

**Computer & Contract Law Diverge: Six Guidelines for Drafting &
Instituting Enforceable Forum Selection Clauses in the Context of
Clickwrap Agreements**

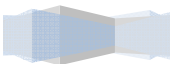
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Spring, 2007

Directed Research



Introduction

It is a process of which we are all too familiar. You go online to your favorite Internet vendor to make a purchase. At some point during the transaction, you encounter a screen which displays an agreement expressing the vendor's terms and conditions of sale, commonly referred to as a clickwrap agreement (hereinafter "clickwrap(s)" or "clickwrap agreement(s)").¹ In order to proceed with the transaction, you click on the box marked "I agree" without even stopping to read the agreement. With a simple act of a click you have just agreed to substantially limit your legal rights of recourse and remedies against the vendor.²

Millions of online transactions are completed daily between e-commerce businesses and consumers for the purchase of goods, software, and services. As a result, these e-commerce businesses face a legitimate concern in incurring endless liability in any jurisdiction from which their website can be assessed.³ To alleviate such concerns, these businesses utilize clickwraps to govern the online transactions that occur on their website.⁴ More importantly, e-commerce companies include forum selection provisions in their clickwraps in order to control their liability and litigation costs.⁵ Although a majority of

¹ Richard Raysman & Peter Brown, *Clarifying the Rules for Clickwrap and Browsewrap Agreement*, 228 N.Y. L.J. 1 (2002). The agreement that appears on the computer screen at some point in an online transaction or when the user first installs software is generally referred to as a clickwrap agreement. *Id.* The purchaser's or user's access to the transaction or the software is usually conditioned on assenting to the conditions set forth in the agreement by clicking on either a dialog box or radio the button labeled "I agree" on the screen. *Id.*

² Garry L. Founds, Note, *Shrinkwrap and Clickwrap Agreements: 2B or Not 2B?*, 52 Fed. Comm. L.J. 100 (1999). A study conducted in 2004 by the National Science Foundation indicated that over 70% of Americans own a personal computer. *See Science and Engineering Indicators 2006, National Science Foundation*, <http://www.nsf.gov/statistics/seind06/pdf/c07.pdf> (Visited February 12, 2007).

³ Richard Raysman & Peter Brown, *Computer Law: Drafting and Negotiating Forms*, 2 CLDNF § 13.07G, 1 (2006).

⁴ Jeffrey P. Aiken & Rebecca Grassl Bradley, *Lessons Learned: Enforceability of "Clickwrap" Agreements*, <http://www.whdonline.com> (Visited January 10, 2007).

⁵ *Id.*

courts have recently held these agreements to be generally enforceable, courts are currently in disagreement as to whether forum selection clauses, in particular, contained within a clickwrap are enforceable.⁶ This disagreement, in turn, has led to a seemingly dichotomous line of court decisions, leaving e-commerce businesses puzzled as to the enforceability of such clauses.⁷

This article will correspondingly argue that despite this seemingly inconsistent line of court cases with regard to forum selection clauses contained in clickwraps, there, nonetheless, can be certain trends ascertained from these cases which provide some certainty in this area of computer law.⁸ More specifically, this article will identify six general guidelines which, if acknowledged and followed, can assist e-commerce businesses and drafting practitioners alike in drafting and instituting enforceable clickwrap agreements. The guidelines are the following: 1) clear and conspicuous notice of the clickwrap should be given at the outset of the transaction; 2) the drafting practitioner should ensure that the consumer is notified about the specific conduct that is deemed to be acceptance of the clickwrap agreement; 3) the clickwrap should be presented to the consumer at the earliest possible point in a transaction; 4) the terms of the clickwrap should provide the consumer with a method of refund or return; 5) the vendor must demonstrate a sufficient “nexus” between its business and the designated forum for dispute resolution; and 6) the drafting practitioner should pay close attention to the style, format and overall visual presentation of the terms of the clickwrap.⁹

Before further discussion of each of these guidelines, this article will first discuss the evolution of clickwraps and the preceding case law which has led to the ascertainment of

⁶ Kevin W. Grierson, J.D., *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common to Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5th 309, 1 (2003).

⁷ Raysman & Brown, *supra* note 1, at 1.

⁸ Aiken and Bradley, *supra* note 4, at 1.

⁹ *See infra* text at 25-31.

these above-mentioned guidelines. The article will also address the cost motivation of e-commerce businesses for utilizing such agreements in their transactions.

Part I of this article will explore the evolution of clickwrap agreements by examining the courts' recent general validation of clickwrap agreements and the basis for such validation. Part II of this article will address the difficulties that venue poses in the e-commerce universe and the subsequent benefit and need for the inclusion of forum selection clauses for e-commerce businesses. Part III of this article will examine the four types of challenges made against such clauses and the courts' seemingly inconsistent response to such challenges. Finally, Part IV of this article will attempt to reconcile these aforementioned cases and provide e-commerce businesses and practitioners with a six-step guideline on how to draft enforceable forum selection provisions in the context of clickwrap agreements.

I. The General Enforceability of Clickwrap Agreements

Before our society's shift to online transactions, vendors were primarily limited to selling their products in traditional brick-and-mortar retail stores.¹⁰ Consequently, these vendors controlled the terms and conditions of sale for their products through the use of shrinkwrap agreements (hereinafter "shrinkwrap(s)" or "shrinkwrap agreement(s)"), as opposed to clickwraps. A shrinkwrap agreement differs from a clickwrap agreement mainly in the sense that the terms of the agreement appears on the actual packaging containing the good instead of a computer screen.¹¹ Due to the similarity in function of shrinkwraps and clickwraps, landmark decisions discussing the enforceability of shrinkwraps have been later used by courts as a subsequent basis for validating the use of clickwraps in online

¹⁰ Founds, *supra* note 2, at 100.

¹¹ *Id.* at 100, n2.

transactions. The most prevalent of these shrinkwrap cases is *ProCD v. Zeidenberg & Silken Mtn. Web Services*, which is discussed below.¹²

A. The Evolution of Clickwrap Agreements: The Shrinkwrap

The *ProCD* case has been widely cited for the proposition that shrinkwrap agreements are generally enforceable as long as their terms “[...] are not objectionable on grounds applicable to contracts in general[...].”¹³ In *ProCD*, the shrinkwrap agreement was printed in a box containing software CDs.¹⁴ The agreement contained a provision which prohibited the use of the software for commercial purposes.¹⁵ In this instance, the software purchaser subsequently breached this provision and the software manufacturer sued.¹⁶ At trial, the court agreed with the purchaser’s contention that the shrinkwrap agreement constituted an after-the-fact proposal for additional terms, which the buyer did not accept.¹⁷ More specifically, since the terms of the agreement was placed inside the box, the buyer did not accept the additional terms because he could not examine them until after purchase of the software.¹⁸ On appeal, however, the Seventh Circuit court approved the software manufacturer’s practice in stating that “[...]transactions in which the exchange of money precedes the communication of detailed terms are common.”¹⁹ The court compared this “payment now, terms later” approach to the sale of insurance, where the policy holder pays first and receives the terms of the policy

¹² 86 F.3d 1447 (7th Cir. 1996). See also John. M Norwood, *A Summary of Statutory and Case Law Associated with Contracting in the Electronic Universe*, 4 DePaul Bus. & Comm. L.J. 415, 441-442 (2006).

