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Platform for Privacy Preferences (“P3P”): Finding Consumer Assent to Electronic Privacy Policies

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Cover Page Footnote

Author would like to thank Professor Joel Reidenberg for his advice and comments on early drafts of this Note. Thanks also go to Sam Moore and author's husband, Barry, for their helpful remarks.

NOTES

Platform for Privacy Preferences ("P3P"): Finding Consumer Assent to Electronic Privacy Policies

Kimberly Rose Goldberg*

INTRODUCTION¹

When consumers write a check at a grocery store, call home on a cell phone, mail tax returns, apply for a credit card, or buy concert tickets online, they share private personal information with a third party.² In online transactions, once a consumer shares personal information for a legitimate purpose, i.e., buying concert tickets, that information is also likely to be used for illegitimate

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¹ When referring to online activity, the term "consumer" will be used throughout this Note to signify an individual Internet user, even though not all Internet activity involves consumer transactions. This terminology is used to avoid confusion with the term "user-agent" which will refer to a software program on a consumer's personal computer.

The term "illegitimate use," as defined for purposes of this Note, encompasses both illegal uses, such as identity theft, and legal but unauthorized uses, such as the unauthorized sale to a third party of an e-mail address that was collected legally.

Finally, the term "Web site" is used throughout this Note to refer not only to the Web site itself, but also to the business entity that owns and operates the Web site, whether it is a sole proprietor, partnership, or corporation.

² See Fed. Trade Comm'n, *Privacy: Tips for Protecting Your Personal Information*, at www.ftc.gov/bcp/online/pubs/alerts/privtipsalrt.htm (Jan. 2002).

secondary uses.³ As the online collection of personal information expands exponentially, technology companies, consumer groups, and state and federal regulators are all escalating efforts to protect the privacy of personal data.⁴ Last year, the World Wide Web Consortium (“W3C”)⁵ introduced the Platform for Privacy Preferences (“P3P”).⁶ P3P is “designed to inform Web users of the data-collection practices of Web sites.”⁷ In broad strokes, P3P

³ See FED. TRADE COMM’N, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE: A REPORT TO CONGRESS app. C, tbls. 1, 9a (May 2000) (providing results of a study that finds nearly ninety-nine percent of Web sites collect personally identifying information from consumers and about sixty-eight percent of those Web sites disclose that they do or may share this information with third parties), available at <http://www.ftc.gov/reports/#2000> (last visited Nov. 30, 2003).

⁴ See CAN-SPAM Act of 2003, S. 877, 108th Cong. (2003) (an anti-spam bill introduced by Senator Conrad R. Burns (R-Mont.) that is designed to protect against unsolicited commercial electronic mail, including prohibitions on misleading headings or fraudulent transmission information), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.877.RS>: (last visited Nov. 12, 2003); Saul Hansell, *3 E-Mail Giants Will Join in an Effort to Reduce Spam*, N.Y. TIMES, Apr. 28, 2003, at C2 (discussing the announcement of a joint effort to cut down on spam by Microsoft, Yahoo, and America Online); Saul Hansell, *Virginia Law Makes Spam, with Fraud, a Felony*, N.Y. TIMES, Apr. 30, 2003, at C1 (discussing legislation enacted by Virginia criminalizing the sending of fraudulent, unsolicited commercial e-mail); Fed. Trade Comm’n, *FTC Publishes Agenda for Three-Day Public Spam Workshop*, at <http://www.ftc.gov/opa/2003-04/spamforumagenda1.htm> (Apr. 21, 2003) (The Federal Trade Commission (FTC) hosted a forum to “address the proliferation of unsolicited commercial e-mail and to explore the technical, legal, and financial issues associated with it.”); Ian Fried, *In Privacy Debate, Tech Has Two Faces*, CNET News.com, at <http://news.com.com/2100-1029-996405.html> (last modified Apr. 10, 2003) (discussing various legislative and technology industry initiatives for data privacy protection, including an IBM lab project to create a layered health care database that allows access to certain patient information to only authorized personnel and protects against unauthorized access).

⁵ The World Wide Web Consortium (“W3C”) is a technology industry coalition that promotes Web interoperability by creating technology standards that can be used by all technology companies. “W3C’s mission is to lead the Web to its full potential, which it does by developing technologies (specifications, guidelines, software, and tools) that will create a forum for information, commerce, inspiration, independent thought, and collective understanding.” World Wide Web Consortium, *W3C in 7 Points*, at www.w3c.org/Consortium/Points (last modified Jan. 15, 2003).

⁶ See Fried, *supra* note 4.

⁷ See Lorrie Cranor et al., *The Platform for Privacy Preferences 1.0 (P3P1.0) Specification: W3C Recommendation* § 1.1.1, at <http://www.w3.org/TR/2002/REC-P3P-20020416/#P3P1.0> (Apr. 16, 2002) [hereinafter *P3P Specification*]. As of July 2003, 105 of the top 500 Web sites have created P3P privacy policies. See ERNST & YOUNG, *P3P DASHBOARD REPORT* (July 2003) (finding a twenty-one percent P3P adoption rate in the top 500 domains), available at <http://www.ey.com/global/download.nsf/US/>

allows online consumers “to specify which information, such as names and shipping addresses, they are willing to automatically share with websites.”⁸ When a Web site seeks information that is not cleared, such as a credit card number or e-mail address, the browser displays a warning.⁹ P3P makes Web site data-collection practices more transparent to the consumer so the consumer can intelligently decide with which Web sites he or she wants to interact.¹⁰ P3P does not control a Web site’s actions;¹¹ it merely dictates a uniform vocabulary, which each P3P-enabled Web site should use to describe its data-collection practices.¹² Put another way, “P3P does not protect privacy in and of itself. It does, however, help create a framework for informed choice on the part of consumers.”¹³

P3P has received a mixed response.¹⁴ The P3P specification faces several technological and legal challenges,¹⁵ and even its

P3P_Dashboard_-_July_2003/\$file/E&YP3PDashboardJuly2003.pdf (last visited Nov. 12, 2003).

⁸ Fried, *supra* note 4.

⁹ *See id.*

¹⁰ *See P3P Specification, supra* note 7, § 1 (“P3P provides a technical mechanism for ensuring that users can be informed about [Web sites’] privacy policies before they release personal information . . .”).

¹¹ *See id.* (stating that P3P “does not provide a technical mechanism for making sure sites act according to their policies”).

