuperscript{35} With respect to potential products liability, see 3 LEE & LINDAHL, supra note 34, ch. 27. With respect to potential liability for misrepresentation, see 15 U.S.C. § 1125(a) (2000) (corresponds to Lanham Act, §43(a)). See also 3 LEE & LINDAHL, supra note 34, §27.56 (“The general policy of strict liability is to bring within its scope all those who play any part in putting a defective product into the stream of commerce.”).

\textsuperscript{36} See, e.g., CAL. CIV. CODE § 1812.600 (West 2003).

\textsuperscript{37} Of course, e-Bay’s explanation alone will not prevent the regulation of its activities if, in fact, it falls within the statutory definition of the regulated enterprise.

\textsuperscript{38} See Larry W. Smith, A Survey of Current Legal Issues Arising From Contracts For Computer Goods and Services, 1 COMPUTER/ L.J. 475, 478-79 (1979) (“Despite their technical sophistication, the same basic marketing strategies are usually followed in selling computer systems as with other large ticket items. What is said and done during the early stages of this marketing activity can have a profound impact on subsequent questions of legal liability.”). Similarly, UCITA §420(a)(1) states: “An affirmation of fact or promise made by the licensor to its licensee, including by advertising, which relates to the information and becomes part of the basis of the bargain creates an express warranty that the information to be furnished under the agreement will conform to the affirmation or promise.” UCITA § 420(a)(1) (2002). \textit{But see} UCITA § 406(a) (2002) (“Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable and consistent with each other.”).
subsidiary or affiliated companies and/or third party licensors. All trademarks, service marks, and trade names are proprietary to Disney Enterprises, Inc. or its affiliates.\textsuperscript{39}

Except for the notice requirements that are applicable to works of authorship created before March 1, 1989,\textsuperscript{40} notice is not technically required to either establish or preserve patent, copyright and trademark rights. More importantly, where a WSO wants to enjoy the benefits that flow from intellectual property notices, it is important that the form and location of the notices meet statutory requirements. Simple references to “patent, copyright, and trademark rights” contained in a definition of rights clause may not suffice.\textsuperscript{41}

Since the United States joined the Berne Convention in 1989, notice of copyright is no longer required for works published under the 1976 Copyright Act.\textsuperscript{42} However, a number of benefits are derived from such notice.\textsuperscript{43} Most importantly, a copyright notice precludes a defendant in a copyright infringement action from asserting the innocent infringement defense.\textsuperscript{44} Similarly, while U.S. law does not mandate the use of a trademark notice, failure to use a notice with respect to registered marks will limit the damages that can be claimed in a trademark infringement action.\textsuperscript{45} In the case of patents, so-called “patent marking” is only mandated for patented articles that are being sold and is not required at all for patented methods and

\textsuperscript{39} Disney Online, Terms of Use, Restrictions on Use of Materials, \textit{supra} note 5.

\textsuperscript{40} If a web site contains works that were created before March 1, 1989, care must be taken to include an appropriate copyright notice in order to ensure that such works do not enter the public domain. \textit{See} 2 \textsc{Melville B. Nimmer \& David Nimmer, Nimmer on Copyright} §§ 7.12[C][2], [D] (1978 & Supp. 2002).

\textsuperscript{41} “It should here be noted... that a mere statement on the work that copyright protection is claimed, or words to that effect, will not serve the purpose of a valid copyright notice if the technical requirements of form and placement are not observed.” 2 \textsc{Nimmer, supra} note 40, § 7.05 (citing Higgins v. Keuffel, 140 U.S. 428 n. 5 (1891)).

\textsuperscript{42} \textit{See} U.S. Copyright Office, Circular 3, Copyright Notice (1999), \textit{available at} http://www.copyright.gov/circs/circ03.pdf; \textit{see also} 2 \textsc{Nimmer, supra} note 40, § 7.02[B].

Nimmer notes:

\textit{The Berne Convention bars notice, along with all formalities, from serving as a condition to copyright protection. Under the current [U.S. copyright] Act as enacted in 1976, notice served that proscribed function of being a condition to U.S. Copyright. Therefore, in order to bring the United States into conformity with Berne, Congress prospectively eliminated the mandatory notice requirement.}

\textit{Id.}

\textsuperscript{43} U.S. Copyright Office, Circular 3, \textit{supra} note 42, at 2 (“Use of the notice may be important because it informs the public that the work is protected by copyright, identifies the copyright owners, and shows the year of first publication.”).

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} 15 \textsc{U.S.C.} § 1111 (2000) (stating that no profits and no damages will be awarded unless defendant has actual notice).
processes.\textsuperscript{46} Furthermore, the only consequence of a failure to mark a patented article is a limitation on potential damage claims.\textsuperscript{47}

Generally, the components of a proper copyright notice under U. S. law are: (1) the © symbol, the word "Copyright," or the abbreviation "Copr."; (2) the year of first publication; and (3) the name of the owner of the copyright.\textsuperscript{48} Also, a copyright notice must be "affixed" (i.e., attached) to the work of authorship "in such manner and location as to give reasonable notice of the claim of copyright."\textsuperscript{49} A proper patent notice will consist of the word "patented" or the abbreviation "pat." and the patent number.\textsuperscript{50} A trademark notice can take several forms. If a mark is unregistered, the use of the "tm" or "sm" symbols in close proximity to the mark is recommended.\textsuperscript{51} If a mark is registered, the words "Registered in the U. S. Patent and Trademark Office," an abbreviation of the foregoing, or the ® symbol should be used.\textsuperscript{52}

Because web sites are often a compilation of information, part of which may not be protected by copyright and part of which may be owned by someone other than the WSO, special notice requirements may apply. For instance, 17 U.S.C. § 403 states that if a work consists predominantly of one or more works of the United States (which under 17 U.S.C. § 105 are not protected by copyright), the notice of copyright must include a statement that identifies those portions of the work that are protected or, alternatively, a legend such as: "No claim of copyright is made for the works of the United States Government." With respect to derivative and collective works that incorporate pre-existing works that were created after March 1, 1989, it will generally suffice to include only a notice of copyright that pertains to the

\textsuperscript{46} 35 U.S.C. § 287 (2000); see also 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.03[7][c][ii] (1999).
\textsuperscript{47} 35 U.S.C. § 287; see also 7 CHISUM, supra note 46, § 20.03 [7][c][ii] (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)) ("The availability of damages in an infringement action is made contingent upon affixing a notice of patent to the patented article.").
\textsuperscript{48} See 2 NIMMER, supra note 40, § 7.05.
\textsuperscript{49} See 2 NIMMER, supra note 40, § 7.10[C] (citing 17 U.S.C. §§ 401(c), 402(c) (2000)).
\textsuperscript{50} Pursuant to Patents, Trademarks, and Copyrights, 37 C.F.R. § 201.20(g) (2002), a notice that is displayed at the web site user's terminal at sign-in or that is continuously on display on the terminal should constitute effective notice. The cited regulation concerns "works reproduced in machine-readable copies" and does not specifically refer to web sites. Thus, because pursuant to 37 CFR § 201.20 the examples of acceptable notice that are given are not exhaustive, the placement of copyright notices in other locations may be adequate. However, compliance with the foregoing regulation conclusively establishes that reasonable notice of copyright has been given. See 2 NIMMER, supra note 40, § 7.10.
\textsuperscript{51} As noted by Thomas McCarthy, the benefits of trademark notices for unregistered marks include their educational function and the fact that they act as a sort of "no trespassing sign." Use of such notices can also serve as evidence on the issue of priority of use and help prevent a mark from becoming generic. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19.148 (4th ed. 1996).
entirety of the work.\textsuperscript{53} In other words, a separate copyright notice for all works in a web site is not required.\textsuperscript{54}

In light of the foregoing, placing intellectual property notices in a TOU seems at best superfluous. At worst, such a practice is ill-advised because it may not give adequate notice of the rights claimed. Moreover, there is no need for a web site user to "acknowledge" such notices or otherwise "agree" to the document in which they appear. Obviously, The Coca-Cola Company does not have to include a statement on its COKE bottle that reads: "By opening this bottle and drinking its contents you agree that Coca-Cola is the registered trademark of The Coca-Cola Company." Including appropriately worded intellectual property notices in a prominent location on a web site should suffice.

3. Required and Recommended Disclosures

TOUs often include what this article refers to as "required and recommended disclosures." These disclosures differ from explanatory provisions because they are intended either to meet disclosure requirements that are imposed by law or to take advantage of benefits that can be derived from discretionary disclosures. They also differ from intellectual property notices because they do not involve intellectual property rights.

Depending upon the nature and purpose of a web site and the underlying business that it reflects, there may be a myriad of laws that govern its operation and require certain disclosures.\textsuperscript{55} A general article such as this cannot identify all the disclosure requirements that exist in the law. However, there are three types of disclosures that are of particular relevance to the Internet: (1) the discretionary disclosures of the Online Copyright Infringement Liability Limitation Act (OCILL);\textsuperscript{56} (2) the privacy policy

\textsuperscript{53} See 2 NIMMER, supra note 40, § 7.12[C][1].

Because a notice pertaining to a derivative or collective work suffices to protect the pre-existing works published therein, it follows that the existing practice of many publishers to include earlier copyright notices as well as a notice for the newly published derivative or collective work is a harmless, albeit unnecessary precaution.

\textit{Id.} (citing 17 U.S.C. § 401(a), (b)(2)).

A "derivative work" is "a work based upon one or more preexisting works," and a "collective work" is a work "in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101 (2000).

\textsuperscript{54} Although, according to U.S. copyright law, a separate copyright notice is not required for all works of authorship contained in a collective work, it may be required by contract. This is because the license agreements by which copyright holders allow their materials to be used often contain copyright notice or attribution requirements.

\textsuperscript{55} For instance, the Fair Credit Reporting Act requires every consumer reporting agency to, upon request of a consumer, disclose specified information. 15 U.S.C. § 1681g (2000). The Gramm-Leach Bliley Act requires all financial institutions to regularly disclose their privacy policies and practices to their customers. 15 U.S.C. §§ 6801-6803 (2000).

disclosures mandated by the Children’s Online Privacy Protection Act (COPPA),\(^5\) and (3) the privacy policy disclosures recommended by the Federal Trade Commission (FTC) and advocated by various privacy interest groups.\(^5\)

A question that confronted early online service providers was whether a company that provides interactive services – such as e-mail, chat rooms, and bulletin board services – could be liable for copyright infringement caused by subscribers and web site users. Online service providers (including WSOs) are directly responsible for their unauthorized use and posting of copyrighted works,\(^5\) but they did not want added liability for infringing content posted by others. To ameliorate these concerns, OCILL was adopted. It provides:

A service provider shall not be liable for monetary relief, or, . . . for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider –

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which the infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; . . .\(^6\)


\(^6\) 17 U.S.C. § 512(c)(1) (2000). As used in section 512(c)(1), “service provider” means “a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).” 17 U.S.C § 512 (k)(1)(B). Section 512 (k)(1)(A) defines a “service provider” as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material sent or received.” The precise contours of the definition of “service provider” remain to be defined by case law; however, it appears that it would include any web site operator who provides interactive online services. See Hendrickson v. Ebay, Inc., 165 F. Supp. 2d 1082 (C.D.Cal. 2001) (noting the “broad” definition of “service provider”); see also Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146 (C.D. Cal. 2002); Costar Group, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688 (D. Md. 2001); In re Aimster Copyright Litigation, 2002 Copr. L. Dec. P 28,500, 2002 WL 31006142 (N.D. Ill. Sept. 4, 2002).
The foregoing limitations on liability do not apply unless a service provider: (1) "does not receive a financial benefit directly attributable to the infringing activity"; 61 (2) "upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing"; 62 and (3) has designated an agent to receive notifications of claimed infringement by posting a prescribed notice on its web site. 63 The required notice must be included on the service provider's web site in a location that is accessible to the public and must include the name, address, phone number, and electronic mail address of the person designated by the service provider to receive copyright infringement complaints. 64

In addition to addressing the liability concerns of online service providers, Congress has frequently addressed the interests of children. 65 Although many provisions of these laws have been held unconstitutional on free speech grounds, 66 the provisions of the Children's Online Privacy Protection Act (COPPA) remain intact. 67 According to COPPA, if a WSO establishes a commercial web site that is "targeted" to children under the age of thirteen, it must abide by a series of regulations that have been adopted by the Federal Trade Commission (FTC). 68

