

6-1-2000

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### Recommended Citation

Mark E. Budnitz, *Consumers Surfing for Sales In Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 GA. ST. U. L. REV. (2000).

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# GEORGIA STATE UNIVERSITY LAW REVIEW

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VOLUME 16

NUMBER 4

SUMMER 2000

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## CONSUMERS SURFING FOR SALES IN CYBERSPACE: WHAT CONSTITUTES ACCEPTANCE AND WHAT LEGAL TERMS AND CONDITIONS BIND THE CONSUMER?

Mark E. Budnitz<sup>†</sup>

### INTRODUCTION

Consumer sales on the Internet reached an all-time high during the December 1999 holiday shopping season.<sup>1</sup> Most likely, consumers and merchants were unaware that these millions of sales transactions took place in the context of legal uncertainty. It would be unremarkable if this uncertainty involved marginal legal issues, involved atypical transactions, or occurred under unusual circumstances. Given the recent vintage of electronic commerce (e-commerce), it is inevitable that some legal questions will arise. The legal issues discussed in this Article, however, involve the most fundamental elements

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1. *See Online Shopping Sales Up 300%*, ATLANTA J. & CONST., Dec. 30, 1999, at E4 (reporting that online shopping sales between Nov. 20, 1999 and Dec. 19, were 300% higher than during the same period in 1998; the average purchase increased from \$55.50 to \$60); *Net May Be Making Old Economic Measures Obsolete*, ATLANTA J. & CONST., Dec. 28, 1999, at D5 (reporting that consumers placed 36 million orders valued at \$3.35 billion from Nov. 26, 1999 to Dec. 26, 1999, compared to 8.4 million orders worth \$730 million during the same period in 1998).

of sales transactions. These include: How are contracts formed on the Worldwide Web? What constitutes the consumer's acceptance of the seller's offer? What are the terms and conditions of the contract? What consumer conduct manifests the consumer's agreement to be bound? When a consumer submits her order to a Web seller, does that constitute the consumer's acceptance of the seller's offer, or is the consumer making the offer? If the latter has occurred, what constitutes the seller's acceptance? If a contract has been formed, by what terms and conditions is the consumer bound?

This Article will explore these questions by contrasting the approaches in the Second Restatement of Contracts,<sup>2</sup> current Article 2 of the Uniform Commercial Code,<sup>3</sup> the latest draft of Revised Article 2,<sup>4</sup> and the Uniform Computer Information Transactions Act (UCITA).<sup>5</sup> A survey<sup>6</sup> (the "Survey") of Web shopping sites and the mechanics of Web shopping show that significant differences exist between Web shopping and other types of sales transactions. An analysis of these extant and proposed statutes demonstrates that in its current form, Article 2, written during the 1950s, is inadequate because it fails to address many issues that arise in Web-based consumer sales. This problem has been perpetuated because the Revised Article 2 essentially repeats the provisions of present law and offers little clarity on this issue. This Article focuses on the sale of goods, which is governed by contract law and Article 2. UCITA, however, does not apply to such transactions.<sup>7</sup> Nevertheless, the Article examines UCITA for two reasons. First, UCITA does address some of the issues raised by the Survey in the context of licenses. Second, UCITA may have an impact on Article 2 transactions because it provides guidance on how the law should deal with comparable transactions.<sup>8</sup> Unfortunately,

2. See RESTATEMENT (SECOND) OF CONTRACTS § 1 to 177 (1981) [Hereinafter Restatement].

3. U.C.C. art. 2 (1999).

4. *Revision of Uniform Commercial Code Article 2-Sales, Reporter's Interim Draft For Comment* (Nov. 1999) <<http://www.law.upenn.edu/bll/ulc/ucc2/ucc21199.HTM>> [Hereinafter Rev. art. 2].

5. Uniform Computer Information Transactions Act (1999) <<http://law.upenn.edu/bll/ulc/ucita/cita10st.htm>> [Hereinafter UCITA].

6. See *supra* Part I.C.

7. See UCITA § 103(b)(1) (1999).

8. Elizabeth S. Perdue, *Challenges of Contracting On-line With a 'Point and Click,'*

UCITA fails to clearly answer the questions the Survey raises or to meet the needs of consumers. Finally, little case law exists, and the cases that have been decided do not adequately address the issues that arise when consumers shop online.

Because of the absence of adequate statutes and case law, this Article offers two proposals for revising Article 2. The first contains provisions designed to clarify formation of contracts in consumer Web sales transactions. The second proposal deals with what terms and conditions bind consumers who shop on the Web. These proposals are designed to fill the gap in the law and are tailored to answer the fundamental questions raised above.

## I. CONTRACT FORMATION

### *A. Introduction*

The Federal Trade Commission and others have warned consumers about the risks involved in purchasing goods and services online.<sup>9</sup> Consequently, it is important for consumers to know what types of conduct, on and off the Web, will form a binding contract. As discussed below, it is highly unlikely that consumers could have this knowledge in today's online environment. Unless statutory provisions are enacted to clarify matters, it is not at all clear how acceptance occurs, when it occurs, or even which party is required to do the accepting.

### *B. The Restatement of Contracts and the Typical Online Shopping Experience*

The *Restatement of Contracts* lays out the fundamentals of what the law requires for the consumer's acceptance. "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange."<sup>10</sup> "Manifestation of mutual assent . . . requires that each party

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MULTIMEDIA & WEB STRATEGIST, Nov. 1997, available in 1997 WL 4 No.1 MMEDWST 1.

9. See *Federal Trade Commission* (visited Jan. 13, 2000) <<http://www.ftc.gov>>; *Safeshopping.org* (visited Jan. 13, 2000) <<http://www.safeshopping.org>>; *Better Business Bureau* (visited Jan. 13, 2000) <<http://www.bbbon-line.org>>.

10. RESTATEMENT § 17(1).

either make a promise or begin or render a performance.”<sup>11</sup> “The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.”<sup>12</sup> “The conduct of a party is not effective as a manifestation of . . . assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”<sup>13</sup> If a party’s conduct manifests assent but he did not in fact assent, the resulting contract may be avoidable because of mistake “or other invalidating cause.”<sup>14</sup> “An offer may . . . require acceptance to be made by an affirmative answer in words, or by performing . . . a specified act.”<sup>15</sup>

In the typical online transaction, the consumer begins at the seller’s home page, clicks on links that take her to pages containing various items for sale, selects the items she wants by clicking her mouse as indicated, and places each item into her virtual shopping cart. She then proceeds to the virtual check-out counter where she is asked to type information onto an online order form.<sup>16</sup> The information typically includes her name, address, and credit card account number. She is also asked her preference for how the goods will be shipped.<sup>17</sup> The seller may ask her to register and may also ask her to choose a password.<sup>18</sup> At some point the Web page asks the consumer to click on a “button,” which transmits the information from the consumer’s computer to the seller’s Web server. That button may be labeled “Submit”<sup>19</sup> or may contain some other designation. As discussed below, there is no uniformity as to how the buttons are labeled. At some later time, the seller may send the consumer an e-mail

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11. *Id.* § 18.

12. *Id.* § 19(1).

13. *Id.* § 19(2).

14. *Id.* § 19(3).

15. *Id.* § 30(1).

16. For the basis of this description, see Walter A. Effross, *The Legal Architecture of Virtual Stores: Worldwide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1325 (1997).

17. See Lyle V. Harris, *Clock Shopping: We Put Malls, Web, Catalogs to the Test*, ATLANTA J. & CONST., Dec. 7, 1999, at F1, F5.

18. See Effross, *supra* note 16, at 1327.

19. See *id.* For example, the eToys Web site labels its button “submit order.” See *eToys, placing an order* (visited Dec. 15, 1999) <<http://www.eToys.com>>.

confirming the order.<sup>20</sup> Because a contract is formed through the consumer's various clicks on the mouse as she proceeds through various steps in the online shopping process, these agreements are known as "click-through" contracts.<sup>21</sup>

The consumer's shopping experience may not be without distracting incidents. For example, if the consumer chooses to buy several items, she may forget which ones she has selected, especially if the seller's Web site is not well-organized and it takes considerable time to navigate through various screens to find desired goods.<sup>22</sup> In addition, the consumer may have changed her mind and discarded some items from her shopping cart upon finding something better, or upon discovering—after considerable searching—that an item was not offered<sup>23</sup> or was not available.<sup>24</sup> In the middle of a search for an item, the consumer may be confronted with unsolicited advertisements.<sup>25</sup> When completing the forms at checkout, the consumer may be disturbed by certain personal inquiries, such as the consumer's gender.<sup>26</sup>

### *C. A Survey of Web Shopping Sites*

For purposes of supplying an empirical basis for a consideration of contract formation,<sup>27</sup> the Author reviewed several popular Web shopping sites.<sup>28</sup> In considering the

20. Effross, *supra* note 16, at 1327; Harris, *supra* note 17, at F5.

21. Margaret Jane Radin & Daniel L. Appelman, *Doing Business in the Digital Era: Some Basic Issues*, 570 PRAC. L. INST. 51, 77 (1999).

22. See *Catalogs Take to the Web*, CONSUMER REP., Nov. 1999, at 23, 24 ("You could drive to the mall and back again in the time it takes to explore the product offerings and find what you can afford at some of the web sites we visited.").

23. Harris, *supra* note 17, at F5 (noting that one Web site offered several Star Wars action figures, but not the one the shopper desired).

24. Frances Katz, *Holiday Cybershopping Stampede Brings Web Woes*, ATLANTA J. & CONST., Dec. 6, 1999, at D1.

25. See Harris, *supra* note 17, at F5.

26. See *id.*

27. The Survey results were used for other purposes as well. See *infra* text accompanying notes 151-208.

28. Sites were chosen on a more or less random basis except that the selection purposely included both Web-only merchants, such as amazon.com, and merchants with Web sites and physical stores, such as Macy's. The former are known as "pure e-tailers," and the latter are referred to as "clicks-and-mortar" businesses." Karl Taro Greenfeld, *Clicks and Bricks*, TIME, Dec. 27, 1999. A variety of types of retailers were chosen: booksellers and toy sellers, higher-end department stores such as Macy's, and the lower-

descriptions that follow, it is instructive to compare them with an illustration of an agreement to the terms of a license that appears in the draft Reporter's Comments to UCITA.

The registration screen for NY Online prominently states: "Please read the *license*. It contains important terms about your use and our obligations with respect to the information. If you agree to the license . . . , indicate this by clicking on the "I agree" button. If you do not agree, click "I decline." The on-screen buttons are clearly identified. The underlined text is a hypertext link which, if selected, promptly displays the license.

A party that indicates "I agree" manifests assent to the license and adopts its terms.<sup>29</sup>

In contrast to the above illustration, Walmart has the consumer "check out" by clicking on a button labeled "Complete" when she is finished shopping and has had the opportunity to review her selected items.<sup>30</sup> After clicking on the "Complete" button, a page that permits the consumer to verify or change her delivery address and select a payment method appears. She then clicks on a button labeled "Proceed." That transmits her order. Walmart then follows up with an e-mail "confirming transmission and receipt of your order." This procedure raises two questions. First, does the seller intend that clicking on "Complete" constitutes acceptance? Or does this amount to the consumer's offer with the seller's e-mail confirmation constituting acceptance? Second, if the seller intends that the consumer's clicking on "Complete" amounts to acceptance, has the consumer's conduct amounted to the legally required manifestation of assent? To paraphrase the Restatement, does the consumer know or have reason to know that the seller may infer from her conduct (clicking on a button labeled "Complete") that she assents?<sup>31</sup> A subsidiary question is whether it is correct to focus solely on the button's label, or whether we should ask what the consumer should have reason

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end Walmart and K-Mart. The selection was confined to popular sites and what are believed to be substantial and legitimate firms rather than marginal or mom-and-pop companies. Auction sites were not included.

