

**SURVEY OF THE LAW OF CYBERSPACE**  
**ELECTRONIC CONTRACTING CASES 2007 – 2008**

**Juliet M. Moringiello**\*

**William L. Reynolds**\*\*

**I. INTRODUCTION**

In this, our fourth annual survey of electronic contracting developments,<sup>1</sup> we discuss cases decided between July 1, 2007 and June 30, 2008. This year's crop brings us some interesting parties: Mick Jagger is a defendant in one case,<sup>2</sup> in another, some high school students who were required by their schools to upload their papers to Turnitin, the

---

\* Professor, Widener University School of Law. Professor Moringiello would like to thank Crystal Burkhart and Matthew Foreman for their help with research.

\*\* Jacob A. France Professor of Judicial Process, University of Maryland School of Law.

<sup>1</sup> Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Internet Contracting Cases 2004 – 2005*, 61 BUS. LAW. 433 (2005) [Moringiello & Reynolds, 2005 Survey]; Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2005 – 2006*, 62 BUS. LAW. 195 (2006) [Moringiello & Reynolds, 2006 Survey]; Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2006 – 2007*, 63 BUS. LAW. 219 (2007) [Moringiello & Reynolds, 2007 Survey].

<sup>2</sup> *Druyan v. Jagger*, 508 F. Supp. 2d 228 (S.D. N.Y. 2007).

plagiarism detection service, sued Turnitin for copyright infringement.<sup>3</sup> In yet another of this year's cases, a man who bought flowers for his girlfriend from 1-800-flowers.com sued after the seller sent the receipt for the flowers to his wife.<sup>4</sup> And last but by no means least is the John Doe plaintiff who sued an online dating service for not verifying the age of a girl he slept with; she turned out to be fourteen and the plaintiff was last seen facing criminal charges.<sup>5</sup>

Fun facts aside, this year's cases present one issue not previously addressed by courts, modification of online contracts.<sup>6</sup> Three opinions discuss incorporation by reference,<sup>7</sup> an issue that we have discussed in previous surveys.<sup>8</sup> Several cases discuss unconscionability, two of which show that in California, courts will likely hold an online standard form contract to be procedurally unconscionable, regardless of how the terms

---

<sup>3</sup> A.V., et al. v. iParadigms, L.L.C., 544 F. Supp. 2d 4 (E.D. Va. 2008).

<sup>4</sup> Greer v. 1-800-flowers.com, Inc., No. H-07-2543, 2007 U.S. Dist. LEXIS 73961 (S.D. Tex., Oct. 3, 2007).

<sup>5</sup> Doe v. Sexsearch, 502 F. Supp. 2d 719 (N.D. Ohio 2007).

<sup>6</sup> Douglas v. United States Dist. Court, 495 F. 3d 1062 (9<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008).

<sup>7</sup> Feldman v. United Parcel Service, Inc., No. 06 Civ. 2490, 2008 U.S. Dist. LEXIS 30637 (S.D. N.Y., March 24, 2008); Manasher v. NECC Telecom, No. 06-10749, 2007 U.S. Dist. LEXIS 68795 (E.D. Mich., Sept. 18, 2007); Greer v. 1-800-flowers.com, Inc., 2007 U.S. Dist. LEXIS 73961.

<sup>8</sup> Moringiello & Reynolds, *2006 Survey*, *supra* note 1 at 199 – 201, Moringiello & Reynolds, *2007 Survey*, *supra* note 1 at 235.

are presented.<sup>9</sup> The remaining cases add to the literature on the enforceability of clickwrap and browsewrap contracts.

## II. Contract Formation

On-line contracting usually takes one of two forms; they are commonly known as clickwrap and browsewrap. A clickwrap agreement is one to which an offeree must signify her agreement by clicking on an “I agree” or “I accept” icon in order to complete the transaction to which the terms apply. Browsewrap agreements, which are often found behind hyperlinks labeled “Legal” or “Terms of Use,” are so named because such agreements tend to provide that a web site user is bound simply by using (or “browsing”) the web site. Courts use the term browsewrap to refer to any contract terms posted on a web site that do not require an explicit manifestation of assent.<sup>10</sup> At one time, much ink had been spilled over the difference between the two, and the tests that should be applied to each. Two years ago, however, we observed that courts were not paying much

---

<sup>9</sup> Mazur v. eBay, Inc., No. C 07-03967, 2008 U.S. Dist. LEXIS 16561 (N.D. Cal., March 3, 2008); Brazil v. Dell, Inc., No. C-07-01700 RMW, 2007 U.S. Dist. LEXIS 59095 (N.D. Cal., Aug. 3, 2007).

<sup>10</sup> Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1317 – 1318 (2005). For an example of a typical browsewrap agreement, see <http://www.facebook.com/terms.php> (last visited June 17, 2008) (“[b]y accessing or using our web site . . . you (the ‘User’) signify that you have read, understand and agree to be bound by these Terms of Use . . .”).

attention to the once much-mooted distinction between browsewrap and clickwrap.<sup>11</sup>

Instead, the focus of recent judicial opinions has been on notice – did the seller provide a reasonable amount of information to the buyer so that it could know what, if anything, it was contracting for? This year’s cases continue that trend.

### *A. Clickwrap*

By now the law seems pretty well-settled that a mere click of agreement on a website acts as an acceptance of an offer to do what the website proposes—and of the terms contained in the website, even if those terms can only be reached by a hyperlink. Like a signature line on a paper contract, an “agree” icon on a website notifies the reader that she should look at the appended terms. To be sure, the offeree may still contend that the contract was induced by fraud, or that the terms were unconscionable, or, as in one of the cases discussed later, that he is an infant. Several of the cases in this year’s survey illustrate that point. One example is *People v. Direct Revenue, L.L.C.*<sup>12</sup> At issue there was an online agreement and an investigation by the State of certain alleged deceptive practices by the provider. The State’s allegations were easily disposed of: “Claims that a consumer was not aware of the agreement or did not actually read it must be disregarded where, as here, it is undisputed that the agreement was acknowledged and accepted by

---

<sup>11</sup> See Moringiello and Reynolds, *2006 Survey*, *supra* note 1, at 201 – 203, 204 – 205.

<sup>12</sup> No. 401325/06, 2008 NY Misc. LEXIS 2195 (N.Y.Sup. Ct., March 12, 2008).

clicking on the relevant icon.”<sup>13</sup> In other words, if you click you are bound by what you could have read but chose not to.