A web site or online service directed to children is generally required to: (1) provide notice on the site of what information it collects from children, how it uses the information, and its disclosure practices; (2) obtain parental consent prior to the collection, use or disclosure of such information; (3) provide a means for parental review of the information collected from a child and to refuse to permit further use or maintenance of such information; (4) not to condition any online activity on a child

63 17 U.S.C. § 512 (c)(2). When contrasted with the simple liability limiting provisions that Congress enacted to resolve concerns about service provider liability for defamatory and fraudulent statements, discussed in Section III.B.iii. of this article, it is obvious that the stringent requirements of OCILL were the result of the more powerful lobby of content owners.
64 Id. A copy of the notice must also be provided to the U.S. Copyright Office. Id. For information on submitting the required information to the U.S. Copyright Office, see the instructions and form that are posted at U.S. Copyright Office, Online Service Providers: Designation by Service Provider of Agent for Notification of Claims of Infringement, at http://www.copyright.gov/onlinesp (last visited Feb. 25, 2003).
disclosing personal information; and (5) establish reasonable procedures to protect the confidentiality, security and integrity of the information collected.\(^\text{69}\) The required notice must be clearly labeled and be posted on the web site with "clear and prominent" links to the notice located on the home page and "at each area on the website or online service where personal information is collected."\(^\text{70}\)

For web sites that are not targeted to children, no generally applicable federal law exists to require WSOs to post privacy policies.\(^\text{71}\) Rather, the presence of privacy policies on the home pages of numerous web sites is the result of efforts by the FTC and various public interest groups to encourage a system of self-regulation.\(^\text{72}\) The four core principles of privacy protection are: notice, choice, access and security.\(^\text{73}\) The notice principle requires data collectors to disclose their information practices to consumers before collecting personal information. Then, if information will be used for a purpose other than the purpose for which it was initially collected, the consumer must be given the choice of whether and how the information is used. Consumers must also be given access to their personal information so they can review and contest its accuracy and completeness. Finally, all online data collectors must take reasonable steps to protect the security and accuracy of the information they collect.

Although the FTC Act generally prohibits unfair and deceptive advertising, and the FTC has jurisdiction to enjoin a WSO from making any false or misleading claims about its privacy policies,\(^\text{74}\) except for its authority

\(^{69}\) 16 CFR § 312.3.

\(^{70}\) 16 CFR § 312.4(b).


\(^{72}\) It may also be explained by the adoption of state laws or the laws of other countries. \textit{See, e.g.}, Council Directive 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.


under COPPA, the FTC does not yet have specific authority to mandate online privacy policies. Currently, the principal benefits to be derived from posting a privacy policy are consumer goodwill and the associated marketing benefits that may flow from “privacy seal programs.” Pursuant to these programs, WSOs are given permission to use the certification marks of various companies if they implement privacy policies that comport with the four core privacy principles detailed above. The theory is that as the seals of companies like TRUSTe, WebTrust and the Better Business Bureau (BBB Online) become better known, consumers will have an easy way to determine the privacy practices of WSOs and will refuse to conduct business with companies that do not provide the level of privacy they desire.

While the acknowledgement by web site users of voluntary and mandatory disclosures may be desired, with the exception of those portions of COPPA that require parental consent, it is not necessary for a web site user to “agree” to such provisions. In fact, given the length and obscurity of many TOUs, it can be argued that disclosures that are included in TOUs are not sufficiently clear and conspicuous to constitute effective notice. The better practice is to include required and recommended disclosures in separate, properly marked notices that can be readily located on a web site.

B. User Rights and Obligations

A fundamental principle of contract law is that if you want to impose a contractual duty on someone (i.e., require someone to do something that they are not otherwise required by law to do or require them to waive rights that they enjoy under the law), they must be informed of the proposed obligation and affirmatively assent thereto. While some aspects of the six provisions that are discussed below may be merely declaratory of existing

---

75 In its May 2000 report to Congress, the FTC recommended legislation that would “establish basic standards of practice for the collection of information online, and provide an implementing agency with the authority to promulgate more detailed standards pursuant to the Administrative Procedures Act.” Federal Trade Commission, Privacy Online: Fair Information Practices In the Electronic Marketplace (May 2000), available at http://www.ftc.gov/reports/privacy2000/privacy2000.pdf (last visited Apr. 5, 2003). To date, no such legislation has been enacted.


77 The FTC generally requires that all disclosures that are made in order to prevent an ad from being deceptive or misleading must be clear and conspicuous. “In evaluating whether disclosures are likely to be clear and conspicuous in online ads, advertisers should consider the placement of the disclosure in the ad and its proximity to the relevant claim.” Federal Trade Commission, Dot Com Disclosures, available at http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html (last visited Feb. 7, 2003).

law or informational, the bulk of the provisions appear to require affirmative assent.

1. Definition of Rights Clause

A definition of rights clause (sometimes labeled "intellectual property rights" clause, "proprietary rights" clause or "scope of rights" clause) is designed to give notice of the rights that a WSO claims in the materials that are accessible on its web site. Often it serves the benign purpose of repeating in narrative form the description of copyrights, patent rights and trademark rights that are contained in an intellectual property notice. For instance, Oracle's TOU has just one paragraph that appears much like the information on the back of a can of Coca-Cola. It states: "Copyright © 1995-2000, Oracle Corporation. All rights reserved" and "Oracle is a registered trademark of Oracle Corporation." The definitions of rights clauses contained in Microsoft's TOU include a provision that purports to define the ownership of the "software that is made available for download," a standard copyright notice and a provision that lists the numerous trademarks owned by Microsoft. Amazon's definition of rights clause is more expansive, consisting not only of a listing of trademarks and patents, but a copyright clause that attempts to identify all copyrightable content on the site.

Despite the benefits that flow from simple copyright, trademark and patent notices, a definition of rights clause is not needed to create such rights. Copyrights, trademark rights, and patent rights either exist independently of the TOU or they do not exist at all. Moreover, where

---

79 See supra Section III.A.ii (discussing intellectual property notices).
81 See Microsoft, Information on Terms of Use, supra note 6.
82 Such clause states:
All content included on this site, such as text, graphics, logos, button icons, images, audio clips, digital downloads, data compilations, and software, is the property of Amazon.com or its content suppliers and protected by United States and international copyright laws. The compilation of all content on this site is the exclusive property of Amazon.com and protected by U.S. and international copyright laws. All software used on this site is the property of Amazon.com or its software suppliers and protected by United States and international copyright laws.

Amazon, Conditions of Use, supra note 5.
83 See discussion supra Section III.A.ii.
84 Discussing the predecessor to UCITA, Article 2B of the U.C.C., David Nimmer et al. explained:
Contrary to the claim that Article 2B is needed to protect copyright interests . . ., existing copyright law adequately protects those owners when they distribute copyrighted mass market software, even in a world in which shrinkwrap agreements are not deemed enforceable contracts. That conclusion follows because the exclusive rights granted under the
notice is recommended it does not need to be contained in a document (such as a TOU) that purports to be an agreement. Thus, putting aside the potential educational value of a definition of rights clause, to the extent it is simply explanatory of existing law or is repetitive of intellectual property notices, it is unnecessary.

Sometimes, however, definitions of rights clauses go beyond their simple notice function and attempt to expand the scope of intellectual property rights that a WSO rightly enjoys under copyright, patent, or trademark law. For instance, the TOU of Barnes and Noble provides:

User acknowledges that barnesandnoble.com contains information, data, software, photographs, graphics, videos, typefaces, graphics, music, sounds, and other material (collectively "Content") that are protected by copyrights, trademarks, trade secrets, or other proprietary rights, and that these rights are valid and protected in all forms, media and technologies existing now or hereinafter developed. All copyright laws effectively preclude use of computer software – to the extent the Constitution and Congress accord a monopoly therein – without the express or implied permission of the copyright owner.

When a copyright owner distributes its software, it is free to grant a license extending only to specified uses, while excluding others. Moreover, any such license does not require a bilateral contract. A simple, unilateral statement by the copyright owner of the scope of its license suffices.


85 Id. See also supra Section III.A.ii (discussing intellectual property notices).
86 That such is the purpose of these clauses is made clear by Comment 1 to section 105 of UCITA:

The transition from print to digital media has created new demands for information. Because digital information is so easily copied, increased attention has been focused on the formulation of rights in information in order to encourage its creation and on the development of contracting methods that enable effective development and efficient marketing of information assets. Here, as in other parts of the economy, the fundamental policy of contract law is to enforce contractual agreements. At the same time, there remains a fundamental public interest in assuring that information in the public domain is free for all to use from the public domain and in providing access to information for public purposes such as education, research, and fair comment. While the digital environment increases the risk of unfair copying, the enforcement of contracts that permit owners to limit use of information and the development of technological measures have given the owners of information considerable means of enforcing exclusivity in the information they produce and collect. This is true not only against those in contractual privity with the owners, but also in some contexts against the world-at-large.

UCITA § 105 cmt. 1 (2002).
Content is copyrighted as a collective work under U.S. copyright laws, and barnesandnoble.com owns a copyright in the selection, coordination, arrangement, and enhancement of such Content. 87

Under U.S. law it is unlikely that the entire contents of a web site are protected by trademark, patent and copyright law. Trademark rights attach to "any word, name, symbol, or device, or any combination thereof" that is used to identify and distinguish one person's goods and services from another's and do not attach to the contents of web sites. 88 Patent rights, if any exist, are limited to the invention described in the patent claims and in the case of web sites are likely to consist of either a business-method 89 or software patent. 90 Basic facts, such as the identity and price of goods being sold or the dates and times of events, are not protected by either copyright law or patent law. 91 Ideas that are expressed on web sites and material that has already entered the public domain are also not protected. 92

Absent copyright, patent or trademark protection, the principal way information can be protected under U.S. law is pursuant to trade secret law and associated contract law doctrine. 93 This strategy, however,

87 Barnes & Noble, Terms of Use, supra note 5 (emphasis added).
88 15 U.S.C. § 1127 (2000). A web site's design and organization could, conceivably, be protected as trade dress, but even if such were the case, the entirety of the web site would not be protected. See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992). See also Xuan-Thao N. Nguyen, Should It Be a Free For All? The Challenge of Extending Trade Dress Protection to the Look and Feel of Web Sites in the Evolving Internet, 49 AM. U. L. Rev. 1233 (2000).
91 See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45 (1991). See also Ticketmaster Corp. v. Tickets.com, Inc., 2000 WL 525390, 54 U.S.P.Q. 1344 (C.D. Cal. Mar. 27, 2000), in which the court found no actionable copyright claim resulting from defendant's practice of merely copying factual data. ("While the expression, organization, placement, etc., of the factual data may be protected, [defendant] is not alleged to have copied the method of presentation, but rather to have extracted the factual data and presented it in its own format."). Id. at *2.
92 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").
93 It may also be protected under a theory of misappropriation, but based upon the reasoning of Int'l News Service and NBA, such a claim only applies to the misappropriation of so-called "hot news." See Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918); NBA v. Motorola, Inc., 105 F.3d 841 (1997).
94 See supra note 87 and accompanying text.
should not succeed in cases where access to the subject content is widespread because information that has been disclosed to the public cannot be a trade secret.\footnote{In early commentaries on the use of trade secret law to protect computer software it was often acknowledged that the strategy of designating software as a trade secret would not continue to work once software was widely distributed. See, e.g., Miles R. Gilbume & Ronald L. Johnston, Trade Secret Protection for Software Generally and in the Mass Market, 3 COMPUTER/L.I. 211, 229 (1982) ("Even if enforceable license agreements are obtained from all end-users of mass-distributed software, an issue still exists as to whether or not the mere fact of massive distribution is inconsistent with the 'secrecy' element of trade secret protection."). In the Final Report of the National Commission on New Technological Uses of Copyrighted Works (the "CONTU Report"), it is noted: "Although many proprietors feel secure when using trade secrecy, there are several problems they must face with respect to its use in protecting programs. Because secrecy is paramount, it is inappropriate for protecting works that contain the secret and are designed to be widely distributed." Final Report of the National Commission on New Technological Uses of Copyrighted Works 17 (1978). More recently, Raymond Nimmer stated:

As both a practical and a legal matter, there is a fundamental distinction between information products generally disseminated and products of limited distribution. In a general dissemination product, information is placed in the public domain. No effective way exists to recall the information from public use or to regulate access from public sources.}

Under the Uniform Trade Secrets Act (UTSA),\footnote{The Uniform Trade Secrets Act is currently applicable in forty-three of the fifty United States plus the District of Columbia. Uniform Law Commissioners, A Few Facts About the Uniform Trade Secrets Act, available at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-utsa.asp (last visited Apr. 10, 2003). Where it is not applicable, the Restatement of the Law of Torts is likely to apply. Under the Restatement (First) of Torts, a trade secret is defined as "information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT (FIRST) OF TORTS § 757 cmt. b. (1939).}
a trade secret has two critical components: (1) it must be information that "derives independent economic value, actual or potential, from not being generally known to" the public, and (2) it must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."\footnote{See UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 437 (1990); see also CAL. CIV. CODE § 3426.1(d) (West 1997) (California's version of the UTSA).} It is axiomatic that if information is not subject to reasonable efforts to maintain its secrecy, it is not a trade secret.\footnote{1 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.03 (2002) ("Indispensable to an effective allegation of a trade secret is proof that the matter is, more or less, secret.").} Although absolute secrecy is not required for trade secret protection to exist, it is generally understood that the more widely information is disseminated, the less likely it is to be a trade secret.\footnote{Id. § 1.07[2].}

To counter the foregoing argument, a WSO like Barnes and Noble is likely to argue that everyone who views information on its web site is under...
a contractual obligation to maintain the secrecy of such information. Of course, this argument assumes that the TOU constitutes a binding and enforceable contract in the first instance. Even if a binding contract results, however, at some point information that is widely distributed loses its status as a trade secret. This is because “reasonable efforts to maintain secrecy” does not simply mean that the trade secret owner engaged in efforts to create a contractual duty of confidentiality, but also depends on whether the information maintains some semblance of secrecy. Moreover, a confidentiality agreement cannot operate to convert information that is already in the public domain into a trade secret. In other words, although contractual restrictions can be cited as one example of reasonable efforts to maintain secrecy, they can only preserve that secrecy which already exists.

The inability of contract law to convert publicly available information into a trade secret is not the only problem facing WSOs who seek to implement a broad description of rights clause. There are also public policy issues that must be considered. First, trade secret law only escapes preemption problems because it applies in very limited circumstances. Therefore, the broader the trade secret rights asserted by a WSO, the more likely it is that attempts to enforce those rights will be preempted by copyright or patent law. Second, although a broad definition of rights

---

100 See Nimmer, Information Law, supra note 95, ¶ 3.11[2] (suggesting use of this very strategy to protect information that is not otherwise protected by copyright law) (“The second rationale for controls over access to data in electronic form involves combining efforts to protect the secrecy of the material coupled with establishing relationships that by contract or other expectation restrict disclosure and use of the information.”).

101 1 Milgrim on Trade Secrets, supra note 98, §1.05[5] (“Where a piece of software has been widely distributed, there arise concerns . . . regarding how ‘confidential’ or ‘secret’ the software can really be.”). The same, of course, can be said of widely distributed web site content.

102 1 Milgrim on Trade Secrets, supra note 98, § 1.03 (“It is not the characterization of the parties which establishes the existence of a trade secret.”); § 1.04 (“Although evidence of intensive and extensive efforts to maintain secrets may be probative, that the information itself is a trade secret,” the most elaborate secrecy, however, will not elevate public knowledge to the status of a trade secret.”).

103 See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 493 (1974) (holding that trade secret law is not preempted by copyright law, in part because trade secret rights can be destroyed by independent development). Thus, even if something begins as a trade secret when it is the subject of an agreement between a WSO and web site user, it may cease to be a trade secret in the future through no fault or action by the web site user.

104 See generally 2 Farnsworth, supra note 78, ch. 5; see also discussion infra Section IV.

105 Id. at 480-81; see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146-57 (1989).

clause may be of little actual legal significance, a WSO may nonetheless use such a provision to scare unsophisticated web site users into limiting their use of web site content. To the extent such content is unprotected by intellectual property law, this strategy is not recommended because it may constitute unfair competition or an illegal restraint of trade.\footnote{See generally Mark A. Lemley, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, 87 CAL. L.R. 111 (1997) (noting that in addition to preemption issues, contracts that attempt to expand intellectual property rights may constitute copyright misuse or otherwise conflict with federal and state statutes); Roger E. Schecter, The Unfairness of Click-On Software Licenses, 46 WAYNE L. REV. 1735 (2000) (arguing that various terms contained in software licenses may violate the Federal Trade Commission Act's prohibition against unfair trade practices). If a TOU is a contract as WSOs assert, then it may be a “contract ... in restraint of trade or commerce” in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, or of similar state statutes. See also RESTATEMENT (SECOND) OF CONTRACTS § 186 (1981) (noting that a contract in restraint of trade may violate public policy).}

With the foregoing in mind, definitions of rights clauses that are motivated by a desire to expand the intellectual property rights of WSO’s are probably ineffectual for such purpose. The intellectual property rights in the site either pre-exist the TOU or they do not. If the WSO owns information and data that it wishes to protect under principles of trade secret law, it is better not to post that information on the Internet than to rely on a TOU for protection. At a minimum, a WSO should segregate the trade secret information it makes available over the Internet from more general information and establish special security measures and contracts to govern access to such information. Information treated in this manner is more likely to constitute a trade secret, and the duty of confidentiality specified in the contract is more likely to be enforced because assent was manifested before access to the trade secret is allowed.\footnote{See, e.g., Smith v. Snap-On Tools Corp., 833 F.2d 578, 579 (5th Cir. 1987) (holding that the originator of a concept for a new tool could not state a cause of action for trade secret infringement in the absence of a confidentiality agreement that pre-existed disclosure).}

2. Scope of Use/Restrictions on Use

Defining the rights claimed in a web site is only the first step a WSO usually employs in an attempt to protect such content. The second step is to define and limit how the web site and its contents can be used. This is typically done in a clause that is variously labeled “site license,” “scope of
"use" and "restrictions on use." The TOU of AOL includes an example of one such clause. It provides, in pertinent part:

Amazon.com grants you a limited license to access and make personal use of this site and not to download (other than page caching) or modify it, or any portion of it, except with express written consent of Amazon.com. This license does not include any resale or commercial use of this site or its contents; any collection and use of any product listings, descriptions, or prices; any derivative use of this site or its contents; any downloading or copying of account information for the benefit of another merchant; or any use of data mining, robots, or similar data gathering and extraction tools. You may not frame or utilize framing techniques. You may not use any meta tags or any other "hidden text" utilizing Amazon.com's name. Any unauthorized use terminates the permission or license granted by Amazon.com.

There are five apparent purposes for restrictions on use clauses:
1. to expressly delineate the ways in which web site content can be used;
2. to prevent the creation of an implied license;
3. to avoid application of the first-sale doctrine;
4. to expand the scope of existing intellectual property rights;
5. to prevent certain activities considered to be invasive or destructive.

The first three purposes are an outgrowth of intellectual property law; namely, the right of WSOs to control certain uses of their intellectual property rights. In this regard, restrictions on use clauses are similar to software licenses in that they are often worded as express grants of power to use a web site. Such clauses have both positive and negative aspects. On the one hand, web site users are given permission to use a web site in a specified way. On the other hand, these clauses can impose limitations on the use of the web site that may be undesired by some users.

---

109 Sometimes the scope of use and restrictions on use clauses are stated as separate clauses. Other times they are combined into one clause. Still other times language concerning the authorized use and limitations on use of a web site are dispersed throughout a TOU.

110 Amazon, Conditions of Use, supra note 5.

111 For instance, the owner of a copyrighted work has the right to decide how such works will be sold and distributed, whether and to what extent they can be copied, and if they can be publicly displayed or used to make a derivative work. 17 U.S.C. § 106 (2000). Under patent law, the owner of a patented invention has the right to control the making, using, offering for sale, and selling of such invention. 35 U.S.C. § 271(a).
manner. On the other hand, by granting an express license, WSOs hope to prevent the creation of an implied license. 112

Although a simple intellectual property notice should suffice to inform web site users of the limitations on the use of intellectual property rights that are imposed by operation of law,113 many WSOs fear that by creating a web site and making information accessible for free on the Internet, web site users will assume that the information contained therein can be used more broadly than the law allows. While the copying of web site content for small-scale personal use is likely to be inferred, WSOs do not want anyone to believe that large-scale commercial use is permissible.114 A

112 3 NIMMER, supra note 40, § 10.10[C] ("It will sometimes be held that in order to permit the full enjoyment of a right expressly granted there is a necessary implication that certain collateral rights have also been granted."). "Generally, the existence and scope of an implied license depend upon the facts of the individual case, and are determined from the objective conduct of the parties." Allen R. Grogan, Implied Licensing Issues in The Online World, 14 No. 8 COMPUTER LAW., Aug. 1997, at 1.

113 See supra Section III.A.ii. Consider the nature of most web sites. If one thinks of a web site as a compilation of information consisting mainly of information and advertising (which most web sites are), a web site is not much different from a magazine. Open the pages of your favorite magazine, and although you are likely to find a copyright notice and perhaps a trademark notice, you will not find a scope of use provision. This is because a scope of use provision is not needed to protect the magazine’s contents. To the extent the contents of the magazine are protected by copyright law, copyright law prevents it from being copied, distributed, displayed, and used to create derivative works. 17 U.S.C. § 106. And no agreement is needed to invoke the provisions of the U.S. copyright laws. Note, however, that newspaper and magazine publishers often include scope of use provisions on their web sites. See Matthew D. Walden, Note, Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions, 58 WASH. & LEE L. REV. 1625, 1628 (2001). This practice raises the issue: Are TOUs necessary in cyberspace when they are not used in the physical world? Perhaps the answer lies in the fact that there would be a tremendous public outcry if all information and products that are sold were made subject to an agreement that restricts how they can be used.

114 Because of the nature of computers, there is at least an implied license that web site users can make a copy of web site content for purposes of momentarily storing it in the random access memory (RAM) of their computers and viewing it on their computer monitors. Grogan, supra note 112, at 2-3. Given how web site usage has developed, it may also be argued that web site users have an implied license to make hard-copies of web pages for reference and archival purposes (e.g., web site users should be allowed to make archival copies of the TOUs that supposedly govern their activities). Also, based upon the reasoning of Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999), and Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992), web site users arguably have the right to copy web pages for time-shifting, space-shifting and reverse engineering purposes.

Assuming that all of the foregoing uses are acceptable to a WSO, a scope of use/restrictions on use clause that is intended to prevent the creation of other types of implied licenses is only meaningful if such licenses are likely to be recognized. Moreover, as argued by David Kramer in a discussion on spidering, some implied licenses can be revoked. See David Kramer & Jay Monahan, Panel Discussion to Bot or Not to Bot: The Implications of Spidering, 22 HASTINGS COMM. & ENT. L.J. 241, 253 (2000) ("But an implied license can be expressly revoked. So, if I tell you, ‘You may not copy this page,’ which is what all these bots are doing, if I expressly revoke the license to do that, then when you make that copy, you’re
strategy for reducing the risk that an implied license will be inferred is to set forth the boundaries of use in an express license. Of course, whether such provisions are an essential part of a TOU depends upon the facts and circumstances surrounding a particular site and whether a license is likely to be inferred in the first instance.

Another apparent purpose of restrictions on use clauses relates to the first-sale and exhaustion doctrines. Pursuant to the first-sale doctrine, once the owner of a copyrighted work sells copies of the work, purchasers have the right to sell or otherwise dispose of their copies without permission of the copyright owner. Under patent law, although the owner of a patented invention has the initial right to control whether and how the invention is made, used, offered for sale, or sold, the exhaustion doctrine recognizes that once a patented article is sold without restriction the buyer can use it and resell it. Thus, like its forbearer the software license, restrictions on use clauses are often worded in language of a license in the hope of preventing the first-sale and exhaustion doctrines from applying. However, this purpose seems misplaced as applied to the mere operation of a web site since nothing akin to a book, software or a patented article is actually being sold.