29. UCITA § 112, cmt. 5, illus. 1 (1999).

30. See *Walmart, Let's Check Out, Online* (visited Dec. 15, 1999) <<http://www.walmart.com>>.

31. See RESTATEMENT § 19(2).

to know from all of the surrounding circumstances. Even if we assume that one should look at all the circumstances, in a new environment like the Web, it is not clear what a consumer would have "reason to know." Finally, if it is not even clear whether the seller intends that the act of clicking the button constitutes consumer acceptance or an offer, it obviously would be unfair to find that the consumer's conduct constitutes acceptance if the consumer never intended to accept.

The Lands' End site provides a "Send it in" button at the virtual checkout counter.<sup>32</sup> Although many consumers may not understand that "Send it in" constitutes acceptance, if the consumer clicks to one page on the site she is told: "When you're all through, click on the 'Send it in' button and the order will be submitted to us . . . . [Y]ou can reconsider your selections—right up [sic] the point when you've made a final decision and clicked on the 'Send it in' button."<sup>33</sup> Presumably, most consumers reading this page understand that by using the term "final decision" the site is explaining that clicking on the button constitutes acceptance. The question remains, however, whether consumers will ever find that explanation; to do so, they must click on the links that lead to the page containing the explanation.

Macy's provides a button labeled "Complete Order Online," which causes a screen to display the total of the order, including shipping costs.<sup>34</sup> The consumer then clicks on "Charge It" to complete the transaction. This process closely resembles an in-store transaction in which the consumer has selected the merchandise, has handed it to the clerk at the register, the clerk has rung up the total and asked the customer how he will pay for the goods.

Amazon.com tells the consumer: "Your order is not complete until you click here."<sup>35</sup> The consumer is directed by an arrow to click on a button labeled "Place Your Order." This site raises the question of whether placing an order constitutes accepting the

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32. See *Lands' End, Now you can order anything . . .* (visited Dec. 15, 1999) <<http://www.landsend.com>>.

33. *Id.*

34. See *Macy's, frequently asked questions* (visited Dec. 17, 1999) <<http://www.macys.com>>.

35. *amazon.com, Review and Submit Your Order--the Last Step!* (visited Dec. 17, 1999) <<http://www.amazon.com>>.



seller's offer or whether it is the consumer making an offer that requires the seller's acceptance. After the consumer places her order, amazon.com sends an e-mail confirmation. Arguably, that confirmation is the seller's acceptance.<sup>36</sup> If that is an accurate analysis, the consumer could withdraw her offer by notifying the seller before the seller sends the confirmation.<sup>37</sup>

Although amazon.com may be the site most commonly associated with Web shopping, eToys Inc. also operates a popular Web site.<sup>38</sup> When the consumer clicks to the checkout page, the screen displays the total amount of the order.<sup>39</sup> At that point, the consumer can still cancel her order.<sup>40</sup> If the consumer clicks on the button labeled "submit order," the site displays a page, which states: "confirming your order and giving you an Order Number . . . . We will also confirm your order via e-mail within 24 hours."<sup>41</sup> However, unlike amazon.com, eToys's "terms and conditions" page provides the following information:

The receipt of an e-mail order confirmation does not constitute the acceptance of an order or a confirmation of an offer to sell. eToys reserves the right, without prior notification, to limit the order quantity on any item and/or [sic] refuse service to any customer. Verification of information may be required prior to the acceptance of any order.<sup>42</sup>

These terms of the contract seem to provide that eToys does not consider the consumer's click on "submit order" an acceptance of the seller's offer because the clause states that it is the seller who is accepting the consumer's order but the e-mail is not the conduct which constitutes that acceptance. If the seller is the party accepting, the consumer must be the party making the offer. The terms and conditions make this unclear, however.

36. See U.C.C. § 2-207(1) (1999).

37. U.C.C. § 2-205 restricts a "merchant" from revoking a "firm offer." A consumer is not subject to this section because a consumer is not a merchant. See *id.* §§ 2-104(1), 2-205 (1999).

38. See *Hot e-shopping Sites Record Surge in Business*, ATLANTA J. & CONST., Dec. 17, 1999, at D2 (reporting that amazon.com and eToys led a 35% rise in Internet shopping traffic during the pre-Christmas week of Dec. 6, 1999).

39. See *etoys, placing an order* (visited Dec. 15, 1999) <<http://www.etoys.com>>.

40. See *id.*

41. *Id.*

42. *Id.*

The consumer's receipt of a confirmation "does not constitute . . . a confirmation of an offer to sell."<sup>43</sup> This may mean receipt of a confirmation is not a confirmation of the seller's offer to sell. Does this imply that some other conduct constitutes the seller's offer to sell? If that is true, what is that conduct, and when does it occur? If the seller intends that some other act constitutes the seller's offer, the seller both makes and accepts the offer. On the other hand, perhaps what is meant is that the consumer's receipt of the seller's confirmation is not confirmation of an offer to sell because the consumer is offering to buy, not the seller offering to sell.

Assuming the consumer makes the offer, the provision states that the seller's confirmation does not constitute the seller's acceptance. Acceptance apparently occurs at some later time. Presumably, acceptance occurs when the seller "performs" by shipping the goods.<sup>44</sup> However, it is not clear what happens in the interim or what determines acceptance. The final sentence of the provision might mean that during the period between the consumer's point and click and the seller's acceptance, the seller verifies the information that the consumer has submitted. If it verifies the information, the seller accepts the consumer's offer. On the other hand, the previous sentence contains very broad language, which seems to permit the seller to refuse to accept for any reason. It is not crucial for contract formation to be able to determine the moment when the contract was made.<sup>45</sup> Nevertheless, the uncertainty of the circumstances and timing of online contract formation on this site illustrate the confusion that exists in the world of consumer shopping on the Web.

Magazine City.net has buttons with labels even more explicit than the other sites, asking the consumer to choose between "Yes: Place Order," and "No: Do Not Order."<sup>46</sup> When the consumer clicks on the "Yes" button, her conduct appears to indicate that she has made a conscious choice to accept, especially since she has the choice to refuse to accept by clicking on the "Do Not Order" button. Nevertheless, even this

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43. *Id.*

44. *See* U.C.C. § 2-206(2) (1999).

45. *See id.* § 2-204(2).

46. *See Magazine City Order Form* (visited Jan. 14, 2000) <<http://www.magazinecity.net>>.

button labeling is not as explicit as the UCITA illustration. More importantly, it is not clear that clicking on the "Yes: Place Order" button actually results in acceptance because the seller allows the consumer to cancel her order within twenty-four hours.<sup>47</sup> One could argue, as the Seventh Circuit has done in a comparable transaction discussed below,<sup>48</sup> that providing the consumer a no-fault right to cancel without penalty means acceptance has not yet occurred and does not occur until expiration of the cancellation period.

The following questions arise from these shopping experiences and the *Restatement* rules: 1) Did the seller require the consumer to accept by an "affirmative answer in words, or by performing . . . a specified act"?<sup>49</sup> 2) Has there been the requisite manifestation of assent? 3) If there has been a manifestation of assent, was it in writing, by conduct, or by the failure to act? 4) How can the seller or a court determine whether the consumer intended to engage in conduct and knew or had reason to know that the seller might infer from his conduct that he accepted the seller's offer? 5) When did acceptance occur? 6) Even if the consumer intended to accept, and reasonably believed by the labeling on the button that the seller requested acceptance, does the consumer's conduct actually constitute an offer? 7) If the consumer made an offer, when and how did the seller accept?

It appears from the above description of the Web shopping experience that the acceptance procedure is a highly formalistic one in which the seller has required acceptance to be done in exactly the manner established in the checkout stage. Nevertheless, it is not clear how to apply the *Restatement* rules. While the seller requires the consumer to accept only in the manner set out on the Web checkout page, is acceptance being required by words, by a specified act, or by some combination of the two? The *Restatement*, naturally, had traditional transactions in mind, as evidenced by the examples it provides. The illustrations speak of acceptance by "signing on the dotted

47. See *id.* "We will prepay your order to the publishers within 24 hours, after which time the order will not be subject to cancellation." *Id.*

48. See *infra* text accompanying notes 74-81 discussing the *ProCD* case. However, that case can be distinguished in that it involved a situation where the consumer was not provided the terms of the contract until after he agreed to pay.

49. RESTATEMENT § 30(1).

line”<sup>50</sup> and of orally saying “I accept your offer.”<sup>51</sup> Arguably, the checkout forms require an affirmative answer in words by having the consumer type in her name, address, and credit card number, as well as by conduct requiring the consumer to click on the “submit” button. One could also reason that submitting personal information constitutes performance of a specified act. The significant point, however, is not whether Web shopping can fit neatly into the *Restatement’s* rules, but rather that Web shopping requires applying these rules to new circumstances.

Has the consumer manifested assent? That question cannot be answered unless we determine in what manner she may have manifested that assent. Arguably, by typing in her name, address, and credit card account number, the consumer is making an “affirmative answer in words.”<sup>52</sup> By making mouse clicks on the desired items and clicking on the “submit” button, she is “performing a specified act.”<sup>53</sup>

The fact that online shopping takes place under different circumstances becomes important because the *Restatement* requires that the consumer “intends to engage in the conduct and knows or has reason to know” the seller may infer from that conduct that the consumer assents.<sup>54</sup> The consumer may not realize that clicking on the “submit” button has the effect of finalizing the transaction by constituting her acceptance. She may believe that, in legal terms, she is merely being invited to make an offer and that clicking on the button simply means that she is submitting her order form for the seller’s review; if approved, she believes the seller will make an offer to which she is not obligated to accept. Professor Effross has found that it is not always clear that the seller is making an offer that requires the consumer’s acceptance, or whether the buyer’s response to the seller’s request for information is nothing more than the consumers’ offer to buy.<sup>55</sup>

The uncertain meaning of typing information on electronic forms and clicking a button is further illustrated if we ask when

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50. RESTATEMENT § 30, cmt. a, illus. 1.

51. *Id.* cmt. C, illus. 3.

52. *Id.* § 30.

53. *Id.*

54. *Id.* § 19(2).

55. See Effross, *supra* note 16, at 1331. Professor Effross illustrates the latter situation by quoting from a site’s conditional offer to sell. See *id.* at 1331 n.179.

the acceptance occurs.<sup>56</sup> Did the consumer accept when she clicked on the "submit" button, when the message was received by the seller's server, or when a seller's employee first noticed it and began to act upon it? If the seller promises to send an e-mail acknowledgment of the order, does acceptance become effective only upon the seller's sending or the consumer's receipt of that e-mail? In other words, is the consumer's acceptance conditional upon the sending or receiving of that e-mail? What if the seller sends the e-mail acknowledgment, but through no fault of the consumer she never receives it? A reasonable consumer's inability to answer such questions further illustrates the uncertainty surrounding the issue of whether the consumer has intended to engage in conduct manifesting assent. Even if the law were to provide clear rules, without disclosure of those rules on the Web site, consumers will remain in the dark.

