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Internet Solutions to Consumer Protection Problems

Gregory E. Maggs
George Washington University Law School

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INTERNET SOLUTIONS TO CONSUMER PROTECTION PROBLEMS

GREGORY E. MAGGS*

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Many businesses see the Internet as a place of opportunity. At very little cost and in a largely unregulated environment, the Internet allows companies to reach tens of millions of people.¹ Accordingly, firms have begun to employ the Internet as a venue for advertising and, in many cases, sales.² Although few companies have had great success so far,³ they all hope to profit from their Internet activities.

This Article suggests an additional view of the Internet by arguing that the Internet not only may benefit businesses but also may create opportunities for consumers. These opportunities provide consumers with new kinds of protection in buying goods and services and new powers in resolving disputes. The Internet achieves these results by reducing the cost of communication.

Part I explains that although the legal system presently provides consumers with

* Associate Professor of Law, George Washington University Law School. The author thanks Professor Peter B. Maggs for his helpful comments.

1. See G. Christian Hill, *Adult Net Users in U.S., Canada Put at 58 Million*, WALL ST. J., Dec. 11, 1997, at A11 (noting growth in Internet usage and increasing commercial use); Eli M. Noam, *An Unfettered Internet? Keep Dreaming*, N.Y. TIMES, July 11, 1997, at A27 (discussing regulation of the Internet).

2. To search for the web sites of thousands of businesses, see *Yahoo!-Business and Economy: Companies* (visited Mar. 3, 1998) <<http://www.yahoo.com/Business/Companies>>.

3. See Thomas E. Weber, *The X Files: For Those Who Scoff at Internet Commerce, Here's a Hot Market*, WALL ST. J., May 20, 1997, at A1 (noting that most businesses have not yet profited on the Internet).

a wide array of rights, it does not solve all of their problems. Despite the efforts of consumer protection laws, consumers can still benefit from more information about products and a better understanding of the terms upon which they buy them. Also, consumers need more leverage in resolving their disputes against businesses with which they transact.

Part II reveals how the Internet can address some of these unmet consumer needs. It discusses four examples of difficulties that consumers conventionally have faced in markets. It then describes how the Internet can assist consumers.

Part III considers possible ways that the legal system might respond to the opportunities that the Internet is creating for greater consumer protection. In some instances, market competition will make changes in legal rules unnecessary. In other situations, the legal system should impose different rules depending on the options that technology makes available. In still other instances, lawmakers should adopt legal rules that encourage businesses to employ technology to reduce consumer problems.

Part IV briefly concludes by discussing the promises and limitations of the Internet.

I. CONSUMER PROTECTION LAWS AND THEIR CONVENTIONAL LIMITATIONS

The legal system protects consumers in a variety of ways.⁴ For example, the common law of contracts and the Uniform Commercial Code (U.C.C.) afford traditional safeguards to consumers. Consumers may rescind bargains induced by misrepresentations,⁵ avoid unconscionable terms in agreements,⁶ and collect damages for nonperformance or breach of warranty.⁷ Consumers may also recover in tort when injured by defective or unreasonably dangerous products.⁸

Various specific consumer protection statutes supplement the general protection offered by contract and tort law. For instance, both federal and state legislation prohibit unfair trade practices.⁹ In addition, Congress has enacted a number of statutes addressing specific topics such as odometer tampering,¹⁰ interstate land sales,¹¹ unauthorized credit or debit card transactions,¹² and debt collection

4. For a general background of consumer protection law, see JOHN A. SPANOGLE ET AL., CONSUMER LAW (1991); DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW (1991).

5. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

6. *Id.* § 208; U.C.C. § 2-302 (1995).

7. RESTATEMENT (SECOND) OF CONTRACTS §§ 344-356 (1981); U.C.C. §§ 2-713 to -715 (1995).

8. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

9. See 15 U.S.C. § 45(a) (1994); UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 2-3, 7A U.L.A. 305-27 (1985) (model state law adopted in numerous states defining deceptive trade practices and providing remedies).

10. Odometer Disclosure Act, 49 U.S.C. §§ 32701-32711 (1994).

11. Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1994).

12. Truth in Lending Act, 15 U.S.C. §§ 1601-1667e (1994) (regulating credit cards and other

practices.¹³

These laws benefit consumers in many ways, but no one would characterize them as a panacea. Despite the existence of these laws, consumers continue to face a variety of problems. For example, consumers often do not realize the choices available to them in the marketplace. Also, consumers rarely fully understand the terms of contracts to which they agree. Moreover, consumers, in many cases, do not have effective methods of asserting their rights and resolving disputes.

