

The ‘No-reading’ and Consent in Online Consumer Standard Form Contracting

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Abstract

Like transactions in the paper world, online consumer transactions are dominated by standard form contract terms. The online era has brought with it various mechanisms of entry into agreements, including shrink wrap, click wrap and browse wrap agreements. With increasing alacrity, consumers are mouse-clicking their way into standard form contracts on the internet. A major challenge with the otherwise called online contracts of adhesion is the perception that consumers do not often read or understand the fine-print terms and this makes it difficult to identify the requisite “meeting of the minds” or “mutual assent” of contract formation. When confronted by a lengthy and incomprehensible standard form contract, the response of many, if not most, consumers is to click “yes” – without reading the contract or giving it careful consideration. The paper examines how case law responds to the issues of no-reading and assent in an online consumer standard form environment. The paper recommends some practical guides for implementation of technique of legal agreements in the light of case law.

Keywords: consumer, standard form contract, terms and conditions, no-reading, assent

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1. Introduction

The law of contracts has developed over centuries and has had to transform so as to keep pace with economic, political and technological developments. One of the most noteworthy shifts came with the industrial revolution and the creation of mass markets — instead of individual parties bargaining for their positions, mass production led to businesses using pre-printed standard form contracts. As early as the 19th century, standard forms emerged in the form of railroad tickets, insurance contracts, lottery tickets and mail order sales contracts.¹ Indeed, standard form contracts assist business transactions. David Slawson remarked in 1971:

Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theatre tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.²

The use of standard form contracts has only increased since the time of Slawson's observations.³ Furmston opines that in the complex structure of modern society, the device of the standard form contract has become prevalent and pervasive.⁴ Standard form contracts account for over 99% of all contracts in commercial and consumer transactions in an advanced economy for the transfer of goods, services and software.⁵ They are the contract form of choice for most of the transactions carried out in everyday life. Whenever we purchase life insurance, when we lease a car or render the services of a firm for a performance, a standard form contract is governing the transaction. Standardization of contracts serves as an important function of the law of contract. By standardizing contracts it serves the need to eliminate as much as possible of the uncertainty of complicated transactions.⁶

The development of internet transactions has given standard term contracts an increased importance.⁷ The primary impact of the rise of online contracts upon consumer contracts is an exacerbation of the already existing issues of consumer contracts. Online contracting has done this in three primary ways. First, online contracts increase the problem of non-readership.⁸ Second, online transactions have increased the ease and decreased the costs to sellers of including lengthy contracts. Consumer transactions involve lengthy contracts; however, prior to

¹ JJA Burke, ‘Standard Form Contracts’ <<http://www.lex2k.org/sfc/discussion.html>>53, accessed 23 April 2019.

² WD Slawson, ‘Standard Form Contracts and Democratic Control of Law-making Power’ (1971) 84 Harv. L. Rev. 529, 529.

³ Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 U. Chi. L. Rev. 1203, 1203.

⁴ M Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (16th edn, Butterworths 2012) 21.

⁵ JJA Burke, ‘Contract as Commodity: A Notification Approach’ (2000) 24 Seton Hall Legis. J. 285, 290.

⁶ MR Cohen, ‘The Basis of Contract’ (1933) 46 Harv. L. Rev. 533, 589.

⁷ JR Maxeiner, ‘Standard-terms Contracting in the Global Electronic Age: European Alternatives’ (2003) 28 Yale Journal of International L. 111.

⁸ RA Hillman and Maureen O’Rourke, ‘Defending Disclosure in Software Licensing’ (2011) 78 U. Chi. L. Rev. 95, 103.

online contracting, these terms were frequently provided by default rules.¹ Third, online transactions lack the same degree of formalism that is present in their print counterparts. While it is well established that a click legally does function as a signature, social psychology suggests that people give greater weight to contracts created with more formalism.² If consumers consider online contracts less binding, then they are even less likely to weigh the terms or to invest in reading them.

An issue that is often raised in litigation involving online services is that the consumer never actually read the terms of service, and so they should not be bound by it. Framed in legal terms, this argument states that while there was technically acceptance of the contract, there was no assent to its contents. Therefore, an essential component of the contract is missing and as a result the court should not enforce the agreement. The courts have rarely accepted this argument. It takes a very unusual set of circumstances for a court not to enforce a contract because one party did not read the terms. In *Rudder v Microsoft Corp.*,³ Justice Winkler states that technological impediments to viewing an entire contract (in this case scrolling) should not act as a reason not to enforce its terms. In most cases, both parties review a paper copy of the contract before signing it, and so it would be disingenuous to argue there was no opportunity to read the terms. Judges' aversion to this type of argument flows from the legal duty that both parties have to read and understand the terms of the contract to which they are agreeing; to ignore this duty is at one's own peril. In online contracting, the situation is different. Since the early days of lengthy license agreements accompanying the installation of every software program, a culture has developed where users 'click through' legal agreements without reading them. As well, online services have recognized that forcing users to read lengthy legal documents may prevent some users from signing up to their service, and so their platforms are often designed to make terms of service accessible but not necessary to read. Courts have categorized these agreements into "click wrap" and "browse wrap" licenses. The terms "click wrap" and "browse wrap" gained prominence in the many U.S. decisions which consider the formation of contracts online. The terms were coined in imitation of the "shrink wrap" licences that were found under the packaging of boxes of software.⁴ The paper considers these kinds of online standard form contract and examines case law response to the issues of non-readership and assent.

