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## NOTE

# The Electronic “Sign-in-Wrap” Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability

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## INTRODUCTION

Six years ago during a speech to students at Canisius College in New York, Chief Justice Roberts confessed that he does not usually read the fine print when accessing some websites.<sup>1</sup> Roberts admitted that the small print and overwhelming amount of information contained in those contracts is a “problem” for consumers.<sup>2</sup> Today, the legal field continues to struggle with how to address different kinds of electronic contracts, both in academia<sup>3</sup> and in the judicial system.<sup>4</sup> While the law is relatively settled for some forms of electronic contracts,<sup>5</sup> newer forms do not have clear rules for determining their validity.<sup>6</sup>

In *Berkson v. Gogo, LLC*, Judge Weinstein of the U.S. District Court for the Eastern District of New York addressed a new type of electronic contract, designating it a “sign-in-wrap.”<sup>7</sup> The opinion is significant both for its brevity and treatment of the issues surrounding electronic contracts, and for its novelty in this area. Judge Weinstein, an extremely well-known and respected judge, describes these contracts as electronic contracts of adhesion that combine elements of two kinds of electronic contracts — clickwrap contracts, where users click “I agree” to accept terms, and browsewrap contracts, where users agree to terms simply by using or visiting a website.<sup>8</sup> Somewhat unusually, the *Berkson* court found the sign-in-wrap contract in this

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<sup>1</sup> Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, A.B.A. J. (Oct. 20, 2010, 12:17 PM CDT), [http://www.abajournal.com/news/article/chief\\_justice\\_roberts\\_admits\\_he\\_doesnt\\_read\\_the\\_computer\\_fine\\_print](http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print) (reporting on Chief Justice Roberts' speech addressing fine print, cameras in court, and President Obama's State of the Union address).

<sup>2</sup> *See id.*

<sup>3</sup> Compare Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 219-20 (2000) (arguing that existing law in the area of e-commerce, including electronic contracting, is limited and should be developed to address new issues that have arisen because of the increased use of technology in business), with Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 456 (2012) (arguing that except in limited circumstances, the common law of contracts is able to address most electronic contract issues).

<sup>4</sup> *See infra* Part I (providing a background of the competing decisions of various courts).

<sup>5</sup> *See infra* Part I.A (describing the current law regarding clickwrap, scrollwrap, and browsewrap contracts).

<sup>6</sup> *See infra* Part I.B (describing the emerging legal theories regarding hybrid clickwrap/browsewrap contracts).

<sup>7</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 366 (E.D.N.Y. 2015).

<sup>8</sup> *See id.*

case invalid because it did not give the users proper notice or show manifestation of assent.<sup>9</sup> Many other lower courts have reached different conclusions on this issue, with several finding that these types of contracts are valid and do not raise new contract concerns.<sup>10</sup>

Part I of this Note will provide the relevant history of electronic contracts of adhesion, including a brief overview of the law with regard to various kinds of electronic contracts.<sup>11</sup> In addition, this section will address the recent cases that involve the type of hybrid contracts Judge Weinstein reviewed.<sup>12</sup> These cases contain fundamental differences in the interpretation of the law that go beyond the basic structure of the website contracting forms. For clarity, this paper will adopt Judge Weinstein's term and call these contracts "sign-in-wraps."

The fundamental differences between these contracts types will be addressed in Part II, as the judicial approaches and opinions on the contract requirements define the current judicial conflict.<sup>13</sup> One area of conflict revolves around the requirements of notice and assent, which affects both the structure and content of sign-in-wrap contracts.<sup>14</sup> A related area of contention is the "average Internet user" standard that presumes Internet literacy, causing problems when that presumption is unfounded or unclear.<sup>15</sup> Finally, Part II provides an analysis of the doctrine of unconscionability as it relates to electronic contracts, and specifically the sign-in-wrap.<sup>16</sup>

In *Berkson*, Judge Weinstein adopts a four-part inquiry for the evaluation of sign-in-wrap contracts.<sup>17</sup> Part III examines this test, finding that it would provide stronger rules for the requirements of these contracts regardless of consumers' backgrounds.<sup>18</sup> However, though Judge Weinstein's approach would make it easier for courts to regulate these contracts, it assumes levels of Internet literacy that are not guaranteed.<sup>19</sup> I argue for a modified "Berkson Test" that allows the

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<sup>9</sup> See *id.* at 367.

<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> See *infra* Part I.A.

<sup>12</sup> See *infra* Part I.B.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part II.A.

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> See *infra* Part II.C.

<sup>17</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 402-03 (E.D.N.Y. 2015) (arguing that it is better to have "hard-edged" rules to govern these kinds of contracts).

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part III.

court to take into account individuals’ experience to address the Internet literacy issue.<sup>20</sup> Part IV provides an overview of how some courts have chosen to implement *Berkson* in the last year.<sup>21</sup> It also addresses a recent case, *Salameno v. Gogo Inc.*, also decided by Judge Weinstein, that presents some tension with the *Berkson* decision.<sup>22</sup> I conclude that ultimately, assessing the validity of newer forms of electronic contracts of adhesion requires contract law that considers the unique issues presented in these electronic contracts.

## I. BACKGROUND: ELECTRONIC CONTRACTS OF ADHESION

### A. *Current Law on the Validity of Clickwrap, Scrollwrap, and Browsewrap Contracts*

The electronic contracts addressed in this section are contracts of adhesion that require the consumer to agree to all the terms or refuse the contract altogether.<sup>23</sup> Another characteristic of these contracts is that consumers have virtually no bargaining power.<sup>24</sup> This means that although the contracts are generally valid,<sup>25</sup> courts may look closer at their provisions if challenged.<sup>26</sup> Rather than treating all electronic contracts the same, courts have addressed the different contract forms individually. In general, courts find clickwrap and scrollwrap contracts to be valid, while browsewrap contracts require courts to look more closely at individualized facts of the case.

Clickwrap contracts require Internet users to affirmatively click “I agree” when assenting to the terms and conditions on a website or making online purchases.<sup>27</sup> For example, in *Feldman v. Google, Inc.*, the court enforced a forum selection clause in an online clickwrap

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<sup>20</sup> See *infra* Part III.B.

<sup>21</sup> See *infra* Part IV.A.

<sup>22</sup> See *infra* Part IV.B.

<sup>23</sup> See Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 855-57 (1964) (discussing the history of adhesion contracts and defining them as form contracts where one party has distinctly more or all of the bargaining power).

<sup>24</sup> *Id.* at 856.