The legal system has not eliminated these lingering consumer protection problems—not because courts and legislatures place little value on the rights of consumers—but because economic factors have made the problems seem intractable. Obtaining information, securing legal advice, and asserting rights are expensive acts. These transaction costs traditionally have stood in the way of ameliorating the condition of consumers.

Regulation can shift the costs from consumers to businesses in some instances. Various laws require businesses to provide information to consumers about the products that they offer. The Truth in Lending Act, for example, mandates that banks fully explain interest rates on loans.¹⁴ Other laws strive to force businesses to bear some of the burden of explaining to consumers their legal rights. Several states recently have mandated that businesses write consumer contracts in “plain English.”¹⁵ In addition, at both the state and federal level, a variety of statutes seek to help consumers by allowing recovery of attorneys’ fees if the consumer prevails in a dispute.¹⁶

Shifting costs to businesses, however, generally does not reduce those costs. This economic reality limits the extent to which the legal system can benefit consumers. In many cases, businesses shift increased costs back onto consumers in the form of higher prices or reduced services, distributing the burden among all their customers. Thus, in one way or another, the transaction costs of supplying consumers with product information, advising consumers about their rights, and helping consumers resolve disputes remain an obstacle for consumers.

Might these problems have a solution? The answer is yes, but the solution does not necessarily involve more regulation. Instead, the solution lies in developing and using new technology to reduce the costs of providing consumers with the kinds of information and protection that they want. In a limited fashion, as Part II will show,

lending); Electronic Fund Transfers Act, 15 U.S.C. §§ 1693-1693r (1994) (regulating debit cards and other devices for making electronic fund transfers).

13. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a-1692o (1994).

14. 15 U.S.C. §§ 1631-1632 (1994).

15. See, e.g., CONN. GEN. STAT. ANN. § 42-152 (West 1992) (requiring the use of plain language in every consumer contract); N.J. STAT. ANN. § 56:12-2 (West 1989) (requiring consumer contracts to be written in a simple and understandable manner); N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1997-1998) (requiring the use of plain language in real and personal property leases).

16. See, e.g., 15 U.S.C. § 1693m(a)(3) (allowing the recovery of reasonable attorneys’ fees under the Electronic Fund Transfers Act); UNIFORM DECEPTIVE TRADE PRACTICE ACT § 3(b), 7A U.L.A. 321 (1985) (allowing the recovery of attorneys’ fees for “wilful” violations).

this process already is beginning to take place on the Internet.

II. ASSISTANCE FROM THE INTERNET

The Internet links millions of computers and their users. This linkage can reduce the cost of communication in two very important ways. First, it enables people to convey large quantities of information to a widespread audience at a low cost. Second, it allows people to use computers to perform tasks in communication that formerly required expensive labor.

Making information available on the Internet has become very easy. A potential user (business or consumer) merely has to pay an Internet hosting provider a small monthly fee to furnish space on a computer (called a "server") accessible through the Internet.¹⁷ The business or consumer then transmits to the server files containing the information to be made public.

Software that enables an Internet user to view files on other computers (called "browser" software) has made the Internet increasingly interactive. Web sites frequently ask users questions and then use the information to direct them in appropriate ways. Users thus can obtain individualized attention directed toward their particular needs. Accordingly, computers can take over some of the functions that humans conventionally have provided in dispensing information.

By decreasing the costs of communication in these ways, the Internet can benefit consumers in their dealings with businesses. As noted above, despite the extensive consumer protection legislation, consumers still face a variety of difficulties: inadequate information about the products available for sale, misunderstandings about their legal rights, and problems resolving disputes. However, as the transaction costs decrease, these problems may diminish. The following discussion provides four examples of how the Internet can reduce communication costs and alleviate consumer concerns.

A. Inadequate Information About Products

In deciding how consumers should use their money, they need to know what products and services the market offers for sale. Consumers cannot make wise decisions about whether to save or spend their income if they do not know their options. They also cannot engage in comparison shopping when they remain unaware of the different alternatives available.

Businesses long have recognized that they have a self-interest in addressing this problem. If consumers do not know what businesses have to sell, they will not make purchases. Businesses, as a result, relay information to consumers by advertising.

