UNCONSCIONABILITY IN ONLINE BUSINESS TO CONSUMER CONTRACTS

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I INTRODUCTION

Online business to consumer contracts are almost invariably standard form contracts. Like their paper counterparts, online standard form terms are written in tiny print with tight margins, are long, detailed and full of legal jargon, and are biased to the online business offering the terms. However, online standard form contracts have additional characteristics: there is no physical limitation on the number of terms, the terms are offered by a machine, which makes even notional negotiation impossible, and the terms are presented in an interactive riot of sounds, colours and pop-ups that divert consumers from the contractual nature of the transaction. There is clear empirical evidence that online consumers do not read online standard form terms because they are too long, too difficult to understand and too difficult to locate. Nevertheless, common law courts have routinely held online consumers to their click signatures incorporating all the online terms.

Relational contract theory, which assumes bounded rather than complete rationality as a consequence of the transactions costs of bargaining,[1] offers the hope that online businesses' fear of reputational damage and the availability to potential consumers of online information about standard form terms may deter online businesses from skewing 'non-salient' terms like arbitration, damage limitation and warranty disclaimers, as well as spyware clauses and unusual restrictions of licence, in their favour.[2] However, empirical findings that products with higher online consumer ratings tend to have been sold under more business-friendly online standard form contracts do not bear out these assumptions.[3] The efficacy of other suggested pre-

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[1] Chapin F Cimino, 'The Relational Economics of Commercial Contract' (2015) 3(1) *Texas A&M Law Review* 91, 93; Russell Korobkin, 'Bounded Rationality, Standard Form Contracts and Unconscionability' (2003) 70(4) *University of Chicago Law Review* 1203.

[2] Wayne R Barnes, 'Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)' (2007) 82(2) *Washington Law Review* 227, 229.

[3] Nishanth V Chari, 'Disciplining Standard Form Contract Terms through Online Information Flows: An Empirical Study' (2010) 85(5) *New York University Law Review* 1618, 1622.

contractual solutions, such as imposing a 'readability' standard on online businesses or requiring pre-contract notice of the terms, also lacks evidentiary support.

It follows that the most effective remedies for online consumers may be post-contractual. This article examines circumstances where online consumers may deny their click signature, argue that the click signature was procured by fraud or misrepresentation or was unauthorised, or argue that they should be relieved of the effect of their click signature on the grounds of unconscionability. The article ends in considering an instance of a statutory unfair terms jurisdiction applied to an electronic contract. The article concludes that the courts have been slow to invalidate online standard form contracts for unconscionability. Further, there may be scope for a broader approach to procedural unconscionability in the presence of the known characteristics of these contracts.

II THE CHARACTERISTICS OF ONLINE STANDARD FORM TERMS

Online business to consumer contracts are standard form contracts. The known characteristic of standard form terms is that they are written in tiny print with tight margins[4] and are often 'long, detailed, full of legal jargon' and 'one sided'.[5] Consequently, consumers fail 'in a reliable and predictable fashion' to read the terms.[6] The conclusion that consumers do not read paper standard form terms has become 'so well accepted and documented as to be virtually enshrined as dogma within the contracts literature'.[7] It has been accepted by the common law courts for over 50 years—'the customer has no time to read [standard form terms], and if he did read them, he probably would not understand them'.[8]

The conclusion that consumers do not read paper standard form terms remains good for online standard form terms. In 2014, Marrota-Wurgler found that only one or two of every 1,000 retail software shoppers accessed the licence agreement, and of those, most read no more than

[4] Kristin B Cornelius, 'Standard Form Contracts and a Smart Contract Future' (2018) 7(2) *Internet Policy Review* 1–18.
[5] Robert A Hillman and Jeffrey J Rachlinski, 'Standard Form Contracting in the Electronic Age' (2002) 77(2) *New York University Law Review* 429, 468.
[6] Ibid 432, 433.
[7] Barnes (n 2) 237.
[8] *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406 (Reid LJ).

a small portion of the licence.[9] In the same year, a study was conducted using self-reported amounts of time subjects took to read online licence agreements. Actual observations of them installing software concluded that this took less than one minute on average, making it impossible to read most of the agreements, which averaged over 6,000 words.[10] A reason that consumers may not read online standard form terms is that they are incomprehensible. A study in 2019 found that online standard form terms present at the level of an academic article that is not meant for the public. They are dense and contain long sentences, most of which far exceed an average recommended sentence readability length of 25 words.[11] These results, reported for the United States, are likely to be similar for developed countries more widely.[12]

