Consent You Cannot Obtain:

Post-Sale Terms on a Durable Good, the Strangers They Name, and the Formation Challenge That Survives Arbitration

Travis Gilly* ❧ September 2026 (v0.1)

Abstract

A television is bought at a retail counter. The sale is complete before anyone has seen a word of the manufacturer's terms, which appear on the screen after unboxing, mounting, and connection, run to roughly forty thousand words across six instruments, and can be changed afterward by software update. Four of those instruments close with a paragraph in which the purchaser represents that he has obtained consent from every member of his household and is providing it on their behalf. This Article asks whether any of that binds anyone, and it answers on the shrinkwrap cases' own terms. *ProCD* held that a buyer who is told terms exist, is given them, has a right to return the product if they are unacceptable, and uses it anyway has accepted by conduct; measured against all four, the television transaction satisfies the first only, and only as to the single term the manufacturer prints on the outside of the carton, which is the arbitration notice and nothing else. *Hill* expressly reserved the case of a buyer with no advance notice that terms are coming. The Ninth Circuit, on a consumer electronics purchase with terms in the box, held that silence is not assent and declined to follow the Seventh Circuit. And the people the household clause purports to bind, guests, children, and bystanders, are strangers to the agreement on any theory, which *ProCD* itself said contracts cannot reach. The Article then shows why a formation challenge, and only a formation challenge, survives the arbitration provision and the delegation clause inside it: both of the Supreme Court's severability decisions reserve whether any agreement was ever concluded, the 2024 *Suski* decision holds that a challenge applying equally to the whole contract and to the delegation clause is for the court, and a status objection applies equally by its nature. It closes by comparing the clause's allocation of the consent duty to the consumer against the one federal regime that has addressed consent on behalf of someone who cannot give it, which placed the duty on the party that built the collection, and by disaggregating the collection under the statutory unfairness standard to show that the function the consumer wanted is small and user-initiated and the functions producing the injury are neither. None of this is about televisions. It applies to any durable good sold at retail whose terms appear after the sale.

Keywords: contract formation; shrinkwrap; browsewrap; assent; post-sale modification; unilateral modification; arbitration; delegation clauses; severability; consumer contracts; durable goods; smart televisions.

---

*Travis Gilly is Founder and Executive Director of the Real Safety AI Foundation. ORCID: 0009-0007-2954-6313. Correspondence: `t.gilly@ai-literacy-labs.org`. The author discloses the use of speech-to-text software (Wispr Flow) and Anthropic's Claude as assistive technology for a diagnosed neurodevelopmental condition. All legal analysis, case synthesis, theoretical framing, doctrinal arguments, and conclusions are solely the author's own.

Contents

I. Introduction

A television is bought at a retail counter. Money changes hands, the box is carried out, and the sale is complete before anyone has seen a word of the manufacturer's terms. The terms appear later, on the screen, after unboxing, placement, connection, and setup: six instruments, roughly forty thousand words, some two thousand seven hundred remote presses to traverse.[1] Four of them close with the same paragraph, in which the purchaser represents that he has obtained consent from all other members of his household whose information may be collected and is providing consent on their behalf.[2] A separate clause assigns to the purchaser sole responsibility for obtaining, from anyone whose voice may be captured, consent in compliance with wiretapping, eavesdropping, and privacy laws, and disclaims the manufacturer's liability if he does not.[3] The terms can be changed afterward by update, and declining the update is reported to end security patches.[4]

This Article asks whether any of that binds anyone. It is a question about contract formation, and it is asked about a durable good rather than about software, which turns out to matter.

A. What This Article Adds

The surveillance practices of connected televisions have been measured, litigated, settled, and legislated, and a companion article takes up what those practices do to a population the enforcement does not reach.[5] None of that activity has asked the prior question, which is whether the terms that accompany these devices are contracts at all. Nor has the scholarship: the shrinkwrap and clickwrap literature, from the first responses to *ProCD* to the present, is a

1. *See infra* Part II.

2. LG Elecs. Inc., Viewing Information Agreement ¶ 13; Voice Information Agreement ¶ 8; Interest-Based & Cross-Device Advertising Agreement ¶ 8; Who.Where.What? User Agreement ¶ 10.

3. LG Electronics, Terms of Use §6(d).

4. *See infra* Part II.

5. Travis Gilly, *The Television Is Listening: Smart Television Microphones, All-Party Consent, and the Households Where Reality Testing Failed* (working paper 2026).

literature about software and online services, and a search of it conducted for this Article returned nothing on a durable good sold at retail.[6] This Article adds four things toward answering it.

The first is a reading of the shrinkwrap cases on their own conditions. *ProCD* and *Hill* are cited as though they hold that terms inside a box bind whoever opens it. They hold that terms bind a buyer who was told they exist, was given them, had a right of return, and used the product anyway. Part III takes each condition in turn and shows that the television transaction satisfies the first only, and only as to the single term the manufacturer chose to print on the carton, which is the arbitration notice. *Hill* expressly reserved the case of a buyer with no advance notice that terms were coming, and the Ninth Circuit, on a consumer electronics purchase, has since held that silence is not assent and declined to follow the Seventh Circuit line.

The second is the strangers. The household clause purports to bind guests, children, and bystanders through a purchaser who has no authority over them. Part III shows that this is not a formation defect to be argued about; it is the absence of any contract with those people, and the authority for that is *ProCD* itself, which said that contracts generally affect only their parties and strangers may do as they please.

The third is forum. Terms of this kind carry an arbitration provision and, in the ordinary case, a delegation clause. Part IV shows that a formation challenge, and only a formation challenge, survives both: the Supreme Court's severability decisions reserve whether any agreement was ever concluded, its 2024 decision in *Suski* holds that a challenge applying equally to the whole contract and to the delegation clause is for the court, and a status objection applies equally by its nature. The circuit split on existence challenges is stated and the argument is built so as not to depend on which side of it a court takes.

The fourth is allocation. Part V sets the clause's assignment of the consent duty to the consumer beside the one federal regime that has addressed consent on behalf of someone who

6. Search of the Consensus index, September 2026, returning commentary on software licenses, video game agreements, and online terms of use, and nothing addressing a physical chattel whose terms arrive after the sale. Stated as a finding of the search rather than a proof of absence.

cannot give it, which placed the duty on the operator, and then asks under the statutory unfairness standard what the collection is for, function by function.

Part II sets out the terms, how they arrive, and what enforcers and legislators have already done about the underlying practice, so that a reader knows what has been tried and why none of it reached this question.

II. The Terms and the Transaction

This Part sets out only what the formation analysis needs: what the purchaser is asked to accept, how and when it arrives, and what has already been done about the underlying practice by enforcers and legislators. The technical findings about the device, and the population for whom they matter most, are the subject of a companion article and are summarized here in a paragraph.[7]

A. Six Agreements at Setup

On initial setup, a purchaser is presented with six instruments: terms of use and privacy policy, a viewing information agreement, a voice information agreement, an interest-based and cross-device advertising agreement, a marketing communications agreement, and one styled Who.Where.What.[8] Four of the six close with an identical paragraph in which the purchaser represents that he has obtained consent from all other members of his household whose information may be collected and is providing consent on their behalf.[9] The Terms of Use add, under the heading Voice Recognition and Privacy Compliance, that it is the purchaser's sole

---

7. The companion article, *The Television Is Listening*, sets out the reported device findings, the peer-reviewed measurement study, and the eavesdropping analysis in full. In brief: the sets contain microphones in the panel and the remote; the manufacturer's own voice agreement concedes that a hands-free feature may capture speech on a false wake without notification; independent researchers found recognition traffic active when the set is used as an external display and found the opt-out functional once exercised; and the manufacturer's advertising subsidiary receives the recognition stream. Nothing in this Article depends on any of those findings beyond the existence of the terms.