17. For a list of hundreds of Internet hosting providers, see *Internet Presence Providers* (visited Mar. 3, 1998) <<http://www.nerdworld.com/nw500.html>>. Many of the providers listed allow a user to obtain space online in a matter of hours simply by transmitting credit card information. <https://scholarcommons.sc.edu/sclr/vol49/iss4/8>

Through mass media such as television, radio, magazines, newspapers, and billboards, businesses can reach thousands of prospective customers.

Advertising in mass media, although often effective, has a notable deficiency. In particular, mass media advertising generally allows businesses to convey only a small amount of information about their products. Television advertisements rarely run more than thirty seconds. Advertisements in magazines and newspapers usually take a page or less. Billboards typically contain only a picture and a slogan.

Space limitations in mass media advertising impose only a negligible burden if a company is selling a simple product. Most consumers already know a fair amount about items such as soap or soda pop. Mass media advertising can build on consumers' existing knowledge by supplying small amounts of additional information concerning matters such as prices, new vendors, or product improvements.

The brevity of mass media advertisements creates a much larger problem for more complicated products that require more disclosure to the consumer. The best example of this problem involves prescription drugs. For years, pharmaceutical companies have wanted to tell consumers about the availability of safe and effective prescription drugs and to encourage them to see doctors. Yet, drug makers have faced a substantial problem in advertising.

Worried that consumers might harm themselves by taking the wrong medicine, Congress has regulated the advertisement of drugs. The Federal Food, Drug, and Cosmetics Act¹⁸ supplies some of this regulation by mandating that drug advertisements contain a "brief summary" of the drug's "side effects, contraindications, and effectiveness."¹⁹ Congress thought that requiring drug makers to make this information more available would benefit consumers. Yet, the statute had an unfortunate consequence. For many years the brief summary requirement simply prevented pharmaceutical manufacturers from advertising in mass media. Drug makers could not give consumers information about their products because they could not fit the brief summary into a radio or television commercial of reasonable length. Moreover, consumers chose not to see physicians because they were unaware that prescription drugs were available that might help their conditions. Thus, consumers suffered needlessly.

In the 1980s, the Department of Health and Human Services (HHS) attempted to remedy this problem by offering drug makers an alternative. HHS decreed that an advertiser does not have to include a brief summary in an advertisement, provided that the advertiser makes "adequate provision" for dissemination of the information in other ways.²⁰ HHS hoped that pharmaceutical manufacturers would advertise their products on television and radio, and use different methods of distributing the necessary information about side effects, contraindications, and

18. 21 U.S.C. §§ 301-392 (1994).

19. *Id.* § 352(n).

20. 21 C.F.R. § 202.1(e)(1) (1997).

effectiveness.²¹

Unfortunately, for about ten years manufacturers did not avail themselves of the exception.²² Although they would have liked to advertise in broadcast and other mass media, manufacturers had difficulty finding cost-effective alternatives of disseminating the required brief summaries to consumers. As a result—and despite the best intentions of Congress and HHS—consumers still did without the beneficial information.

In the 1990s, with the growth of the Internet, a technological solution emerged for this consumer protection problem. The Internet, as noted above, allows anyone to make large amounts of information available to an immense audience at very little cost and with very little difficulty. A person merely needs to pay an Internet hosting provider a small monthly charge for putting the information in a publicly available file.

The Internet has fueled all sorts of drug advertising. Manufacturers of medicines designed to treat allergies, migraine headaches, depression, and other ailments now advertise in broadcast media and mass circulation newspapers and magazines. Consumers can now obtain detailed information about the advertised drugs at web sites that the companies maintain on the Internet.²³ These Internet sites, in large part, serve to satisfy the HHS adequate provision requirement.²⁴ The Internet lowers the cost of communication, and thus permits consumers to know more about available prescription drugs.

Even in areas where the law does not require full disclosure by advertisers, the Internet now makes it possible for advertisers to supplement their mass media public relations efforts at a low cost. Businesses, when advertising in conventional media, merely have to direct consumers to their web sites for further information. This practice already has become widespread. A recent issue of *Newsweek* magazine, for example, contained advertisements listing the web sites of over a dozen major

21. HHS has explained that “[t]he ‘adequate provision’ requirement recognizes the inability of broadcast advertisements of reasonable length to present and communicate effectively the extensive information that would be included in a brief summary.” Consumer-Directed Broadcast Advertisements, 62 Fed. Reg. 43,171, 43,172 (1997).

22. See *id.* (noting that direct advertising, although permitted since the early 1980s, became popular only in the 1990s).