Further, a characteristic of standard form terms presented online is that there is no physical limit to the length of an online contract. There are no set standards regarding the online placement of onerous contractual terms.[13] Businesses hide 'controversial terms on the website and within the e-standard form' and 'experiment with online presentation to deter reading' as much as possible.[14] For example, it takes about 68 minutes to read Fitbit's terms and conditions. PayPal's terms and conditions are longer than Shakespeare's *Hamlet,* and Apple's *iTunes* terms and conditions are longer than *Macbeth.*[15]

The second characteristic of online terms is that standard form terms are offered by a machine with which it is impossible to negotiate. As early as 1954, in the case of a policy of flight insurance vended by a machine at an airport, a majority on appeal in *Lachs v Fidelity & Casualty Company of New York*[16] commented on the consequences of dealing with a machine:

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[9] Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts' (2014) 43(1) *Journal of Legal Studies* 1.
[10] Thomas J Maronick, 'Do Consumers Read Terms of Service Agreements When Installing Software? A Two Study Empirical Analysis' (2014) 4(6) *International Journal of Business and Social Research* 137.
[11] Uri Benoliel and Shmuel I Becher, 'The Duty to Read the Unreadable' (2019) 60(8) *Boston College Law Review* 2255, 2277–81.
[12] OECD (2018) 'Improving Online Disclosures with Behavioural Insights' (Digital Economy Papers No 269, 12 April 2018) 23.
[13] Vincent Gautrais, 'The Colour of E-Consent' (2003–2004) 1 *University of Ottawa Law and Technology Journal* 189, 195–6.
[14] Robert A Hillman, 'Consumer Internet Standard Form Contracts in India: A Proposal' (2017) 29(1) *National Law School of India Review* 70, 71. For an earlier discussion of 'unfair surprise' in online standard form terms, see also Robert L Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts' (2005) 42(4) *Houston Law Review* 1041.
[15] OECD (n 12) 24.
[16] *Lachs v Fidelity & Casualty Company of New York*, 306 NY 357 (1954).

> There must be a meeting of minds achieved between the applicant and the company through an application and signs and lettering, for while the applicant has a mind, the machine has none and cannot answer questions. If the appellant had paid for a living salesman, the deceased would not have purchased the insurance, since the insurance did not cover her trip.[17]

Similarly, in the Californian case of *Steven v Fidelity and Casualty Company of New York,*[18] heard eight years later, the court held:

> We do not here deal with the orthodox insurance policy sold in the protective aura of the insurer's explanation and discussion of its terms ... The inanimate machine told the purchaser nothing, and even if he had wanted to ask about the coverage in the event of an emergency, the box would not have answered ... The purchaser lacks any opportunity to clarify ambiguous terms ... To equate the bargaining table, where each clause is the subject of debate, to an automatic vending machine, which issues a policy before it can even be read, is to ignore basic distinctions.[19]

In England too, in *Thornton v Shoe Lane Parking Ltd,*[20] the inability of the customer to even notionally negotiate or return a ticket offered by a machine caused Lord Denning MR to reject a ticket case analysis[21] of the transaction:

> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time.[22]

The courts in the United States imposed a particular obligation of 'reasonable communicativeness' on insurance companies relying on exclusion terms in machine-vended contracts. Because the vendor was not available in-person to explain the terms to the consumer, the physical appearance of the offer had to put the consumer on notice that it contained legally binding terms, and the consumer had to be able to meaningfully inform him or herself of the terms before entering into the contract.[23] The 'red hand' rule suggested by Denning MR in *J*

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[17] Ibid 366.
[18] *Steven v Fidelity and Casualty Company of New York*, 58 Cal 2d 862 (1962).
[19] Ibid 877, 883, 884.
[20] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, applied in *The Queen (on application of Software Solutions Partners Limited) v Her Majesty's Commissioners for Customs and Excise* [2007] EWHC 971 (Admin), [66]-[68].
[21] *Parker v South Eastern Railway Co* (1877) 2 CPD 416.
[22] *Thornton v Shoe Lane Parking Ltd* (n 20) 169.
[23] Juliet M Moringiello, 'Signals, Assent and Internet Contracting' (2004) 57(4) *Rutgers Law Review* 1307.

Spurling v Bradshaw[24] has had a similar function in common law jurisdictions outside the United States.