¹³ 86 F.3d at 1449.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1448. The buyer’s contention was based on Uniform Commercial Code (hereinafter U.C.C.) §2-207.

¹⁸ *Id.*

¹⁹ *Id.* at 1451.

at a later date.²⁰ Subsequently, the Seventh Circuit reversed the trial court, holding that shrinkwrap agreements are generally enforceable.²¹ The court reasoned that in this case, the buyer had adequate notice that the transaction was subject to a shrinkwrap agreement because the outside of the box stated so.²² Therefore, binding the purchaser to the agreement would not be unconscionable under common law contract grounds. As the court notes, “[W]e treat [shrinkwrap agreements] as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts.”²³

The “common law of contracts” approach used in *ProCD* to validate shrinkwraps was subsequently applied in *I.Lan Sysrms, Inc. v. NetScout Service Level Corp.*, one of the first cases to address the enforceability of clickwrap agreements.²⁴ In *I.Lan Systems*, the court found that although clickwrap and shrinkwrap agreements share the defect of any standardized contract, such as unconscionability concerns, they are nonetheless an acceptable and appropriate way to form contracts.²⁵ In this case, a computer network support provider purchased software from a software distributor.²⁶ After the distributor’s breach, the support provider sought specific performance of the transaction.²⁷ At trial, the distributor contended that the clickwrap agreement which governed the transaction explicitly excluded the remedy

²⁰ *Id.* See Norwood, supra note 12, at 441.

²¹ *Id.* at 1449.

²² *Id.* The court also relied on Uniform Commercial Code (“U.C.C.”) §2-204 which specifies that parties may contract “...in any manner sufficient to show agreement.” See also *Microstar v. Formgen, Inc.* 154 F.3d 1107 (9th Cir. 1998) (holding that although a game software disk contained a license agreement as a separate file from the original game it was nonetheless enforceable because the purchaser had adequate notice that the seller required assent to additional terms); and *Adobe Systems, Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051 (N.D. Cal. 2002) (holding that a failure of the purchaser of packaged software to return software for refund constituted acceptance of the enclosed shrinkwrap agreement for purposes of enforcement).

²³ *Id.* See also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (Successor to *ProCD*, holding that shrinkwrap agreement was enforceable notwithstanding the fact that the terms of the agreement was not viewable by the purchaser at the time of payment.).

²⁴ 183 F. Supp. 2d 328 (D. Mass. 2002). See also Norwood, supra note 12, at 442.

²⁵ 183 F. Supp. 2d at 338.

²⁶ *Id.* at 330.

²⁷ *Id.*

of specific performance.²⁸ Citing *ProCD*, the court acknowledged that the case was to be analyzed under common law contract grounds and the Uniform Commercial Code (“U.C.C.”), which provides an objective standard in determining formation of a contract.²⁹ Consequently, the court held that pursuant to U.C.C. 2-204, the purchaser “[...]manifested assent to the clickwrap license agreement when it clicked on the box stating ‘I agree,’ so the agreement is enforceable.”³⁰ In so holding, the court alluded to the “payment now, terms later” doctrine acknowledged in *ProCD* as well as the U.C.C. stated goal of allowing for the “[...]continued expansion of commercial practice through custom, usage and agreement of the parties.”³¹ Consistent with the *ProCD* holding, this case has been cited to stand for the proposition that clickwrap agreements are generally enforceable unless objectionable under grounds applicable to contracts in general.³²

In sum, the *ProCD* and *I.Lan Systems* cases acknowledged the general enforceability of shrinkwrap and clickwrap agreements under the common law of contracts. As a result, e-commerce businesses have responded in utilizing such agreements to control their business costs and litigation liability. However, the court in neither instance specified the circumstances in which a clickwrap agreement would be found to be unenforceable. More specifically, the court in the aforementioned cases did not discuss the extent of the enforceability of specific provisions contained in a shrinkwrap or clickwrap, such as a forum selection clause. This, in turn, has led to a dichotomous line of court decisions in the late 1990’s and the early millennium which has troubled practitioners in the drafting of such agreements for their e-business clients. This inconsistent line of case decisions will be

²⁸ *Id.*

²⁹ *Id.* at 335-336.

³⁰ *Id.* at 336.

³¹ *Id.* at 338.

³² Norwood, *supra* note 12, at 441-443.

thoroughly examined below. However, before proceeding, it is important to understand an online vendor's motivation in including a forum selection clause in his/her clickwrap agreement.

II. The Problem of Venue in Online Contract Formation and the Subsequent Solution: Forum Selection Clauses

The global nature of the Internet poses a considerable concern for e-commerce businesses as they may incur liability in any jurisdiction from which their online services or website may be accessed.³³ Moreover, when a contract is entered into electronically, it is difficult to determine the location of execution and performance of the contract for the purposes of determining personal jurisdiction.³⁴ For example, if an individual in California enters into a clickwrap agreement on the Web with a merchant in New York, where is the contract executed?³⁵ New York, California, or neither? In their treatise on computer law, Richard Raysman and Peter Brown point out that to date, courts have not provided a clear answer on this issue.³⁶ As a result of this uncertainty, Raysman and Brown specify the two “key jurisdiction-related” concerns e-commerce businesses face: “(1) whether and to what extent establishing a presence on the Internet somehow makes a defendant ‘present’ in (or establishes sufficient contacts with) any jurisdiction from which the Web site may be accessed; and (2) how to limit the risk of liability in multiple jurisdictions.”³⁷

To date, there have been very few cases which have addressed whether “merely entering into a contract” on the Internet is sufficient to establish minimum contacts for the

³³ Computer Law, *supra* note 3, at 1.

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1.

purpose of subjecting a defendant to the personal jurisdiction of the court of another state.³⁸ Perhaps the leading case that has given some guidance on this issue is *CompuServe, Inc. v. Patterson*.³⁹ In *Patterson*, the defendant service subscriber, residing in Texas, entered into a set of online clickwrap agreements with the plaintiff Internet service provider for the distribution of the defendant's software to other subscribers of the plaintiff's service.⁴⁰ The clickwrap agreements contained a choice of law provision which expressed that the contract was considered to be entered in Ohio and that it was to be governed by Ohio law.⁴¹ Upon the defendant's breach of the agreement, the plaintiff filed suit and contended that the defendant was subject to personal jurisdiction in Ohio.⁴² The Sixth Circuit Court of Appeals agreed with the plaintiff in holding that the defendant's contracting with the plaintiff constituted sufficient minimum contacts for an Ohio federal court to exercise personal jurisdiction over him.⁴³ The court reasoned that the defendant took affirmative actions, although electronic in nature, to create a connection with Ohio such as sending his computer software electronically to the plaintiff's server system in Ohio and advertising the software on the plaintiff's server system.⁴⁴ The court also gave weight to the choice of law provision in stating that Ohio's exercise of personal jurisdiction over the plaintiff would not be unfair because "he was on notice that he had made contracts, to be governed by Ohio law, with an Ohio-based company."⁴⁵ Although a choice of law provision is not sufficient by itself to establish

³⁸ *Id.* at 3.

