

Revisiting the Enforceability of Online Contracts: The Need for Unambiguous Assent to Inconspicuous Terms

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ABSTRACT

In determining the enforceability of online contracts, namely those formed from the use of smartphone applications, courts typically look to whether the contract terms were reasonably conspicuous or communicated to the consumer. With the rise of “browse-wrap” contracts, where terms are not directly communicated to the consumer or where the consumer is not required to click the equivalent of an “I agree” button clearly manifesting assent to the terms, courts have inconsistently applied the reasonable communicativeness standard to the detriment of consumers and application developers alike. This Comment will explore the development of browse-wrap contracting jurisprudence and the need to embrace the *Specht v. Netscape Communications Corp.* and GDPR requirements that all contracts entered into online are only enforceable once the consumer clearly and unambiguously manifests assent to the contract’s terms.

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INTRODUCTION

Online consumer-corporate contracts, while convenient, have faced regular litigation and inconsistent rulings regarding enforceability in the modern age. Today, many Americans regularly bind themselves to contract terms with corporations with the simple click of a button on a mobile application. Consumers, rather than negotiating each contract term, will generally assent to whatever contract terms the service provider or producer requires. Yet, how many of these consumers understand the terms they agree to? What constitutes a manifestation of assent? And what clauses are enforceable, especially if the terms are inaccessible, “buried,” or “inconspicuous”?¹ These are the issues courts have grappled with and are especially relevant given the recent litigation against Uber.²

Modern corporations contracting with consumers via the internet have developed new methods to make terms more ambiguous while still maintaining their enforceability. While terms placed completely out of sight are unenforceable,³ some companies have tried more “subtle ways of binding consumers to terms without drawing the consumer’s attention to those terms.”⁴ Corporations know that consumers are unlikely to read lengthy contracts engulfed in legalese;⁵ indeed, many have shifted to drafting more ambiguous terms, allowing corporations to enforce contracts that consumers would never have otherwise agreed to.

The recent Uber cases are an avid illustration of the ambiguity found in modern contracts. The first and second circuits split in *Cullinane v. Uber Technologies* and *Meyer v. Uber Technologies* (Uber cases) as to whether mandatory arbitration clauses—terms not directly viewable by the

1. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74, 79 (2d Cir. 2017) (quoting *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035–36 (7th Cir. 2016); and then quoting *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 351 (Cal. Ct. App. 1972)).

2. See generally *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018); *Meyer*, 868 F.3d 66.

3. See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002).

4. Brief of *Amicus Curiae* Public Justice, P.C. in Support of Plaintiff-Appellee at 13, *Meyer v. Uber Techs., Inc.*, 868 F.3d. 66 (2d Cir. 2017) (No. 16-2750 (L), 16-2752), 2016 WL 7157289 [hereinafter *Meyer Brief*].

5. See, e.g., Gerrit De Geest, *The Signing-Without-Reading Problem: An Analysis of the European Directive on Unfair Contract Terms*, in *ECONOMIC ANALYSIS OF LAW: CONSEQUENCES OF ECONOMIC NORMS* 213, 214 (2002) (few people read or understand contracts they make); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 *J. LEGAL STUD.* 1, 22 (2014) [hereinafter Bakos et al. 2014] (finding that only one or two of every thousand internet retail software shoppers choose to access license agreements, and that the cost of reading and comprehending the contracts are key factors).

consumer but accessible via hyperlink—are enforceable.⁶ Uber, in both cases, utilized what is colloquially known as a browse-wrap contract in which a user could assent to a contract’s terms by registering for a service, even if the terms were not directly viewable to the user. Because the first and second circuits ruled so differently in each case on similar fact patterns, the need for a clarification in the law of online contracting is underscored. While it is true that “new commerce on the Internet . . . has not fundamentally changed the principles of contract,”⁷ these foundational principles are being undermined by practices demonstrated in many circumstances similar to the Uber example. One need only look to Facebook,⁸ Instagram,⁹ Google Maps,¹⁰ and other online services to realize the harmful effect these terms can have; these companies have used consumer’s private information in ways many never contemplated. Given the courts’ uncertainty regarding online contract formation and enforceability, and the harm inconspicuous contract terms may have on the consumer, this issue requires attention.

In this Comment I will argue in favor of affirming the Second Circuit’s holding in *Specht*, which required unambiguous assent in contracting, especially in the online realm.¹¹ In Section I, I will briefly discuss the history of online contracting and the development of browse-wrap contract jurisprudence. In Section II, I will contrast the rulings in the Uber cases in detail. In Section III, I will discuss practical problems that undermine the reasonable conspicuous standard that is currently employed by many jurisdictions, including the following: (1) unequal bargaining power between consumer and corporation; (2) asymmetric information between the parties; (3) consumer inattentive blindness; and (4) the ease of developing click-wrap contracts. Finally, I will conclude and underscore the need for unambiguous assent; a solution that will balance not only the need for fast and efficient contracting but also the need to protect consumers from what seems to be a trend in favor of manipulating

6. See *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74, 79 (2d Cir. 2017).

7. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

8. Amanda Scherker, *Didn’t Read Facebook’s Fine Print? Here’s Exactly What It Says*, HUFFPOST (July 21, 2014), https://www.huffpost.com/entry/facebook-terms-condition_n_5551965 [<https://perma.cc/94KL-CVVG>].

9. Jessica Booth, *6 Ways Instagram May Be Compromising Your Privacy, Like with Its New DM Feature*, HELLO GIGGLES (Jan. 19, 2018), <https://hellogiggles.com/news/instagram-compromising-privacy-dm-feature/> [<https://perma.cc/M6AJ-7KAD>]; Jose Pagliery, *How an Artist Can Steal and Sell Your Instagram Photos*, CNN (May 28, 2015), <https://money.cnn.com/2015/05/28/technology/do-i-own-my-instagram-photos/> [<https://perma.cc/MFB6-D7T9>].