<sup>25</sup> See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

<sup>26</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (finding that although form contracts are valid, they must still go through judicial scrutiny for fairness to the consumer as well as inquiry into potential bad motives of the party holding the bargaining power); *Barnett v. Network Sols., Inc.*, 38 S.W.3d 200, 203 (Tex. 2001) (finding that even though “non-negotiated form contract[s] [are] valid,” such contracts are “subject to judicial scrutiny for fundamental fairness.”).

<sup>27</sup> *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

agreement, rejecting the plaintiff's argument that he did not have notice or assent to the terms and conditions.<sup>28</sup> The decision put great emphasis on the fact that a user had to specifically click the link that stated, "Yes, I agree to the above terms and conditions"<sup>29</sup> in order to use the product. Similarly, in *i.Lan Systems, Inc. v. Netscout Service Level Corp.*, the court found that the plaintiff had explicitly assented to the terms of a clickwrap agreement simply by clicking "I agree."<sup>30</sup>

Courts also generally find scrollwrap contracts enforceable, as they require users to scroll through the terms and conditions before they can agree.<sup>31</sup> In *Barnett v. Network Solutions, Inc.*, the court rejected plaintiff's contention that he did not have adequate notice of the forum selection clause.<sup>32</sup> Rather, the court examined the structure of the agreement, which required users to scroll through the terms and conditions before they could access the product.<sup>33</sup> The court then concluded that the contract by its very form required demonstrated assent.<sup>34</sup>

Not every court identifies these contracts as "scrollwrap" because they also generally require the user to click "I agree," making them look like clickwrap agreements.<sup>35</sup> However, the structure of these agreements is distinguishable, as clickwrap agreements do not always require the user to scroll through the terms.<sup>36</sup> The scrolling arguably provides even greater protection for the consumer because he or she cannot just click "I agree" without looking at the terms and conditions.

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<sup>28</sup> *Id.* at 237 (finding the forum selection clause in the clickwrap contract enforceable where plaintiff allegedly suffered from clickwrap fraud after purchasing defendant's advertising product).

<sup>29</sup> *Id.*

<sup>30</sup> *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 336-38 (D. Mass. 2002) (reviewing the clickwrap agreement at issue and finding it enforceable primarily due to the explicit assent shown by the requirement of clicking "I agree").

<sup>31</sup> See *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 398-99 (E.D.N.Y. 2015) (describing scrollwrap contracts and providing a visual).

<sup>32</sup> *Barnett v. Network Sols., Inc.*, 38 S.W.3d 200, 203-04 (Tex. 2001) (rejecting plaintiff's argument that the clause was buried in the registration agreement and not readily apparent).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 204. The court also noted that it was Barnett's own responsibility to read the contract. *Id.* Therefore, because the disputed clause was clearly stated in the registration agreement, he had no substantial argument as to lack of notice. *Id.*

<sup>35</sup> See, e.g., *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1257-58 (10th Cir. 2012) (holding an electronic contract valid when consumers had to scroll through terms and then click "I Agree" during registration for the product, but identifying the contract as a "clickwrap").

<sup>36</sup> See, e.g., *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007) (providing an example of a clickwrap agreement where a user could, but was not required to, scroll through the terms and conditions before agreeing).

In contrast to clickwrap and scrollwrap contracts, courts tend to take a closer look at the individual circumstances surrounding browsewrap agreements.<sup>37</sup> Browsewrap contracts occur when the user agrees to the terms of the website by merely using the website or searching for information there.<sup>38</sup> These contracts are unenforceable if the court determines that the user did not have notice of the terms and conditions.<sup>39</sup> Such was the case in *Specht v. Netscape Communications Corp.*,<sup>40</sup> where the court held a browsewrap contract unenforceable because the structure of the website required the user to search for the terms.<sup>41</sup>

As discussed above, the law as it applies to these contracts is fairly settled. However, courts have discretion to determine if the structure of the contract or website gives users reasonable notice of the terms or requires express assent.<sup>42</sup> Drawing on these legal principles provides important context for evaluating new forms of electronic contracts of adhesion, such as the hybrid “sign-in-wrap” contract.

B. *The Judicial Conflict over Electronic “Sign-in-Wrap” Contracts:  
A Comparison of Berkson and Fteja*

In the recent *Berkson v. Gogo, LLC* decision,<sup>43</sup> Judge Weinstein addressed a new form of electronic contract that incorporates elements

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<sup>37</sup> See, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002) (holding an electronic contract of adhesion unenforceable because a “reasonably prudent Internet user” would not have cause to know the software’s license terms because of the website’s structure); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1066 (D. Nev. 2012) (finding the arbitration clause in an electronic browsewrap contract unenforceable).

<sup>38</sup> See *In re Zappos.com*, 893 F. Supp. 2d at 1066.

<sup>39</sup> See, e.g., *id.* (holding the arbitration clause in the electronic browsewrap contract unenforceable due to a lack of notice of the terms and conditions because the terms were located in an “inconspicuous hyperlink” at the bottom of the page).

<sup>40</sup> *Specht*, 306 F.3d at 20.

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., *id.* at 29-30 (stating that in California, courts evaluate assent based on an objective standard that takes into account the context of the transaction); *In re Zappos.com*, 893 F. Supp. 2d at 1063-65 (summarizing several court decisions determining whether users had notice and concluding that there was no notice or assent in the present case under the circumstances); *Koch Indus., Inc. v. Does*, No. 2:10-CV-1275-DAK, 2011 WL 1775765, at \*9 (D. Utah May 9, 2011) (finding that the hyperlink to the terms on the bottom of the page could not constitute adequate notice for assent because this website structure did not have a method for people to manifest assent).

<sup>43</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015). Although the *Berkson* case is currently on appeal with the Second Circuit and thus not binding on state or federal courts, it is an important decision that summarizes the history and

of both clickwrap and browsewrap contracts.<sup>44</sup> These contracts merge users' agreement to website terms with signing up for the website services.<sup>45</sup> In *Berkson*, the website structure presented the user with a sign-in screen that requested the user's username and password.<sup>46</sup> Underneath, there was the text: "By clicking 'Sign In' I agree to the terms of use and privacy policy."<sup>47</sup> The terms of use and the privacy policy were then hyperlinked so a user could, but did not have to, click to view those items.<sup>48</sup> Here, I have included the images of these contracts as provided in *Berkson*:<sup>49</sup>

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current law regarding electronic contracts of adhesion, and it outlines a firm approach to dealing with these contracts. *Id.* at 394-403. Additionally, the judicial and legal community is already taking note of this decision. See *Whitt v. Prosper Funding LLC*, No. 1:15-CV-136, 2015 WL 4254062, at \*4-5 (S.D.N.Y. July 14, 2015); *Wilson v. Kellogg Co.*, 111 F. Supp. 3d 306, 313 (E.D.N.Y. June 25, 2015); Adam Ruttenberg, Diane Savage & Charles Schwab, *New York District Court Articulates New Test for Assessing the Validity and Enforceability of Online Agreements*, LEXOLOGY (July 14, 2015), <http://www.lexology.com/library/detail.aspx?g=60ab5224-0664-4418-a4ee-2084b95a4ddb> (recommending that companies review their electronic contract agreements and potentially even change their contracts to a scrollwrap or clickwrap format in order to protect contracts from invalidity challenges).