³⁹ *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

⁴⁰ *Id.* at 1260.

⁴¹ *Id.* at 1263-4.

⁴² *Id.* at 1263.

⁴³ *Id.*

⁴⁴ *Id.* at 1264. *See also* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (1997) (holding that defendant's acts of electronic commerce with Pennsylvania residents constituted sufficient purposeful availment of doing business in the state for the purpose of being subjected to personal jurisdiction in Pennsylvania.).

⁴⁵ *Id.* *See also* *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp.2d 1154 (D.C. Cal 2000) (holding that the California choice-of-law provision in defendant's contract with plaintiff California Corporation for

“minimum contacts” for the purpose of personal jurisdiction, the *Patterson* case provides that a court may give great weight to such a clause in determining a connection between the defendant and the forum state.⁴⁶

The *Patterson* decision illustrates that e-commerce businesses can avoid being haled into undesirable forums through careful drafting of their clickwrap agreements. More specifically, by including a forum selection clause in a clickwrap, an e-commerce company avoids the difficulty in discerning whether its activity over the web will constitute “sufficient minimum contacts” for the purposes of a certain state court exercising personal jurisdiction over such company.⁴⁷ Moreover, the use of such clauses also allows businesses to avoid jurisdiction in undesirable forums.

When forum selection clauses were first utilized by e-commerce businesses in their clickwrap agreements in the 1990’s, it was uncertain how much weight they would be given by the courts. Businesses initially relied on the common law rule regarding forum selection clauses in form agreements which states that such clauses are generally enforceable if reasonable under the circumstances, freely negotiated into, and not the result of “fraud, undue influence or overweening bargaining power.”⁴⁸ In the late 1990’s and the early millennium, trial courts initially addressed the use of such clauses in the context of online agreements and generally upheld them on the basis of their utility to businesses.⁴⁹

advertisement on defendant’s website constituted “purposeful availment” in California for purposes of personal jurisdiction.)

⁴⁶ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481 (1985).

⁴⁷ *Computer Law*, supra note 3, at 3.

⁴⁸ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Courts have held that unlike choice of law clauses, forum selection clauses, in and of themselves, are sufficient to constitute minimum contacts as long as they are not the product of “fraud, undue influence” or unequal bargaining power. *Computer Law*, supra note 3, at 10 n38. See also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (holding that a forum selection clause on the back of a passenger ticket was enforceable because it was reasonable and passed the test of “fundamental fairness”).

⁴⁹ *Raysman & Brown*, supra note 1, at 1.

In upholding the forum selection clause in a clickwrap agreement, the district court of California in *Stomp, Inc. v. NeatO, LLC*, indicated that the merchant is the party in the best position to control and limit the jurisdictions in which it may be haled into court.⁵⁰ The court noted, “It is the merchant who seeks to sell their goods only to consumers in a particular geographic area that can control the location of resulting lawsuits.”⁵¹ The court then went on to state that an appropriate way for a merchant to limit the risk of multiple jurisdiction liability is to “[...]include[...]an interactive ‘clickwrap agreement’ that includes a [forum selection] clause that the consumer must agree to before being allowed to purchase any products.”⁵²

Similarly in *Tech Heads, Inc. v. Desktop Service Center, Inc.*, the district court of Oregon acknowledged the holding in *Stomp* and expressed that an entity “[...]conducting business over the Internet can protect themselves with (1) a disclaimer that they will not sell products or provide services[...]outside a certain geographic area; and (2) an interactive agreement that includes a [forum selection] clause to which a consumer or client must agree before purchasing any products or receiving any services.”⁵³

Although these initial cases have generally upheld the use of such clauses in the context of clickwraps, they did not address the extent of their enforceability or the specific circumstances in which such clauses will be held as unenforceable.⁵⁴ Consequently, the unsettled nature of this area of law has opened the door to a myriad of challenges based on a variety of common law contract theories.

⁵⁰ 61 F. Supp.2d 1074, 1081.

⁵¹ *Id.* at 1080.

⁵² *Id.* at 1080-81.

⁵³ 105 F.Supp.2d 1142, 1152 (D. Or. 2000). *See also* American Eyewear, Inc. v. Peeper’s Sunglasses & Accessories, Inc., 106 F. Supp.2d 895, 904 (D.C. Tex. 2000) (noting that clickwrap agreements are a useful tool for an online business to avoid jurisdiction in undesirable forums.)

⁵⁴ Grierson, *supra* note 6, at 1.

III. Challenging the Forum Selection Clause in Clickwrap Agreements

Since the disposition of the early cases discussed above, the forum selection clause in the context of clickwrap agreements have been prone to relentless challenges by consumers and merchants alike who enter into online transactions with e-businesses utilizing such clickwraps.⁵⁵ The basis for such challenges can be broken down into the following four general types: 1) inadequate notice of the clickwrap;⁵⁶ 2) Inadequate timing of clickwrap presentation;⁵⁷ 3) term preclusion by an integration clause in a previous agreement;⁵⁸ and 4) unconscionability.⁵⁹ Each of these types of challenges and the courts' subsequent response will be thoroughly discussed below.⁶⁰

A. *Notice of the Terms of the Agreement Inadequate*

Many forum selection clauses have been challenged on the basis that the party had inadequate notice of the clause prior to performance of the agreement because of unreasonable placement, font, type face and presentation of the clause text in the agreement. Courts generally have not been sympathetic to such an argument.

In *Forrest v. Verizon Communications, Inc.*, a forum selection clause was placed at the end of a thirteen page clickwrap agreement in regular type face.⁶¹ The top of the agreement contained the following in capital letters: "PLEASE READ THE FOLLOWING

⁵⁵ Aiken & Bradley, *supra* note 4, at 1.

⁵⁶ Grierson, *supra* note 6, at 19.

⁵⁷ *See Williams v. America Online*, 2001 MassSuper. LEXIS 11 (SuperCt Feb. 8, 2001). *See also Raysman & Brown*, *supra* note 1, at 2.

⁵⁸ Grierson, *supra* note 6, at 21

⁵⁹ *See America Online v. Superior Court (Mendoza)*, 90 Cal. App. 4th 1 (Cal. Ct. App. 2001).

⁶⁰ If such forum selection clauses in clickwrap agreements were interpreted under UCITA law, they would be enforceable as a matter of law. Norwood, *supra* note 12, at 2-3. However, UCITA has been enacted only by Maryland and Virginia. *Id.* Also, no court decisions to date have applied UCITA to software or service transactions. *Id.* Finally, several states have enacted laws which hold clauses in contracts unenforceable against residents of those states to the extent that the contract calls for application of the law of a UCITA state. *Id.*

⁶¹ *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002).