Like definitions of rights clauses, restrictions on use provisions are also often designed to contractually expand existing intellectual property rights. This is done, not by defining the scope of what a WSO asserts is protected by intellectual property law, but by attempting to limit the otherwise legitimate uses that a web site user can make of web site content. For instance, a TOU might state that the site cannot be the subject of "reverse engineering" or that web site users waive their rights to use web site

committing a copyright infringement – perhaps."). Under this view, even without a TOU that contains a scope of use clause, if a WSO becomes aware of activities by a web site user that it dislikes, it can always forward a message that states: "We hereby revoke whatever implied licenses to use our site that may have arisen in the past." To the extent implied licenses can be revoked, an implied license may be better than an express license because a WSO may not be able to unilaterally revoke an express license that is contained in a "binding" TOU.

Michael J. Swope, Comment, Recent Developments in Patent Law: Implied License – An Emerging Threat to Contributory Infringement Protection, 68 TEMPLE L. REV. 281, 305 (1995) ("The best method to control the scope of the implied license is proactive (that is, before the product is sold). Before the sale, the patent owner has two primary forms of recourse: (1) providing a notice to the purchaser along with the product; and (2) controlling the scope of the implied license when the patent application is filed.").

5 Chisum, supra note 46, § 16.01 ("One who purchases a patented product from one with authority to sell it for use in the United States may use and resell that product free of the control of the patent owner."). For a more extensive discussion of the law governing implied patent licenses, see Mark D. Janis, A Tale of the Apocryphal Axe: Repair, Reconstruction and the Implied License in Intellectual Property Law, 58 MARYLAND L. REV. 423 (1999). See also Swope, supra note 115.

The term "reverse engineering" refers to a process by which an item, procedure, or work of authorship that is publicly available is studied and, perhaps, physically
content for the "fair use" purposes specified in U.S. copyright law. Or, as discussed supra, they may limit the use of "trade secrets" where no actual trade secrets exist.

Efforts to restrict the use of web site content in ways that are allowed under established intellectual property laws are arguably against public policy because they disrupt the delicate balance that such laws seek to achieve between free competition and restrictions on competition. Thus, while it is tempting for WSOs to include reverse engineering, fair use and similar restrictions in TOUs, the enforceability of those provisions is questionable. Additionally, because such provisions constitute restrictions on trade that go beyond the scope of recognized intellectual property rights, disassembled to determine how it was made. See Newton's Telecom Dictionary, supra note 23.

17 U.S.C. §107 (2000) (setting forth the factors to be evaluated to determine whether a particular use of information constitutes "fair use"). See supra notes 94-103 and accompanying text.

See Campbell aka Luke Sywalker v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Steward v. Abend, 495 U.S. 207, 236 (1990)) ("The fair use doctrine thus 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"). Relying on the fair use doctrine in finding that it is not a violation of copyright law to copy the software of another for purposes of reverse engineering, the court in Sega Enterprises emphasized that one of the purposes of copyright law is to encourage the free flow of information and creativity. 977 F.2d at 1523 ("It is precisely this growth in creative expression, based on the dissemination of other creative works and unprotected ideas contained in those works, that the Copyright Act was intended to promote."). See also Whelan Assoc., Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1235 (3d Cir. 1986) ("[T]he purpose of copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development.").

While the Uniform Trade Secrets Act (UTSA) prohibits the "misappropriation" of trade secrets, it acknowledges that "proper" means of acquisition include "[d]iscovery by 'reverse engineering', that is, by starting with the known product and working backward to find the method by which it was developed." UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 437 (1990). In Kewanee Oil Co. v. Bicron Corp., the U.S. Supreme Court identified this right of reverse engineering as a key reason for its finding that trade secret laws are not preempted by U.S. patent law. 416 U.S. 470, 489-90 (1974) ("Trade secret law provides far weaker protection in many respects than patent law. While trade secret law does not forbid the discovery of the trade secret by fair and honest means, e.g., independent creation or reverse engineering, patent law operates 'against the world' ... ").

they may subject WSOs to liability for unfair competition. At the very least, the anti-competitive and restrictive nature of the provisions may make such provisions unenforceable particularly if the website user was not required to affirmatively assent to the TOU in which they are contained.

The fourth apparent purpose of restrictions on use clauses relates to the boundary-less nature of the Internet. Unlike ACME, which has physical control of the real property on which its store is located, a WSO who establishes a web site on the open architecture of the Internet has fewer traditional means by which to control unwanted activity. To be sure, technological means exist to enable a WSO to limit access to its site, but most WSOs prefer to have an initial open-door policy and deal with problems later. By including detailed language in a TOU that places restrictions on how a web site can be used, WSOs attempt to draw contractual boundaries around what many consider to be their property. Such provisions are conceptually akin to signs on real property that read: "No Trespassing" or "No Shoes, No Shirt, No Service."

---

125 See supra note 107.
126 See discussion of enforceability of TOUs, infra Section IV.
127 For instance, a WSO cannot call the police to have a trespasser removed from the premises. Arguably, however, WSOs have more ways to control the use of their site through "self-help." For instance, WSOs can condition use of their online services to web site users who "subscribe" and program their servers to block access to offending users.
128 For a discussion of a variety of technological means that can be used to prevent web sites from being accessed by robots, see Jeffrey M. Rosenfeld, Spiders and Crawlers and Bots, Oh My: The Economic Efficiency and Public Policy of Online Contracts That Restrict Data Collection, 2002 STAN. TECH. L. REV. 3 (2002) [hereinafter "Spiders and Crawlers and Bots"], and Panel Discussion to Bot or Not to Bot: The Implications of Spidering, supra note 114. Of particular interest to WSOs that are concerned about the enforceability of TOUs is the ability to use software to identify robots after they begin operation and require them to execute a "click-wrap" agreement before continuing. As noted by Mr. Rosenfeld, this tactic raises the issue of whether robots can enter into binding contracts (i.e., are they the authorized agents of their masters?) Spiders and Crawlers and Bots, supra, at 41.
129 Jay Monahan, Senior Intellectual Property Counsel for eBay, referred to restrictive use provisions in TOUs, but acknowledged the likely unenforceability of browse-wrap TOUs, when he stated:

Now, we may not ever be able to bind somebody into a contract, but I would say that, at a minimum, that constitutes a very detailed "no
The restrictions on use provisions contained in many TOUs, however, often go beyond merely stating a right to control the use of the web site to detail a litany of behavior that is expressly forbidden. Reference in the AOL TOU set forth above to “data mining,” “robots,” “framing,” and “meta-tags” is one example. The TOUs of Yahoo and Excite include a long list of “don’ts” that fill a standard 8½” x 11” sheet of paper. Of particular relevance to the present discussion are restrictions on use that seek to prevent invasive or disruptive activities. These activities generally fall into one of five categories: (1) intentionally spreading computer viruses, (2) “hacking,” (3) “linking,” (4) “spamming,” and (5) “data mining.”

Panel Discussion to Bot or Not to Bot: The Implications of Spidering, supra note 114, at 247-48, 257. See also infra Section IV.

Yahoo, Terms of Service, Member Conduct, ¶ 6, at http://docs.yahoo.com/info/terms/ (last visited Oct. 14, 2002).

Often referred to by various other names, such as: “Trojan horses,” “worms,” “time bombs,” “cancel bots,” or “easter eggs.”

Also referred to as “cracking.” The term “hacking” means “[t]he act of gaining unauthorized access to another network, computer system or files” while “cracking” refers to “the act of breaking password protection on a network, computer system, or files.” Keith J. Epstein & Bill Tancer, Enforcement of Use Limitations by Internet Services Providers: “How to Stop That Hacker, Cracker, Spammer, Spoof, Flamer, Bomber”, 19 HASTINGS COMM. & ENT. L.J. 661, 669 (1997).


The most basic type of link . . . is the Hypertext Reference Link (HREF). A HREF link is usually a bit of text within a web document that is highlighted or otherwise set off from the rest of the text. When a user clicks on the HREF link (or pointer), the computer stops displaying what is currently on-screen, connects to the linked site, and displays the content of that site . . . . A second type of link . . . is the “frame.” . . . A site that utilizes framing has the ability to bring up the entire contents or portions of one or more of the other sites that are “framed” within the linking site.

A “meta tag” is an optional HTML tag that is used to specify information about a web document to search engines crawling the Internet. NEWTON’S TELECOM DICTIONARY, supra note 23.

Also includes the related acts of “mail bombing,” “flaming,” and “syn/flood attacks.” “Spamming” and “mail bombing” refer to the act of sending numerous unsolicited e-mail or newsgroup messages. Epstein and Tancer define “spamming” as: “[T]o cause a news group to be flooded with irrelevant or inappropriate messages.” Epstein & Tancer, supra note 132, at 668. “Mail bombing” is defined as: “[T]o send, or urge others to send, massive amounts of e-mail to a single system or person, with intent to crash the recipient’s system.” Id. “Flaming” means: “[T]he act of emailing or posting material designed to insult or provoke.” Id. at 670. “The sole purpose of a syn flood is to overburden the intended victim’s systems by sending a high volume of spurious data, effectively slowing or shutting down those systems.” Id. at 669.

“Data mining” generally refers to a process of collecting and analyzing data in order to better target advertising and other promotional efforts. NEWTON’S TELECOM...
In addition to whatever technological capabilities a WSO has to stop the foregoing acts, it is hoped that express restrictions in TOUs will provide the basis for a breach of contract action. More importantly, by designating certain activities as "unauthorized," WSOs arguably enhance the legal protections they enjoy under the Computer Fraud and Abuse Act (CFAA) and make it easier to define such activities as actionable torts.

Even in the absence of a TOU, the first two categories of proscribed activities are clearly outlawed by the CFAA. According to 18 U.S.C. § 1030(a)(2), it is unlawful for anyone to intentionally access a computer (i.e., hack or crack) without authorization to obtain information that is: (A) contained in a financial record of a financial institution; (B) from any department or agency of the United States; or (c) from any "protected

---

DICTIONARY, supra note 23. To the extent such activities are focused on the review, collection and organization of publicly available information that is not protected by copyright, trade secret or privacy laws, there does not appear to be anything wrong with this practice. See Ticketmaster Corp. v. Tickets.Com, Inc., No. 99-CV76541, 2000 WL 1887522, at * 3 (C.D. Cal. Aug. 10, 2000) (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) ("[U]nfair as it may seem to [Ticketmaster], the basic facts that it gathers and publishes cannot be protected from copying."). But see Council Directive 96/9/EC of 11 March 1996 on the Legal Protection of Databases, art. 7, 1996 O.J. (L 77) 20 (requiring members of the European Union to enact laws to protect databases which constitute "qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents.").

With the development of software robots has come the ability of companies to collect, organize and store information faster than is humanly possible. This raises the question of whether, separate and apart from the principles articulated in Feist, the use of such robots should be allowed. Jeffrey Rosenfeld explains:

Especially troublesome to those who struggle against this unwanted copying of website information are software robots. Also referred to as "bots," "spiders," and "web crawlers," these small programs automatically and rapidly search, copy, and retrieve information from websites. Prevalent and controversial among software robots are shopbots or pricebots, which comb through commercial websites, extracting pricing and product information. Typically shopbots are used in conjunction with a metasite, a web site that displays prices from a variety of vendors for an identical item.

Spiders and Crawlers and Bots, supra note 128, at 3.


computer" if the conduct involved interstate or foreign communication. Similarly, 18 U.S.C. § 1030(a)(5)(A)(i) makes it unlawful for anyone without authorization to knowingly cause "the transmission of a program, information, code, or command" (i.e., a virus), and as a result, intentionally cause damage to a protected computer. While a contract provision that specifically prohibits the foregoing acts will make it clear that such acts are not authorized by the WSO, it is highly unlikely that authorization will be found without an express agreement to that effect.

The acts of "linking," "framing" and "metatagging" are not specifically precluded by the CFAA. They also are not necessarily unwanted or disruptive. WSOs generally benefit from links to their sites because they increase web site traffic and, possibly, advertising revenue. However, if linking, framing and metatagging mislead or confuse consumers, efforts to stop such activities may be required. These efforts are likely to focus on principles of unfair competition, including trademark infringement and trademark dilution, and copyright infringement. Given that such claims are a product of statute or common law, a potential breach of contract claim based on restrictions on linking, framing and metatagging does not add much to a WSO's litigation arsenal. In fact, because of the principle of law that injunctive relief, particularly preliminary relief, is not available to prevent a breach of contract, a breach of contract action is unlikely to give a WSO the timely relief it needs to prevent misleading linking.