8. Texas' Original Verified Petition, State of Texas v. LG Elecs. U.S.A., Inc. (Tex. Dist. Ct. filed Dec. 15, 2025) [hereinafter Texas Petition] (describing the consent screen). The State alleged that all six boxes are presented unchecked and that nearly all consumers select all in order to finish setup.

9. LG Elecs. Inc., Viewing Information Agreement ¶ 13 (last updated Jan. 2024); Voice Information Agreement ¶ 8 (last updated Mar. 2024); Interest-Based & Cross-Device Advertising Agreement ¶ 8 (last updated Jan. 2024); Who.Where.What? User Agreement ¶ 10 (last updated Jan. 2024).

responsibility to obtain all necessary consents from third parties whose voices may be captured, in compliance with applicable wiretapping, eavesdropping, and privacy laws; that if anyone does not consent the owner should disable the microphone; and that the manufacturer disclaims liability for the owner's failure to do either.[10]

A forced arbitration notice is reported printed on a sticker on the back panel of some units, not all, in fine print.[11] Reported figures for the full set run to roughly forty to fifty thousand words, some two thousand seven hundred remote presses to traverse, and between two and four hours at ordinary adult reading rates.[12]

B. How the Terms Arrive

None of that is presented before purchase. The terms appear on the screen after unboxing, placement, connection, and setup. The clause examined here reached existing sets as part of a software update introducing AI-based service terms, and a monitor purchased during the investigation displayed on first connection a notice that the terms would be updated and would be effective in thirty days.[13] An owner who declines the update is reported to stop receiving security patches.[14]

C. The Controls

A do-not-sell request does not stop recognition; the manufacturer's own agreement tells the user that recognition services remain active unless a separate toggle is also turned off.[15] The State of Texas pleaded the opt-out path at roughly forty clicks across four or more menus, beginning

---

10. LG Electronics, Terms of Use §6(d), `https://www.lg.com/us/terms`. The clause reaches televisions through an on-device instrument delivered by webOS update.

11. Gamers Nexus, LG smart television investigation, YouTube (Sept. 5–6, 2026) (135 min.).

12. *Id.* The figures are the investigation's own count.

13. *Id.* The amendment subjects were identified as the arbitration agreement and AI-based service terms. The terms were amended in late July 2026, after the investigation's first video on July 16.

14. *Id.*; *see also* contemporaneous coverage of the rollout describing the same consequence. The precise relationship between accepting the AI-based service terms and continuing to receive security updates should be established from the manufacturer's documentation before publication.

15. LG Elecs. Inc., Viewing Information Agreement ¶ 11.

under an accessibility heading, against a one-click opt-in, and named the patterns as privacy zuckering and roach motel.[16]

D. What Has Already Been Done

On December 15, 2025 the Attorney General of Texas sued five manufacturers under the Deceptive Trade Practices Act on a single count alleging misrepresentation and failure to disclose.[17] The manufacturer examined here consented to a final judgment on May 11, 2026 requiring affirmative express consent before viewing data is collected and an unavoidable disclosure on model year 2027 and later sets.[18] Kentucky made content recognition collection opt-in by statute effective July 2027, and wrote a provision voiding any contract term that purports to waive or limit the consumer rights it creates.[19]

None of those actions raised the question this Article takes up. The Texas pleading asked whether consumers were told, not whether they agreed. The judgment prescribes what a consent screen must say going forward and does not decide whether the screens that preceded it formed a contract with anyone. And the Kentucky anti-waiver provision, which is the closest any of it comes, is a legislative judgment about who bears the risk of terms nobody reads rather than a holding about whether such terms bind.

III. Consent That Cannot Be Given

This Part asks whether the consent the manufacturer's clause contemplates is obtainable at all, and it approaches that question in two stages: whether the purchaser ever agreed to anything, and whether anyone else in the room could have. The first stage occupies most of the Part, because it is where the shrinkwrap cases are usually thought to have settled the matter, and they have not. It

16. Texas Petition (describing the opt-out path).

17. Texas Petition, Count I (citing Tex. Bus. & Com. Code §17.46(a), (b)(24)).

18. Agreed Final Judgment and Permanent Injunction, State of Texas v. LG Elecs. U.S.A., Inc., Cause No. 25DCV358507 (Tex. Dist. Ct., Bell Cnty., 169th Jud. Dist. 2026) [hereinafter Agreed Final Judgment], ¶¶ 1(g), 1(h)(iii), 17. The judgment's definition of clear and conspicuous requires that a disclosure in an interactive electronic medium be unavoidable, which is the standard this Article argues was never met at the point of sale.

19. 2026 Ky. Acts ch. 118 (H.B. 692), §2 (amending KRS 367.3617(1)(f), (2)).

proceeds through the conditions those cases set, notice first and the right of return second, then to the two features of this transaction the cases never reached. The second stage closes the Part.

A. When Was the Contract Made

The sequence set out in Part II, sale first and terms afterward, has one feature that no reading of it can remove: the purchaser did not read the terms before buying, was not offered them before buying, and in most cases was not told they existed.

That sequence is not new and it has been litigated. The governing authority in the Seventh Circuit is *ProCD, Inc. v. Zeidenberg*, which held that a license enclosed with software binds a buyer who uses the product after an opportunity to read it.[20] A vendor, as master of the offer, may invite acceptance by conduct and propose limitations on the kind of conduct that constitutes acceptance, and a buyer may accept by performing the acts the vendor proposes to treat as acceptance.[21] The following year the court extended that reasoning to a computer ordered by telephone and delivered with terms in the box, holding that terms inside a box bind consumers who use the product after an opportunity to read them and to reject them by returning it.[22]

Hill also supplies the adverse proposition that has to be met head on rather than avoided. A contract need not be read to be effective, the court wrote, and people who accept take the risk that the unread terms may in retrospect prove unwelcome.[23] That disposes of an argument this Article does not make. The objection here is not that the purchaser failed to read what he was given. It is that he was given nothing, and the two are different objections with different answers. A rule that a party bears the risk of unread terms presupposes a party who had them.

---

20. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). This was not the prevailing view when it was decided. Writing two years later, a leading commentator observed that most judicial opinions had refused to enforce shrinkwrap licenses because consumers had not meaningfully assented, and that those courts regarded the contract of sale as complete when the store rang up the sale, treating the license in the box as at most a proposal to modify that consumers had to accept separately and typically did not. Pamela Samuelson, *Does Information Really Have to Be Licensed?*, 41 Comm. ACM 15 (1998). The Seventh Circuit's position became the dominant one afterward; it did not start that way.

21. *Id.* at 1452 (citing U.C.C. §2-204(1)).

22. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148–49 (7th Cir. 1997).

23. *Id.* at 1148.

This Part does not argue that *ProCD* was wrongly decided. It argues that the arrangement described in Part II does not satisfy what *ProCD* required, and that *ProCD* expressly declined to reach the feature that makes this arrangement different.

B. The Three Conditions, and the One That Fails

The holding is stated with its conditions attached. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable, a right that the license expressly extends, may be a means of doing business valuable to buyers and sellers alike.[24] The court reinforced the point through the Uniform Commercial Code's provision on acceptance of goods,[25] and it mattered that acceptance was unmistakable: the software splashed the license on the screen and would not let the buyer proceed without indicating acceptance.[26]

1. Notice on the Outside

Inspection of the retail carton of a current-generation set answers part of this.[27] The front panel is a marketing panel: product line, screen class, three feature callouts including one for the operating system, and a row of interoperability logos. Beneath those, in type substantially smaller than everything above it, is a block of legal text in English, French, and Spanish, most of it trademark attribution and a brightness disclaimer.[28] One paragraph is different. Under a heading reading arbitration notice, it states that disputes between the purchaser and the manufacturer arising out of or relating in any way to the product, including but not limited to warranty disputes, shall be resolved through binding arbitration on an individual basis unless the laws of the

---

24. *ProCD*, 86 F.3d at 1451.