2. Formation of a Contract

In order to form a contract there has to be a manifestation of mutual assent. This requires that each of the parties to a contract either make a promise or render a performance. The test for whether or not there has been a manifestation of mutual assent is an objective one. A party's subjective intent not to be bound by a contract is irrelevant in light of said party's objective conduct.⁵ According to the classical subjective theory of contract law for a legally binding contract to be formed there has to be a "meeting of the minds on the essential terms of the agreement."⁶ This means that the parties to a contract must have mutual assent to the same thing and in the same sense for the contract to be considered enforceable. The meeting of minds that occurs must apply to all the terms of the contract.⁷ However, when considering the objective theory of contract law circumstances surrounding the objective conduct of the parties and whether a reasonable person would conclude that the parties intended to be bound by a contract in regards to an objective manifestation of mutual assent is the basis of whether a legally binding contract is formed.⁸

The making of an offer or a proposal by one of the parties followed by an acceptance of that offer by the other party is the usual form of manifestation of mutual assent. One of the parties makes an offer and the other accepts this offer. The offer in itself has to be intended as such in order to create a legally binding contract upon acceptance.⁹ However, the United States of America Contract Law Restatement also provides that a manifestation of mutual assent can occur even in cases where neither an offer nor acceptance has been identified. This is also true for some situations where the moment of formation cannot be determined.¹⁰ Manifestation of assent can also be expressed through work, act or conduct of the parties' intention to form a contract.¹¹

3. Kinds of Electronic Contract

Broadly, e-contracts may be classified into Shrink-wrap, Click-wrap, and Browse-wrap/Web-wrap Agreements. While the shrink-wrap transaction has been around for some time and actually exists in a paper environment, the

¹ Omri Ben-Shahar, 'Regulation through Boilerplate: An Apologia' (2014) 112 Mich. L. Rev. 883, 883–84.

² Tess Wilkinson-Ryan and DA Hoffman, 'The Common Sense of Contract Formation' (2015) 67 Stan. L. Rev. 1269, 1297.

³ [1999] O.J. No. 3778 (Sup. Ct. J.), at para 11-12.

⁴ Smith, GJH, *Internet Law and Regulation*, 2002, 3rd ed, Sweet & Maxwell: London, at 357

⁵ See, e.g., *Anderson Marketing, Inc. v Maple Chase Co.*, 241 F.3d 1063, 1066 (8th. Cir. 2001).

⁶ *Homestead Golf Club, Inc. v Pride Stables*, 224 F.3d 1195, 1200 (10th. Cir. 2000).

⁷ *Ibid.* 1199.

⁸ *Wilcher v City of Wilmington*, 139 F.3d 366, 40 Fed. R. Serv. 3d. 934, 373 (3rd. Cir. 1998).

⁹ *Starr Farm Beach Campowners Ass'n, Inc. v Boylan*, 811 A.2d 155, 158 (Vt. 2002).

¹⁰ Restatement (Second) of Contracts § 22 (1981).

¹¹ *Beaver v Grand Prix Karting Ass'n, Inc.*, 246 F.3d 905, 909 (7th. Cir. 2001).

other two types of transactions (click wrap and browse wrap) are suitable to electronic commerce. These are agreements presented and consummated entirely in an online environment; most often on the internet. These contracts are typically contracts of adhesion i.e., one-sided (in favour of the presenting party), boiler plate agreements presented to customers on a “take-it or leave it” basis. There is little or no room to negotiate the contract and, if the consumer does not accede to the agreement, he or she will be denied access to the product or service.¹ Click wrap or browse wrap agreements take their name from shrink wrap agreements; written paper contracts that were included in the plastic shrink wrapped packaging containing, most often, computer software. Computer software companies widely rely on the use of shrink wrap license agreements in the mass market distribution of software. In Shrink-wrap Agreements, software vendors in the early 1980’s were constrained to deliver their products in physical form – i.e. on a computer disk, usually in a cardboard box along with manuals and other paperwork. The term “shrink-wrap” derives from the fact that these agreements are often included on the outside of the packaging and are visible through the clear plastic shrink wrap with which the package is sealed. The contractual terms are supplied with the software packaging. Mark Lemley writes that the theory of the shrink wrap license is that the user manifests assent to the license terms by engaging in a particular course of conduct that the license specifies constitutes acceptance.² Typically, there is a notice on the packaging which states that acceptance on the part of the user of the terms of the agreement is indicated by opening the shrink wrap packaging of the software, by use of the software, or by some other specified procedure. The user does not sign the agreement. As technology evolved and allowed the sale and delivery of computer software electronically (ie over the Internet), software vendors required a new licensing model that was not dependent on a physical licence agreement and a physical manifestation of the user’s assent. Click wrap licences emerged and have largely replaced shrink wrap licences. Although, in the case of retail software sold in physical form, both forms of licensing can be and sometimes are used.³

Under click-wrap agreements, a contracting party consents to be bound by electronically displayed terms (usually online) after being given an opportunity to read those terms. The contracting party demonstrates his or her consent by either typing and submitting words indicating his/her acceptance (“Type and Click”) or clicking on a specified icon (“Icon Clicking”). Click wrap agreements are very common in internet electronic sales, as well as in sales of software, where the acceptance of the conditions of sale is required before the first installation and use of the software. Some websites might ask the user to scroll through the entire text of the license before being allowed to proceed. In some other cases, the user may be referred via a hyperlink to another location on the Internet where the terms are hosted. The basis for validating these licenses is the ability of courts to reach the conclusion that the user had manifested his or her consent to the online terms presented to him directly or indirectly, by signaling such consent through his or her actions, e.g., through loading the required software.⁴ The problem with click-wrap licenses arises from the common practice of Internet users. Evidence suggests, for various reasons, most users do not read nor understand the terms and conditions.⁵

Another evolution of the ‘wrap’ genus is the browse wrap licence, where the operator of a website purports to make all use of that website subject to ‘terms and conditions’ agreement, where the terms of that agreement are never actually presented to the website user, and the user is said to assent by merely using the website. In browse-wrap, while an internet vendor gives the user the opportunity to look at the terms of the sale, it does not require the user to click on anything to indicate assent to these terms before paying for the product. For instance, the web site may contain a button saying ‘click here for legal terms’, which the purchaser may click or ignore. Courts, especially in the United States, have split on the enforceability of browse wrap agreements on the ground of absence of adequate assent being given.⁶

4. Online Standard Form Contracting and No-reading Problem

The imposition of standard terms contract means that the specific terms of the contract are positively not negotiated and sometimes not even read or known at all. Consumers may sign standard form contracts without reading them carefully because they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers.⁷ However, consumer protection law does not assume that standard form contracts are not

¹ Azmat Ali1, ‘Electronic Contract and Consumer Protection Issues in India; Emerging Legal Challenges and Remedial Measures’ (2018) 8 International Journal of Research in Social Sciences 521, 533.