The third characteristic of online standard form terms is that they are interactive. Web pages containing standard form terms may be loaded with links, movies and sounds distracting consumers from the legal nature of the transaction. Pop-ups containing terms may be ignored or clicked on to be removed because they are an annoyance to users.[25] The appearance of terms may alter according to the interactive device on which they appear, and vendors may even experiment with the presentation of e-standard terms by manipulating graphics and requiring searches through various screens to deter reading[26] and to de-emphasise the presence of the contract.[27] Even colour is important. Decisions on incorporating standard form terms have turned on whether they are sufficiently notified in difficult-to-see grey text or by conspicuous blue hyperlinks.[28]

These characteristics of no limits on the length of standard form terms, the inability to negotiate even notionally with the machine offering the terms and the noisy and colourful interactivity of the machine distracting the consumer from the legal nature of the transaction bring into question whether the act of clicking an intangible icon on a web page is psychologically equivalent to setting a mark on paper to approve the paper's contents.[29] Nevertheless, courts in the United States, relying on the *Uniform Commercial Code* ('UCC') have routinely equated online contracts and click signatures with paper contracts and pen signatures.[30] In *Barnett v Network Solutions Inc*,[31] the Court of Appeals of Texas expressly equated online contracts with paper contracts. In *Groff v America Online*, the court held it was irrelevant the appellant had not read the terms, as he was bound by clicking two 'I agree' buttons.[32] These decisions have

[24] *J Spurling v Bradshaw* [1956] 1 WLR 461, 466.
[25] Ty Tasker and Daryn Pakcyk, 'Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements' (2008) 18(1) *Albany Law Journal of Science and Technology* 79, 106; Cornelius (n 4).
[26] Hillman (n 14) 71, 73.
[27] Cornelius (n 4).
[28] *Pollstar v Gigmania Ltd*, 170 F Supp 2d 974 (ED Cal, 2000); *PDC Laboratories Inc v Hach* (CD Ill, No 09–1110, 25 August 2009) distinguishing *Hubbert v Dell Corp*, 835 NE 2d 113 (Ill App Ct, 2005).
[29] Hillman and Rachlinski (n 5) 481.
[30] Cornelius (n 4).
[31] *Barnett v Network Solutions Inc*, 38 SW 3d 200 (Tex Ct App, 2001).
[32] *Groff v America Online Inc* (RI Sup Ct, No PC-97-0331, 27 May 1998).

been followed at the appellate level in a number of jurisdictions in the United States.[33] In the Australian case of *eBay International AG v Creative Festival Entertainment Pty Limited*, Rares J found that, without the assistance of legislative intervention, when purchasers electronically clicked the terms of an online contract for the purchase of tickets, it was 'a contract in writing signed by the parties. By clicking on the relevant buttons and, by the computer bringing up all terms needed to purchase a ticket ... the whole transaction was in writing, signed and agreed by the parties'.[34]

In contrast, in England and Wales, *Spreadex v Cochrane*[35] ('*Spreadex*') has been cited as an example of a click signatory not having been held to their click signature because of the 'inadequate' online presentation of copious terms.[36] However, caution should be used in the approach to the result in *Spreadex*. First, it was an interlocutory decision denying summary judgment to the online business. Secondly, the ratio of the decision was that independently of any signature, the electronic terms under discussion, as a matter of construction, could not have been in existence before the stock market trades in dispute. Thirdly, the court's finding of the inadequate presentation of the online terms was an obiter consideration of whether the terms were unfair pursuant to legislation.

III PRE-CONTRACT REMEDIES FOR ONLINE STANDARD FORM TERMS

The starting point for the academic literature has been that online standard form terms, like their paper equivalents, subvert the common law ideal of a contract as a bargain and that businesses probably exploit the failure of consumers to read the terms. Nevertheless, in an age of mass provision of consumer goods and services, standard form contracts promote market efficiency by promoting economies of scale and reducing the transactional costs of bargaining.[37] Hillman and Rachlinski concede that internet consumers are no more likely than real-world consumers

[33] *Barnett v Network Solutions Inc* (n 31); *Bell v Hollywood Entertainment Corp* (Ohio Ct App, No 87210, 3 August 2006); *Treiber & Straub Inc v United Parcel Service Inc*, 474 F 3d 379 (7th Cir, 2007); *Durrett v ACT Inc* (Haw Int Ct App, Civil No 07-1-0622, 12 July 2011); *In Re: H&R Block IRS Form 8863 Litigation; Bullock v HRB Tax Group Inc* (WD Miss, Master Case No 4:13-MD-02474-FJG, 11 July 2014).

[34] *eBay International AG v Creative Festival Entertainment Pty Limited* (2006) 170 FCR 450, [49].

[35] *Spreadex v Cochrane* [2012] EWHC 1290 (Comm) ('*Spreadex*').

[36] See the discussion in Trish O'Sullivan, 'Online Shopping Terms and Conditions in Practice: Validity of Incorporation and Fairness' (2014) 20 *Canterbury Law Review* 1 ('Online Shopping Terms').

[37] Hillman and Rachlinski (n 5) 438.

to read standard terms. This proposition has been borne out by research. Individuals treat the internet as primarily 'amusement, information-gathering for real-world transactions, or window shopping' and may be too quick to complete their online purchases.[38] However, because the internet gives consumers an unparalleled opportunity to comparison shop and investigate businesses, Hillman and Rachlinsky have taken, at least initially, an optimistic view of competition on the internet restraining online businesses from exploiting consumers.