25. *Id.* at 1452–53 (citing U.C.C. §§2-602(1), 2-606(1)(b)) (a buyer accepts when, after an opportunity to inspect, he fails to make an effective rejection; the parties may structure their relations so that the buyer has a chance to make a final decision after a detailed review).

26. *Id.* at 1452.

27. Photographic inspection of the sealed retail carton of an LG OLED evo AI C5, 77-inch class, 2025 model, on file with the author. The transcription below is at the limit of the image's resolution and should be re-transcribed from a higher-resolution capture before publication; nothing in the argument turns on precise phrasing.

28. The callout for the operating system describes it as making it easier to stream apps, watch movies and more.

purchaser's state or territory do not permit it; that the purchaser may opt out; and that further information is available at a stated web address and in the owner's manual or warranty.[29]

So there is notice on the outside, and this Article says so. A purchaser who reads the bottom two inches of the carton is told before payment that disputes go to arbitration and that opting out is possible.

That concession should be stated at exactly its width. Notice that a term exists is not agreement to the term. *ProCD* did not hold that a buyer told terms exist is bound by them; it held that a buyer who is told terms exist, is given the terms, is given a right to return, and then uses the product anyway has accepted by conduct.[30] Acceptance was the last step and the court named the act that supplied it. Measured against all four requirements rather than the first, the carton fails three. The terms are not supplied; the notice points to a web address and to documents sealed inside the box.[31] The right to reject is the one examined below, which is to say the right to unbox, mount, and connect a seventy-seven inch television and then attempt to return it. And the acceptance relied on is not an act. A term the purchaser may choose to opt out of binds unless he affirmatively rejects it, which makes inaction the operative event, the inverse of the structure *ProCD* approved and against the ordinary rule that silence and inaction do not operate as acceptance.[32]

A federal court of appeals has applied that rule to this commercial setting. A consumer bought a mobile telephone whose box contained a safety and warranty brochure with an arbitration provision and an opt-out; he did not opt out; the manufacturer moved to compel and the court refused.[33] Three strands transfer. Silence or inaction does not constitute acceptance, and

29. Carton inspection, *supra*.

30. *ProCD*, 86 F.3d at 1451–52.

31. Carton inspection, *supra* (referring the purchaser to the owner's manual or warranty).

32. Restatement (Second) of Contracts §69 (1981) (silence and inaction operate as acceptance only where the offeree takes the benefit of offered services knowing compensation is expected, where the offeror has given reason to understand assent may be so manifested and the offeree so intends, or where prior dealings make it reasonable for the offeree to notify the offeror of non-acceptance). The section is quoted and applied in the decisions cited in this subsection.

33. Norcia v. Samsung Telecomms. Am., LLC, 845 F.3d 1279 (9th Cir. 2017).

an offer cannot be turned into an agreement because the recipient makes no reply even though the offer states that silence will be taken as consent, because the offeror cannot prescribe conditions of rejection so as to turn silence into acceptance.[34] An offeree is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.[35] And the court declined to follow the shrinkwrap line, rejecting the argument that failing to opt out of a provision in the product box constituted assent because California had not adopted the principle set forth in *Hill* and had made clear that silence alone does not constitute assent.[36]

The platform comparison the manufacturer will want defeats the point. Online arbitration provisions are enforced because the user performed an act whose only function was to signify assent and the platform can produce the record. Here there is no button, no record, and no moment. There is a paragraph on a carton, beneath a brightness disclaimer, on a box the delivery crew takes away.

What that same purchaser is not told is everything else. Nothing on the carton states that terms of use apply, that the television contains microphones, that recognition software is embedded and enabled, that the purchaser will represent he has obtained consent from every household member, or that the terms may be amended after purchase by update.[37] The manufacturer selected one legal term for the outside of the box, and it selected the term that protects the manufacturer. A notice that discloses one term does not supply notice of the others, and the selective disclosure cuts the other way: a purchaser who reads the fine print and finds an arbitration notice and nothing else has been given a reason to believe he has seen the legal terms that apply.

---

34. *Id.* at 1284–85 (quoting Leslie v. Brown Bros. Inc., 208 Cal. 606, 621 (1929)). A manufacturer does not acquire the purchaser's agreement by announcing what the purchaser must do to withhold it.

35. *Id.* at 1288. A safety and warranty brochure is such a document; so is fine print beneath a brightness disclaimer.

36. *Id.* at 1290. *ProCD* and *Hill* are the Seventh Circuit's rule, not the universal one. Two limits: the court reserved the case of a box whose exterior explicitly states that opening it constitutes agreement to terms inside, which this carton does not say; and it distinguished warranty conditions from freestanding obligations limiting a buyer's rights outside the warranty, *id.* at 1286–87. The notice examined here reaches disputes arising out of or relating in any way to the product, which places it on the freestanding side of that line.

37. Carton inspection, *supra*.

2. *No Presentation Event*

There is a deeper problem the carton does not touch. Online consent is administrable because a clickwrap agreement presents terms and requires an act that has no purpose other than to signify assent, and the act generates a record.[38] Courts enforce clickwrap and decline to enforce browsewrap on that basis: in the first the consumer has received notice of the terms and knows the other party may infer assent from the conduct; in the second the user can proceed without ever visiting the page where the terms live.[39]

A precise word about what that architecture accomplishes, because the imprecise version concedes too much. It does not produce informed agreement; the literature on that is settled and unflattering. It produces proof. After the click, it is difficult for the consumer to maintain that no assent occurred, because the record shows the button was pressed. That is an evidentiary function, not a consent function. This Article does not argue that the television falls short of a standard the online form meets. It argues that the television lacks even the record.

ProCD itself sits on the clickwrap side of that line: the software splashed the license on the screen and would not let the buyer proceed without indicating acceptance.[40] There was a moment at which the buyer did a thing whose only meaning was assent. A sticker on a back panel produces no such moment and no record. If a purchaser later denies having agreed to anything, the manufacturer's proof is that a label existed on some units and the purchaser owned one. The burden of establishing assent rests on the party asserting the contract.

3. *Terms on the Inside, and the Right to Return*

Terms on the inside is satisfied, and it is the least useful of the three, because the terms are on the inside of a device rather than a package, and reaching them requires assembly and setup.

---

38. *See* Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175–76 (9th Cir. 2014). Both carry caution treatment tracing to the Ninth Circuit's subsequent refinement of the taxonomy rather than to repudiation. *See* Oberstein v. Live Nation Ent., Inc., 60 F.4th 505, 516–17 (9th Cir. 2023); Keebaugh v. Warner Bros. Ent. Inc., 100 F.4th 1005, 1014 (9th Cir. 2024); Chabolla v. ClassPass Inc., 129 F.4th 1147, 1154–55 (9th Cir. 2025) (neutral; may be substituted as the current statement).

39. *Berman*, 30 F.4th at 856; *Nguyen*, 763 F.3d at 1176.

40. *ProCD*, 86 F.3d at 1452.

The right of return is where the structure fails. *ProCD*'s buyer could read the license and put the disc back in the box. The purchaser of a television cannot evaluate the terms without first performing the acts that consume the ability to return: opening the carton, removing the packing, attaching the stand or mount, connecting power and network, and navigating a setup flow reported at roughly forty to fifty thousand words across the linked agreements, some two thousand seven hundred remote presses, and two to four hours at ordinary adult reading rates.[41] A right to return that can be exercised only after the buyer has spent an afternoon doing the things that make return impractical is the form of *ProCD*'s right without its function.