It is notable that the agreement at issue in *Direct Revenue* was a license for advertising software that generated pop-up advertisements based on the consumer’s internet usage. Such “adware” is controversial; while consumers might want the free software applications that companies such as Direct Revenue offer, they also often dislike being bombarded with pop-up ads. Because the pop-up ads are targeted to the consumer based on browsing information collected by the software, some characterize the software as undesirable spyware.<sup>14</sup> The court found, however, that the consumers were given plenty of notice of the nature of the software, in fact, the first section of the agreement stated that “[t]he software will collect information about websites you access and will use that information to display advertising on your computer.”<sup>15</sup> Because of this notice, the consumers were bound by the terms.

A more interesting case making the same point is *A.V. v. IParadigms*.<sup>16</sup> Defendant owned Turnitin, a software system that can be used to detect plagiarism in

---

<sup>13</sup> *Id.* at \*10.

<sup>14</sup> For a good discussion of the use of contract doctrine to limit the distribution of spyware, see Jane K. Winn, *Contracting Spyware By Contract*, 20 BERKELEY TECH. L.J. 1345 (2005).

<sup>15</sup> 2008 NY Misc. LEXIS 2195, \*4-5.

<sup>16</sup> 544 F. Supp. 2d 473 (E.D. Va. 2008).

written work such as term papers. Defendant also archived papers submitted to it in order to be able to compare them with later submissions. Plaintiffs were students whose schools required them to submit papers to Turnitin for evaluation of their originality. Plaintiffs did so online; this required them to click “I agree” with the terms of the user agreement (also called the Clickwrap Agreement by the court). The Clickwrap Agreement was displayed directly above the “I agree” icon. Plaintiffs clicked the “I agree” link when they submitted their papers. Plaintiffs did not want their papers archived so they placed “a disclaimer on the face of their works indicating that they did not consent to the archiving of [them] by Turnitin.”<sup>17</sup> Plaintiffs then sued, claiming that Turnitin, by continuing to archive their papers, committed copyright infringement.

Despite that disclaimer,<sup>18</sup> the court had no trouble in finding that the click on “I agree” had formed a contract. The user agreement stated, in its first line, that “ ‘Turnitin and its services . . . are offered to you, the user . . . , *conditioned on your acceptance without modification* of the terms, conditions and notices contained herein.’ ”<sup>19</sup> The user agreement contained a clause limiting iParadigms’ liability for any damages arising out

---

<sup>17</sup>*Id.* at 478.

<sup>18</sup>At common law, it would be possible to assert that the disclaimer, by altering the terms of the offer, was a counter-offer which was accepted by Defendant when it processed the papers. See Restatement (Second) of Contracts § 59. On the facts presented, however, that argument was not available; a contract had been formed when plaintiffs hit the “Agree” icon.

<sup>19</sup> 544 F. Supp. 2d at 478 *quoting* the Turnitin User Agreement (emphasis in opinion).

of the students' use of the Turnitin web site. The court found that the plaintiffs' attempted disclaimers were ineffective because plaintiffs were given two choices: "Agree" or "Disagree."<sup>20</sup> The opinion cites many cases for authority that a click signifies agreement;<sup>21</sup> it seems that, at least in the Eastern District of Virginia, the physical presentation of the terms has little relevance. Because the terms at issue in *iParadigms* were displayed above the "I agree" button, however, the court's conclusion regarding formation is correct. Plaintiffs had notice of the terms and clicked their agreement, therefore they were bound.

### ***B. Browsewrap***

There were three browsewrap cases in this year's crop of cases.<sup>22</sup> They nicely illustrate the current state of the law.

---

<sup>20</sup> *Id.* at 480.

<sup>21</sup> *Id.*

<sup>22</sup>A fourth case, *Fiser v. Dell Computer Corp*, 165 P.3d 328 (N.M. App. 2007), discussed browsewrap but eventually decided the case on shrinkwrap grounds because the plaintiff had received a written copy of the terms and conditions of sale in the box with his computer. A fifth decision, *Brazil v. Dell, Inc.*, No. C-07-01700 RMW, 2007 U.S. Dist. LEXIS 59095 (N.D. Cal., Aug. 3, 2007), also involved a browsewrap agreement that the court assumed without discussion was enforceable. The court in *Brazil* ultimately held that the term in question was unenforceable due to unconscionability. *See notes - infra* and accompanying text.

First is *Druyan v. Jagger*,<sup>23</sup> where a Rolling Stones fan bought tickets online to attend a Stones concert in Atlantic City. The concert was cancelled, however, and the aggrieved fan sued Ticketmaster (who had sold the tickets), the immortal Mick Jagger, and others. In order to buy the tickets, Plaintiff had to visit Ticketmaster’s web site. That site contained Ticketmaster’s Terms of Use which provided that, “By using or visiting the website, you expressly agree to be bound by these Terms....”<sup>24</sup> Those Terms stated that Ticketmaster would not be liable for any damages of the type claimed by the disappointed fan.<sup>25</sup>

The court held that the dispositive question was whether the Terms of Use were “sufficiently conspicuous.” If so, “courts have consistently held that the use of a website for such purposes as purchasing a ticket manifests the user’s assent to the Terms of Use and that such terms constitute a binding contract as long as the terms are sufficiently conspicuous.”<sup>26</sup> In order to buy her tickets on the Ticketmaster web site, Plaintiff had to click on a “Look for Tickets” button. The statement “[b]y clicking on the ‘Look for Tickets’ button or otherwise using this web site, you agree to the Terms of Use” appeared immediately above the “Look for Tickets” button.<sup>27</sup> Having found those Terms

---

<sup>23</sup>508 F. Supp. 2d 228 (S.D.N.Y. 2007).

<sup>24</sup>*Id.* at 234.

<sup>25</sup> *Id.*

<sup>26</sup>*Id.* at 237.

<sup>27</sup> *Id.*

“sufficiently conspicuous,” the court emphasized that enforceability “does not depend on her [Plaintiff’s] having actually read them.”<sup>28</sup> That point was reinforced by the facts that she claimed to have “concert expertise,” and that she had been a long-time user of Ticketmaster’s services.

In short, browsewrap agreements can be enforced even if they have not been read by the user, so long as the user had notice of them. That conclusion will be easier to reach if the user is experienced and a frequent repeat player with the seller.