AGREEMENT CAREFULLY.”⁶² The rest of the agreement could be viewed a portion at a time through the use of an on-screen “scroll box.”⁶³ The forum selection clause which was placed at the end of the agreement designated the state of Virginia as the exclusive forum for handling disputes against Verizon, the DSL service provider.⁶⁴ Oddly enough, Virginia was one of the two states in the United States that precluded the use of class actions.⁶⁵ After subscribers experienced disruption with the DSL service, they brought a class action suit in the District of Columbia for breach of contract, negligent misrepresentation, and violation of state consumer statutes.⁶⁶ Verizon filed a motion to dismiss on the grounds that the forum selection clause in the clickwrap agreement precluded suits in any jurisdiction other than Virginia.⁶⁷ The plaintiffs argued, in response, that notice of the forum selection clause was inadequate.⁶⁸ The court disagreed in noting that “[...]we are not persuaded that notice would have been sufficient only if the clause was in all capital letters or was placed in the section entitled ‘Limitations of Liability and Remedies’ rather than ‘General Provisions.’”⁶⁹ The plaintiffs also contented that Verizon should have to provide notice when consumers are required to waive a possible remedy, such as class action, by agreeing to a forum selection clause.⁷⁰ The court stated in response that “We fail to see[...]why the absence of one particular remedy in a foreign jurisdiction should be elevated beyond all other possible jurisprudential consequences of a forum selection clause.”⁷¹ Accordingly, the District of

⁶² *Id.* at 1010.

⁶³ *Id.* at 1008.

⁶⁴ *Id.*

⁶⁵ Aiken & Bradley, *supra* note 4, at 1.

⁶⁶ 805 A.2d at 1008.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1011.

⁷⁰ *Id.* at 1012.

⁷¹ *Id.*

Colombia Court of Appeals held that notice of the existence of the forum selection clause was not inadequate under the circumstances.⁷²

A similar “inadequate notice” challenge to a forum selection clause was made in *Caspi v. Microsoft Network, LLC*.⁷³ In *Caspi*, the clickwrap agreement contained a forum selection clause which designated the state of Washington as the exclusive forum for the resolution of all disputes with the company.⁷⁴ In upholding the clause, the court based its decision on the U.S. Supreme Court decision in *Carnival Cruise Lines v. Shute*.⁷⁵ In *Carnival*, the Court held that the cruise line passengers were bound by a forum selection clause contained in a written travel contract.⁷⁶ In *Caspi*, the New Jersey Superior court compared the adequacy of notice of such a clause in an online agreement with that of the written agreement in *Carnival*.⁷⁷ The court noted that although the medium used in both cases were different, written versus electronic, there was not enough of a “significant distinction” to reach a contrary result.⁷⁸ In both cases, the plaintiffs were able to “peruse” the terms of their respective contracts before they proceeded with their purchase.⁷⁹ The court further noted that in this case, the clause in question was presented in the exactly same manner as the other provisions in the agreement and that “[...]there was nothing extraordinary about the size or placement of the forum selection clause text.”⁸⁰ Finally, the court stated that “To conclude that plaintiffs are not

⁷² The court further noted that the dsl provider’s use of an on-screen “scroll box” which displayed only a portion of the agreement at a time did not make the agreement void for lack of adequate notice. *Id.*

⁷³ 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

⁷⁴ *Id.* at 529. The clause specifically states: “This agreement is governed by the laws of the State of Washington, USA, and you consent to the exclusive jurisdiction and venue of courts in King County, Washington in all disputes arising out of or relating to your use of MSN or your MSN membership.” *Id.*

⁷⁵ 499 U.S. 585 (1991).

⁷⁶ In *Carnival*, the passengers contended that the clause was unreasonable because it was printed “in fine print on the back of the cruise ticket.” *Id.* at 597.

⁷⁷ *Id.* at 532.

⁷⁸ *Id.*

⁷⁹ 732 A.2d at 532.

⁸⁰ *Id.*

bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented.”⁸¹

Forrest and *Caspi* seem to hold for the proposition that forum selection clauses will not be invalidated on the basis of inadequate notice as long as the clauses are presented in the same type face, font, and form as the other clauses in the provision. Furthermore, it is immaterial whether the clause is not in all capital letters or if the agreement can be viewed only a portion at a time via a scroll box, as long as the placement of the clause is not unreasonable.⁸² It has been argued by many, however, that the above-mentioned proposition has been challenged by the Texas district court in *Thompson v. Handa-Lopez*.⁸³

In *Thompson*, the plaintiff was a Texas resident and the defendant was a California corporation who maintained an Internet arcade site which could be accessed by any Internet user.⁸⁴ The plaintiff entered into a clickwrap agreement to play an arcade game on the defendant’s site.⁸⁵ Contained in the contract was what the defendant contended to be a forum selection clause.⁸⁶ The clause explicitly stated that all disputes “[...]shall be governed by the laws of California, excluding choice of law principles, and shall be resolved exclusively by final and binding arbitration in the City of San Jose, County of Santa Clara, State of

⁸¹ *Id.* The court also relied on the “overweening bargaining power” test set out in *Carnival* in finding that a forum selection clause in a consumer contract does not by itself constitute overweening bargaining power. *Id.* at 531. Here, the plaintiffs did not show sufficient facts to support that they were subjected to “overweening bargaining power” in their dealings with Microsoft as they were given “ample opportunity” to consent to the terms of the forum selection clause before they accepted the agreement. *Id.*

⁸² In *Carnival*, the court concluded that the fact that the forum selection clause came at the end of the agreement which could only be viewed a portion at a time did not fail the test for “unreasonableness” or “unfairness.” 805 A.2d at 1010. Similarly in *Caspi*, the court held that there was nothing “extraordinary” about the size or placement of the forum selection clause text in the agreement. 732 A.2d at 532. The clause was placed in the first provision in the last paragraph of the agreement. *Id.* See also *Hughes v. McMenamon*, 204 F. Supp. 2d 178 (D. Mass. 2002) (In upholding a forum selection clause in a multi-page agreement, the court stated that “[...]such clauses are prima facie valid unless it is shown that they are unreasonable under the circumstances.” *Id.* at 178.)

⁸³ 998 F.Supp. 738 (1998).

⁸⁴ *Id.* at 741.

⁸⁵ *Id.*

⁸⁶ *Id.*

California[...].”⁸⁷ In response to the plaintiff filing suit in Texas for breach of contract and fraud, the defendant contended that the Texas court lacked personal jurisdiction because of the forum selection clause contained in the clickwrap agreement.⁸⁸ There seems to be no evidence that the clause was presented in a different type face or format than the other provisions in the agreement so as to constitute lack of adequate notice. Nevertheless, the court held that this “inconspicuous” clause “buried within” the clickwrap agreement did not prevent the Texas district court from exercising personal jurisdiction over the California defendant.⁸⁹

Although the holding of this case, on its face, seems to run contrary to the proposition established above by *Forrest* and *Caspi*, it can be reconciled upon closer examination of the *Thompson* court’s reasoning for such holding. The court in *Thompson* reasoned that the forum selection clause was “inconspicuous” not because of the format or manner in which the clause was presented, but rather because it cannot be interpreted as a forum selection clause.⁹⁰ The court noted that “[...]this clause is not a forum selection clause because it does not mandate that disputes arising from this contract be litigated in California; it merely states that disputes shall be governed by the laws of the State of California and shall be resolved exclusively by[...]binding arbitration in California.”⁹¹ The court, therefore, concluded that the clause did not require that “a lawsuit must be filed in California.”⁹² Based on this reasoning, it is evident that the court did not invalidate the clause because it was “buried” within the agreement, but rather because the language of the clause did not amount to a traditional forum selection

⁸⁷ *Id.* at 742.