The fact that the consumer may not realize the significance of clicking on the "submit" button also raises the possibility of mistake.<sup>57</sup> The Restatement provides that a contract may be avoidable if there is a mistake or "other invalidating cause."<sup>58</sup> Clicking on the "submit" button under the misapprehension that such conduct did not amount to formal acceptance may be considered a type of mistake. There may be other types of mistakes as well. For example, as a result of one or more of the distractions described above,<sup>59</sup> she may not realize exactly what

56. The discussion about the uncertainty of when acceptance occurred is not intended to suggest that the formation of a contract depends upon being able to pinpoint that exact moment. Both the *Restatement* and the U.C.C. reject that approach. See U.C.C. § 2-204(2) (1999); RESTATEMENT § 22(2). Rather, the discussion illustrates consumers' reasonable confusion about the significance of the actions they are required to take to complete an online transaction. The Uniform Electronic Transactions Act provides that, unless otherwise agreed, an electronic record is received when it enters the recipient's information processing system, even if it is never actually received by the recipient, and the recipient is not aware of it. See UNIF. ELECTRONIC TRANSACTIONS ACT § 15(b) & (e) (1999).

57. See Zachary M. Harrison, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907, 939 (1998) ("Although it is unlikely that a consumer in an article 2 transaction would accidentally pay for a product and take it home from the store, with an article 2B transaction all it takes is an accidental click on 'O.K.' to bind the consumer to the click-wrap terms.") Proposed Article 2B was the precursor to UCITA.

58. RESTATEMENT § 19(3).

59. See *supra* text accompanying notes 22-26.

she has accepted and will have ordered goods she thought she had discarded from her virtual shopping cart. Perhaps her finger stayed too long on the keyboard and she ordered eleven sets of one item when she meant to order one. In the latter two examples, the consumer would have intended to accept the seller's offer, but was mistaken as to exactly what she had accepted.<sup>60</sup> The common law of contracts has long recognized the doctrine of mistake.<sup>61</sup> Hopefully, parties to Web contracts and the courts will not have difficulty applying the doctrine to these new circumstances. The question arises, however, whether it would be better to enact legislation that would apply the doctrine at least to the major situations in which claims of mistake could arise. Such legislation could take into account the specific operational aspects of electronic commerce. Otherwise, the parties to e-commerce transactions will have to wait years until the appellate courts address such issues. Even then, the development of the doctrine in the online context will be lengthy and unpredictable because it will depend upon which particular situations happen to be litigated and appealed.

#### *D. U.C.C. Article 2*

Because Article 2 was drafted specifically to apply to transactions in goods, one might expect that it would provide further guidance on the questions posed above. Unfortunately, Article 2 does not add anything helpful to the *Restatement* rules.

Article 2 applies to the sale of all goods and generally does not make any distinction between consumer and commercial transactions.<sup>62</sup> U.C.C. Section 2-204 adopts an open-ended approach to formation by simply providing that "[a] contract for sale of goods may be made in any manner sufficient to show agreement."<sup>63</sup> This may include "conduct by both parties which

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60. See KENT D. STUCKEY, *INTERNET AND ONLINE LAW* 1-40 (1999) (stating that clicking on the wrong icon or button accidentally is not the manifestation of assent).

61. See E. ALLAN FARNSWORTH, *CONTRACTS* 679-700 (2d ed. 1990).

62. See U.C.C. art. 2. For example, § 2-103 contains no definition of "consumer" or "consumer transaction" because none of Article 2's provisions apply specifically to that type of transaction, with the exception of § 2-719(3). See U.C.C. §§ 2-103, 2-719(3) (1999).

63. *Id.* § 2-204(1).

recognizes the existence of such a contract.”<sup>64</sup> The section on offer and acceptance is equally open-ended and unhelpful in the context of consumer e-commerce. It provides that “[u]nless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”<sup>65</sup> In online consumer transactions, it seems clear from the sites in the Survey that most sellers intend the consumer to respond through the Web. It is not at all clear, however, whether the consumer’s conduct of clicking on a button is an offer, an acceptance, or an acceptance conditioned upon the seller’s confirmation.

One could argue that Article 2’s approach provides the best fit for consumer electronic commerce. Courts could adapt these very flexible standards to the changing landscape of electronic commerce. Web sellers would not be restricted to rules based on yesterday’s technology and marketing practices. Consumers would be protected by the U.C.C.’s doctrines of good faith<sup>66</sup> and unconscionability,<sup>67</sup> as well as the states’ unfair and deceptive trade practice laws.<sup>68</sup> To the extent a court finds it useful and consistent with a state’s common law of contracts, it can rely on the *Restatement’s* concept of manifestation of assent. Despite these advantages, the disadvantages of this approach are substantial. Both sellers and consumers need to know the “rules of the road” concerning fundamental factors such as what constitutes formation of an online contract. Otherwise, it is impossible to know when both are bound to the contract. The U.C.C. approach depends upon the slow, nonuniform, and random development of case law to clarify how courts should apply its vague standards in particular circumstances. Because most online consumer transactions involve little money and because litigation costs are high, commercial parties—not consumers—will bring most lawsuits. Moreover, most of them will be decided or settled absent a reported appellate decision. Furthermore, the proliferation of binding arbitration clauses in

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64. *Id.*

65. *Id.* § 2-208(1).

66. *See id.* §§ 1-203, 2-103(1)(b).

67. *See id.* § 2-302.

68. *See generally* JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (1997).

consumer contracts makes case law development applying the U.C.C. to online consumer transactions even more unlikely. In addition, because contract formation is a question of state law and the amounts of money at stake are relatively small, most cases will be brought in state courts; only those cases that are appealed will be reported and may serve as precedent. However, the consumer cases that are reported may not provide useful guidance. The opinions may well be restricted to the specifics of the individual site involved in the lawsuit. Inconsistent decisions may be made from one court to another. Finally, what issues are decided will be purely a matter of which cases happen to result in appellate decisions, rather than what issues are most important. For these reasons, consumer e-commerce cannot rely on the development of case law under the U.C.C.

### *E. Proposed Revision of Article 2*

Article 2 is currently in the process of revision. But this road has been extremely rocky, with electronic commerce and consumer protection among the hotly disputed issues. In fact, the controversy over consumer issues caused a crisis in the drafting process.<sup>69</sup> As of November, 1999, Revised Article 2 reflected the difficulty of dealing with the issue of online acceptance in the context of consumer transactions. Certain proposed revisions are straightforward and repeat the Article 2 provisions now in place; they also take into account e-commerce innovations, such as "electronic agents."<sup>70</sup> For example, the

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69. Revised Article 2 was supposed to be reviewed and voted upon at the annual meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL) held in July, 1999. Instead, that review was withdrawn from the agenda. According to Linda Rusch, associate reporter for the revision, industry concerns about proposed consumer protection provisions resulted in the withdrawal. See Sarah Howard Jenkins et al., *Subcommittee On U.C.C. Article 1*, COMMERCIAL LAW NEWSLETTER (ABA), Nov. 1999, at 15. According to Fred Miller, Executive Director of NCCUSL, the article was withdrawn because the agenda was crowded and because the NCCUSL leadership was concerned about whether the article would be enacted by the states in its current form. See *id.* As a result of the actions at the annual meeting, both Rusch and the Reporter, Professor Richard Speidel, resigned, and an entirely new drafting committee was formed. See *id.*; see also Linda T. Rusch, *A History And Perspective of Revised Article 2: The Neverending Saga of a Search For Balance*, 52 SMU L. REV. 1683, 1684-85 (1999).

70. "Electronic agent" means a computer program, or electronic or other automated means, used by a person to initiate an action, or to respond to electronic record or performances, on the person's behalf without review or action by an individual at the



Revision provides that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of such contract, or the interaction of electronic agents.”<sup>71</sup> The section on offer and acceptance also tracks the language of the current Article 2.<sup>72</sup> In that respect, the revision will permit the present state of confusion and uncertainty to continue.

Revised Article 2 does contain a major departure from the current law, however, in how it deals with what the Reporter for the revision refers to as “the *Gateway* problem.”<sup>73</sup> In order to understand the problem with which the *Gateway* case dealt, it is necessary to examine the case’s precursor, *ProCD, Inc. v. Zeidenberg*.<sup>74</sup> In *ProCD*, the licensor of software distributed its product, a CD-ROM, in a box. It stated on the outside that inside the box was a license containing restrictions.<sup>75</sup> The district court refused to enforce the license because the licensor did not disclose the terms on the outside of the box.<sup>76</sup> The district court found that Article 2 of the U.C.C. did not permit the buyer to be bound by terms that are disclosed after the buyer pays.<sup>77</sup>

The Seventh Circuit also relied upon Article 2 of the U.C.C., but rejected the lower court’s analysis. The court instead found that, pursuant to section 2-204(1), the licensor restricted the manner in which the licensee could accept. “ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure.”<sup>78</sup> It is important to understand the several steps involved in this type of transaction. First, the seller made an offer by distributing its product in a box. The outside of the box informed the buyer that the product was subject to a license inside. The buyer had the

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time of the action, response, or performance.” Rev. art. 2, §2-103(a)(17) (1999). Unless otherwise indicated, references to Rev. art. 2 refer to the Article 2 Revision draft dated November 1999.

71. *Id.* § 2-204(a).

72. Compare *id.* § 2-206(a)(1) with U.C.C. § 2-206(1)(a) (1999).

73. See Rev. art. 2, § 2-204, Reporter’s Note. The reference is to *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

74. 86 F.3d 1447 (7th Cir. 1996).

75. See *id.* at 1450.

76. See *id.*

77. See *id.* at 1452.

78. *Id.* at 1452.

opportunity to read and consider the terms of the license when he opened the box. After having a chance to consider the terms, the buyer then could use the product by running the CD-ROM. However, before the product would operate, the license agreement was displayed again on the computer screen. Thus, the license was readily and continually available to the buyer.<sup>79</sup> Only if the buyer indicated acceptance of the license's terms could the buyer use the product. In addition, the license expressly provided that if the buyer did not accept the license's terms, he could return the software and receive a refund "if the terms are unacceptable."<sup>80</sup> However, it was not apparent from the decision whether the right to a refund was essential to the court's holding that the license was enforceable.

Cases such as *ProCD* involve two distinct questions. First, has the buyer accepted the offer? Second, if the buyer has accepted, what are the terms of the resulting contract? Consideration of the latter issue is deferred until Part III of this Article. The *ProCD* court had no difficulty concluding that the buyer had accepted and a contract had been formed. However, the facts of the case distinguish it from the typical online consumer transaction and thus make the case inapposite to such transactions. *ProCD* involved the situation where the seller provided the terms after the consumer paid. As the Seventh Circuit analyzed the transaction, the licensor had structured the transaction so that no acceptance took place until the licensee read the license, accepted the license, and used the software. In *ProCD*, there was no question that the licensee clearly accepted because the CD-ROM blocked his access to the database unless he had accepted the terms,<sup>81</sup> and it was undisputed that the licensee had gained access to it. The Web consumer sales transactions surveyed for this Article did not involve terms provided only after the consumer pays, and the potential

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79. The license was "encoded on the CD-ROM disks as well as printed in the manual, and . . . appears on a user's screen every time the software runs . . ." *Id.* at 1450.

80. *Id.* at 1451.

81. *See id.* at 1452. Because the user was required to assent before he could use the software, this type of license has been referred to as a "click-on" license rather than a "click-through" license. *See* Jason Kuchmay, *ProCd, Inc. v. Zeidenburg: Section 301 Copyright Preemption of Shrinkwrap Licensees—A Real Bargain For Consumers?*, 29 U. TOL. L. REV. 117, 138 (1997). The decision has been criticized for not distinguishing the "click-on" license in the case from the "click-through" licenses with which consumers are usually presented. *Id.*

transactions were not structured to preclude use of the product until the consumer reviewed the terms. *ProCD*, therefore, does not aid in the analysis of whether a consumer has accepted a seller's offer in the context of the typical sale of goods online under Article 2.