10. Ryan Nakashima, *Google Tracks Your Movements, Like It or Not*, ASSOCIATED PRESS (Aug. 13, 2018), <https://www.apnews.com/828aefab64d4411bac257a07c1af0ecb> [<https://perma.cc/6UVU-GRVJ>].

11. *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

everyday mobile phone and internet users into signing contracts with ill-advised terms.

I. DEVELOPMENT OF BROWSE-WRAP & ONLINE CONTRACTING JURISPRUDENCE

The jurisprudence behind the enforceability of electronic contracting has evolved since the early 1990s. Moving from the traditional offer and acceptance, courts began to accept new types of agreements and different modes of assent. In large part, beginning with *ProCD, Inc. v. Zeidenberg*,¹² so-called “shrink-wrap” agreements—unilateral contracts where consumers manifest “assent to [contract] terms by engaging in a particular course of conduct that the license specifies constitutes acceptance”¹³—became enforceable. Breaking the shrink-wrap on prepackaged software, or running the software after purchasing, indicated that the purchaser manifested assent to the software company’s take-it-or-leave-it terms.¹⁴ Subsequent rulings have generally upheld the enforceability of “click-wrap” contracts—an extension of the shrink-wrap concept—where a consumer manifests assent by clicking an “I agree” button to a standard set of readable terms.¹⁵ However, there is still a conflict in the law behind so-called “browse-wrap” agreements—the type of contracts at issue in the Uber cases. Under a “browse-wrap” contract, the contract terms are not directly viewable; instead, a potential consumer has the option of accessing the terms via a hyperlink but can still assent to the contract without clicking the hyperlink.¹⁶

Before the 1996 *ProCD* decision, courts held that shrink-wrap contracts were unenforceable unilateral contracts; *Step-Saver Data Systems, Inc. v. Wyse Technology*¹⁷ is a good illustration. In a dispute between merchants, the court held the shrink-wrap license was unenforceable on the theory that the terms at issue were proposed additions to the contract but were not incorporated into the contract because the terms were material alterations of the contract governed under UCC 2-

12. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

13. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 467 (2006).

14. *Id.*

15. Bill Wiese, *The Enforceability of Browsewrap Agreements*, 7 J. INTERNET L. 1, 14 (2004). See generally Stephen Y. Chow, *A Snapshot of Online Contracting Two Decades After ProCD v. Zeidenberg*, 73 BUS. LAW. 267 (2017) (distinguishing between click-wrap and browse-wrap contracts).

16. Wiese, *supra* note 15, at 14.

17. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105–06 (3d Cir. 1991).

207.¹⁸ Contract terms were not accepted merely by breaking the plastic wrapping around the software.¹⁹ The terms, located on the box-top of software Step-Saver purchased from The Software Link, Inc. (TSL), were standard for all consumers and contained disclaimers of all express and implied warranties.²⁰ A typical transaction between Step-Saver and TSL constituted an order made through a phone call, coupled with a purchase order that detailed quantity, price, and shipping terms for the software.²¹ TSL would send an invoice with the goods, containing identical terms as the purchase order.²² Disclaimers were never discussed or negotiated.²³ However, TSL argued that too many “material terms were omitted” during the phone calls to constitute an acceptance of the order and that the box-top terms were a counteroffer.²⁴ By purchasing the software and breaking the surrounding shrink-wrap, Step-Saver manifested assent to disclaimers embedded in the box-top terms.²⁵ In typical “battle of the forms”²⁶ fashion, the court disagreed on the theory that the box-top license under UCC 2-207 was an additional proposal to the contract rather than an acceptance conditioned on Step-Saver’s opening of the software packaging.²⁷ Because the terms “materially alter[ed]” the contract, they were not incorporated.²⁸

18. U.C.C. § 2-207 (AM. LAW INST. & UNIF. L. COMM’N 2002) (“A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. . . . The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless . . . they materially alter [the contract].” Course of conduct may also show the parties accepted the proposed contract alterations).

19. *See Step-Saver Data Sys.*, 939 F.2d at 103.

20. *Id.* at 96–97.

21. *Id.* at 95–96.

22. *Id.* at 96.

23. *See id.* at 97.

24. *Id.* at 97–98.

25. *See id.* at 98.

26. “Battle of the forms” refers to the rule that conflicting terms cancel each other out. U.C.C. § 2-207 cmt. 6 (AM. LAW INST. & UNIF. L. COMM’N 2002); *see also* Learning Works, Inc., v. The Learning Annex, Inc., 830 F.2d 541 (4th Cir. 1987) (holding that the letter in which seller agreed to buyer’s proposed terms but asserted an additional term of interest on the deferred portion of the purchase price was not an acceptance of buyer’s offer but, rather, a counteroffer); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972) (case remanded to determine whether additional terms materially altered the contract; if so, they would be canceled out of the final agreement); *Challenge Mach. Co. v. Mattison Mach. Works*, 359 N.W.2d 232 (Mich. Ct. App. 1984) (conflicting provisions of forms instituted by buyer and seller of precision grinder, one form an offer, and one form an acceptance, cancelled each other out and did not become a part of the contract); *Owens-Corning Fiberglass Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533 (D. Kan. 1982) (if acceptance contains terms which conflict with terms of offer, then conflicting terms cancel each other out and the contract between parties consists of terms which both parties expressly agree, with contested terms being supplied by applicable sections of the Uniform Commercial Code).

27. *Step-Saver Data Sys.*, 939 F.2d 91 at 105–06.

28. *Id.* at 106.