² MA Lemley, ‘Terms of Use’ (2006) 91 Minnesota Law Review 459, 467.

³ Dale Clapperton and Stephen Coronos, ‘Unfair Terms in ‘Clickwrap’ and other Electronic Contracts’ (2007) volume 35 Australian Business Law Review 152.

⁴ In *SoftMan Products Company, LLC v. Adobe Systems Inc.* 171 F. Supp. 2d 1075 (C.D. Cal 2001).

⁵ European Commission's expert group on cloud computing contracts 'unfair contract terms in cloud-computing service contracts: discussion paper' <http://ec.europa.eu/justice/contract/files/expert_groups/unfair_contract_terms_en.pdf> accessed 15 May 2019.

⁶ Two contrasting cases on the point are: *Specht v Netscape Communications Corp.*, 150 F. Supp.2d 585, 593-94 (SDNY 2001), affd 306 F.3d 17 (2d Cir 2002), on the one hand; and *Pollstar v Gigama, Ltd.*, 2000 WL 33266437, 6 (ED Cal. 2000); 170 F 2d 974 (ED Cal. 2000)—on the other.

⁷ RA Hillman and JJ Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ 77 N.Y.U. L. REV. 429, 446-47 (2002)

exploitative. Some features of standard form contract would support the position of consumer protection law. The system assumes, however unrealistically, that the consumer has read and understood the form and consents to every term. On this basis, the law of contracts has subsumed form contracts within its structure. Studies show that few consumers ever take the time to read the terms and conditions they agree to when entering into contracts online. For example, in one such study 90% of the respondents indicated that they never read the whole agreement, while at the same time 64% indicated that they always click “I agree”. Furthermore, 55% did not believe that they entered into a legally binding contract when clicking “I agree”!¹ There are several reasons for this. First of all, some consumers simply do not think that the terms and conditions are legally binding.² Second, most consumers are poorly equipped to understand the significance of the terms of the contracts they enter into. Consciously or subconsciously, they rely upon the legal system to protect them from unfair contractual clauses. They take a more or less calculated risk, hoping to be treated fairly by the law. If this is true, it could be argued that consumer protection laws have created lazy and irresponsible consumers who do not take the time to seek to protect their interests. However, the counter argument is that people are exposed to such a mass of contracts of adhesion that even the most cautious consumer cannot take the time to fully understand the standard contracts they are continually subjected to. Further, many standard contracts contain complex legal clauses, such as choice of forum clauses and exclusion clauses, that even legally trained people may struggle to fully comprehend. As a result, consumers in general do not read the terms and conditions of the contracts they enter into. Key challenges in this respect relate to the volume and complexity of information that consumers can face.

There are dangers in consumers’ failure to read online terms and conditions in standard form contract. If online terms and conditions are agreed to without reading, consumer detriment may occur if there are hidden fees, costs or charges in the terms and conditions. Where consumers do not read or understand terms and conditions they may fail to select the product or service that best suits their needs. This has costs for the consumer and, to the extent that this is widespread behaviour, for the broader market. Accepting terms and conditions without reading could lead consumers to make purchases that are of a lower quality than anticipated. This could be because elements of the quality of a product or service are buried in the terms and conditions and not fully factored into the consumer’s decision making.³ If consumers do not read or understand privacy notices they may unwittingly share personal information or agree to provide such information to third-parties, or agree to their data being used in ways they would not knowingly approve of.⁴

Consent and standard form contracts

The question that arises from failure to read or lack of understanding of terms of the form contract relates to what rules apply to the characteristic modes of contract formation in an electronic environment – shrink wrap, click wrap, and browse wrap. All these types of e-contracts have raised fundamental questions, in particular, about assent. The question is regarding what types of conduct constitute assent to terms and conditions. There are issues as regards how to treat terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. There are also questions related to disclosure about whether there was assent, when was it manifested, is it only for terms about which the user had knowledge or awareness, or does it extend to terms and conditions which the user had not read or understood?

In the United States, United Kingdom and Australia for example, on account of the possibility of unequal bargaining power and unconscionability, courts may void certain provisions or the entire contract itself taking into account, *inter alia*, the nature of the consent. The U.S. courts, additionally, have also adopted the “expectation” principle in dealing with standard form contracts. The impugned terms will be scrutinised and the test is whether they fall within the reasonable expectations of the party who had no hand in drafting the contract. Where on a finding of fact, the court deems that they were outside the said party’s expectations, *prima facie* grounds are said to be established for contractual avoidance. The objective test is used to ascertain whether or not a term is reasonable taking into account the purpose of the term, its importance and the entire circumstances leading to the contract being executed. This expectation principle governing contracts of adhesion is well expounded in American jurisprudence as follows: Where the other party has reason to believe that the party manifesting such assent would not have done so if he knew that the writing contained a particular term, the term would cease to be part of the agreement, and might thus be excised therefrom. This is the purport of Section 211 of the American Law Institute’s Restatement (Second) of Contracts. It is to be noted that this stipulation renders the assessment to be ascertained via a subjective test, shifting the focus from the buyer to the seller. However, this was not necessarily so in the 1980’s as the general judicial attitude then, even in the United States, appeared to be averse to permitting contractual avoidance except for clear-cut situations falling within the conventional factors of consent vitiation. The court’s approach then was to put the onus on the party seeking avoidance. The overriding question was: Why

¹ A Gatt, ‘The Enforceability of Click-wrap agreements’ (2002) 18 Computer Law & Security Report 408.

² *Ibid.*

³ OECD (2018), Improving Online Disclosures with Behavioural Insights < <https://bit.ly/2KFoIHN>> accessed 19 May 2019.