*ProCD* was followed in the Seventh Circuit by *Hill v. Gateway 2000, Inc.*<sup>82</sup> The consumers in *Gateway* ordered a computer by phone. The salesperson did not provide any terms over the phone,<sup>83</sup> but the terms were included in the carton along with the computer upon delivery.<sup>84</sup> According to the written agreement, the buyers would be bound by the terms unless they returned the computer within thirty days.<sup>85</sup> The court held that "[b]y keeping the computer beyond [thirty] days, the Hills accepted Gateway's offer . . . ."<sup>86</sup> As in *ProCD*, there was no question whether the buyers had accepted. The seller clearly informed them that they had thirty days to return the goods, and the court construed this to mean that the buyers had not accepted the seller's offer until and unless they kept the computer more than thirty days. Like *ProCD*, the *Gateway* case does not provide useful guidance on what constitutes acceptance in the context of Web sales to consumers, unless the seller delays disclosure of the terms.

The current draft of the proposed Revised Article 2 reflects the confusion surrounding the issue of delayed disclosure of terms and the difficulty of crafting a solution. As of November 1999, the drafting committee could not even agree on what approach to take. Instead, members proposed two alternative ways of dealing with the "*Gateway* problem."<sup>87</sup> Under the first approach, a contract forms when the conduct of both parties, including offer and acceptance, recognizes the existence of a contract.<sup>88</sup> If one party intends to defer contract formation until the other party agrees to proposed terms, however, no contract

82. 105 F.3d 1147 (7th Cir. 1997).

83. *See id.* at 1149.

84. *See id.* at 1150.

85. *See id.* at 1148.

86. *Id.* at 1150.

87. The previous drafting committee had agreed to a third alternative: not address the problem at all and leave the issue for the courts. *See* Rev. art. 2 § 2-204, Reporter's Notes (1999).

88. *See id.* § 2-204(a).

forms until there is such agreement.<sup>89</sup> The Reporter's Notes impose three conditions upon this "deferred contract formation" or "rolling" contract.<sup>90</sup> First, the buyer knows of the seller's intention to defer contract formation. Second, the standard terms are "packaged in such a way that they would come to the attention of a reasonable buyer."<sup>91</sup> Finally, the contract allows the buyer to return the goods if she does not use them. If the buyer does not know the seller intends to defer formation of the contract, the contract is formed "when the seller takes the buyer's credit card number."<sup>92</sup> If that is the situation, the contract terms are not those which are later disclosed in a box or somewhere else. Rather, they are whatever terms the parties have agreed upon at that point, and "terms derived from any relevant course of dealing or usage of trade, supplemented by the gap-filling provisions of this Article."<sup>93</sup> Any terms that the seller subsequently discloses to the consumer, such as terms in the box, merely constitute proposals to modify the contract.<sup>94</sup>

This approach poses a problem for consumers who shop online. First, consider the situation where the seller does not intend to defer contract formation. The test is whether both parties have engaged in conduct that recognizes the existence of a contract. As seen by the Survey of Web sites, it is very difficult to know what conduct qualifies. For example, on some sites, it is even uncertain which party is making the offer and which is accepting. The revised Article 2 test suffers from the same vagueness as the current Article 2. Matters are made even more confusing when one considers the second situation, in which the seller intends to defer contract formation. According to the Comment, if the buyer does not know of the seller's intention to defer, the contract is formed "when the seller takes the buyer's credit card number."<sup>95</sup> In other words, the Comment would deem that the consumer accepted when she typed her credit card number into a form on a Web site. But that act alone is hardly a clear manifestation of assent, given the confusing

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89. *See id.* § 2-204(d).

90. *See id.* § 2-204(d), Reporter's Notes.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.* § 2-204, cmt.

geography and nomenclature of Web sites. Furthermore, one could claim that if this "credit card rule" is good enough to constitute acceptance where the consumer did not know of an intention to defer, it also should apply in the first situation, when no such intention is present. In other words, the 'credit card rule' may be applied to the first situation; thus, typing in this information would constitute conduct that recognizes the existence of the contract despite the fact that it may not reflect a manifestation of assent.

An alternate, proposed approach in the Revised Article 2 is to assume that a contract is formed when the parties engage in conduct recognizing the existence of a contract,<sup>96</sup> even though the seller does not disclose the terms at the time the consumer phones in or places an order on a Web site, as long as the seller delivers the terms to the buyer either before or at the time the buyer receives the goods.<sup>97</sup> Those terms are part of the contract "only if (i) the seller gives the buyer a right to return the goods for a full refund within thirty days after receipt of the goods, (ii) prior to receipt of the goods the buyer agrees to be bound by such terms, or (iii) the terms do not materially alter the contract to the detriment of the buyer . . . ."<sup>98</sup>

This second alternative contradicts *ProCD* and *Gateway* because it presumes that acceptance has taken place before the buyer has an opportunity to review the terms of the contract. Yet the alternative is similar to *ProCD* because it allows the buyer to get out of the contract by returning the goods for a full refund.<sup>99</sup> This alternative does nothing to clarify when and how a consumer accepts an offer during a Web sale because it merely throws us back to the vague terms of conduct recognizing the existence of a contract.

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96. *Id.*

97. *See id.* § 2-207(d).

98. *Id.*

99. *Gateway* was ambiguous about whether the seller must offer a full refund. Rather than deal with this issue directly, the court posed the hypothetical of consumers to whom disagreeable terms are disclosed only after they opened the box but decided not to return the goods because of shipping costs. "What the remedy would be in such a case—could it exceed the shipping charges?—is an interesting question, but one that need not detain us . . . ." *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

*F. UCITA*

UCITA was drafted with Internet transactions specifically in mind. Although UCITA does not apply to the transactions that are the subject of this Article, UCITA nevertheless likely will influence courts considering Web issues where its provisions do not conflict with Article 2.<sup>100</sup> UCITA's provisions on contract formation and offer and acceptance track those of Article 2 and the proposed Revised Article 2.<sup>101</sup>

UCITA goes further than the U.C.C., however. Section 112 provides:

A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it . . . intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.<sup>102</sup>

Although the section seems to apply only to assent to the terms of the contract,<sup>103</sup> rather than contract formation, a comment explains that the "manifestation of assent . . . is one method by which a party agrees to (accepts) a contract."<sup>104</sup>

The comment goes on, however, to say that the "opportunity to review *the record or term*"<sup>105</sup> "is a precondition to manifesting assent to it."<sup>106</sup> This statement raises the issue of whether the opportunity to review applies to manifestation of assent to form the contract as well as to assent to the terms. Presumably, because the comment applies manifestation of assent to the formation of a contract as well as to acceptance of a term or record, the opportunity to review is a precondition to

100. See Perdue, *supra* note 8. UCITA has faced vigorous opposition by those who claim it does not adequately protect consumers. See Jean Braucher, *Proposed Uniform Computer Information Transactions Act (UCITA): Objections from the Consumer Perspective*, MEMORANDUM (U. Ariz.), Dec. 3, 1999, at 11.

101. Compare UCITA §§ 202, 203 (1999), with U.C.C. §§ 2-204, 2-206 (1999), and Rev. art. 2, §§ 2-204, 2-206 (1999).

102. UCITA § 112(a), (2) (1999).

103. "Record" is defined as "information . . ." *Id.* § 102(54). "Term" is defined as "that portion of the agreement which relates to a particular matter." *Id.* § 102(62).

104. *Id.* § 112, cmt. 1.

105. *Id.* § 112(a) (emphasis added).

106. *Id.* cmt. 1.

manifestation of assent both to the formation of a contract and the terms of a contract. This may not be a proper interpretation, however. Neither UCITA nor the comments contain any explanation of how the opportunity to review would apply to formation of the contract. Rather UCITA only addresses the opportunity to review terms, providing that “[a] person has an opportunity to review a *record or term* only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.”<sup>107</sup>

As a result of the above conflicting messages in UCITA and the comment, it is not clear whether the opportunity to review applies to the formation of the contract. Nevertheless, it is instructive to assume that it does apply to formation of contracts. Assuming UCITA requires an opportunity to review as a precondition to manifestation of assent, how could a Web site comply? Sites that provide the consumer with essential information before she is required to click on the “submit” button illustrate how this can be accomplished. For example, an online seller could display a screen containing essential information such as the consumer’s name and address, the seller’s name and address, an itemization of the goods purchased, and an itemization of the total price.

Illustrations in the UCITA comment indicate how the Reporter would apply UCITA to standard licenses. In Illustration 1, the licensee is provided a prominent notice to read the license, stressing the importance of the license, and providing a link to the license itself.<sup>108</sup> The screen provides both an “I agree” button and an “I decline” button and an explanation of what those buttons mean. The comment concludes that clicking on the “I agree” button indicates manifestation of assent, that is, acceptance of both the contract and the terms of the contract as contained in the license. At several of the sites surveyed for this Article, in addition to having the consumer click on a button labeled “Submit Order,” “Charge It,” or “Send It In,” the site contained a link which included an explanation of the significance of clicking that button.<sup>109</sup> Presumably, if the link was clearly marked, UCITA

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107. *Id.* § 112(e)(1) (emphasis added).

108. *See id.* § 112, cmt. 5, illus. 1.

109. *See supra* text accompanying notes 32, 38-41.

would regard the consumer as having accepted when she clicked on the button. As discussed above, however, Web sites selling consumer goods often contain buttons labeled with terms less descriptive than "I agree" and "I decline" and do not clearly indicate the meaning and significance of clicking on designated buttons.<sup>110</sup> The UCITA illustration suggests that these sites might not pass muster if UCITA governed the transaction. Courts will have to grapple with the question of whether, in light of current and revised Article 2's silence, they should be guided by this illustration.

Illustration 2 describes a site in which the licensee enters her name, address and credit card number and strikes the "enter" key.<sup>111</sup> The statement "*Terms and conditions of service; disclaimers*" appears further down the screen, with a link to the terms and disclaimers. Nowhere does the site call attention to this statement or ask the licensee to react to it. According to the Comment, the mere act of entering one's "name and identification, *coupled with using* the service," constitutes acceptance, and a contract is formed.<sup>112</sup> Presumably, if the licensee never used the service, a court should not consider her conduct to be acceptance. Unfortunately, the comment does not say this; as a result, it is not certain what the effect of not using the service would be. The comment does conclude that the licensee would not be bound by the terms of the license, and a court would determine the terms of the license, based upon UCITA's default rules and trade usage.

Applying this illustration to the sales of goods, the consumer's typing in her name, address, and credit card number and striking the "enter" key would not constitute acceptance, unless the seller delivered and the consumer used the goods. If the consumer returned the goods without using them, she would not be obligated under the contract.<sup>113</sup> The major flaw in UCITA

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110. See *supra* text accompanying notes 35-36.

111. UCITA §112, illus. 2 (1999).

112. *Id.* (emphasis added).

113. This interpretation would be consistent with Article 2, in which "any act inconsistent with the seller's ownership" of the goods constitutes acceptance. U.C.C. § 2-606(1)(c) (1999). That U.C.C. provision applies to the situation where the buyer has a right to reject because the goods did not conform to the contract. The buyer has this right to reject, however, only if she has not accepted. See *id.* § 2-601. The discussion in the text applies to the situation where the goods may conform exactly to the contract,



on this point is that the statute does not require the seller to inform the consumer of her right to return under these circumstances. Therefore, its grant of this limited consumer protection is meaningless because consumers will not be aware of it.

