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Signals, Assent and Internet Contracting

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I. INTRODUCTION: MACHINE-MADE CONTRACTS THEN AND NOW

Scene One: 1965. A businessman plans to fly from Los Angeles to New York. When he arrives at the airport, he sees a vending machine offering travel insurance. He inserts money in the machine and receives a paper policy of insurance. After taking a quick look at the policy, he puts it in the envelope provided by the machine and sends it to his beneficiary, his wife. He then boards his plane and starts his trip. The policy states that it covers travel only on "scheduled air carriers." When he misses his connection in Chicago, his original airline arranges for him to complete his trip on an airline that is not considered a "scheduled air carrier."[1] If the flight from Chicago to New York crashes, can his wife recover from the insurance company? Or is her recovery barred by the policy's limitation to "scheduled air carriers?"

Scene Two: 2005. The businessman's daughter plans a trip from Philadelphia to San Diego, making all of her reservations from her desktop computer. First, she visits the "FlyMe.com" website to purchase her airline tickets.[2] After she chooses her flights and types in her credit card information, the webpage prompts her to signify her agreement to the site's terms and conditions by checking a box next to the statement, "I agree to the terms and conditions of this fare." If she does not check this box, she cannot purchase the ticket. So, she clicks it without reading the terms and conditions. Next, she visits the "CheapSleeps.com" website to find a hotel room. After she chooses her city and dates and clicks "Go," the site presents her with

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1. The facts of this hypothetical are based on *Steven v. Fidelity & Casualty Co. of N.Y.*, 377 P.2d 284 (Cal. 1962).

2. Both website examples in this scene are fictional. They do, however, possess characteristics of numerous existing websites. *See, e.g.*, US Airways.com Terms and Conditions of Travel, http://www.usairways.com/help/t_and_c.htm (last visited Aug. 19, 2005); Quikbook.com Legal Information and Notices, http://www.quikbook.com/legal.htm (last visited Aug. 19, 2005).

a page listing available hotels. She makes her reservation without ever clicking a button explicitly agreeing to the site's terms of use. At the bottom of the home page there is a link entitled "Our Lawyers Have Their Say." Unbeknownst to her, if she clicks on that link she will be presented with the website's terms of use, which purport to govern her use of the website. Will she be bound by the terms and conditions of her FlyMe.com fare? To CheapSleeps.com's terms of use?

Both of the above vignettes involve standard form contracts, delivered to the purchasers by machines. The main difference between the transactions in the two scenes is that the contract terms in Scene #2 were presented over the Internet. While we are often tempted to think of the Internet age as a unique era requiring new laws[3] and new terminology, Internet contracting transactions are similar in many important ways to earlier transactions. Despite the new terminology spawned by Internet contracting (terms such as the FlyMe.com terms above have been dubbed "click-wrap" terms and those such as the CheapSleeps.com terms have been dubbed "browse-wrap" terms[4]), computers connected to the Internet were not the first machines to deliver contract terms and the challenges presented by contracts presented on a website are similar to those presented by earlier machine-delivered contracts and by other paper standard form contracts.[5] The hypothetical buyers in this Introduction had no opportunity to bargain for the terms of their agreements (a problem that is well-chronicled but unlikely to disappear[6]) and no opportunity to ask an individual to explain the terms. The 2005 traveler might not even have known that the CheapSleeps.com site contained conditions of use.

3. For an excellent discussion of the various views of the relationship between the Internet, law and the effect the Internet is having on the laws governing both the Internet and society, see Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 365-73 (2003). For a discussion and criticism of some of the federal laws enacted in response to challenges presented by the Internet, see Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309 (2002).

4. Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW 279, 279-80 (2003). For a more detailed discussion of click-wrap and browse-wrap terms, see Part IV *infra*.

5. Indeed, in 1960, Karl Llewellyn wrote that he knew of no private law problem "more disturbing to life or more baffling to lawyers" than that of standard form contracts. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 362 (Little, Brown & Co. 1960).

6. *See* Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1809-11 (2000) (conceding that mass-produced contracts are unavoidable in commerce but advocating for more effective disclosure of standard terms to facilitate a competitive marketplace for consumers).

As business transactions move to the electronic environment, courts are called on to decide disputes that appear, at first blush, to be novel. In deciding these disputes, they must determine the extent to which existing legal doctrine should be modified to account for new methods of business facilitated by the Internet. Judges must distinguish between problems that are so novel that only new rules will suffice and those that are so similar to those presented in the tangible world that no modification to existing law is necessary. In the middle are problems that require no great overhaul of existing law, but an adjustment to traditional rules to take into account the differences between paper and electronic communications. The problems posed by Internet contracting fall into this middle category.

The thesis of this article is that courts, in deciding whether or not to enforce contract terms delivered over the Internet, must account for the fact that individuals perceive paper and electronic communications in different ways. Traditional contract rules, based on the model of two individuals meeting face-to-face to negotiate written terms, have been modified over the years to accommodate diverse methods of communicating those terms. In developing these modifications, courts recognized the traditional cautionary function served by the signed paper contract and fashioned new rules to account for the different signals sent to offerees by novel methods of contracting.

To support this thesis, in Part II of the article, I will review some basic contracting principles, focusing on how these principles have been modified over the years to accommodate new methods of contracting. In Part III, I will introduce the different types of electronic contracts, focusing on "click-wrap" and "browse-wrap" agreements and in Part IV, I will review the published decisions that address the issue of assent in such agreements. In that discussion, I will show that courts often ignore the different signals sent by paper and electronic communications and thus have not developed a coherent framework for determining when an offeree has assented to electronically delivered terms.

Courts have not always ignored the unique signals sent by novel contracting methods, and in Part V I look back in time and discuss the judicial treatment of two different types of contracts: machine-delivered insurance policies and travel tickets. I then return to the present in Part VI and highlight two statutes that recognize the factual differences between paper and electronic communications: the Uniform Electronic Transactions Act ("UETA")[7] and the Electronic Signatures in Global and National Commerce Act ("E-SIGN").[8] Both

7. UNIF. ELEC. TRANSACTIONS ACT, 7A U.L.A. 225 (2002).

8. E-SIGN, 15 U.S.C. §§ 7001-7031 (2000).

of these statutes provide that a contract must not be denied legal effect *solely* because it is in electronic form and otherwise preserves the substantive law of contracts.[9] In Part VII, I review some of the empirical studies in the marketing and computer science literature to support my contention that significant differences in popular perceptions of paper and electronic communications do exist. I conclude by suggesting an approach to electronic contracting that takes these different perceptions into account.

While consumer use of the Internet for retail transactions has grown exponentially in a very short time,[10] popular familiarity with websites continues to develop.[11] A common-law approach to electronic contract formation that takes consumer perceptions of electronic communications into account will allow contract doctrine to adapt to the evolving popular familiarity with Internet transactions.[12] Two caveats are in order at this point. The first is that I will not discuss the enforceability of specific contract terms, rather, I will stress that it is impossible to find mutual assent in the electronic contracting process without recognizing that electronic communications send signals that are different from those sent by paper forms. The second is that my analysis necessarily concedes that website terms of use and other electronically delivered terms that accompany products or services are agreements to which contract rules apply and not products, as some scholars have proposed in the past.[13] Rather than propose a new metaphor for standard form terms delivered electronically, this article analyzes contract law history to show that new forms of contracts often push courts to impose new duties on

9. *See* UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7; E-SIGN, *supra* note 8.

10. Retail e-commerce sales, defined as sales of goods and services where an order is placed over an Internet, extranet, electronic data interchange network, e-mail or other on-line system, increased by 23.1% between the second quarter of 2003 and the second quarter of 2004, a period during which total retail sales increased by only 7.8%. *United States Department of Commerce News*, Aug. 20, 2004, at 1, http://www.census.gov/mrts/www/ecom.pdf.

11. The enormous potential for growth in consumer use of the Internet is demonstrated by the fact that in the second quarter of 2004, retail e-commerce sales accounted for only 1.7% of total retail sales. *See id.*

12. There are numerous other proponents of a common-law approach to regulating the Internet. *See*, *e.g.*, Sherry, *supra* note 3; Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L. J. 1743 (1995) (opining that because of the natural evolution of cyberspace law, there is no need for court or government intervention at the present).

13. *See*, *e.g.*, Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970) (arguing that the law should treat consumer standard form contracts as things); W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1 (1974) (arguing that standard form terms should be viewed as property). *But see* Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 442 (2003) (noting that the "contract-as-assent" metaphor "appears to be the model of the moment").

contracting parties, and advocates a similar approach to Internet contracting. Because courts use the objective theory of contracts to analyze Internet contracts, I will focus on that theory, but my goal is to show that no matter how one chooses to treat standard form terms, it is impossible to extend the analysis to electronic standard form terms without taking the special characteristics of electronic communications into account.

II. SOME BASIC CONTRACTING PRINCIPLES, THE IMPORTANCE OF SIGNALS, AND THE USE OF STANDARD FORMS

The black letter definition of "contract" is "a promise, or set of promises that the law will enforce."[14] It is a basic rule of contract law that in order for a contract to be formed, the parties to the contract must reach a meeting of the minds. Because a contract is a consensual relationship, both parties to the contract must agree to be bound.[15] One party must make an offer and the other party must accept it.[16] No rules mandate the form of assent, and Article 2 of the Uniform Commercial Code illustrates this broad view of assent by stating that "[a] contract for sale of goods may be made in any manner sufficient to show agreement."[17] A handshake, a nod of the head or any other conduct recognizing the existence of a contract will suffice. Inaction, however, is generally held not to indicate assent to contractual terms.[18] The offeror is said to be the "master of the offer" and can invite acceptance by any means.[19]

These rules of traditional contract law, based on the ideal of two humans meeting in person to agree to terms, have been modified almost to the point of non-existence. For more than a century, courts have adhered to the objective theory of contract, which holds that the actual state of mind of the parties is irrelevant.[20] Courts judge the conduct of contracting parties by a standard of reasonableness and

14. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.1, at 4 (Little, Brown & Co. 1999) (emphasis in original).

15. *Id*. § 3.1, at 160-61.

16. *Id*. § 3.3, at 163.

17. U.C.C. § 2-204(1) (2002). At the time of this writing, it is unclear if and when the 2002 version of Article 2 will become law in any jurisdiction, but the current § 2-204 is identical to the revised version. U.C.C. § 2-204 (1999).

18. 1 FARNSWORTH, *supra* note 14, § 3.1, at 160.

19. *Id*. § 3.13, at 229-30.

20. Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913); Woburn Nat'l Bank v. Woods, 89 A. 491, 492 (N.H. 1914). This rule is sometimes tempered by the unconscionability doctrine, under which a party will not be bound to contract clauses to which he is deemed to have agreed if the clauses are particularly one-sided, *see* U.C.C. § 2-302 and Official Comment 1, or if the clauses are unfairly surprising, *see* RESTATEMENT (SECOND) OF CONTRACTS, § 211 cmt. c. (1981).

find mutual agreement if a reasonable person would be led to believe that an agreement exists.[21] As a result, when a party *signs* an agreement, that party is deemed to have assented to its terms.[22]

An integral component of the objective theory of contracts is the "duty to read." In common parlance, the word "agreement" connotes an understanding of the terms agreed to, but according to the objective theory of contracts, a person can be bound to contract terms whether he reads them or not.[23] This last rule, that a party can be bound by terms that he has not read, is often cast as the offeree's "duty to read" offered terms. This duty is not a duty to any other party, but rather a duty that the offeree owes to himself, because if an offeree signs or otherwise manifests assent to contract terms, he is bound by the terms whether he has read them or not.[24]

A corollary to the offeree's duty to read is the absence, generally, of a duty to explain on the part of the offeror. It is a traditional rule of contract law that the offeror in an arm's length transaction has no duty to explain offered terms.[25] The traditional statement of this rule is a broad generalization, however, because many courts and legislatures have in fact imposed a duty to explain terms in specific types of transactions. In fact, the rule is probably better stated as a rule that the offeror has no duty to *verbally* explain terms.