23. See, e.g., *Claritin-Allergy Sufferers* (visited Mar. 3, 1998) <<http://www.claritin.com/consumer/index.htm>> (containing a brief summary of Claritin, a drug manufactured by Schering Plough); *Lilly USA: Prozac (fluoxetine hydrochloride)* (visited Mar. 3, 1998) <<http://www.lilly.com/products/usa/prozac/index.html>> (containing a brief summary of Prozac, a drug manufactured by Lilly); *Imitrex* (visited Mar. 3, 1998) <<http://www.migrainehelp.com/imitrex/index.html>> (containing a brief summary of Imitrex, a drug manufactured by GlaxoWellcome).

24. HHS has not yet decided whether an advertiser can meet the adequate provision requirement solely by including the information on the Internet. See Edmund Polubinski III, Note, *Closing the Channels of Communication: A First Amendment Analysis of the FDA's Policy on Manufacturer Promotion of "Off-Label" Use*, 83 VA. L. REV. 991, 1001 n.54 (1997). Most advertisers, accordingly, place the information in other media as well.

companies, including Charles Schwab, Chevrolet, Chrysler, Dodge, Eli Lilly, Epson, Ford, GlaxoWellcome, Hewlett Packard, Microsoft, NEC, Timex, Toshiba, and Toyota.²⁵ Indeed, nearly every full page advertisement in the issue, except those for cigarettes and liquor, listed an Internet address that consumers could visit to obtain more information.

Technology, in this way, makes more information about products available to consumers than ever before. It achieves this result, not by shifting costs around, but by reducing them. The Internet provides a partial remedy for this major consumer protection problem.

B. Undisclosed Contractual Terms

When businesses sell expensive consumer goods such as computers, computer peripherals, or video cameras, they usually want to express their rights and duties in an elaborate standard form contract. This desire makes sense. Given the money at stake, businesses want to know exactly where they stand before any dispute arises about the quality of the goods.

Consumers also would like to know their legal rights when buying products. Yet, they often face a problem. In particular, businesses typically put the form contract governing the sale inside the box containing the computer or video recorder or other goods. As a result, consumers often cannot learn of the contractual terms until after they already have purchased the item and opened the box.

Consider, for example, the recent case of *Hill v. Gateway 2000, Inc.*²⁶ Rich and Enza Hill wanted to buy a computer. They telephoned a large manufacturer (Gateway 2000), ordered a particular model, and paid with a credit card. The operator who took their call did not mention the contractual terms.²⁷

When the computer arrived, it contained an elaborate form contract that included two clauses which turned out to be important: one clause required arbitration of all contract disputes; the other clause provided that the contract became effective unless the purchaser returned the computer within thirty days.²⁸

The Hills kept their computer for more than thirty days.²⁹ After that time, they became dissatisfied with its quality and performance, and when Gateway 2000 did not resolve their complaints, the Hills sued the company in federal court. Gateway 2000 sought to dismiss the lawsuit, arguing that the contract required arbitration of disputes.³⁰

The Hills appealed the case to the United States Court of Appeals for the Seventh Circuit. In an opinion by Judge Frank Easterbrook, the court sided with

25. See NEWSWEEK, Dec. 15, 1997, *passim*.

26. 105 F.3d 1147 (7th Cir. 1997).

27. *Id.* at 1148.

28. *Id.*

29. *Id.*

30. *Id.*

Gateway 2000, and held the arbitration clause enforceable.³¹ Although the court recognized that the Hills did not have an opportunity to see the contractual terms before they purchased the product,³² it also realized that Gateway 2000 needed to express the terms of sale in a contract. The court recognized that Gateway 2000 had no other economically sensible method to convey the terms to the purchasers, other than to put a form contract in the box containing the computer.³³ Judge Easterbrook's opinion explained his reasoning as follows:

Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions.³⁴

In view of these practical considerations, the court concluded that businesses simply cannot avoid the minor hardship to people like the Hills who do not have an opportunity to see the terms of the contract until they open the box.³⁵ The opinion concluded: "Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device."³⁶ In other words, economic factors sometimes simply prevent consumers from learning of the terms of their contracts before making a purchase.

Given the facts of the case, the Seventh Circuit's decision seems very reasonable. The court confronted a difficult situation and adopted a rule that, although not favorable to the plaintiffs, attempted to take into account the interests of consumers as a whole. The Hills faced a problem—not knowing the terms of the contract—that the law did not seem capable of solving because of the cost and burden of supplying the terms in advance.