Efforts to stop "spamming" and "data mining" activities have focused on both the CFAA and the common law tort of trespass to chattels.

---

139 A "protected computer" is defined broadly to include any computer "which is used in interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(B).

140 "Without hyperlinks, the World Wide Web would not have the qualities that make it so compelling .... Without these links, and without search engines that are based on the techniques of hyperlinking, the information posted on the web would lose much of its value as it would not be easy to find." Alain Strowel & Nicolas Ide, Liability with Regard to Hyperlinks, 24 COLUM.-VLA J.L. & ARTS 403 (2001).

141 The pricing structure of advertising on the Internet is often based upon the volume of visitors to a site.


143 See, e.g., Tickets.Com, 2000 WL 1887522, at * 5 ("The contract theory lacks sufficient proof of agreement by defendant to be taken seriously as a ground for preliminary injunction. Besides, a preliminary injunction to prevent a breach of contract is an almost unheard of thing, being the equivalent of specific enforcement by preliminary injunction.").
A claim under the CFAA is based on the assertion that the alleged activity is “unauthorized” by the WSO and therefore constitutes illegal accessing of a protected computer in violation of 18 U.S.C. § 1030(a)(2). Under the CFAA, “[a]ny person who suffers damage or loss by reason of a violation of [18 U.S.C. § 1030] may maintain a civil action against the violator to obtain compensatory damages and injunctive relief . . . .”, provided the alleged damages meet a $5,000 threshold. While the CFAA does not require contractual restrictions on use as a prerequisite to suit, the existence of a binding and enforceable agreement may be cited to show that certain activity is unauthorized. For instance, in *America Online, Inc. v. LCGM, Inc.*, AOL complained that the defendant sent large numbers of unauthorized and unsolicited bulk e-mail advertisements (known as “spam”) to AOL members. Because the defendant admitted to maintaining a membership in AOL and was therefore subject to AOL’s Terms of Service agreement, the court found that the defendant’s actions were unauthorized within the meaning of the CFAA.

Pursuant to the Restatement (Second) of Torts, a trespass to chattel occurs when one person intentionally uses or intermeddles with a chattel in the possession of another. In *CompuServe, Inc. v. Cyber Promotions, Inc.*, CompuServe sought to prevent the defendant from sending unsolicited e-mail to its subscribers and based its action on the tort of trespass to chattels. The focus of the case was not on the act of sending unsolicited e-mail per se, but on the alleged burden that massive e-mails placed on CompuServe’s computer system. Because CompuServe notified defendant that it no longer consented to the use of its proprietary computer equipment, the court had little trouble finding a trespass.

---

144 18 U.S.C. § 1030 (a)(5)(B), (e)(8), (g). (“[T]he term ‘damage’ means any impairment to the integrity or availability of data, a program, a system, or information” that – (A) causes loss aggregating at least $5,000 in value during a one-year period to one or more individuals; (B) modifies or impairs, or potentially modifies or impairs, the medical examination, diagnosis, treatment, or care of one or more individuals; (C) causes physical injury to any person; or (D) threatens public health or safety.).


146 Id. at 450 (“Defendants have stated that they acquired these e-mail addresses by using extractor software programs. Defendants’ actions violated AOL’s Terms of Service, and as such was [sic] unauthorized.”).

147 RESTATEMENT (SECOND) OF TORTS § 217(b) (1965).


149 CompuServe Inc., 962 F. Supp. at 1022, 1027 (“Plaintiff has demonstrated that defendants’ intrusions into their computer systems harm plaintiff’s business reputation and goodwill.”).

150 Id. at 1024 (“It is arguable that CompuServe’s policy statement, insofar as it may serve as a limitation upon the scope of its consent to the use of its computer equipment, may be insufficiently communicated to potential third-party users when it is merely posted at some location on the network. However, in the present case the record indicates that defendants were actually notified that they were using CompuServe’s equipment in an
As with definitions of rights clauses, the question whether restrictions on use clauses are needed in TOUs depends on whether they are likely to accomplish anything. If merely being granted access to a web site is unlikely to result in a broad implied license, a use clause is not needed to prevent such implication. Similarly, if the nature of the web site content is such that there is little risk that it will be copied or reverse engineered, a use clause is not needed to contractually limit such uses. Also, to the extent data mining activities are limited to search engine type functions and do not substantially impair the operation of a WSO's servers, they are desirable because they enable a WSO's site to be found. On the other hand, where a web site is rich in content that may be copied by others and technological means are ineffective to limit such activity, then even a seemingly unenforceable browse-wrap agreement may have value as a prophylactic measure.\textsuperscript{151}

3. Third-Party Content Provisions

As used in this article, “third-party content provisions” refer to those portions of a TOU that are addressed to information or content sent to a WSO by a web site user. Thus, the following discussion assumes some level of interactivity between the WSO and the web site user whether in the form of e-mail, chat rooms, bulletin boards, or a process for ordering goods and services. One easy way to avoid the problems that arise from third-party content is to configure a web site so it does not allow for the receipt or posting of such content. If a web site only allows e-mail, but the e-mails are not accessible to the general public, the establishment of internal procedures for the handling of such correspondence should suffice to limit a WSO's exposure.\textsuperscript{152} It is where third-party content can be posted on a web site that most issues arise.

The primary concern that WSOs attempt to address in third-party content clauses relates to potential liability for copyright infringement, defamation and false statements. An example of such a clause is contained in the TOU of Amazon, which states, in pertinent part:

\textsuperscript{151} See supra note 107 and accompanying text.

\textsuperscript{152} This point demonstrates the nonsensical nature of many TOU provisions. Obviously, businesses have been dealing with customer correspondence and personal information for years, indeed centuries. Yet, the practice of entering into a contractual agreement with customers to define how collected information will be used is largely unheard of in the physical world. If correspondence that a business receives is defamatory, the law establishes that a business can be held liable for “re-publishing” its contents. Similarly, if a business becomes known for distributing the personal information of its clients to others, it will not be long before its revenues will suffer as a result.
Visitors may post reviews, comments, and other content... so long as the content is not illegal, obscene, threatening, defamatory, invasive of privacy, infringing of intellectual property rights, or otherwise injurious to third parties or objectionable and does not consist of or contain software viruses, political campaigning, commercial solicitation, chain letters, mass mailings, or any form of “spam.”

... You represent and warrant that you own or otherwise control all of the rights to the content that you post; that the content is accurate; that use of the content you supply does not violate this policy and will not cause injury to any person or entity; and that you will indemnify Amazon.com or its affiliates for all claims resulting from content you supply. Amazon.com has the right but not the obligation to monitor and edit or remove any activity or content. Amazon.com takes no responsibility and assumes no liability for any content posted by you or any third party.

As discussed above, a WSO's desire to limit its liability for content posted by others is understandable. Simply because a WSO provides a forum for others to speak doesn't mean that it should be responsible for such speech. However, TOU provisions that seek to limit a WSO's responsibility for the defamatory, false or infringing content posted by others are arguably inessential because principles of law already exist which define the narrow circumstances under which a WSO can be held liable for the acts of others. Moreover, a provision of a TOU that characterizes a WSO as a "mere conduit" of information is meaningless if the WSO acts in a way that makes it directly or vicariously responsible for the alleged wrongs.

In order to determine whether one party will be held liable for the defamatory statements or infringing content of another it is necessary to examine the role, if any, that the first party actually played in the dissemination of the statements. Under well-established principles of defamation law, a person who is a conduit of information and who exercises no editorial control over the information cannot be liable for defamation. However, where some editorial control is exerted, different liability rules

153 Amazon, Conditions of Use, supra note 5. The eBay TOU includes a long list of so-called “restricted activities.” It reads, in part:

Your information (or any items listed) and your activities on the site shall not:
(a) be false, inaccurate or misleading;
(b) be fraudulent or involve the sale of counterfeit or stolen items;
(c) infringe any [third party rights];
(d) violate any law .
(e) be defamatory .
(f) be obscene.

eBay, User Agreement, supra note 6, ¶ 6.1.

apply depending upon whether the person is characterized as a "publisher" or a "distributor." Under the laws governing contributory copyright infringement, a person can be held responsible for the infringing activity of another if he "induces, causes or materially contributes to the conduct of another" with knowledge of the infringing activity. Under principles of agency law, a person can be held responsible for the acts of his agents and employees committed in the course of their agency or employment.

Much of the concern about a WSO's potential liability for third-party content, and therefore the need of WSOs to address such issues in a TOU, has been ameliorated by the enactment of both the Online Copyright Infringement Liability Limitation Act, discussed supra, and the Communications Decency Act (CDA). There are two parts to the CDA that are of particular importance to WSOs. First, 47 U.S.C. § 230(c)(1) significantly reduces the risks of "publisher" liability when it states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Second, the so-called "good samaritan" provision reduces the risks of "distributor" liability by specifying a level of control that an interactive computer service can assert over third-party content without incurring liability for such content.

Another aspect of third-party content clauses that appears in some TOUs concerns the question of who owns the rights to information that is not authored or generated by the WSO but is created by web site users. The subject information can take the form of demographic, personal and statistical information about web site users or may consist of actual messages.

---

155 Id.
157 RESTATEMENT (SECOND) OF AGENCY, §§ 212, 219 (1958). See also Sarah Beckett Boehm, A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?, 5 RICH. J.L. & TECH 7, 44-48 (1998) (noting that even though the Communications Decency Act, 47 U.S.C. § 230(c)(1), may act to prevent computer service providers from being held directly liable for defamatory content posted by web site users, they can still be held vicariously liable under principles of agency law).
158 See supra note 56 and accompanying text.
160 Id. An "interactive computer service" is defined to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). Arguably, this definition is broad enough to encompass WSOs that provide a degree of interactivity on their sites.
161 47 U.S.C. § 230(c)(2) ("No provider . . . shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . . ").
Paradoxically, although WSOs are quick to disclaim responsibility for defamatory and infringing content that is posted on their site by others, they often claim the right to use such information at their discretion and sometimes claim an ownership interest in such information. In this regard, Amazon’s TOU states:

If you do post content or submit material, and unless we indicate otherwise, you grant Amazon.com and its affiliates a nonexclusive, royalty-free, perpetual, irrevocable, and fully sublicensable right to use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute, and display such content throughout the world in any media. You grant Amazon.com and its affiliates and sublicensees the right to use the name that you submit in connection with such content, if they choose.

To the extent a WSO asserts ownership over content posted by others and then re-publishes it on its web site, it can be held accountable for any harm caused thereby. In this way, the ownership aspects of third-party content provisions are contrary to TOU provisions that seek to distance WSOs from liability for third-party content and may act to limit the effectiveness of those provisions. But the underlying rationale of third-party content clauses apparently relates, not to a preconceived plan by WSOs to use and profit from such content, but to a fear that its inadvertent use will expose WSOs to liability. By including a license to use third-party content in a TOU, a WSO can theoretically protect itself from copyright, right of publicity and idea submission claims brought by the users of its interactive services. It may also help WSOs avoid claims that they violated the Electronic Communications Privacy Act (ECPA).

"Electronic transactions, especially when based on on-going relationships, transfer electronically substantial amounts of potentially significant information that relates to both parties to the relationship. How that information is handled and who controls rights of use and disclosure in the information represents an issue important to the overall relationship." Raymond T. Nimmer, Electronic Contracting: Legal Issues, 14 J. Marshall J. Computer & Info. L. 211, 237 (1996).

Amazon, Conditions of Use, supra note 5. Some TOUs have specific idea submission provisions. For example, see Microsoft, Information on Terms of Use, supra note 6, paragraph labeled “Unsolicited Idea Submission Policy.”