The belief that the online market can self-regulate is underscored by the belief that even if consumers fail to read terms, their failure is 'boundedly rational'. Consumers do not have limitless resources of time and energy to make perfect decisions in every circumstance. Instead, they weigh the costs of reading long and impenetrable terms against the benefit of avoiding a bad deal on a consumer item and substitute a 'satisfactory' decision for an 'optimal' one.[39] Further, even if most consumers do not read online standard form terms, it may be sufficient to discipline online businesses if an 'informed minority' at the margin does, actively shopping for better terms.[40]

Leon Trackman has less confidence in the market to restrain the predatory behaviour of businesses. Still, he has not concluded that any special laws are required to deal with the challenges of online terms:

> 'Wrap' contracts are insufficiently different from other forms of rolling contracts to warrant distinctive treatment. With the possible exception of browse-wrap contracts, disputes over conditions in 'wrap' contracts should be resolved without carving out new remedies devoted specifically to e-commerce. Nor are new classes of mass online consumers sufficiently different from offline consumers of the past to warrant special rules to protect them.[41]

However, Nancy Kim has argued that online consumer contracts are 'aberrant' because their ubiquity, intangibility and flexibility encourage consumer habituation, reducing the signalling effect of contracts and deterring consumers from reading terms.[42] She has doubted whether the practice of the common law courts in treating electronic contracts 'just like' paper contracts

[38] Hillman and Rachlinski (n 5) 467, 479.
[39] Barnes (n 2) 254, 255; Korobkin (n 1) 1206.
[40] Benoliel and Becher (n 11) 2291.
[41] Leon Trakman, 'The Boundaries of Contract Law in Cyberspace' [2009] 1 *International Business Law Journal* 159, 160.
[42] Nancy S Kim, 'Situational Duress and the Aberrance of Electronic Contracts' (2014) 89(1) *Chicago-Kent Law Review* 265, 265.

sufficiently acknowledges the differences between them, arguing that form has an impact on substance:

> Electronic contracts create a feedback loop, with customer consent becoming automatic as consumers become habituated to the ubiquity of electronic contracts. Because consumers fail to notice, companies modify and increase the number of terms, further perpetuating consumer habituation. Consequently, electronic contracts are lengthier and their terms more aggressive than their paper counterparts.[43]

If online consumer contracts are aberrant, the solutions offered in the literature have been varied. Bruce Benson has argued the relational contract position: because the vast majority of internet transactions are not one-off but are repeated dealings, they are valuable, and businesses live under the 'implicit threat' of their reputations being tarnished if they do not perform their contractual obligations.[44] For this reason, the most effective regulation will be market regulation similar to the emergence of the *lex mercatoria* of medieval Europe,[45] under which rules were customary and enforcement voluntary.[46] Becher and Zarsky have given some theoretical support for this view. They have argued that the investigatory paradigm be re-oriented away from the availability of online terms to prospective customers to the flow of information available on the internet about the terms from former customers.[47] However, Chari empirically tested the 'online information flows' theory of Becher and Zarsky and found that products with higher product ratings from consumers tended to have been sold under online standard form contracts biased in favour of businesses.[48]

Another group of solutions has focused on the pre-contractual readability and availability of terms. Benoliel and Becher suggest that a requirement of 'readability' be imposed on businesses that the courts could enforce according to objective standards, such as the Flesch Reading Ease and Flesch-Kinkaid tests.[49] Hillman has suggested the adoption of the American Law Institute's Principles of the Law of Software Contracts, which advocates the early disclosure

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[43] Ibid 270, 272.
[44] Bruce L Benson, 'The Spontaneous Evolution of Cyberlaw: Norms Property Rights, Contracting Dispute Resolution and Enforcement Without the State' (2005) 1(2) *Journal of Law, Economics and Policy* 269, 282.
[45] Ibid 270.
[46] Ibid 291.
[47] Shmuel I Becher and Tal Z Zarsky, 'E-Contract Doctrine 2.0 Standard Form Contracting in the Age of Online User Participation' (2008) 14(2) *Michigan Telecommunications and Technology Law Review* 303.
[48] Chari (n 3) 1622.
[49] Benoliel and Becher (n 11) 2284.

of terms on businesses' websites.[50] Yet other solutions, focusing on post-contractual outcomes, have emphasised the utility of unfair terms legislation and equitable relief in rebalancing the contractual relationship between online consumers and businesses,[51] although few post-contract solutions have gone as far as Beshuisen, who has recommended the 'creation of a new legal principle' striking down any terms in a contract that are inaccessible to non-legally trained consumers.[52]