⁸⁸ *Id.*

⁸⁹ *Id.* at 745. Moreover, the court concluded that the Internet site run by the defendant allowed it to interact with individuals in the forum state so as to constitute sufficient minimum contacts within the forum state for the purposes of personal jurisdiction. *Id.* at 743.

⁹⁰ *Id.* at 745

⁹¹ *Id.* at 745.

⁹² *Id.*

clause. This would adequately notify a party that resolution of a dispute was limited to a sole forum.

After examination of *Thompson's* holding, it is clear that the proposition illustrated by *Forrest* and *Caspi* remain undisturbed. The *Thompson* case simply supplements this proposition by adding that a forum selection clause will not be void for lack of adequate notice as long as the language of the clause clearly manifests that disputes arising from the clickwrap agreement must be litigated in an exclusive forum.⁹³

B. Damages Incurred or Cause of Dispute arises prior to Notice of Forum Selection Clause.

Many times a user or purchaser is presented with a clickwrap agreement after software has been downloaded and installed on their computer or after an online purchase has been completed. The problem with such a practice is that the alleged damage or cause for dispute may occur prior to the parties entering a contractual relationship via a clickwrap agreement.⁹⁴ As a result, the consumer is aware of the existence of a forum selection clause only after the harm has occurred. Such a practice has been examined by the Massachusetts Superior Court in *Williams v. America Online* and subsequently disapproved.⁹⁵

In *Williams*, the plaintiffs brought suit against America Online (“AOL”), an Internet service provider, in Massachusetts state court for fraud, negligent misrepresentation, and unfair and deceptive practices under state statutes.⁹⁶ The plaintiffs contended that installation of AOL 5.0 software caused “unauthorized” changes to the configuration of their computers

⁹³ *Id.*

⁹⁴ Raysman & Brown, *supra* note 1, at 2.

⁹⁵ See 2001 Mass. Super. LEXIS 11 (2001).

⁹⁶ *Id.* at 2.

so that they were unable to run non-AOL email programs or access non-AOL Internet service providers.⁹⁷ AOL moved to dismiss the suit claiming that the suit was filed in breach of a forum selection clause contained in a clickwrap agreement which designates Virginia as the exclusive forum for disputes against the company.⁹⁸ The court subsequently denied AOL's motion to dismiss. After hearing expert testimony, the court found that extensive reconfiguration of the plaintiffs' computers took place prior to the presentation of the clickwrap agreement.⁹⁹ Moreover, even if the plaintiffs attempted to uninstall the software or decline to accept the terms of the clickwrap agreement containing the forum selection clause, their computers had already been altered.¹⁰⁰ Thus, the timing of the notice of the provision was inadequate. Second, the court noted that such a clause was against public policy because "[...]the expense and inconvenience of litigating in Virginia would effectively prevent [plaintiff] from seeking redress for their relatively small damages."¹⁰¹ Based on these factors, the court concluded that the forum selection clause was unfair and unreasonable.¹⁰²

The *Williams* case illustrates the importance court's place on the timing in which a clickwrap agreement is presented to the consumer.¹⁰³ *Williams* encourages online vendors and software manufacturers alike to anticipate the possibility of the consumer incurring damages before presentation of a forum selection clause. If such a possibility is likely, then these businesses should tailor the sequencing of their transactions or software installation in order to

⁹⁷ *Id.*

⁹⁸ *Id.* at 5. The forum-selection clause explicitly stated, "You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of AOL resides in the court of Virginia...." *Id.*

⁹⁹ Raysman & Brown, *supra* note 1, at 1-2.

¹⁰⁰ Mass. Super. LEXIS 11 at 7-8.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 4-5.

¹⁰³ See also 646 Jacobson v. Mailboxes Etc., N.E.2d 741 (Mass. 1995) (holding that a forum selection clause was not enforceable as to the damages that occurred before the parties entered into the franchise agreement) (applying California law.)

minimize these risks. For instance, the clickwrap agreement can be placed at the commencement of the transaction or before any software is installed or downloaded on the consumer's computer. If businesses fail to address these issues, they risk the possibility of having the forum selection clause contained in their clickwraps deemed invalid for inadequate timing of notice and, consequently, facing liability in multiple jurisdictions.

C. Clickwrap Terms Precluded by Integration Clause in a Previous Agreement

Not only should businesses be cognizant of the timing in which a clickwrap is presented, but also whether the transaction was governed by a previous agreement containing an integration clause, which precluded the terms of the clickwrap agreement. This situation arises most often in software licensing agreements between two merchants. Such agreements are usually in writing and grant the purchaser the right to copy, distribute, or “bundle” the software with other software for the purpose of sale and distribution.¹⁰⁴ Confusion arises, however, when the terms of the written licensing agreement conflict with a clickwrap agreement which is presented upon software installation.¹⁰⁵ The question is, therefore, whether the previously executed license agreement precludes the terms of a subsequent clickwrap agreement, such as a forum selection clause. The California district court specifically addressed this issue in *Morgan Laboratories, Inc. v. Micro Data Base Systems, Inc.*¹⁰⁶

In *Morgan*, the plaintiff was a software manufacturer specializing in producing software for the banking industry.¹⁰⁷ In 1991, the plaintiff was interested in incorporating the

¹⁰⁴ Roger Milgrim, 3-28 Milgrim on Licensing § 28.04 (2006).

¹⁰⁵ *Id.*

¹⁰⁶ 41 U.S.P.Q.2D (BNA) 1850 (N.D. Cal. 1997).

¹⁰⁷ *Id.* at 1.

defendant's software modules into plaintiff's own software and subsequently distributing it. Therefore, in the same year, the plaintiff entered into a license agreement with the defendant which granted the plaintiff the right to copy and distribute the defendant's software modules.¹⁰⁸ Upon a dispute arising out of the licensing agreement, the main issue in this case was determining the state in which venue was proper. The 1991 licensing agreement did not contain a forum selection clause.¹⁰⁹ However, a shrinkwrap agreement containing a forum selection clause appeared on the box of each of the defendant's software modules which were shipped to the plaintiff.¹¹⁰ The clause designated the state of Indiana as the exclusive forum for resolving disputes arising between the parties.¹¹¹ The plaintiff, however, contended that the terms of the shrinkwrap agreement, specifically the forum selection clause, was precluded by the terms of the previously executed license agreement which contained an integration clause.¹¹² The integration clause provided that the 1991 license agreement constituted the "entire agreement" between the parties and prohibited modification of the contract except by writing executed by both parties.¹¹³ The court held that "Although shrinkwrap licenses may, in some cases, be enforceable[...]they do not trump explicit prior agreements where those agreements contain integration clauses and "no-modification-unless-in-writing" clauses."¹¹⁴

Although this case did not involve a clickwrap agreement, it is nevertheless illustrative of the binding nature of a previous agreement containing an integration clause on a

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5. However, the agreement did contain a choice of law clause which required that Indiana apply to all disputes between the parties. *Id.* at n3.