¹² *See id.* § 1.1.3 (“The P3P vocabulary is designed to be descriptive of a site’s practices rather than simply an indicator of compliance with a particular law or code of conduct.”).

¹³ Deirdre Mulligan et al., *P3P and Privacy: An Update for the Privacy Community*, Center for Democracy & Technology, at <http://www.cdt.org/privacy/pet/p3pprivacy.shtml> (Mar. 28, 2000).

¹⁴ *Compare* World Wide Web Consortium, *W3C Publishes First Working Draft of P3P 1.0: Testimonials*, at <http://www.w3.org/Press/1998/P3P-test.html> (May 20, 1998) (providing a list of favorable responses to P3P from technology executives), *with* ELEC. PRIVACY INFO. CTR., *PRETTY POOR PRIVACY: AN ASSESSMENT OF P3P AND INTERNET PRIVACY*, at <http://www.epic.org/reports/pretypoorprivacy.html> (June 2000) (providing a report that concludes “there is little evidence to support the industry claim that P3P will improve user privacy”).

¹⁵ *See* LORRIE F. CRANOR & JOEL R. REIDENBERG, *CAN USER AGENTS ACCURATELY REPRESENT PRIVACY NOTICES?* 13–18 (Telecommunications Policy Research Conference, Discussion Draft 1.0, 2002), *available at* <http://intel.si.umich.edu/tprc/archive-search-abstract.cfm?PaperID=65> (last visited Nov. 12, 2003). The authors discuss several

staunchest proponents admit that it is not a panacea for the privacy problem.¹⁶ Most significantly, the P3P specification has no enforcement mechanisms, resulting in little risk for Web sites that deviate from their stated data-collection policies.¹⁷ The Federal Trade Commission ("FTC") filed lawsuits against several Web sites under section 5 of the Federal Trade Commission Act ("FTCA")¹⁸ for making false privacy promises.¹⁹ Individual consumers might also file suit to recover for harm caused by false privacy promises or illegitimate use of data.²⁰ Among the possible claims a consumer plaintiff could assert is breach of the contract created through the P3P transaction.²¹ Before the consumer can prove breach, however, he or she must first show that the P3P transaction in fact created a binding contract. The very nature of P3P makes this difficult to prove, since the P3P transaction occurs between two computers with no human involvement.²² Humans

possible legal challenges to P3P including the application of the mistake doctrine, confusion as to which terms bind, deception, defamation, and negligence.

¹⁶ See Mulligan, *supra* note 13.

¹⁷ See *P3P Specification*, *supra* note 7, § 1.

¹⁸ Federal Trade Commission Act [FTCA] § 5, 15 U.S.C. § 45 (2003).

¹⁹ The FTC has settled the suits it filed against the following companies: Guess.com, Inc.; Educational Research Center of America, Inc.; Student Marketing Group, Inc.; The National Research Center for College & University Admissions; Microsoft Corp.; Eli Lilly & Co.; various online pharmacies; Toysmart.com, Inc.; Toysmart.com, LLC; ReverseAuction.com; Liberty Financial Companies, Inc.; and GeoCities. See Fed. Trade Comm'n, Privacy Initiatives, *Enforcing Privacy Promises: Enforcement*, at http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html (last visited Nov. 12, 2003) (providing settlement information for cases the FTC has brought against various companies involving consumer information privacy violations under section 5 of the FTCA).

²⁰ Case law does not yet exist on the breach of privacy policy contracts. See Claude M. Stern & Carlyn Clause, *Privacy Litigation, Breach of Contract*, in KEVIN P. CRONIN & RONALD N. WEIKERS, *DATA SECURITY AND PRIVACY LAW: COMBATING CYBERTHREATS* § 9:56 (West 2002).

²¹ Other possible causes of action include violation of the Computer Fraud and Abuse Act, consumer fraud, invasion of privacy, trespass, unjust enrichment, false advertising, and negligence. See, e.g., Cranor & Reidenberg, *supra* note 15, at 15-17; see also *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001) (plaintiff Web users filed a class action against DoubleClick for collecting a variety of personally identifying information from Web sites they had visited, as part of its Internet advertising business).

²² See Stern & Clause, *supra* note 20.

cannot even read the privacy policy transmitted between the two computers.²³ Arguably, the key to contract formation—a manifestation of mutual assent by the parties—is lacking.

This Note explores the ways in which a consumer plaintiff might show assent to a Web site's P3P privacy policy even though he or she was not involved in the actual transaction. Part I gives a detailed explanation of the P3P transaction, while Part II introduces the problematic issue of assent. Part III explores possible avenues of proving a consumer's inferred assent to the P3P transaction. The first section of Part III analogizes the consumer's minimal participation in the P3P transaction to the conduct manifesting assent in click-wrap agreements. The second section compares the non-activity of the consumer with some types of non-activity that manifest assent in browse-wrap agreements. The last section argues that even where there is no apparent conduct manifesting assent, the theory of standard form-contracting may demonstrate the consumer's inferred consent to all P3P privacy policies.

I. HOW P3P WORKS

A. P3P Privacy Policies

The P3P transaction is essentially a transaction between a Web site and the Web browser (i.e., Netscape Navigator or Microsoft Internet Explorer) on a consumer's personal computer.²⁴ Once a Web site decides it wants to make its data-collection practices more transparent to consumers by following the P3P specification, the Web site begins by creating a P3P privacy policy.²⁵ The P3P privacy policy differs in several ways from the general privacy

²³ See *P3P Specification*, *supra* note 7, § 1. A human-readable version of the P3P policy is available, but the consumer-user must proactively request that the machine-readable version be translated for viewing.

²⁴ See *id.* § 1.1.2 for an example of a P3P transaction.