C. Nobody Thinks a Television Has Terms

There is a further difficulty, and it is prior to notice rather than a species of it. Notice doctrine asks whether a reasonably prudent person in the buyer's position would have been alerted that terms existed and applied. That question presupposes that the buyer occupies a transaction type in which terms are expected.

ProCD was careful about this. The court grounded its holding in the observation that transactions in which the exchange of money precedes the communication of detailed terms are common, and it gave examples: insurance, airline and concert tickets, and the drug package insert.[42] Every one of those is a purchase of a service, an admission, or a regulated product accompanied by required disclosure. In each, the buyer is in a setting where the existence of terms is a background feature of the transaction. And the goods at issue in *ProCD* and *Hill* were software and a computer, categories in which a license was already the industry norm the courts were ratifying.

A television is not in that class. It is a chattel bought at a counter, carried out, and owned. The buyer of a refrigerator, a lamp, or a piano does not understand the purchase to have subjected them to a services agreement, and nothing in ordinary commercial experience suggests otherwise. The proposition that a household appliance carries terms of use is not a proposition

---

41. Reported findings, Part II *supra*.
42. *Id.* at 1451.

most purchasers have ever had occasion to form, which means the question a court would ask, whether a reasonably prudent buyer was on inquiry notice, has an answer that does not depend on where the sticker was placed.

That is a claim about consumer understanding, and it should be supported rather than asserted. The empirical literature on terms of service is one-directional and the finding is not marginal: the overwhelming majority of consumers do not read agreements even when the agreement is displayed and an affirmative click is required.[43] Whatever that literature shows about agreements people are shown, it establishes an a fortiori proposition about agreements they are not.

D. The Question Hill Reserved

There is a further condition in the Seventh Circuit line, and it is the one this transaction fails most clearly. It appears in *Hill* as a factual predicate rather than as a stated element, which is why it is easy to miss.

The plaintiffs argued that they had no way to know terms were coming. The court declined to reach the general question, and the sentence in which it declined is the important one. Whether a buyer must be alerted in advance that terms will accompany the product is, the court said, an interesting question, but one that need not detain us, because the Hills knew before they ordered the computer that the carton would include some important terms and did not seek to discover them in advance. The court grounded that knowledge in the vendor's own advertising, which stated that its products came with limited warranties and lifetime support.[44]

---

43. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1 (2014) (tracking the browsing of 48,154 monthly visitors to ninety online software retailers and finding that one or two of every thousand shoppers accessed the license agreement, and that most who did spent too little time to have read more than a small portion of it). The authors conclude that the limiting factor is the cost of reading and comprehending the contract rather than the cost of finding it. *Id.* at 1.

44. *Hill*, 105 F.3d at 1150.

Two things follow. The Seventh Circuit has not decided the case of a buyer with no advance notice that terms exist, and it said so. And in the case it did decide, the pre-purchase knowledge came from marketing that told the buyer what to expect.

A television is not advertised as coming with terms of use. It is advertised on panel technology, refresh rate, brightness, and price. Nothing in the marketing of the product alerts a purchaser that the carton contains a contract, still less that the contract will assign him a consent-obtaining duty toward everyone who enters the room. The predicate the *Hill* court relied on to avoid the question is absent, which returns the question the court reserved.

The same opinion leaves open two further conditions relevant here. It does not address whether terms would be enforceable if the cost of returning the product were prohibitive, and it does not address whether they would be enforceable if the vendor refused to supply a copy of the terms on request before purchase.[45] A sixty-five inch display, unboxed and mounted, presents the first question in an acute form.

One clarification about scope, stated with the precision the doctrine requires.

An agreement to arbitrate must be enforced save upon such grounds as exist at law or in equity for the revocation of any contract.[46] In *Casarotto* the Supreme Court applied that provision to a Montana statute requiring that notice of arbitration appear in underlined capital letters on the first page of a contract, where the clause at issue sat in ordinary type on page nine. Montana held the clause unenforceable; the Court reversed, holding the statute preempted.[47]

The holding is about state rules that single out arbitration clauses for special treatment. It does not displace generally applicable contract defenses, and the statutory text says as much by preserving grounds that exist for the revocation of any contract.

That distinction disposes of a misreading in both directions. An argument that this manufacturer's arbitration provision is insufficiently prominent, framed as a rule for arbitration

---

45. Both questions appear in the opinion's own account of what it did not decide. Neither has been resolved in this Circuit by any authority located for this Article, and the search for such authority should be completed before publication.

46. 9 U.S.C. §2.

47. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683–84, 687–88 (1996).

clauses, is preempted. An argument that no contract was formed at all, framed as a rule applicable to every agreement, is not. Everything in this Part is of the second kind.

E. The Price of Declining

There is a further feature of how these terms arrive, and it bears on whether the acceptance means anything even where a purchaser reads and understands what is offered.

The clause examined here reached existing televisions as part of a software update. An owner who does not wish to accept it can decline the update. Reporting on the rollout describes what follows: a set that stops taking updates stops receiving security patches.[48]

Set that beside what the device is. It is a networked general-purpose computer with persistent storage, a microphone, and access to every other device on the household network, and researchers have reported remote code execution paths against it.[49] The owner's options are to accept terms assigning him consent duties he cannot discharge, or to run an unpatched computer of that description on his home network indefinitely.

Two observations follow, and the second is the one that matters doctrinally.

The first is that this is a poor setting in which to speak of voluntary acceptance. *ProCD* rested on a buyer who could put the disc back in the box. Here the alternative to acceptance is not a refund; it is a degraded and progressively less secure product the buyer already owns.

The second is about timing, and it returns to the point *Granite Rock* makes. Where terms arrive after purchase, by update, on a device already installed, the question when the contract was formed is not academic. It determines whether the terms governed the conduct complained of, and the Court has said that question belongs to a court.

48. Reported findings, Part II *supra*; *see also* coverage cited there describing the update mechanism. The precise relationship between accepting the AI-based service terms and continuing to receive security updates should be established from the manufacturer's own documentation before publication.

49. *See* Gilly, *The Television Is Listening*, *supra*, Part III (setting out the reported findings and the peer-reviewed measurement study).

F. What ProCD Did Not Decide

ProCD considered a fixed set of terms, delivered once, accepted or rejected once. It did not consider terms the seller could change unilaterally after the sale, and the omission is on the face of the opinion.[50]

That is what happened here. The smart television terms were amended in late July 2026, after the first published investigation, to add a binding arbitration provision and elaborate a class action waiver, and a monitor purchased during the investigation displayed on first connection a notice that the terms would be updated and would be effective in thirty days.[51] That is not approve-or-return. The buyer is told that undisclosed terms will take effect on a date certain in a device already installed, out of any return window, and already collecting.

The strongest version of the resulting objection is unavailable and this Article should not reach for it. A promise is illusory where it leaves a party free to perform or withdraw at his own pleasure,[52] and the Fourth Circuit has held a promise to arbitrate illusory where the drafter reserved the right to alter, amend, modify, or revoke the policy at any time with or without notice.[53] That court expressly did not decide whether a change-in-terms provision requiring a specific period of advance notice would be valid.[54] The manufacturer here gives thirty days' notice, which on that authority places the case outside the clearest illusory-promise decisions.

What remains is narrower. In the closest case, a court applying New York and California law held that a unilateral modification right does not automatically render an arbitration

---

50. *ProCD*, 86 F.3d 1447 (addressing a single fixed license; the opinion's own account of its scope does not reach post-sale modification).

51. Reported findings, Part II *supra*. The amendment subjects were identified as the arbitration agreement and AI-based service terms.