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.* at 6. The shrinkwrap agreement also provided that opening of the software package constitutes acceptance of the terms. *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 4. Such a clause is enforceable under U.C.C. 2-209. David Bender, Computer Law § 4A.02 (2006). Court held that the shrinkwrap agreement in this case did not constitute a valid modification as it was not sufficiently executed by both parties. 41 U.S.P.Q.2D (BNA) at 12.

¹¹⁴ *Id.* at 11.

subsequent agreement between two parties. Accordingly, e-commerce companies should be conscious of such an occurrence if they wish for their shrinkwraps and clickwraps to be given binding effect.¹¹⁵ Moreover, these companies should not disregard the fact that courts will not hesitate in applying the UCC and common law contract principles in finding such agreements invalid, regardless of the medium in which they are presented

D. The California View: Unconscionability, Consumer Protection & Public Policy

California courts take a different and more speculative view on the enforceability of forum selection and arbitration clauses in clickwrap agreements, in comparison to other states. More specifically, California courts interpret such clauses in light of consumer protection and public policy considerations. Therefore, California courts hold such clauses unconscionable and against public policy if they place an unreasonable burden on a consumer's fundamental right to seek a legal remedy. Such an approach is best demonstrated in *America Online v. Superior Court (Mendoza)*.¹¹⁶

In *Mendoza*, an Internet subscriber brought a class action suit based on an allegation that America Online ("AOL") continued to debit the plaintiffs' credit cards for monthly service fees after the plaintiffs terminated their subscription.¹¹⁷ The class action was filed in California. AOL filed a motion to dismiss the action on the basis of a forum selection clause contained in a clickwrap agreement entered into by plaintiffs designating Virginia as the forum for dispute resolution.¹¹⁸ The clause also provided that Virginia law was to be applied

¹¹⁵ See also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). In *Hill*, the court applied U.C.C. 2-207 to a subsequent shrinkwrap agreement. *Id.* The court noted that since the buyer was not a merchant, additional terms in the seller's acceptance would not be binding unless they were accepted by the buyer. Therefore, the arbitration clause in the shrinkwrap was not enforceable. *Id.* at 1150.

¹¹⁶ 90 Cal. App. 4th 1 (Cal. Ct. App. 2001).

¹¹⁷ *Id.* at 4.

¹¹⁸ *Id.*

to any dispute.¹¹⁹ The trial court denied the motion and the California Court of Appeals upheld the lower court's decision. In so holding, the court of appeals acknowledged that not only did Virginia law preclude consumers' lawsuits to be brought as class actions, but also the consumer protection laws in that state afforded significantly less remedies than those under California law.¹²⁰ Therefore, "the rights of the[...]consumer class members would be substantially diminished if they are required to litigate their dispute in Virginia, thereby violating an important public policy underlying California's consumer protection law."¹²¹

While the court in *Mendoza* held that the forum selection clause in this instance was void, it did note, however, that such clauses are actually "favored" and valid under California law so long as the designated jurisdiction is "[...]suitable, available, and able to accomplish substantial justice."¹²² More specifically, the court set out three factors in determining whether such forum selection agreements are enforceable.¹²³ First, the agreements must be procured "freely" and "voluntarily."¹²⁴ Second, there must be some "logical nexus" between one of the parties or the dispute and the designated forum.¹²⁵ Third, the exercise of jurisdiction in the designated forum should not significantly impair the "substantial" legal rights of the California consumer.¹²⁶

In applying the factors to this case, the court of appeals found that the adhesive nature of the clickwrap agreement and circumstances surrounding contract formation did not reflect *Mendoza*'s "exercised free will."¹²⁷ The court also found that the enforcement of the forum

¹¹⁹ *Id.*

¹²⁰ *Id.* at 5.

¹²¹ *Id.*

¹²² *Id.* at 12.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

selection clause would substantially diminish the legal rights afforded to California consumers under the state's law.¹²⁸ Therefore, the clause violated California's public policy of consumer protection and was unenforceable.¹²⁹

It must be noted that California courts are not alone in invalidating forum selection clauses on consumer protection and public policy grounds. Such consideration was also made by the Massachusetts Superior court in *Williams v. America Online* discussed above.¹³⁰ The forum selection clause in both the *Williams'* case and *Mendoza* case were identical in designating the state of Virginia as the forum for dispute resolution. Like the California court, the Massachusetts court in *Williams* recognized the inadequacy of Virginia law in precluding consumer class actions.¹³¹ The court reasoned that such preclusion functioned as an effective bar to a consumer pursuing a legal remedy.¹³² This is because "[...]the expense and inconvenience of litigating in Virginia would effectively prevent [each individual plaintiff] from seeking redress for their relatively small [individual] damages."¹³³ Thus, in that instance, it only made "financial" sense to pursue a claim in the aggregate, such as a class action claim. However, Virginia law precluded such an action. As a result, the court in *Williams*, like the court in *Mendoza*, held that AOL should not be able to abuse Virginia law in a manner as to immunize itself from customers seeking legal redress from the company.¹³⁴ Such a practice is unreasonable and violates public policy.¹³⁵

¹²⁸ *Id.*

¹²⁹ *Id.* See also *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2001). The federal court in northern California concluded that an arbitration provision contained in a clickwrap agreement was unenforceable mainly because it deprived the consumer from initiating a class action suit. *Id.* at 1165. See also Aiken & Bradley, supra note 4, at 1-2.

¹³⁰ *Williams*, 2001 Mass. Super. LEXIS 11 at 8.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 4-5.

¹³⁵ *Id.*

While the public policy and consumer protection reasoning in the *Williams* and *Mendoza* seem sensible, courts in other jurisdictions refuse to acknowledge such reasoning and read such clauses in favor of the online vendors. This is apparent in the District of Columbia case of *Forrest v. Verizon Communications, Inc.*, discussed above.¹³⁶ The *Forrest* case, like the *Williams* and *Mendoza* case, involved a forum selection clause designating Virginia as the exclusive forum for disputes.¹³⁷ As in *Williams* and *Mendoza*, the appellate court in *Forrest* also acknowledged that Virginia is one of only two states in the country that precludes the use of class actions.¹³⁸ However, the court in this case held in favor of Verizon Communications, the Internet service provider, and upheld the forum selection clause.¹³⁹ The court reasoned that despite the class action preclusion, each consumer could still seek an effective remedy by filing a small claim action while also recovering attorney fees under Virginia’s consumer protection law.¹⁴⁰ Moreover, the court noted that that there was nothing “sinister” or “unreasonable” in the selection of Virginia as an exclusive forum because it was Verizon’s principle place of business.¹⁴¹

It is evident from the foregoing discussion that not all jurisdictions follow California’s lead in placing consumer protection at the forefront in determining enforceability of a forum selection clause.¹⁴² Instead, those jurisdictions which are at odds with the California approach hold the view that consumer protection considerations alone are not sufficient in avoiding a

¹³⁶ 805 A.2d at 1007.