²⁵ See *id.* § 1.1.5 (“Web sites can implement P3P[on their servers by translating their human-readable privacy policies into P3P syntax and then publishing the resulting files along with a policy reference file that indicates the parts of the site to which the policy applies.”).

policy that is normally posted on Web sites for consumers to read. First, the P3P privacy policy is created in machine-readable language, which consumers cannot read.²⁶ In addition, the P3P privacy policy is not a free-form text document. To create a P3P privacy policy, Web site administrators complete a survey that serves as a template for the P3P privacy policy.²⁷ The survey asks for general information such as what legal entity is responsible for the P3P privacy policy and what dispute resolution procedures are available to consumers.²⁸ Further, for each element of data collected, the administrators must identify specifically what data is collected, how it will be used by the Web site, how long the Web site plans to retain the data, and which third parties can access that data element.²⁹ Web sites collect data such as physical contact information (i.e., phone number) or online contact information (i.e., e-mail address), purchase information (i.e., credit card information), financial information (i.e., account status), computer information (i.e., Internet protocol address), Internet use data (i.e., Web pages accessed and searches performed), government-issued identifiers (i.e., social-security number), GPS location data, content from messages written by the consumer in an e-mail, chat room, or bulletin board, and, finally, demographic and socioeconomic data.³⁰ The demographic and socioeconomic category includes age, gender, income, health information, and political, religious, and social affiliations.³¹ Once the Web site provides its responses to the survey, those responses are then translated into a P3P privacy policy and placed on one of the Web site's servers where it is easily accessible by P3P user-agents.³²

²⁶ *See id.* The privacy policy is available in human-readable, as well as machine-readable, form. Machine-readable language is directly usable by a computer, and in the case of P3P is not human-readable. A consumer, however, may obtain a human-readable version if she directs the user-agent to translate the machine-readable version into human-readable form.

²⁷ *See generally id.* § 3.1.1 (providing a sample privacy policy in English and broken into the various P3P elements including policy, entity, access, disputes, remedies, base data schema, purpose, recipients, and retention).

²⁸ *See id.* §§ 3.2.2, 3.2.4, 3.2.6.

²⁹ *See id.* § 3.4.

³⁰ *See id.*

³¹ *See id.*

³² *See id.* §§ 2.1–2.2.

B. P3P User-Agents

A consumer is able to access and browse the Internet through a Web browser.³³ P3P is implemented in Microsoft's Internet Explorer 6 ("IE6") browser and Netscape's Navigator 7 browser.³⁴ AT&T also developed a P3P product.³⁵ P3P has two components: a consumer interface and a P3P user-agent.³⁶ The interface is the mechanism through which the consumer is able to select his or her desired privacy settings.³⁷ The consumer may choose to (1) restrict or limit the setting of "cookies"³⁸ by Web sites; (2) release personal information only if the Web site's practices comport with the consumer's privacy settings; (3) be warned of any unauthorized use and to be asked for consent to that particular use; or (4) request a translation of the P3P policy into a human-readable version.³⁹ When a consumer visits a P3P-enabled Web site, the second P3P component, called a P3P user-agent, accesses the P3P privacy policy, and compares the data-collection practices stated in that P3P privacy policy to the consumer's privacy settings.³⁹ Based on that comparison the user-agent either allows the Web site's data collection or restricts it.⁴⁰

³³ A Web browser is a "software application used to locate and display Web pages." See Webopedia, at <http://www.webopedia.com/TERM/b/browser.html> (last visited Nov. 12, 2003) (Internet.com's online encyclopedia of computer technology).

³⁴ See Cranor & Reidenberg, *supra* note 15, at 8–10.

³⁵ See *id.* at 10–11. AT&T's P3P agent is the Privacy Bird. It may be downloaded at <<http://www.privacybird.com>>.

³⁶ See *P3P Specification*, *supra* note 7, § 1.1.2 (providing an example of the role of both these components in a P3P transaction).

³⁷ See *id.* § 1.1.1.

³⁸ Cookies are small text files that a Web site or telecommunications company places on the hard drive of a personal computer. See generally *In re DoubleClick, Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 502–05 (S.D.N.Y. 2001) (explaining an Internet advertising service's use of cookies to collect information from consumers); *Chance v. Ave. A, Inc.*, 165 F. Supp. 2d 1153, 1156 (W.D. Wash. 2001) (explaining how cookies enable Internet information exchange "by allowing the interactions between a specific computer and a web server to develop a memory of the communications between the two parties"). The cookie stores information, such as name, address, e-mail address, and telephone number. See *DoubleClick*, 154 F. Supp. 2d at 502–03. Once information is stored in a cookie, it can be uploaded by that Web site at any time. See *id.*

³⁹ See Cranor & Reidenberg, *supra* note 15, at 5–11; see also *P3P Specification*, *supra* note 7, §§ 1.1–1.1.4.

³⁹ See *P3P Specification*, *supra* note 7, § 1.1.4.

⁴⁰ See *id.*

What privacy settings are available to the consumer depends largely on the P3P user-agent he or she uses.⁴¹ For example, IE6's user-agent focuses largely on limiting or restricting cookies.⁴² The consumer indicates general privacy settings by choosing one of six possible privacy "levels."⁴³ The lowest level is "Accept All Cookies," and the highest is "Block All Cookies."⁴⁴ The levels in between are "Low," "Medium," "Medium-High," and "High."⁴⁵ In general, these levels restrict data collection to various degrees depending on whether a site has a P3P policy, whether third parties are collecting data while the consumer is at that site, and whether the use of information is without the consumer's implied or express consent.⁴⁶ "Medium," which is the default setting for IE6, restricts first-party cookies that collect personally identifiable information without the consumer's explicit consent and restricts certain cookies from third-parties.⁴⁷ Navigator 7's privacy settings are similar to IE6's.⁴⁸ While IE6 and Navigator 7 use confusing technical language such as "Blocks third-party cookies that use personally identifiable information without your explicit consent,"⁴⁹ AT&T's Privacy Bird has a consumer-friendly interface.⁵⁰ For instance, under the heading "PERSONALLY

⁴¹ See *id.* While the P3P privacy policy format is pre-determined by the P3P specification, those who develop the P3P user-agent have flexibility in how they design the user-agent. Therefore, language, features, and privacy preferences may vary based on which company developed the P3P user-agent.

⁴² See Microsoft Windows, *Overview of Internet Explorer 6 Privacy Features*, at <http://www.microsoft.com/windows/ie/evaluation/overview/privacyfeat.asp> (Mar. 26, 2003) (offering an overview of privacy features that discusses what cookies are and how Internet Explorer 6 ("IE6") handles them).

⁴³ Microsoft's privacy settings can be accessed through the settings menu on IE6's browser: Tools > Internet Options > Privacy ("IE6 Privacy Settings").

⁴⁴ See *supra* note 43.

⁴⁵ *Id.*

⁴⁶ See *id.* (providing a description of the criteria used to block or allow cookies under each of these privacy levels).

⁴⁷ See *id.*

⁴⁸ See Cranor & Reidenberg, *supra* note 15, at 9–10 (describing similarities between IE6 and Navigator 7). Netscape's privacy settings can be accessed through Navigator 7's browser: Edit > Preferences > Privacy & Security > Cookies ("Navigator 7 Privacy Settings").