Technology, however, can change prevailing conditions, and can make practices economically sensible that previously seemed unreasonable. Although vendors may have to include form contracts in the box when they sell products in

31. *Id.* at 1151.

32. *Hill*, 105 F.3d at 1149.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

conventional ways, a new way of making sales has emerged. Many businesses now market products of all kinds over the Internet.³⁷ The products range from expensive computers to inexpensive children's toys. Sales over the Internet have a tremendous advantage over other types of sales when it comes to providing consumers with information about the terms of the sales. Once a company has established a web site advertising products for sale, it costs almost nothing to make the terms of the sale available to anyone who has online access.³⁸

In fact, some businesses already have put this idea into practice. Dell Computer's home page, for example, allows consumers to purchase numerous computers either online or by calling a toll-free telephone number.³⁹ The site permits the consumer to see in advance the complete terms of the sale.⁴⁰ Even firms that do not sell products on the Internet often put their form contracts online. Ford, for instance, includes a copy of its standard automobile lease on its web site so that potential customers can be "familiar with it prior to going to a Ford or Lincoln-Mercury dealership."⁴¹

In sum, the Internet can benefit consumers by ameliorating a problem that, at the time the Hills brought their lawsuit, seemed unsolvable. Sellers have good reasons for using standard form contracts. Now, thanks to technology that has cut communication costs, businesses have at least one cost-effective way of making these form contracts available to consumers before they buy a product.

C. *Surprise Contractual Terms*

Even when consumers know that a form contract governs a transaction, and even when they have the opportunity to read the contract in advance, consumers may still have a problem. Specifically, form contracts often contain important terms that consumers fail to notice or understand. Consumers are later surprised by these terms when a dispute arises with the merchant who sold them the goods or services.

The law traditionally has placed the burden of surprise contractual terms on consumers. Courts have shown little sympathy for a consumer who argued that he did not read or comprehend a term in a form contract. While courts have the power

37. See *supra* note 2.

38. Most form contracts run only a few pages long, would require only a few thousand bytes to store, and would take only seconds to make available.

39. *Dell Computer Corporation—Home Page* (visited Mar. 4, 1998) <<http://www.us.dell.com>>.

40. *Terms and Conditions of Sale* (visited Mar. 4, 1998)

<<http://www.us.dell.com/dell/legal/terms.htm>>. Interestingly, Gateway 2000's web site does not include all of the terms of sale online. *Gateway 2000, Inc. Splash Page* (visited Mar. 4, 1998) <<http://www.gateway2000.com/splash.asp>>. Under the Seventh Circuit's reasoning, perhaps Gateway 2000 will lose its next lawsuit with a customer who purchases a computer over the Internet, but does not see the terms until opening the box, given that Gateway 2000 could have made the terms available online at little cost. See *supra* notes 26-36 and accompanying text.

41. *RCL Motor Vehicle Agreement* (visited Mar. 4, 1998)

<<http://www.fordcredit.com/redcarpetlease/agreement1.html>>.

to strike egregious provisions that violate public policy or are unconscionable,⁴² courts will generally enforce form contracts against consumers. Consumers must protect themselves by carefully reading the fine print.

This solution to the problem of surprise terms in form contracts is not wholly satisfying. For sound economic reasons, consumers often do not read form contracts. Poring over form contracts takes considerable effort and rarely accomplishes anything valuable. Also, because disputes with merchants seldom arise, reading the contract is usually a waste of time. Without a very careful reading, moreover, consumers most likely would miss the significance of many of the clauses. In any event, consumers usually cannot persuade a merchant to change the terms of a form contract even if they find a term objectionable.

As an alternative, the law could place the burden of surprise contractual terms on the merchant. The American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) are working on a revised version of Article 2 of the U.C.C. that would achieve this result. In the latest draft, the ALI and the NCCUSL proposed to address the difficulty consumers have with form contracts in a new section. The new section would make an unexpected contractual term in a consumer contract unenforceable if a reasonable consumer in that type of transaction would not expect that term to be in the contract.⁴³ This controversial proposal, if enacted by state legislatures, would shift the problem of surprise terms to merchants. After its adoption, consumers undoubtedly still would fail to notice terms in contracts; the proposal would merely make the lack of notice a problem for the merchants and not the consumers.