<sup>44</sup> See *Berkson*, 97 F. Supp. 3d at 399.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 374-75 (providing an annotated visual of the website structure).

<sup>47</sup> *Id.* at 374.

<sup>48</sup> *Id.* Judge Weinstein also notes that this phrase appears in lowercase and in a much smaller font than the "Sign In" button located below the small text. *Id.*

<sup>49</sup> *Id.* at 371-73 (providing annotated screenshots of the plaintiffs' various sign-in-wrap contracts).

### Create Account

**sign in/sign up**

**Contact Information**

Title: Select

\* First Name: [input field]

\* Last Name: [input field]

\* Email: [input field]

\* Confirm Email: [input field]

**Username**

\* Username: [input field]

\* Confirm Username: [input field]

Reminder Question: Select

\* Answer: [input field]

**Password**

\* Password: [input field]

\* Confirm Password: [input field]

\* Reminder Question: Select

\* Answer: [input field]

I agree to the Terms of Use

I would like to receive email offers and news from Gogo

Tip: Lorem ipsum dolor sit amet, consectetur adipiscing elit, Nunc tempor.

**Order Summary**  
\$9.95 Single Pass

Need Assistance?  
Have a question or need more information?  
[Chat Live with Gogo](#)  
[Read FAQs](#)

\* indicates required fields

**\* indicates required fields**

**I agree to the Terms of Use**

**NEXT** **CANCEL**



Judge Weinstein asserted that under this structure the plaintiffs were not given required notice of the terms and conditions.<sup>50</sup> Therefore, they were not subject to the contractual venue and arbitration requirements.<sup>51</sup> Central to this determination was that the larger, more user-friendly sign-in button served to hide, or at least make inconspicuous, the terms and conditions link.<sup>52</sup> Additionally, plaintiffs never had a copy of the contract emailed to them or available for print-out without clicking the links.<sup>53</sup>

*Berkson* contrasts strongly with *Fteja v. Facebook, Inc.*,<sup>54</sup> where the court chose to enforce a nearly identical electronic contract as the one at issue in *Berkson*.<sup>55</sup> The *Fteja* court noted that the contract in question had aspects of both clickwrap and browsewrap contracts.<sup>56</sup> This structure required the court to look beyond the settled contract

<sup>50</sup> *Id.* at 403-04.

<sup>51</sup> *Id.*; see also Rachel Hirsch, *It's a Wrap: Gogo In-Flight Wi-Fi Case Signals Possible End to How Companies Display Internet Contracts*, 61 No. 4 PRAC. LAW 43, 44-45 (2015) (discussing the *Berkson* case and possible implications for internet contract structuring).

<sup>52</sup> See *Berkson*, 97 F. Supp. 3d at 401-04.

<sup>53</sup> *Id.* at 403.

<sup>54</sup> *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839-40 (S.D.N.Y. 2012) (finding a forum selection clause enforceable in a contract that was a combination of a browsewrap and clickwrap).

<sup>55</sup> See *id.* at 834 (describing Facebook's electronic contract as one that requires users to agree to the website terms at the time they sign up for the services).

<sup>56</sup> *Id.* at 838.

categories discussed above. Interestingly, because the plaintiff had the opportunity to click on the terms via the provided hyperlink,<sup>57</sup> the court concluded that this was enough to give him notice.<sup>58</sup> As such, clicking the “sign in” button constituted assent to the terms.<sup>59</sup>

Several other courts have addressed sign-in-wrap contracts with varying results.<sup>60</sup> For example, in *Vernon v. Qwest Communications Intern., Inc.* the court found the sign-in-wrap contract enforceable because the plaintiffs affirmatively agreed to the conditions.<sup>61</sup> The act of clicking “I agree” manifested assent even though the website never required the plaintiffs to actually read the terms.<sup>62</sup> Similarly, in *Swift v. Zynga Game Network, Inc.* the court upheld what it described as a “modified clickwrap” contract.<sup>63</sup> This contract’s terms of service were not explicitly provided on the sign-in page, but rather linked in blue hyperlink below the “Allow” button that permitted the user to continue the login.<sup>64</sup> The court determined that the contract was binding because the plaintiff clicked “Allow,” even though she did not know she was agreeing to an arbitration clause.<sup>65</sup>

In contrast, the court in *Nguyen v. Barnes & Noble, Inc.* refused to enforce an online contract due to the structure of the website.<sup>66</sup> Although the court identifies the contract at issue as a browsewrap, it is clear from the website structure that it would fall into the category of Judge Weinstein’s sign-in-wrap.<sup>67</sup> The website had the hyperlink to the terms and conditions listed in small text below a button the user

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<sup>57</sup> *Id.* at 839-40 (finding that the hyperlinked terms on the sign-in page provided ample opportunity for the user to review said terms, giving him sufficient notice).

<sup>58</sup> *Id.* at 840.

<sup>59</sup> *Id.*

<sup>60</sup> *See, e.g.,* *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1177-79 (9th Cir. 2014) (finding the contract unenforceable because of the design of the website); *Vernon v. Qwest Commc’ns Int’l, Inc.*, 925 F. Supp. 2d 1185, 1190-92 (D. Colo. 2013) (affirming magistrate judge’s order to compel arbitration pursuant to an arbitration clause in a sign-in-wrap form contract, even though plaintiffs alleged the terms were inconspicuous and presented in a convoluted manner); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 910-12 (N.D. Cal. 2011) (finding a “modified” form of clickwrap contract enforceable).

<sup>61</sup> *Vernon*, 925 F. Supp. 2d at 1191 (finding that it was the consumers’ responsibility to read and understand the contract terms if they were going to click that they agreed to them).

<sup>62</sup> *Id.*

<sup>63</sup> *Swift*, 805 F. Supp. 2d at 912.

<sup>64</sup> *Id.* at 910.