Illustration 3 provides an example of the "double assent sequence" contemplated by Section 112(d), which provides that a person manifests assent if she assents, and then "reaffirms [that] assent by electronic means."<sup>114</sup> Illustration 3 describes a site where the licensee is offered two buttons; one is labeled "I agree" and the other "I decline."<sup>115</sup> If the licensee clicks on "I agree" a second screen presents a summary of the licensee's order and provides two more buttons; one button confirms the licensee's order, and the second cancels the order. If the licensee clicks on the confirmation button, she has "intentionally engage[d] in conduct . . . with reason to know that the other party . . . may infer from the conduct . . . that the person assents . . . ."<sup>116</sup>

Professor Braucher characterizes this provision as sanctioning "fictional assent by double click."<sup>117</sup> She claims that it "undermines the basic standard of intentional agreement otherwise stated [in] section 112(a)(2)."<sup>118</sup> Section 112(a)(2) requires that the licensee manifest assent by "intentionally engag[ing] in conduct . . . ."<sup>119</sup> Section 112(d) requires "conduct that assents and subsequent conduct that reaffirms assent by electronic means."<sup>120</sup> Apparently, that second click is all it takes to create a presumption that the licensee engaged in intentional conduct. While illustration 3 describes a site in which the licensee is presented with a second screen summarizing the license and providing the licensee with two clearly designated buttons, the statute itself does not require this. The statute seems to require merely that the licensee be required to click a

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but the consumer nevertheless has a right to avoid obligation because the Web site did not give her sufficient information for her to manifest assent.

114. UCITA § 112(d) (1999).

115. *Id.* § 112, cmt. 5, illus. 3.

116. *Id.* § 112(a)(2).

117. Braucher, *supra* note 100, at 11.

118. *Id.*

119. UCITA § 112(a)(2) (1999).

120. *Id.* § 112(d).

second time. The statute does not seem to require a summary of the license, the price, or an explanation of the significance of the double click. Rather, only one button is offered, and that button has an ambiguous label such as "Submit."

UCITA and its comments discuss issues relating to contract formation in the context of Web transactions. However, it fails to provide a satisfactory model for consumer sale of goods transactions on the Web because of several deficiencies. As discussed above, both the statute and the comments leave many questions unanswered. The comments fill many of the gaps in the statute, but they do not have the force of law; therefore courts may ignore them and interpret UCITA's provisions in entirely different ways. Finally, UCITA and the comments state rules for contract formation in which consumers have not manifested assent in any meaningful way.

### *G. The Caspi Case*

One appellate court has dealt with the question of whether the click of a mouse constitutes acceptance. Although the opinion in *Caspi v. The Microsoft Network*<sup>121</sup> has been touted as a decision which "resoundingly approved a 'click' as assent to an electronic contract,"<sup>122</sup> the court did not even consider the major issue raised by the Survey. The Survey revealed the confusion surrounding the consumer's conduct when she "checks out" (*e.g.*, the variety of terms used to label buttons, some not suggesting acceptance at all, the role of confirmation e-mails, and whether the consumer is the offeror or the acceptor). The *Caspi* court did not consider any of these issues. The plaintiffs alleged breach of contract and fraud because the defendant allegedly switched them into more expensive plans. The lower court dismissed the case because the parties' agreement contained a forum selection clause requiring them to bring all suits in King County, Washington. Both the lower court's decision and the appellate decision focused on whether the plaintiffs had agreed to that particular term of the contract, rather than whether the plaintiffs had formed a contract.

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121. 732 A.2d 528 (N.J. Super. 1999).

122. Kurt A. Wimmer, *Enforcing Click-Wrap Licenses, E-Litigation: Clicks and Contracts*, 14 CORP. COUNS., No. 4, Sept., 1999, at 2.

Moreover, Microsoft's Web design was clear and did not present the potential for confusion found in the sites included in the Survey. For example, the consumer could register to become a member only after he had the opportunity to view the membership agreement and after assent by clicking on a button labeled "I Agree."<sup>123</sup> To make it even more clear, the consumer also had the choice of clicking on a button labeled "I Don't Agree."<sup>124</sup> Thus, the *Caspi* decision offers limited guidance for future controversies.

The preceding Survey of Web sites and current law suggests several possible approaches to crafting a law of contract formation for online consumer purchases. The analysis presented in connection with each approach, however, indicates that all of them are flawed because of problems they would cause both for sellers and consumers. A better approach is to adopt standards that provide sellers with needed flexibility while at the same time providing clear rules when necessary. In regard to certain standards, a list of factors for courts to consider may provide satisfactory guidance.

#### *H. A Proposal for Formation of Web Consumer Contracts*

Based on the preceding discussion, the following provisions on formation of contracts are proposed for inclusion in revised Article 2. The proposal is based on the insights gained from examining the limited number of sites included in the Survey and is therefore tentative in nature. A far more extensive review of sites might raise additional issues and indicate the need for other modifications to Article 2. In reviewing the proposal, it is important to take into account the fact that online shopping is a new experience for consumers and one that varies in important respects from traditional purchasing. The proposal attempts to meet the needs of the novice consumer who is unfamiliar both with using computers and with buying on the Web,<sup>125</sup> while not unduly burdening Web sellers. It is as follows:

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123. See *Caspi*, 732 A.2d at 530.

124. See *id.*

125. See Harrison, *supra* note 57, at 936.

### Section XXX Formation of Consumer Contracts on the World Wide Web

1) General rule. A contract for the sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of such contract, or the interaction of electronic agents.<sup>126</sup> In order for there to be an agreement, there must be a manifestation of mutual assent.<sup>127</sup>

#### 2) Opportunity to review

a) an opportunity for the consumer to review the essential terms of the agreement is a precondition to manifesting assent to the formation of an agreement;<sup>128</sup>

b) a person has an opportunity to review only if the essential terms of the agreement are made available in a manner that ought to call them to the attention of a reasonable consumer and permit review;<sup>129</sup>

c) an opportunity to review requires that the essential terms appear together on one page at a meaningful time;<sup>130</sup>

d) The essential terms include, but are not limited to: the name, address, and telephone number of the seller; the name and address of the consumer; an itemization of the goods or services<sup>131</sup> that the consumer has ordered,

126. This provision is from Rev. art. 2, § 2-204(a) (1999).

127. See RESTATEMENT § 17(1).

128. See UCITA § 112, cmt. 1 (1999).

129. See *id.* §112(e)(1).

130. Either the provision itself or a comment should provide that a "meaningful time" is the time after the consumer has completed putting items into her virtual shopping cart and has proceeded to the virtual checkout counter. The consumer needs to see the essential terms close to the conclusion of her shopping. Disclosure of various terms at various stages of the shopping experience would make it far more difficult for the consumer to knowingly agree to be obligated.

131. Article 2's scope should be expanded to include the sale of services, at least when services are sold on the Web. Consumers need clear rules and protection tailored to the circumstances of electronic commerce when purchasing services on the Web. *But see* Frederick H. Miller, *Article 1: The Agenda for Revision and Coordination*, Am. L. Inst.-A.B.A. Cont. Leg. Ed., SB 29 ALI-ABA 69, \*92 (1996) (proposing that parties opt-in to coverage under the U.C.C. rather than codifying inclusion of services).

including the price of each item; the total price; and an itemization of charges in addition to the price of the items, such as shipping and handling charges.<sup>132</sup> Under the circumstances, other terms may be essential.<sup>133</sup>

#### Section XXXX Conduct

1) General. The conduct of a party is not effective as a manifestation of assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.<sup>134</sup> If a party's conduct manifests assent but he did not in fact assent, the resulting contract may be avoidable because of mistake or other invalidating cause.<sup>135</sup>

2) Acceptance. If the seller considers a consumer's click<sup>136</sup> on a designated button to be conduct indicating the consumer's acceptance, a court may consider the following non-exclusive factors in determining whether a contract has been formed<sup>137</sup>

a) the presence or absence on the page containing the acceptance button of a clear

132. Other items could easily be added to the list of essential terms, such as the estimated shipping date and the seller's return policy. The items listed in the proposal are intended merely to be illustrative. Because of the likelihood that important items are not included in this list of essential terms, section 2 grants to a state official the authority to add to the list. This is comparable to the authority to issue regulations found in many federal consumer protection statutes. *See, e.g.*, 15 U.S.C.A. § 1604 (1998) (authorizing the Federal Reserve Board to promulgate regulations pursuant to the Truth in Lending Act).

133. The Comment should give examples. One example would be a Web site that urges shoppers to place their orders early to ensure delivery before Christmas. An essential term would be disclosure that the seller cannot guarantee that orders placed after a specified date would arrive before Christmas.

134. *See* RESTATEMENT § 19(2).

135. *See id.* § 19(3).

136. Perhaps someone with better technical expertise than the author could choose and define a more apt term than "click on a designated button." The meaning of the phrase should be clear, however, from the previous discussion.

137. It is unwise to lock sellers into one required Web design for obtaining the consumer's acceptance. Therefore, the proposed statute presents various factors for courts to consider. While following most or all of the features suggested by the proposed provision increases the likelihood that the court will find the consumer accepted, sellers may be able to develop alternative designs that are equally clear and informative, or even more so.

statement that the goods the consumer selected constitute the seller's offer and that by clicking on the designated button, the consumer is accepting the seller's offer and will form a mutually binding contract;

b) the presence or absence of a button which is clearly labeled with a term such as "I accept seller's offer," or similarly clear language;

c) the presence or absence of two buttons, one labeled "I accept seller's offer," and the other labeled "I do not accept seller's offer," or similar language.

2) The [state consumer protection entity authorized to issue regulations under the mini-FTC or Unfair and Deceptive Acts and Practices statute] may designate factors in addition to those listed in section 2 by regulation.

3) Conduct that shows assent and subsequent conduct that reaffirms assent by electronic means are not indications of acceptance.<sup>138</sup>

4) Offer. If the seller regards the consumer's submission of an order as an offer and not an acceptance, on the page where the consumer is requested to submit the order the seller shall clearly disclose:

a) that clicking on the designated button does not constitute the consumer's acceptance;

b) what effect the consumer's submission has; and

c) what action by the seller constitutes the seller's acceptance, and how or whether the consumer will be informed of that acceptance.

5) The seller shall disclose to the consumer on the page where the consumer indicates his offer or acceptance, whether, and if so how and when, the seller will confirm the transaction, and the effect of that confirmation.<sup>139</sup>

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138. This provision explicitly rejects the "double assent" presumption in section 112(d) of UCITA. *See supra* text accompanying notes 114-120.

139. Is the confirmation the seller's acceptance of the consumer's offer? If the

6) Failure of the seller to comply with sections 4 or 5 shall constitute a violation of [the state's Unfair and Deceptive Acts and Practices (UDAP) statute].

## II. WHAT TERMS AND CONDITIONS BIND THE CONSUMER?

If there has been offer and acceptance or other conduct that forms a contract, the next issue concerns what terms are included in the contract. The discussion below suggests that current and proposed laws are inadequate when applied to the sites in the Survey.

### A. The Law

Neither the *Restatement* nor the U.C.C. deal directly with the situation consumers face when buying online. As the Survey suggests, most sites do contain terms and conditions. Most online transactions are not indefinite agreements in which one or more terms are left open.<sup>140</sup> Rather, the terms appear right there on the Web site. However, they are often difficult to find. In some instances, the Web site makes it so hard to find the terms that consumers should not be regarded as having agreed to them. Accordingly, if a court were to conclude that the terms were "hidden" in this manner, it could regard the terms as analogous to open terms under Article 2. If a contract has been formed, the court will supply the terms by applying Article 2's "gap fillers."<sup>141</sup>

Although UCITA does not directly apply to the types of transactions at issue in this Article, the fact that no other relevant law exists would likely lead courts to look to UCITA for guidance.<sup>142</sup> UCITA borrows the concept of "manifestation of assent" from the *Restatement's* provisions relating to contract formation<sup>143</sup> and applies it to assenting to terms and

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confirmation is a confirmation of the consumer's acceptance, can the consumer cancel before or after transmission or receipt of the confirmation? *See supra* text accompanying note 42.