The second browsewrap case, *Southwest Airlines Co. v. Boardfirst, L.L.C.*,<sup>29</sup> is to like effect. Defendant Boardfirst had started a service that permitted Southwest customers to check in more conveniently than Southwest itself permitted. In order to do that, the customer provided ticket information to Defendant so that it could check the customer in on Southwest’s website. Southwest contended that such use violated conditions it had imposed on the use of its website.<sup>30</sup> The terms of use prohibited third

---

<sup>28</sup> *Id.*

<sup>29</sup> No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230 (N.D. Texas, Sept. 12, 2007) 2007).

<sup>30</sup>The court described how the website worked. “Southwest’s homepage states in small black print at the bottom of the page that ‘[u]se of the Southwest websites constitutes acceptance of our Terms and Conditions.’ Clicking on the words “Terms and Conditions”, which are distinguished in blue print, sends the User to the Terms page.”

party use of the Southwest website “for the purpose of checking Customers in online or attempting to obtain for them a boarding pass in any certain boarding group.”<sup>31</sup>

A review of the law and literature led the court to observe that “one general principle that emerges is that the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site’s terms and conditions prior to using the site.”<sup>32</sup> There was no doubt that Defendant had such knowledge, as at least once Southwest had informed Defendant by letter that it was violating the terms Southwest had imposed on users of its website.

In so holding, the *Southwest* court followed *Register.com, Inc. v. Verio, Inc.*,<sup>33</sup> where the Defendant was found to have expressly agreed to the posted terms. In following *Register.com*, the court distinguished another leading case, *Specht v. Netscape Communications Corp.*,<sup>34</sup> on the ground that the consumer there could not reasonably be said to have been aware of the terms that it was allegedly agreeing to. Both *Specht* and *Register.com* are well-known cases, and the distinction between them drawn by the *Southwest* court, and by other courts as well, should prove to be widely accepted.

---

*Id.* at \*4 – 5. Once on the Terms page, the Defendant would learn that its use of the website was forbidden by them.

<sup>31</sup>2007 U.S. Dist. LEXIS 96230 at \*5-6.

<sup>32</sup> *Id.* at \*5.

<sup>33</sup> 356 F. 3d 393 (2d Cir. 2004).

<sup>34</sup> 306 F. 3d 17 (2d Cir. 2002).

As in *Druyan*, the first case discussed in this sub-section, in both *Southwest* and *Register.com* the court found it important that both were repeat players with the Defendant and, therefore, were well aware of the contents of the website. Both were also experienced entities (and the *Druyan* plaintiff bragged of her “concert expertise). In those circumstances, it will be easy to find that a contract has been formed on the terms of the browsewrap.

*Specht* is often cited for the proposition that browsewrap terms should not be enforced.<sup>35</sup> In the years since the *Specht* decision, however, a clearer rule regarding the enforceability of browsewrap terms has emerged. If a website user has clear notice that she should read the browsewrap terms, they will be enforced. Such clear notice can be provided by a conspicuous statement on the website, such as the warning provided by Ticketmaster that clicking on the “Look for Tickets” button will bind the user to the terms. Notice can also be found when the user is shown to be familiar with the website in question, such as when the user is a frequent user of the website. As we explained two years ago in our discussion of *Hubbert v. Dell*,<sup>36</sup> notice can also be found when the user

---

<sup>35</sup> Winn, *supra* note 14 at 1354; Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 991 – 993 (2008); James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 25 (2007); *Recursion Software v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 782 (N. D. Tex. 2006).

<sup>36</sup> 835 N.E. 2d 113 (Ill. Ct. App. 2005), *appeal denied* 844 N.E. 2d 965 (Ill. 2006).

is shown to be familiar with web sites in general.<sup>37</sup> In that case, the court held that persons who purchase computers over the internet should be familiar with how hyperlinks work.<sup>38</sup>

The court in *Southwest* recognized and followed this general rule. There was no need for it to determine whether the Southwest web site gave adequate notice of the terms, however, because, as noted above, Southwest notified Boardfirst of its terms by letter. Nevertheless, the *Southwest* decision provides a good overview of the evolution of the browsewrap case law.

Formation by browsewrap is questionable, however, when the website user has no reason to know that the contract terms exist. The third browsewrap case illustrates this point. *AV v. iParadigms*,<sup>39</sup> discussed in the preceding section on clickwrap, also had a separate browsewrap problem. When the plaintiff students sued Turnitin, the plagiarism software provider, for copyright infringement, Turnitin claimed that the students were required to indemnify Turnitin for the costs of defending the lawsuit. Turnitin's claim was based on its Usage Policy, "a separate and distinct document" from the Clickwrap Agreement. A hyperlink to that Policy appears on each page of Turnitin's web site.<sup>40</sup>

---

<sup>37</sup> Moringiello & Reynolds, *2006 Survey*, *supra* note 1 at 204.

<sup>38</sup> 835 N.E. 2d at 121 ("A person using a computer quickly learns that more information is available by clicking on a blue hyperlink").

<sup>39</sup> 544 F. Supp. 2d 473 (E.D. Va. 2008).

<sup>40</sup> *Id.* at 478-479.

The court refused to enforce the indemnification provision in the Usage Policy for two reasons. First, it had not been incorporated into the Clickwrap Agreement to which the plaintiffs had agreed.<sup>41</sup> Not only did the Clickwrap Agreement not mention the Usage Agreement, it stated that it constituted “the *entire agreement* between the user and iParadigms with respect to usage of [the Turnitin] web site . . .”<sup>42</sup> Second, the court rejected defendant’s argument that plaintiffs had agreed to the Usage Policy because there was “no evidence that Plaintiffs viewed or read the Usage Policy.”<sup>43</sup> Of course, plaintiffs could have been bound to the policy without reading it, but here, the court found that defendant did nothing to direct plaintiffs to view the Usage Policy. The court refused to impute knowledge of the terms of the Usage Policy to Plaintiffs because, unlike the defendant in *Register.com*, they were not repeat users of the site.

*A.V. v. iParadigms* gives us another rule regarding the enforceability of browsewrap terms. A first-time or sporadic user of a website *can* be bound by browsewrap terms of use, but only if the existence of those terms is clearly brought to his attention. A warning such as that in *Druyan* might suffice; a small link at the bottom of a web page would likely not.

### **III. The Terms of the Contract.**

---

<sup>41</sup> *Id.* at 484.

<sup>42</sup> *Id.* at 485, *quoting* Turnitin User Agreement (emphasis in opinion).