<sup>65</sup> *Id.* at 912.

<sup>66</sup> *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 at 1177-79 (9th Cir. 2014).

<sup>67</sup> *See id.*

had to click proceed to checkout.<sup>68</sup> The *Nguyen* court followed the stricter analysis generally applied in browsewrap cases<sup>69</sup> and consistent with Judge Weinstein's approach in *Berkson*.<sup>70</sup> It held that websites have a duty to put customers on notice of the terms of using the website or purchasing merchandise or services through it.<sup>71</sup>

The contradictory results in the above cases illustrate a fundamental division in judicial approaches to online contracting. Those courts that embrace the idea that current and common law contract principles can apply without modification to electronic contracting seem inclined to enforce sign-in-wrap contracts.<sup>72</sup> They also put greater responsibility on the consumer to read and understand the terms, or at least accept that clicking "I agree" is binding.<sup>73</sup> On the other hand, courts that focus on the consumer appear to be more wary of upholding sign-in-wrap contracts.<sup>74</sup> These courts are also generally more skeptical that older contract principles can resolve these contractual issues.<sup>75</sup>

## II. THE INHERENT CONFLICTS OF THE SIGN-IN-WRAP

### A. *The Elusive Requirements of Notice and Implied Assent*

A fundamental aspect of the common law of contracts is the manifestation of mutual assent to the terms of the contract.<sup>76</sup>

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<sup>68</sup> *Id.* at 1178.

<sup>69</sup> *Id.* at 1178-79 (relying on the court's "traditional reluctance to enforce browsewrap agreements against individual consumers").

<sup>70</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 401-02 (E.D.N.Y. 2015).

<sup>71</sup> *Nguyen*, 763 F.3d at 1179.

<sup>72</sup> *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401-04 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.").

<sup>73</sup> *See, e.g., Vernon v. Qwest Commc'ns Int'l, Inc.*, 925 F. Supp. 2d 1185, 1191 (D. Colo. 2013) (finding that because the users chose to agree to the conditions, even without reading them, they must "accept the consequences" and are bound by the conditions); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911-12 (N.D. Cal. 2011) (finding that the plaintiff had the opportunity to review the terms, chose not to, and clicked "I agree" anyway, which is sufficient to give notice).

<sup>74</sup> *See, e.g., Berkson*, 97 F. Supp. 3d at 404 (finding that the ruling in *Carnival Cruises* does not apply to contracts online, as they are clearly distinguishable); *Nguyen*, 763 F.3d at 1179 (finding that because Internet consumers have varying degrees of Internet literacy, consumers cannot be expected to look for hyperlinks and know that they are bound to terms and conditions, which they may never be prompted to read or even look at).

<sup>75</sup> *See, e.g., supra* notes 66-71 and accompanying text (discussing the *Nguyen* case).

<sup>76</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (AM. LAW INST. 1981) ("The

Legitimate manifestation requires notice of the terms.<sup>77</sup> Even if a consumer does not have actual notice, she can have “inquiry notice.”<sup>78</sup> Inquiry notice means that a person would have a legitimate opportunity to learn the terms, even if she did not take that opportunity.<sup>79</sup> If the consumer has inquiry notice and then assents, she is subject to the terms.<sup>80</sup> However, it is questionable whether actual assent is a firm requirement for electronic contracts today.<sup>81</sup> Even so, many courts argue that there is no reason to change the application of the common law of contracts in the electronic realm.<sup>82</sup> Judge Weinstein makes an alternative claim in *Berkson*.<sup>83</sup>

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conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”).

<sup>77</sup> See *Nguyen*, 763 F.3d at 1177 (finding that when users do not have actual notice of terms, the court must then look to see whether a “reasonably prudent user” would be put on “inquiry notice”); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (“Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”).

<sup>78</sup> See Juliet M. Moringiello, *Signals, Assent, and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1314 (2005) (discussing the “reasonable communicativeness test,” which asserts that if a person has the opportunity/ability to read the terms and the terms are validly presented, then she has manifested assent even if she did not actually read them).

<sup>79</sup> See *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012) (stating that “inquiry notice is actual notice of circumstances sufficient to put a prudent man upon inquiry” (quoting *Specht*, 306 F.3d at 30 n.14 (2d Cir. 2002))); see also CAL. CIV. CODE § 19 (2015).

<sup>80</sup> See Moringiello, *supra* note 78.

<sup>81</sup> See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179-80 (1983) (arguing that creators of contracts of adhesion assume that consumers do not read the terms, and even if they do, do not understand many of the terms, suggesting that broad application of a single form of contract law is potentially inappropriate for these kinds of contracts because they have unique problems).

<sup>82</sup> See, e.g., *Caspi v. Microsoft Network, LLC*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (referencing *Carnival Cruise Lines* and finding that although that case involved a printed ticket containing terms and the case at issue involved an electronic contract, “there is no significant distinction”); *Barnett v. Network Sols., Inc.*, 38 S.W.3d 200, 203-04 (Tex. 2001) (finding that although Barnett claimed he did not have adequate notice of the forum selection clause because it was hidden in the agreement, he had both the responsibility and opportunity to read the contract terms, which would have given him such notice); see also Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 488 (2002) (comparing different court approaches to the validity of electronic contracts). Rachlinski concludes that courts generally find that as long as consumers have the opportunity to see and read through terms before clicking their agreement, they have

Judge Weinstein argues that the way consumers use the Internet is conceptually different than how they approach paper contracts.<sup>84</sup> These differences justify at the very least a consideration of altered requirements for online contracts.<sup>85</sup> This is not to say that an entirely new set of rules should (or even could) be adopted. Rather, as Judge Weinstein suggests, the rules regarding notice need to be tailored to the unique difficulties present in online contracting.<sup>86</sup>

One such difficulty is the way websites present contract information.<sup>87</sup> For instance in *Specht*, users had to download the purchased computer software before they could even access the terms.<sup>88</sup> Under these conditions, the court found that the consumers could not have assented to the terms because they could not even access them.<sup>89</sup> The structure of the site prevented the seller from giving consumers reasonable notice.<sup>90</sup> Then-Judge Sotomayor found that although consumers are bound to contract terms, even unread ones,<sup>91</sup> the terms must be visible and accessible to put users on notice.<sup>92</sup> A submerged screen that required following links to more than one webpage did not constitute a structure that would give reasonably prudent users notice.<sup>93</sup>

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been given reasonable notice. *Id.*

<sup>83</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 382 (E.D.N.Y. 2015) (“It is not unreasonable to assume that there is a difference between paper and electronic contracting.”).