Theories of a self-regulating online market that restrains businesses from posting standard form terms with 'non-salient' terms skewed in their favour are not supported by empirical evidence. Further, solutions advocating improved readability and availability of pre-contract online standard form terms have had, at best, mixed support from empirical evidence insofar as simplified terms may impact reading behaviour,[53] while mandatory disclosure requiring the push of a virtual button may only marginally increase reading.[54] The remainder of this paper investigates post-contractual remedies to online standard form contracts. It reviews post-contractual arguments available at general law to consumers caught by exploitative online standard form terms. It considers the extent to which an electronic signature may be denied or the online consumer relieved of its effect for fraud and misrepresentation or procedural unconscionability. The paper finally considers the application of a legislative jurisdiction to relieve an online consumer of the effect of a signature to a substantively unconscionable term.

[50] Hillman (n 14).
[51] Barnes (n 2); Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard from Consumer Contracts' (2009) 33(3) *University of Melbourne Law Review 934*. See also Chinelle Van Der Westhuizen and Phillip Evans, 'ACL Unfair Contract Terms and Standard Construction Contracts' (2019) 21 *The University of Notre Dame Australia Law Review* 4:1–37.
[52] Mike Beshuisen, 'Just Click Here: A Brief Glance at Absurd Electronic Contracts and the Law Failing to Protect Consumers' (2005) 14 *Dalhousie Journal of Legal Studies* 35, 56.
[53] Alessandra Rossetti, Patrick Caldwell and Sharon O'Brien, 'The Terms and Conditions Came Back to Bite: Plain Language and Online Financial Content for Older Adults' in Constantine Stephanidis et al (eds), *HCI International 2020 – Late Breaking Papers: Universal Access and Inclusive Design, Lecture Notes in Computer Science* (Springer LNCS Proceedings, vol 12426, 2020).
[54] Cornelius (n 4).

IV POST-CONTRACT REMEDIES TO ONLINE STANDARD FORM CONTRACTS

A *Denying a Signature*

Forms of electronic signatures include scanning a manuscript signature, typing a name into an electronic format, clicking on an 'I accept' icon on a web page, using a personal identification number, using a digital or cryptographic signature, making a voice print or giving a retinal scan. Clicking on a virtual icon is the most common way of making an online standard form agreement. A click signature can perform the same function as a handwritten signature, manifesting unambiguous assent to terms and binding the parties to an enforceable agreement.[55]

Elizabeth McDonald has argued that under the law of England and Wales, clicking an 'I agree' button is probably not a signature. Even if it is, there is 'a considerable capacity for unfairness'.[56] However, despite the obiter remarks in *Spreadex,* there are now many examples of superior and appellate courts accepting that a click is capable of binding a click signatory in the same way as a signature binds a paper signatory.[57] Further, it is difficult to conceive of the common law courts depriving themselves of a rule of evidence that, in conjunction with the parole evidence rule, allows them to find all the terms of a contract incorporated without the parties themselves having to give often lengthy and contradictory evidence of the terms they agreed to.

Conversely, Jeannie Paterson holds that there may be ambiguity as to whether clicking an 'I accept' button necessarily is a signature incorporating all standard form terms:

> Acts such as typing in a name or clicking to proceed do not uniformly represent consent to the suppliers' terms.[58] ... In some cases, clicking an 'I accept' icon might reasonably be understood by consumers as performing a more limited function. For example the click might reasonably

[55] Simon Blount, *Electronic Contracts* (LexisNexis, 2nd ed, 2015) [1.11].
[56] Elizabeth McDonald, 'Incorporation of Standard Terms in Website Contracting-Clicking "I Agree"' (2011) 27(3) *Journal of Contract Law* 198, 210.
[57] *eBay International AG v Creative Festival Entertainment Pty Limited* (n 34); *Groff v America Online Inc* (n 32); *Barnett v Network Solutions Inc* 38 SW 3d 200 (Tx Ct App, 2001); *Bell v Hollywood Entertainment Corp* (n 33); *Treiber & Straub Inc* (n 33); *Durrett v ACT, Inc* (n 33). *Spreadex* (n 35) led to a different result. See the discussion in Trish O'Sullivan, 'Online Shopping Terms' (n 36). See also *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] 4 All ER 765, 771.
[58] Jeannie Marie Paterson, 'Consumer Contracting in the Age of the Digital Natives' (2011) 27 *Journal of Contract Law* 152, 162.