While an offeror has no duty to verbally explain terms, courts have imposed a duty to explain terms, or at least explain the fact that contract terms exist, on the offerors of various types of standard form terms. In imposing such a duty, courts have recognized that signals play an important role in the objective theory of contracts. For instance, a signature performs a number of functions, one of which is a cautionary function.[26] It is universally accepted that a person who

21. FARNSWORTH, *supra* note 14, § 3.6, at 169; *see* Linda J. Rusch, *The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions About Assent*, 72 TUL. L. REV. 2043, 2075-76 (1998) (discussing the "will theory to contract," maintaining that courts should look at the person's objective behavior to decide if a contract exists).

22. *See*, *e.g.*, Keller v. Orr, 7 N.E. 195 (Ind. 1886); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.41 (West 5th ed. 2003).

23. *See, e.g.,* PERILLO, *supra* note 22, § 9.41, at 392; DeJohn v. TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003).

24. There is a rich literature analyzing the duty to read. *See generally* John D. Calamari, *Duty to Read – A Changing Concept*, 43 FORDHAM L. REV. 341 (1974) (discussing the duty to read with regard to freedom of contract, assent, unconscionability and current contract trends); Stewart Macaulay, *Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966) (discussing the duty to read before executing a contract in the context of policy considerations and credit card contracts).

25. Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 287 (9th Cir. 1988).

26. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

signs a contract is deemed to know the contents of that contract, because a signature requirement sends a signal to the offeree that she should read the offered terms.[27] The rules applicable to standard form contracts that do not require signatures and contract terms delivered by machine compensate for the lack of the clear signal sent by the signature line by imposing a duty to explain on the offerors of those terms.

Even the objective theory of contracts is tested by standard-form contracting. Standard form contracts take many forms: automobile financing agreements, ski lift tickets and cruise ship tickets, to name a few. The different types of paper standard forms pose different contract law problems. While the contractual nature of an automobile financing agreement might be obvious to the average car buyer and the agreement is often presented by someone willing and able to explain the terms, many of the important terms are non-negotiable. The contractual nature of other standard forms, such as ski lift tickets, is not always obvious to the buyer. While a ski lift ticket is often presented by a human, that human may be unable to explain the terms. Many standard form contracts do not require the offeree's signature, so these contracts are not accompanied by the signing "ceremony" that reinforces the importance of the offered terms.[28]

The arguments on both sides of the standard-form contracting debate are well chronicled and need not be repeated here. While the cost-effectiveness of standard forms is inarguable,[29] so is the reality that few people ever read them.[30] As a result, it is hard to argue that

27. This rule is also sometimes tempered by the unconscionability doctrine. *See, e.g.*, Weaver v. Am. Oil Co., 276 N.E.2d 144, 148 (Ind. 1971) (relieving a lessee from a hold harmless clause in a lease that he had signed because the lessor, who had far superior bargaining power, had not called the clause to his attention).

28. It is commonly said that the signature requirement serves a "cautionary function," warning the signer against "inconsiderate action." Fuller, *supra* note 26, at 800.

29. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1221 (1983) (stating that standard form contracts lower administrative and transactional costs, helping to avoid damages and liability); Rusch, *supra* note 21, at 2082 (stating that businesses use standard form contracts in order to reduce the cost of considering all of the contract terms individually); M. J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 364 (1976) (stating that standard form contracts reduce the costs of transactions and promote efficiency in the conduct of trade).

30. For a discussion noting that while many commentators have noted that many people do not read standard forms, there is little empirical research available to prove that individuals do not read standard forms, see, e.g., Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680 (2004); Russell Korobkin, *Bounded Rationality, Standard Form Contracts and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217 (2003). There is little empirical research available to prove that individuals do not read standard forms. One exception is a recent study by Prof. Robert

a recipient of a standard form has in fact assented to its terms. Moreover, many contend that the format of standard terms discourages buyers from reading them and that the circumstances accompanying delivery of standard terms is such that the buyer feels pressure not to read them.[31] This failure to read, according to some, causes sellers to shift more risk to their buyers.[32] This reality has caused some commentators to call for the abandonment of the traditional notion of mutual assent as a prerequisite to the enforceability of standard form terms.[33] While some writers have suggested that standard form contracts are not contracts at all but rather products that accompany goods and services,[34] courts are reluctant to adopt that view, at least explicitly.[35]

Despite the spirited academic debate about the true nature of standard form terms, judges have clung to traditional contract doctrine, specifically the objective theory of contracts, in deciding whether standard form terms are enforceable. In doing so, they have substituted notice of terms for the classic meeting of the minds and have fashioned tests such as the "reasonable communicativeness" test, under which the combination of reasonable notice of the contractual nature of offered terms and the opportunity to review those terms serves as a proxy for the offeree's clear manifestation of assent. Therefore, while a recipient of a standard form offer of contract has a duty to read it, that duty is triggered by notice of the terms. As a result, courts routinely enforce standard form contracts

Hillman. *See* Robert A. Hillman, *On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications* (Cornell Law School Legal Studies Research Paper Series, Research Paper No. 05-012, 2005), *available at* http://ssrn.com/abstract=686817.

31. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 446 (2002).

32. Rakoff, *supra* note 29, at 1227.

33. *See* LLEWELLYN, *supra* note 5, at 370; *see, e.g.,* Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000).

34. *See generally* Leff, *supra* note 13; W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984) (arguing that the conceptualization of a contract as a product would allow legislatures to regulate the content of a contract, much in the same way that legislatures can regulate the content of automobile tires). *See also* Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 63 (1995) (arguing that "[a]ssent is not . . . a useful way to look at the question of when to enforce contingent terms in long forms.").

35. While the Seventh Circuit's decisions in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), and *ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447, 1448 (7th Cir. 1996), appear to adopt the "contract as product" view, Judge Easterbrook stretches to find mutual assent in both cases. His view of contract as product is different from that of the authors cited in the previous footnote in that he notes that "[c]ompetition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy." *ProCD*, 86 F.3d at 1453.

unless they give no notice of the fact that they contain terms that could affect the offeree's legal rights,[36] or contain unconscionable or objectively unexpected terms.[37]

The "reasonable communicativeness" test requires that a standard paper form send a signal that it contains important terms. Under the first prong of the test, judges consider the physical characteristics of the form to determine whether or not it sends such a signal. Therefore, courts have compensated for the absence of the signal sent by the signature line by requiring some other clear signal that contract terms exist, such as a statement like "IMPORTANT NOTICE – READ BEFORE ACCEPTING," in large, bold print.[38] The test compensates for the probable absence of an individual willing and able to explain those terms in its second prong, under which judges are directed to consider a variety of subjective factors in order to determine whether or not the offeree had the opportunity to become meaningfully informed of the terms.[39]

Electronic contracting stretches contract doctrine even further. Machine-delivered standard terms present some of the same challenges presented by paper standard form agreements delivered in a face-to-face transaction, but pose other problems as well. The contractual nature of web site terms of use might be even less obvious than the contractual nature of ski lift tickets. And while the presence of a human in the contracting process is often overrated,[40] when contract terms are delivered by machine, no human is available to explain the terms. Machine-delivered contract terms were not born in the Internet age; however, there are several cases from the 1950s and 60s that addressed many of the same issues faced by courts analyzing today's Internet contracts.[41] In those earlier cases, the courts, in analyzing terms delivered by vending machines, stressed that traditional contracting principles apply "with special force," and imposed enhanced duties on the offerors.[42] Today, however, courts apply the objective theory of contracts to terms delivered electronically without considering the differences between paper and electronic communications.

36. Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 9 (2d Cir. 1995); O'Brien v. Okemo Mountain, Inc., 17 F. Supp. 2d 98, 103 (Conn. 1998).

37. *See*, *e.g.*, *ProCD*, 86 F.3d at 1449.

38. *Effron*, 67 F.3d at 8.

39. Wallis v. Princess Cruises Inc., 306 F.3d 827, 836 (9th Cir. 2002). The "reasonable communicativeness" test is explained in more detail in Part V(B) *infra*.

40. For instance, the person presenting the standard terms often has no authority to negotiate the terms. *See* Hillman & Rachlinski, *supra* note 31, at 435.

41. *See Steven*, 377 P.2d 284; Lachs v. Fidelity & Cas. Co. of N.Y., 118 N.E.2d 555 (N.Y. 1954).

42. *Steven*, 377 P.2d at 293.

The importance of signals in law and the adaptation of the law to new forms of transacting cannot be ignored in the Internet age. In contract law, a written signature provides the traditional evidence of assent because when we are asked to sign something, we are conditioned to think that we are doing something important.[43] The importance of such conditioning is reflected in Judge Learned Hand's explanation of the objective theory of assent in *Hotchkiss v. National City Bank of New York*.[44] He defined a contract as "an obligation attached by the mere force of law to certain acts of the parties . . . which *ordinarily* accompany and represent a known intent."[45] Today, a written signature is viewed as ordinarily accompanying an intent to agree and when a signature is not required, contract law has developed alternative means of showing assent.

Actions taken by Internet users might not be as clear. Another statement of the objective theory of assent appears in *Woburn National Bank v. Woods*,[46] in which the court stated that mutual assent occurs when "[a] proposal is made by one party and is acceded to by the other in some kind of language [that is] *mutually intelligible*."[47] In the Internet age, sometimes an offeror asks an offeree to assent to terms by clicking an "I agree" icon. That a click can clearly constitute a signature under UETA and E-SIGN,[48] but the definition of "signature" requires that the click be adopted with an *intent* to sign the contract.[49] As result judges must ask whether or not the click through requirement sends the same clear signal, triggering the duty to read, as the paper signature requirement.[50] Likewise, when a click is not required, courts must determine when a web site

43. *See* Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1109 (1984) (explaining that the classical model of contract law (which incorporates the objective theory of contracts) might reflect a theory that because subjective states of mind are unknowable, we must rely on "conventional objective signs as tokens of the interior states to which the signs normally correspond").

44. 200 F. 287 (S.D.N.Y. 1911).

45. *Id*. at 293 (emphasis added).

46. 89 A. 491 (N.H. 1914).

47. *Id.* at 493 (emphasis added) (quoting Stoddard v. Ham, 129 Mass. 383, 384-85 (1880)).

48. UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 2(8) (defining "electronic signature" as "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."); E-SIGN, *supra* note 8, at § 7006(5) (offering substantially the same definition).

49. UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 2(8) cmt. at 7 (reinforcing the necessity of determining intention of the assenting party to an electronic transaction).

50. While courts have not yet addressed the possibility that the requirement of a click might not send the same signals as a signature line, several scholars have. *See* Mark E. Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?* 16 GA. ST. U. L. REV. 741, 750-53 (2000); Hillman & Rachlinski, *supra* note 31, at 481.

sends the same signals as a paper standard form.

III. NEW TECHNOLOGIES, NEW CONTRACTING TERMINOLOGY

New technologies have spawned new contract terminology. First came the "shrinkwrap" licenses included in retail software packages. In the classic shrinkwrap license transaction, a statement that use of the software is subject to terms to be found inside the box appears on the face of the box containing the software. The written license often states that use of the software constitutes acceptance of the license terms.

Judges faced with electronic form contracts coined them "click-wrap" and "browsewrap," analogizing them to shrinkwrap licenses.[51] One can find click-wrap agreements both on the Internet and in software. These agreements are so named because the software purchaser or the purchaser of goods or services on the Internet must click an icon to signify agreement before obtaining the desired product or service.[52] In the classic click-wrap scenario, the buyer cannot complete a purchase without at least clicking an "I agree" icon. In some cases, as when someone installs software on a computer, the license terms are presented so that the user must view (but not necessarily read) them before clicking "I agree."[53] On many web sites, however, the contract terms can only be found behind a hyperlink presented near the "I agree" button and the buyer need not even view them before clicking the "I agree" button.[54]

The most recent version of Internet contract to challenge the courts is the browse-wrap agreement: a set of terms, presented on a web site, that does not invite any outward manifestation of assent.[55] One common use of the term browse-wrap is to describe web site

51. Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 592-93 (S.D.N.Y. 2001), *aff'd* 306 F. 3d 17 (2d Cir. 2002); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

52. Christina L. Kunz, Maureen F. Del Duca, Heather Thayer and Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent,* 57 BUS. LAW. 401, 401 (2001) [hereinafter Kunz, *Click-Through*].