<sup>84</sup> *Id.*; see *infra* Part II.B (discussing and critiquing the “reasonably prudent internet user” standard currently in place today).

<sup>85</sup> *Berkson*, 97 F. Supp. 3d at 382.

<sup>86</sup> *Id.* (“Based on assumptions about internet consumers, they require clearer notice than do traditional retail buyers.”). *But see* Kidd & Daughtrey, *supra* note 3 at 220 (arguing that new legal problems associated with the increased use of technology in business can be analogized to current legal principles, so in general only current law should be used to address these issues).

<sup>87</sup> See *Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2015 WL 5568706, at \*6 (N.D. Cal. Oct. 9, 2013) (asserting that the structure of a website greatly determines how much notice a user has of the terms and conditions). Indeed, this is the fundamental difference underlying the various types of electronic contracts of adhesion, and it greatly affects whether courts find them valid or not. See *supra* Part II.

<sup>88</sup> *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 30 (“A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.” (citing *Marine Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049 (2001))).

<sup>92</sup> *Id.* at 31-32.

<sup>93</sup> *Id.* at 32.

However, it is not always clear when the terms of an electronic contract are accessible or visible enough to provide adequate notice for consumers. Such a concern highlights the current dispute surrounding the sign-in-wrap. In *Berkson*, Judge Weinstein examines electronic contract structure on websites in detail.<sup>94</sup> He concludes that terms in sign-in-wrap contracts, and even electronic contracts more generally, should require clearer notice.<sup>95</sup> This requirement is necessary because of the differences between Internet consumers and traditional buyers.<sup>96</sup>

What “clearer notice” might look like is open for debate. Not only does the structure of the website make a difference, but the style can also have influence. The typeface, size, color, and form of the lettering can itself prevent a consumer from having reasonable notice.<sup>97</sup> This issue is further complicated as reasonable notice concerns are not even fully settled in the paper-contracting realm, as controversy surrounding the Supreme Court’s decision in *Carnival Cruise Lines v. Shute*<sup>98</sup> continues today.<sup>99</sup>

While the *Shute* court did not address the issue of notice,<sup>100</sup> it did discuss the validity of forum-selection clauses in form contracts.<sup>101</sup>

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<sup>94</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 395-401 (E.D.N.Y. 2015) (describing the different forms of electronic contracts and providing visual representations of the ways the different contracts present terms).

<sup>95</sup> *Id.* at 401-04.

<sup>96</sup> *Id.* at 378-81; see *infra* Part II.B.

<sup>97</sup> See, e.g., *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (refusing to uphold an electronic contract where the terms were in small gray print on a gray background).

<sup>98</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587-89 (1991) (finding under admiralty law that a forum selection clause in a form contract located on the back of a cruise ticket was enforceable against the consumer).

<sup>99</sup> See Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553, 561-62 (2012) (discussing the possible implications of the *Shute* decision on modern contract laws, especially with regard to some forms of electronic contract). Knapp suggests that the decision, if applied to these electronic contracts (and really any kind of form/adhesion contract) will likely result in consent no longer having “any real significance,” and the contracting parties with the power will ultimately be immunized from liability. *Id.*; see also Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT’L L.J. 323, 325-26 (1992) (arguing that the court erred in upholding the forum selection clause of an adhesive consumer contract where precedent contract law would have required the opposite result).

<sup>100</sup> *Shute*, 499 U.S. at 590 (finding that respondents had “essentially . . . conceded” that they had notice of the contract terms, so the court would not address that topic). Justice Stevens does address notice in his dissent, though only briefly, stating that even if respondents had proper notice, he would still find the forum selection clause

The Court found a form contract (a contract of adhesion) contained on the back of a passenger ticket valid.<sup>102</sup> It upheld the contract even though many passengers did not have the opportunity to read the ticket terms before purchasing.<sup>103</sup> Justice Stevens was the lone justice to address the notice issue.<sup>104</sup> In his dissent he argued that only the most vigilant consumer would have seen the fine print terms of the forum-selection clause.<sup>105</sup>

Several lower courts have applied the Supreme Court's decision in *Shute* to electronic contracts.<sup>106</sup> The *Fteja* court in particular drew a strong analogy between the ticket at issue in *Shute* and the electronic sign-in-wrap contract at issue in its case.<sup>107</sup> It found that there was no difference between clicking on a hyperlink to find terms and being directed on a ticket that the terms are contained therein.<sup>108</sup> Indeed, the court stated that nothing supported a different outcome for the online contract because it was located on another screen instead of another piece of paper.<sup>109</sup>

Judge Weinstein makes the opposite finding in *Berkson*.<sup>110</sup> He distinguishes the cases, pointing out that the respondents in *Shute* conceded that they had notice of the terms, while the respondents in *Berkson* did not.<sup>111</sup> Similarly, the respondents in *Fteja* did not admit that they had notice of the terms.<sup>112</sup> Rather, respondents in both *Berkson* and *Fteja* asserted that they *did not* have adequate notice because of the structure of the electronic contracts at issue.<sup>113</sup> This factual distinction between *Shute* and *Berkson-Fteja* about whether or

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invalid under federal admiralty law. *Id.* at 598 (Stevens, J., dissenting).

<sup>101</sup> *Id.* at 593-96 (majority opinion).

<sup>102</sup> *Id.* at 593-97.

<sup>103</sup> *Id.* at 597 (Stevens, J., dissenting).

<sup>104</sup> *Id.* (including a copy of the ticket and noting that the forum selection clause was tucked into paragraph 8 of a 25 paragraph, fine print contract).

<sup>105</sup> *See id.*

<sup>106</sup> *See, e.g., Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839-40 (S.D.N.Y. 2012) (finding that *Shute* applies to electronic contracts and comparing the form of the ticket form contract in *Shute* with the electronic form contract in *Fteja*).

<sup>107</sup> *See id.*

<sup>108</sup> *Id.* at 839.

<sup>109</sup> *Id.*

<sup>110</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 403-04 (E.D.N.Y. 2015) (finding that there are "significant differences" between hyperlinked contracts and hard copy contracts such as the one available in *Shute*).

<sup>111</sup> *Id.* at 404.

<sup>112</sup> *See Fteja*, 841 F. Supp. 2d at 840-41 (discussing the requirements and application of notice in the case at issue).