<sup>43</sup> *Id.*

A contract may have been formed by the parties, but what are its terms? Our review found two areas of interest. First, can one party unilaterally modify the agreement by posting changes to it on its website? Second, can the website offer incorporate by reference the terms of another document?

### *A. Contract Modification*

A customer has a continuing business relationship with a seller. The seller posts new terms relating to the agreement on its website. If the customer continues to use the service after the new terms have been posted, is it bound by them? One would expect this scenario to arise frequently in litigation, but it does not.

A rare exception is *Douglas v. United States District Court*.<sup>44</sup> The plaintiff there alleged that his telephone service provider changed the terms of his service contract without notifying him. In fact, he would only have been aware of the new terms if he had visited the provider's website. Plaintiff, however, had no reason to visit the website. The Ninth Circuit noted that the provider could not unilaterally change the terms of a contract, and that assent based on continued use of the phone service could only be "inferred after he received proper notice of the proposed changes."<sup>45</sup> After all, "[p]arties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been

---

<sup>44</sup> 495 F. 3d 1062 (9<sup>th</sup> Cir. 2007).

<sup>45</sup> *Id.* at 1066.

changed by the other side.”<sup>46</sup> The court added that even a daily examination of defendant’s website by the user would be “cumbersome” because a word-by-word comparison of the original agreement with the current post on the website would be needed to detect any changes.<sup>47</sup> This eminently sensible result once again emphasizes the importance of reasonable notice.<sup>48</sup>

The result in *Douglas* is mandated by basic contract law. Terms offered after a contract is formed are proposals—that is, offers-- for modification. Such proposals only become part of the contract upon acceptance.<sup>49</sup> An offeree cannot accept terms of which she does not have notice; mere posting of the revised terms on the offeror’s website does not provide the necessary notice. Modification presents the same notice issues as browsewrap, and the emphasis on reasonable notice in *Douglas* is consistent with the browsewrap cases.

---

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The court might also have wondered how often the website would have to be checked—perhaps hourly?

<sup>48</sup> *See also* *Campbell v. General Dynamics Government Systems Corp.*, 407 F. 3d 546 (1<sup>st</sup> Cir. 2005) (holding that e-mail can be used to modify an employee handbook as long as the modification is reasonably designed to reach the employer). *Campbell* is discussed in Moringiello and Reynolds *2005 Survey*, *supra* note 1, at 440 – 441.

<sup>49</sup> U.C.C. § 2-209; RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981). Modifications raise other contract law questions such as the impact of the pre-Existing Duty rule. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 278-80 (1981).

### ***B. Incorporation by Reference***

In our 2006 survey, we discussed several cases addressing the issue of whether a written agreement that refers to online terms incorporates those terms by reference.<sup>50</sup> This year, we have three incorporation by reference cases: *Feldman v. United Parcel Service, Inc.*,<sup>51</sup> *Manasher v. NECC Telecom*,<sup>52</sup> and *Greer v. 1-800-flowers.com*.<sup>53</sup>

The plaintiff in *Feldman* had purchased a \$57,000 diamond ring from a web site. His agreement with the seller gave him the right to return the ring for a full refund if he was not satisfied with its quality. He was not satisfied with the ring, so he took it to his local UPS store to return it to the seller. An employee of the store told him to complete his shipping label using the “I-Ship Online Shipping” computer system located at the store. He used this system at a computer terminal located in the store.<sup>54</sup>

Feldman typed the relevant information into the I-Ship system and printed his label. To print the label, he was required to click a “print” button on the computer screen. The language on the screen directed him to “[r]eview everything carefully and then click

---

<sup>50</sup> Moringiello & Reynolds, *2006 Survey*, *supra* note 1, at 199 – 201.

<sup>51</sup> No. 06 Civ. 2490, 2008 U.S. Dist. LEXIS 30637 (S.D. N.Y., March 24, 2008).

<sup>52</sup> No. 06-10749, 2007 U.S. Dist. LEXIS 68795 (E.D. Mich., Sept. 18, 2007).

<sup>53</sup> No. H-07-2543, 2007 U.S. Dist. LEXIS 73961 (S.D. Tex., Oct. 3, 2007).

<sup>54</sup> 2008 U.S. Dist. LEXIS 30637 at \*3 – 4.

**Print** to print [his] shipping request.”<sup>55</sup> Two hyperlinks appeared below the “Print” button: one labeled “Terms of Service” and the other labeled “Privacy Policy.” When a customer clicked the “Terms of Service” button, the computer displayed a pop-up window. The pop-up window stated that all shipments were subject to the UPS Tariff, and further stated that the UPS Tariff was available either on the UPS web site or upon request from a store employee. Importantly, while the pop-up screen gave the web address for the Terms of Use, it did not provide a hyperlink to those terms. He did not read the UPS tariff; had he read it, he would have learned that UPS would not send items with a value of over \$50,000. Feldman printed out the shipping form and then told the store employee that he wanted to insure the ring for \$57,000. He claimed that she told him that \$50,000 was the “maximum that it would take.” Feldman then bought \$50,000 worth of insurance and shipped the ring.<sup>56</sup>

Sometime after Feldman shipped the ring, it disappeared. UPS refused to pay on the insurance policy, claiming that shippers are not permitted to ship items with a value of over \$50,000. Feldman then sued UPS for, among other things, breach of contract, and UPS moved for summary judgment.<sup>57</sup>

The court refused to grant summary judgment on the breach of contract claim, because there was a question of fact regarding whether Feldman had adequate notice of

---

<sup>55</sup> *Id.* at \*4 (emphasis in original).

<sup>56</sup> *Id.* at \*6.

<sup>57</sup> *Id.* at \*8 – 10.

the UPS Tariff. In refusing summary judgment, the court rejected UPS' argument that Feldman had constructive notice of the UPS Tariff simply because the published tariff existed.

The opinion contains a solid discussion of contract law. First, the court acknowledges that a person can be bound by a contract without having read it, so long as the terms of the contract are provided to that person during the process that leads to the acceptance of the contract.<sup>58</sup> That is basic contract law.<sup>59</sup> The court then applied this rule to internet contracts and stated that a court could find adequate notice if two conditions were satisfied: the vendor (here, UPS) must require the customer to agree to the terms as one of the steps in the acceptance process, and the terms must be made available to the customer during this process.<sup>60</sup>

The court found that the facts did not meet the standard for reasonable notice. It applied the reasonable communicativeness test that the Second Circuit developed to assess the enforceability of terms printed on travel tickets. Under that test, the court must first assess the physical characteristics of the offered terms and then consider any other factors that might affect the customer's ability to become meaningfully informed of the terms in question.<sup>61</sup>

---

<sup>58</sup> *Id.* at \*38.