52. *See* Mattei v. Hopper, 51 Cal. 2d 119, 122 (1958).

53. Coady v. Nationwide Motor Sales Corp., 32 F.4th 288, 292–93 (4th Cir. 2022) (quoting Cheek v. United Healthcare of the Mid-Atlantic, Inc., 835 A.2d 656, 662 (Md. 2003)). The Maryland court's reasoning shows why the words without notice are load-bearing: an illusory promise is words in promissory form that promise nothing, leaving the promisor's future action subject to its own whim as if it had said nothing at all, and what made that clause illusory was that it appeared to allow revocation even after arbitration was invoked and a decision rendered. *Cheek*, 835 A.2d at 661–63. The court answered the standard criticism of this line on the same ground: there might be disputes at the margins, and unilateral revocation at any time without notice or consent is at that margin. *Id.* at 663.

54. *Coady*, 32 F.4th at 292–93 (reservation in the opinion's own account of what it did not decide).

agreement illusory, but that the analysis turns on reasonableness and fair notice, and it identified the feature that saved the provision before it: a notice requirement becomes significant when coupled with the right to accept or reject the change, and the plaintiff there could reject changes under procedures the provision set out.[55] The notice examined here confers no rejection right. It states that the terms will be updated and will be effective in thirty days. The recipient is told what will happen, not asked whether it may.

G. The Positive Law Carve-Out

One more feature of *ProCD* bears directly on the clause.[56] The holding is conditional on its face: shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general, for example if they violate a rule of positive law, or if they are unconscionable. The court took care to note that no one had argued the terms before it were troublesome.[57]

A term is troublesome in that sense when it directs the counterparty toward conduct a criminal statute forbids without a consent the counterparty cannot obtain. The companion article sets out the elements. A term that assigns to a consumer the duty of securing all-party consent to recording, in a household that may contain a person who cannot give it, and that operates against a statute making the recording an offense absent that consent, is a candidate for the carve-out the *ProCD* court reserved and was not asked to apply.

---

55. Bassett v. Electronic Arts, Inc., 93 F. Supp. 3d 95, 106–08 (E.D.N.Y. 2015) (quoting Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021, 1034 (D. Colo. 2012)). The case involved a video game publisher, where the practice this Part describes was refined before it reached household appliances, and where the resulting erosion of purchaser rights through unilateral modification has been documented in the current literature. *See* Evan Schoop, Comment, *Do You Think You Own That Game You Just Bought? Think Again: The Degradation of Ownership Rights in the Digital Age*, Tex. A&M J. Prop. L. (2026) (using a 2024 publisher agreement as a case study and concluding that federal legislation is needed to address unilateral contract modification and the absence of standardized disclosures). The volume and page should be confirmed before citation. The court did not decide whether the plaintiff had actual notice of the arbitration terms at the physical point of purchase, or whether a unilateral right to modify without any notice or opt-out would be illusory; the plaintiff had clicked an acceptance during online registration, which the court treated as clickwrap.

56. The broader critique, that shrinkwrap terms let vendors opt out of the balance struck by federal intellectual property law, is well developed and is not repeated here. *See* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239 (1995). That critique concerns what the terms do; this Article concerns whether they were formed.

57. *Id.* at 1449.

H. The Strangers

The formation problems above concern the purchaser, and they are contestable. The problem in this subsection is not contestable, and it is the one the clause creates for itself.

The clause requires the purchaser to obtain all necessary consents from any third parties whose voices may be captured. Those third parties are named: family members, guests, children, and bystanders. None of them bought the television. None of them saw the terms. None of them performed any act the manufacturer proposed to treat as acceptance. They are not parties to the agreement on any theory, and no doctrine of formation reaches them, because there is nothing to form.

The manufacturer's response is embedded in the clause itself: the purchaser provides consent on their behalf. But a person does not acquire authority to consent for a houseguest by buying a television. Agency requires a manifestation from the principal, and the guest has manifested nothing. Where the third party is a minor, the difficulty compounds, because the consent is one the minor could not give personally and the purchaser has no relation to the child that would supply it.

The authority for this point is the adverse case. Distinguishing private contractual ordering from copyright's public regulation, Judge Easterbrook wrote that rights equivalent to copyright are rights that restrict the options of persons who are strangers to the author, that a copyright is a right against the world, and that contracts, by contrast, generally affect only their parties, so that strangers may do as they please.[58]

Strangers may do as they please. The guest in the living room is a stranger to the agreement between the purchaser and the manufacturer, and that agreement cannot reach her. What it can do, and what it attempts, is to make the purchaser answerable for her.

58. *ProCD*, 86 F.3d at 1454.

IV. Who Decides

The three objections in Part III are objections to the existence of an agreement rather than to the enforceability of one that exists. Before any of them can be heard, a prior question has to be answered, because terms of this kind contain an arbitration provision and, in the ordinary case, a delegation clause inside it. This Part establishes that a formation challenge, and only a formation challenge, reaches a court.

A. No Presumption at the Threshold

A court may order arbitration only where it is satisfied that the parties agreed to arbitrate the dispute, and to satisfy itself it must resolve any issue that calls into question the formation or applicability of the specific arbitration clause a party seeks to enforce.[59] The federal policy favoring arbitration does not displace that requirement, and the presumption of arbitrability has a defined and narrow office: it applies only where a validly formed and enforceable agreement is ambiguous about whether it covers the dispute at hand.[60] It resolves ambiguity within an existing agreement. It does not supply one.

The Court has also said that for arbitrability purposes, when a contract was formed can be as critical as whether it was formed, where the timing determines whether the agreement's

---

59. Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297 (2010). The decision has been applied rather than limited by the Court's subsequent arbitration decisions, including *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015), *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*, 590 U.S. 432 (2020), *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), and *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022). Nothing located disturbs the propositions relied on here. A concurring Justice would have applied the presumption of arbitrability more readily on those facts; that view did not carry. *Id.* at 315 (Sotomayor, J., concurring in part and dissenting in part).

60. *Id.* at 301–02 (the Court has never held that the policy overrides the principle that courts may submit to arbitration only those disputes the parties have agreed to submit, and has never held that courts may use policy considerations as a substitute for party agreement). The allocation of the threshold question to the court was settled well before the modern delegation cases: unless the parties clearly and unmistakably provide otherwise, whether they agreed to arbitrate is decided by the court and not the arbitrator. AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986). *AT&T Technologies* carries two limits that do not reach this Part: a court deciding arbitrability is not to rule on the merits of the underlying claim, *id.* at 649–50, and where a clause exists, doubts about its scope are resolved in favor of coverage, *id.* at 650. Neither concerns whether a clause exists.

provisions were enforceable during the relevant period.[61] That reaches the post-sale modification problem in Part III directly.

B. Severability and Its Reservation

Where an agreement contains an arbitration provision, challenges to the contract as a whole are for the arbitrator, and courts adjudicate only challenges directed at the arbitration clause itself.[62] That rule is demanding and it disposes of most objections to terms of this kind.

It does not dispose of this one, and the reason appears in the Court's own account of its scope. The issue of a contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded, and the severability decisions address only the former.[63] In the footnote making that reservation, the Court identified what it was leaving with the courts: whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent.[64]

Those three questions are the three arguments of Part III. Whether the obligor ever signed is the presentation problem. Whether the signor had authority to bind the principal is the problem of the strangers. Whether the signor had capacity is the household member who cannot give what the clause demands. All three concern whether an agreement came into existence rather than whether an existing one is enforceable, which is the line the Court drew.

---

61. *Granite Rock*, 561 U.S. at 303.

62. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46, 448–49 (2006) (an arbitration provision is severable from the remainder of the contract as a matter of substantive federal arbitration law; the rule applies in state as well as federal courts and even where the challenge, if successful, would render the entire contract void from the beginning). The decision has been applied in the Court's own subsequent arbitration line (*Preston v. Ferrer*, 552 U.S. 346 (2008); *Vaden v. Discover Bank*, 556 U.S. 49 (2009); *Rent-A-Center*; *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012); *Kindred Nursing Ctrs., L.P. v. Clark*, 581 U.S. 246 (2017); *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024)).

63. *Buckeye*, 546 U.S. at 444 n.1; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70 n.2 (2010) (same, in the majority text). Both are stated as reservations rather than holdings.

64. *Buckeye*, 546 U.S. at 444 n.1 (citing Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992); Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000); Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587 (7th Cir. 2001); and Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003)). Each of the four has been separately verified for this Article and is discussed in the notes that follow.

C. Why the Objections Cannot Be Narrowed to a Clause

The severability formula asks a party to direct its challenge at the arbitration clause specifically. That is a demand some challenges cannot satisfy, and the reason marks the boundary of this Part.

The capacity branch has been reasoned through in terms that generalize. It would be odd indeed, one court observed, if a party claimed that its mental incapacity specifically affected the agreement to arbitrate; unlike fraud in the inducement, which can be aimed at individual provisions, a capacity challenge can logically be directed only at the entire contract, and it therefore places the making of the agreement at issue for the court.[65]

That holding is contested. The Fifth Circuit had held the year before that a capacity defense goes to the arbitrator unless directed at the arbitration provision itself, and *Spahr* disagreed with it by name.[66] The reach of that contrary decision is narrower than its language. A member of the panel wrote separately that the circuit had not squarely decided whether challenges going to the very existence of a contract must be arbitrated, that other circuits had split on the question, and that the majority's statements on it were dicta in which he did not join.[67] His count of that split ran four circuits to one in favor of judicial resolution of existence challenges.[68] A Sixth Circuit judge has since found the Tenth Circuit's reasoning persuasive, in a separate opinion that must not be cited as that court's holding.[69]

The distinction that reasoning rests on is between challenges of status and challenges of behavior. Fraud is something a party did, and can be aimed at a provision. Incapacity is something a party was, and cannot. Every objection in Part III is of the first kind. A purchaser never presented with terms did not fail to assent to some particular clause; he did not assent to

65. Spahr *ex rel.* Spahr v. Secco, 330 F.3d 1266, 1272–73 (10th Cir. 2003). The decision is on one side of a circuit split described in the following notes.

66. Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 471–72 (5th Cir. 2002).

67. *Id.* at 473 (Dennis, J., concurring).

68. *Id.* (citing Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136 (9th Cir. 1991); I.S. Joseph Co. v. Michigan Sugar Co., 803 F.2d 396 (8th Cir. 1986); Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998 (11th Cir. 1986); and Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51 (3d Cir. 1980), against Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524 (1st Cir. 1985)). Of those, *Three Valleys* has been verified for this Article and is discussed below; the others have not.

69. *See* I.C. v. StockX, LLC, 19 F.4th 873 (6th Cir. 2021) (separate opinion).

anything. A houseguest is not a non-party as to the consent provision and a party as to the rest; she is not a party at all. None can be narrowed to the arbitration provision because none is about a provision.

Both sides of the circuit split just noted were reasoning in part from a distinction between void and voidable contracts, and that distinction has become unreliable. *Buckeye* held a legality challenge arbitrable though illegality would have rendered the contract void, and in the same footnote left open capacity challenges though incapacity renders a contract merely voidable; the two moves point opposite directions on that axis, which is the clearest sign the axis is not doing the work.[70]

The Supreme Court supplied a test in 2024 that does not use the void and voidable line at all. The specific-challenge rule does not require a party to challenge only the arbitration or delegation provision; where a challenge applies equally to the whole contract and to an arbitration or delegation provision, a court must address it.[71] A status objection applies equally by its nature. The requirement is satisfied by the character of the objection rather than by anything added to the pleading.

D. The Delegation Clause and Its Limit

A manufacturer will not stop at severability. Modern arbitration provisions commonly contain a delegation clause purporting to assign the gateway questions themselves to the arbitrator, and the Court has enforced such clauses on strong terms: unless a party challenges the delegation provision specifically, a court must treat it as valid, must enforce it, and must leave any challenge to the agreement as a whole for the arbitrator.[72] The clear-and-unmistakable requirement for

---

70. *See* SBRMCOA, LLC v. Bayside Resort, Inc., 707 F.3d 267, 273–74 (3d Cir. 2013) (observing that it is unclear whether the void and voidable distinction survived *Buckeye*, and resolving the question on the line between validity challenges, which are arbitrable, and formation challenges, which generally are not). Applying that line, the court held an unauthorized-signatory challenge was for the court while a coercion claim was arbitrable. *Id.* at 274–75. That pairing marks the boundary of this Part: a purchaser who says the terms were oppressive is making a validity argument and will be sent to an arbitrator; a purchaser who says he was never presented with them, or a person who says no one had authority to bind her, is making a formation argument and is not.

71. Coinbase, Inc. v. Suski, 602 U.S. 143, 152–53 (2024).

72. *Rent-A-Center*, 561 U.S. at 70–72 (quoting *Buckeye*, 546 U.S. at 445).

delegation goes to the parties' manifestation of intent rather than to the agreement's validity.[73] That line is also why the Seventh Circuit's broadest formulation on this subject, that arbitrators lack authority to determine their own authority because no contract means no power, has not aged well as a general proposition and now carries negative treatment.[74]

The reservation travels with the rule. Immediately after stating it, the Court wrote that the issue of the agreement's validity is different from the issue whether any agreement was ever concluded, and that it was addressing only the former.[75] A delegation clause is a contract term, and a contract term cannot operate before there is a contract. The formulation courts now use carries that limit on its face: gateway questions are for the courts unless the parties have clearly and unmistakably referred them to arbitration in a written contract whose formation is not in issue.[76] The reasoning is that lack of assent to the container contract necessarily implicates the arbitration agreement, because both depend on the same act for their legal effect, and that this is no less true where the container contract incorporates a delegation provision.[77] A contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it.[78]

That court also identified the one way a delegation clause survives a formation dispute: its legal effect must come from an independent source outside the contract whose formation is disputed, such as a pre-negotiation agreement to arbitrate arbitrability or a post-dispute

---

73. *Id.* at 69 n.1. Do not rely on the Stevens dissent, which would treat every general revocation challenge as a challenge to the making of the agreement; that view did not command a majority.

74. Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 591 (7th Cir. 2001). Later decisions have rejected that broad formulation on the reasoning described in this subsection; the decision is cited below only for its narrower holding on authority to bind.

75. *Rent-A-Center*, 561 U.S. at 70 n.2.

76. MZM Constr. Co. v. New Jersey Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 397 (3d Cir. 2020). The opinion acknowledges and works through the tension with *Rent-A-Center*, and reaffirms rather than departs from the court's prior holding in *Sandvik*, discussed below.

77. *Id.* at 402.

78. *Id.* (quoting China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 288 (3d Cir. 2003)). *China Minmetals* arose on a claim that signatures were forged, and held that a party resisting on the ground that the agreement was void from the outset is entitled to present evidence to the district court, which must make an independent determination. *Id.* at 290.

stipulation.[79] A clause inside the disputed instrument is not an independent source. That answers the concurring observation in *Suski* that a sufficiently broad master provision reaching future agreements might require a court to step aside.[80]

A party contending that no agreement was ever concluded is contending, necessarily and without needing to say so separately, that the delegation clause was never concluded either. It cannot bootstrap its own existence.