53. *See* Caspi v. Microsoft Network L.L.C., 732 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1999).

54. The USAirways website is an example of such a presentation. When a traveler wants to purchase an airline ticket, she cannot complete the purchase without checking a box that appears next to the statement "I agree to the terms and conditions of this fare." The word "fare" appears in blue and is underlined, a presentation that signifies that it is a hyperlink to the fare rules. *See* US Airways.com, http://www.usairways.com (last visited Aug. 19, 2005); *see also* Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1169 (N.D. Cal. 2002) (discussing click-wrap presentations).

55. A more accurate name for this type of agreement might be "click-free" because the term encompasses all Internet agreements that do not require the offeree to indicate her assent by a click. *See* Kunz, *Click-Through*, *supra* note 52, at 401.

terms of use. Such terms of use often begin with a statement that use or browsing of the web site constitutes agreement to the terms, hence the name "browse-wrap." The terms of use often set forth the rights that the web site owner claims in the posted information, prohibit the use of robots, spiders and other automatic devices to copy the site's information, and contain choice of law and choice of forum provisions.[56] A web site user can find such terms by clicking a link on the site's home page, a link that is often at the bottom of the page, sometimes "below the fold" (in other words, the web site user must use the scroll bar to reach the bottom of the page), and given one of a number of labels: "Terms of Use,"[57] "Terms and Conditions,"[58] "Legal"[59] and yes, even "Our Lawyers Have Their Say."[60] Sometimes, the link itself states that use of the web site constitutes acceptance of the terms of use.[61] On most web sites, however, the user must click the "Terms of Use" link to see this statement, which usually appears at the beginning of the terms of use.[62]

The broader definition of browse-wrap encompasses all terms presented by a web site that do not solicit an explicit manifestation of assent. For instance, a purchaser buying books from the online retailer Amazon.com can order a book by filling in information on successive web pages linked by a "continue" icon and then clicking on an icon stating "Place your order." The buyer is asked to review her shipping information, her payment method and the title and price of the books she has ordered. At no time, however, is she asked to signify her agreement to any other contract terms. Those contract terms can be found at the bottom of the page, behind a link entitled

56. *See*, *e.g.*, Legal Information and Notices of Quikbook.com, http://www.quikbook.com/legal.html (last visited Aug. 19, 2005).

57. *See* Zagat.com, http://www.zagat.com (last visited Aug. 19, 2005).

58. *See* LexisNexis Research System Home Page, http://www.lexis.com (last visited Aug. 19, 2005).

59. *See* ING Direct USA, http://home.ingdirect.com/products/products.html (last visited Aug. 19, 2005).

60. *See* Quikbook.com, http://www.quikbook.com (last visited Aug. 19, 2005). In the mid-1990s, these attempts at humor were more prevalent on websites. For a discussion of some of the more entertaining links, see Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1377-79 (1997); *see id.* (describing the terms of use on the Betty Crocker website, which said, "[h]ello. I'm glad you clicked on this page, but I must admit that I'm a bit surprised . . . people poke around this site for good recipes, tasty food ideas and sound kitchen advice, but not too many check out the legal stuff," and the link to the terms of use on the Simon and Schuster website, which read "[o]ur lawyers made us put this here").

61. *See* Ebay.com, http://www.ebay.com (last updated Aug. 19, 2005) ("Use of this Web site constitutes acceptance of the eBay User Agreement and Privacy Policy.").

62. *See* Zagat.com, http://www.zagat.com/about/terms.aspx (last visited Aug. 19, 2005).

"Conditions of Use." If the buyer reads such terms, she will learn that the risk of loss of the books passes to her when Amazon delivers the books to a carrier and that if the product offered by Amazon does not match the web site's description of the item, her sole remedy is to return the book in an unused condition.[63] This type of agreement is also a browse-wrap agreement.

Click-wrap and browse-wrap terms cause problems for contract law. Some of these problems resemble the problems presented by paper standard form terms but others differ from those posed by paper forms. In addition, the challenges posed by the different types of electronic form agreements differ in some respects. Browse-wrap agreements cause problems for contract law because they do not fit within the traditional offer and acceptance mold. Not only do most Internet users fail to read terms of use (a situation no different from the usual paper world standard form contract), in some cases, the user does not even *know* that there are terms to be read (a situation somewhat different from that in the paper world). When a web site user views a home page, the "offer" contained in the terms of use is rarely apparent. For these reasons, some of the issues surrounding enforceability of browse-wrap agreements are different from those surrounding the enforceability of click-wrap agreements.

Courts analyzing the assent process in browse-wrap agreements tend to analogize those agreements to the other types of electronic contracts rather than to paper agreements that are similarly deficient in assent, providing little guidance to today's Internet sellers. On the other hand, courts analyzing click-wrap agreements tend to analogize the act of clicking on an "I agree" icon to the act of signing a paper form without discussing whether the two acts are factually identical, thus finding assent to offered terms whenever an offeree clicks "I agree." In doing so, courts have ignored the possibility that individuals perceive electronic communications in a unique manner, a possibility of great importance when contract law provides that effective communication of contract terms to an offeree is a substitute for that offeree's assent in the process of contract formation.

IV. ELECTRONIC AGREEMENTS IN THE COURTS

Although courts have considered numerous click-wrap and browse-wrap agreements, it is difficult to find in their reported decisions a coherent framework for analyzing electronic agreements. In most of the cases, the courts have focused on whether or not the offeree received adequate notice of the existence of contract terms.

63. *See* Amazon.com Help: Conditions of Use, http://www.amazon.com/exec/obidos/tg/browse/-/508088/pop-up/002-3673578-0917608 (last visited Aug. 19, 2005).

The courts deciding click-wrap cases have focused on the act of clicking an "I agree" icon – if the offeree did so, she had notice of and therefore assented to the terms of the underlying contract, regardless of the manner in which such terms were presented. The courts deciding the few published browse-wrap cases have recognized that notice of such terms is often lacking, but have failed to develop clear guidelines for ascertaining when notice is sufficient.

Absent from most of these cases, however, is a discussion of the presentation of the contract terms themselves. The opinions tend to stress that there is little difference between electronic contracts and paper contracts and some erroneously cite *Carnival Cruise Lines, Inc. v. Shute*,[64] a case involving a cruise ship ticket, for the proposition that terms in a paper standard form contract need not be conspicuous or otherwise give notice of their importance in order to be enforceable. Even when courts recognize that paper standard contracts are held to a standard of reasonable communicativeness, they do not distinguish the ways in which electronic media communicate terms from the way that paper communicates terms. Some of these courts, in their zeal to treat paper and electronic contracts in an identical manner, misconstrue UETA and E-SIGN which, as noted earlier in this paper, remove barriers to electronic contracting by providing that a contract shall not be denied legal effect *solely* because it is in electronic form.[65]

A. Wrong Turn on the Cyberseas: Misplaced Reliance on Carnival Cruise Lines

If there is any coherent theme in the judicial rulings on the enforceability of electronic contracts, it is that such contracts are really no different from paper contracts. Because the courts tend to see no factual difference between paper and electronic contracts, they tend to hold that whenever a paper form reasonably communicates its terms, the analogous electronic form communicates *its* terms. To support this contention, in several cases the courts have pointed to the United States Supreme Court's decision in *Carnival*.[66] The problem with this is that *Carnival* is silent on the issue of contract formation and thus of no help to courts looking to develop rules regarding valid assent to electronic contracts.

It is tempting to rely on *Carnival* for the proposition that terms in electronic contracts should be enforceable because many of the electronic contracting cases were brought by plaintiffs trying to avoid

64. 499 U.S. 585 (1991).

65. UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 7; E-SIGN, *supra* note 8, § 7001(a).

66. 499 U.S. at 585.

the effect of choice of forum clauses in their agreements. In *Carnival*, the plaintiffs, residents of Washington state, had purchased tickets to travel on one of the defendant's ships on a cruise from California to Mexico. After one of the plaintiffs was injured, the couple sued Carnival Cruise Lines in Washington, in contravention of a choice of forum clause in the cruise ticket that mandated a suit in Florida.

The Court upheld the choice of forum clause, and the Court's discussion focused on the specific rules applicable to enforcing choice of forum clauses, *not* on contract formation rules. The major rule pronounced by the Court was that forum selection clauses are subject to judicial scrutiny for fundamental fairness. In determining whether the forum selection clause at issue was fundamentally fair, the Court inquired into whether the cruise line had a bad faith motive in choosing a forum and whether the cruise line obtained the plaintiffs' assent to the disputed clause by fraud or overreaching. Absent from the Court's analysis, however, was any discussion of whether the plaintiffs had notice of the disputed clause. The reason that the Court did not address the notice issue was that the plaintiffs in *Carnival* conceded that they had notice of the disputed choice of forum provision. In fact, the Court's holding that the clause was fundamentally fair rests on the fact that the plaintiffs had notice of the choice of forum provision and on the accompanying assumption that the plaintiffs "retained the option of rejecting the contract with impunity."[67] In cases decided after *Carnival*, courts opining on the enforceability of cruise tickets and similar paper forms have not reached the fundamental fairness issue until they have first found that the plaintiffs had *notice* of the clause at issue.[68]

Despite its lack of analysis on the notice issue, *Carnival* has made a splash in the emerging jurisprudence of electronic contracting. In *Caspi v. Microsoft Network, L.L.C.*,[69] the court seemed to require that the offeree in a click-wrap contract be given adequate notice of contract terms and then correctly noted that *Carnival* does not dispose of the notice issue because the plaintiffs in that case had conceded notice.[70] Despite this, the court then proceeded to discuss whether or not the plaintiffs in *Caspi* had adequate notice of the contractual terms presented to them by comparing the physical appearance of the click-wrap terms in *Caspi* to the physical appearance of the terms on the cruise ticket in *Carnival*. The court discounted the difference between electronic and printed terms,

67. *Id.*

68. *See*, *e.g.*, *Wallis*, 306 F.3d at 836; Ward v. Cross Sound Ferry, 273 F.3d 520, 524 (2d Cir. 2001); *Effron*, 67 F.3d at 8; *O'Brien*, 17 F. Supp. 2d at 103.

69. 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

70. *Id.* at 532.

stating that just as the plaintiffs in *Carnival* could have "perused all the fine-print provisions of their travel contract if they wished before accepting the terms . . . [t]he plaintiffs in this case were free to scroll through the various computer screens that presented the terms . . . before clicking their agreement."[71] Consistent with its pronouncement that "there is no significant distinction" between paper and electronic terms, the court was not troubled by the fact that most of the provisions of the contract were presented in an identical format.[72] In holding that the contract was enforceable, the court seemed to assume that individuals perceive a scrollable electronic agreement in the same way that they perceive paper.

While not addressing an *electronic* contract, the court in the controversial and often-cited case of *ProCD, Inc. v. Zeidenberg*[73] used similar reasoning in finding that shrinkwrap terms were enforceable against a buyer of computer software.[74] In *ProCD*, the court found the software licensee's act of *using* the software to be sufficient assent to the shrinkwrap license terms.[75]

Absent from the court's discussion in *ProCD* was any detailed analysis of how a buyer was to know that acceptance of the seller's offer would take place not upon payment for the software but upon use of the software. The software at issue was sold in a box that displayed a statement that use of the software was subject to the restrictions stated in the enclosed license. The box contained the paper license terms and in addition, the license was displayed on the user's computer screen every time that the user used the software.