140. *See* U.C.C. § 2-204(3) (1999); *RESTATEMENT* § 33(2); *see also* FARNSWORTH, *supra* note 61, at 280.

141. *See, e.g.*, U.C.C. §§ 2-305, -308, -309, -310 (1999).

142. *Perdue, supra* note 8.

143. *RESTATEMENT* §§ 18 - 20.

conditions.<sup>144</sup> A person manifests assent if she has knowledge of the term or “after having an opportunity to review the record or term . . . intentionally engages in conduct . . . with reason to know that the other party . . . may infer from the conduct . . . that the person assents to the record.”<sup>145</sup> “A person has an opportunity to review a . . . term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.”<sup>146</sup>

The comment acknowledges that the common law “is not clear” on the requirement of an opportunity to review, but states that “it reflects simple fairness and codifies or adapts concepts preventing procedural unconscionability.”<sup>147</sup> UCITA only requires the licensor to provide the opportunity; the licensee can decide not to take advantage of the opportunity “unless the [licensor] intentionally manipulates the circumstances to induce the [licensee] not to review the record.”<sup>148</sup> The comment notes: “[A] record is not available for review if access to it is so time-consuming or cumbersome as to effectively preclude review. It must be presented in a way as to reasonably permit review. In an electronic system, a record promptly accessible through an electronic link ordinarily qualifies.”<sup>149</sup>

Therefore, applying the standards of UCITA and its Comment to Web sites selling goods to consumers, one should determine whether the buyer has assented to the seller’s terms by determining whether the seller’s disclosure of those terms is fair, whether the seller placed the terms to induce the consumer not to examine them, whether access to the terms is unduly time-consuming or burdensome, and whether the manner of

144. See UCITA § 112 (1999).

145. *Id.* § 112(a), (2).

146. *Id.* § 112(e)(1); see also *id.* § 211(1)(b) (applying to standard form licenses which are the type of licenses consumers are offered). Under section 211(1)(B) the licensor provides an opportunity to review, *inter alia*, if all it does is disclose, not the terms of the license, but rather the “availability of the standard terms . . . and promptly furnish[es] a copy . . . on request before the transfer of the computer information.” *Id.* In other words, the licensor can require the user to write to the licensor to request a copy. A licensor could also comply with the section by posting information on a different site without any link to that information. See Braucher, *supra* note 100, at 13. Section 211 undermines the concept of manifestation of assent to such an extent that it offers no guidance as to how the law might fairly deal with the issue of the terms to which the consumer has agreed.

147. UCITA § 112, cmt. 8 (1999).

148. *Id.*, cmt. 8.a.

149. *Id.*, cmt. 8.b.



disclosure is procedurally unconscionable. Because one element of procedural unconscionability is unfair surprise,<sup>150</sup> it is appropriate to determine whether the placement of the terms would surprise the consumer. Despite all of these standards, the Comment seems to suggest that there is a rebuttable presumption that a link to the terms is a method that reasonably provides the opportunity to review them.

### *B. The Disclosure of Terms and Conditions on Surveyed Web Sites*

The FTC<sup>151</sup> and others<sup>152</sup> have stressed the importance of consumers finding and considering certain terms and conditions in Web transactions. Some terms, such as shipping terms and warranty coverage, are important in any consumer sale.<sup>153</sup> Particularly crucial for Web sales are terms such as security, privacy, obtaining records, passwords,<sup>154</sup> and online payments.<sup>155</sup> The Survey of Web sites revealed a variety of difficulties in finding and understanding the terms and conditions governing consumer transactions on the Web.<sup>156</sup>

On December 17, 1999, Disney.com's home page<sup>157</sup> contained links with the following titles: "Return/Exchange Policy," "Shipping Information," and "Please click here for legal restrictions and terms of use applicable to this site. Use of this site signifies your agreement to the terms of use."<sup>158</sup> The site

150. See U.C.C. § 2-302, cmt. 1.e (1999).

151. See *Federal Trade Commission* (visited Jan. 13, 2000) <<http://www.ftc.gov>>.

152. See *Safeshopping.org* (visited Jan. 13, 2000) <<http://www.safeshopping.org>>; *Better Business Bureau Online* (visited Jan. 13, 2000) <<http://www.bbon-line.org>>. The safeshopping.org site is a project of the American Bar Association Business Law Section, Cyberspace Law Committee's Electronic Commerce Subcommittee's Working Group on Consumer Protection. The author is co-Chair of the Working Group.

153. See *Safeshopping.org*, *supra* note 152.

154. See *id.*

155. See *Federal Trade Commission*, *supra* note 151.

156. In rating Web sellers, *Consumer Reports* includes ratings on "the clarity and prominence of a site's explanation of its security precautions and shipping costs" as well as "how quickly and efficiently buyers could browse, find merchandise, and order it." *Catalogs Take to the Web*, *CONS. REP.*, Nov. 1999, at 23, 25; see also *Digging for Information on Card Issuers Web Sites*, *CONSUMER ACTION NEWS*, Winter 1999-2000, at 7 (reporting on difficulty of finding information on sites of credit card issuers).

157. See *Disney Store.com Home Page* (visited Dec. 17 1999) <<http://www.disney.com>>.

158. *Id.*

appeared to provide consumers with an opportunity to review that complies with the suggestions in UCITA's Comments. The links were easy to find from the home page and clearly labeled; therefore, it was not time-consuming or cumbersome for consumers to review these terms and conditions.

Issues arise, however, upon examination of the page containing the "legal restrictions and terms of use." Although consumers can purchase goods from the site, clicking on the latter link did not disclose terms and conditions for such purchases. Rather, the disclosed terms related to the rules for entering contests, participating in chat groups, posting items on message boards, and downloading licensed software.<sup>159</sup> Therefore, the consumer who clicks on that link would not find the terms and conditions that applied to her purchase of goods. Unless the terms appear somewhere else on the site or are sent to the consumer later, a court would have to supply the terms by using the "gap filler" provisions of the U.C.C.<sup>160</sup>

Moreover, even if the terms on this page apply to goods purchased from the site, the site's use of a dark color raises another problem for consumers. Although the terms were clear and easy to read on screen, the dark blue background or some other technical feature made the text difficult to read when printed. Consequently, a consumer who wanted to make a copy to study the terms at greater length or to keep a printed record would be unable to produce a legible copy. A Web site's background color thus may raise issues with regard to proper disclaimers of implied warranties. The U.C.C. requires that disclaimers of the implied warranty of fitness for a particular purpose be conspicuous, and the disclaimer of the implied warranty of merchantability must be conspicuous if the disclaimer is in writing.<sup>161</sup> "Conspicuous" is defined as "so written that a reasonable person . . . ought to have noticed it . . . Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."<sup>162</sup> Assuming that a site discloses its disclaimer in a manner that clearly satisfies these requirements when viewed from the screen, does the disclaimer

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159. *See id.* at *Terms and Conditions of Use*.

160. *See supra* text accompanying note 141.

161. *See* U.C.C. § 2-316(2) (1999).

162. *Id.* § 1-201(10).

nevertheless lose its validity if it is no longer conspicuous when printed out? Neither Article 2 nor Revised Article 2 address this issue.<sup>163</sup> UCITA's language mirrors that of Revised Article 2.<sup>164</sup> Consumers are put at a serious disadvantage if the conspicuousness of a disclaimer disappears when they print it. Therefore, the law should explicitly require that terms be conspicuous both on a computer screen and when printed out as a hard copy.

UCITA and revised Article 2 use the term "record" in place of "written" or "writing" in order to include information stored in an electronic medium.<sup>165</sup> Under the definition of that term in these statutes, the information must be "retrievable in perceivable form."<sup>166</sup> The recently issued Uniform Electronic Transactions Act (UETA) contains the same definition of "record" as the other statutes.<sup>167</sup> In addition, it contains requirements suggesting that text which becomes inconspicuous upon printing may not satisfy legal requirements. The UETA's objective is to provide a statutory framework for electronic records and signatures.<sup>168</sup> It provides that if the parties agreed to participate in an electronic transaction, such as purchasing goods on the Web, and a law, such as U.C.C. Article 2, requires a seller to provide information in writing, that requirement is satisfied if the seller delivers "an electronic record capable of retention."<sup>169</sup> Furthermore, if a law requires a record "to contain information that is formatted in a certain manner . . . the record must contain the information formatted in the manner specified in the other law."<sup>170</sup> Finally, "[i]f a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient."<sup>171</sup> These provisions indicate that the

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163. Rev. art. 2, § 2-103 tracks the language of current U.C.C. § 1-201(10) except that it adds that a conspicuous term includes "a term prominently referenced in an electronic record or display which is readily accessible and reviewable from the record or display." Rev. art. 2, § 2-103(10)(A)(iii) (1999).

164. Compare *id.*, with UCITA § 102(14) (1999).

165. See Rev. art. 2, § 2-103(32) (1999); UCITA § 102(54) (1999).

166. *Id.*

167. See UETA § 3(14) (1999).

168. See *id.* § 3.

169. *Id.* § 8(a).

170. *Id.* § 8(b)(3).

171. *Id.* § 8(c).

integrity of the printed copy is an important component of the contract's enforceability. The UETA makes it clear that if the U.C.C. requires a conspicuous writing, an electronic record also must be conspicuous and the consumer must be able to print the record. It is inconsistent with the thrust of these provisions for the seller to be able to use color or other means which result in an inconspicuous printed copy.

The malleable nature of Web sites presents further problems. For example, on December 22, 1999, the Disney home page no longer displayed the links to the return and exchange policy or to shipping information that appeared on the site on December 17, 1999.<sup>172</sup> Clicking to a link labeled "Help" also did not lead to information on these vital topics. One of the major advantages of online selling is the ability to change Web pages easily to promote new goods and services and fine-tune marketing techniques. However, this feature may be less helpful for consumers who after visiting and learning the geography of a site find radically different geography on subsequent visits.

The ever-changing content of Web pages also makes it harder for consumers to prove the terms of an online contract. For example, assume a Web site guaranteed delivery before Christmas if shoppers made their purchase by December 20. Cathy Consumer purchased \$1000 worth of goods on December 15. However, the goods did not arrive until after Christmas, thus causing her financial injury.<sup>173</sup> Cathy, wishing to sue the seller, would need proof of the Christmas delivery guarantee. Unless she printed out a copy of the Web page containing the guarantee, she may have to engage in expensive discovery to prove exactly when she ordered the goods and to prove what text appeared on the site at precisely that time; the seller could have changed the site moments after she ordered the goods. In fact, the time of acceptance may be crucial; in our hypothetical

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172. See *Disney Store.com*, *supra* note 157 (visited Dec. 22, 1999); see also *Walmart home page* (visited Dec. 28, 1999) <<http://www.walmart.com>> ("Our site is temporarily closed until the new year to prepare for our new online store."); *Waiting for Wal-Mart*, TIME, Dec. 27, 1999, (reporting that the Wal-Mart site would reopen on New Year's Day 2000 completely redesigned); see generally *New (and some improved) Catalog Web Sites*, CONSUMER REP., Jan. 2000, at 48 (reporting on changes in Web sites which occurred after the Survey of sites in November, 1999).