For the contract to have been enforceable, TSL must have “clearly express[ed] its unwillingness to proceed with the transactions unless its additional terms were incorporated into the parties’s agreement.”²⁹

The decision in *ProCD* was a dramatic shift in the law. In a famous opinion, Judge Easterbrook treated the shrink-wrap license as an ordinary contract of sale, which could only be invalidated for common law contractual reasons, such as fraud or unconscionability.³⁰ Although the contract terms were “secret” to the consumer at the time of purchase, because the license did not become immediately effectual upon opening the packaging but upon use of the software, the contract was valid.³¹ ProCD produced a software database, a compilation of over 3,000 telephone directories,³² which was available for commercial and non-commercial use, with the latter available at a lower price but coupled with a license limiting the use to such purposes.³³ Zeidenberg purchased the non-commercial software but ignored the license and proceeded to resell the information on his own database for-profit.³⁴ In contrast to *Step-Saver*, Easterbrook relied on UCC 2-204,³⁵ finding that UCC 2-207 was “irrelevant” as there was only one form in this case.³⁶ Easterbrook reasoned:

“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance . . . So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways.³⁷

The *ProCD* court’s language was key for the development of contracting in the electronic age. Easterbrook treated shrink-wrap contracting as a simple contract of sale, avoiding many of the problems that come with alterations to contracts and the invocation of the battle of

29. *Id.* at 103.

30. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

31. *Id.* at 1450, 1452–53.

32. *Id.* at 1449.

33. *Id.* at 1450.

34. *Id.*

35. See U.C.C. § 2-204 (AM. LAW INST. & UNIF. L. COMM’N 2002).

36. *ProCD, Inc.*, 86 F.3d at 1452.

37. *Id.*

the forms,³⁸ namely uncertainty of whether a contract was formed and, if so, which terms apply. The consequences of this reasoning have pervaded modern clickwrap cases—such standard form unilateral contracts, where the click of a button manifests assent, have become so commonplace in the age of online contracting that they are rarely controversial. While Easterbrook’s reasoning has arguably led to more efficient contracting, new and unique problems have arisen, particularly in so-called browse-wrap cases.

Browse-wrap contracts have not been upheld in court as consistently as their click-wrap counterparts.³⁹ In contrast to click-wrap, where terms must be directly viewed and accepted by clicking a button often stating “I agree,” browse-wrap terms are not directly viewable by the consumer, and accessing the terms is not required for use of the software or service.⁴⁰ Often, browse-wrap terms are hidden behind a hyperlink.⁴¹ A court may find such agreements invalid if there is no “reasonable communicativeness” or the consumer lacked constructive notice of the contract terms.⁴² In some cases, consumers may not even realize that they assented to a binding agreement.⁴³

38. There have been many criticisms over Judge Easterbrook’s analysis in *ProCD*. See, e.g., Roger C. Bern, “*Terms Later*” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 643 (2004) (arguing that Judge Easterbrook’s imposition of a “terms later” contracting rule was “devoid of legal, economic, and moral sanction”); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1240 (1995) (arguing that “shrinkwrap licenses should not be effective to alter the balance of rights created under federal law”); Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 463 (2013) (showing how scholars have found a lot to dislike about shrink-wrap’s “‘pay now, terms later’ presentation of contract terms. . . . [N]ot only did such a presentation fly in the face of traditional contract formation doctrine, the content of the shrinkwrap terms wreaked havoc on the balance struck by the federal intellectual property statutes”). But see Eric A. Posner, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHIC. L. REV. 1181, 1186–89, 1194 (2010) (discussing the tension between providing too much or too little information to the consumer, while also calling Judge Easterbrook’s opinion a “masterpiece of realist judging”).

39. See, e.g., *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 301–03 (D. Mass. 2016) (contract found enforceable as users were required to scroll through the terms and click a blue “I accept” button before registering), *aff’d*, 918 F.3d 181 (1st Cir. 2019); *i-Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (clicking an “I agree” button was sufficient to find an enforceable clickwrap agreement); *Campinha-Bacote v. AT&T Corp.*, No. 16AP–889, 2017 WL 2817566, at *2 (Ohio Ct. App. June 29, 2017) (click-wrap agreement held to be enforceable even though appellant claimed that he never had an opportunity to review the terms of service); *Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 WL 307001, at *5 (R.I. Super. May 27, 1998) (one of the first click-wrap cases, where the court held that clicking an “I agree” button is analogous to signing a written instrument); see also Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH L.J. 577 (2007).

40. Wiese, *supra* note 15, at 14.

41. *Id.*

42. Moringiello & Reynolds, *supra* note 38, at 460, 471.

43. Wiese, *supra* note 15, at 14.

In *Specht v. Netscape Communications Corp.*, the court held a software developer did not provide reasonable notice of license terms, including an arbitration provision, where the purchaser had to scroll below the webpage's "download" button to find the contract terms—terms that were not required to be viewed before use of the software.⁴⁴ The plaintiffs in the case alleged that by downloading Smart Download, a program which enhanced the internet browser's web-browsing capabilities, they were effectively being "eavesdropp[ed]" upon.⁴⁵ The terms authorizing this capability were not easily accessible by the plaintiffs, as they were not directly viewable before the button to install Smart Download.⁴⁶ Notably, there was no "I accept" button,⁴⁷ and a buyer did not have to click on or read terms to manifest assent.⁴⁸ The court reasoned that the plaintiffs did not have constructive notice of the terms, as a reasonably prudent offeree in their position would not have known of the pertinent agreement prior to acting.⁴⁹ Here, the court acknowledged that "[t]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."⁵⁰ Further, the court applied California common law, which provides that a party's contractual assent is judged objectively "by the party's *outward* manifestation of consent."⁵¹

In contrast, the Second Circuit in *Register.com v. Verio, Inc.* affirmed the browse-wrap contract was enforceable.⁵² The plaintiff, Register.com (Register), issued domain names over the internet.⁵³ Verio, as a competitor, developed a "robot" that would track new domain names that registered with the plaintiff, and use the acquired data to solicit the new registrants.⁵⁴ Verio's tracking of domain names was in violation of an agreement that users of Register's website would "support the transmission of mass unsolicited, commercial advertising or solicitations via email."⁵⁵ Although Verio argued it never manifested assent by clicking an "I agree" button, the contract was still held to be enforceable.⁵⁶ In

44. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

45. *Id.* at 21.

46. *Id.* at 23.

47. *Id.*

48. *Id.* at 23.

49. *Id.* at 30.

50. *Id.* at 29 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 19 (2) (AM. LAW INST. 1981)).