> be seen as ... signalling agreement only to the specified purchase price, quantity or delivery details or as authorising the download of software.[59]

Paterson's analysis seems to leave open the possibility that where an electronically checked box indicates assent, there may be an argument that it is not a signature but an indication that standard form terms have been brought to the consumer's notice. In these circumstances, there may be some leeway for a court to determine whether, despite the checked box, the online business has not done all that is reasonably necessary to bring the term to the notice of the online consumer. As always in common law jurisdictions, the argument will turn on whether, in checking the box, the consumer manifested an intent to approve and adopt the online standard form terms.[60]

B *Fraud or Misrepresentation*

Courts in the United States have given effect to the fraud and misrepresentation exceptions to the signature rule. An example of the fraud exception is *Scarcella v America Online*,[61] where the plaintiff entered into an online membership agreement by electronically ticking a virtual box assenting to standard terms. The screen inviting prospective members to agree appeared before the agreement itself appeared, and it was possible to bypass the terms of the agreement by simply clicking on the 'I agree' button. Even if the prospective member persisted and clicked on the 'read now' button, the following message appeared:

> Because TOS and ROR are detailed, they are lengthy, and while we encourage you to take the time to read them now, we understand if you are eager to just explore the service.[62]

Then, the prospective member was presented with a second opportunity to press an 'OK, I agree' button. The court indicated that the plaintiff may not have been bound by his signature, as the defendant deceitfully used language effectively encouraging Scarcella to skip the agreement while enjoying the protection of his signed assent to it.

An example of the misrepresentation exception is *Specht v Netscape Communications.*[63] Netscape had invited consumers to download two software programs, *Communicator* and

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[59] Ibid 163.
[60] See Blount, *Electronic Contracts* (n 55) [2.18]–[2.20].
[61] *Scarcella v America Online* 798 NYS 2d 348 (2004) ('*Scarcella*'); affirmed in *Scarcella v America Online* 811 NYS 2d 858 (NY, 2005).
[62] *Scarcella* (n 61) 349.
[63] 306 F 3d 17 (2nd Cir, 2002).

SmartDownload, free of charge. During the installation of *Communicator*, consumers were automatically shown a scrollable text of that program's licence agreement. They were not permitted to complete the installation until they clicked on a 'Yes' button to indicate acceptance of the licence terms. However, during the *SmartDownload* installation, consumers were neither shown any licence agreement nor required to click any agreement to licence terms, with the sole reference to *SmartDownload's* licence terms located in text that only became visible if the plaintiffs scrolled down to the next screen. The most important fact leading the Second Circuit to conclude that the *SmartDownload* terms were misrepresented as being not of a contractual nature was that the software was offered for free:

> It is true that a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing. But ... an exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term.[64]

C *Lack of Authority*

It may be possible to deny authority for the electronic signature. In *Hugger Mugger LLC v Netsuite Inc*,[65] the plea was unsuccessful because an IT manager without actual authority was found to have had ostensible authority to bind the plaintiff because he possessed the user ID and password necessary to sign. In *AET Inc Ltd v C5 Communications LLC*[66] the issue also turned on ostensible authority. The plaintiff denied an agreement on the basis that the electronic signature of its employee was a fraud. The defendant's owner's son worked for the plaintiff, and it was common ground that the son put the employee's electronic signature into the agreement. However, the employee had sent the son an email containing the employee's electronic signature. In the circumstances, the email could have been evidence of authority to sign or evidence of the son fraudulently accessing the employee's signature to sign the agreement. In Australia, in *Williams Group Australia Pty Limited v Crocker*,[67] the respondent was issued an ID and password to make a remote electronic signature and did not change the password. The New South Wales Court of Appeal held that the respondent's failure to change his password did not

[64] Ibid 30.
[65] (CD Utah, No 2:04-CV-592, 12 September 2005).
[66] (SD Tex, No G-06-487, 14 February 2007).
[67] [2016] NSWCA 265.

amount to a representation of ostensible authority for someone else to use the signature. It is arguable that the Court of Appeal's decision was lenient and that an electronic signature holder who fails to take reasonable steps to secure their signature should now expect to be dealt with more harshly by the courts.

D *Unconscionability*

Courts in the United States have also set aside online standard form contracts for unconscionability. An example of a contract being set aside in its entirety for procedural unconscionability is *Comb v PayPal* ('*PayPal*').[68] PayPal's online payment service generated revenue from transaction fees and interest derived from holding funds until they were paid out. The text of the agreement was available via a hyperlink, but the hyperlink did not have to be opened for an application to be processed. Under the terms, where funds were in dispute, 'at its sole discretion' PayPal could restrict accounts, withhold funds, investigate customers' financial records, close accounts and procure ownership of all funds unless and until it determined customers were entitled to the funds. Without prior notice, PayPal could also change the agreement by posting the amended agreement on its website. The District Court of California found the contract was procedurally unconscionable on the grounds that, although there were alternatives to the defendant's services in the online marketplace, the plaintiffs were generally unsophisticated and, in reality, had little choice whether or not to enter into an agreement containing an arbitration clause because it was likely the defendant's competitors also required customers to enter into arbitration agreements. The Court also found the contract was substantively unconscionable because the defendant's ability to act unilaterally to the plaintiffs' detriment displayed a want of mutuality between the parties. The later Californian decision of *Shroyer v New Cingular Wireless Services Inc* ('*Shroyer*')[69] also found that the lack of market alternatives could render a contract containing a substantively unconscionable arbitration clause procedurally unconscionable. The Ninth Circuit held that a contract could be procedurally unconscionable when the party with substantially greater bargaining power presented a 'take it or leave it' contract to a customer, even where the customer had a meaningful choice of service providers.