While the presentation format of the contract terms might have been sufficient to alert the average purchaser of the terms, the court did not hold that any notice or explanation was necessary. Instead, the court noted that absent any statutory requirement of conspicuousness, shrinkwrap terms may be "as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*."[76]

Some courts have used *Carnival* correctly, or partially so. In another click-wrap case, *Koch v. America Online, Inc.*,[77] the court appropriately relied on *Carnival* for the proposition that a forum selection clause in a standard form contract will be upheld only if it is

71. *Id.*
72. *Id.*
73. 86 F.3d 1447 (7th Cir. 1996).
74. *Id.* at 1450-51.
75. *Id.* at 1452 (emphasis added).
76. 86 F.3d at 1453.
77. 139 F. Supp. 2d 690 (D. Md. 2000).

fundamentally fair.[78] While the opinion in *Koch* gives a fairly detailed physical description of the click-wrap terms at issue, it leaves the notice requirement out of its discussion of whether or not the forum selection clause was enforceable. This omission is particularly unfortunate, as the terms at issue both notified the offeree of their contractual nature (the first screen contained the statement "AOL Terms of Service – Read Carefully") and required a clear manifestation of assent (the plaintiff's registration with AOL was not complete until he clicked a button labeled "Agree" to signify his agreement to the terms).

A Texas court similarly relied on *Carnival* solely for the fundamental fairness analysis and then separately analyzed whether the plaintiff had notice of the forum selection clause at issue. The court in *Barnett v. Network Solutions, Inc.*[79] found that the plaintiff had notice of the disputed forum selection clause because he was *required* to scroll through the entire electronic contract before accepting its terms, presumably by clicking an "I agree" icon (although that is not clear from the decision).[80] Because the plaintiff had no choice but to scroll through the agreement, the court found that he should have known to read it.

Carnival is certainly relevant for determining the enforceability of specific clauses – choice of forum clauses – in Internet contracts. However, it does not guide judges in determining the threshold question that must be answered before one can determine whether a specific type of clause is enforceable: the question of whether the offeree had adequate notice of the offered terms, which is essential to determining whether or not the offeree assented to those terms. There is, however, a rich body of law that developed through other travel ticket cases both before and after *Carnival* that can provide an enormous amount of guidance to today's courts in developing rules regarding the enforceability of Internet contracts. The rules, expressed as the reasonable communicativeness test, account for the fact that a paper standard form sends different signals to an offeree than a signed, negotiated agreement. I will discuss those cases in Part VI of this article.

C. If You Click It, You're Bound: Click-Wrap in the Courts

Many courts analyzing click-wrap agreements have found the act of clicking an "I agree" button to be an explicit manifestation of assent to contract terms. Some opinions have said so explicitly,[81]

78. *Id.* at 693.

79. 38 S.W.3d 200 (Tex. App. 2001).

80. *Id.* at 204.

81. *See*, *e.g.*, I.Lan Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328 (D.

while others seem to assume without discussion that when an offeree is required to click an "I agree" button, she knows that she is entering into a contract.[82] In some of these cases, the courts focused on the physical presentation of the "I agree" icon in making their decisions, in others, they did not.

The decision in *I.Lan Systems, Inc. v. Netscout Service Level Corp.*[83] is one in which the court held, without extended discussion, that a click is an explicit manifestation of assent to contract terms.[84] *I.Lan* was a business-to-business case in which the buyer had paid over $85,000 for software and argued that it should not be bound by the limitation of remedies in a click-wrap license. In its decision, the court considered the only issue before it to be "whether clickwrap license agreements are an appropriate way to form contracts . . . ."[85] In analyzing the issue, the court relied on the Uniform Commercial Code, which allows a contract for the sale of goods to be formed "in any manner sufficient to show agreement."[86] The court found that the assent manifested by clicking the "I agree" button was explicit, and held that "[i]f *ProCD* was correct to enforce a shrinkwrap license agreement, where any assent is implicit, then it must also be correct to enforce a clickwrap license agreement, where the assent is explicit."[87] The opinion contains no description of the presentation of the "I agree" icon and the court assumes that anyone clicking an "I agree" icon would know that he is agreeing to legally binding terms. It is important to note that the licensee in *I.Lan* was a company in the computer business, so presumably its employees were familiar with click-wrap software licenses.

The fact that an offeree was required to click an "Accept" button before receiving services also appeared to be sufficient evidence of assent in *Forrest v. Verizon Communications, Inc.*[88] In *Forrest*, the plaintiff challenged a forum selection clause in an agreement presented in a scroll box above an "Accept" button. Purporting to apply the "reasonable communicativeness" test applied in many paper standard-form contract cases, the court upheld the click-wrap

Mass. 2002).

82. *Caspi*, 732 A.2d at 532 (finding that "plaintiffs must be taken to have known that they were entering into a contract . . . .").

83. *I.Lan Sys., Inc.*, 183 F.Supp. 2d at 338.

84. *Id.* at 338-39.

85. *Id.* at 338.

86. U.C.C. § 2-204(1) (2002). Although it is questionable whether the U.C.C. applies to software contracts, the *I.Lan* court is one of many that have applied it by analogy. *I.Lan Sys.*, 183 F. Supp. 2d at 338.

87. *I.Lan Sys.*, 183 F.Supp. 2d at 338.

88. 805 A.2d 1007 (D.C. 2002).

terms.[89] In doing so, the court rejected plaintiff's contentions that he lacked adequate notice of the clause and that the terms should have explained the import of the choice of Virginia law (which prohibits class action relief in actions at law).[90] Unfortunately, however, the court, while citing to one case applying the reasonable communicativeness test,[91] neither set forth the elements of the test nor applied them to the facts at hand. The court downplayed the differences between paper and electronic contracts, stating that "[a] contract is no less a contract simply because it is entered into via a computer."[92]

Indeed, the disputed agreement in *Forrest* incorporated some characteristics that would satisfy a reasonable communicativeness test. As noted above, a portion (albeit small) of the agreement appeared in a scroll box above the "Accept" button. In addition, the disputed agreement stated, at its top, "PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY." However, the agreement, in its printed form, was thirteen pages in length and while two provisions of the agreement were in capital letters, the choice of law provision was not. Moreover, the choice of law clause was in the last section of the contract, entitled "General Provisions," rather than in the section entitled "Limitation of Liability and Remedies." Nevertheless, the court rejected plaintiffs' argument that the defendant did not provide adequate notice of the disputed clause or its significance, stating that the plaintiffs would have discovered the clause had they scrolled through the thirteen pages of text, only a small portion of which was visible in the scroll box at any one time.[93]

Another click-wrap decision that focuses on the physical presentation of the "I agree" button as a basis for upholding a click-wrap agreement is that in *DeJohn v. TV Corporation International*.[94] The plaintiff in that case argued unsuccessfully that Register.com's click-wrap agreement was unenforceable. The agreement was presented at the bottom of a domain name registration application behind a hyperlink that was located above the statement "I have read, understood and agree to be bound to the Services Agreement."[95]

89. *Id.* at 1010.

90. *Id.* at 1011.

91. *Id.* at 1010 (citing O'Brien v. Okemo Mt., Inc., 17 F. Supp. 2d 98, 103 (D. Conn. 1998)).

92. *Forrest*, 805 A.2d at 1011.

93. *Id.*

94. 245 F. Supp. 2d 913 (C.D. Ill. 2003).

95. *Id*. at 915-16. The current Register.com domain name application is identical to that described in the case. *See* Register.com, http://www.register.com/retail/policy/servicesagreement.rcmx (last updated May 20, 2005) (describing the appearance of the website).

The court held that the website's presentation of terms put the registrant on adequate notice that he should have read the offered terms, and found no reason to distinguish the duty to read offered terms in an electronic form from the duty to read offered terms on a paper form.[96]

D. Must You Click It In Order To Be Bound?: Courts and Browse-Wrap

There are few reported cases to date addressing the enforceability of browse-wrap agreements. The two major ones, *Specht v. Netscape Communications Corp.*[97] and *Register.com, Inc. v. Verio*, *Inc.*,[98] were both decided by the Second Circuit yet contradict each other in answering one critical question: whether an unambiguous manifestation of assent is a necessary prerequisite to formation of an online contract. With *Specht* answering the question in the affirmative and *Register.com* answering it in the negative, the cases impart no clear rules regarding the enforceability of browse-wrap terms. In addition, while both cases held that an offeree must have notice of terms in order to be bound by them, neither case describes the elements of adequate notice.

The plaintiffs in *Specht* were consumers seeking to escape the effect of a choice of forum provision in a browse-wrap software license agreement. They had downloaded free software from the Netscape web site without viewing the agreement. When those plaintiffs sued Netscape, Netscape moved to compel arbitration, claiming that the plaintiffs were bound by the arbitration clause in the license agreement.[99]

In ruling that a contract had not been formed between the plaintiffs and the defendants, the court focused on the physical appearance of the Netscape web site and whether that appearance put the plaintiffs on inquiry notice of the license terms.[100] The plaintiffs downloaded software from a screen entitled "SmartDownload Communicator," which had a prompt at the bottom

96. *DeJohn,* 245 F. Supp. 2d at 919. The court in *Barnett v. Network Solutions Inc.* came to the same conclusion, but in order to accept the offered terms in that case, the domain name registrant was required to scroll through the entire contract. 38 S.W.3d 200, 202 (Tex. Ct. App. 2001). The court in *Barnett* rejected the plaintiff's argument that he did not have notice of the forum selection clause because it was hidden because in order to accept the terms, the plaintiff had to scroll through the portion of the agreement containing the disputed clause. *Id.* at 204.

97. 306 F.3d 17 (2d Cir. 2002).

98. 356 F.3d 393 (2d Cir. 2004).

99. *Id.*

100. *Id.* at 21-23.

of the screen, next to the "Download" button.[101] The link to the license agreement was below the bottom of the screen, visible *only* if the person viewing the screen used the web site's scroll bar. If the plaintiffs had scrolled down to the bottom of the screen, they would have seen the invitation to "[p]lease review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software."[102] This invitation was underlined, and had the plaintiffs clicked on the statement, the plaintiffs would have been presented with a list of license agreements.[103]

In finding that the license agreement was unenforceable against the plaintiffs, the court looked for a meeting of the minds, adhering to the view that "[m]utual manifestation of assent . . . is the touchstone of contract."[104] The court recognized the realities of standard form contracting, but noted that if an offeree does not *know* that an offer has been made to him, even the objective standard of intent cannot apply.[105] While the court recognized that many cases hold that an offeree's receipt of a paper document containing contract terms "place[s] the offeree on inquiry notice of those terms," the opinion gives scant guidance about the web site characteristics that would give adequate notice of contract terms.[106]

The court rejected Netscape's argument that downloading the software constituted assent to the license terms, noting that the web site did not make it clear that the act of clicking the "Download" button would constitute assent.[107] It found the click-wrap cases inapposite in that when a web site presents contract terms in a click-wrap format, the user is on notice that a click will signify agreement to the terms.[108] The court concluded by setting forth a general rule regarding the enforceability of browse-wrap agreements: in order for such agreements to be binding on the web site user, there must be reasonably conspicuous notice of the existence of the terms *and* some unambiguous manifestation of assent to them.[109]

The court in *Register.com, Inc.*,[110] agreed that notice of terms was a necessary prerequisite to enforceability but dispensed with the

101. *Id.* at 22.
102. *Id.*
103. *Register.com, Inc.*, 356 F.3d at 23-24.
104. *Id.* at 29.
105. *See id.* at 29-30.
106. *Specht*, 306 F.3d at 31.
107. *Id.* at 32-33.
108. *Id.* at 33.
109. *Id.* at 35 (emphasis added).
110. 356 F.3d at 393.

requirement of unambiguous assent.[111] In *Register.com,* the court allowed the plaintiff to enforce its web site terms despite the fact that its site did not require users to click a button to agree to the terms.[112] The facts in *Register.com* were distinguishable from those in *Specht* in one important respect. Verio, the party seeking to escape the contract terms, was a competitor of Register.com that had repeatedly visited the Register.com web site for nefarious purposes, not a consumer like the plaintiff in *Specht*.[113] Verio had sent multiple automated queries to Register.com's WHOIS database[114] in order to market its web site development services to entities that had registered domain names with Register.com.[115] Verio's activities were prohibited by Register.com in terms that were presented to Verio with the results of every WHOIS query.[116] Verio claimed that it never agreed to these terms and therefore should not be bound by them.[117]

Because Verio was a repeat visitor to the Register.com site and received Register.com's terms governing the use of information received from a WHOIS search every time it performed such a search, the court found that Verio had actual notice of the disputed terms.[118] As a result, Verio's acceptance of the benefits of its WHOIS searches constituted acceptance of these terms. Importantly, the court held that no explicit statement of acceptance was necessary.[119] Relying on the Restatement (Second) of Contracts, the court explained that when a benefit is offered subject to stated terms and the offeree takes the benefit *knowing of the terms*, the offeree is bound regardless of whether the offeree says "I agree" or makes any other statement indicating agreement.[120]

While the Second Circuit adequately distinguished *Specht* from *Register.com* on the notice issue, emphasizing that in *Specht* there was no way to determine whether any Internet user actually saw Netscape's offer,[121] it was silent about the distinction that made

111. *Id.* at 402-03.