⁴ *Ibid.*

should the defendant be allowed to avoid the impugned contractual term? The reverse onus would have been: Why should the term be regarded as binding? The law then was described as “a softened or decayed form of the traditional solution”.¹ Even lately, the trend is to push for an objective test of consent in such contracts. For example, free market proponents or more correctly, advocates of the economic theory of law contend that courts should allow parties to enter into transactions unhindered by subjective interference. Whether or not the terms are favourable or lop-sided is not a matter that should come within the purview of the courts. Unless one is dealing with a communist system or any kind of totalitarian form of government practicing an absolute command economy, free market forces will ensure that such contracts contain terms that are beneficial to non-drafting parties as a class. Courts should therefore enforce all form terms or, at a minimum, all form terms that non-drafting parties read and understand and there should be greater use of mandatory contract terms²

The current trend, however, favours the enforceability of standard form contracts to be challenged from the consent matrix: was there “informed” consent, in the sense of consent arrived at after full or at least adequate knowledge of the nature of the contract and its terms and conditions? Where there is an absence of informed consent, there are strong views against their enforcement. Informed consent presupposes complete or at least substantive information about the contract’s terms. Without it, a party cannot be said to have been sufficiently apprised of such information and it becomes doubtful whether consent is possible under the circumstances.³

5. Guidelines for Ensuring Enforcement of Online Contracts of Adhesion

Contracts of adhesion have been described as contracts modelled by seven distinct characteristics:

(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract. (2) The form has been drafted by, or on behalf of, one party to the transaction. (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine. (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent. (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent. (6) The adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party. (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.⁴

Businesses engaged in electronic commerce yearn for assurance that terms important to their transactions are indeed binding and enforceable between the parties. That is to say, assurance about knowing that assent has been given to the terms. Any term could become the subject of disagreement between the vendor and the user, but the terms most commonly providing the impetus to challenge the validity of electronic standard form agreements are dispute resolution clauses, forum selection clauses, disclaimers of warranty, and prohibitions on the commercial use of the data or software available on the site. For the effective and efficient enforcement of online contracts especially for contracts of adhesion, some guidelines have been suggested. A group within the American Bar Association⁵ has come up with an analysis for ensuring valid assent in such transactions, and suggests that a user validly and reliably assents to a browse-wrap agreement if four conditions are satisfied: (a) The user is provided with adequate notice of the existence of the proposed terms; (b) The user has a meaningful opportunity to review the terms; (c) The user is provided with adequate notice that taking a specified action (which may be use of the web site) manifests assent to the terms; (d) The user takes the action specified in the latter notice.

Ballon⁶ has proffered a number of guidelines as follows:

- (i) A provision of clear and prominent notice that access to a site or service is subject to terms.
- (ii) Ensuring that online contracts of adhesion are printable and viewable by users before they are required to assent to the terms. Ballon advises that notices about an agreement, and the agreement itself, should be in a readable font size, at least as large as surrounding text (and in a larger font, in bold or otherwise prominent where a conspicuous disclosure is required or appropriate). Also, the contract itself should be presented to a user, rather than merely accessible via a link (even though some courts will enforce a contract presented this way). Users should be afforded enough time to review the agreement. In *Hines v Overstock.com Inc.*⁷ the court held that Hines was not aware of the notice of the Terms and Conditions because the website did not prompt her to review them and because the link to them was not prominently displayed as to provide reasonable notice of these Terms and Conditions.

¹TD Rakoff, ‘Contracts of Adhesion: An Essay in Reconstruction’ (1983) 96 Harvard Law Review 1173.

² Korobkin Russell, “Bounded Rationality, Standard Form Contracts, and Unconscionability.” (2003) 70 *The University of Chicago Law Review* 1203

³ MF Abdullah and Rozanah Ab. Rahman, ‘Consent, standard form contracts and empowerment for consumers’(2015) 2 *Journal of Scientific Research and Development* 68, 69.

⁴ TD Rakoff, (n 30).

⁵ CL. Kunz *et al*, 2003, ‘Browse-wrap agreements, Validity of Implied Assent in Electronic form Agreements’ 59 *Business Law* 279.

⁶ IC Ballon, *E-Commerce and Internet Law* (2nd edn., Thomson Reuters/West 2009) 21-63.

⁷ 668 F.Supp. 2d 362 (2009).

- (iii) The use of click-to-accept contracts is highly recommended as against mere reliance on implied assent to posted terms. It should be made clear to users that they are clicking to accept the terms of a contract, and not just to download software or other content or accessing a site or service. Users who do not click on the “Yes” or “I Agree” button should be prevented from accessing the site or service or obtaining the product offered subject to licence. To ensure that users read all the terms, the “I Accept” button should be placed at the very end of the document so that the user would be bound to scroll through the entire agreement.
- (iv) A requirement that users should check a box next to the assent clauses such as “I have read the Terms of Service and agree to be bound by them” or “By clicking on this button, you agree to be bound by our Terms of Use Agreement.” Users who do not check the box cannot access the site.
- (v) Obtaining an express assent (or failing that, providing a notice) before granting a user access to a site or service or providing goods or services.¹
- (vi) For provisions such as arbitration clauses etc. which require unqualified assent, it is advisable to require a second assenting click.
- (vii) The terms must be clearly expressed.
- (viii) Where the terms on the site change in material respects, notice must be sent to the users and assent to the revised terms should be obtained from them. Users should have been alerted prior to the revision that the terms are subject to changes and that the email address they provide would be used to notify them of the changes so that they are obligated to ensure that they update the site as to their current emails. It is advisable that express assent to the revised terms be obtained by requiring the user to undergo a new click through process sequel to accessing an account for the first time after the revision. If possible, prior to the coming into effect of the revised terms, notice of the new terms should be pasted on the site, with information as to when it would come into effect.²
- (ix) The use of descriptive section headings to draw attention to salient terms is advisable.³
- (x) Choice of law and forum provisions should be clearly indicated.
- (xi) Where applicable, it should be clearly indicated that the transaction is one for licensing the use of intellectual property because of the usual presumption that intellectual property rights are not generally intended to be committed to the public domain.
- (xii) The contract should be straight to the point.⁴ In *Comb v. Paypal, Inc.*, the court found as a fact that the length of the internet contract made it difficult to read in entirety and the contract was held unconscionable.
- (xiii) Finally, to avoid confusion and ultimately a finding of unenforceability, the number of separate agreements that users are required to enter into in order to obtain goods, services or access should be minimized.