⁴⁹ See *supra* notes 43, 48.

⁵⁰ See Cranor & Reidenberg, *supra* note 15, at 10–11 (describing the options available to users under the Privacy Bird).

IDENTIFIED INFORMATION (name, phone number, email address, etc.),” one privacy setting allows the consumer choose to be warned if a site will try to contact him by phone or by other means.⁵¹

While the consumer merely selects his or her privacy settings, the P3P user-agent actually conducts the comparison between those settings and the P3P privacy policy.⁵² The consumer is one-step removed from the process and does not read or respond to the P3P privacy policy.⁵³ In fact, all P3P user-agents work automatically, meaning that the P3P user-agent operates at the default level until the consumer selects the privacy settings.⁵⁴ As a result, the consumer’s awareness and knowledge of the privacy settings must play a significant role in the contractual analysis of assent. It is through the selection of the privacy settings that the consumer has the best chance to prove that he or she assented to P3P terms, since that conduct objectively demonstrates the consumer’s acceptance of the allowed data-collection practices. On the other hand, where the consumer has not set his or her privacy settings, or did not understand what the privacy settings meant, the consumer is less likely to have assented to any P3P transaction.

II. THE PROBLEMATIC ISSUE OF ASSENT

The P3P privacy policy is only read, evaluated, and acted upon by the computers on each side of the transaction.⁵⁵ This lack of human participation creates a problem in a contract claim because both parties to a contract must indicate their agreement to the terms

⁵¹ See, e.g., AT&T, AT&T Privacy Bird Tour, *Privacy Preference Settings Panel*, at http://www.privacybird.com/tour/1_2_beta/privacypreferences.html (last visited Nov. 12, 2003) (providing a sample privacy preference settings panel).

⁵² See *P3P Specification*, *supra* note 7, § 1.

⁵³ See *id.*

⁵⁴ The default setting for IE6 is “Medium.” See *supra* text accompanying note 47.

⁵⁵ See *P3P Specification*, *supra* note 7, § 1.1.2 (providing an example of the interaction between two computers involved in a common use of P3P); see also Cranor & Reidenberg, *supra* note 15, at 8–10 (describing this procedure in IE6 and Navigator 7).

of the contract.⁵⁶ It is well-established that “[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.”⁵⁷ Where written or oral manifestation is lacking, as in the P3P transaction, conduct may be as effective as words in manifesting mutual assent to a contract.⁵⁸ As long as the acting party knows that the other party will infer assent from that conduct, assent will be effective.⁵⁹ Whether a party’s conduct manifests assent is a question of fact, and the facts and circumstances are viewed objectively.⁶⁰

Since the P3P transaction is automated and carried out in machine-readable language, consumers are unlikely to have direct knowledge of each P3P policy. The formation of a contract based on the P3P policy likely will be based on inferred assent. Conduct that creates an inference of assent is nothing new, but recent contract cases involving online activities have expanded the definition of conduct from which assent may be inferred to include the act of unwrapping a package, clicking on a link, or not returning an item in a timely fashion.⁶¹ The P3P transaction, however, challenges even this expanded definition. The conflict arises when the fact finder must assess the consumer’s conduct for an effective inference of assent. Once the consumer selects the desired privacy settings, the consumer no longer participates in the P3P transaction. Computers perform all the necessary actions. Thus, the consumer has little conduct upon which to rest an inferred assent argument.

⁵⁶ See *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 28 (2d Cir. 2002) (“Whether governed by the common law or by Article 2 of the Uniform Commercial Code (‘UCC’), a transaction, in order to be a contract, requires a manifestation of agreement between the parties.”).

⁵⁷ See *id.* at 29 (citing *Binder v. Aetna Life Ins. Co.*, 89 Cal. Rptr. 2d 540, 551 (Cal. Ct. App. 1999)).

⁵⁸ See *Fed. Land Bank v. Houck*, 4 N.W.2d 213, 219–20 (S.D. 1942) (“It is elementary that conduct may be as effective as words in manifesting mutual assent to a contract. Such agreements are said to be implied in fact. . . . [T]he facts are viewed objectively, and if a party voluntarily indulges in conduct reasonably indicating assent he may be bound even though his conduct does not truly express the state of his mind.”).

⁵⁹ See *Binder*, 89 Cal. Rptr. 2d at 551; see also RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981).

⁶⁰ See *Fed. Land Bank*, 4 N.W.2d at 219–20.

⁶¹ See discussion *infra* Part III.C.

III. CONTRACTUAL ANALYSIS

A. Web Site Makes an Offer

Before continuing with the contract analysis, one must determine which role each party plays in the transaction, since it is the offeree's conduct that must be examined to determine whether there was an acceptance.⁶² The previous sections assume that the consumer is the offeree. Indeed, the consumer is the party who must accept or reject the offer, but this conclusion is not as intuitive as it may appear. An offer is the offeror's manifestation of the willingness to enter into a bargain, which shows his or her commitment to the transaction.⁶³ A mere statement of intent, with no commitment attached to it, is not an offer.⁶⁴ The P3P transaction begins when the consumer's browser sends a request to the Web site to send back to the browser all the information needed to display a Web page on the consumer's computer.⁶⁵ The Web site responds by sending the requested information.⁶⁶ When the Web site is P3P-enabled, the Web site server also will indicate that a P3P policy is available.⁶⁷ The user-agent then can request the Web site's P3P policy or ignore it, depending on the consumer's privacy settings.⁶⁸ At first glance the consumer appears to be making the offer. The consumer initiates contact by accessing the Web site. Through his browser, the consumer offers to enter and browse the Web site. The Web site accepts the offer, but only on the condition that the consumer agrees to the P3P policy. Under the common law "mirror image rule," however, this analysis fails,

⁶² See generally ARTHUR LINTON CORBIN, 1-3 CORBIN ON CONTRACTS § 3.2 (Joseph M. Perillo ed., 1993) (explaining that only the offeree has the power to accept an offer).

⁶³ See *Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983) (finding no manifestation of intent on the part of the defendant-offeror because the offeror was merely negotiating a sale, not committing to it).

⁶⁴ See *Cutler-Hammer, Inc. v. United States*, 441 F.2d 1179 (Ct. Cl. 1971) (holding that no contract was created when plaintiff silver dealer submitted an application to the Federal Reserve to buy silver, and the Federal Reserve merely informed him they would respond to the application accordingly); see also JOHN CALAMARI & JOSEPH PERILLO, THE LAW OF CONTRACTS § 2.6(c) (4th ed. 1998).