112. *See id.*

113. *See id.* 396-97.

114. *Id.* The WHOIS database allows Internet users to learn the identity of all persons who have registered domain names. *See* Welcome to UWHOIS.com, http://www.uwhois.com/about.html (last visited Aug. 7, 2005).

115. *Register.com Inc.*, 356 F.3d at 396-97.

116. *Id.* at 397. To see the presentation of these terms, visit the Register.com website at http://www.register.com and submit a WHOIS query.

117. *Id.* at 401.

118. *Id.* at 401-02.

119. *Id.*

120. *Register.com, Inc.*, 356 F.3d at 403 (relying on RESTATEMENT (SECOND) OF CONTRACTS, § 69(1)(a) (1981)).

121. *Id.* at 402.

explicit assent necessary in *Specht*, but not in *Register.com*.[122] In addition, because Verio's actual notice of Register.com's terms was so clear, the court in *Register.com* had no need to explain the characteristics of adequate notice.

Two other browse-wrap opinions, one unpublished, discuss the notice issue in more detail. The web site at issue in *Pollstar v. Gigmania Ltd.*[123] was one that might not have given reasonably conspicuous notice of its terms. Because the court was ruling on a motion to dismiss, however, it did not decide whether or not the browse-wrap terms were enforceable. The home page at issue in *Pollstar* contained a statement at the bottom that "use is subject to license agreement."[124] The link to the license agreement was not underlined, as links typically are, but instead appeared in a light gray type, distinguishing it from other type on the page. The court conceded that the appearance of the link *might* not put the average web site user on notice that the link was indeed a "live" link and that clicking on it would cause the license agreement to appear.[125] Nevertheless, the court declined to hold the license agreement unenforceable, relying in part on the fact that many people purchase goods and services without ever seeing the terms applicable to their purchases.[126]

Ironically, an unpublished opinion without precedential value begins to create a framework for analyzing Internet contracts. *Waters v. Earthlink, Inc.*,[127] was a First Circuit case affirming the District Court's refusal to dismiss a class action lawsuit against an Internet service provider ("ISP"). The ISP had moved for dismissal on the basis of an arbitration clause in its service agreement. A link to the service agreement at issue was posted on the ISP's web site.[128]

In refusing to uphold the putative agreement to arbitrate, the court focused on the lack of any evidence that the ISP's customers ever saw the link to the service agreement. The court also looked for, and failed to find, evidence that the customers were, or should have been, on notice that they were bound to arbitrate any dispute with the ISP. In its short opinion, the court implied that both the prominence of the hyperlinks and the labeling and explanation of the hyperlinks would be relevant to a determination of the enforceability of the terms. While the First Circuit adhered to the theory that

122. *See id.*

123. 170 F. Supp. 2d 974 (E.D. Cal. 2000).

124. *Id.* at 981. Pollstar's website today is substantially the same as that at issue in the case. *See* Pollstar, http://www.pollstar.com/home.pl (last visited Aug. 7, 2005).

125. *Pollstar*, 170 F. Supp. 2d at 981- 82.

126. *Id.* at 982.

127. 91 F. App'x 697 (1st Cir. 2003) (per curiam).

128. *Id.*

assent is key to contract formation, it substituted adequate notice of terms for assent without elaborating on what might constitute adequate notice.[129]

With only *Specht* and *Register.com* providing real guidance, the state of the law governing browse-wrap terms can almost be described as follows: bad-guys (screen-scrapers collecting information for a competitor's web site) lose, good guys (consumers like the plaintiffs in *Netscape*) win. While the policy behind these results might be appealing, the cases provide no framework at all for ascertaining whether or not browse-wrap terms generally should be enforced. In addition, while the court in *Register.com* concedes that contract terms might be enforceable without the offeree's explicit manifestation of assent,[130] neither *Register.com* nor *Netscape* explains when a *first time* visitor to a web site might be bound to offered terms.

E. Analytical Deficiencies in Existing Case Law

In their zeal to treat paper and electronic form contracts in an identical manner, the courts that have analyzed Internet contracts to date have ignored some important differences between paper and electronic communications. While it is true that there is no reason to formulate an entirely new set of contract rules to govern Internet transactions, it is also true that throughout history new forms of contracting have led courts to refashion existing contract doctrine.

One troubling rule that arises from the electronic contracting cases is that the act of clicking an "I agree" icon *always* signifies assent to the terms that lie beyond that icon, regardless of the label given to the icon and the ease of finding the terms to which the offeree is allegedly agreeing.[131] In holding that a click equals assent, courts appear to follow, perhaps too literally, the rule set forth in the various electronic contracting statutes that a contract will not be denied enforcement *solely* because it is in electronic form.[132]

There are a number of problems with this reasoning. In some

129. *Id.*

130. *See Register.com Inc.*, 356 F.3d at 403 (holding "[i]t is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree."). *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(a) (1981) ("[S]ilence 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.").

131. *See, e.g., I.Lan Sys., Inc.*, 183 F. Supp. 2d at 328.

132. *See* UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 7(b); E-SIGN, *supra* note 8, § 7001(a)(2).

cases, it is not easy to find the contract terms to which the "I agree" icon refers. For instance, a traveler making a reservation on the US Airways web site must check a box next to the statement "I agree to the terms and condition of this fare" before her purchase can be completed.[133] The word "fare" is in blue type and underlined. If the traveler clicks the word "fare," she is brought to a page that lists her flights, each one followed, in a column labeled "adult fare," by a series of letters and numbers, also in blue type and underlined. When she clicks on the series of letters and numbers, she is brought to yet another page, this one entitled "Non Refundable Special Fare."[134] Should an Internet user be required to click through a series of pages to find the contract terms to which she is agreeing? This is one of the many questions that remains unaddressed in the Internet contracting cases. Yet another question is this: do all Internet users know that a word that is in blue or other contrasting type and that is underlined represents a live link? The court in *Specht* assumed that Internet users do not necessarily know to use a scrollbar to find "below the fold" terms.[135] Could a court similarly assume that Internet users do not know what a live link looks like without cautioning words such as "Click here to see the terms of your contract?"

The assumption that a click serves all of the same purposes that a signature does is also flawed. While the electronic contracting statutes address the statute of frauds function of a handwritten signature and hold that an electronic signature is as valid as a handwritten signature,[136] they do not give any guidance on the other functions that signatures, and forms generally, perform. One of those functions is the cautionary function.[137] While it is clear that an offeree need not read contract terms in order to be bound by them, it is also clear that she must be given some signal that she is entering into a legally binding transaction so that she knows to read the offered terms.[138] A signature provides that signal. It is not yet clear, however, that a click provides that signal, and courts do not seem to even address the possibility that is does not.[139]

Another troubling assertion is the assertion that electronic contract terms can be presented in the same physical format as paper

133. *See* US Airways, http://www.usairways.com (create a "traveler profile" and make a reservation) (last visited Aug. 9, 2005).

134. *Id.*

135. *Specht*, 306 F.3d 17, at 31-32.

136. A click can suffice as an electronic signature. UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 2(8) (1999); E-SIGN, *supra* note 8, § 7006(5).

137. *See* Fuller, *supra* note 26, at 800.

138. *See* Hillman & Rachlinski, *supra* note 31, at 493.

139. *See id*. at 481.

terms. This assertion is then followed by the rule that if the terms are in the same format, then they are enforceable. This coupling is incorrect for two reasons. First, the law imposes conspicuousness requirements in some transactions,[140] and one cannot assume that a paper presentation that is considered conspicuous can be translated to the electronic format. In addition, courts that take this position are ignoring the role that form plays in the law.

Form plays as much as a cautionary role in the contracting process as the signature does. Therefore, it is necessary for courts to consider whether a person who is presented with 13 pages of Internet text (as the plaintiff in *Forrest v. Verizon Communications*[141] was) perceives that text in the same way that she would perceive 13 pages of printed matter. A person receiving paper terms might naturally flip through those terms, thus seeing any terms that appear in bold or large print. On the other hand, a person scrolling through computer screens is harder pressed to pick out significant terms. This point is illustrated particularly well in an unpublished New York case, *Scarcella v. America Online,*[142] in which the America Online sign-up process was described as consisting of 91 computer screens, two of which invited the potential subscriber to consent to the terms of the Member Agreement.[143] Despite the plaintiff's contention that viewing 91 screens might lull a computer user into a "trance of lethargy and inattentiveness," the court held that a refusal to treat paper and electronic contracts as equivalent would "threaten the viability of the [I]nternet as a medium of commerce."[144]

The courts' failure to account for the different ways individuals perceive paper and electronic communications leads to some inconsistencies in the decisions. For instance, the click-wrap cases say that so long as the offeree is required to click an "I agree" icon before receiving the offered product, the offeree has assented to the contract terms, without regard to the length of the agreement or the manner in which the terms are presented. These holdings presume that the average Internet user knows to scroll to the end of the offered terms and to click underlined text to find the offered terms. On the other hand, in *Specht v. Netscape*, one of the few cases in which the court did note that paper and electronic communications send different signals, the court did not impose a duty on the offeree

140. *See*, *e.g.*, U.C.C. § 2-316(2) (2002).

141. 805 A.2d 1007.

142. No. 1168/04, 2004 N.Y. Misc. LEXIS 1578 (N.Y. Civ. Ct. Sept. 8, 2004). The court in Scarcella ultimately refused to enforce the choice of forum clause on public policy grounds after finding that the plaintiff had in fact agreed to the clause. *Id.* at **8-13.

143. *Id.* at **3-4.

144. *Id.* at **4-5.

to use a scroll bar to learn whether or not there were contract terms below the web site's "fold."[145]

Over sixty years ago, in his article *Consideration and Form*, Lon Fuller noted that contract and other legal rules adapt to new ways of entering into transactions.[146] In making this observation, he recognized that forms, like signatures, serve an important cautionary function.[147] As I will show in the next section, different forms of contracts have historically led courts to refine existing contract rules to accommodate those different forms, often by imposing additional duties on the person offering the terms. In developing appropriate guidelines to be used in determining the validity of assent in electronic contracting, judges should recognize these historical developments and consider the differences between paper and electronic transactions.