6. Consumer Protection Law Response to No-reading and Assent Problems

The question which arises is that if contractual terms are not read, how is it that there can be a clear meeting of the minds? On the whole, the courts have adopted an objective theory of contracts to determine consent. The objective test was set out by Blackburn J. in *Smith v Hughes*.⁵

I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v Cooke* (2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119). If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms. Thus, an essential part of the test to determine agreement and *consensus ad idem* is whether the reasonable person would have concluded that the parties had entered into the contract.

A well-known offline example are the so called “ticket cases” which concern the applicability of standardised terms and conditions mainly in contracts of carriage.⁶ Here it has been stated that accepting and retaining a ticket without any query or objection to the terms and conditions within would be regarded as acceptance. This argument is based on the objective premise that firstly the customer has read the terms and secondly had he disagreed with them he would have refused to accept the same. The possibility that a customer may not bother to read the terms at all is not taken into consideration. A more pragmatic view was taken in the case of *Thornton v Shoe Lane Parking Ltd*⁷ which concerned the applicability of terms and conditions on tickets issued by automatic ticket vending machines and it was held that a customer would be bound by the said terms and conditions provided that

¹ Ballon, (n 35).

² *Ibid.*

³ *Ibid.*

⁴ 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

⁵ 53 (1871), LR QB 597, 607.

⁶ *Parker v South Eastern Railway Co.* [1877] 2 CPD 416, *McCutcheon v David MacBrayne Ltd* [1964] 1WLR 125.

⁷ [1971] 2 QB 163, CA.

the other party had taken reasonably sufficient steps to bring them to his notice at the outset i.e. before acceptance occurs. In an online context this reasoning has been applied by the American Courts to the so called “wrap contracts” in a similar manner.

To overcome the gap in the assent requirement of valid contracts, courts have relied upon the long-standing duty to read.¹ Under this doctrine, parties are taken to agree to terms that they had the opportunity to read before signing. The doctrine “creates a conclusive presumption, except as against fraud, that the signer read, understood, and assented to the terms.”² The presumption has long been justified as a necessary attribute of contracting regimes grounded in both efficiency and equity. For example, in *Lewis v Great Western Railway*, the Court of Exchequer unanimously rejected counsel’s argument that the plaintiff should not be bound to unread terms of the contract:

It would be absurd to say that this document, which is partly in writing and partly in print, and which was filled up, signed, and made sensible by the plaintiff, was not binding upon him. A person who signs a paper like this must know that he signs it for some purpose, and when he gives it to the Company must understand that it is to regulate the rights which it explains. I do not say that there may not be cases where a person may sign a paper, and yet be at liberty to say, “I did not mean to be bound by this,” as if the party signing were blind, and he was not informed of its contents. But where the party does not pretend that he was deceived, he should never be allowed to set up such a defence.³

Courts have routinely relied upon the duty to read doctrine in enforcing contracts. In 1875, the United States Supreme Court declared:

It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. . . . A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.⁴

The duty to read has been applied in the modern consumer contract context. In *McKenna v Metropolitan Life Insurance Co.*,⁵ court held that it was “unreasonable” for an insured consumer not to read his insurance policy and in *Federal Trade Commission v JFC Credit Corp.*⁶; it was held that consumers were responsible for reading telecommunications equipment leases. The case of *Treiber & Straub, Inc. v United Parcel Service*⁷ is a direct application terms and conditions. In this case, the plaintiff, a jeweler, wished to return a ring worth 105,000 USD Dollars to the manufacturer utilizing the service provided by the United Parcel Service (UPS). The plaintiff arranged to return the ring using the UPS website. The ring never reached its final destination, however, and the plaintiff sued the defendant for his loss. The court found that Treiber had entered into a contractual relationship with UPS to send the ring to its final destination when he had consented to their online terms. During the process of sending the shipment, Treiber had to click on an icon indicating that he accepted the terms and conditions set by UPS covering the transaction.⁸ One of those terms specified that the defendant’s insurance was not intended to cover items exceeding a value of more than 50,000 USD Dollars.⁹ Treiber had clicked the relevant icon, and arranged for the shipment to be sent. In this case, the court determined that the plaintiff had the duty to read before he clicked, and in spite of his failure to read the terms, he remained bound by them.¹⁰ This case exemplifies the concept that “one cannot accept a contract and then renege based on one’s own failure to read it,”¹¹ especially since Treiber had adequate notice concerning the value covered by the insurance.¹² The courts clearly ruled that the contractual parties are bound by a duty to read and follow the terms and conditions if consent is given.

The question whether the consumer plausibly could have read the contract takes center stage when courts scrutinize Internet contracts. Consumer protection law responds to the doctrine of duty to read by attempting to induce firms to create a real opportunity for consumers to read. Thus, firms cannot enforce terms that are hidden in fine print or written in obscure language; even prudent consumers who had diligently tried to apprise themselves of the offered terms would later be “surprised.”¹³ Rather than treating all electronic contracts the same, courts have addressed the different contract forms individually. In general, courts find click wrap contracts to be valid, while browse wrap contracts require courts to look more closely at individualized facts of the case. In each case, they

¹ For an exposition of the duty to read doctrine, see JD Calamari, ‘Duty to Read - A Changing Concept’ (1974) 43 Fordham L. Rev. 341.