51. *Id.* (quoting *Cedars Sinai Med. Ctr. v. Mid-West Nat'l Life Ins. Co.*, 118 F. Supp. 2d 1002, 1008 (C.D. Cal. 2000)) (emphasis added).

52. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

53. *Id.* at 395.

54. *Id.* at 396.

55. *Id.*

56. *Id.* at 402–03.

Specht, users had one opportunity to download the software and view the clandestine terms, with the court reasoning that “there was no way to determine that any downloader had seen the terms of the offer.”⁵⁷ Here, Verio admitted it was “fully aware” of Register’s terms—terms visible each time Verio accessed the website data.⁵⁸ Notably, the court went on to criticize a federal district court’s analysis in *Ticketmaster Corp. v. Tickets.com*⁵⁹ in which the court held there was insufficient proof of an agreement simply because a website user was not required to click an “I agree” box before proceeding: “[W]here the taker of information . . . [knows] full well the terms . . . we see no reason why the enforceability of the offeror’s terms should depend on whether the taker states (or clicks), ‘I agree.’”⁶⁰

The evolution of these cases shows how courts have inconsistently held whether an online contract is formed, particularly when a corporation utilizes a browse-wrap contract, often with inconspicuous terms and unclear modes of manifesting assent. In the future, courts should adopt the holding in *Specht* rather than *Verio*. While the courts in both cases considered whether the contract terms were reasonably conspicuous, the law can be simplified to allow contract formation to be more certain by adopting a rule that a party must expressly and unambiguously assent to the contract terms rather than relying on evidence of mere knowledge of contract terms as the court did in *Verio*.

II. THE UBER CASES

The enforceability of browse-wrap contracts was again analyzed in the recent Uber cases by the first and second circuits. The courts considered whether the terms were “reasonably conspicuous”⁶¹ rather than adopt a rule that a party’s lack of unambiguous, express assent is a per se showing of unreasonably conspicuous notice. It was unsurprising that the circuits split on whether reasonable conspicuous notice was given due to the inconsistent application of contract law in this context.

Generally, the facts are the same for both cases. The plaintiffs challenged the enforceability of mandatory arbitration clauses embedded

57. *Id.* at 402.

58. *Id.*

59. *See generally* Ticketmaster Corp. v. Tickets.com, Inc., No. CV 99–7654 HLH(BQRX), 2000 WL 525390 (C.D. Cal. March 27, 2000).

60. Register.com, 356 F.3d at 403 (2d Cir. 2004); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 69 (1)(A) (AM. LAW INST. 1981) (“Silence and inaction operate as an acceptance . . . [w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.”).

61. *See* Cullinane v. Uber Techs., Inc., 893 F.3d. 53, 62 (1st Cir. 2018); Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017).

within terms and conditions available via a hyperlink during the process of creating an Uber account.⁶² Uber offers an application for smartphones that allows users to request rides from third-party drivers.⁶³ In creating an account, customers may manually input personal information when registering in lieu of using preexisting Facebook or Google accounts.⁶⁴ Potential users are then directed to a payment screen where they may input credit card information and click “register” to complete the process.⁶⁵ Below the payment input fields, there is text advising users that by creating an Uber account they agree to the “Terms of Service & Privacy Policy.”⁶⁶ In a slightly newer version of the application, these terms were included in a blue hyperlink, not directly viewable on the payment page.⁶⁷ The hyperlink was white for these terms in the older version.⁶⁸

The first of the two cases, *Meyer*, was decided by the Second Circuit. Although the contract terms were not directly viewable during the application process, the court held that the contract and the embedded mandatory arbitration clause are enforceable.⁶⁹ The Second Circuit based this ruling on California common law; a contract will only be found where there is “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms.”⁷⁰ In the context of web-interfaces, the court reasoned that browse-wrap contracts do not require express assent, so enforceability depends on “whether the user has actual or constructive knowledge of a website’s terms and conditions,”⁷¹ or if the terms were “reasonably communicated to the user.”⁷²

Employing a fact-based inquiry, the court noted the pervasiveness of the modern cell phone.⁷³ In the modern world, the court does not need to “presume that the user has never before encountered an app or entered into a contract using a smartphone. . . . [A] reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found.”⁷⁴ Because the screen was “uncluttered” and nothing was

62. *Cullinane*, 893 F.3d. at 59; *Meyer*, 868 F.3d at 71.

63. *Always the ride you want*, UBER, <https://www.uber.com/us/en/ride/> [<https://perma.cc/T6YN-ZHVC>].

64. *Meyer*, 868 F.3d at 70.

65. *Id.* at 71.

66. *Id.*

67. *Id.*

68. *Cullinane*, 893 F.3d at 57.

69. *Meyer*, 868 F.3d. at 81.

70. *Id.* at 75 (quoting *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002)).

71. *Id.* (citing *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) (internal citations omitted)).

72. *Id.* at 76.

73. *Id.* at 77.

74. *Id.* at 77–78.

misleading about the nature of the hyperlink, the court held that a modern user would have objectively reasonable notice of the terms.⁷⁵ And even though the registration button had two functions of both creating an account and assenting to the terms, that alone did not render the terms ambiguous. The terms were viewable prior to registration, and text on the payment screen expressly warned applicants about the nature of the registration button—that it was indeed a manifestation of assent.⁷⁶ Regardless of whether the applicant clicked on the hyperlink, because the terms of service were provided simultaneously to enrollment and because a supposed reasonable consumer knew or should have known that by clicking the registration button he or she agreed to the terms and conditions, Uber had provided “reasonably conspicuous notice.”⁷⁷

The First Circuit in *Cullinane* ruled differently, finding that the mandatory arbitration clause was not enforceable because the terms were *not* reasonably conspicuous to the consumer.⁷⁸ The court utilized a two-step inquiry based on underlying Massachusetts common law: first, “whether the contract terms were ‘reasonably communicated to the plaintiffs’”; and second, “whether the record shows that those terms were ‘accepted and, if so, the manner of acceptance.’”⁷⁹ As noted, under Massachusetts common law, there is no requirement that notice be clear and conspicuous but merely reasonably conspicuous. The burden lies on the party seeking to enforce mandatory arbitration to prove that the terms were reasonably communicated and accepted.⁸⁰

The court seemingly ruled differently here because of a few minor distinctions between various versions of the Uber application. Unlike *Meyer*, the hyperlink was in bolded white font and located in a grey box, which the court thought was atypical given that hyperlinks are commonly in blue font.⁸¹ This may still have been sufficient to provide reasonable notice, but other terms on the screen were also bolded and in similar font size.⁸² The inclusion of more attention-grabbing items, such as a large blue PayPal button, only served to diminish the conspicuousness of the hyperlink.⁸³ The court summarized by stating:

Even though the hyperlink did possess some of the characteristics that make a term conspicuous, the presence of other terms on the same

75. *Id.* at 79.