V. THE DUTY TO EXPLAIN: COMPENSATION FOR DIFFERENT SIGNALS

The imposition of a duty to explain in several categories of cases recognizes the importance of humans in the contracting process and the reality that in some cases, an offeree will want to ask for clarification. While the law does not impose a duty on an offeror to proffer an explanation of terms in an arm's length transaction, if the offeree asks for an explanation, the offeror must answer truthfully to avoid a fraud claim.[148] On the other hand, if the offeree does not ask, the offeror need not tell.[149] Thus, the rule that there is no duty to explain finds its best application in situations in which a knowledgeable human offers the contract terms. In those transactions, the offeree has the duty to know when she should ask a question about the offered terms.

In this section, I will discuss two categories of cases in which courts have imposed a duty to explain: cases in which the terms were delivered mechanically and cases in which the terms were offered in a document whose contractual nature was not obvious. In both of these categories of cases, contract terms were delivered by new methods, rendering these cases particularly useful to today's courts in formulating a sensible approach to Internet form contracting. Internet contracts possess characteristics similar to contracts in both categories of cases in that they are delivered by a relatively novel method and they are often hidden behind links that do not advertise the contractual nature of the terms.

145. *Specht*, 306 F.3d at 32.

146. Fuller, *supra* note 26, at 816.

147. *Id.* at 800.

148. Parker v. Title & Trust Co., 233 F.2d 505, 510 (9th Cir. 1956).

149. Mutual of Omaha Ins. Co. v. Russell, 402 F.2d 339, 345-46 (10th Cir. 1968).

A. Agreements between Humans and Machines: A Half-Century of Common Law

The process of contracting by means other than face-to-face communication has challenged courts for at least 50 years. Courts were called upon to determine the enforceability of contracts entered into by mail[150] and by vending machine[151] long before the advent of click-wrap and browse-wrap terms presented on the Internet. Unlike the courts in today's Internet contracting cases, the courts in the vending machine cases recognized the unique contracting process created by the mechanized delivery of terms and imposed special duties on the offerors tailored to the special characteristics of the mechanized contracting process.

All of these cases dealt with contracts of insurance, and while they have been cited in some insurance decisions,[152] they have been virtually ignored by courts opining on the enforceability of standard form agreements[153] and have been *completely* ignored by courts struggling with the enforceability of terms presented electronically. The courts deciding these cases, like the courts deciding today's click-wrap and browse-wrap cases, recognized the economic desirability of presenting terms to offerees by methods other than human-to-human delivery. Just as today's courts have pointed out in upholding "pay first, terms later" contract formation that the recitation of contract terms by a human in a telephone transaction would be time consuming and possibly so boring as to thwart a sale,[154] yesterday's courts recognized that many more insurance policies could be sold by mail[155] or machine[156] than could be sold in person. However, yesterday's courts stressed that traditional contracting principles should apply with "special force" when contract terms are delivered

150. *See*, *e.g.*, Fritz v. Old Am. Ins. Co., 354 F. Supp. 514 (S.D. Tex. 1973).

151. *See*, *e.g.*, Steven v. Fid. & Cas. Co. of N.Y., 377 P.2d 284 (Cal. 1962); Lachs v. Fid. & Cas. Co. of N.Y., 118 N.E.2d 555 (N.Y. 1954).

152. *See* Jeffrey W. Stempel, *Lachs v. Fidelity & Casualty Co. of New York: Timeless and Ahead of its Time*, 2 NEV. L. J. 319, 320 (2002) (stating that "*Lachs* has long been either overlooked or treated as something of a novelty case because of its subject matter – 'vending machine' or 'self-service' flight insurance.").

153. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 598 (1991) (Stevens, J. dissenting) (citing *Steven v. Fidelity & Casualty Co. of New York* in discussion disapproving of "pay first, terms later" contracts).

154. *See*, *e.g.*, Hill v. Gateway 2000 Inc., 105 F.3d 1147 (7th Cir. 1997) (enforcing terms delivered inside a computer shipping box after the buyer ordered and paid for the computer by telephone, but did not return it within thirty days as specified in the enclosed terms).

155. *Fritz*, 354 F. Supp. at 518.

156. *Id.; Lachs*, 118 N.E.2d at 559.

by a machine.[157]

Today's courts should consider the guidelines suggested by the mail-order and machine-dispensed contract cases. The first important rule is that a vendor choosing a contracting method other than human-to-human delivery of terms should satisfy a buyer's reasonable expectations generated by its chosen delivery method.[158] Therefore, in one mail-order insurance case, the court held that the policy became effective when the applicant mailed the application, despite several statements in the application that the policy would become effective upon the company's acceptance of the application. In so holding, the court relied on the fact that the application encouraged applicants to "[a]ct now, [because] tomorrow may be too late."[159] Similarly, in a case in which an insurance company sold airline trip insurance from a vending machine, the court held that the policy covered travel on a non-scheduled airline regardless of the policy's statement to the contrary, in part, because the vending machine was located in an area of the airport used by non-scheduled airlines.[160] In both of these cases, the courts, in fashioning rules applicable to machine-delivered contracts, recognized that different methods of delivery send different signals to offerees.[161]

The fact that some important terms were not delivered to the buyers until after they were obligated to pay for their insurance was also important to courts analyzing machine-dispensed insurance policies. In one case, the vending machine had an aperture through which the buyer could view some, but not all of the policy's terms.[162] There was no proof that the buyer could see that the policy was limited to travel on "scheduled air carriers" prior to purchase.[163] Because the buyers did not know of the disputed terms until *after* purchase, the courts held that the hidden terms would be unenforceable.[164] As a result, because a reasonable person might have expected that a trip insurance policy would cover both the original transportation and substitute emergency transportation arranged by the original carrier, the court allowed the beneficiary of a trip insurance policy to recover when her husband was killed in the crash of a plane operated by a non-scheduled airline.[165] However, in another case, when an insurance company attached a sample of its

157. *Steven*, 377 P.2d at 293.
158. *Fritz*, 354 F. Supp. at 518.
159. *Id.*
160. *Lachs*, 118 N.E.2d at 558-59.
161. *Id.* at 559; *Fritz*, 354 F. Supp. at 518.
162. *Steven*, 377 P.2d at 286.
163. *Id.*
164. *Id.* at 298.
165. *Id.* at 288-89.

policy to its vending machine, the buyer was held to be bound to all terms, because he had the opportunity to read them before purchase.[166]

Another feature of machine-dispensed insurance policies that led courts to invalidate some of their terms was the short amount of time that a buyer was given to read the terms. The machines offering these contracts were located at airports next to airline ticket counters.[167] They dispensed only one copy of the policy: the copy to be sent to the beneficiary. As a result, the insured had little opportunity to learn what flights were covered.[168]

The courts deciding mail and machine contracting cases made much of the difference between man and machine. They all noted the rule that a contract is formed when two informed individuals agree to terms, but held that when terms are offered *without* a human being present, the offeror has an enhanced duty to inform. The courts stressed that when contract terms are delivered by humans, the human can answer questions. One court, while maintaining the fiction that a meeting of the minds can be achieved in the standard form contracting context, noted that "while the [insurance] applicant has a mind[,] the machine has none and cannot answer questions."[169] Because no one is available to answer questions when a contract is delivered by a machine, the offeror must use terms that are clear to the average person.[170] In the two machine-dispensed insurance cases, both courts found that the term "scheduled air carrier" was not one that had a common meaning apparent to the average person.[171] They noted that one would have to read a set of federal laws to determine that one's flight was not covered by the policy.[172] Such a lack of clarity made the absence of a person available to explain the policy fatal to the enforcement of the arguably confusing terms.[173]

While delivery of terms by vending machine is different in important ways from delivery of terms by a web site, the two methods of delivery are similar in an important respect: no human is available to explain the terms to the offeree. The courts of the 1950s and 60s recognized the significance of human interaction in the contracting process and as a result, placed a duty to explain on offerors choosing mechanized delivery of contract terms. For this

166. Merrill v. Fid. & Cas. Co. of N.Y., 304 F.2d 27, 29 (6th Cir. 1962).

167. *See, e.g., Steven*, 377 P.2d at 284; *Lachs*, 118 N.E.2d at 555.

168. *Steven*, 377 P.2d at 294.

169. *Lachs*, 118 N.E.2d at 559.

170. *See, e.g., Fritz*, 354 F. Supp. at 518; *Steven*, 377 P.2d at 293-94; *Lachs*, 118 N.E.2d at 558.

171. *Steven*, 377 P.2d at 290; *Lachs*, 118 N.E.2d at 560.

172. *Steven*, 377 P.2d at 290-92; *Lachs*, 118 N.E.2d at 558.

173. *Steven*, 377 P.2d at 298.

reason, the vending machine cases provide some important lessons for today's courts. For many years, decisions made by judges have informed machine design,[174] and the lessons taught by the courts deciding whether terms dispensed by vending machines were enforceable are valuable today as courts struggle with click-wrap and browse-wrap terms.

B. Other Terms in Novel Packaging

The vending machine and mail order cases illustrate the fact that courts are inclined to impose enhanced duties on offerors who use novel methods to deliver contract terms. Courts have also placed enhanced duties on offerors who offer terms whose physical manifestation serves a primary purpose other than as a contract. One prominent example of such a dual-purpose forms is the travel ticket.

There is already a duty to explain terms on paper. In the world of standard-form contracting cases involving travel tickets, courts have refused to enforce contract terms that were not "reasonably communicated" to the buyers.[175] This "reasonable communicativeness" test developed over the course of at least a century, beginning with the United States Supreme Court's 1897 decision in *The Majestic*.[176] The development of this test over the years is instructive for today's courts in that the rules regarding reasonable communicativeness changed as the public became more familiar with travel tickets.

In *The Majestic*, the Court evaluated whether a limitation of remedy term was incorporated into the Contract of Carriage. In determining that it was not, the Court divided the passengers' ticket in to two parts, the "contract proper" and the "notices."[177] Unless incorporated in the contract proper, notices were not binding on the passengers unless they were specifically called to the passengers' attention.[178] The contract proper was defined as the box on the face of the ticket that contained the name of the ship, the ports, the date of sailing, the fares, the passengers' names, and the carrier's signature.[179] Terms included in the contract proper were held to be

174. *See generally* Leon E. Wien, *Maladjusted Contrivances and Clumsy Automation: A Jurisprudential Investigation*, 9 HARV. J.L. & TECH. 375 (1996).

175. Although some courts define the test as one that determines the enforceability of forum selection clauses, *see*, *e.g.*, *Effron*, 67 F.3d at 7, 9, the test has also been used to invalidate clauses limiting liability, *see*, *e.g.*, *Wallis*, 306 F.3d at 827, 835-36, and clauses reducing the period in which a passenger can file suit, *see*, *e.g.*, Ward v. Cross Sound Ferry, 273 F.3d 520, 523-26 (2d Cir. 2001).

176. 166 U.S. 375 (1897).

177. *Id.* at 385.

178. *Id.*

179. *Id.* at 376-77.

binding on the passengers whether they read them or not.[180]

For almost 70 years, the courts followed the highly formal approach taken in *The Majestic*. If the "mere notices" were prominently referred to in the contract proper, the notices were held to be binding on the passengers.[181] If not, they were held not to be. As a result, a ticket that contained the warning "[a]cceptance of this Transportation Order by the passenger should be regarded as signifying his or her decision to abide by the Passage Regulations of [the steamship company]" on a form attached to the ticket proper was held not to include contractually binding passage regulations.[182] It appears that the courts focused on what would be obvious to the average passenger upon his first look at the ticket. Often the physical limits of the contract proper were defined by the placement of the carrier's signature.[183]

While the earlier courts approached the enforceability of terms and conditions as an incorporation by reference issue, later courts abandoned the incorporation by reference analysis and applied a "reasonable communicativeness" test to the ticket package as a whole. The "reasonable communicativeness" test retains the gist of the earlier analysis by requiring, as its first prong, an evaluation of the physical appearance of the ticket to determine whether the physical characteristics of the form placed the offeree on notice that the form contained legally binding terms.[184]

The "reasonable communicativeness" test goes a step further, however, by forcing the court to consider various subjective factors to determine whether the passenger had the ability to become meaningfully informed of the terms of the offered form.[185] To satisfy its obligations under this second prong, a court can consider "the time and incentive under the circumstances to study the provisions" of the form.[186]

Both parts of the test incorporate the kind of duty to explain that would be appropriate in Internet contracting cases. In applying the first part, courts look to see whether the offeror has adequately warned the offeree that the terms and conditions were "important matters of contract affecting his legal rights."[187] In evaluating

180. *Id.* at 384.