173. Cf. Frances Katz, *Bargains Lure After-Christmas Shoppers*, ATLANTA J. & CONST., Dec. 27, 1999, at A1 (noting that online merchants incorrectly estimated pre-Christmas volume and were not able to deliver some orders before the holiday).

case, the consumer probably read the delivery guarantee soon after she visited the site, but she may have spent a considerable amount of time shopping on the site. The delivery guarantee could well have been removed from the site between the time she read the guarantee and the time she clicked on the acceptance button. Moreover, as discussed above, for some sites clicking on the button is not acceptance at all; acceptance is done later by the seller. In that instance, perhaps the proper analysis is in terms of the "battle of the forms."<sup>174</sup> That is, the consumer's offer consists of whatever terms the site contains when the consumer makes her offer, and the seller's acceptance includes those terms that the site contains when the seller accepts.

The home page of eToys.com<sup>175</sup> contains a frame that includes a section providing links to pages labeled "Help," "Shipping Options," "Low Price Guarantee," and "Safe & Secure Shopping."<sup>176</sup> Near the top of the page is a prominent link labeled "Shopping at eToys is 100% safe—guaranteed."<sup>177</sup> Consumers will not find a link to the terms and conditions on the home page. If they click on the "Help" page, however, they will find a list of 36 links. Under the category "Additional Topics," is a link called "Terms of Use." That page includes important topics such as a sweeping disclaimer of warranties and limitation of liability in regard to "services, products, and materials contained in this site."<sup>178</sup> In addition, it contains a disclaimer stating that receipt of an e-mail confirmation is not the seller's acceptance of the consumer's order.

Several issues arise from a comparison between this site and the UCITA Comment's standards. The Comment states that a term which is "promptly accessible" through a link ordinarily satisfies the opportunity to review requirement.<sup>179</sup> The Comment further clarifies 'accessible' by stating that access must not be so "cumbersome as to effectively preclude review."<sup>180</sup> The Comment clarifies "promptly" by stating that

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174. *See id.* § 2-207.

175. *eToys Home Page* (visited Dec. 17, 1999) <<http://www.eToys.com>>.

176. *See id.*

177. *Id.* at *Safe & Secure Shopping*.

178. *Id.*

179. UCITA § 112, cmt. 8.b (1999).

180. *Id.*

access is not “so time consuming . . . as to effectively preclude review.”<sup>181</sup> The consumer searching for the terms of the eToys agreement will not find any reference to them on the home page. A consumer might claim that this fact alone creates a presumption that access is so cumbersome that a consumer does not have a reasonable opportunity to review. The seller could make several arguments in defense. First, the home page provides links to many important pages with information valuable to consumers, such as shipping, safety, and security. The seller should not have to provide a link on the home page to every discrete topic of importance to consumers. Moreover, if a consumer cannot find the terms, a reasonable place to look next is at the “Help” page, which contains a link to the terms and conditions. How should the “promptly” and “so time-consuming” tests be applied to this site? Internet promoters constantly claim that speed is a primary goal of Internet Service Providers and should be an objective of every consumer.<sup>182</sup> Should this emphasis on speed influence our conception of what is time-consuming? Do the UCITA standards require a direct link to the terms? Would two or more links constitute excessively time-consuming access?

Further questions arise from the text of the page titled “terms of use.” The disclaimer there states that “[t]he information, services, products, and materials contained in this site . . . are provided on an ‘as is’ basis with no warranty.”<sup>183</sup> The consumer gets a different message, however, if she clicks on the “Help” link from the home page, and then clicks on the link to “Frequently Asked Questions” under the topic heading “new visitors.” In answer to one of the questions on this page, the consumer is told, “We offer 100% satisfaction guaranteed on all your purchases.”<sup>184</sup> Consumers who view this link may make their purchase believing that they are fully protected. Consumers who read the “terms” page but not the “Frequently Asked Questions” page may be concerned about the disclaimer

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181. *Id.*

182. See Katie Hafner, *3 Rules of DSL-Location, Location, Location*, N.Y. TIMES, Jan. 13, 2000, at G1 (reporting on developments in increasing the speed of Internet connections).

183. *eToys, terms of use* (visited Dec. 17, 1999) <<http://www.eToys.com>>.

184. *Id.* at *Frequently Asked Questions*.

and limitation of liability and decide not to purchase anything. Consumers who read both may be thoroughly confused.

Visitors to the Target Web site who click on the page "Legal: Terms/Conditions" find a section labeled "Disclaimers." The first paragraph seems to limit the disclaimer to the site, like the Disney disclaimer. It states: "Target . . . [and] Dayton Hudson . . . disclaim any and all representations and warranties with respect to this site and its contents."<sup>185</sup> The next paragraph of the disclaimer section, however, provides that Dayton Hudson companies "disclaim any and all warranties, express or implied, for any merchandise offered on this site. This disclaimer does not apply to any product warranty offered by the manufacturer of the item."<sup>186</sup> This second paragraph seems to apply the disclaimer to the goods sold from the site. Clicking on another page provides a different message: "For items purchased on Target.com, you can expect the same great guest service as you receive in the store. If you are not fully satisfied with your Target.com purchase, return it with the original Target.com packing receipt within 90 days from order date. We will exchange it, repair it, or offer you a refund based on your method of payment."<sup>187</sup> In sum, Target claims it makes no express warranties and that no implied warranties apply to its goods. Nevertheless, Target will provide consumers with the relief to which consumers may be entitled for breach of express and implied warranties. The confusion that a reasonable consumer likely would feel upon reading these provisions raises questions as to what terms should be considered binding on transactions made on this site.

The prominent link on the home page labeled "Shopping at eToys is 100% safe—guaranteed" produces another type of confusion. The page that accompanies this link informs the consumer that "in the highly unlikely event of credit card *fraud*, AOL and Excite will guarantee your protection."<sup>188</sup> The page titled "payment," however, contains the following statement: "take comfort in this—in the unlikely event that someone

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185. *Target, Legal: Terms/Conditions* (visited Dec. 15, 1999) <<http://www.target.com>>.

186. *Id.*

187. *Target, Help: Online Ordering* (visited Dec. 17, 1999) <<http://www.target.com>>.

188. *eToys, safe & secure shopping* (visited Dec. 17, 1999) <<http://www.eToys.com>> (emphasis added).

makes *unauthorized* charges on a credit card because of an eToys transaction, the cardholder will simply not be held liable.”<sup>189</sup>

Target’s Web site combines provisions on fraud and unauthorized charges on the same page. The site states:

[W]e’ll make sure you don’t have to pay any *fraudulent* charges made to your account. Here’s how it works:

If *fraudulent* charges are made to your credit card, you must notify your credit card company in accordance with its rules and procedures. Under the Fair Credit Billing Act, your credit card company cannot make you pay more than \$50 of the *fraudulent* charges. If your credit card company makes you pay any part of this \$50, then Target.com will reimburse you only if the *unauthorized use* of your card number occurred because you used it to purchase something online through Target.com and only if you properly notified your credit card company.<sup>190</sup>

In contrast, the explanation on the ToysRUs site is phrased exclusively in terms of fraud and does not mention unauthorized use. It states, “If anyone uses your credit card to make a fraudulent purchase through Toysrus.com, and your bank holds you liable, we cover your liability up to \$50. All of the credit cards we accept cover any amount over this.”<sup>191</sup>

These credit card disclosures raise several issues. First, is access to the term cumbersome and time-consuming? This is particularly important when a site requires the consumer to perform certain tasks in order to obtain the benefit that the seller is offers.<sup>192</sup> Second, the terms and conditions may be scattered among several different pages; some may be readily accessible through direct links, while others may be considerably harder to find. Consequently, under the UCITA

189. *Id.* at payment.

190. *Target, Legal: Security/Privacy* (visited Dec. 17, 1999) <<http://www.target.com>> (emphasis added).

191. *ToysRUs, Security & Privacy Policy* (visited Dec. 29, 1999) <<http://www.toysrus.com>>. Consumers are required to report the fraud to their bank and the bank must provide “written verification that you are being held liable for the fraud.” *Id.*

192. For example, ToysRUs offers protection for fraudulent use of a credit card, but only if the consumer follows certain steps. *See id.* Target also requires the consumer to perform certain acts to obtain credit card protection. *See Target, Legal: Security/Privacy* (visited Dec. 17, 1999) <<http://www.target.com>>.



rules, the consumer might be bound by some of the terms on the site, but not by others. Third, the eToys site illustrates that terms affecting the same issue—like credit card misuse—may be on different pages and the terms may vary from one page to another. Fourth, consumers may be induced to enter into contracts, at least in part, by the way in which credit card protection is touted on the home page. For example, ToysRUs's credit card protection is accessed by a home page link titled "Risk-Free Guarantee."<sup>193</sup> The provisions, however, are phrased in a manner which may confuse consumers. This likelihood of confusion raises the issue of whether consumers should be bound by the conditions the seller imposes on them.

Under the regulations promulgated pursuant to the federal Fair Credit Billing Act, cardholders are liable for no more than \$50 when another person makes an unauthorized use of their credit card.<sup>194</sup> "Unauthorized use," however, is a far broader category than fraud, which is the term used on some Web sites. In tort law, fraud is a general term for several types of theories, including "deceit, concealment, innocent misrepresentation, and nondisclosure."<sup>195</sup> An action in deceit, for example, requires proof of nine elements, including proof that there was a false representation of a material fact that the wrongdoer knew was false or made in reckless disregard of the facts.<sup>196</sup> In addition, there must be proof of justifiable reliance on the false representation. In contrast, unauthorized use is defined as "use of a credit card by a person . . . who does not have actual, implied, or apparent authority for such use."<sup>197</sup> It covers a broad range of circumstances and does not include the strict proof requirements for fraud.<sup>198</sup> Consequently, consumers receive far less protection under the fraud provision than the unauthorized use provision. It is doubtful that consumers understand the distinction and its implications.

193. *ToysRUs Home Page* (visited Jan. 3, 2000) <<http://www.toysrus.com>>. The credit card provision also is accessible through other links such as "Security and Privacy Policy." *See id.*

194. *See* 12 C.F.R. § 226.12(b)(1) (1999).

195. MICHAEL GREENFIELD, *CONSUMER TRANSACTIONS* 6 (3d ed. 1999).

196. *See id.* at 7.

197. 12 C.F.R. § 226 n.22.

198. *See generally* ELISABETH RENUART & KATHLEEN KEEST, *TRUTH IN LENDING* 314 (4th ed. 1999).

The Target provision states that under the Fair Credit Billing Act, the credit card company cannot make the consumer pay more than \$50 “of the fraudulent charges.”<sup>199</sup> Actually, under that law, the company cannot make the consumer pay more than \$50 of any charges due to unauthorized use.<sup>200</sup> Target then states that it will reimburse the consumer the \$50 for which she may be liable, but only if the consumer properly notified the credit card issuer of the unauthorized use.<sup>201</sup> Although consumers should applaud Target’s willingness to extend protection beyond the law’s requirements, the juxtaposition of the terms “fraudulent” and “unauthorized use,” may lead consumers to erroneously believe that the terms have the same meaning, even though Target’s protection extends only to fraud.<sup>202</sup>

The ToysRUs site only uses the term “fraudulent.” However, by only using that term, ToysRUs creates the impression that the federal law applies only to fraud. Also, it is unlikely that consumers will realize that ToysRUs is offering less protection than Target, since Target will reimburse even for unauthorized use.

eToys promises protection from fraud on one page<sup>203</sup> and from unauthorized use on another.<sup>204</sup> A court faced with a dispute over the extent of the consumer’s protection could reasonably conclude that the consumer has the greater protection offered for unauthorized use because the seller promised this protection on the site. Such a case, however, is unlikely to reach a court because the maximum amount at issue is only \$50—an amount not protected under federal law. Rather, the consumer will probably only complain to the seller. The seller will likely insist that it is obligated to reimburse only if there is fraud, pointing to the page on its Web site stating precisely that.