76. *Id.*

77. *Id.*

78. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 57 (1st Cir. 2018).

79. *Id.* at 62 (quoting *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 612–13 (Mass. App. Ct. 2013)).

80. *Id.*

81. *Id.* at 62.

82. *Id.* at 63.

83. *Id.*

screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention. If everything on the screen is written with conspicuous features, then nothing is conspicuous.⁸⁴

Although the Circuit Courts employed essentially the same tests, minor differences in application design and inherent differences in the belief of what constitutes reasonable conspicuousness resulted in the inconsistent rulings. While a court may reasonably find that font size and text color may be dispositive in determining whether browse-wrap terms are reasonably communicated, there must be more clarity in the law so that courts may consistently apply contract law to the inevitably unending stream of new applications. Also so that application designers—often uneducated in the law—may have reasonable expectations as to what constitutes permissible application design. These cases again underscore the need to require express, unambiguous assent in contracting. The arbitrary differences here between two versions of the same application are evidence that the reasonable communicativeness standard should be coupled with a requirement for unambiguous assent.

III. PRACTICAL PROBLEMS OF BROWSE-WRAP CONTRACTING

Beyond legal inconsistencies, there are also practical problems that need to be considered with online contracting as the law is currently written. These include (1) unequal bargaining power between consumer and corporation; (2) asymmetric information between the parties; (3) consumer inattentive blindness; and (4) the ease of developing click-wrap contracts, which is further evidence of how browse-wrap contracts are unnecessary and can effectively be used to the detriment of the consumer. Requiring unambiguous assent in online contracting would help address these problems.

A. Unequal Bargaining Power & Asymmetric Information

Not all contracts should be treated equally. In contrast to contracts with bargained-for terms, problems of unequal power between parties and asymmetric information associated with standard form contracts emphasize the need to provide more, not less, consumer protection. Click-wrap, rather than browse-wrap, contracts need to be enforced as they provide an additional degree of notice and clarity that mitigates the harm standard form contracts pose.

Unequal bargaining power in this context can partly be understood as the corporation's ability to dictate the nonprice terms of a contract. With

84. *Id.* at 63–64.

standard form contracts, also known as contracts of adhesion, the consumer is unable to negotiate the terms and must either accept the terms in full or the corporation will not provide the good or service; no true bargain takes place.⁸⁵ Typically, enterprises that use standard form contracts are in positions of strong bargaining power.⁸⁶ “The weaker party [the consumer], in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.”⁸⁷ The consumer must “subjugate” him or herself to terms understood vaguely, if at all.⁸⁸ The power and freedom of contracting in these instances becomes a “one-sided privilege,” with adhesion contracts being suggested by one scholar to even go so far as becoming “effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.”⁸⁹

With unequal bargaining power also comes the issue of asymmetric information where the party in the position of power has more information than the consumer.⁹⁰ In economics, the market becomes “inefficient” when transacting parties are “differently informed regarding the value of the good being exchanged”; here, the nonprice terms of the contract.⁹¹

[I]n the absence of special information, a typical buyer will assume she is dealing with an average-quality seller and will pay no more than her reservation price for average-quality [nonprice terms].

85. Black’s Law Dictionary defines contracts of adhesion as a “standard-form contract prepared by one party, to be signed by another party in a weaker position, [usually] a consumer, who adheres to the contract with little choice about the terms.” *Adhesion Contract*, BLACK’S LAW DICTIONARY (10th ed. 2014).

86. Friedrich Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); see also Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005) (discussing power dynamics in bargaining and law); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that is Yet to Be Met*, 45 AM. BUS. L.J. 723, 726 (2008); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331 (1996); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer*, 5 LOY. CONSUMER L. REP. 112 (1993). But see Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1687 (2012) (suggesting that contracts where nonprice terms are changed may in fact be more efficient, at least when negotiations take place); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHIC. L. REV. 1203 (2003) (stating that economics suggest that markets will normalize contract terms to make them socially efficient).

87. Kessler, *supra* note 86, at 632.

88. *Id.*

89. *Id.* at 640.

90. See generally Becher, *supra* note 86.

91. Avery Wiener Katz, *Standard Form Contracts*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 502–03 (Peter Newman ed., 2002).

Sellers of high-quality [terms] . . . will be unable to recover their costs.⁹²

Therefore, it is in the corporation's best interest to draft self-serving terms.

Further, many consumers will not read a standard form contract before signing, perpetuating the problem of asymmetric information.⁹³ For one, there are communication costs associated with investigating a form, namely time and energy. The consumer must decide whether to invest these resources in evaluating a standardized form, which is usually complex and engulfed in legalese. After deciding to read a contract, these incurred costs of becoming informed are "sunk," with the consumer "winding up in a situation where she just barely wants to accept but wishes she had not bothered to become informed."⁹⁴ It is optimal for the seller to place the buyer in this situation, and because the buyer can anticipate this turn of events, she prefers not to read the terms in the first place.⁹⁵ Therefore, "[i]n [market] equilibrium . . . buyers will not read, sellers will offer the lowest possible quality terms, and buyers will refuse to pay more than fly-by-night prices."⁹⁶

B. Inattentional Blindness

The notion raised in *Meyer*—that because of the proliferation of mobile devices and internet contracting a "reasonably prudent user"⁹⁷ should know that a hyperlink leads to contract terms—can be undermined

92. *Id.* at 504.