<sup>113</sup> *See supra* notes 109-11 and sources therein.

not the plaintiffs challenged adequate notice may not be dispositive, but it does undermine the direct application of *Shute* to these cases. This is especially true considering Justice Stevens’ dissent provides the only substantial discussion about notice and argues in favor of greater clarity and presentation of terms.<sup>114</sup>

Following a Justice Stevens-like approach, Judge Weinstein in *Berkson* found that respondents did not have sufficient inquiry notice.<sup>115</sup> Judge Weinstein asserted that there are important differences between electronic hyperlinks located by sign-in buttons and paper copies of terms when read in light of *Shute*.<sup>116</sup> He specifically noted that the hyperlink contract in this case did not involve a face-to-face or even over-the-phone transaction.<sup>117</sup> Thus, the contract did not fall into the category espoused in *Hill v. Gateway*,<sup>118</sup> where people pay for products before receiving terms and conditions.<sup>119</sup> In those cases, it is not practical for the seller to read the terms of a contract of adhesion to consumers over the phone or in person.<sup>120</sup> Therefore, courts allow sellers to enclose additional terms with the products they send, provided that the buyer can reject the terms by sending the product back.<sup>121</sup> However, this is clearly not the case for sign-in-wrap contracts, as the products at issue in these cases are not the kind mailed to users.<sup>122</sup> Since the products themselves are intangible in

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<sup>114</sup> See *supra* notes 99, 102–04 and accompanying text.

<sup>115</sup> See *Berkson*, 97 F. Supp. 3d at 403.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (“This is not a contract of adhesion situation where a cashier ‘cannot be expected to read legal documents to customers before ringing up sales.’” (quoting *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997))).

<sup>118</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (describing direct-sales operations over the phone).

<sup>119</sup> *Id.* at 1148; see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (finding forum selection clause valid even when consumers could not view terms and conditions until receiving their paper ticket); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448-49 (7th Cir. 1996) (finding that terms and conditions included in the box of merchandise are binding on consumers because they have the opportunity to read the terms and can then reject the terms by sending back the product).

<sup>120</sup> See *Hill*, 105 F.3d at 1149; cf. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (finding a shrinkwrap contract unenforceable because there was no acceptance of the additional terms). Even within this subcategory, the law is unsettled as to the validity of these contracts.

<sup>121</sup> See *Hill*, 105 F.3d at 1149.

<sup>122</sup> See, e.g., *Berkson*, 97 F. Supp. 3d at 370-76 (evaluating a sign-in-wrap contract for in-flight Internet service); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834-35 (S.D.N.Y. 2012) (evaluating the termination of plaintiff’s Facebook account).

nature, the sign-in-wrap contracts tend to be exclusively electronic and not available in hardcopy form.<sup>123</sup>

In fact, Judge Weinstein's second distinction between the sign-in-wrap hyperlink in *Berkson* and paper ticket contract in *Shute* is the unavailability of a hardcopy of the contract.<sup>124</sup> The plaintiff in *Berkson* never had the opportunity to receive a hardcopy of the form contract.<sup>125</sup> This was because the defendant, Gogo, did not email or mail the contracts to customers after they signed in and presumptively agreed to the terms.<sup>126</sup> In contrast, customers received *Shute's* cruise ticket in paper form with the terms contained therein.<sup>127</sup>

Finally, Judge Weinstein argues that nothing in the disputed contract in *Berkson* specifically brought the terms and conditions to the plaintiff's attention.<sup>128</sup> Unlike *Shute*, the hyperlink to the terms in *Berkson* did not mention a contract, use all caps, or refer to the importance of the terms.<sup>129</sup> This lack of minimal notice protections like those in *Shute* arguably makes the distinction between the two cases even greater.<sup>130</sup> Judge Weinstein's analysis thus makes a strong case against applying *Shute* reasoning to sign-in-wrap contracts, as these distinctions are significant in the determination of whether a user had reasonable notice so as to actually assent to the terms.

Such differences may justify specific requirements for inquiry notice for sign-in-wrap contracts. However, there is another important distinguishing factor that requires attention. In order to determine what kind of notice a buyer should have, courts have to look at the understanding and expertise of the buyer.<sup>131</sup> But defining a "buyer" over the Internet has not proved an easy task for courts.<sup>132</sup>

### B. Who Is the "Average Internet User"?

In evaluating these contracts, many courts apply the average internet user standard.<sup>133</sup> This standard initially arose from the reasonably

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<sup>123</sup> *Berkson*, 97 F. Supp. 3d at 403.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-96 (1991).

<sup>128</sup> *Berkson*, 97 F. Supp. 3d at 403.

<sup>129</sup> *Id.* at 403-04.

<sup>130</sup> *Id.*

<sup>131</sup> *See infra* Part II.B.

<sup>132</sup> *See infra* Part II.B.

<sup>133</sup> *Berkson*, 97 F. Supp. 3d at 377-83 (addressing the lower court's interpretation of the average Internet user and concluding that the average Internet user in the

prudent person principle used in paper contracting.<sup>134</sup> It addresses whether a reasonable person in a similar position would have been put on notice of the terms and conditions.<sup>135</sup> In the online business world, the average internet user analysis is a fairly well-established standard.<sup>136</sup> However, as with notice and assent, applying this standard to the world of electronic contracting raises new questions.

One of the primary questions is simply how courts should define the average internet user. Courts have used the standard in different ways, but do not have consistency even on how they name it.<sup>137</sup> For instance, the *Specht* and *Feldman* courts call it the “reasonably prudent internet user” rather than the average internet user standard.<sup>138</sup> The *Pollstar* court did not even mention the average internet user standard, though they clearly analyzed whether the typical visitor would have understood the site’s purpose.<sup>139</sup> While the importance of consistent terminology remains unclear, the real concern is how courts apply this standard.

The average internet user standard is further confusing because courts have elusively defined it as a vague “reasonable person” on the Internet.<sup>140</sup> It is also relatively fact-specific, because it requires courts

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present case would not have been informed of the terms and conditions). The *Specht* court defined this standard as the “reasonably prudent Internet user.” *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

<sup>134</sup> See, e.g., CAL. CIV. CODE § 19 (2015) (“Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such an inquiry, he might have learned such fact.”); see also *Specht*, 306 F.3d at 31-32 (finding that the prudent person standards apply with the same force in the realm of electronic business transactions as in the paper contracting world).

<sup>135</sup> See, e.g., *One Beacon Ins., Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 268 (5th Cir. 2011) (finding that notice for incorporated terms is reasonable when a reasonably prudent person under the circumstances of that particular case would have had notice).

<sup>136</sup> See, e.g., *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176, 191 (W.D.N.Y. 2000) (finding that defendant’s website was structured in a way that the average Internet user would not be aware that the defendant’s website was a parody and not the same as the plaintiff’s website).