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199. *Target, Legal: Security/Privacy* (visited Dec. 17, 1999) <<http://www.target.com>>.

200. *See* 12 C.F.R. § 226.12(b)(1) (1999).

201. *See id.*

202. The ToysRUs site only uses the term “fraudulent.” However, by only using that term, ToysRUs creates the impression that the federal law applies only to fraud. Also, it is unlikely that consumers will realize that ToysRUs is offering less protection than Target, because Target will reimburse even for unauthorized use.

203. *See eToys, safe & secure shopping* (visited Dec. 28, 1999) <<http://www.eToys.com>>.

204. *See eToys, payment* (visited Dec. 17, 1999) <<http://www.eToys.com>>.

In fact, the consumer may never see the page containing eToys's promise of protection for unauthorized use, which is accessed through a link titled "payment." The consumer may instead have gone to the link titled "[S]hopping at eToys is 100% safe—guaranteed," which contains the fraud provision. If the consumer never viewed the "payment" page, but instead only saw the "100%" page, is the seller bound by the promise in the page that the consumer never saw? In regard to warranties, an affirmation of fact or promise is a warranty only if it "becomes part of the basis of the bargain."<sup>205</sup> If the consumer never saw or heard an affirmation or promise, arguably it never became part of the basis of the bargain.<sup>206</sup> The current draft of Revised Article 2 specifically deals with warranties made in advertisements. An affirmation of fact or promise in an advertisement is enforceable against the seller if the buyer knows of the affirmation or promise; thus, the buyer must see the advertisement.<sup>207</sup> In addition to requiring knowledge, the buyer also must have made the purchase "with the expectation that the goods will conform to the affirmation [or] promise."<sup>208</sup>

How should the law treat the situation where the consumer bases his action on the Web page extending protection for unauthorized use? Should the law follow the Revised Article 2 model on advertising warranties? That is, should the consumer have to prove that she saw the page and purchased the goods with the expectation that the seller would provide protection for unauthorized use? Alternatively, should the law presume that the consumer saw the page and assume the consumer expected protection for unauthorized use? Should the seller have the burden of proving that the consumer never viewed the page or had an expectation? It is certainly possible for the seller to prove whether or not the consumer visited the page in question. Many sellers use "cookies" to track the consumer's movements on the seller's site.<sup>209</sup> Because this information is in the

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205. U.C.C. § 2-313(1)(a) (1999).

206. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 341 (1995).

207. See Rev. art. 2, § 2-313B(b) (1999); see also UCITA § 402, cmt. 3 (1999) ("The affirmation of fact in advertising must be known by the licensee, as well as influence and in fact become part of the basis of the bargain . . .").

208. Rev. art. 2, § 2-313B(b) (1999).

209. See *Target, Legal: Security/Privacy* (visited Dec. 17, 1999)

exclusive possession of the seller, it would be most fair to put the burden on the seller to prove that the consumer never visited the page containing the provision on unauthorized use. Some sellers, however, use a separate cookie for each session; the cookie does not contain information about the consumer, and apparently the information is not retained.<sup>210</sup> It is designed solely to allow the seller to keep track of the individual items the consumer puts in her virtual shopping cart during that visit. Moreover, many sellers probably do not use cookies at all. In that case, neither party could prove whether or not the consumer visited the page at the time she made the purchase.

Even if a seller does use cookies and its data shows that the consumer did visit the page on unauthorized use, an additional problem remains. The Revised Article 2 also requires proof of the buyer's expectation. Only the buyer knows whether she bought the goods with the expectation that the seller would protect her from unauthorized use. Therefore, arguably the consumer should bear the burden of proving that expectation. But how can the consumer prove this? Does she have to testify that she has had problems in the past with unauthorized use of her card, so the credit card protection was important to her? What if she has not had any problems in the past? Would it be sufficient for her to testify that she had the expectation of protection with the seller having the burden of offering some evidence that she did not expect protection? The expectation test ultimately rests on the consumer's subjective thought process and is, consequently, unworkable.

The above suggests that the Revised Article 2 provision on advertising warranties does not offer a useful model for resolving this issue. It also is defective on another level. Parties are unlikely to litigate either the provision on unauthorized use or many of the other disputes over terms and conditions on Web sites. They do not involve monetary amounts sufficient to justify the emotional and economic expense of litigation. At most, the consumer will complain to the seller.<sup>211</sup> What

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<<http://www.target.com>>.

210. See *Lands' End, Privacy on the Lands' End Web Site* (visited Dec. 30, 1999).

<<http://www.landsend.com>>.

211. See Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & SOC'Y REV. 701 (1977).

consumers and sellers need are bright-line rules that provide clear answers and are easy to understand and to apply. A rule that satisfies these criteria would be one that simply provides the following. If the seller provides terms and conditions that offer consumers more protection than the law requires, the seller is obligated to comply with those provisions. Whether the consumer saw the page and whether the consumer made the terms and conditions part of her expectations would be irrelevant.

*C. A Proposal for the Consumer's Acceptance of Terms and Conditions*

In light of the previous discussion, the following provisions for revised Article 2 are proposed as follows:

Section XXX Consumer Acceptance of Terms and Conditions in Transactions on the World Wide Web

1) A consumer is bound only by those terms and conditions to which he manifests assent. A consumer manifests assent to a term or condition if the consumer, after having an opportunity to review the term or condition, intentionally engages in conduct with reason to know that the seller or its electronic agent may infer from the conduct that the consumer assents to the term or condition.<sup>212</sup> A person has an opportunity to review a term or condition only if it is made available in a manner that ought to call it to the attention of a reasonable consumer and permit review.<sup>213</sup>

2) A court may consider the following non-exclusive factors in determining whether a seller has provided the required opportunity for review:

a) the presence or absence of a clearly and conspicuously labeled link or links on the seller's home page to the terms and conditions which govern the transaction;

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212. The language is derived from UCITA § 112(a)(2) (1999).

213. The language is adapted from UCITA § 112(e)(1) (1999).

b) the presence of a number of different links, each of which lead to a different category of terms or conditions;<sup>214</sup>

c) the presence of inconsistencies in the terms and conditions from one page to another;<sup>215</sup>

d) the degree of separation between a link on the home page and the link which ultimately results in a page containing a term or condition;<sup>216</sup>

e) the presence of terms and conditions on pages with links containing unrelated categories of terms and conditions and the absence of any other links to those terms and conditions;<sup>217</sup> and,

f) a site design that requires consumers to access a page containing all or substantially all the terms and conditions shortly before the consumer is provided the opportunity to submit an order.<sup>218</sup>

3) The consumer who seeks the benefit of a term or condition shall not be required to prove that he viewed the page containing that term or condition.<sup>219</sup>

4) The [entity with authority to issue regulations pursuant to the state's UDAP statute] may provide factors in addition to those in section 2 by regulation.

5) If the consumer is required to engage in prescribed conduct to receive any benefit provided by a term or condition, such conduct must be clearly and

214. The comment should explain that the more links a consumer has to go through in order to discover the terms and conditions, the less likely the consumer had a satisfactory opportunity to review.

215. A comment could provide an illustration. For example, one page states that the seller will protect the consumer from all loss due to unauthorized use of the consumer's credit card, and another page provides protection only if the card is used fraudulently.

216. A comment should explain that the greater the number of links it takes to get to the terms and conditions, the less likely the consumer had a satisfactory opportunity to review.

217. An example would be a disclaimer of implied warranties that is included only in a page accessed through a link labeled 'How to Order.'

218. This factor illustrates a Web site design that provides consumers with an excellent opportunity to review terms and conditions. Its counterpart is found in many sites containing licenses. See Stuckey, *supra* note 60, at 1-43 (recommending that the provider of goods and services restrict the user's ability to scroll through the terms and conditions without stopping to read them by employing page-by-page prompts); Harrison, *supra* note 57, at 944-45 (recommending that licensors require users to assent to the license prior to accessing the license).

219. See *supra* text accompanying notes 206-211.

conspicuously disclosed on the same page as that which contains the term or condition conferring the benefit.<sup>220</sup>

6) If any applicable law requires a term or condition to be conspicuous, that term must be conspicuous both when displayed on the computer screen and when printed onto a tangible medium.<sup>221</sup>

### CONCLUSION

This Article has explored issues of contract formation and agreement to the terms and conditions of contracts as they pertain to consumer transactions over the World Wide Web. A Survey of Web sites selling goods to consumers was conducted. Current and proposed laws governing consumer Web sales were then applied to the Web sites in the Survey. This permitted the laws to be analyzed in the context of the actual content and format of Web sites. This analysis demonstrates that current and proposed laws fail to address many issues clearly and adequately, to give both sellers and consumers the guidance that they need, and to provide consumers with necessary protection.

In order to remedy the inadequacies in current and proposed laws, the Article recommends the addition of several provisions to U.C.C. Article 2, which presently is being revised. This proposal is tentative in nature. It is based on the findings of a Survey which included a very small number of sites. Examination of other sites might disclose issues worthy of greater statutory attention than those discovered in the Survey. In addition, the suggestion to add the proposed provisions to revised Article 2 is a pragmatic one. The need for legislative reform is urgent, and Article 2 is currently in the process of being revised. Article 2, therefore, is a convenient place to add the proposed provisions. Several significant underlying issues need to be addressed. For example, should Article 2 contain separate provisions on consumer Web sales transactions?

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220. For example, the Target site offers protection for fraudulent use of a credit card, but only if the consumer has first notified his bank. *See supra* text accompanying note 199.

221. *See supra* text accompanying notes 161-170.

Should Article 2 include sale of services as well as goods? Should a free-standing Uniform Act be drafted for consumer Web sales transactions instead of including provisions in Article 2? Should a law governing consumer Web sales transactions be enacted as federal law rather than a state uniform law?

These issues exceed the scope of this Article. Rather, this Article is intended to point out some of the serious questions concerning contract formation and agreement to terms and conditions arising from an examination of actual Web sites. The Article also points out that shopping on the Web is different from any other shopping experience and may likely result in consumer confusion and great legal uncertainty. Thus, the Article offers a proposal to address this confusion and uncertainty through new legislation. Although sellers will probably oppose any legislation, new laws may well increase sales and profits. It is reasonable to assume that if statutes can provide incentives for sellers to make contract formation and agreement to terms less confusing for consumers, consumers will be less hesitant to shop on the Web.<sup>222</sup> Once there is a consensus that legislation is needed, the next step is to decide what issues to address, what exact language provides the necessary clarity and guidance, and what approach properly balances sellers' need for flexibility (to take advantage of technological change and innovative marketing) and consumers' need for disclosure and protection. Finally, decisions will have to be made on whether the legislation should be part of the U.C.C., a free-standing uniform state law, or a federal law. Until these issues are resolved, consumers will find surfing on the Web to be more hazardous and confusing than it should be.

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222. *Consumer Reports* apparently believes clarity and lack of confusion are important factors for consumers. In rating Web sites, they evaluate four factors in addition to giving an overall rating. For example, they evaluate the site's policies. "Policies reflects the clarity and prominence of a site's explanation of its security precautions and shipping costs, and its disclosure of information it collects about visitors." *Catalogs Take to the Web*, CONSUMER REP., Jan. 2000, at 23, 25. The magazine also evaluates the site's ease of use. "Ease of use assesses how quickly and efficiently buyers could browse, find merchandise, and order it." *Id.*