¹³⁷ *Id.* at 1008.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1015.

¹⁴⁰ *Id.* at 1013.

¹⁴¹ *Id.*

¹⁴² See *Gilman v. Wheat, First Securities, Inc.*, 692 A.2d 454, 463 (Md. 1997). This case was also centered on a Virginia forum selection clause. The plaintiff consumer brought suit in Maryland seeking class action status. The Maryland Court of Appeal upheld the forum selection clause enforceable and dismissed the action. The court noted that the fact that the consumer’s personal loss was so small that it made it unfeasible to bring an individual suit did not serve a sufficient enough reason to ignore the contractual provision.

contractual clause that was “voluntarily” entered into by the plaintiff.¹⁴³ This jurisdictional split poses unpredictability for online vendors who market their products and services nationally, such as Internet service providers. Such vendors cannot ascertain the enforceability of their forum selection clause until they are notified of a suit against them in a particular jurisdiction.

Despite the discord in this specific area of law, a slight reconciliation of the two views may be made after close examination of the *Forrest* and *Mendoza* decisions. In *Forrest*, the court seemed to place great emphasis on the fact that the state of Virginia was Verizon’s principle place of business. Therefore, Verizon’s close ties to the state of Virginia eviscerated the unreasonableness of the state as an exclusive forum to dispute resolution. Moreover, the California court in the *Mendoza* alluded that the “nexus” between the designated forum and the parties was a major factor in determining the reasonableness of a forum selection clause. As a result, it seems that an online vendor can increase the likelihood of enforceability of such clauses if they choose a designated forum that has close ties to the vendor’s business such as the location of the vendor’s principle place of business.

In sum, there is no doubt that the enforceability of provisions within clickwrap agreements is critical to the financial success and viability of e-commerce businesses. Unfortunately for these businesses, the foregoing discussion makes it apparent that courts in different jurisdictions rely on a variety of legal principles in determining the binding nature of such agreements.¹⁴⁴ Moreover, such provisions are fact-intensive, thereby further increasing the unpredictable and inconsistent nature of their enforcement.¹⁴⁵ This, in turn, proves to be

¹⁴³ For further discussion regarding the split between the California view and other jurisdictions *see* Aiken & Bradley, *supra* note 4, at 1-2.

¹⁴⁴ Aiken & Bradley, *supra* note 4, at 2.

¹⁴⁵ *Id.*

troublesome to an online vendor who nationally markets their products and services and, therefore, may be prone to claims and challenges in a myriad of jurisdictions.

IV. Six Guidelines for Creating Enforceable Clickwrap Agreements

Despite the apparent inconsistencies in this area of law, as described in the preceding section, there are, nonetheless, general trends ascertained from the above-mentioned case decisions, which, if acknowledged by drafting practitioners and online vendors, will increase the likelihood of enforceability of their clickwrap agreements.

This section of this article will, therefore, attempt to reconcile these aforementioned cases and provide practitioners with six general guidelines on drafting and instituting enforceable clickwrap agreements. The guidelines are the following: 1) clear and conspicuous notice of the clickwrap should be given at the outset of the transaction; 2) the drafting practitioner should ensure that the consumer is notified about the specific conduct that is deemed to be acceptance of the clickwrap agreement; 3) the clickwrap should be presented to the consumer at the earliest possible point in a transaction; 4) the terms of the clickwrap should provide the consumer with a method of refund or return; 5) the vendor must demonstrate a sufficient “nexus” between its business and the designated forum for dispute resolution; and 6) the drafting practitioner should pay close attention to the style, format and overall visual presentation of the terms of the clickwrap. Each of these guidelines will be thoroughly examined below. It should be noted before proceeding, however, that although following these guidelines will not guarantee enforceability, they address many of the major issues identified by the courts in case decisions thus far.¹⁴⁶

¹⁴⁶ Peter Brown, *Practising Law Institute: Clickwrap Licenses*, 533 PLI 209, 228 (1998).

A. Notice of Agreement at the Outset of the Transaction

First, practitioners drafting clickwrap agreements on behalf of online vendors should ensure that that clear and conspicuous notice is given to the consumer that the transaction is subject to a clickwrap agreement.¹⁴⁷ More importantly, such notice should be given at the time of purchase or the outset of the transaction.¹⁴⁸ For example, in *Forrest v. Verizon Communications, Inc.*, discussed above, customers signing up for Internet service were presented with a screen containing a 13 page clickwrap agreement.¹⁴⁹ The top of the agreement contained the statement in capital letters: “PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY.”¹⁵⁰ An “Accept” button appeared below the scroll box containing the agreement.¹⁵¹ The agreement was presented before payment by the buyer.¹⁵² The *Forrest* court held that such a preliminary statement and subsequent format of the clickwrap agreement provided clear and conspicuous notice to the consumer of the forum selection clause contained in the agreement.¹⁵³ Moreover, in the case of *Comb v. Paypal* the customer was required to click a box during an account application process which read “I have read and agree to the User Agreement[...].”¹⁵⁴ Next to the box there appeared a link to the text of the user agreement.¹⁵⁵ The California court, in this case, held that such a practice gave adequate notification to the consumer that the transaction was subject to the user’s assent to the user agreement.¹⁵⁶ Based on the foregoing cases, it is evident that a consumer should be notified that if he or she wishes to proceed with the transaction, then he or she must agree

¹⁴⁷ *Id.* at 228.

¹⁴⁸ *Id.*

¹⁴⁹ 805 A.2d at 1007.

¹⁵⁰ 805 A.2d at 1010.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1009.

¹⁵³ *Id.* at 1012.

¹⁵⁴ *Comb v. Paypal*, 218 F.Supp. 2d 1165 (N.D. Cal 2002).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

to the Vendor's terms and conditions of sale. While the notice need not necessarily be in all capital letters, it should be prominent enough so that it is clearly visible to an average person. This means that notice of the clickwrap cannot be unreasonably buried or entangled within other language unrelated to the terms and conditions of the transaction. Moreover, the terms of the agreement itself should be clear and concise so that a lay person can understand the "nature" of the agreement.¹⁵⁷ Finally, as noted in *Forrest*, notice of the transaction should be given at the outset of the transaction and before payment by the buyer.¹⁵⁸

B. Notice of Conduct Constituting Assent to Terms of the Agreement

Along with providing clear and unambiguous notice of the clickwrap agreement, drafting practitioners should ensure that the consumer is notified about the specific conduct that is deemed to be acceptance of the clickwrap agreement.¹⁵⁹ The customer's method of acceptance should involve an affirmative or interactive action such as clicking "yes" or "I agree" at the end of the agreement text, before being permitted to proceed with the transaction.¹⁶⁰ For example, in the *Forrest* case, an "Accept" button was presented below a scroll box containing the text of the clickwrap agreement. In order to complete the transaction, the customer was required to click the "Accept" button.¹⁶¹ Such an "affirmative" act was deemed to constitute customer's assent to the terms of the agreement.¹⁶² Conversely, in *Specht v. Netscape Communications Corp.*, the software purchaser was presented with a screen containing a "download" button which would immediately download the purchased

¹⁵⁷ Brown, supra note 128, at 228.