[68] 218 F Supp 2d 1165 (ND Cal, 2002).
[69] 498 F 3d 976 (9th Cir, 2007) ('*Shroyer*').

The decisions in *PayPal* and *Shroyer* are unusual because a United States court set aside an entire online contract for procedural unconscionability in each instance. The decisions may be understood in the context of California being more consumer-friendly than many other states.[70] The decisions are also the product of s 2–302 of the UCC and a 'sliding scale' of procedural and substantive unconscionability, under which the more substantively unconscionable the terms of a contract are, the less procedurally unconscionable it need be to attract relief, and vice versa.[71] Many more decisions in the United States have held terms of online contracts, particularly forum selection, arbitration and waivers of class actions clauses, to be substantively unconscionable.[72] However, these decisions have little application outside the United States, as the general law of most common law jurisdictions permits a remedy only in the case of procedural unconscionability. For example, the Ontario Superior Court of Justice's decision in *Kanitz v Rogers Cable Inc,*[73] that an arbitration and class action waiver clause should not be set aside for unconscionability because a remedy and not a right was affected, may well resonate with courts in other common law jurisdictions.

In common law jurisdictions outside the United States, courts must rely on legislation to set aside substantively unconscionable terms in online contracts. In Australia, sections 21 and 22 of the *Competition and Consumer Act 2010* (Cth) schedule 2 ('*Australian Consumer Law*') establish an obligation to trade fairly with consumers and engage in fair business transactions. Section 23 provides that unfair terms in standard form contracts, as defined in section 27, are void. Legislation such as the *Contracts Review Act* 1980 (NSW) and Part 2B of the *Fair Trading Act* 1999 (Vic) also potentially allow the courts to avoid an unjust online contract for substantive unconscionability. An example of the application of Victorian legislation to an online contract is *Jetstar Airways Pty Ltd v Free.*[74] Ms Free bought online 'Jet Saver' fares for a cheap introductory price for herself and her sister. A more expensive kind of fare, the 'Jet Flex' fare was also advertised with the Jet Saver fare. To select the fare, Ms Free had to click that she had read and accepted the airline's terms set out in the body of the website. Ms Free could not complete the booking without clicking 'OK' at the foot of the window displaying the terms. The last sentence

[70] Trakman (n 41) 173.
[71] *Shroyer* (n 69) 981–2.
[72] For a detailed consideration of each of these classes of substantive unconscionability see Blount (n 55) 173–81.
[73] *Kanitz v Rogers Cable Inc* (2000) 21 BLR (3d) 104.
[74] *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.

of the terms indicated that she could view the current fees and a summary of fare types at a specified internet address:

> Jet Saver International Flights to/from Australia ... operated by Jetstar: Up to 24 hours prior to departure, 75AUD per passenger per flight plus any fare difference to re-book.[75]

Ms Free later attempted to change the booking by substituting her niece for her sister. However, she could only change the booking if she were to pay a change fee of $75 per flight plus the fare difference at a total cost of $900. The Victorian Civil and Administrative Tribunal found the 'fare types' term was unfair. It was indiscriminate because it operated not only when a customer requested a change to a different flight on another date but also when a customer requested a change to a passenger name on the flight originally booked. Further, the terms operated irrespective of whether the change was part of a commercial transaction for commercial gain or personal reasons.

The Supreme Court upheld the airline's appeal on two main grounds. First, the tribunal had treated the 'good faith' element consideration of the unfair term as a mere factor or indicator in the assessment of 'significant imbalance'. That is, as distinct from an element in its own right. Secondly, and more importantly for this article, the more expensive Jet Flex fare was displayed side by side with the cheaper Jet Saver fare. A special price reduction could justify what might otherwise be a harsh or unfair term.[76] Significantly, the tribunal went into some detail concerning the online presentation of the terms to Ms Free, her navigation through those terms and her acknowledgement of those terms by having to click on virtual boxes before completing the booking. Although Ms Free asserted on appeal that she was not on notice of the terms, the argument was not open to her, and her only option was to allege that the terms were substantively unfair.