Merchants, at present, have a strong argument against the proposal: consumers do not see important terms in contracts because no one points them out and explains them. Businesses generally fail to perform this function, not because they want to trick consumers, but instead because this undertaking would be too costly. A typical salesperson lacks the time and training to give consumers detailed information regarding the terms of a form contract. Consequently, shifting the problem of surprise terms to merchants would impose a significant new burden on them. If merchants cannot find an internal solution to lessen this burden, they will have to shift the increased transaction costs back to consumers in the form of higher prices. Surprise contractual terms, as a result, will remain a consumer problem.

The Internet, however, may supply a technological solution. In certain instances, the Internet can eliminate surprise contractual terms by using computer resources to clarify to consumers the meaning of form contracts. For example, consider again the case of *Hill v. Gateway 2000, Inc.*⁴⁴ Even after receiving their computer and the form contract that came with it, the Hills did not realize that a

42. U.C.C. § 2-302 (1995) (unconscionability); RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) (public policy).

43. See U.C.C. § 2-206 (Discussion Draft Apr. 14, 1997).

44. 105 F.3d 1147 (7th Cir. 1997).

term in the contract required them to arbitrate disputes.⁴⁵ Gateway 2000, which sold the computer over the telephone, realistically could not have sent a representative to the Hills' home to explain the contract. Yet, if the Hills had purchased their computer over the Internet, Gateway 2000 might have been able to give the Hills a thorough explanation of the form contract at negligible cost.

If the sale had taken place over the Internet, Gateway 2000's web site could have presented the form contract to the Hills in an interactive format. The web site could have walked them through its terms, step by step, and employed a variety of techniques to ensure that the Hills had an opportunity to understand what the contract meant. For example, the web site could highlight important contractual terms in different colors. Also, the web site could use recorded audio to explain the contract's terms orally to the Hills. Moreover, the interactive contract could ask the Hills to use a mouse to click on various boxes on the screen to verify their understanding of each provision in the contract. Although this technique of explaining contractual terms has not yet become widespread—perhaps because the U.C.C. Article 2 revision has not yet become law—the technology already exists to put it into practice.⁴⁶

In sum, the Internet could address and remedy an economic obstacle to effective consumer protection. By substituting computer power for labor, the Internet could reduce the costs of informing consumers about the content of form contracts. Thus, the Internet can provide a new way to address and reduce a seemingly intractable difficulty of explaining standard contractual terms.

D. Uneven Leverage in Dispute Resolution

Consumers traditionally have had difficulty resolving legal disputes with businesses. As in the previous examples, much of the problem concerns economics. Unlike businesses, consumers generally have few cost-effective ways of asserting pressure on parties with whom they disagree.

Consider the following example: A consumer purchases a dishwasher on credit from a major retailer, and the dishwasher fails to operate to the consumer's satisfaction. The consumer wants to rescind the transaction and return the merchandise, but the retailer refuses to cooperate.

A consumer in this situation conventionally has had few appealing options. The consumer could refuse to pay the outstanding debt on the appliance. However, this decision may provoke a variety of unpleasant responses from the retailer. The retailer, for instance, might sue the consumer. In this situation, economics would greatly favor the retailer because many businesses (unlike most consumers) employ in-house counsel or keep lawyers on retainer. As a result, in pursuing litigation,

45. *Id.* at 1148.

46. Many companies already use the Internet to present form contracts to consumers and ask them to acknowledge that they have read and understood the form by clicking on a box stating, for example, "I agree." However, very few firms attempt to use the Internet to explain the terms of the form contract.

businesses face only marginal costs.⁴⁷ In contrast, consumers generally cannot afford to litigate cases that involve small sums because hiring an attorney or pursuing the claim on their own would be too expensive.

If the retailer decides against suing or threatening to sue the consumer, the retailer still may employ a number of other inexpensive but effective debt collection strategies. For example, the retailer will often have retained a security interest in the good sold. The retailer then can repossess the appliance without judicial action provided that the retailer can accomplish the repossession without breach of the peace.⁴⁸

In addition and also at little cost, the retailer could turn the debt over to a collection agency. Although prohibited from harassing debtors,⁴⁹ the debt collector may still pressure the consumer into payment by making repeated demands. The retailer can also exert leverage by warning the consumer that if the consumer fails to pay promptly, the retailer will file a negative report with a credit reporting agency. Although the consumer has a right to respond,⁵⁰ the report nonetheless may hamper the consumer's ability to obtain credit in the future.