⁶⁵ See *P3P Specification*, *supra* note 7, § 1.1.2.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

since an acceptance that does not mirror the offer exactly acts as both a rejection of the current offer and a counter-offer.⁶⁹ Here, the Web site's acceptance did not mirror the consumer's offer because conditions were added.⁷⁰ Under the mirror image rule, the Web site is considered to have made a new offer that the consumer must accept or reject.⁷¹ Therefore, even when the analysis begins with the consumer as the offeror, he or she finishes the transaction as the offeree. This is the correct outcome, but the "willingness to negotiate" analysis provides a more direct route to that conclusion.⁷²

The P3P scenario is analogous to a counter-intuitive line of cases holding that consumers make offers to retail establishments when they respond to retail advertisements.⁷³ In this line of cases, retailers published advertisements for products at certain prices, but then refused or were unable to sell the products at those prices to consumers responding to the advertisements.⁷⁴ The consumers argued that the advertisements were offers and that the stores should be held to the advertised prices.⁷⁵ Courts ruled, however, that the ads were statements of a willingness to negotiate with the consumer, or at most an invitation to the consumer to make an offer.⁷⁶

⁶⁹ See *Pago Pago Aircrash v. Pan Am. World Airways, Inc.*, 637 F.2d 704, 706 (9th Cir. 1981) (holding that a conditional acceptance of a settlement offer was not an acceptance, but rather a counteroffer). Courts still adhere to this common law "mirror image rule." UCC section 2-207, however, allows for conditional acceptance in a "sale of goods" transaction. The discussion as to which is the preferable rule is outside the scope of this Note.

⁷⁰ See *Pago Pago Aircrash*, 637 F.2d at 706.

⁷¹ *Id.*

⁷² See *Craft v. Elder & Johnston Co.*, 38 N.E.2d 416 (Ohio Ct. App. 1941) (unilateral offers through advertisement create no contractual relations); *Steinberg v. Chi. Med. Sch.*, 371 N.E.2d 634 (Ill. 1977) (college brochure listing admission criteria was an invitation for prospective students to make an offer/application); *O'Keefe v. Lee Calan Imps., Inc.*, 262 N.E.2d 758 (Ill. App. Ct. 1970) (car advertisement was an invitation to make an offer). *But see* *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689 (Minn. 1957) ("first come first served" ad worked as an offer to the first person to respond).

⁷³ See cases cited *supra* note 72.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See, e.g., *Craft*, 38 N.E.2d at 419.

In the scenario presented in this Note, the roles are reversed because it is the consumer who browses the Web and decides to access a particular site. The consumer directs the browser to the Web site and sends a request for the Web site's information. The request acts as an invitation to make an offer. In the P3P context, the consumer is requesting an offer to use the Web site. In response, the Web site makes an offer to use the Web site, subject to the P3P policy. The Web site makes the offer by sending its P3P policy to the P3P user-agent, and the user-agent then decides whether to accept or reject the terms.⁷⁷

In both scenarios, the Web site is the offeror and the consumer the offeree. Having established the role of the parties in the transaction, the following sections will analyze the consumer's conduct to determine assent.⁷⁸

B. *The Consumer Types*

This Note argues that, in cases dealing with automated P3P transactions, the consumer's technological skill level plays an important role in the contractual analysis. As noted above, a consumer may or may not be aware of the P3P technology, may or may not actively participate in the P3P transaction by setting his or her privacy settings, and may or may not know that a P3P transaction ever takes place between his or her computer and a Web site he or she visits. The consumer's level of familiarity with the P3P transaction will directly impact the analysis of his or her conduct when determining whether there was assent. The consumer's level of familiarity is directly related to his or her level of technical knowledge. This Note suggests that a subjective approach be taken when examining the conduct of the consumer

⁷⁷ See *P3P Specification*, *supra* note 7, §§ 1.1–2, 2.1–2.

⁷⁸ This Note assumes the defendant Web site's assent to the contract. See *Stern & Clause*, *supra* note 20 and accompanying text.

A defendant company might attempt to argue that it never became contractually bound to follow its own privacy policy because the user never actually read and relied on the policy or otherwise manifested his or her assent to it. It seems likely that a court would find that the defendant was estopped from denying the binding nature of its own promises, or was otherwise precluded on equitable grounds from making such arguments.

Id.

for assent, to account for his or her technical skill and knowledge. This would be an exception to the objective standard that has dominated contract law for over one hundred years,⁷⁹ but this Note concludes that such an exception is necessary in the age of automated transactions.⁸⁰ When an electronic agent, such as the P3P agent, acts on a consumer's behalf, the consumer's intent to contract is less likely to be embodied in his or her own objective acts or conduct. Rather, the electronic agent will perform those acts which would manifest assent under an objective theory.⁸¹ With a subjective approach, the focus would be on whether the consumer *believed* that the terms of a P3P privacy policy were binding, not whether he or she memorialized his or her intent in outward words or actions. Analyzing consumer intent subjectively will allow more consumers to bind Web sites to their stated data-collection practices.

This Note puts forth three categories that define consumers by their technical skills and knowledge: (1) sophisticated, (2) knowledgeable, and (3) unaware. These categories are meant as guidelines to simplify the subjective analysis of a consumer's

⁷⁹ Objective theory focuses on what the parties actually say and do to determine whether they entered into an agreement. Subjective theory explores whether the parties felt, believed, or intended to enter into an agreement. Judge Hand described the objective theory of contracts in *Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.").

⁸⁰ Such an exception is in line with the requirement in most online-contracting cases that the consumer be *aware* of terms of an agreement for it to be binding. The threat of unconscionability is too large when the consumer is not aware. See Cranor & Reidenberg, *supra* note 15, at 13–14 ("In essence, the validity of these agreements appears to turn on whether the users had effective notice of the terms and a real choice to accept the terms prior to the purported conclusion of the agreement.").

⁸¹ Electronic agency is the subject of significant scholarship, one federal statute, and two uniform laws. See, e.g., Tom Allen & Robin Widdison, *Can Computers Make Contracts?*, 9 HARV. J.L. & TECH. 25, 35–43 (1996) (discussing reasons to support the idea of conferring legal personhood on computers); Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L. J. 1145, 1176–86 (2000) (discussing electronic contract formation); Electronic Signatures in Global and National Commerce Act [ESIGN], 15 U.S.C. § 7001 (2000); Unif. Elec. Transactions Act [UETA] (1999), available at <http://www.law.upenn.edu/bll/ulc/ulcframe.htm> (last visited Nov. 13, 2003).

intent and/or conduct. They will be used in analyzing the contract theories below.