² *Fivey v Pa. R.*, 52 A. 472, 473 (N.J. 1902)

³ *Lewis v Great W. Ry.*, (1860) 157 Eng. Rep. 1427 (L.R. Exch.) 1430 (Bramwell B.); 5 H. & N. 867, 874.

⁴ *19 Upton v Tribilcock*, 91 U.S. 45, 50 (1875). See also *John Hancock Mut. Life Ins. Co. v Yates* 299 U.S. 178, 180 (1936); *Brown v E.F. Hutton Grp., Inc.*, 991 F.2d 1020, 1033 (2d Cir. 1993); *Rossi v Douglas*, 100 A.2d 3, 7 (Md. 1953).

⁵ 126 F. App’x 571, 574 (3d Cir. 2005).

⁶ 543 F. Supp. 2d 925, 947 (N.D. Ill. 2008).

⁷ 474 F.3d 379 (7th Cir. 2007).

⁸ *Treiber & Straub, Inc. v United Parcel Service* 474 F.3d 379 (7th Cir. 2007) 382.

⁹ *Ibid.* 382-283.

¹⁰ *Ibid.* 385. Also see J Moringiello and W Reynolds II ‘Survey of the law of Cyberspace: Electronic Contracting Cases 2006-2007’ (2007) 63 Bus. Law 219, 221-222.

¹¹ *Ibid.* 385.

¹² *Treiber & Straub* (n 51) 382, 383 & 385.

¹³ See, e.g., *Harris v Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999).

have examined the notice provided to the user. In *Carnival Cruise Lines, Inc. v Shute*,¹ it was held that although form contracts are valid, they must still go through judicial scrutiny for fairness to the consumer as well as inquiry into potential bad motives of the party holding the bargaining power. Therefore, when considering the enforceability of standard form contracts, the courts have substituted notice of terms for the meeting of the minds in the classical subjective theory of contracts.² The combination of reasonable notice of the contractual nature of the offered terms and whether or not the accepting party has had an opportunity to review the terms of the agreement serves as the basis for the “reasonable communicativeness” test used by the courts when considering standard form contracts.³

One of the first judicial decisions that relate to shrink wrap agreements was *ProCD, Inc. v Zeidenberg*,⁴ decided by Judge Easterbrook of the Court of Appeals for the Seventh Circuit in 1996. Although it involved the acquisition of physical software, the decision set important principles for electronic agreements.⁵ Because the license agreement affords the primary mechanism by which software vendors limit the risks and liability arising from the distribution of their products, the enforceability of shrink wrap agreements is of great significance. The enforceability of these agreements has long been the subject of serious doubt. Before 1996, few cases had touched on the subject of the enforceability of shrink wrap license agreements. One of these cases assumed without explanation that the shrink wrap license at issue in that case was a contract of adhesion which could be enforceable only if the provisions of a state statute—which explicitly made such license agreements enforceable—were a valid statute that was not preempted by (U.S.) federal law.⁶ *Step-Saver Data v Wyse Technology and Arizona Retail Systems v The Software Link*, were cases that focused on the rules of contract formation under the UCC and their implication for deciding whether a shrink wrap license agreement governs a transaction at all—quite apart from rules concerning contracts of adhesion—and, if so, which of the terms contained therein are governing. In both cases, the court held that a contractual relationship was formed between the software vendor and purchaser upon acceptance of orders for the software issued via telephone, and the shrink wrap license agreement which the purchaser saw for the first time after the contract had been formed was ineffective under the Uniform Commercial Code (UCC) to modify the terms of the previously formed contract.⁷ Both of these cases involved transactions between a software vendor and a reseller of the software, rather than an end user, in the context of some unique facts. Thus, none of these cases addressed the issue of the enforceability of a shrink wrap license against an end user who purchases a copy of a mass-marketed computer program in an essentially “over the counter” transaction. It was not until the case of *ProCD v Zeidenberg*⁸ that a court explicitly enforced a shrink wrap license applying to mass-marketed software.

In the case of *ProCD, Inc. v Zeidenberg*, a federal district court squarely addressed this issue, and ruled that a shrink wrap license was unenforceable against the end user under the relevant contract formation provisions of the UCC, because the end user did not see the terms of the shrink wrap license until after the purchase was consummated. The court held that the entire terms of the license agreement had to be visible on the packaging of the software before the purchase was consummated in order for the terms of the license to form part of the bargain between the parties. The district court’s decision was reversed on appeal by the Seventh Circuit, which held that shrink wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general. The Seventh Circuit found shrink wrap licences enforceable where (1) the packaging indicated to the purchaser that software was subject to a licence; (2) the purchaser had ample opportunity to read the licence; and (3) the purchaser had an opportunity to reject the licence by returning software for a refund.⁹ With this foundation, courts following *ProCD* have regarded click wrap terms as equivalent to terms in boilerplate paper contracts, and have upheld most of the click wraps agreements which have been challenged.¹⁰

The click wrap cases often turn on whether consumers could realistically have read the entire contract before agreeing to it. When considering the validity of click wrap licences, courts have typically applied a combination of rules obtained from the general principles of contract law together with case law precedents.¹¹ The courts have relied on the objective theory of contracts when deciding whether or not to enforce the terms of the agreement.¹²

¹ 499 U.S. 585, 595 (1991)

² JM Moringiello, ‘Signals, Assent and Internet Contracting’ (2005) 57 Rutgers L. Rev. 1307, 1314.

³ *Ibid.*

⁴ 86 F.3d 1447 (7th Cir. 1996).

⁵ See RA Hillman and JJ Rachlinski, (n 25) 487.

⁶ *Vault Corp. v Quaid Software Ltd.*, 655 F. Supp. 750, 761 (E.D. La. 1987), *aff’d*, 847 F.2d 255 (5th Cir. 1988).

⁷ *Step-Saver Data Sys. v Wyse Technology* 939 F.2d 91 (3d Cir. 1991) and *Arizona Retail Sys. v Software Link* 831 F. Supp. 759 (D. Ariz. 1993).