Jetstar v Free provides an example of a consumer outside of the United States taking advantage of an unfair contracts jurisdiction created by legislation. However, consumer protection legislation does not protect consumers in every type of online transaction.[77] Dale Clapperton and Stephen Corones warn that although legislation may prescribe certain terms as

[75] Ibid [10].
[76] Ibid [129] citing *Director General of Fair Trading v First National Bank* [2000] QB 672 as authority for this proposition.
[77] See Trish O'Sullivan, 'The Exclusion of Consumer Rights in e-Auctions – Is an e-Auction Really an Auction at All?' (2010) 4(6) *World Academy of Science Engineering and Technology* 905.

being substantively unconscionable within a standard form contract, online 'standard form' contracts, which are peculiar to each online vendor and not drawn up for general use within an industry, may not meet the definition of standard form contracts under legislation.[78]

Legislative solutions to exploitative online standard form terms lag behind the development of new online contracting methods, so today's proposal for tomorrow's legislative solution can do no more than fix yesterday's online problem. An example of a rapid technological modification affecting legal analysis is the replacement of online 'click-wrap' contracts, which presented terms in a scroll box visible to the online consumer before clicking assent, with 'sign-in-wrap' online contracts in which the online business explicitly states that by signing up to the website the consumer agrees to the contract, and the terms are made available by a hyperlink.[79] In the same transaction, sign-in wrap online contracts blend two distinct incorporation of terms analyses: click-wrap incorporation by signature and 'browse-wrap' incorporation by notice.[80] These contracts may confound any legislative attempt to ameliorate online standard form terms based on just one theory of incorporation.

V CONCLUSION

In Canada, the Supreme Court has held that online standard form terms per se are not unconscionable.[81] However, the reality is that online consumers do not read online standard form terms, there is no limit to the number of terms that can be posted in cyber space, it is impossible to ask questions of a machine, and the machine emits sounds, colours and pop-ups disguising the contractual nature of the bargain. As a consequence, online consumers simply click through standard form terms without in any way taking conscious ownership of them.[82] Businesses have been fully aware for many years that consumers do not read standard form terms.[83] It is reasonable to assume that they have taken advantage of the additional negative characteristics of online standard form terms to further exploit online consumers. Online markets do not self-

[78] Dale Clapperton and Stephen Corones, 'Unfair Terms in Clickwrap and Other Electronic Contracts' (2007) 35 *Australian Business Law* 152, 165.
[79] Benoliel and Becher (n 11) 2258–59.
[80] Blount (n 55) Ch 6.
[81] *Dell Computer Corp v Union des Consommateurs and Dumoulin* [2007] 2 SCR 801.
[82] Gautrais (n 13) 206.
[83] Barnes (n 2) 237–8, citing American Law Institute, *Restatement (Second) Of Contracts* (1979) s 211.

regulate to prevent the exploitation, and the efficacy of pre-online contract initiatives, such as enforcing readable online standard form terms and upfront disclosure, is, at best, marginal.

Despite the known problems of online standard form terms, common law courts have invalidated few online contracts for fraud or misrepresentation or lack of authorisation. The decisions of *Scarcella v America Online* and *Specht v Netscape Communications* are the exceptions proving the rule, and *Hugger Mugger LLC v Netsuite* demonstrates the difficulty of denying authority in the presence of the doctrine of ostensible authority. In particular, not all holders of an electronic signature who fail to keep it secure can expect to be treated as leniently as the respondent was in *Williams v Crocker.* Further, just two decisions, *PayPal* and *Shroyer*, have held online contracts containing harsh terms to be procedurally unconscionable because of a lack of online alternatives. With the assistance of s 2–302 of the UCC, many more decisions in the United States have held that individual terms, particularly forum selection, arbitration and class action waiver clauses, are substantively unconscionable. However, the Canadian decision of *Kanitz v Rogers Cable Inc* is a more reliable guide to the outcome where substantive unconscionability is raised without the assistance of the UCC. A rare example of the application of a legislative unfair terms jurisdiction to online standard form terms is provided by *Jetstar v Free*. Still, in this example, the online consumer lost.

There is no ideal solution to the exploitation of online consumers at the hands of online businesses. However, recognition by the courts of the unique problems of online standard form terms may speak to the courts' jurisdiction to give remedies against unconscionable conduct.[84] If a court in equity could be persuaded to accept the proposition that where an online consumer has entered into a standard form contract offered by a machine on an interactive website disguising the contractual nature of the transaction, and the online business offering the terms has knowingly taken advantage of these known characteristics of online standard form terms to exploit the online consumer, the online consumer's assent to non-salient terms skewed in favour of the online business may be vitiated for procedural unconscionability. However, this plea has yet to be made in the higher courts outside the United States.

[84] Korobkin (n 1) 1290.