1. The Sophisticated Consumer

The more technologically sophisticated the consumer, the more likely he or she is to understand the terms of the P3P policy simply because he or she understands the technology and its consequences. The sophisticated consumer is aware that privacy terms exist, knows that he or she is able to change his or her privacy settings—and thus the terms—at any time, and understands that by voluntarily accessing a Web site he or she is agreeing to those terms, which his or her P3P user-agent has accepted on his or her behalf. More importantly, the sophisticated consumer clearly understands the technical language used by most P3P interfaces to describe the intended uses of his or her information, and therefore truly comprehends what information will be collected and how that information will be used.⁸²

2. The Knowledgeable Consumer

A knowledgeable consumer knows the P3P user-agent exists and that a transaction occurs between the user-agent and a P3P-enabled Web site. He or she, however, does not actively participate by setting his or her privacy settings, leaving them instead at the default setting.⁸³ Either the knowledgeable consumer does not care what his or her privacy settings are, or does not fully understand the implications of data collection and use.⁸⁴ Whatever the reason, his or her inaction means that the P3P user-agent, not the knowledgeable consumer, has determined the types and amount of information that may be collected from the consumer. While the consumer is aware that terms exist, he or she probably

⁸² See *infra* Part II for a discussion of the P3P transaction.

⁸³ For IE6 Privacy Settings, see *supra* note 43. For Navigator 7 Privacy Settings, see *supra* note 48.

⁸⁴ See Robert A. Hillman & Jeffery J. Rachlinksy, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 433, 436–37 (2002) (stating that even when consumers are aware of binding contract terms most are unlikely to examine the terms out of frustration, inconvenience, or apathy).

does not understand that he or she has the opportunity to “reject” some terms through the privacy settings.

3. The Unaware Consumer

The unaware consumer does not know P3P exists. He or she does not know that his or her computer contains a P3P user-agent, or that the user-agent is acting on his or her behalf under pre-determined default settings.⁸⁵ He or she does not even know such settings exist and is thus unable to select privacy settings. He or she is completely unaware that the browser’s P3P user-agent and the Web site enter into a P3P transaction.

The next section will reference these consumer types while analyzing the applicability of some online contracting theories to the P3P transaction.

C. Consumer’s Assent to P3P Terms

Contracts relating to software sales or online activities have generally been upheld where the parties to the contracts are conspicuously aware of the terms at issue and unambiguously assent to the terms of those contracts.⁸⁶ These holdings do not necessarily stray from the law of traditional paper contracting.⁸⁷ What *has* changed are the types of conduct that are accepted as manifestations of assent. For instance, breaking shrink-wrap

⁸⁵ See *supra* note 52 and accompanying text.

⁸⁶ See *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (discussing application of certain principles from the world of paper transactions to online activities to find a user’s notice of contract or license terms of a visited Web site); Hillman & Rachlinski, *supra* note 84, at 488–90 (discussing reasonable notice in click-wrap and browse-wrap agreements); Mark Lemley, *Place and Cyberspace*, 91 CALR 521, 528 n.29 (2003) (doubting the validity of browse-wrap agreements as a matter of law, *unless* the user is aware of terms); Cranor & Reidenberg, *supra* note 15, at 13 (“The P3P standard contemplates an agreement predicated on notice and consent between the web site and the user over the use of personal information.”).

⁸⁷ See generally Mary Jane Radin, *Humans, Computers and Binding Commitment*, 75 IND. L.J. 1125, 1133–36 (1999) (providing a comparison of shrink-wrap and click-wrap contracts); Sommer, *Against Cyberlaw*, *supra* note 81, at 1177–78 (rejecting the idea that contract forming machines are called electronic agents and stating that they cannot be agents “except by analogy”).

packaging⁸⁸ or even continuing to browse a Web site after viewing the homepage may manifest a consumer's assent.⁸⁹ In click-wrap cases, if the consumer has notice of binding terms and must click a button on a Web page that indicates his or her consent to those terms, such conduct manifests assent.⁹⁰ The next section examines whether any of the consumer's conduct in the P3P context is similar enough to the conduct that manifests assent in click-wrap cases to be legally binding.

1. Click-Wrap

A click-wrap agreement typically presents the consumer-user with a screen that explains that use of the software product is subject to terms of the agreement; the consumer must affirmatively manifest assent by clicking "I Agree" before using the software.⁹¹ Courts have overwhelmingly upheld these types of agreements.⁹² These contracts are valid because the consumer is aware of

⁸⁸ See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (finding software license terms are binding where the terms are located in the software packaging, even though the consumer will pay for the software before seeing the terms).

⁸⁹ See, e.g., *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981–82 (E.D. Cal. 2000) (finding that the plaintiff was bound to license terms because a barely legible link to terms of use resided on the home page, and plaintiff continued to access the site after visiting the home page).

⁹⁰ See, e.g., *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 587–88 (N.Y. App. Div. 2002) (upholding a software license agreement where the user had to click an "I Agree" button before he could continue using the software).

⁹¹ See *Specht*, 306 F.3d at 22 n.4.

⁹² See *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1010–11 (D.C. Cir. 2002) (holding that plaintiff had adequate notice of the forum selection clause included in the click-wrap agreement to be bound by it); *In re RealNetworks, Inc., Privacy Litig.*, 2000 WL 631341, at *3 (N.D. Ill. 2000) (finding a click-wrap license agreement was a "writing," as required by the federal arbitration statute, because it was printable); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998) (holding that a breach of online terms of use was a breach of contract); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (stating that there is no real difference in law between a standard form contract on paper and one in electronic form); *Moore*, 293 A.D.2d at 587–88 (holding a software license agreement valid where user had to click on an "I Agree" button before using the software); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203–04 (Tex. App. 2001) (holding that plaintiff had adequate notice of forum selection clause included in the click-wrap agreement because he had to scroll past the clause to get to the "I Agree" button).

contract or license terms and affirmatively manifests his or her assent to those terms by clicking the “I Agree” button.