<sup>59</sup> RESTATEMENT (SECOND) OF CONTRACTS § 157 com. b (1981).

<sup>60</sup> 2008 U.S. Dist. LEXIS 30637 at \*38.

<sup>61</sup> *Id.* at \*39-41.

The effective incorporation of the UPS Tariff into the agreement between Feldman and UPS was in doubt for several reasons. First, there was no evidence that the I-Ship computer terminal was connected to the internet. Feldman was required to click a button labeled “Print,” and above that button the words “Terms of Service” were hyperlinked. But the hyperlink did not take the customer to the actual terms, rather, it took that customer to a screen that gave the web address for the site at which he could find the UPS Tariff. It also informed him that he could acquire the tariff from the customer service representative. There was no evidence that Feldman could read the terms of service on that computer; there was also no evidence that the Tariff was available at the counter.<sup>62</sup>

In addition, the button that Feldman was required to click read “Print,” not “Accept” or “Agree,” and thus, according to the court, might not have given him adequate notice that he was agreeing to contract terms.<sup>63</sup>

The *Feldman* court’s analysis of incorporation by reference is simple and correct: one is bound by incorporated terms when one has notice of them. The court distinguished the facts in *Feldman* from another case involving UPS and a very expensive diamond ring, *Treiber & Straub v. UPS*,<sup>64</sup> which we discussed last year.<sup>65</sup> In *Treiber*, the plaintiff

---

<sup>62</sup> *Id.* at \*44-49.

<sup>63</sup> *Id.* at \*51-52.

<sup>64</sup> 474 F.3d 379 (7<sup>th</sup> Cir. 2007).

shipped the ring using the UPS web site, not an in-store kiosk. Both the UPS Tariff and the Terms of Service could be accessed through links on the UPS web site, so the plaintiff had notice of them and was thus bound by them.<sup>66</sup>

*Manasher v. NECC Telecom*<sup>67</sup> is another case in which the court refused to find that terms on a web site were incorporated into an agreement by reference. Plaintiffs were customers of defendant telecommunications company. After being charged fees to which they claim they did not agree, plaintiffs sued. Defendant moved to compel arbitration, claiming that plaintiffs had agreed to arbitrate all disputes arising out of their agreement with defendant.

The arbitration clause could be found on defendant's web site. Plaintiffs did not register for their phone service on the website; rather, they did so over the phone. After their phone service began, plaintiffs received an invoice. Five statements appeared on the second page of the invoice; one of these statements was "'NECC's Agreement 'Disclosure and Liabilities' can be found online at [www.necc.us](http://www.necc.us) or you could request a copy by calling us at (800) 766 2642."<sup>68</sup> The "Disclosure and Liabilities" contained the arbitration clause.

---

<sup>65</sup> Moringiello & Reynolds, *2007 Survey* at 220-221.

<sup>66</sup> *Id.*

<sup>67</sup> *Manasher v. NECC Telecom*, No. 06-10749, 2007 U.S. Dist. LEXIS 68795 (E.D. Mich., Sept. 18, 2007)

<sup>68</sup> *Id.* at \*4-5.

Defendant argued that the invoice's mention of the "Disclosure and Liabilities" was sufficient to incorporate that document, and therefore the arbitration clause, into its agreement with plaintiffs. The court disagreed, distinguishing the facts of *Manasher* from those of two other cases we have discussed in the past, *Treiber & Straub v. United Parcel Service*<sup>69</sup> and *Hugger-Mugger, LLC v. Netsuite*.<sup>70</sup> The court's analysis of the issue started with two basic contract rules: one, a party can be bound to contract terms whether he reads them or not, and two, if a written contract makes reference to another writing for the purpose of incorporating the terms of that writing into the contract, the terms in the other writing are incorporated by reference.<sup>71</sup>

The court held that the web site terms were not incorporated into the parties' agreement because the defendant did not give the plaintiff sufficient notice of those terms. Unlike the plaintiff in *Treiber & Straub*, the *Manasher* plaintiffs had not been required to click their agreement to the terms presented on the web site (in *Treiber*, the online terms and conditions referenced another set of online terms).<sup>72</sup> Courts often find that a click signals to the web site user that she should read the terms to which she is signifying her agreement. Unlike the written agreement in *Hugger-Mugger*, the invoice in *Manasher* did not clearly indicate that defendant intended that the terms of the

---

<sup>69</sup> 474 F. 3d 379 (2<sup>nd</sup> Cir. 2007).

<sup>70</sup> No. 2:04-CV-592 TC, 2005 U.S. Dist. LEXIS 33003 (D. Utah Sept. 12, 2005).

<sup>71</sup> 2007 U.S. Dist. LEXIS 68795 at \*7.

<sup>72</sup> *Id.* at \*9 – 10.

“Disclosure and Liabilities” be incorporated into any agreement between plaintiff and defendant.<sup>73</sup> A mere mention of a web site in another document, without any indication that the web site contains binding contract terms, does not make those web site terms part of the contract. This is the correct result.

*Greer v. 1-800-flowers.com*<sup>74</sup> presents a different incorporation by reference scenario. Plaintiff ordered flowers for his girlfriend from defendant. Unfortunately, defendant sent a “Thank You” note for the order to plaintiff’s home, where it was opened by his wife. His wife then called 1-800-flowers and asked for the proof of purchase. Defendant obliged, sending her not only the receipt for the flowers but also a copy of the message on the card that plaintiff sent with the flowers. Naturally, plaintiff sued, alleging a breach of defendant’s Privacy Policy.<sup>75</sup>

Defendant moved to dismiss the complaint, arguing that the court in Texas did not have venue. Indeed, defendant’s Terms of Use contained a forum selection clause mandating that all claims be filed in New York. Plaintiff, however, had ordered his girlfriend’s flowers over the phone, not through the web site.<sup>76</sup>

---

<sup>73</sup> *Id.* at \* 13-15.

<sup>74</sup> No. H-07-2543, 2007 U.S. Dist. LEXIS 73961 (S.D. Tex., Oct. 3, 2007).

<sup>75</sup> 2007 U.S. Dist. LEXIS 73961 at \*2. Plaintiff sought to recover damages in connection with his divorce.