The consumer has no comparable strategies for persuading businesses to cooperate. Unlike the retailer, the consumer generally cannot file a report with a credit reporting agency. Instead, the consumer could write a letter complaining about the retailer to the local Better Business Bureau, the local news media, or to the office of consumer affairs. Absent a pattern of misbehavior by the business, however, the consumer's letter probably would not achieve anything.

In order to receive better treatment from merchants, consumers need a way to put pressure on businesses. Once again, recent advances in technology may provide assistance. Computer networks such as the Internet lower the cost of widespread communication. By posting their complaints on the Internet, consumers can publicize their grievances to thousands of other consumers. This lawful and simple method affords consumers increased leverage in resolving disputes.

Consumers have already established more than one hundred web sites in which they air complaints about major businesses.⁵¹ For example, one aptly named web site allows consumers to describe problems that they have had in dealing with Wal-Mart.⁵² Others contain criticism of commercial airlines, manufacturers, telephone

47. Not only do businesses have smaller costs in pursuing litigation, but litigation also might give them greater benefits. Some businesses bring lawsuits no matter how trivial the amount in controversy in order to send a message to other customers who might not pay. By contrast, a consumer realistically stands to recover only the amount in controversy.

48. U.C.C. § 9-503 (1995).

49. See 15 U.S.C. § 1692d (1994) (prohibiting a debt collector's harassment and abuse of debtors).

50. See 15 U.S.C. § 1681i(b) (allowing consumers to submit a brief statement to credit reporting agencies).

51. To find some of these websites, visit <<http://www.yahoo.com>>, and search for "consumer opinion."

52. See *Wal-Mart Sucks* (visited Mar. 4, 1998) <<http://www.walmartsucks.com>>.

companies, and so forth.⁵³ These web sites cost nothing for someone with Internet access to visit, and only a minimal amount for their consumer proprietors to maintain.

Consumer complaints posted on the Internet reportedly have had substantial success in vindicating consumer rights and altering corporate policy.⁵⁴ For example, Intel Corporation ultimately had to recall thousands of Pentium processor chips after a college professor documented in a consumer-oriented web site that the chips contained a flaw.⁵⁵ Like Intel, many other firms monitor consumer opinion web sites carefully to ensure that no public relations problems emerge.⁵⁶

Again, the Internet provides a partial solution to a vexing consumer credit problem. In the past, consumers had few, if any, cost-effective ways of complaining about businesses. The Internet can address and diminish this problem by reducing the cost of communicating consumer complaints to others.

III. POSSIBLE LEGAL RESPONSES

The foregoing discussion has shown several ways the Internet can assist consumers in overcoming problems that they have traditionally faced. These examples raise the question of how the legal system should react. The following discussion describes three possible responses, each of which makes sense in different contexts.

A. *No New Rules*

In some situations, courts and legislatures should not alter the law in response to new technologies that benefit consumers. Although the Internet may afford consumers new protections and powers, the legal system need not always respond to this development. Instead, in certain circumstances, the market will sufficiently encourage businesses and consumers to take advantage of the benefits that the Internet offers.

A hands-off approach makes the most sense in three types of situations. First, courts and legislatures should not adopt new legal rules where changes in the law would not affect the condition of consumers. Consider, for example, the growing practice of using web sites on the Internet to complain about business practices. Consumers did not need any change in the law to enable them to publicize their views; they merely required a low cost method of broadcasting them. The Internet has already satisfied that need, and thus, courts and legislatures do not have to act.

Second, in other instances, the market may compel the use of technology that

53. See *supra* note 51.

54. See Jennifer Tanaka, *Foiling the Rogues: "Anti" Web Sites are Great for Angry Customers, but Now Companies Are Trying to Fight Back*, NEWSWEEK, Oct. 27, 1997, at 80, 80.

55. *Id.*

56. *Id.*

benefits consumers even if the law does not. For example, suppose two firms are selling similar products, and one firm makes the terms of the sale available to consumers by posting them on the Internet, while the other firm does not.⁵⁷ If even just a few consumers decide that they favor the firm making the disclosure because they like the additional information, then the other firm will probably start doing the same. Posting information on the Internet costs so little that the market will compel businesses to do so to avoid losing customers.

Third, courts and legislatures, in some other situations, may want to allow technology to progress beyond its current state before altering the legal rules. For example, suppose a regulation requires businesses to post certain types of information on the Internet. A new development may occur that makes the Internet, as we presently understand it, obsolete. The regulation will no longer make sense and, in fact, may limit development of the new technology.