93. See, e.g., Bakos et al. 2014, *supra* note 5 (finding that only one or two of every thousand internet retail software shoppers choose to access license agreements and that the cost of reading and comprehending the contracts are key factors); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 32–33 (arguing that the "informed minority" theory—which asserts that a minority of term-conscious buyers is enough to discipline sellers from offering unfavorable boilerplate terms—has little validity); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 220–21 (2010) (describing factors for why most consumers do not read contracts at the time of sale); Geest, *supra* note 5 (discussing how few people read or understand contracts they make); Thomas J. Maronick, *Do Consumers Read Terms of Service When Installing Software? A Two-Study Empirical Analysis*, 4 INT'L J. BUS. & SOC. RES. 137, 144 (2014) (concluding that 75% of respondents did not read, or spent less than one minute, reading the contract); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"*, 78 U. CHI. L. REV. 165, 165 (2011) (arguing that click-wrap contracts may only result in a marginal increase in contract terms being viewed than browse-wrap contracts).

94. Katz, *supra* note 91, at 504.

95. *Id.*

96. *Id.*

97. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017).

by the expansive empirical science on inattentional blindness.⁹⁸ Inattentional blindness is essentially the idea that a person is “blind” to unexpected occurrences; one will fail to perceive things in their field of vision if they are focusing on something else.⁹⁹ This occurs even if the object is fully visible.¹⁰⁰ In the context of browse-wrap contracting, this blindness suggests that because consumers are focused on obtaining access to the service, such as Uber, and inserting necessary information, not only will they not read the terms behind the hyperlinks, they will even fail to notice the hyperlink itself.¹⁰¹ With the apparent trend toward making these hyperlinks as ambiguous as possible, whether by including more “attention grabbing items”¹⁰² or hiding the terms among text of similar font and size, the potential for inattentional blindness seems all the more likely. Inattentional blindness should not be confused with inattentional amnesia. Inattentional amnesia is a phenomenon where a person will initially notice an event then later disregard it as unimportant and fail to remember it; whereas with inattentional blindness, people fail to notice the unexpected event in the first place.¹⁰³

In one study, Harvard professor Steven Most and his colleagues conducted several experiments exploring sustained inattentional blindness.¹⁰⁴ One experiment’s methodology involved users looking at a computer screen with white and black items against a gray background and an unexpected object running across the screen in the form of a red cross.¹⁰⁵ Notably, users only observed the distinctive red cross seventy-two percent of the time even though it was described as very distinctive.¹⁰⁶ Although the red cross was more distinctive than in earlier experiments where a white or black cross passed the screen on an aquamarine background, it was actually noticed less.¹⁰⁷

98. See, e.g., Steven B. Most et al., *How Not to Be Seen: The Contribution of Similarity and Selective Ignoring to Sustained Inattentional Blindness*, 12 PSYCH. SCI. 9 (2001); Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059, 1064 (1999).

99. Kendra Cherry, *Inattentional Blindness in Psychology*, VERYWELL MIND (Jan. 19, 2020), <https://www.verywellmind.com/what-is-inattentional-blindness-2795020> [https://perma.cc/ZE8N-TLLB].

100. See Most et al., *supra* note 98, at 9.

101. Meyer Brief, *supra* note 4, at 16–17.

102. See, e.g., *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 64 (1st Cir. 2018).

103. Simons & Chabris, *supra* note 98, at 1072–73.

104. Most et al., *supra* note 98.

105. *Id.* at 14.

106. *Id.* at 15.

107. *Id.*

A study performed by Daniel J. Simons and Christopher F. Chabris further shows the real and powerful effect of inattention blindness.¹⁰⁸ They strove to consider the nature of “unusual events” (objects that were clearly distinct from their surroundings).¹⁰⁹ Several video segments with the same actors were filmed at the same time and place, and random observers were asked to watch the recordings.¹¹⁰ Each video showed two teams of white and black passing a basketball around while observers were instructed to keep count of the number of passes between a specific team.¹¹¹ After a lapsed period of time, either a tall woman holding an open umbrella or a woman wearing a gorilla costume would walk across the screen.¹¹² In one instance, the gorilla would stop in the middle of the screen as players continued passing the ball, face the camera, thump its chest, then continue walking off-screen.¹¹³ While these unexpected events may seem extremely obvious and distinct from the passing of a basketball, the results show that casual observers demonstrated sustained inattention blindness and failed to notice either the gorilla or the umbrella woman.¹¹⁴ About half of the observers failed to notice these seemingly obvious occurrences.¹¹⁵ Curiously, it was found that observers are actually more likely to notice unexpected events if the events are visually similar, rather than visually distinct, from their primary visual task.¹¹⁶

The implications of these studies are that regardless of the hyperlink’s color or text, even if the hyperlink is visually distinct from the rest of the page, users may fail to notice the terms due to inattention blindness. The consumer’s primary task is to obtain the service, whether by inserting account, payment, or other necessary information. While click-wrap contracts require users to scroll through entire contract terms, or at least click a separate button manifesting assent to the terms, browse-wrap contracts hide terms behind hyperlinks not required to be visited before obtaining the service. The need to see the hyperlink is secondary—an unexpected occurrence that users will often fail to perceive.

C. Ease of Developing Click-Wrap Contracts

While it is easy for companies to provide click-wrap rather than browse-wrap contracts for consumers, companies, including Uber, often

108. See Simons & Chabris, *supra* note 98.

109. *Id.* at 1065.

110. *Id.*

111. *Id.* at 1065–66.

112. *Id.* at 1066.

113. *Id.* at 1069.