E. The Existence Cases

The decisions that decide existence questions for the court state the principle in the form this Part needs, and two of them arose on facts that are the strangers argument in commercial dress.

A party denied that an individual who signed on its behalf had authority to bind it, and the Third Circuit held the district court was right to decide that question before ordering arbitration, because a court must decide whether an agreement to arbitrate exists before it may order arbitration. The doctrine of severability, it wrote, presumes an underlying, existent agreement; such an agreement exists even where a party seeks to rescind it for fraud in the inducement, but it does not exist if no contract ever existed.[81] The reason is the one the Court has repeated: arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute he has not agreed to submit.[82] The Seventh Circuit's narrow holding rests on the same point: whether an agent had authority to bind a principal is for a court, because if he did not, there is nothing to delegate.[83] Where it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring it, that party is challenging the very existence

---

79. *MZM Constr.*, 974 F.3d at 405–06.

80. *Suski*, 602 U.S. at 157 (Gorsuch, J., concurring). A concurrence, and not the holding.

81. Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 106–07, 111 (3d Cir. 2000). The Third Circuit later addressed the tension between this holding and *Rent-A-Center* and resolved it in *Sandvik*'s favor in *MZM*.

82. *Id.* at 106 (quoting *AT&T Techs.*, 475 U.S. at 648).

83. *Sphere Drake*, 256 F.3d at 590–91.

of any agreement, and the court must decide whether the non-signing party can nonetheless be bound before sending anything to an arbitrator.[84]

The leading decision on the majority side of the split explained the alternative with two hypotheticals: one party could forge another's name and compel the forged party to arbitrate the genuineness of its own signature, and any citizen of Los Angeles could sign a contract on the city's behalf and require the city to submit to an arbitrator the question whether it was bound.[85] The second hypothetical is the clause examined here, transposed. A purchaser signs on behalf of people he has no authority to represent, and the instrument he signs would send to an arbitrator the question whether they are bound by it.

F. Consequences for a Pleading

Four follow. The challenge must be framed as formation from the first filing rather than as unconscionability or illegality, because those are the challenges a delegation clause captures. The pleading should identify the delegation provision by name even though *Suski* does not require the challenge to be confined to it, because the cost is a sentence and the omission costs the argument. Where the submissions put formation in issue, a court may authorize limited discovery on that narrow question and decide it on a summary judgment standard, so the challenge is a fact question with a route to a record, and the facts that would establish it, what a purchaser

---

84. Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992). *Prima Paint*, the court observed, has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract never existed at all. *Id.* at 855. Two features are worth carrying forward: the court treats authority to bind another and ratification by conduct as questions ordinarily decided in the trial court before a motion to compel is resolved, *id.* at 857, which matters because a manufacturer will argue that continued use of the television ratified whatever the terms provide; and it sets the burden as an unequivocal denial that the agreement was made, with some evidence produced to substantiate it. *Id.* at 854 (quoting T & R Enters. v. Cont'l Grain Co., 613 F.2d 1272, 1278 (5th Cir. 1980)).

85. Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140 (9th Cir. 1991) (a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate; only a court can make that decision). Later decisions have limited this one in part because it rests on the void and voidable distinction *Buckeye* later declined to make load-bearing; the result survives because *Buckeye* and *Rent-A-Center* preserved formation by name and *Suski* supplies a test that does not use the distinction. The partial dissent objected that many contract disputes concern the making of a contract and that a rule requiring judicial determination of existence would substantially limit arbitration. *Id.* at 1146–47 (Hall, J., concurring in part and dissenting in part). This Article does not answer that objection in general terms; it answers it only for the case where the party sought to be bound never encountered the instrument at all.

was shown and when, sit with the manufacturer.[86] And a party who objects to arbitrability and then participates does not waive the objection; once stated, it remains preserved for judicial review absent a clear and unequivocal waiver, so a consumer compelled into arbitration before the formation question is resolved does not lose it by appearing.[87]

The six overlapping instruments the manufacturer presents at setup raise one further question the Court has answered. Where parties have agreed to two contracts, one sending arbitrability disputes to arbitration and the other explicitly or implicitly sending them to the courts, a court must decide which contract governs.[88]

V. Where the Duty Belongs

Parts III and IV concern whether the clause binds anyone and who decides. This Part sets those questions aside and asks two others. Where has the federal regulatory system placed the duty to obtain consent from a person who cannot give it? And what, on the statutory test for unfairness, is the collection for?

A. The Federal Allocation

There is one area in which Congress and the Federal Trade Commission have squarely addressed consent on behalf of a person who cannot give it, and the answer they reached is the opposite of the clause.

The Children's Online Privacy Protection Rule requires an operator to notify parents and obtain verifiable parental consent before collecting personal information from a child under thirteen. In September 2025 the Department of Justice, on referral from the Commission, filed a complaint against a manufacturer of children's robot toys whose companion application embedded a third-party software development kit that transmitted children's precise geolocation

86. *MZM Constr.*, 974 F.3d at 406.

87. *China Minmetals*, 334 F.3d at 290–91.

88. *Suski*, 602 U.S. at 149–52. Whether the six agreements enumerated in the Texas petition, *see supra* Part II, are consistent on dispute resolution is a question of fact this Article has not resolved.

to the developer's servers. The company had represented in its privacy policy that it complied with the Rule. It had not notified parents or obtained their consent before the third party's collection.[89] The settlement imposed a civil penalty, deletion obligations, an obligation to ensure third-party software complies with the Rule, and a decade of compliance monitoring.

Two features of that action bear on the clause.

The first is that embedding another party's code does not move the duty. The Bureau of Consumer Protection stated the rule plainly: companies providing online services to children must notify parents and obtain consent even where the data is collected by a third party. A television whose content recognition is performed by an advertising subsidiary and whose voice processing is performed by a separate vendor is in the same posture. Whatever those partners collect, the manufacturer that put them in the device does not become a bystander to the collection.

The second is where the duty sits. The manufacturer could not have discharged its obligation by writing into its terms that the parent must obtain the child's consent, or by having the purchasing adult certify that consent had been obtained on everyone's behalf. The Rule places notice and consent on the operator, and the enforcement action proceeded because the operator did not perform them. In the one place the federal regulatory system has confronted the problem of a subject who cannot consent, the answer was to fix the duty on the party that built the collection.

The clause examined in this Article does the reverse. It identifies the same population, naming children among the third parties whose voices may be captured, and assigns the duty of obtaining their consent to whoever bought the television.

89. United States v. Apitor Tech. Co., No. 3:25-cv-07363-MMC (N.D. Cal. filed Sept. 2, 2025). The joint motion for entry of the proposed stipulated order for permanent injunction, civil penalty judgment, and other relief was filed as document 4 on September 2, 2025, by the Consumer Protection Branch of the Civil Division of the Department of Justice with the United States Attorney for the Northern District of California. The order's operative terms should be read from the stipulated order itself, which is attached to that motion as Exhibit A and is posted on the Commission's website.

B. What the Feature Is For

A defense available to the manufacturer, and the one that has carried this kind of collection for years, is that the objectionable function is integral to the product. Voice control requires a microphone; recognition requires sampling; remove them and the device is worse. The statute governing unfairness asks precisely the question that framing evades. The Commission may not declare a practice unfair unless it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.[90]

Take countervailing benefits function by function rather than as a bundle. A microphone in a remote, engaged by pressing a button, that transmits an utterance and returns a search result delivers a benefit the user asked for at the moment he asked for it; nothing here disputes that.[91] Transcribing that utterance and writing it to a log on the device delivers no further benefit; the search has already returned.[92] Continuing to capture after the request completes, and longer if speech continues, captures conversation that by definition was not addressed to the television.[93] Sampling what is displayed and audible for an advertising subsidiary benefits the advertiser, and the industry describes the data's value in terms of what it lets partners do rather than what it lets viewers do.[94] Enumerating every device on the household network, including devices belonging to people who have never used the television, has no relationship to displaying a picture.[95]

---

90. 15 U.S.C. §45(n) (2026). The section defines neither substantial injury nor countervailing benefits, which is where the disaggregation below does its work.