The risk of copyright infringement claims arises from the fact that, as a general rule, the creator of a work of authorship is the owner of the copyrights contained therein, and thus, web site users own whatever copyrightable content is contained in their original postings. 17 U.S.C. § 201 (2000). A right of publicity claim may arise if the name or likeness of a web site user is used without permission by a WSO in advertising or other promotional efforts. See Restatement (Second) Torts § 652C (1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”); see also Cal. Civ. Code §§ 3344-3344.1 (2003). Under idea submission law, a duty to compensate an “idea man” will arise under circumstances where an express or implied promise of compensation exists. Although it is difficult to create such a duty, many companies have been subject to lawsuits regarding the receipt and alleged use of unsolicited ideas. See
While third-party content clauses provide WSOs with an argument to defeat the foregoing claims, they will not necessarily prevent all such claims. For instance, a TOU provision will do no good if ideas are being submitted under circumstances where a promise of compensation can still be inferred. Additionally, if information was provided to a WSO in confidence or under other circumstances where the web site user did not intend it to be seen by the public, the third-party content provision may not apply. Finally, where a WSO is under a statutory duty to maintain the confidentiality of certain information, or it has promised to do so in a posted privacy policy, a WSO should expect its use of any third-party content to be scrutinized by consumer interest groups and government regulators.  

4. Warranty Disclaimers

The next three common provisions of TOUs – warranty disclaimers, damage limitation clauses and dispute resolution provisions – are frequent features of many contracts. A warranty clause can serve three separate functions: (1) to set forth express "limited" warranties; (2) to disclaim express warranties that may be inferred from advertising or promotional efforts; and (3) to disclaim specified implied warranties. In TOUs, warranty provisions typically consist of disclaimers of all express and implied warranties. The following warranty clause from the Walt Disney Internet Group (WDIG) TOU is an example:

THE MATERIALS IN THIS WDIG SITE ARE PROVIDED "AS IS" AND WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED. TO THE FULLEST EXTENT PERMISSIBLE PURSUANT TO APPLICABLE LAW, WE DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A

---


165 The Electronic Communication Privacy Act of 1986 prohibits any person operating an electronic communications service from knowingly divulging the content of communications in that service while in electronic storage to another unless the service provider is authorized by the service agreement to access the content of the messages for a purpose other than storage or processing in the ordinary course of the storage and communications service. What constitutes authorization in a service agreement has not been tested in court and, consequently, the better approach is to be explicit in the services agreement about for what purpose, if any, the service provider has access to the information.

Nimmer, Electronic Contracting, supra note 162, at 238.

166 See supra notes 57-77 and accompanying text.
PARTICULAR PURPOSE. WE DO NOT WARRANT THAT THE FUNCTIONS CONTAINED IN THE MATERIALS ON ANY WDIG SITE WILL BE UNINTERRUPTED OR ERROR-FREE, THAT DEFECTS WILL BE CORRECTED, OR THAT ANY WDIG SITE OR THE SERVERS THAT MAKE SUCH MATERIALS AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. WE DO NOT WARRANT OR MAKE ANY REPRESENTATIONS REGARDING THE USE OR THE RESULTS OF THE USE OF THE MATERIALS ON ANY WDIG SITE IN TERMS OF THEIR CORRECTNESS, ACCURACY, RELIABILITY, OR OTHERWISE.  

The breadth of the foregoing provision reveals the uncertainties that are at the heart of warranty clauses in TOUs. Because web sites are a new phenomenon, it is not yet clear which, if any, implied warranties will apply to their operation. Rather than speculate about the warranty obligations that may arise, many WSOs choose to broadly disclaim all actual and potential warranties. However, the reference in the foregoing clause to “applicable law” also reveals the potential risk of relying too heavily on warranty disclaimers because even the most broadly worded disclaimers will not insulate a WSO from all applicable obligations.  

Thus, while the strategy of disclaiming warranties is usually advised in situations where such obligations are unclear, it would be a mistake for a WSO to assume that it need not exercise a minimal level of due care in the operation of its web site.  

167 Disney Online, Terms of Use, supra note 5.

168 For reasons of public policy and pursuant to some statutes, certain obligations cannot be avoided or disclaimed. See the Restatement (Second) of Contracts section 195(1), which provides that: “A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.” RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981). Also, while it may be possible to avoid liability for mere negligence, individuals and companies usually cannot disclaim responsibility for gross negligence or intentional torts. See the Restatement (Second) of Contracts, which provides:

A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if

(a) the term exempts an employer from liability to an employee for injury in the course of his employment;

(b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or

(c) the other party is similarly a member of a class protected against the class to which the first party belongs.


169 The Restatement (Second) of Torts provides: “[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade . . . .” RESTATEMENT (SECOND) OF TORTS § 299A (1965).
Moreover, WSOs should consider the adverse impact that broad disclaimers of warranties may have on consumer goodwill and how difficult it would be to meet various warranty obligations. It may be that by refusing to disclaim certain warranties and expressly providing others, a WSO can set its web site apart from competitors.

Of course, in order to determine which warranties to disclaim and which warranties to honor, WSOs need some sense of the nature of the warranties that may apply to the operation of a web site. For software licenses, the courts usually apply the warranties that are specified in Article 2 of the U.C.C. However, the operation of a web site does not involve a sale of goods. Thus, while the U.C.C. may be looked to for guidance as to the type of warranties that should apply to web sites, whatever warranties are ultimately held applicable are more likely to be derived from common law. In the two states where the Uniform Computer Information Transactions Act (UCITA) has been enacted, a number of implied warranties are recognized by statute. These warranties are instructive of the nature of warranty obligations that may be applied to web sites in the future.

The first two warranties listed in UCITA are the implied warranties of noninfringement and noninterference. These warranties are neither

170 See, e.g., Robert W. Gomulkiewicz, The Implied Warranty of Merchantability In Software Contracts: A Warranty No One Dares To Give and How To Change That, 16 J. MARSHALL J. COMPUTER & INFO. L. 393 (1997) (discussing the practice of the software industry to disclaim all implied warranties and suggesting how the scope of the implied warranty of merchantability might be altered to decrease the number of disclaimers). "Though the disclaimer is routine, software publishers have little interest in needlessly eroding confidence in the quality of their products by conspicuously disclaiming a warranty with which their products may well comply." Id. at 393.


172 A much different body of law applies if the transaction entails a license, sale or other provision of information, images, or data. Here, sales of goods law does not apply, nor does any idea of there being implied merchantability or other warranties. Instead, we are in the realm of contract common law and, more importantly, we are governed by cases that entail consideration of free speech and similar, noncommercial limitations on what liability or obligation should be imposed in a contract when the parties did not agree explicitly to anything defining what they expected the obligation to be.

173 Pursuant to the warranty of noninfringement, a licensor of information represents that "the information will be delivered free of the rightful claim of any third party by way of infringement or misappropriation." See UCITA § 401(a) (2002).

174 Under the warranty of noninterference and exclusivity a licensor warrants "that no person holds a rightful claim to, or interest in, the information which . . . will interfere with the licensee’s enjoyment" of the information. See UCITA § 401(b).
unique to the Internet nor new, but reflect longstanding policies applicable to copyrights and other intellectual property rights. To meet these warranty obligations, a licensor must either own the intellectual property rights in the licensed material or have the permission of the owner to use and sublicense such rights. If neither is the case and the licensor does not use the licensed rights itself, then a disclaimer of the two warranties makes sense because it insulates the licensor from potential liability flowing from the licensee’s use of the licensed materials. However, in the case of web sites, where a WSO uses the licensed material itself and can be held directly liable for copyright, patent, trademark and trade secret infringement, a disclaimer of the warranties of noninfringement and noninterference will not completely insulate a WSO from liability. Although such a disclaimer may limit a web site user’s claims, it will not limit the claims of third parties who contend their intellectual property rights have been infringed.

The second type of warranty listed in UCITA is the express warranty. Express warranties arise from the affirmative representations and promises of a warrantor. As recognized in UCITA and Article 2 of the U.C.C., however, they need not be contained in a warranty clause to be enforceable. They can be contained in advertisements and other promotional materials or in informational materials and instructions. They can even be reflected in samples, models and demonstrations. As long as these representations and promises form a part of the basis of the bargain, they are enforceable as express warranties. Thus, where a WSO has made an express promise, even if it is made inadvertently, it may be required to live up to that promise even if all express warranties are disclaimed.

Another warranty mentioned in UCITA is the implied warranty for informational content. This warranty arises under circumstances where a licensee of information reasonably expects that the information provided is “not made inaccurate because of the provider’s lack of reasonable care in performing the contract.” UCITA proposes to insulate most content providers from responsibility for the accuracy of the information by narrowly defining the warranty for informational content and allowing it to be disclaimed. In states where UCITA has not been adopted, it remains to be

175 See 3 NIMMER, supra note 40, §§ 10.11-10.13.
177 See UCITA § 402(a)(2); U.C.C. § 2-313(1)(b).
178 See UCITA § 401(a)(3); U.C.C. § 2-313(1)(c).
179 See supra note 38.
180 UCITA § 404 cmt. 2 (2002).
181 As defined by UCITA, the implied warranty for informational content only applies to “a merchant that, in a special relationship of reliance with a licensee, collects, compiles, processes, provides, or transmits informational content.” UCITA § 404(a). It does not apply at all to

(1) subjective characteristics of the informational content, such as aesthetics, appeal, and suitability to taste;
(2) published informational content; or
seen whether this warranty will be recognized and, if so, whether it will be defined as narrowly as it is in UCITA. However, even under UCITA, when a “merchant” makes specific promises concerning informational content, it is required to exercise reasonable care to prevent inaccuracies. Thus, a WSO’s potential exposure for inaccuracies in web site content will depend, at least in part, upon whether a promise to provide accurate information has been made or can be inferred. But even without such a promise, WSOs have an interest in avoiding defamation claims by exercising care not to post untruths about others. Thus, whether a WSO disclaims the warranty for informational content or not, it should still exercise reasonable care to ensure the accuracy of the information about others that it posts.

The final UCITA-listed implied warranty that may be applicable to web sites is the implied warranty of fitness for licensee’s purpose.182 According to UCITA, this warranty arises when “a licensor has reason to know of the licensee’s particular purpose in the transaction and that the licensee is relying on the licensor’s expertise in selecting or developing information suitable for that purpose.”183 This warranty, and attempts to disclaim it, has its roots in the early days of software licensing when licensees often harbored unrealistic expectations about the functions and capabilities of software. As with the implied warranty for informational content, whether such a warranty arises with respect to the operation of a web site will depend on what a WSO represents about the functions and

(3) a person that acts as a conduit or provides no more than editorial services in collecting, compiling, distributing, processing, providing, or transmitting informational content that under the circumstances can be identified as that of a third person.

UCITA § 404(b). “Published informational content” is defined to mean “informational content prepared for or made available to recipients generally, or to a class of recipients, in substantially the same form.” UCITA § 102(a)(52) (2002). The stated intent of excluding published informational content from the implied warranty for informational content is to ensure that it is treated in the same manner as print newspapers and books. UCITA § 404 cmt. 3b (“This Act treats published informational content that is computer information analogously to print newspapers or books which are not exposed to contractual liability risks based on mere inaccuracy; treating the computer informational content differently would reject the wisdom of prior law.”).

UCITA indicates that the warranty for informational content is derived from the Restatement (Second) Torts section 552, which provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.


182 UCITA § 405(a). Two other UCITA warranties, the implied warranty of merchantability of computer programs and the implied warranty of system integration, are not discussed herein because they apply to transactions involving software. See UCITA §§ 403, 405(c) (2002).

183 UCITA § 405 cmt. 2.
capabilities of its site. A broad disclaimer of the warranty of fitness for licensee's purpose will do no good if in other parts of a web site a WSO makes promises that the web site will serve particular purposes. Thus, in addition to disclaiming the warranty for licensee's purpose, WSOs should use explanatory or instructional provisions to clearly explain the limited purpose of their sites.

5. Efforts to Limit Damages

In addition to narrowly defining the scope of their services and broadly disclaiming all warranties, WSOs often seek to limit their potential liability by contractually restricting the scope of available damages in the event of a breach of duty. These efforts typically include exculpatory clauses and indemnification provisions. For instance, the TOU of Oracle contains the following exculpatory clause:

IN NO EVENT SHALL ORACLE BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES, OR DAMAGES FOR LOSS OF PROFITS, REVENUE, DATA OR USE, INCURRED BY YOU OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT OR TORT, ARISING FROM YOUR ACCESS TO, OR USE OF, THE SITE.