⁸ 3 908 F. Supp. 640 (W.D. Wis. 1996).

⁹ See for example *ProCD Inc v Zeidenberg*, *ibid.* and *Hill v Gateway* 105 F.3d 1147 (7th Cir. 1997).

¹⁰ *Compuserve, Inc. v Patterson*, 89 F.3d 1257 (6th Cir. 1996).

¹¹ EM Qutieshat and Bassam Al-Tarawneh, ‘Consent in Cloud Computing Contracts: Some Legal Issues under the Jordanian Law’ (2016) 6 International Journal of Humanities and Social Science 201, 204.

¹² JM Moringiello, ‘Signals, Assent and Internet Contracting’ (2005) 57 Rutgers L. Rev. 1307, 1314.

In *Specht v Netscape Comm'ns Corp.*,¹ court refused to enforce a click wrap license where users were required to take no affirmative steps in acknowledging their understanding of the agreement noting that mutual assent is the bedrock of any agreement to which the law will give force. As such, when determining if click wrap agreements should be enforceable the courts have generally focused on the fact of whether or not the existence of the terms of a contract has been given adequate notice to the purchaser.²

When considering the formation of a contract the courts have basically taken to a mechanical approach of determining if assent to the terms of the agreement has been given. This has consistently been done by simply testing whether or not the clicking of an icon can be proven.³ Whenever there is an absence of fraud or deception the courts will find assent to the terms to be present in most cases. The courts have made it clear that this will be the conclusion they come to when deciding these cases regardless of whether or not the user fails to read, carefully consider or otherwise recognize the binding effect of clicking “I Agree” when downloading or purchasing software.⁴ Failure to read an enforceable online agreement, as with any binding contract, will not excuse compliance with its terms. A customer on notice of contract terms available on the internet is bound by those terms.⁵

Click wrap contracts require Internet users to affirmatively click “I agree” when assenting to the terms and conditions on a website or making online purchases.⁶ For example, in *Feldman v Google Inc.*, the court enforced a forum selection clause in an online click wrap agreement, rejecting the plaintiff’s argument that he did not have notice or assent to the terms and conditions.⁷ The decision put great emphasis on the fact that a user had to specifically click the link that stated, “Yes, I agree to the above terms and conditions”⁸ in order to use the product. Similarly, in *i. Lan systems, Inc. v. NetScout*,⁹ the court attempted to fit the case of click wrap licenses under the provisions of the UCC. The court reached the decision that the UCC does not expressly govern software licenses, but that courts assume that the UCC provisions could be applied. Subsequently, the courts decided that a contract could be formed by clicking on an icon that indicates consent. This is, from the court’s perspective, for the same reasons that consent was accepted as implicit in *ProCD*. One important point relating to the issue of consent in click-wrap licenses in general, is that the user should retain the right to review the content of the terms and then to accept or reject them. Delivering a notice regarding the existence of terms and conditions to the customer is insufficient, unless the latter is able to choose between accepting or rejecting them.¹⁰ Furthermore, a website should allow a user to print and save these terms in order to reference them in the future.

In contrast to click wrap contracts, courts tend to take a closer look at the individual circumstances surrounding browse wrap agreements. A browse wrap agreement is almost ubiquitous across websites, but also for mobile apps and even for software apps. It’s usually the small hyperlink at the bottom of the web page that redirects the user to the legal page, be it a Privacy Policy or a Terms and Conditions. Browse wrap contracts occur when the user agrees to the terms of the website by merely using the website or searching for information there.¹¹ These contracts are unenforceable if the court determines that the user did not have notice of the terms and conditions. In the case of browse wrap contracts where acceptance occurs by merely using the website or carrying out certain actions on it,¹² the courts have held that¹³ the crucial factor would be how and where the website owner made available the terms and conditions of the contract. Here the prominence given to terms and conditions of the website (i.e. location) along with the ease of access would to a certain extent take precedence over the actual content of terms per se as clear and precise terms and conditions would be of little value if the user could not see them in the first place.¹⁴ Here too the standard of evaluation would be that of the reasonable website visitor.¹⁵

As the above authorities demonstrate, the application of the objective test appears to have been uniformly applied in respect of standardized contracts both online and offline. It is also interesting to note that the burden of establishing a consensus appears to have shifted from looking at the actual conduct of the parties to ascertaining whether reasonable notice had been provided of the terms and conditions. Deveci suggests that this requirement

¹ 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001).

² *Ibid.* 1319.

³ NJ Davis, ‘Presumed Assent: The Judicial Acceptance of Clickwrap’ (2007) 22 Berkeley Tech. L.J. 577, 579.

⁴ *Ibid.*

⁵ See, e.g., *Burcham v Expedia, Inc.*, 2009 WL 586513, 2 (E.D.Mo. 2009).

⁶ *Feldman v Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

⁷ *Ibid.* 237.

⁸ *Ibid.*

⁹ 183 F Supp 2d 328, 46 UCC Rep. Serv. 2d 287, 106 A.L.R 5th 743 (D. Mass 2002).

¹⁰ See art. 8 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to- Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/ECC, Directive 97/7/EC, 98/27/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practice Directive”) OJL 149/22.

¹¹ See *In re Zappos.com*, 893 F. Supp. 2d at 1066.

¹² *Ibid.*

¹³ *Specht v Netscape Communications Corp* (2002) 2nd Cir, 306 F 3d 17 ,32

¹⁴ Elizabeth Macdonald, ‘When is a Contract Formed by the Browse-wrap Process?’(2011) 14 Int J. Law Info Tech 285.

¹⁵ *Ibid.*

can be satisfied by actions such as:¹

1. Prominent display of the terms and conditions on the website prior to the commencement of any transaction.
2. Actively directing users to refer to the terms and conditions at the beginning of the transaction.
3. Attempting to highlight particularly important terms. e.g. applicable law and jurisdiction.
4. Requiring the user to do a positive act of assent such as ticking a box, clicking on a button labelled “I agree” after the user has the opportunity to review the terms, For example placing the tick box/ button under the page of terms and conditions.
5. In the case of repeated transactions by the same user, attempt to draw their attention/obtain consent to terms and conditions in each individual transaction.
6. Set out the terms in clear, concise and simple language in order to make the terms more accessible to the user.
7. Offer a service such as a help function to enable users to obtain clarifications if any.
8. Set out the possibility of the terms being amended and attempt to individually inform all users of subsequent changes.