The relevant question in the P3P context is whether the consumer is aware of the P3P privacy policy terms at any time during the P3P transaction and whether the consumer does anything to affirmatively manifest his or her assent. The unaware consumer will not benefit from this analysis at all, since he or she is not aware of any P3P terms. The sophisticated or knowledgeable consumer, however, can argue that he or she was implicitly aware of the terms of a specific P3P policy. The most sophisticated consumer will know the contents of the P3P specification. He or she will know what questions are asked in the survey, as well as the range of possible answers from which a Web site may choose.

Knowledge of the P3P specification can be imputed to each specific P3P policy because the P3P policies are all derivatives of the P3P template and use the same uniform language to describe data-collection practices. A less sophisticated but still knowledgeable consumer with a basic understanding of cookie technology and P3P specification will generally understand what types of data are collected and how that data is used. Either level of knowledge should satisfy the standard of awareness required by the large majority of click-wrap cases.⁹³

In *Forrest v. Verizon Communications, Inc.*, the plaintiff argued that he did not have adequate notice of a forum selection clause at the end of a thirteen-page click-wrap agreement.⁹⁴ The court found that the plaintiff had adequate notice of the clause even though it was in an unconventional location, was not capitalized or otherwise distinguished from the rest of the terms, and appeared inside a scroll box that only displayed portions of the license at one time.⁹⁵ The court noted that provisions that were much harder to locate and read were upheld routinely in paper contracting cases.⁹⁶ The court had no reason to believe the plaintiff did not see the

⁹³ See cases cited *supra* note 92.

⁹⁴ See 805 A.2d at 1010.

⁹⁵ *Id.*

⁹⁶ See *id.* at 1010–11.

clause, since he relied significantly on the choice of law clause in the same agreement.⁹⁷ The spirit of the awareness requirement is to ensure that the consumer does not enter into an agreement unknowingly.⁹⁸ In the case of the sophisticated or knowledgeable consumer with enough expertise to understand the general terms of a P3P and to select his or her desired privacy settings, that spirit is not violated by assuming that consumer is implicitly aware of the terms of a P3P privacy policy.

Further, when selecting his or her privacy settings, the consumer has the chance to restrict the data-collection practices of which he or she does not approve. The corollary is that the consumer implicitly manifests his or her assent to the remaining terms by doing so.

2. Browse-Wrap

As one court explained, “a browse wrap license is part of the web site and the consumer assents to the contract when the consumer visits the web site.”⁹⁹ The consumer does not have to click on the link to the terms of use to continue, as in with a click-wrap agreement, and the link might even be obscured from view.¹⁰⁰ Browse-wrap agreements are less favored by courts, but are typically upheld where there is adequate notice of the terms.¹⁰¹ It is important to note that the consumer is not required to have

⁹⁷ See *id.*

⁹⁸ See *Specht*, 306 F.3d at 30.

⁹⁹ See *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

¹⁰⁰ For instance, in *Specht v. Netscape* the link was submerged on the page from which the software was downloaded. See 306 F.3d at 30. In *Pollstar*, the link was in gray print on a gray background. See 170 F. Supp. 2d at 981.

¹⁰¹ Compare *Ticketmaster Corp. v. Tickets.Com, Inc.*, Copyright L. Rep. (CCH) ¶ 28,607 (C.D. Cal. Mar. 6, 2003) (distinguishing *Specht* from this case because the terms of agreement there were not plainly visible or known to defendants); *Pollstar*, 170 F. Supp. 2d at 974 (upholding a browse-wrap agreement where the text was small and gray on a gray background); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) (upholding a browse-wrap agreement where the contract terms were visibly placed on the download screen); *America Online, Inc. v. Booker*, 781 So. 2d 423, 424–25, (Fla. Dist. Ct. App. 2001) (upholding a forum selection clause in an online terms of service agreement), with *Specht*, 306 F.3d at 30 (rejecting a browse-wrap agreement where the link to terms was obscured at the bottom of the download page).

read the terms of a contract for it to be binding, he or she only must be aware that binding terms exist.¹⁰²

A sophisticated or knowledgeable consumer who is aware of the human-readable version of the P3P policy has a valid argument under the browse-wrap doctrine that he or she assented to the P3P terms. The human-readable version of the P3P policy is similar to the browse-wrap agreement, in that the privacy terms are constantly available to the consumer, but the consumer must choose to look at them.¹⁰³ Under the rule of law in some browse-wrap cases, the mere fact that a human-readable policy exists would be sufficient to hold all consumers to such contracts.¹⁰⁴ In *Pollstar v. Gigmania, Ltd.*, the link to terms of use appeared in a gray font on a gray background on the homepage.¹⁰⁵ Even though the court agreed that the link to the terms of use was not easily seen, it hesitated to “declare the invalidity and unenforceability of the browse wrap license agreement.”¹⁰⁶ The court cited the discussion in *ProCD v. Zeidenberg* of the several types of valid paper contracts in which the consumer enters into a contract by using a service before receiving the terms of the contract (i.e., tickets for sporting events, cruises, or airlines), where terms are printed on the back of the ticket and the consumer does not see them until after he or she has already purchased the ticket.¹⁰⁷

Similarly, the consumer enters into the P3P transaction before viewing the P3P privacy policy, but like the browse-wrap agreement in *Pollstar*, the opportunity to view the terms is always there. Any consumer who is aware that the browser has privacy settings will be alert enough to look in these settings for privacy information if so desired. The privacy terms are always available to the consumer, and the knowledgeable consumer will be aware

¹⁰² See *Specht*, 306 F.3d at 30 (stating that failure to read terms before signing a contract is not a legitimate defense).

¹⁰³ See *Pollstar*, 170 F. Supp. 2d at 981.

¹⁰⁴ See, e.g., *id.* at 982 (stating that even though the user was not immediately confronted with the notice of the license agreement this did not invalidate the browse-wrap agreement).

¹⁰⁵ See *id.* at 980–81 (“Notice of the license agreement is provided by small gray text on a gray background.”).

¹⁰⁶ *Id.* at 982.

¹⁰⁷ See *id.* at 981 (citing *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

that such terms exist. Therefore, the human-readable option warrants a finding of the same type of assent found in browse-wrap agreements for the knowledgeable and sophisticated consumer.

Finally, the consumer who actually reads the human-readable version of the policy has the best chance of proving assent to the P3P terms under the browse-wrap theory. This situation would be closely analogous to the Internet consumer who actually browses the terms of use before he or she continues using the Web site and is fully aware of the terms governing the use.