The Oracle TOU also contains an indemnity provision, as follows:

You agree to defend, indemnify and hold harmless Oracle, its officers, directors, employees and agents from and against any and all claims, liabilities, damages, losses or expense, including reasonable attorneys' fees and costs,

---

184 Liquidated damage provisions are typical in many contracts for the sale of goods, including software licenses, but are not as common in TOUs. This most likely reflects the fact that it is difficult to pre-determine the amount of loss occurring as a result of a breach. See UCITA § 804 (2002) (discussing the requirements of an enforceable liquidated damages clause).

Damages for breach of contract by either party may be liquidated by agreement in an amount that is reasonable in light of:

(1) the loss anticipated at the time of contracting;
(2) the actual loss; or
(3) the actual or anticipated difficulties of proving loss in the event of breach.

UCITA § 804(a). See also U.C.C. § 2-718 (2002). It may also reflect the fact that, although WSOs post TOUs in order to be able to argue that web site owners are contractually bound thereby, with respect to potential breaches by web site users, WSOs would prefer the remedies that are available under principles of tort law and pursuant to various intellectual property statutes.

185 Oracle, Terms of Use, supra note 80, ¶ 8.
arising out of or in any way connected with your access to or use of the Site.¹⁸⁶

Exculpatory clauses seek to limit or extinguish potential liability by, for instance, specifying the types of damages that are not recoverable in the event of a breach of contract or by stating that a party will not be liable for certain torts.¹⁸⁷ Pursuant to an indemnification clause, a WSO does not disclaim liability for its own wrongs but seeks to impose a contractual duty on web site users to reimburse it for any damage claims or defense costs that it incurs as a result of the actions of web site users.¹⁸⁸

Public policy often trumps exculpatory clauses and indemnification provisions.¹⁸⁹ Sometimes the public policy limitations are expressed in specific statutes.¹⁹⁰ Other times, courts will refuse to enforce exculpatory clauses because they conflict with established law.¹⁹¹ Indemnification clauses suffer from an additional weakness; they are only beneficial if the indemnitor can be identified and sued and if he has the financial resources to pay the indemnitee. Moreover, because WSOs are likely to be viewed as the “deep-pocket,” such provisions will not prevent WSOs from being sued in the first instance.

Including damage limitation clauses in TOUs is generally advised but the ultimate effectiveness of exculpatory clauses and indemnification provisions will depend on whether they are enforceable. Generally, the enforceability of such provisions depends on applicable public policy and how broadly the clauses are written. In order to enhance the effectiveness of such clauses it is recommended that they be written in a way that reflects the actual relationship between the parties and that web site users be given

¹⁸⁶ Id. § 9.
¹⁸⁷ See generally 2 LEE & LINDAHL, supra note 34, ch. 22, "Exculpatory Contracts."
¹⁸⁸ Id. § 20:4 ("A party may expressly agree to indemnify another for future damages. Such agreements are not against public policy, and are similar to an insurance agreement, with the indemnitee in the position of the insured.").
¹⁸⁹ See generally 2 LEE & LINDAHL, supra note 34, ch. 22; RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). The Oracle TOU itself recognizes that exculpatory clauses will not be enforced in all cases: “SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY. ACCORDINGLY, SOME OF THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU.” Oracle, Terms of Use, supra note 8, ¶ 8.
¹⁹⁰ See generally 2 LEE & LINDAHL, supra note 34, § 20:4 (noting that several states have enacted statutes which make indemnity agreements in the construction industry void); Id. § 22:2 ("Exculpatory contracts are not warmly received by the courts as a whole . . . and many states have statutes nullifying them.").
¹⁹¹ Id. § 22:2 ("It is well established that one may not by contract exculpate himself or herself from liability for willful and wanton conduct or gross negligence.").
adequate advance notice of the potential financial obligations being imposed upon them by such clauses.\textsuperscript{192}


One of the most difficult issues facing e-commerce participants concerns the global nature of the Internet and the fact that, if they are prudent, WSOs must worry about the laws of all states and countries where they conduct business.\textsuperscript{193} To some degree WSOs can limit problems by limiting the geographic scope of their targeted sales activities.\textsuperscript{194} But if they want to take full advantage of the markets that the Internet opens up to them, they must prepare for the possibility of being sued in distant locales. A way to reduce this risk is to include forum-selection, choice-of-law, and arbitration clauses in TOUs.\textsuperscript{195} The TOU of Barnes and Noble contains a very WSO-friendly version of a forum-selection and choice-of-law provision:

This site is created and controlled by barnesandnoble.com in the State of New York. As such, the laws of the State of New York will govern these disclaimers, terms and conditions, without giving effect to any principles of conflicts of law. barnesandnoble.com reserves the right to make changes to its site and these disclaimers, terms and conditions at any time. User hereby irrevocably and

\textsuperscript{192} See generally Steven B. Lesser, \textit{How to Draft Exculpatory Clauses That Limit or Extinguish Liability}, 75-Nov FLA. B.J., Nov. 2001, at 10 (discussing how Florida courts interpret exculpatory language).

\textsuperscript{193} The problem was explained in a recent article as follows:

If a consumer purchases goods online, what law should apply to the transaction, and which jurisdiction will adjudicate any subsequent dispute? In many cases, the consumer will not know whether the website she has just accessed is "located" on a server just down the street or on a different continent (and indeed a single website may have elements that reside on multiple servers in multiple locations). For example, if a French consumer accesses a "Swedish" website, has she somehow "entered" Sweden for purposes of jurisdiction and choice of law?


\textsuperscript{194} This result flows from the fact that it is generally recognized that a person or company cannot be sued in a locale where it does not have a sufficient presence or "minimum contacts." In the United States, this principle is based on concepts of due process as explained in the famous case of \textit{International Shoe Co. v. Washington}, 326 U.S. 310 (1945). Of course, not all countries have the same concept of due process as the United States and may apply the general principle differently. See generally Arthur Taylor von Mehren, \textit{Adjudicatory Jurisdiction: General Theories Compared and Evaluated}, 63 B.U. L. REV. 279 (1983). Thus, even the strategy of setting up separate web sites for different countries with different rules applicable to each may not insulate a WSO from litigation in a distant locale for what was thought to be purely U.S. based activity. See, e.g., Berman, \textit{supra} note 193, at 337-40 (discussing the lawsuit brought against Yahoo in France based on an alleged violation of a French law that prohibits the sale of Nazi memorabilia).

\textsuperscript{195} See generally \textit{WINN & WRIGHT}, \textit{supra} note 24, §§ 3.05, 3.06.
unconditionally consents to submit to the exclusive jurisdiction of the courts of the State of New York and of the United States of America located in the State of New York for any litigation arising out of or relating to use of or purchase made through barnesandnoble.com (and agrees not to commence any litigation relating thereto except in such courts), waives any objection to the laying of venue of any such litigation in the New York Courts and agrees not to plead or claim in any New York Court that such litigation brought therein has been brought in an inconvenient forum.\(^{196}\)

An example of an arbitration clause is set forth in Amazon's TOU:

Any dispute relating in any way to your visit to Amazon.com or to products you purchase through Amazon.com shall be submitted to confidential arbitration in Seattle, Washington, except that, to the extent you have in any manner violated or threatened to violate Amazon.com’s intellectual property rights, Amazon.com may seek injunctive or other appropriate relief in any state or federal court in the state of Washington, and you consent to exclusive jurisdiction and venue in such courts. Arbitration under this agreement shall be conducted under the rules then prevailing of the American Arbitration Association. The arbitrator’s award shall be binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.\(^{197}\)

In the absence of binding dispute resolution clauses, a well-established body of law exists to answer jurisdictional and choice of law questions.\(^{198}\) The court in which litigation is commenced will decide whether

---

\(^{196}\) Barnes & Noble, Terms of Use, \textit{supra} note 5, ¶ 8.

\(^{197}\) Amazon, Conditions of Use, \textit{supra} note 5.

\(^{198}\) In the U.S. this includes state long-arm statutes, principles of constitutional law, case decisions, and the First and Second Restatements of Conflict of Laws. For example, the Restatement (Second) of Conflict of Laws provides that in the absence of an agreement between the parties, “[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction . . . .” \textit{Restatement (Second) of Conflict of Laws} § 188 (1971).
it has jurisdiction to hear the dispute and what law will apply to determine its outcome. Dispute resolution provisions are designed to add more predictability to the process by resolving forum and choice-of-law issues pre-dispute. For this reason, they are generally recommended. However, even where dispute resolution clauses are alleged to exist, the court where an action is initiated will still need to determine if the underlying contract is enforceable and what law should apply on the issue of enforceability. Depending on the nature of the dispute, the public policy interests of a forum state may dictate that the lawsuit be heard in that forum despite contractual provisions to the contrary.

In order to enhance the enforceability of dispute resolution provisions in TOUs it is generally recommended that they be drafted in an equitable manner and that their contents be fully disclosed to web site users. Although WSOs obviously are inclined to draft forum-selection and choice-of-law clauses to require consumers to bring suit where they are located, before deciding if a forum-selection clause is needed, WSOs should consider the nature and value of the claims that may be brought against them and whether it is more economical to allow certain claims to be litigated where a web site user is located. The enforceability of arbitration clauses will depend upon the nature of the claims sought to be arbitrated and the fairness of the arbitration process. Based upon the result of Brower v. Gateway 2000, Inc., the more costs and inconvenience that dispute resolution clauses impose on consumers, the less likely they are to be enforced.

In the international realm, answers to jurisdiction and choice-of-law questions are found in the laws of various countries and in various international agreements including the Brussels Convention, the Rome Convention and the Vienna Convention.

199 See, e.g., Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001), aff'd 306 F. 3d 17 (2d Cir. 2002). In Specht, a federal judge sitting in New York considered a lawsuit brought by plaintiffs who resided in a number of different states against a Delaware corporation that maintained its principal place of business in California. Id. at 591. Applying the choice-of-law rules of New York, the court held that California had the most significant relationship to the transaction and the parties and, therefore, that California law would apply on the question of whether a browse-wrap agreement allegedly entered into between the parties was enforceable. Id.

200 This is most likely to occur where the lawsuit is based upon a tort claim or where a significant number of a forum state's citizens have been harmed by the alleged wrongdoing.


202 See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83 (Cal. 2000) (detailing circumstances under which agreement to arbitrate statutory rights will be enforced under California law); see also Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 89-91 (2000) (noting that although the Federal Arbitration Act evinces a strong public policy in favor of the enforcement of arbitration clauses, they will not be enforced if they are precluded by a federal statute or, in the case of claims based on statutory rights, if they are ineffective to protect such rights).

203 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) ("Excessive fees, such as those incurred under the ICC procedure, have been grounds for finding an arbitration provision
IV. THE ENFORCEABILITY OF TERMS OF USE AGREEMENTS

Regardless of the purpose and intent of a TOU, it is largely meaningless if it is not enforceable. As a preliminary matter, the enforceability of a TOU will depend upon whether it meets the classic requirements of a binding contract: (1) parties capable of contracting; (2) mutual assent; and (3) consideration. Additionally, since TOUs are a type of standard-form contract that are not bargained for, they are likely to be scrutinized to determine if they are unconscionable or otherwise against public policy. Of course, how these requirements and limitations are interpreted and applied will depend upon the court in which enforcement is sought and what laws are applied to determine the enforceability of the contract.

Much of the discussion surrounding the enforceability of shrink-wrap, click-wrap and browse-wrap agreements has focused on the issue of mutual assent. Early on, cases such as Vault Corp. v. Quaid Software Ltd.

17A AM. JUR. 2D Formation of Contracts §16 ("[I]n order to form a valid contract there must be the mutual assent of two or more persons competent to contract, founded on a sufficient and legal consideration, to perform some legal act or to omit to do something, the performance of which is not enjoined by law.").


Generally, in all states of the United States except Louisiana, contracts for the sale of goods are governed by the U.C.C., Article 2. For transactions not covered by the U.C.C., including those involving the provision of services, common law principles as reflected in the Restatement (Second) of Contracts are likely to govern. In Virginia and Maryland, the UCITA governs contracts involving computer information.

If a web site is intended for an international audience, a prudent company should also consider the laws of every country where the web site will be actively used and promoted but, at a minimum, must determine if the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the “CISG”), the United Nations Commission on International Trade Law (UNCITRAL) Model Law of Electronic Commerce (hereinafter the “Model Law”), available at http://www.uncitral.org/englishtexts/electcom/ml-ec.htm (last visited Apr. 4, 2003), and the Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19, are applicable.