B. New Rules for Transactions Using New Technology

Although leaving certain legal rules in place is the best policy in some contexts, the status quo may be insufficient in others. As an alternative, courts and legislatures could adopt a dual set of rules. These rules could impose different duties upon businesses depending on the type of transaction involved and the ability of the Internet to provide assistance. This response would provide new protection to consumers in some cases.

For example, suppose that three consumers independently buy a new computer modem. The first consumer purchases the product at a store. The second consumer orders the modem over the telephone after seeing an advertisement in a magazine. The third consumer purchases the modem from an Internet web site. In all three instances, the sellers reveal the terms of the sale only in a printed document included inside the box.

In the first two cases, the court might hold the consumer bound to the terms of the contract for the reasons given by the court in *Hill v. Gateway 2000, Inc.*⁵⁸ The court may decide that pre-disclosure of the terms did not make sense, because the consumer really would not want a salesperson to read the terms over the telephone, and the terms would not fit on the outside of the box containing the modem.

However, in the third case the court might reach a different conclusion. The court might conclude that, because the sale took place over the Internet, the firm could easily have provided the consumer with the terms of the sale by merely posting them on its web site. As a result, the court might hold the form contract included in the box unenforceable.

This approach would afford consumers greater protection and impose only minimal costs on retailers. Businesses would not be required to sell computers over

57. See *supra* note 40 and accompanying text.

58. 105 F.3d 1147 (7th Cir. 1997); see *supra* notes 26-36 and accompanying text.
<https://scholarcommons.sc.edu/sclr/vol49/iss4/8>

the Internet, although market forces might encourage them to do so. However, if businesses did use the Internet to sell goods, they could not use inconvenience as an excuse for failing to divulge contractual terms.

The same type of approach could also work in cases involving surprise contractual terms. A court might conclude that consumers generally have a duty to read their contracts, and that businesses generally have no obligation to explain them. Yet, the court might decide to create an exception if the business sold a product over the Internet, reasoning that if the web site could have explained the contract in an interactive way at little expense, then the business could not enforce any terms that the consumer could not reasonably expect.

C. New Rules Encouraging New Technology

Finally, in some instances, the legal system should take a more dramatic approach by adopting rules that would require businesses to use the Internet. This result makes sense when the rules would impose only minor burdens on businesses, while providing substantial benefits to consumers.

Consider the example of prescription drugs. HHS now permits drug manufacturers to advertise drugs if they make "adequate provision" for disseminating important information about the drugs' effectiveness, side effects, and contraindications.⁵⁹ Some firms accordingly have taken the step of posting this information about the drugs on the Internet.⁶⁰

Congress and HHS, however, could go much further than they have. For instance, Congress could enact a law requiring all manufacturers of prescription drugs—regardless of whether they advertise in mass media—to post information about their drugs on the Internet where consumers have easy access to it. This regulation would impose a minimal burden on drug manufacturers because a simple Internet site costs little to establish and maintain. Yet, the information on the web site could greatly benefit those consumers and physicians who have access to the Internet.

In other instances, needless to say, mandating that businesses employ the Internet would not make sense. For example, restaurants do not want to sell products over the Internet and do not have any vital information that the law should require them to publicize. Lawmakers should carefully consider what will actually benefit consumers, and what will not, in deciding whether to adopt new rules.

IV. CONCLUSION

No one would suggest that the Internet can solve all consumer protection problems. Most consumers neither have easy access to the Internet nor do they

59. 21 C.F.R. § 202.1(e)(1) (1997).

60. See *supra* Part II.A.

know how to use it. Yet the Internet already benefits many individuals in their dealings with businesses. This article has shown some of these gains consumers have made, and new developments will continue to occur.

The idea that new technology can remedy long-standing consumer protection problems should not seem surprising. New technologies constantly ameliorate problems that society faces. Improved fertilizers and pesticides help farms to produce larger crops. New types of materials make stronger and safer buildings. Computerized medical equipment enables doctors to make faster and more accurate diagnoses. The Internet simply provides another example of how technological advances improve our lives.

The legal system cannot ignore technological developments such as those now occurring on the Internet. In many instances, these developments can protect consumers in more ways than traditional regulation. In appropriate circumstances, the legal system may adopt rules for the new possibilities. In other cases, however, the market may render intervention unnecessary. Where the lines should be drawn depends on the nature of the transactions and the technology available.