3. Standard-Form Contracting Theories

It becomes apparent that the unaware consumer, with no knowledge of the P3P transaction, has fewer tools at his or her disposal than other consumers. Much legal scholarship, however, has focused on the validity of standard form contracts, especially in the electronic contracting context.¹⁰⁸ Some statistics show that ninety-nine percent of all paper contracts include standard, non-negotiable forms, and that number will only increase as commerce moves online.¹⁰⁹ Some of the theories that support the validity of standard forms also support the validity of contracts entered into without the knowledge or assent of the consumer.¹¹⁰ These theories might aid the unaware consumer in his or her quest to prove assent to the P3P terms.

Mary Jane Radin, in her article *Humans, Computers and Binding Commitment*, discusses the ubiquities of standard form contracts and discusses several methods of standardizing electronic contracts.¹¹¹ Radin describes all contracts as fitting one of two models: the contract-as-consent model and the contract-as-product model.¹¹² The former is the traditional notion of a contract as embodying the mutual consent of the parties.¹¹³ The latter, according to Radin, represents the reality of a bulk of today's

¹⁰⁸ See e.g., Hillman & Rachlinksi, *supra* note 84; Radin, *supra* note 87.

¹⁰⁹ Hillman & Rachlinksi, *supra* note 84, at 431.

¹¹⁰ See text accompanying notes 111–129.

¹¹¹ See generally Radin, *supra* note 87.

¹¹² See *id.* at 1125–26.

¹¹³ *Id.*

commercial transactions.¹¹⁴ The terms are part of the product; they are not scrutinized before the sale and are not negotiable.¹¹⁵ Even though this model does not comport with our legal sense of what a contract should look like, Radin claims that it is increasingly accepted by businesses, consumers, and even the legal community,³ and is becoming the exception that swallows the rule.¹¹⁶ Electronic contracts in which terms are discovered, if at all, once the transaction is complete, are examples of these contracts-as-products.¹¹⁷ Because commerce is moving online, and economic efficiency calls for electronic contracts to be binding, even where mutual consent is lacking, Radin explores possible ways to give legal legitimacy to these electronic contracts-as-products.¹¹⁸ One method is to correlate the use of a computer with consent to any transaction the computer is programmed to conduct.¹¹⁹ In the case of an unaware consumer, the very act of turning on the computer and browsing the Internet would constitute consent to the P3P transaction because the computer is programmed to automatically conduct this transaction when possible. This theory comes with its own problems, many of which involve the validity of electronic agency.¹²⁰

Another method of achieving legal legitimacy for contracts-as-product is the adoption of legal standards.¹²¹ Standards improve efficiency because transactions are easier when all parties understand the terms of the contract.¹²² Standards are created through legislation or through an industry push for a set of terms.¹²³ Courts often hesitant to enforce standards that seem

¹¹⁴ *See id.* (stating the “contract-as-product model may describe a great deal of modern commercial practice”).

¹¹⁵ *Id.*

¹¹⁶ *See id.* at 1126–31.

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.* at 1128.

¹²⁰ *See supra* note 81 and accompanying text (discussing electronic agency).

¹²¹ *See Radin, supra* note 87, at 1148.

¹²² *See id.* (stating that “sets of standardized terms[] might reduce the transaction costs of the proliferation of different terms and uncertain enforceability”).

¹²³ *See id.* (stating that standards can be obtained by legislation, industry agreement, or by the emergence of a dominant format).

oppressive or monopolistic.¹²⁴ Typically, standards imposed through legislation fare better in courts.¹²⁵ Both legislators and industry groups continue to push for the terms of electronic contracts to be valid and binding without the requisite consent currently needed to enforce a contract.¹²⁶ The results of these legislative efforts, including the Electronic Signatures in Global and National Act and the Uniform Electronic Transactions Act,¹²⁷ were created to address transactions much like the P3P transaction, where computers are engaging in commerce-related transactions without the consumer's explicit consent, and often without the consumer's knowledge.¹²⁸ All plaintiffs, whether sophisticated or unaware, should use these legislative acts to their advantage in arguing that the P3P contract is valid as a matter of federal statute.

Finally, the "blanket assent" approach to standard form contracts supports the P3P contract as binding. Blanket assent is described as:

Karl Llewellyn's vision that the law should create a presumption of assent . . . to standard terms. Llewellyn recognized that businesses generally compete to offer reasonable goods and services to consumers, and assumed that businesses, better than judges, could determine "the particular set of terms that 'fits' the practical problems and needs that arise . . . in carrying out the transactions." . . . In sum, Llewellyn based his framework on the perspective that, so long as the terms are not unfair in presentation or substance, courts should presume consumers' "blanket assent" to the details they may have ignored.¹²⁹

Under this approach, the consumer can effectively argue that he or she gave his or her blanket assent to all the terms of the P3P

¹²⁴ See *id.* (contending that industry induced standards can be looked at by courts as schemes imposed by private companies for their own interests only).

¹²⁵ See *id.* at 1149 ("Traditionally . . . courts have looked more favorably on standard terms achieved through legislation than on those achieved through industry self-regulation or other market emergence.").

¹²⁶ See *supra* note 81 and accompanying text.

¹²⁷ See *id.*

¹²⁸ *Id.*

¹²⁹ Hillman & Rachlinksi, *supra* note 84, at 455 (footnotes omitted).

transaction, even when he or she was not aware of them because the Web site would have created terms that were competitive, fair, and efficient.

CONCLUSION

No matter what level of technological skill a consumer possesses, or what theory the consumer uses to advance his or her cause of action, the issue remains whether and how a consumer can manifest his or her assent to the terms of a P3P policy that he or she never read. Courts, legislators, and the legal and technology communities have proposed many solutions to the problem. Legislators and business entities want the realm of possible conduct to be broad enough to create the maximum number of binding electronic contracts. Courts have tried to accommodate commercial needs without sacrificing the traditional concept of contract law, and scholars have constructed many arguments for tweaking the traditional contract law to encompass the nature of modern contracting. None of these entities, however, in their rush to give electronic contracts the same weight as paper contracts, have done much to define the conduct necessary to manifest assent to terms that a consumer might not have had the chance to review, reject, accept, or modify. Leaving these standards undefined creates confusion and uncertainty for both Web sites and consumers. As these cases play out in court, more definite standards likely will emerge. One principal remains consistent throughout all of the doctrine and theories presented in this Note: all consumers are not created equal when it comes to technical skills and ability, and that distinction should be recognized by the adoption of a subjective approach to examining conduct which might infer assent.