<sup>76</sup> *Id.* at \*1-3.

How can a telephone order be governed by the seller's website Terms of Use? Plaintiff admitted in his complaint that he "was referred to the website for information regarding defendant's Privacy Policy."<sup>77</sup> The Privacy Policy, in turn, states that it is part of the Terms of Use. The forum selection clause appeared not in the Privacy Policy, but in the Terms of Use.

The court dismissed plaintiff's complaint, holding that he was bound by the forum selection clause in the Terms of Use. Consistent with the two cases discussed above, notice of the clause was key to the courts' reasoning. Here, the telephone representative referred plaintiff to the web site's Privacy Policy. The Privacy Policy, in turn, clearly stated, "on the first page and in all capital letters,"<sup>78</sup> that it was part of the Terms of Use. In addition, the court noted that a link to the Terms of Use was displayed on the left-hand side of the Privacy Policy.<sup>79</sup>

---

<sup>77</sup> *Id.* at \*5-6.

<sup>78</sup> *Id.* at \*5.

<sup>79</sup> *Id.* at \*7. In the Privacy Policy that appears on the 1-800-flowers.com web site today, the reference to the Terms of Use is not in all capital letters, but it is at the top of the Privacy Policy and the words "Terms of Use" are hyperlinked. There is also, as the opinion states, a link to the Terms of Use on the left-hand side of the Privacy Policy. *See* 1-800-flowers.com Privacy Policy,

<http://ww22.1800flowers.com/template.do?id=template8&page=9005> (last visited June 16, 2008).

The plaintiff was bound by the forum selection clause because he had notice of it. Despite some unfortunate language in the opinion that appears to hold that the plaintiff was bound by the Terms of Use simply because he accessed the site,<sup>80</sup> the court was right on the incorporation by reference issue. Plaintiff had notice of the Privacy Policy because the telephone representative referred him to it. The Privacy Policy, in turn, clearly indicated that it was part of another document, the Terms of Use.

#### IV. Defenses to Breach of Contract

##### *A. Infancy*

Our law generally does not permit minors – those under 18 – to enter into contracts. The plaintiffs in the anti-plagiarism software case, *iParadigms*,<sup>81</sup> however, were just such “infants,” and they invoked the well-known rule that an infant can void a contract upon attaining majority. Thus, their argument ran, they were not bound by the terms of the Clickwrap Agreement, even if they had assented to it.

---

<sup>80</sup> *Id.* at \*5 (“.

<sup>81</sup> *AV v. iParadigms*, 544 F. Supp. 2d 473 (E. D. Va. 2008), discussed at nn. \_\_\_\_\_, *supra*

The court had no trouble rejecting that argument. It is equally hornbook law<sup>82</sup> that the minor cannot accept the benefits of the contract without also bearing its burdens: “Plaintiffs cannot use the infancy defense to void their contractual obligations while retaining the benefits of the contract.”<sup>83</sup> Because plaintiffs had benefitted from their use of the defendant’s product, (they had, after all, satisfied their school paper requirements), they must accept any burdens imposed by the Clickwrap Agreement.

### ***B. The Effect of Third Party Behavior.***

Although we typically think of contract problems as involving only the (usually) two contracting parties themselves, strangers to the contract can affect the performance of the agreement. That involvement can take many forms, of course; two in our sample were of special interest because they raise issues unique to internet contracting.

The first and most bizarre of the three is *Doe v. Sexsearch*.<sup>84</sup> Plaintiff<sup>85</sup> there had joined an online dating service whose members posted personal profiles and photos.

---

<sup>82</sup> JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS, § 8.4 (5<sup>th</sup> ed. 2003) (“The infant is not entitled to enforce portions that are favorable, and at the same time disaffirm other portions that are burdensome”).

<sup>83</sup> 544 F. Supp. 2d at 481.

<sup>84</sup> 502 F. Supp. 2d 719 (N.D. Ohio 2007).

<sup>85</sup> Unfortunately, we do not know Plaintiff’s real name—the court let him file as a John Doe plaintiff.

Plaintiff made contact with a woman online and eventually arranged to meet her. After they had sex, he learned that she was only fourteen years old—not the eighteen promised on her online profile. Plaintiff later was charged with three felonies concerning sexual misconduct with a minor. Naturally, he sued Sexsearch alleging, among other things, that it had breached its contract with him by permitting a fourteen-year old to become a member of Sexsearch.<sup>86</sup> This argument lost quickly.

Can an online service provider be held liable for content posted by one of its members? The Communications Decency Act (“CDA”) says “no,” so long as the service provider is acting solely as an intermediary, and *not* as a content provider itself.<sup>87</sup> The court held that Sexsearch was an interactive computer provider and not an information content provider and, therefore, it was protected by § 230; it had provided the information supplied by the minor, but had not edited it. The *Sexsearch* opinion emphasizes the broad scope of the CDA, explaining that it immunizes service providers from all civil liability for content provided by others, *including* liability for breach of contract.<sup>88</sup>

The Terms and Conditions posted by Sexsearch clearly stated that it assumed no responsibility for the accuracy of the information on the individual provided by other users. Moreover, as a member himself, plaintiff knew that there was no age-verification process. Plaintiff was fully aware, in short, that he could not rely on the information

---

<sup>86</sup> 502 F. Supp. 2d at 723.

<sup>87</sup> 47 U.S.C. § 230; *Sexsearch*, 502 F. Supp. 2d at 724.

<sup>88</sup> 502 F. Supp. 2d at 727.

contained in the profile. The breach of contract claim failed, therefore, despite the fraud of the minor.

Bad third party behavior was also an issue in *People v. Direct Revenue*<sup>89</sup>. Consumers had signed up online to receive computer services from Direct Revenue. In return, the consumers had agreed to let Direct Revenue generate pop-up ads on the consumer's computer. Direct Revenue made money by selling the pop-up ads to third parties. The State of New York alleged that Direct Revenue had engaged in deceptive practices because the third-party ad distributors were installing software without the consent of the consumer.

The court treated the problem as one of routine agency law. The distributors were independent agents; Direct Revenue had not promised to control the work of the distributors. Even so, Direct Revenue had required the distributors to receive consumer consent and not to represent themselves as Direct Revenue's agents. Under these circumstances, Direct Revenue could not be found responsible for the bad practices of the third parties.<sup>90</sup>

---

<sup>89</sup>No. 401325/06, 2008 NY Misc. LEXIS 2195 (N.Y.Sup. Ct., March 12, 2008). One of the interesting aspects of this case is that it took the State 16 months to conduct 29 "tests" of websites. *Id.* at \*4. What could possibly have taken so long?