114. *Id.*

115. *Id.*

116. *Id.* at 1070.

fail to do so. The supposed justification of reducing transaction costs¹¹⁷ by streamlining the service application process and making the process easier for consumers by not drowning them in legalese is undermined when considering successful examples of click-wrap contracts, including by Uber itself in other contexts.¹¹⁸

To satisfy the basic rules of contract formation and notice, one need not provide the entire terms for a user to scroll through before signing. Indeed, a corporation can permissibly include a hyperlink to said terms, so long as it also includes a separate box where a user must click to manifest assent to the terms while also making it clear that the user must agree to the terms before they may access the service.¹¹⁹ Browse-wrap contracts are inferior because although they may include a hyperlink, they do not require the terms to be accessed or affirmatively agreed to by a click before the service is used.¹²⁰ The separate box in many cases is all that is required.

There are many examples of successful, easy to access click-wrap contracts.¹²¹ Amazon Web Services uses a checkbox that users must click before creating an account, coupled with text stating: “Check here to indicate that you have read and agree to the terms of the AWS Customer Agreement.”¹²² PayPal goes further. Before signing up for its service, a user must click a box which contains not only hyperlinks to the pertinent terms but in detail emphasizes key portions of terms the user agrees to the following:

You have read and agree to the E-Communication Delivery Policy, which provides that . . . You have also read and agree to the User Agreement and Privacy Statement . . . [Y]ou give us permission to contact you about your PayPal branded accounts using automated

117. See Becher, *supra* note 86, at 726 (discussing how standardized contracts will result in reduced transaction costs, and, therefore, reduced prices).

118. See Brief of Public Justice, P.C. & National Consumer Law Center as *Amicus Curiae* in Support of Plaintiffs-Appellants at 21–22, *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018) (No. 16-2023), 2017 WL 876462 [hereinafter *Cullinane* Brief] (first citing *O'Connor v. Uber Techs., Inc.*, No. 13-3826, 2015 WL 5138097, at *17 (N.D. Cal. Sept. 1, 2015); then citing Annie Lowrey, *Is Uber's Surge-Pricing an Example of High-Tech Gouging?*, N.Y. TIMES (Jan. 10, 2014), <https://www.nytimes.com/2014/01/12/magazine/is-ubers-surge-pricing-an-example-of-high-tech-gouging.html> [<https://perma.cc/W6CJ-3FQX>]; and then citing Dan Kedmey, *This is How Uber's 'Surge Pricing' Works*, TIME (Dec. 15, 2014), <https://time.com/3633469/uber-surge-pricing/> [<https://perma.cc/UNZ4-WBF5>]).

119. See Lemley, *supra* note 133, at 460.

120. *Id.*

121. See Sara Pegarella, *Examples of "Click to Accept," TERMS FEED* (May 23, 2019), <https://termsfeed.com/blog/examples-click-accept/> [<https://perma.cc/L2BK-85CJ>].

122. *Id.*; Portal to Create an Amazon Web Services Account, AMAZON WEB SERV., <https://portal.aws.amazon.com/billing/signup#/account> [<https://perma.cc/6QP4-K99F>] (insert email, password, and username to proceed to pertinent page).

calls or texts to: service your accounts, investigate fraud, or collect a debt, but not for telemarketing.¹²³

Ironically, Uber utilizes an effective click-wrap contract with its surge pricing model. When faced with irregular circumstances, such as a dramatic increase in business, Uber increases its fares, calculated using a “multiplier on the typical fare to reflect increased passenger demand and/or decreased driver supply.”¹²⁴ The application screen will clearly state that surge pricing is in effect, and depending on the city, will ask the user to type in the surge multiplier, or it will show the new calculated price upfront.¹²⁵ The user will then click a separate button generally stating that they accept the new increased fare. With surge pricing, Uber itself admitted that it “work[s] on making sure [the increased price] is clear and understandable to riders.”¹²⁶ If Uber can use click-wrap contracts effectively in the surge pricing context, it is certainly peculiar, if not deceptive, for it to then use browse-wrap contracts at the initial stage of registration when the consumer has more contractual issues at stake.

Until the law requires unambiguous assent in online contracting, these practical problems will not be addressed. And it is certainly possible to make these changes. The European Union, with its adoption of the GDPR, provides guidance as to how such a law could be formulated.

IV. THE EUROPEAN UNION MODEL

The European Union has two regulations,¹²⁷ the Consumer Rights Directive (CRD)¹²⁸ and the General Data Protection Regulation

123. Portal to Create a PayPal Account, PAYPAL, https://www.paypal.com/welcome/signup/#/name_address [<https://perma.cc/VEE4-DCG7>] (insert email, password and username to proceed to pertinent page).

124. Cullinane Brief, *supra* note 118, at 21–22.

125. *Accepting Surge Pricing*, UBER HELP, <https://help.uber.com/h/707e5567-a8ea-47c0-9e2b-bd2fbc2aa763> [<https://perma.cc/WJA3-9LNQ>].

126. *Id.*

127. It is important to note that a regulation in the European Union is essentially the equivalent of a statute; it is a “binding legislative act” that must be applied “in its entirety across the EU.” *Regulations, Directives and Other Acts*, EUR. UNION, https://europa.eu/european-union/eu-law/legal-acts_en [<https://perma.cc/3ECL-NSF5>].

128. See Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council, and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64 (EU) [hereinafter CRD Official Text]; see also Sha Naqvi, *The EU Digital Consumer Law and its Scope of Application: A Special Focus on the Right of Withdrawal* (Jan. 12, 2017) (unpublished thesis, University of Oslo), https://www.duo.uio.no/bitstream/handle/10852/60842/5670_8032.pdf?sequence=1 [<https://perma.cc/5ZBN-5USA>].