¹⁵⁸ 805 A.2d at 1009. See also Brown, supra note 128, at 228.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 805 A.2d at 1010.

¹⁶² *Id.* at 1012.

software on his or her computer upon clicking on such button.¹⁶³ At the bottom of the screen there was a link stating “Please review and agree to the terms of the[...]software license agreement before downloading and using the software.”¹⁶⁴ No further instructions were provided on the screen or in the agreement itself as to the specific conduct that would be deemed to be acceptance of the license agreement.¹⁶⁵ Moreover, there was not an “Accept” button or its equivalent on the screen or on the license agreement itself.¹⁶⁶ The court held that the mere downloading and installation of the software did not constitute a manifestation of assent to the terms of the agreement.¹⁶⁷ This case conveys the importance of requiring a specific “affirmative” act on part of the consumer denoting assent to the terms of the clickwrap agreement.

C. Timing of Agreement Presentation Crucial

In addition to the notification guidelines outlined above, practitioners should pay close attention to the time at which the agreement is presented during the transaction process. The actual terms of the agreement should be disclosed to the consumer prior to the start of use of the purchased material.¹⁶⁸ In the case of software downloads, the clickwrap agreement should be presented before the software is downloaded or installed.¹⁶⁹ If the agreement is presented after such point, its provisions may be held to be inapplicable to disputes which arose prior to assent of the agreement pursuant to *Williams v. America Online*, discussed above.¹⁷⁰ In

¹⁶³ 306 F.3d 17, 21-22 (2d Cir. 2002) (applying California law).

¹⁶⁴ *Id.* at 22.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 24-25.

¹⁶⁷ *Id.* at 39.

¹⁶⁸ Raysman & Brown, *supra* note 1, at 2.

¹⁶⁹ *Id.*

¹⁷⁰ *Williams v. America Online*, 2001 MassSuper. LEXIS 11 (SuperCt Feb. 8, 2001). *See also* Raysman & Brown, *supra* note 1, at 2.

Williams, the consumers claimed that their computers were damaged when they installed the vendor's software.¹⁷¹ The terms of the clickwrap agreement were not presented to the consumers until after the software was downloaded and installed.¹⁷² As a result, the court held that the agreement was inapplicable to the damage claim because the consumer did not have notice of the agreement and its provisions "prior to the point in which the alleged damage took place."¹⁷³ Therefore, drafting practitioners should ensure that the terms of a clickwrap agreement are presented to the consumer at the earliest possible point in an online transaction to ensure that it covers all subsequent events that arise in the transaction process.¹⁷⁴

D. Consumer Should be Provided with a Method of Refund or Return.

Practitioners should make certain that the terms of their clickwrap agreement provide consumers with an easy method for returning the purchased items or obtaining a refund if he or she decides to reject the terms of the agreement.¹⁷⁵ For example, in *Adobe Systems, Inc. v. Stargate Software Inc.*, the court emphasized the fact that the agreement gave the software consumer the opportunity to return the packaged software if he or she was not in agreement with the terms of the contract.¹⁷⁶ The court subsequently held that such an agreement was enforceable and assented to by the purchaser in light of the fact that the purchaser had an opportunity to return the software for a refund, but chose not to do so.¹⁷⁷ Therefore, depending on when an agreement is presented to the consumer, purchasers should be given an

¹⁷¹ 2001 MassSuper. LEXIS 11 at 7-8.

¹⁷² *Id.* at 8.

¹⁷³ Raysman & Brown, *supra* note 1, at 2.

¹⁷⁴ Compare *Williams v. America Online with Moore v. Microsoft Corp.*, 293 AD2d 587 (2d Dept. 2002). In this case, the user was presented with a clickwrap agreement and was required to click "I agree" prior to downloading the software. The court subsequently held that the agreement was enforceable.

¹⁷⁵ Brown, *supra* note 128, at 228.

¹⁷⁶ 216 F. Supp. 2d 1051 (N.D. Cal. 2002).

¹⁷⁷ *Id.* at 1060.

opportunity to decline to assent to the terms of the agreement and be restored to their original, pre-transaction position.

E. Businesses Should Demonstrate a sufficient “Nexus” with the Designated Forum for Dispute Resolution.

To ensure that a forum selection clause within a clickwrap agreement will be binding on the parties, the business should be prepared to demonstrate “close ties” with the designated forum, especially when the designated forum provides significantly less consumer remedies. The specific standard set out in *America Online v. Superior Court (Mendoza)* is that the “[...] [forum] chosen [should have] some logical nexus to one of the parties or the dispute.”¹⁷⁸ The *Mendoza* court seems to indicate that simply marketing a product or service in a certain forum does not constitute a sufficient “nexus.” However, the *Forrest* decision, discussed above, indicates that the “nexus” requirement is satisfied if the designated forum is the location of company’s principle place of business or corporate headquarters.¹⁷⁹

F. Consideration should be given to the Visual Presentation of the Terms of the Agreement.

Finally, practitioners should pay close attention to the style, format and overall visual presentation of the terms of the clickwrap agreement. As demonstrated in the *Forrest* and *Caspi* decision above, practitioners should confirm that all clauses contained in agreement are presented in the same type face, font, and form.¹⁸⁰ Moreover, it is immaterial whether the clause is not presented in all capital letters or if the agreement can be viewed only a portion at

¹⁷⁸ 90 Cal. App. 4th at 12.

¹⁷⁹ 805 A.2d at 1012.

¹⁸⁰ See *Forrest*, 805 A.2d at 1010 and *Caspi*, 732 A.2d at 532.

a time via a scroll box, as long as the placement of the clauses in question are not unreasonable.¹⁸¹ Finally, as displayed in *Thompson*, the language of the clause must clearly manifest that disputes arising from the agreement must be litigated in an exclusive forum. It is not sufficient to state that the dispute will be governed by laws of a certain state.

V. Conclusion

It is evident that the law in the area of clickwrap agreements is still in its infancy. While there has been a significant increase in the number of judicial decisions addressing the enforceability of such agreements since the initial decisions of the 1990's, there still lies dissonance in this area of law.¹⁸² As the universe of electronic commerce matures and courts become more familiar and comfortable with the idea of electronic contracting, the inconsistencies in this area of law will hopefully dissipate and one day will become stabilized. Until then, practitioners and e-commerce businesses alike should be proactive in taking measures which will increase the likelihood of courts upholding their clickwrap agreements in the future. Such measures can only be ascertained through close examination of prior judicial decisions which interpret the enforceability of such agreements.

¹⁸¹ *Forrest*, 805 A.2d at 1012.

¹⁸² Raysman & Brown, *supra* note 1, at 1.