See generally WINN & WRIGHT, supra note 24, §6.02[A] (discussing potential problems with the enforceability of shrinkwrap, clickwrap, and webwrap contracts); see also Kunz et al., supra note 13.
and Step-Saver Data Systems, Inc. v. Wyse Technology recognized the problems inherent in purported agreements that are neither seen nor read by a consumer before a sales transaction is consummated. But not all courts share this view. In both ProCD, Inc. v. Zeidenberg and Hill v. Gateway 2000, Inc., the Seventh Circuit enforced shrink-wrap agreements that were not disclosed to the consumers before the exchange of money. Relying on U.C.C. section 2-204(1), the court in Zeidenberg noted that the buyer of the software accepted the terms of the contract in the manner invited by the seller, i.e., by using the software after having an opportunity to read the license at his leisure. Thus, as long as the purchaser of the goods had the ability to reject the terms of the shrink-wrap agreement and return the goods, it did not matter to the court when the terms were presented.

Extrapolating from the reasoning of Zeidenberg, many commentators believe that click-wrap agreements are enforceable provided that the recipient of the form agreement has advance notice of its existence. Further strengthening this argument is the fact that, unlike shrink-wrap agreements, the recipient of a click-wrap agreement is typically required to “click” on an “I agree” icon as part of a registration process, thereby affirmatively manifesting assent. The same arguments, however,
cannot be made with respect to the typical browse-wrap TOU. Unlike a click-wrap agreement, if a manifestation of assent to a browse-wrap agreement exists at all it is not the result of an affirmative act but can only be inferred from inaction. Additionally, although TOUs are generally accessible as a link from a WSO’s home page, there is no guarantee that they are noticed, let alone read, by web site users. To the extent a web site user has no understanding that the mere act of logging onto a site is obligating him to a lengthy contract with potentially severe consequences, there is an obvious unfairness to the assertion that an agreement exists. Finally, unlike the software licensing transactions that were involved in the foregoing cases, the operation of a web site is not subject to the U.C.C. and, thus, the more liberal principles of assent that are reflected in the U.C.C. will only be applied by analogy, if at all.

Typically, WSOs seek to bind web site users to browse-wrap agreements by stating in a TOU that the mere act of searching a site constitutes assent to the TOU. For instance, Amazon’s TOU provides: “If you visit or shop at Amazon.com, you accept these conditions.” Amazon, Conditions of Use, supra note 5. This statement does not appear automatically on the home page of Amazon.com, but is resident on another page that must be linked to by web site users.

For a discussion of the inherent weaknesses of browse-wrap agreements and how they differ from shrink-wrap and click-wrap agreements, see Jennifer Femminella, Note, Online Terms and Conditions Agreements: Bound By the Web, 17 ST. JOHN’S J. LEGAL COMMENT. 87 (2003).

The ABA Working Group on Electronic Contracting Practices initiated a project in 2002 entitled “Electronic Non-Negotiated Contracts without Clear and Unambiguous Assent (‘Browse-wrap Agreements’)” (hereinafter referred to as the “ABA Project”). According to the working group, the project “builds on last year’s ABA project published in the November 2001 issue of the Business Lawyer that proposed fifteen strategies for transactional lawyers to help their clients to avoid disputes about the validity of the assent process in a ‘click-through agreement.’” ABA Project (on file with author), available in upcoming Nov. 2003 edition of BUSINESS LAWYER. The project regarding “browse-wrap” agreements is described as a “tougher related project.” Id. For a discussion of the fifteen strategies proposed in the earlier ABA project, see Kunz et al., supra note 13.

See Ticketmaster Corp. v. Tickets.com, Inc., 2000 WL 525390, at *3, 54 U.S.P.Q. 1344 (C.D. Cal. Mar. 27, 2000), in which, on a motion to dismiss, the court held that: "It cannot be said that merely putting the terms and conditions in [small print at the bottom of a home page] necessarily creates a contract with any one using the web site."

See Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000), in which the court expressed concern about the enforceability of a browse-wrap agreement in a case brought by the purported licensor for an alleged breach of the confidentiality provisions of the agreement. But see Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y 2000), where the court found assent in a similar action brought by the purported licensor for the alleged breach of the restrictions on use provisions of a browse-wrap agreement.

As for the potentially severe consequences that may befall unsuspecting web site users, consider that provisions of a TOU that purport to define certain information as trade secrets and limit a web site user’s “authorized” access to the site may subject the web site user to criminal liability under the Federal Economic Espionage Act, 18 U.S.C. §§ 1831-1839 (2000), and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000).

The application of the UCC has expanded our collective conception of a contract in many ways, including the most fundamental understanding of what a contract is and how it operates. In general, contracts are easier to
As a practical matter, the precise terms of a browse-wrap TOU will also have a bearing on its enforceability. The more unfair contractual provisions seem, the less likely courts are to enforce them. While courts can invalidate such provisions under principles of unconscionability, they may also find a lack of mutual assent. Indeed, one way to reconcile the divergent shrink-wrap cases is to consider the contractual provisions that were at issue.\textsuperscript{221} For instance, the contractual provision involved in \textit{Hill} was an arbitration clause that arguably did not adversely affect the merits of the consumers' underlying claims.\textsuperscript{222} In contrast, the contract involved in \textit{Step-Saver} sought to modify the licensee's rights by disclaiming all express and implied warranties under circumstances where express warranties had apparently been given.\textsuperscript{223} The holding in \textit{Specht v. Netscape Communications Corp.} refusing to enforce an arbitration provision is explained, at least in part, by the egregious nature of the provision. In that case, the arbitration clause not only required the consumer to submit to arbitration in the location of the licensor's principal place of business, but also required the losing party to pay all costs of arbitration.\textsuperscript{224}

Based on principles of freedom of contract and in the interests of judicial economy, courts are generally inclined to enforce dispute resolution provisions.\textsuperscript{225} In fact, the Federal Arbitration Act specifically provides that a form under the UCC, and impose a broader range of obligations than a contract under the common law.

\begin{itemize}
\item While the common law requires the parties to exchange communications that constitute the offer and acceptance, under the UCC, the parties' conduct may form a contract.
\end{itemize}

Jane M. Rolling, \textit{The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses}, 104 COM. L.J. 197, 204-05 (1999). As noted by the appellate court in \textit{Specht v. Netscape Communications Corp.}, while U.C.C. Article 2 has often been applied to the licensing of tangible software, there is considerable doubt whether it will be applied to the licensing of downloadable software. 306 F.3d at 29 n. 13. This fact, coupled with amendments to Article 2 of the U.C.C. which expressly exclude "information" from the definition of "goods," supra note 172, explains the impetus behind UCITA. Without UCITA, contracts involving transactions in information, including the online licensing of software, will be subject to common law principles that are arguably less supportive of the seller and licensor.

\textsuperscript{221} The differences in results may also be explained by the fact that the laws of different states were applied and, although there is a general understanding of what constitutes mutual assent, the application of that understanding from state-to-state may differ.

\textsuperscript{222} \textit{Hill}, 105 F.3d 1147.

\textsuperscript{223} 939 F.2d at 96.

\textsuperscript{224} 150 F. Supp. 2d at 589.


[A] clause establishing \textit{ex ante} the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.
written agreement containing an arbitration clause is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.”\textsuperscript{226} Under traditional contract theory, however, there are a number of circumstances where such clauses will not be enforced. First, they will not be enforced if they are not part of a binding contract. The court in \textit{Specht} refused to compel arbitration because the contract in which the arbitration clause was contained was not assented to by the plaintiffs.\textsuperscript{227} Also, as noted in \textit{Specht}, dispute resolution clauses will not be enforced if they were not reasonably communicated to the offeree.\textsuperscript{228} Finally, such clauses, and indeed all contractual provisions, will not be enforced if they are unconscionable.

Under the doctrine of unconscionability, a court will refuse to enforce a contract or specific terms of a contract if it is deemed unfair.\textsuperscript{229} Usually, courts examine both the procedural and substantive fairness of a contract to determine if it is unconscionable.\textsuperscript{230} Procedural unconscionability
examines the circumstances surrounding contract formation while substantive unconscionability looks at the actual terms of the contract. As the court in Brower noted, the purpose of the doctrine is "to ensure that the more powerful party cannot ‘surprise’ the other party with some overly oppressive term." Given that the mutual assent of a web site user to a browse-wrap TOU is marginal at best, and that in many cases a web site user will not have seen the TOU, the procedural unfairness of browse-wrap TOUs is clear. To minimize the successful application of the unconscionability defense with respect TOUs, care must therefore be taken to ensure that they are at least substantively fair.

Finally, as is discussed throughout this article, there are a number of public policy reasons why a TOU may not be enforced. While freedom of contact is a highly valued concept in American jurisprudence, courts can, and often do, refuse to enforce contractual provisions that conflict with public policy. Most obviously, if a statute forbids a particular contractual provision it will be declared void. But courts may also refuse to enforce contractual provisions that violate common law policies.

V. CONCLUSION

There are many possible benefits to TOUs but the magnitude of the benefits depends upon the nature of the relationship between the WSO and the likely and intended users of the web site. It also depends on the content of the web site. TOUs that fulfill disclosure requirements that are mandated by law are obviously necessary in order to comply with the law. Similarly, TOUs that are designed to take advantage of statutory limitations on liability, to preclude the creation of an implied license, or to give notice of rights as necessary to trigger damage claims and injunctive relief are also useful. But TOUs that are designed to alter default rules which exist under applicable

procedurally and substantively unconscionable when made."). But see Swanson, supra note 229, at 393 ("While many jurisdictions adhere to the language requiring the presence of both components, the growing trend has been to employ either a sliding scale analysis or to allow one element to suffice if the unfairness was sufficiently strong.").

231 Swanson, supra note 229, at 365-66.


233 The principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements. In general, therefore, parties are free to make such agreements as they wish, and courts will enforce them without passing on their substance. Occasionally, however, a court will decide that this interest in party autonomy is outweighed by some other interest and will refuse to enforce the agreement or some part of it.

2 FARNSWORTH, supra note 78, § 5.1.

234 Id.

235 Id. § 5.2.
contract, tort and intellectual property principles may be unnecessary and enforceable.

Because the legal issues that faced the emerging software industry are different from the legal issues that face many WSOs today, software licenses are not a good model for TOUs. For one thing, in contrast to the relationship that exists between a software company and its licensees, the relationship between a WSO and a web site user is not necessarily ongoing. In the absence of an ongoing relationship, detailed contractual provisions designed to govern future activities are unnecessary. Secondly, where the uncertainties in the law regarding computer software related to applicable means of intellectual property protection, the principal uncertainties regarding the Internet and e-commerce relate to the communicative and cross-border nature of the medium. Third, in contrast to the state of the law that existed in the 1960's and 1970's when the software license was invented, more laws and case decisions now exist to answer Internet-related uncertainties.

In designing a TOU, web site owners can use software licenses as a checklist of the issues that should be addressed. But the rote application of software license terms to TOUs does not make sense without a proper account of the particular needs of individual WSOs. Judging from existing TOUs, the copying of software licenses often leads to lengthy agreements that can best be characterized as prophylactic measures that may fail in their essential purpose because they contain surprising and unfair terms that are unlikely to be enforced. To the extent they also create a false sense of security in a WSO that prevents it from taking other steps to protect its interest (for instance, by purchasing insurance or ordering its business practices so as to obtain more traditional contractual agreements), they may do more harm than good.

In designing a TOU, web site owners are well-advised to consider TOUs as just one of several possible tools that help to define their rights, limit their liability and establish their relationship with their customers. Clearly, they are not a substitute for intellectual property protection. They are also not a substitute for wise and fair business practices.

---

236 UCITA apparently recognizes this fact by excluding "casual exchanges of information" from its scope and by distinguishing between "computer information transactions" that have "computer programs" as their subject matter and those that concern "access and Internet contracts." See UCITA § 103 cmts. 2-3 (2002). However, the term "casual exchanges of information" is not included as a specific exclusion in section 103 and is not defined. See UCITA § 103. Thus, it is not clear if it is intended to refer to the mere act of browsing the Internet.
HISTORY OF CONFLICTS LAW