<sup>137</sup> See *Specht*, 306 F.3d at 20; *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 980-81 (E.D. Cal. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1164 (C.D. Cal. 1998).

<sup>138</sup> *Specht*, 306 F.3d at 20; *Feldman*, 513 F. Supp. 2d at 238.

<sup>139</sup> See, e.g., *Pollstar*, 170 F. Supp. 2d at 980-81 (E.D. Cal. 2000) (finding it unlikely that users would be informed of the terms on a website because of the website design, which is essentially an average Internet user analysis without the title).

<sup>140</sup> See, e.g., *Faber*, 29 F. Supp. 2d at 1164 (C.D. Cal. 1998) (using the reasonably prudent Internet user standard but without explaining or defining it).

to look specifically at electronic contract design through the lens of the average user.<sup>141</sup> These characteristics makes it a difficult standard to apply, leaving courts with significant discretion to determine if an electronic contract provides sufficient notice.<sup>142</sup>

Judge Weinstein critiques this discretion in *Berkson* when he argues that courts have decided what constitutes inquiry notice based on mere speculation rather than more tangible evidence, such as scientific studies.<sup>143</sup> There is thus no universal standard, or even a more formal test for courts to use when assessing the qualities of the average Internet user.<sup>144</sup> Such ambiguity creates confusion for companies who are looking to create these online contracts because they do not have clear guidelines for how to validly structure them.

In attempting to provide some definition, it is helpful to look at the differences between contracting on the Internet versus in person. One example is simply the difference between flipping through pages versus scrolling through text in a computer screen. By flipping through pages a person might notice certain identifying information like bolded words or phrases where all the words are capitalized.<sup>145</sup> Conversely, when scrolling through a screen it could be harder to pick out those kinds of distinctions.<sup>146</sup> Theoretically, a user can easily scroll through a screen all at once without stopping, which hinders adequate appraisal of the contract. Websites that allow users to skip over contracts without even scrolling through the terms are especially problematic.

Another example is the difference between a written signature and an electronic signature.<sup>147</sup> A written signature arguably conveys a stronger commitment because people are accustomed to thinking that signing their name to something is meaningful.<sup>148</sup> But electronic

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<sup>141</sup> See, e.g., *Forrest v. Verizon Commc'ns., Inc.*, 805 A.2d 1007, 1010-11 (D.C. Cir. 2002) (finding a scrollwrap contract enforceable because a user would have adequate notice of the terms); *Feldman*, 513 F. Supp. 2d at 238 (finding that the website structure that required the user to click "I agree" gave the user reasonable notice).

<sup>142</sup> See *supra* notes 137-40 and accompanying text (discussing the imprecise definitions and giving examples of the application of the standard).

<sup>143</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 380 (E.D.N.Y. 2015). However, a problem with this critique is the lack of scientific studies, which Judge Weinstein acknowledges. *Id.* at 380-81.

<sup>144</sup> See *id.* at 380.

<sup>145</sup> See Moringiello, *supra* note 78, at 1332 (discussing practical differences between electronic contracts and paper contracts).

<sup>146</sup> *Id.*

<sup>147</sup> See *id.* at 1316 (discussing electronic versus written signatures).

<sup>148</sup> See *id.* ("[A] written signature provides the traditional evidence of assent

signatures, which can be as little as the click to agree, may not accurately reflect a user’s understanding or even real agreement.<sup>149</sup> Even so, courts generally accept the “I agree” assent of clickwrap contracts.<sup>150</sup> Such acceptance arguably shows that courts have not seriously considered that users might relate to electronic communication in a way that is distinct from traditional communication.<sup>151</sup>

Judge Weinstein focuses on this problem extensively in *Berkson*.<sup>152</sup> He reviews the lower court’s attempt to define the average Internet user, finding their reliance on empirical and sociological studies insufficient.<sup>153</sup> Judge Weinstein attributes the bulk of the inadequacy to the fact that none of the studies assessed what Internet users understood “terms and conditions” to mean.<sup>154</sup> Unfortunately, such targeted empirical research has not been undertaken to date.<sup>155</sup>

Future studies of this nature could theoretically reveal that the average Internet user understands the terms as they are presented in sign-in-wraps. In that case perhaps courts would be justified in giving little consideration to differences between electronic and paper contracts when it comes to consumer understanding of terms. Nonetheless, in the absence of such evidence, Judge Weinstein argues for a cautious approach that favors buyers over vendors.<sup>156</sup>

However, though Judge Weinstein does not give current studies in this area great weight due to their generality,<sup>157</sup> they should not be discounted entirely. There are several eye-tracking studies that evaluate the way people read Internet webpages that could be useful in assessing how users perceive Internet contracts.<sup>158</sup> Judge Weinstein

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because when we are asked to sign something, we are conditioned to think that we are doing something important.”).

<sup>149</sup> See *id.* at 1316-17.

<sup>150</sup> See *supra* Part II.A (discussing clickwrap contracts and how courts generally find them valid because they require users to specifically agree by clicking “I agree”).

<sup>151</sup> See Moringiello, *supra* note 78, at 1319 (discussing court’s application of traditional law to clickwrap and browsewrap contracts).

<sup>152</sup> See *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 377-81 (E.D.N.Y. 2015).

<sup>153</sup> See *id.* at 377-80.

<sup>154</sup> *Id.* at 380.

<sup>155</sup> *Id.* (finding that researchers are calling for more research in this area) (citing Juliet M. Moringiello, *Notice, Assent, and Form in a 140 Character World*, 44 SW. L. REV. 275, 284 (2014)).

<sup>156</sup> *Id.* at 402; see also *infra* Part III (discussing Judge Weinstein’s approach).

<sup>157</sup> *Berkson*, 97 F. Supp. 3d. at 380 (finding the studies inadequate because they do not focus on what the average internet user actually understands when he or she reads terms and conditions).