<sup>90</sup>The court also rejected the notion that Direct Revenue had ratified the misconduct because it "it took significant steps to modify...." the bad procedures when it learned of them. *Id.* at \*15.

### *C. Unconscionability*

One defense commonly raised by individuals aggrieved by the application of online contract terms is unconscionability. In some states, to prevail on that defense, the aggrieved individual must show that the contract terms are both procedurally and substantively unconscionable, in others, a showing of either procedural or substantive unconscionability will suffice.<sup>91</sup> Courts will find that contract terms are procedurally unconscionable when the aggrieved party lacks meaningful choice, and will find that terms are substantively unconscionable when the terms are extremely one-sided in that they unduly restrict the remedies of the weaker party or unduly expand the remedies of the stronger party.<sup>92</sup> Three cases in this year's survey discuss unconscionability.<sup>93</sup> Because the procedural unconscionability inquiry focuses on the presentation of the terms, an issue that addresses facts unique to electronic contracting, we devote most of our discussion to procedural unconscionability.

---

<sup>91</sup> JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS*, § 96 b. (4<sup>th</sup> ed. 2001).

<sup>92</sup> JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* §§ 4-3, 4-4 (5<sup>th</sup> Ed. 2000).

<sup>93</sup> *Doe v. Sexsearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007); *Mazur v. eBay, Inc.*, No. C 07-03967, 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. Mar. 4, 2008); *Brazil v. Dell, Inc.*, No. C-07-01700 RMW, 2007 U.S. Dist. LEXIS 59095 (N.D. Cal. Aug. 3, 2007).

In discussing judicial approaches to unconscionability in online contracts, it is important to separate the cases applying California law from those applying the law of other states. In California, the individual seeking to escape application of the allegedly unconscionable clause must prove both procedural and substantive unconscionability.<sup>94</sup> Those claims are analyzed on a sliding scale; in other words, the more substantively unconscionable a court finds a term to be, the less procedural unconscionability it will require.<sup>95</sup> This is a particularly important point for internet businesses. As two of our cases, *Mazur v. eBay* and *Brazil v. Dell, Inc.* illustrate, the fact that terms are non-negotiable can satisfy the standard for procedural unconscionability if the substance of the challenged term is offensive enough.

In both *Mazur* and *Brazil*, the plaintiffs were challenging an arbitration clause. California courts abhor such clauses because of California's strong public policy against class action waivers. Because of this policy against class action waivers, California courts will find an arbitration clause to be unconscionable unless "the arbitration remedy contains a 'modicum of bilaterality.'"<sup>96</sup> As a result, it seems that mandatory arbitration clauses presented in online terms will *always* be held to be unconscionable in California,

---

<sup>94</sup> *Mazur v. eBay*, 2008 U.S. Dist. LEXIS 16561 at \*10; *Brazil v. Dell, Inc.*, 2007 U.S. Dist. LEXIS 59095 at \*21.

<sup>95</sup> *Mazur v. eBay*, 2008 U.S. Dist. LEXIS 16561 at \*11; *Brazil v. Dell, Inc.*, 2007 U.S. Dist. LEXIS 59095 at \*21.

<sup>96</sup> *Ting v. AT&T*, 319 F. 3d 1126, 1149 (9<sup>th</sup> Cir. 2003), *quoting* *Armendariz v. Found. Health Psychcare Servs., Inc.* 6 P. 3d 669 (Cal. 2000).

regardless of how the terms are presented, because the offeree has no opportunity to negotiate the terms.

Both of the California cases discussing unconscionability support this conclusion. The court in *Mazur*, in its substantive unconscionability analysis, found the arbitration clause at issue to be “especially egregious.”<sup>97</sup> It then had to find that the clause was procedurally unconscionable in order to rule that the clause was invalid.

To determine whether the arbitration clause was procedurally unconscionable, the court in *Mazur* focused on two factors, oppression and surprise. A court will find oppression when there is such inequality of bargaining power that the weaker party is deprived of a “meaningful opportunity to negotiate the terms of the contract.”<sup>98</sup> Because the contract in *Mazur* was a non-negotiable standard form, the court found oppression.

The court also found surprise in *Mazur*. According to the court, surprise exists when “the terms to which the parties allegedly agreed are ‘hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.’”<sup>99</sup> In its analysis of surprise, the court discussed the presentation of the terms. The terms at issue were those of Hot Jewelry Auctions (“HJA”), which conducts its auctions via eBay. The plaintiff in *Mazur* was automatically presented with these terms prior to bidding in HJA’s auction,

---

<sup>97</sup> *Mazur v. eBay*, 2008 U.S. Dist. LEXIS at \*21.

<sup>98</sup> *Id.* at \*13.

<sup>99</sup> *Id.*, quoting *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4<sup>th</sup> 1519, 1532 (1997).

and it appears that she was required to click her agreement with them.<sup>100</sup> The terms were displayed in a scroll-box without any paragraph, section, or heading breaks. Because there was no visible separation of paragraphs or sections, the court described the presentation as a “single-spaced massive block of impenetrable text.”<sup>101</sup> As a result, the court found both oppression and surprise. This finding, coupled with the court’s finding that the mandatory arbitration clause was particularly onerous, led the court to invalidate the arbitration provision.

Internet vendors should be discouraged from presenting terms in the format described in *Mazur*. A lengthy set of terms with no paragraph breaks arguably does not give adequate notice of important contract terms. The next case, *Brazil v. Dell, Inc.*<sup>102</sup> illustrates that no matter how clearly online terms are presented, a California court will strike down as unconscionable an arbitration clause contained in them.

*Brazil* involved the Dell Terms and Conditions of Sale, an agreement that we have discussed in other surveys.<sup>103</sup> The plaintiffs in *Brazil* bought computers from Dell’s web site. Every page of the Dell ordering process contains a hyperlink to these terms and a paper copy of the terms is shipped with every computer. In addition, before completing a

---

<sup>100</sup> *Id.* at \*2.

<sup>101</sup> *Id.* at \*14.

<sup>102</sup> No. C-07-01700 RMW, 2007 U.S. Dist. LEXIS 59095 (N.D. Cal. Aug. 3, 2007).