181. *See, e.g.,* Baron v. Compagnie Generale Transatlantique, 108 F.2d 21, 22-23 (2d Cir. 1939); Murray v. Cunard S.S. Co. Ltd., 139 N.E. 226, 228 (N.Y. 1923).

182. Baer v. N. German Lloyd, 69 F.2d 88, 89 (2d Cir. 1934).

183. *See*, *e.g.*, Maibrunn v. Hamburg-American S.S. Co., 77 F.2d 304, 306 (2d Cir. 1935).

184. *Wallis*, 306 F.3d at 835-36.

185. *Id.* at 836.

186. *Id*. (quoting Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1364 (9th Cir. 1987)).

187. Silvestri v. Italia Società per Azione di Navigazione, 388 F.2d 11, 17 (2d Cir.

whether or not the offeror satisfied this duty, courts consider factors such as the size of type and the conspicuousness of notice on the face of the form.[188] Standard forms satisfying this prong of the test tend to combine a boldface statement of the contractual nature of the offered terms on the face or first page of the form with a plain language statement of the fact that the offeree agrees to comply with the offered terms.

Because the idea behind the first prong of the reasonable communicativeness test is to impress upon the offeree the importance of the printed matter that follows, both the placement of the initial warning and its language are important. As a result, a cruise ship ticket that contained on its face the warning "IMPORTANT NOTICE – READ BEFORE ACCEPTING" in bold, medium-sized lettering was held to contain enforceable contract terms.[189] On the other hand, a ski lift ticket that contained no warning on its face that it contained important terms potentially affecting a skier's right to sue was held not to contain an enforceable forum selection clause. In that case, the forum selection clause was in small typeface on the back side of the lift ticket and the front of the ticket contained no instruction to read the back of the ticket.[190] Under this part of the test, the signal sent by the conspicuous warning substitutes for the signal sent by the signature line and triggers the duty to read.

The second part of the test incorporates a duty to explain, which serves as a substitute for an individual willing and able to explain terms. While it is expressly part of the "reasonable communicativeness" test set forth in the travel ticket cases, two major factors that courts consider in applying this second part were also integral to the holdings in the vending machine cases. The first is the amount of time that the offeree was given to read the terms. The lack of adequate time to read terms was one of the facts that led the court in *Steven* to hold that the insured could not have possibly assented to the offered terms.[191] Decades later, a court refused to enforce the terms of a ferry ticket against one of the boat's passengers because the passenger bought the ticket and then minutes later turned the entire ticket over to an agent in order to board the boat.[192]

The other factor important in mechanized contracting is the offeree's incentive to study the provisions of the form. In determining

1968).

188. Shankles v. Costa Armatori, S.P.A., 722 F.2d 861, 864 (1st Cir. 1983).

189. *See Effron*, 67 F.3d at 9.

190. O'Brien v. Okemo Mountain, Inc., 17 F. Supp. 2d 98, 103 (D. Conn. 1998).

191. 377 P.2d at 294 .

192. *Ward*, 273 F.3d at 526-27.

whether or not a standard form gives the offeree such an incentive, courts often look for a clear explanation of the contract terms. As a result, in *Wallis v. Princess Cruises* the court refused to enforce a limitation of damages that was described as "liability limitations . . . applicable to [Princess] under the Convention Relating to the Carriage of Passengers and Their Luggage by Sea of 1976."[193]

It may be very easy for Internet terms to satisfy this second prong for several reasons. The first is that an offeree can read the terms in his own home, free from the pressure of others standing in line behind him.[194] The other is that unfamiliar terms can be defined by the use of hyperlinks, thus providing a visually appealing presentation that might induce web surfers to seek out the definition of these terms.

VII. PAPER AND ELECTRONIC TRANSACTIONS: THERE IS A DIFFERENCE AND THE LAW RECOGNIZES IT

Both the Uniform Electronic Transactions Act ("UETA") and the federal Electronic Signatures in Global and National Commerce Act ("E-SIGN"), have as their underlying policies the elimination of barriers to electronic contracting. Historically, a major impediment to electronic commerce was the belief that electronic records and signatures were too ethereal to support large commercial transactions.[195] As a result, both acts strive to put electronic records on an equal legal footing with paper ones.[196] Placing electronic and paper records on an equal legal plane, however, is not the same as saying that there is no difference between electronic and paper records and both of the electronic transactions acts recognize the differences. The drafters of these acts recognized this, and stressed that while the purpose of both acts was to create "a basic legal structure recognizing and effectuating records and signatures generated electronically,"[197] once those media are recognized, the existing substantive rules of contract law should govern most questions. The Prefatory Note to UETA emphatically states that

193. 306 F.3d at 836-37 (9th Cir. 2002).

194. Hillman and Rachlinski make a similar point. *See* Hillman & Rachlinski, *supra* note 31, at 478.

195. Ben Beard, UNIF. ELEC. TRANSACTIONS ACT, Reporter's Memorandum (Aug. 15, 1997), *available at* http://www.law.upenn.edu/bll/ulc/uecicta/ect997.htm.

196. *See* Patricia Brumfield Fry, *Introduction to the Uniform Electronic Transactions Act: Principles, Policies and Provisions*, 37 IDAHO L. REV. 237, 248 (2001).

197. Beard, *supra* note 195. Similarly, the legislative history of E-SIGN indicates that the purpose of the Act is to ensure that "electronic signatures and electronic contracts will have the same legal effect and enforceability as paper signatures and contracts." H.R. REP. NO. 106-341, at 7 (1999).

UETA "is NOT a general contracting statute."[198] As I have illustrated in this article, the substantive law of contracts has historically developed new rules in response to new ways of transacting. Unfortunately, this distinction seems to be lost in some of the recent decisions involving electronic contracts.

The key mandate of both E-SIGN and the UETA is that a contract shall not be denied legal effect *solely* because it is in electronic form.[199] If paper and electronic communications were factually identical, the statutes would need to say no more. The statutes say much more, however. Both E-SIGN and the UETA allow an electronic record to suffice as a writing for the purpose of the statute of frauds and other legal requirements *only* if the electronic record satisfies the standards defined in the statutes.[200] These standards account for the factual differences between paper and electronic records.

One factual difference between paper and electronic communications is that paper communications have some permanence. If a person picks up his paper mail on a Thursday morning but knows that he will not have time to read it until Saturday afternoon, he knows that unless he throws the mail in the garbage, it will be available, in an unaltered form, for him to read on Saturday. The same does not necessarily hold true for electronic communications. Therefore, the idea that one must have adequate time to read and refer to terms has been incorporated into the electronic transactions acts. As a result, both acts provide that an electronic record is not enforceable if the record cannot be retained and reproduced.[201]

Two other sections, one in E-SIGN and one in the UETA, are notable for their recognition of the factual differences between paper and electronic communications. E-SIGN contains a section governing consumer disclosures that requires more disclosure in the electronic world than in the paper world. Under E-SIGN, if a law requires that a consumer be provided with information in writing, the use of an electronic record to provide such information satisfies the writing requirement only if certain statutory requirements are met.[202] One requirement is that the consumer must affirmatively consent to the

198. Prefatory Note, UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7 (1999).

199. E-SIGN, *supra* note 8, § 7001(a) (emphasis added); UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 7.

200. E-SIGN, *supra* note 8, § 7001(a).

201. E-SIGN, *supra* note 8, § 7001(e); UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 8. The UETA and E-SIGN differ on this point. E-SIGN denies enforceability of such record only when another law imposes a writing requirement while the UETA does so in all transactions.

202. E-SIGN, *supra* note 8, § 7001(c).

use of electronic records in the transaction.[203] In addition, the consumer must be provided with the option to receive the record in paper form and to terminate her consent to the use of electronic records.[204] Importantly, a consumer must either consent electronically to the receipt of electronic notices or confirm such consent electronically in a manner that demonstrates her ability to access electronic information.[205] These requirements recognize important differences between paper and electronic communications. While everyone can receive and open a paper envelope, there are many individuals who cannot receive and open electronic records.

The UETA recognizes that it might be easier to enter into a contract inadvertently if the contract terms are presented electronically rather than on paper. In its section on contracts between individuals and electronic agents (think of the contract between the 21st century traveler and Flyme.com from Scene #2 in the Introduction to this article), the UETA requires that the offeree be given the chance to prevent or correct mistakes in the electronic record as a prerequisite to the record's enforceability.[206] For instance, if the traveler had mistakenly made a reservation to travel from Philadelphia to San Antonio instead of to San Diego and Flyme.com did not give her the opportunity to review and correct her reservation before becoming bound to pay, the traveler would not be required to pay. In the paper world, the law assumes that if the buyer holds contract terms in her hands, she has the opportunity to read the terms and correct mistakes. These sections recognize that while there is no duty to explain contract terms, most individuals would like the appearance, however ephemeral, of a person willing and able to explain terms.

As cases involving electronic modes of communication have made their way to the courts, at least one court has recognized that, despite the proliferation of electronic communication, people do not view paper and electronic communications equally.

In *Campbell v. General Dynamics Government Systems Corp.*,[207] a case involving a dispute resolution provision contained in a company's employment manual, the court refused to find that notice of the change in policy was adequate because it was sent in a mass e-mail to the company's employees. While this case deals with the enforceability of an arbitration clause and has a heavy civil rights focus, the court's pronouncements about the difference between

203. *Id.* § 7001(c)(1)(A).

204. *Id.* § 7001(c)(1)(B)(i).

205. *Id.* § 7001(c)(1)(C)(ii).

206. UNIF. ELEC. TRANSACTIONS ACT, *supra* note 7, § 10.

207. 321 F. Supp. 2d 142 (D. Mass. 2004), *aff'd* 407 F.3d 546 (1st Cir. 2005).

electronic and paper communications are useful as an illustration of common perceptions about electronic communications. In that case, the court based its holding, in part, on its belief that the receipt of an e-mail message is not the same as receipt of a paper letter in an envelope.[208] One of the reasons for this belief was the sheer bulk of e-mail that people receive daily and the ease of deleting bulk e-mail messages with out reading them.[209] The court noted that employees routinely delete mass e-mails without reading them, because so many relate to trivial matters such as company functions and birthdays.[210] While one can make the same arguments about bulk paper mail, the courts in electronic contracting cases tend not to even acknowledge the possibility that paper and electronic communications might be perceived differently and therefore treated differently.

UETA and E-SIGN are desirable developments in that they remove important barriers to electronic contracting, but lawyers should not rely on them to support the argument that paper and electronic communications are factually identical. The statutes preserve the substantive law of contracts, a law that has adapted over the years to account for the different signals sent by different methods of communication.

VIII. DIFFERENCES BETWEEN FACE-TO-FACE AND REMOTE TRANSACTIONS: THE MARKETERS AND COMPUTER SCIENTISTS SPEAK

For decades, scholars in the marketing and computer science fields have studied and reported on the differences between face-to-face and remote transactions. Many researchers have studied consumer perceptions of remote transactions and have found that consumers believe that remote transactions are riskier than face-to-face transactions. Many of these studies have found that the perception of risk stifles the growth of new types of transactions. These studies are valuable from a legal perspective because they illustrate the differences in consumer perceptions, differences that are essential to a determination of when an individual is bound by contract terms delivered electronically.

The recognition that remote transactions present risks different from those in face-to-face transactions is not unique to the Internet age. In the 1960s two business school professors, Donald Cox and Stuart Rich, studied perceived risk in telephone shopping.[211] While

208. *Id.* at 148-49.