(GDPR),¹²⁹ recently enacted to combat many of the issues regarding consent and digital contracting also seen in the Uber cases. Not only does the GDPR, in the context of data processing, do away with browse-wrap contracting entirely, but both the CRD and the GDPR include a right of withdrawal among various other consumer protections.¹³⁰

Under the CRD, the consumer is permitted to unilaterally withdraw from an e-contract by returning the pertinent good to the trader for reimbursement.¹³¹ Article 9 of the CRD states that a consumer shall have fourteen days to withdraw from any “distance or off-premises contract,” given exceptions.¹³² There is no requirement that the consumer give “any reason” for the withdrawal.¹³³ Typically though, this applies to online transactions in goods, whereas transactions for services, once “fully performed . . . with the consumer’s prior express consent, and with the acknowledgement that he will lose his right of withdrawal . . . [.]” are exempted.¹³⁴ The right of withdrawal is designed to mitigate issues of asymmetric information.¹³⁵ Rather than, say, walking into a shoe store and trying on the shoes to see if they fit, with digital contracts, the consumer must completely rely on the seller’s word as to the quality of the product. The right of withdrawal allows the consumer to return goods purchased online if they do not meet the consumer’s minimum standards.¹³⁶

While the CRD mostly applies to contracts for the sale of goods, the GDPR more directly combats issues associated with browse-wrap contracting. The GDPR applies to the processing of any personal data

129. See Regulation 2016/679 of the European Parliament and of the Council of Apr. 27, 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR Official Text]; see also Robert Bateman, *GDPR: EU General Data Protection Regulation*, TERMSFEED (June 25, 2019), <https://termsfeed.com/blog/gdpr/#Consent> [<https://perma.cc/29QQ-5CRC>]; *GDPR Overview*, GDPR EU, <https://www.gdpreu.org/> [<https://perma.cc/YUB3-KX9X>].

130. See CRD Official Text, *supra* note 128; GDPR Official Text, *supra* note 129.

131. Naqvi, *supra* note 128, at 20.

132. CRD Official Text, *supra* note 1288 (Article 9). See generally Naqvi, *supra* note 128 (distance and off-premises contracts include digital contracts).

133. CRD Official Text, *supra* note 128 (Article 9).

134. *Id.* (Article 16, which has listed exceptions).

135. Patricia Sanchez Abril et al., *The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law*, 3 INDRET 7 (2018).

136. See *id.* at 5 for a general discussion on the right of withdrawal. See generally Jan M. Smits, *Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?*, 29 PENN. ST. INT’L L. REV. 671 (2011) (mandatory withdrawal may result in a crowding-out effect and undermine the trust-building process corporations seek with voluntarily allowing withdrawal); Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175 (2006) (discusses divergence between U.S. and EU over the need for regulation of online contracting, including browse-wrap contracts, and the development of EU consumer protections).

online, including “the offering of goods or services” and the “monitoring of [the user’s] behavior.”¹³⁷ Under the regulation, consent is defined as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a *clear affirmative* action, signifies agreement”¹³⁸ Consent must be presented in a manner which is “clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language.”¹³⁹ In contrast to the CRD, in the context of processing personal data, the consumer will have the right to withdraw his or her informed consent at any time; it must be as easy to withdraw consent as it is to give it.¹⁴⁰

By its terms, the GDPR makes sure that corporations are no longer able to use “illegible terms and conditions full of legalese,” as the request for consent must be in an “intelligible and easily accessible form.”¹⁴¹ The issue seen in *Cullinane*, where the hyperlink was hidden behind “more attention-grabbing items,” with other terms on the same screen with similar typeface and more noticeable attributes, would not be an issue under the GDPR, as such a hyperlink would have to be “clear and distinguishable from other matters.”¹⁴² Yet, the most pertinent language here is the GDPR’s requirement that consent be shown by a “clear and affirmative action”;¹⁴³ browse-wrap contracts are impermissible. As we have seen in the Uber cases, under a browse-wrap, the hyperlink does not need to be clicked to manifest assent to the contract terms. The GDPR strengthens the requirements for consent by requiring, at the very least, for the consumer to click a button stating, “I agree.”¹⁴⁴

With the GDPR in particular, the European model addresses many of the issues present in American jurisprudence regarding browse-wrap contracting. By requiring clear, affirmative assent, the GDPR allows consumers the opportunity to at least be on notice of the terms they agree to and, at best, prevents the opportunistic veiling of unfavorable terms.

CONCLUSION

Following *Specht* and using the European Union model as an example, I propose that the law be changed regarding online contracting

137. GDPR Official Text, *supra* note 129 (Article 3, Section 2).

138. *Id.* (Article 4, Section 11) (emphasis added).

139. *Id.* (Article 7, Section 2).

140. *Id.* (Article 7, Section 3).

141. *GDPR Overview*, *supra* note 129.

142. *Id.*

143. *Id.*

144. Bateman, *supra* note 129.

to include a requirement for clear, affirmative, and unambiguous assent.¹⁴⁵ This should balance freedom of contract with consumer protection, resulting in not only efficient, but fair contracting. While online contracting is a necessity in the modern economy for corporation and consumer alike, in reality, consumers are not placed on a level playing field.¹⁴⁶ As browse-wrap contracts have been inconsistently enforced in court,¹⁴⁷ it would be better to simplify what constitutes reasonable conspicuous notice and strengthen the consent requirement by removing the possibility of browse-wrap contracting altogether with language mandating clear and affirmative assent. Corporations may protest but given their willingness to create click-wrap contracts in other instances,¹⁴⁸ and given the ease of doing so, there is little justification in failing to change the law.

Requirements for clear, affirmative assent would be effective countermeasures against the practical problems associated with browse-wrap contracting. Online contracting is not purchasing fruit at a stand, where terms of sale are commonly understood with no need to read specific terms.¹⁴⁹ Rather, contracting online is vastly more complex, with terms the average consumer, even if read, would have a difficult time understanding. The aim of these requirements is not to overly burden companies but to balance the playing field between consumer and corporation. It is important that companies do not bury contract terms in unrelated or hidden screens and provide consumers at the very least an opportunity to understand the deal they are making.

145. See *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29–30 (2d Cir. 2002); GDPR Official Text, *supra* note 129.

146. See, e.g., Barnhizer, *supra* note 866 (discussion on asymmetric information and unequal bargaining power); Becher, *supra* note 86, at 726; Kessler, *supra* note 86, at 632.

147. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (browse-wrap contract held to be enforceable as it provided reasonably conspicuous notice); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (browse-wrap contract held to be unenforceable as there was no showing of unambiguous assent).

148. See, e.g., *Accepting Surge Pricing*, *supra* note 125.

149. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991).