<sup>103</sup> Moringiello & Reynolds, *2005 Survey* at 436-438; Moringiello & Reynolds, *2006 Survey* at 204-205.

purchase online, the purchaser must click his agreement to the terms. The first paragraph of the terms, which appears in all capital letters, directs the reader to read the document carefully and warns the reader that the terms contain a dispute resolution clause.<sup>104</sup>

In analyzing whether the arbitration clause was procedurally unconscionable, the court explained that a clause could be procedurally unconscionable if the plaintiff proved oppression *or* surprise.<sup>105</sup> The court then appeared to find neither. While the contract was one of adhesion, two facts mitigated the oppressiveness of the terms. First, other manufacturers offered similar products, so the plaintiffs had the choice to buy from sellers other than the defendant. Second, Dell's Return Policy allowed a purchaser who did not agree with the terms to return the computer.<sup>106</sup> Therefore, the court stated that "the oppression prong of the procedural unconscionability inquiry is not *necessarily* met."<sup>107</sup>

The arbitration clause also did not satisfy the surprise prong. The plaintiffs were clearly notified of the existence of the terms, they were required to click their agreement with them, and the terms warned the plaintiffs, in conspicuous type, that an arbitration clause was included.<sup>108</sup>

---

<sup>104</sup> Brazil v. Dell, Inc., 2007 U.S. Dist. LEXIS at \*3-5.

<sup>105</sup> *Id.* at \*13.

<sup>106</sup> *Id.* at \*14.

<sup>107</sup> *Id.* at \*14-15 (emphasis added).

<sup>108</sup> *Id.*

If there's no procedural unconscionability because the terms were clearly presented and the buyers had the option of returning their computers, the arbitration clause is valid, right? Not in California. The court never said that terms did not meet the oppression prong of the procedural unconscionability test, it said that the oppression prong was not *necessarily* met. Because the court found the class action waiver to be “considerably” substantively unconscionable,<sup>109</sup> it required very little procedural unconscionability. Because the arbitration clause was “a contract of adhesion imposed upon the plaintiffs by a party with superior bargaining power,” the court found it to be procedurally unconscionable.<sup>110</sup> As a result, the court refused to enforce the arbitration clause. The lesson? No matter how clearly an internet vendor presents its terms to consumer buyers, if those terms are non-negotiable and contain a mandatory arbitration clause, the arbitration clause will be unenforceable in California.

Unconscionability was also raised by the plaintiff in *Doe v. Sexsearch*.<sup>111</sup> Plaintiff in that case made several arguments in support of his unconscionability claim. First, he argued that defendant required him to agree to “terms and conditions that contained no guarantee Defendants would or could perform their contractual promises.”<sup>112</sup> He also

---

<sup>109</sup> *Id.* at \*22.

<sup>110</sup> *Id.*

<sup>111</sup> 502 F. Supp. 2d 719 (N.D. Ohio 2007).

<sup>112</sup> *Id.* at 723.

argued that the limitation of liability clause contained in the terms was unreasonably favorable to defendants.<sup>113</sup>

Ohio law governed the Sexsearch terms. Ohio, like California, requires courts to find both procedural and substantive unconscionability before invalidating a contract clause as unconscionable.<sup>114</sup> In *Sexsearch* the court found neither. The plaintiff was not able to negotiate the terms of the agreement, but that fact alone did not establish procedural unconscionability. The court focused on whether plaintiff had a reasonable opportunity to understand the terms and concluded that he did because the plaintiff had unlimited time to read the terms. In addition, relying on *Hubbert v. Dell Corp.*,<sup>115</sup> the court found that the terms were sufficiently conspicuous because the terms were “highlighted in bold, capital letters . . .with hyperlinks to highlight some of the more important terms.”<sup>116</sup> Because the court found no procedural unconscionability, the terms were enforceable.

## V. Statutory Law

Case law provided the overwhelming support for the decisions covered in this year’s report. Statutory law involving e-commerce was discussed seriously in only one

---

<sup>113</sup> *Id.* at 724.

<sup>114</sup> *Id.* at 734.

<sup>115</sup> 835 N.E. 2d 113 (Ill. Ct. App. 2005), *appeal denied* 844 N.E. 2d 965 (Ill. 2006).

<sup>116</sup> 502 F. Supp. 2d at 735.

case. That case was *Doe v. Sexsearch*,<sup>117</sup> where a user of a dating service ended up in criminal court for having sex with a minor he had met online. As we discussed in Part IV. C. above, the operator of the internet dating service protected from liability for the minor's content under the Communications Decency Act.

The only other federal statute<sup>118</sup> to receive any discussion was the Computer Fraud and Abuse Act ("CFAA").<sup>119</sup> Plaintiffs raise the CFAA in many internet contract cases, because the CFAA punishes unauthorized access to computers. If a defendant exceeds the authority granted in the online terms of use, she has arguably accessed the computer without authorization for the purpose of the CFAA. In two cases previously discussed, *A.V.* and *Southwest*, the court found that insufficient damages had been alleged by Plaintiff to satisfy a condition for application of the CFAA. What is interesting about these two references is the cavalier dismissal of the CFAA, a statute that had raised much academic concern when adopted.<sup>120</sup> Perhaps the courts are now ready to limit the broad sweep of the CFAA.

---

<sup>117</sup> 502 F. Supp. 2d 719 (N.D. Ohio 2007).

<sup>118</sup> Litigants in these cases sometimes raised questions arising under state statutory law. We do not discuss those questions in this article.

<sup>119</sup> 18 U.S.C. § 1030.

<sup>120</sup> See, e.g., Christine D. Galbraith, *ACCESS DENIED: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet Websites*, 63 MD. L. REV. 320 (2004).

## **VI. Conclusion**

Judges trained in the common law rarely, perhaps, never face novel problems. Unusual problems are handled by analogy. There may be some stumbling at first, as the courts learn the new fact settings. But the results soon will tie in nicely with the old law. The law of e-commerce illustrates this nicely. After some early forays into a separate set of legal principles for electronic transactions, it is now clear that common law rules fit them very nicely. An offeree who “signs” an agreement by hitting the “I accept” button is bound to its terms just as much as will someone who signs a paper contract. Repeat and sophisticated players will be more likely to be bound by more ambiguous forms of assent than will innocent ones. Otherwise applicable concepts such as agency and unconscionability will play their normal roles. The law of e-commerce, in other words, has matured.