91. The Voice Information Agreement describes exactly that function: collection when the user activates the voice command, converted to text by a service partner, to respond to the command or return search results. LG Elecs. Inc., Voice Information Agreement ¶¶ 1–2.

92. Gilly, *The Television Is Listening*, *supra*, Part III (reported findings of transcripts written to logs surviving reboot).

93. *Id.* (capture window remaining open after a command); *see also* LG Elecs. Inc., Voice Information Agreement ¶ 1 (conceding capture on a false wake without notification).

94. LG Elecs. Inc., Viewing Information Agreement ¶¶ 7, 9 (the service partner may use the information for analytics and selling advertisements and may pass it to third parties who may enrich, aggregate, and commercialize it).

95. Gilly, *The Television Is Listening*, *supra*, Part III (reported enumeration of at least thirty-eight devices on the household network).

That disaggregation is the point. Integral-to-the-product works only if the functions are one thing. Separated, the function the consumer wanted is small, bounded, and user-initiated, and none of the functions that generate the injury are any of those. Reasonable avoidability is not developed here; the companion article addresses it, and the short answer is that the controls are defaulted against the user and buried, the microphone switch does not reach every microphone, and the self-help remedy is barred by federal copyright law.

One further point about countervailing benefits, which the industry has conceded in filings made under the securities laws. One manufacturer reports on two segments, one for devices and one for its advertising and data platform.[96] Device revenue declined while platform revenue grew on advertising: record platform revenue of one hundred seventy-four million dollars and record platform gross profit of one hundred five million in the fourth quarter of 2023, while device revenue fell on a fifteen percent decline in units and a nine percent decline in average price;[97] by the third quarter of 2024, platform revenue of one hundred ninety-seven million against device revenue of two hundred forty-seven point seven million, with platform gross margin of fifty-eight point eight percent.[98] Roughly sixty percent of revenue comes from selling televisions and effectively all of the gross profit growth comes from what the televisions observe. The collection is not defraying the cost of a feature the consumer wanted. It is the reason the hardware can be priced where it is.

That has a consequence running in the manufacturer's favor, and it should be stated. Where data revenue subsidizes the hardware price, a consumer arguably receives something for it. But that is the exchange the statute asks about rather than assumes, function by function, on a record. A discount on a television is a benefit. It is not obviously a benefit that outweighs the

---

96. Vizio Holding Corp., Annual Report (Form 10-K) for the fiscal year ended Dec. 31, 2023 (filed Feb. 28, 2024), Accession No. 0001835591-24-000011 (defining device gross profit as device revenue less device cost of goods sold, and platform gross profit the same way).

97. *Id.* (shareholder letter accompanying the annual report).

98. Vizio Holding Corp., Q3 2024 Financial Results (Nov. 6, 2024). The corresponding device gross margin should be read from the filed statements; secondary compilations report it as negative in that quarter and the specific number is not relied on here.

enumeration of every device on a household network, and no one has been asked to make that trade explicitly.

VI. Conclusion

The shrinkwrap decisions are thirty years old and they were decided on facts that no longer describe the transaction they are cited for. A buyer of software in 1996 knew a license was coming, could read it before installing anything, and could return the disc if he did not like it. A buyer of a television in 2026 is told nothing before payment except that disputes go to arbitration, cannot read the terms without first doing the things that make return impractical, and can decline the terms only by accepting a progressively less secure device on his home network.

Measured against *ProCD*'s own conditions, that transaction forms nothing. Measured against *Hill*, it presents the case that court declined to reach. Measured against the Ninth Circuit, it presents the case that court decided the other way. And as to the people the household clause names, family members, guests, children, and bystanders, there is no formation question at all, because the purchaser who signs for them has no authority to do so, and *ProCD* itself says so.

That argument survives the arbitration provision and the delegation clause because it is the one argument the Supreme Court has consistently reserved for courts: not that the contract is unfair, not that a provision is illegal, but that no agreement was ever concluded. It applies equally to the whole and to the clause, which is what *Suski* requires, and it applies equally by its nature rather than by pleading.

The clause's allocation of the consent duty to whoever carried the box home is the reverse of the allocation federal regulators reached in the one setting where they confronted consent for a person who cannot give it. And the collection the clause is written to enable, taken function by function, delivers a search result the user asked for and then a great deal the user did not.

None of this is about televisions. Any durable good sold at retail whose terms appear after the sale presents the same questions, and the answers are the same.

References

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986).

Bassett v. Electronic Arts, Inc., 93 F. Supp. 3d 95 (E.D.N.Y. 2015).

Bakos, Y., Marotta-Wurgler, F., & Trossen, D. R. (2014). Does anyone read the fine print? Consumer attention to standard-form contracts. *Journal of Legal Studies*, 43, 1.

Berman v. Freedom Financial Network, LLC, 30 F.4th 849 (9th Cir. 2022).

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

Chabolla v. ClassPass Inc., 129 F.4th 1147 (9th Cir. 2025).

Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992).

Cheek v. United Healthcare of the Mid-Atlantic, Inc., 835 A.2d 656 (Md. 2003).

Children's Online Privacy Protection Rule, 16 C.F.R. pt. 312.

China Minmetals Materials Import & Export Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003).

Coady v. Nationwide Motor Sales Corp., 32 F.4th 288 (4th Cir. 2022).

Coinbase, Inc. v. Suski, 602 U.S. 143 (2024).

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

Federal Trade Commission Act, 15 U.S.C. §45.

Granite Rock Co. v. International Brotherhood of Teamsters, 561 U.S. 287 (2010).

Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

Lemley, M. A. (1995). Intellectual property and shrinkwrap licenses. *Southern California Law Review*, 68, 1239.

MZM Construction Co. v. New Jersey Building Laborers Statewide Benefit Funds, 974 F.3d 386 (3d Cir. 2020).

Nguyen v. Barnes & Noble Inc., 763 F.3d 1171 (9th Cir. 2014).

Norcia v. Samsung Telecommunications America, LLC, 845 F.3d 1279 (9th Cir. 2017).

Primerica Life Insurance Co. v. Brown, 304 F.3d 469 (5th Cir. 2002).

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010).

Samuelson, P. (1998). Does information really have to be licensed? *Communications of the ACM*, 41, 15.

Sandvik AB v. Advent International Corp., 220 F.3d 99 (3d Cir. 2000).

Schoop, E. (2026). Do you think you own that game you just bought? Think again: The degradation of ownership rights in the digital age. *Texas A&M Journal of Property Law*.

SBRMCOA, LLC v. Bayside Resort, Inc., 707 F.3d 267 (3d Cir. 2013).

Spahr *ex rel.* Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003).

Sphere Drake Insurance Ltd. v. All American Insurance Co., 256 F.3d 587 (7th Cir. 2001).

State of Texas v. LG Electronics U.S.A., Inc., Cause No. 25DCV358507 (Tex. Dist. Ct., Bell Cnty. 2026).

Three Valleys Municipal Water District v. E.F. Hutton & Co., 925 F.2d 1136 (9th Cir. 1991).

United States v. Apitor Technology Co., No. 3:25-cv-07363-MMC (N.D. Cal. filed Sept. 2, 2025).

Vizio Holding Corp., Annual Report (Form 10-K) (filed Feb. 28, 2024).

2026 Ky. Acts ch. 118 (H.B. 692).

☙ ❧