7. Relevance of U.S. Case Law to other Jurisdictions

It is important to note that most cases cited in this paper are directly applicable to US law. However, they are also important in other jurisdictions outside the US. These U.S. cases may set the foundation for other countries decisions. An example can be shown from the Canadian case of *Century 21 v. Rogers Communications*.² Century 21 sued Canadian real estate search engine Zoocasa for infringing the agreement on Century 21’s website, including breach of copyright and breach of contract. Zoocasa’s search engine was allegedly using Century 21’s website information for Zoocasa’s monetary benefit which was against the legal agreement of Century 21’s website. Canadian law on contracts *requires that the offer and its terms be brought to the attention of the user, be available for review and be in some manner accepted by the user*. The reviewing court decided that Zoocasa had notice of Century 21’s browse wrap agreement and Zoocasa accepted it by their continued use of the website listings. Therefore, Canada appears to mirror the United States in forming their case law on browse wrap and click wrap agreements. The court in the case also cited an overwhelming amount of U.S cases covering notions of contract law, browse wrap, click wrap, notice, consent, and fairness.

Even though most jurisdictions have resolved issues raised and recognized that click-wrap contracts create legal obligations, certain issues still remain unresolved, especially in Nigeria, as to when a click-wrap agreement is really formed, and what constitutes an offer and acceptance.³ In most cases relating to online contracts in Nigeria, the traditional rules of contract apply. Parties must satisfy the basic requirements of ordinary contractual obligation, the existence of such online contracts must therefore be inferred from all that transpired between the parties from start to finish of their transaction. The Supreme Court per Mukhtar JSC in *Ajagbe v. Idowu*⁴ states “The existence of an agreement is not an issue merely of fact... the law takes an objective rather than a subjective view of the existence of an agreement and so its starting point is the manifestation of mutual assent by two or more persons to one another.” This dictum explains how the courts in Nigeria will treat cases of online contracts. It is important to state that this may not necessarily meet the challenges associated with online transactions. Although the cases are persuasive in Nigerian courts, to remain relevant in a digital age of mass commerce the U.S. jurisprudence in this area is very much useful for Nigerian courts in responding to the twin problem of no-reading and consent in consumer online standard form contracts.

8. Conclusion

The use of standard form contracts in electronic consumer transactions cannot be eradicated without stifling the growth of the online market. This need is based on the belief that most consumer do not read the terms of standard form contracts before acceptance; and the ones who make out time to read the terms, do not always understand the implication of the terms because they are often complex and in small prints. There is also the argument that even where the consumer is unsatisfied with the terms of the contract, he will usually not have much choice but to accept what has been offered because of the high cost of scouting for better terms. Besides, sellers in the same industry often use similar contract terms. There is the need to limit the application of the traditional contract law doctrine of freedom/sanctity of contract in consumer contracts so as to ensure that terms which are significantly prejudicial to consumers are not inserted in the contract by businesses without their prior knowledge and consent.

In resolving the issues of no-reading and assent in online consumer standard form contracts, general principles of contracts as well court cases have provide factors to be considered. Specifically, whether the user was properly on notice of the agreement is an important benchmark for the validity of a click wrap agreement or browse wrap.

¹ HA Deveci, ‘Consent in Online Contracts: Old Wine in New Bottles’ (2007) 13 C.T.L.R. 231.

² 2011 BCSC 1196.

³ Ihuoma Ilobinso, Formation of Electronic Contracts: Melding the Traditional Contract Law with Contemporary Electronic Commerce Citation Information (2016) 2 Commercial and Industrial Law Review 49, 54.

⁴ [2011] 17 NWLR (Pt 1276) 422 at 442, para. D-G

For agreements to be enforceable, all contracting parties must knowingly agree to all of the different aspects of the contract. Both parties must be aware or have had reasonable opportunity to become aware, of the existence of the terms of the agreement. How this concept of notice applies to the two kinds of agreements can be distinct. For click wrap or browse wrap to be enforceable, the agreement must have been consented to by both parties, and what is sometimes referred to as a meeting of the minds. One problem with browse wrap agreements is the way they gain consent. Users do not typically purposefully consent to browse wrap agreements. Rather, browse wrap agreements are written in a manner that gathers consent by the user's action, such as browsing a website. Therefore, the consent is implied and might be harder to prove when seeking to enforce the agreement.

In the light of court decisions, website owners or mobile app developers should take several precautions when deciding which implementation technique of the legal agreements they should use. For click wrap agreement, clearly displaying the legal agreement in a clear and noticeable location on the website or within the mobile app before displaying the products or the services is recommended. This can also apply if the website is an e-commerce store and the only agreement is just the Return and Refund Policy. Clearly indicate that by accepting the agreement, the users are on notice of the legal contract that they explicitly consented to. If users can register an account on the website or mobile app, proper notice should be given of the legal agreements that they must agree to before they can create an account. In case of a browse wrap agreement, the placement of Terms and Conditions and Privacy Policy links should be displayed prominently somewhere on the page, not along the edge of the pages at the top or bottom. Even worse is being placed on a sub-page. Another suggestion is to make the font of the links distinguishable. The links font should be of a larger size than other fonts, perhaps a different style and a brightened or highlighted colour. A notice with links to the legal agreements should be provided anytime a user either creates an account or purchases a good or a service. When displaying the notice, it should be required that the user takes some form of action to positively bypass the agreement if they choose. This allows demonstrable evidence that the users had clear notice and affirmatively bypassed the information to their detriment. If any changes occur with an agreement, even small ones, the existing users should be notified each of the changes to the agreement.