209. *Id.* at 148.

210. *Id.*

211. Donald F. Cox & Stuart U. Rich, *Perceived Risk and Consumer Decision-Making – The Case of Telephone Shopping*, J. MKTG. RESEARCH, Nov. 1964, at 33.

their article is quite quaint from a sociological standpoint (the subjects of the telephone shopping survey were all women, described as "housewives"), their study is highly relevant today in determining the different transactional risks that individuals perceive when transactions are conducted remotely.

Like Internet shopping today, telephone shopping in the 1960s was regarded as a wonderful new convenience.[212] Despite the convenience of telephone shopping, many individuals in the 60s, in fact most of the women in the Cox and Rich study, were reluctant to buy goods over the phone.[213] The Cox and Rich hypothesis was that the "additional elements of potential uncertainty" present in telephone shopping acted as a deterrent to this type of shopping.[214]

Contributing to such potential uncertainty were the absence of a variety of means of collecting information. One such method of collecting information, of course, was talking to a knowledgeable salesperson.[215]

Cox and Rich were not discussing whether new laws were necessary to govern telephone shopping, rather, they were studying ways in which the perceived risks could be reduced in order to encourage this very desirable type of shopping. Because they concluded that the availability of information would alleviate the perceived risks of telephone shopping, they suggested that more information, both in newspaper advertising and from telephone sales people, should be readily available.[216] Thus they suggested that more and better information could compensate for the risks of remote transactions.[217]

Three other marketing professors studied perceived risk in mail order shopping and came to a similar conclusion.[218] Their study, which compared perceptions of mail-order and retail store buying, found that individuals perceived more risk in buying by mail than in buying from a salesperson in a store.[219] Significantly, they focused their attention on different buying situations rather than on different products in order to convince marketers to consider perceived risk in

212. *Id.* ("Instead of the dressing, shopping, walking, looking, waiting and carrying which characterize an in-person shopping expedition, the telephone shopper merely picks up the phone, dials, orders, and awaits delivery, usually within 48 hours.")

213. *Id.* at 38.

214. *Id.* at 33.

215. *Id.*

216. Cox & Rich, *supra* note 211, at 39.

217. *Id.*

218. Homer E. Spence, James F. Engel & Roger D. Blackwell, *Perceived Risk in Mail-Order and Retail Store Buying*, J. MKTG. RESEARCH, Aug. 1970, at 364.

219. *Id.* at 367.

their marketing of mail-order sales.[220]

While it is not the thesis of this article that Internet transactions are riskier than paper transactions, the observations of the marketing scholars are relevant to the thesis that signals must be accounted for in determining when an offeree is bound by terms delivered electronically. The law of contracts has developed mechanisms to compensate for the lack of human interaction; the response is usually to require more and clearer information as a prerequisite to finding assent.

Today, scholars continue to study perceived risk, but today's scholars focus on the Internet. In the early days of the World Wide Web, Sirkka Jarvenpaa and Peter Todd published their study of consumer reactions to shopping on the World Wide Web.[221] In their study, they concentrated on the consumer-centered view of Internet retailing, rather than the technology-centered view.[222] In other words, while they noted that reliable technology is necessary to consumer acceptance of Internet shopping channels, they focused on the factors that have influenced adoption of a range of retail shopping options. The subjects in the Sarvenpaa and Todd study cited numerous factors that were salient in their decisions to shop online.[223] Particularly relevant in determining when an individual can be deemed to have assented to online terms are two of these factors: effort and responsiveness.[224]

Many subjects in the Jarvenpaa and Todd study believed that Web sites were difficult to navigate.[225] These consumers found that they had to take too much time and too many steps to find what they wanted on the Internet. Two comments provided by subjects highlight some differences between paper and electronic communications: "I am familiar with the paper printed versions of their products which is [sic] a lot easier to view than on screen," and "I probably get 20 catalogs a week . . . I can lay them all out at once and compare prices and quality and that kind of thing. You cannot do that with the World Wide Web; it was very limited."[226] If comments such as these are typical of Internet users, it does not make sense to interpret a Web site in the same way as a paper communication for the purposes of judging assent in the contract formation process.

Responsiveness was also important to the study's participants

220. *Id.* at 365.

221. Sirkka L. Jarvenpaa & Peter A. Todd, *Consumer Reactions to Electronic Shopping on the World Wide Web*, INT'L J. OF ELEC. COMM., Winter 1996-97, at 59.

222. *Id.* at 61.

223. *See id.* at 69-71.

224. *Id.* at 72-73.

225. *See* Jarvenpaa & Todd, *supra* note 221, at 72.

226. *Id.* at 74.

and they tended to identify the most responsive sites as the best sites.[227] The subjects' comments regarding responsiveness provide some insight into what Internet users want to see in lieu of a human able to explain terms.[228] Information is an essential component of a Web site's responsiveness, and the information must be presented clearly.[229] Among the biggest problems noted by the survey participants were missing and inactive hyperlinks and incomprehensible hyperlinks.[230]

Courts should not ignore marketing research when fashioning rules of assent applicable to Internet contracts. If, in the world of standard-form contracting, an offeree can be deemed to assent to terms *only* if those terms are reasonably communicated to her, the factual differences between paper communication and electronic communication must be taken into account.

VIII. CONCLUSION: RECOGNIZING THE IMPORTANCE OF SIGNALS IN INTERNET CONTRACTING

Since the advent of the World Wide Web, Internet business has been viewed as a desirable development, and one that is to be encouraged and facilitated. This belief about Internet business is reflected in UETA and E-SIGN, legislation designed to remove the barriers to electronic commerce.[231] The desire to encourage and protect Internet commerce is similarly reflected in the developing common law of electronic contracting. Internet businesses are protected by decisions that uphold contracts when there is something that looks like explicit assent (an "I agree" icon), and when competitors violate on-line terms and conditions to gain a competitive advantage. On the other hand, while decisions like *Specht v. Netscape*[232] appear to harm Internet businesses by refusing to enforce on-line terms, Netscape's mistake might have been easily remedied by the addition of words of assent above the "Download Now" icon.

The proliferation of online terms begs a more principled approach. While today's judicial approach to the issue of assent in Internet contracting may be appealing to businesses offering goods and services online, it is deficient in several respects. First, the existing judicial decisions discussing the issue give scant guidance to businesses in designing their Web sites. Second, business-to-consumer Internet contracts are standard form contracts, and they

227. *Id.* at 75.

228. *See id.* at 76.

229. *See* Jarvenpaaa & Todd, *supra* note 221, at 73.

230. *Id.*

231. *See supra* note 9 and accompanying text.

232. 306 F.3d 17 (2d Cir. 2002).

will always be subject to criticism because of the fictional nature of assent to them.

Courts are often reluctant to police the content of standard forms but they regularly police form. In regulating the form of Internet contracts, judges must consider the ways in which individuals perceive electronic communications. If courts recognize the different signals sent by paper and electronic communications, they can impose a duty to explain on offerors of electronic terms. The imposition of such a duty would not contravene the policies underlying UETA and E-SIGN because there already is a duty to explain terms in the paper world of standard form contracting.

Courts should have the opportunity to develop standards for determining when an Internet contract sufficiently explains itself. These standards should apply equally to click-wrap and browse-wrap agreements. Judges' conceptions of what an average Internet user should expect should evolve in the same way that their conceptions of what an average cruise ship passenger should see evolved throughout the years. In the paper world many people believe that asking a party to sign a contract emphasizes the solemn nature of the contractual undertaking,[233] so it is not unreasonable to believe that many people asked to click an "I agree" button *might* know to take the offered terms seriously. Yet the Internet is not old enough for the world to assume that *everyone* knows to do so. Therefore, judges should consider whether the "I agree" button standing alone is the same as a signature line, which has long been seen as a signal of seriousness.

Given the relative youth of the World Wide Web, it is possible that the click requirement does not send a signal to offerees to take the transaction seriously. If judges find that this is the case, they could require Internet vendors be more explicit, by requiring a more affirmative act than simply a click. Some web sites do this already. For instance, a person purchasing a US Airways Club membership online must type her initials in a box next to the statement "[p]lease type your initials to indicate you have read and agree to all the terms of membership and applicable charges stated above" before she can complete her purchase.[234] Other Internet vendors have, as the default position, the phrase "I don't agree." On these Web sites, the box next to the statement "I do not agree" is checked when the user reaches the terms and conditions page and in order to complete a purchase, the buyer must check the box next to the statement "I agree" before

233. *See*, *e.g.*, Hillman and Rachlinski, *supra* note 31, at 481; Juliet M. Moringiello, *Revised Article 9, Liens From the Fringe, and Why Sometimes Signatures Don't Matter*, 10 WIDENER J. PUB. L. 135, 150 (2001); Patrick A. Randolph, Jr., *Has E-SIGN Murdered the Statute of Frauds?,* PROB. & PROP. July/Aug. 2001, at 23-24.

234. US Airways Club Enrollment, https://www.secure.usairways.com/secure/club_application.htm (last visited July 26, 2005).

proceeding.[235]

Despite the fact that browse-wrap terms do not invite an outward manifestation of assent, courts should not be reluctant to uphold them. In the paper world, a handwritten signature is not always a necessary prerequisite to an enforceable contract. To compensate for the signals that are lost due to the absence of a signature line, adequate notice of reasonable terms has long been used as a substitute for assent. The cruise ship passenger is not required to sign the terms attached to her ticket, but if the ticket reasonably communicates its terms to the buyer, she is bound by them.[236] Courts must incorporate the signals sent by electronic communications into their reasonable communicativeness analysis.

Standard form agreements presented in a browse-wrap format can provide better notice of their terms than both their mechanized predecessors and paper forms. Fatal to the machine-dispensed insurance cases was the fact that the buyers could not inform themselves of the contract terms at all before purchasing their policies. They did not have the benefit of x-ray vision which would have allowed them to see the hidden terms and there was no human available to explain the terms. When terms are presented in a browse-wrap format, no term is truly hidden; all terms can be seen by clicking on a link. No term need be ambiguous; a prudent web site owner could provide links explaining terms that might not be familiar to the average web site user. Currently, eBay does exactly that by providing in its User Agreement a link to its Frequently Asked Questions page.[237] Unlike many standard-form agreements, browse-wrap agreements are delivered to offerees in their homes or offices, where they may have unlimited time to read and understand the terms.

The important task facing courts analyzing browse-wrap agreements is determining when the website owner satisfies the reasonable expectations of the web site user. In doing so, courts will be called upon to determine what web site users expect to see on a site's homepage, and will need to answer a number of questions. The

235. The enrollment process for Hertz #1 Club Gold incorporates these features. *See* Hertz #1 Club Gold Enrollment eConsent, https://www.hertz.com (follow "Hertz #1 Club Gold" hyperlink under "#1 Club", then follow "Join Now" hyperlink) (last visited July 26, 2005).) An American Bar Association Working Group, of which the author of this article is a member, recommended a number of strategies for avoiding disputes on the validity of assent in the click-wrap process. These strategies account for the different signals sent by paper and electronic communications. *See generally* Kunz, *Click-Through*, *supra* note 52.

236. *See* Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 9 (2d Cir. 1995).

237. eBay, Your User Agreement, http://pages.ebay.com/help/policies/user-agreement.html (last visited July 26, 2005).

challenge of browse-wrap lies in the appearance of the websites presenting such agreements. When do the links notify the web site user of important terms? Does the reasonable user know that a link entitled "Legal" at the top of a page contains important contract terms? Does a reasonable user know that the existence of a scrollbar means that the webpage might contain important information below the fold? As terms of use become widely recognized, it is possible that courts will find that every Internet user should know that the use of a website does not come without strings and that the use of all websites is potentially conditioned by terms of use. Until then, as courts struggle with this new type of contract they should consider the different signals sent by paper and electronic communications and develop their rules of assent accordingly.