<sup>158</sup> See, e.g., Jakob Nielsen, *Banner Blindness: Old and New Findings*, NIELSON

himself cites to a few of these studies, including one from the Nielsen Norman Group which found that users generally read webpages in an “F” shape, focusing on the first two paragraphs and then scanning down.<sup>159</sup> This means that the first two paragraphs are the most important, as readers look there more carefully than the rest of the page.<sup>160</sup> It also suggests that subheadings should carry important informational language, as users will usually scan only the first two words of a subheading.<sup>161</sup> The study ultimately concludes that users read differently online, which means website designers have to write differently in order to communicate information to users.<sup>162</sup>

Additionally, there are helpful studies that assess reader comprehension for digital versus paper documents.<sup>163</sup> A 2013 study by Mangen, Walgermo, and Brønnick analyzed the reading comprehension of students who read both paper texts and digital texts.<sup>164</sup> The study concluded that reading texts on a computer screen resulted in lower reading comprehension than reading from paper.<sup>165</sup> Furthermore, it found that when the digital text is longer, there is more risk for low comprehension due to the lack of spatial markers that aid comprehension and memory.<sup>166</sup> The study therefore implicates sign-in-wrap contracts, and electronic contracts more generally, as these contracts are digital by nature. So even if users do

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NORMAN GROUP (Aug. 20, 2007), [hereinafter *Banner Blindness*] <http://www.nngroup.com/articles/banner-blindness-old-and-new-findings/>; Jakob Nielsen, *F-Shaped Pattern for Reading Web Content*, NIELSON NORMAN GROUP (Apr. 17, 2006), [hereinafter *F-Shaped Pattern*] <http://www.nngroup.com/articles/f-shaped-pattern-reading-web-content/>. Judge Weinstein also cites Nielson’s F-Shaped Pattern study in *Berkson*, 97 F. Supp. 3d at 378-79.

<sup>159</sup> *F-Shaped Pattern*, *supra* note 158.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See generally Diana DeStefano & Jo-Anne LeFevre, *Cognitive Load in Hypertext Reading: A Review*, 23 COMPUTERS HUM. BEHAV. 1616 (2007) (examining the effects of hyperlink reading on cognitive processing during text navigation and comprehension); Anne Mangen et al., *Reading Linear Texts on Paper Versus Computer Screen: Effects on Reading Comprehension*, 58 INT’L J. EDUC. RES. 61 (2013) (comparing reading comprehension of students who read text on paper and those who read on a computer screen); M. Julee Tanner, *Digital vs. Print: Reading Comprehension and the Future of the Book*, 4 SJSU SCH. INFO. STUDENT RES. J. 1 (2014), <http://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1186&context=slissrj> (studying the current research on digital and print comprehension and concluding that different platforms affect readers’ comprehension).

<sup>164</sup> See Mangen, et al., *supra* note 163, at 61.

<sup>165</sup> *Id.* at 67.

<sup>166</sup> *Id.*

take the time to read these contracts, this study suggests that comprehension will be lower than if users read paper versions.

In a 2007 study DeStefano and LeFevre also found that when digital readings are accompanied by hyperlinks,<sup>167</sup> reading performance is further impaired.<sup>168</sup> They postulated that digital documents that required readers to move through the text using hyperlinks would create “a new set of cognitive requirements” that demand more from working memory.<sup>169</sup> The researchers found that every time readers had to address hyperlinks that interrupted reading patterns, that interruption negatively affected comprehension.<sup>170</sup> However, they also found that hyperlink structures for informational content increased comprehension and memory.<sup>171</sup> Such results imply that there are specific website designs that can help readers more effectively comprehend the content. In terms of the sign-in-wrap, this study suggests that extra hyperlinks potentially decrease comprehension because of the added working memory requirements for users.<sup>172</sup>

Taking such studies into account, there is perhaps more for courts to rely on in assessing the average Internet user than Judge Weinstein indicates. Though specifically targeted empirical research in the area of electronic contract comprehension may be lacking,<sup>173</sup> there is no reason why courts cannot take into account existing relevant studies. Once courts have established an empirically-supported test for determining the average Internet user, they can more effectively evaluate whether an individual has been afforded adequate notice.

If an average Internet user has adequate notice and has assented to the terms, it becomes much harder for the user to argue that the contract is invalid. In fact, the only way a user could potentially proceed in these circumstances would be to attack the fairness of the contract as a whole.<sup>174</sup> In order to do this, the user would need to invoke the doctrine of unconscionability.

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<sup>167</sup> See DeStefano & LeFevre, *supra* note 163, at 1616-17 (identifying hyperlinks as “hypertext” and describing them as a “collection of documents containing links that allow readers to move from one chunk of text to another”).

<sup>168</sup> *Id.* at 1616.

<sup>169</sup> *Id.* at 1618-19.

<sup>170</sup> *Id.* at 1619.

<sup>171</sup> *Id.* at 1636. Such structures followed the “hierarchical” model, which presented the text in a “tree structure,” so the broader topics were higher and more specific topics or subcategories were lower. *Id.* at 1618.

<sup>172</sup> See *id.* at 1619 (discussing the increased working memory requirements).

<sup>173</sup> See *supra* note 155 and accompanying text.

<sup>174</sup> See *infra* Part II.C. (discussing the doctrine of unconscionability as a way for plaintiff to proceed in litigation when they cannot prevail on inadequate notice and

### C. *The Sign-in-Wrap and Unconscionability*

Understanding how consumers relate to these electronic contracts of adhesion implicates the doctrine of unconscionability,<sup>175</sup> a historically controversial doctrine for both courts and scholars.<sup>176</sup> The purpose of the unconscionability doctrine is to prevent “oppression and unfair surprise.”<sup>177</sup> Uniform Commercial Code section 2-302<sup>178</sup> codified unconscionability, and was potentially motivated by the judiciary’s notable dislike of fine print and deceptively arranged print.<sup>179</sup> Plaintiffs can invoke the unconscionability doctrine to challenge contract terms that are exceedingly one-sided or overly harsh.<sup>180</sup> In the realm of electronic contracts, unconscionability is more important than ever, as the contracts are typically one-sided contracts of adhesion that raise these concerns.<sup>181</sup>

In order to discuss the complexities of unconscionability in relation to electronic contracts, and specifically the sign-in-wrap, it is important to understand how courts analyze this doctrine. When

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assent requirements).

<sup>175</sup> See *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 391-93 (E.D.N.Y. 2015) (discussing unconscionability).

<sup>176</sup> See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 762-64 (2004) (discussing scholars’ critiques that unconscionability allows too much “judicial meddling,” and judges’ reluctance to look like they were engaging in “case-specific legislating” through the use of the doctrine); Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 359 (2001) (“Courts and commentators have construed and criticized the concept for almost forty years, and the arguments and uncertainty continue unabated.”).

<sup>177</sup> U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2015) (describing the test for unconscionability).

<sup>178</sup> *Id.* § 2-302.

<sup>179</sup> William B. Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121, 140-41 (1967).

<sup>180</sup> U.C.C. § 2-302 cmt. 1; see also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (stating that unconscionability is characterized by one party having no true choice along with contract terms that are “unreasonably favorable to the other party”); Jonathan Bick, *Unconscionable Terms Prevent Enforceability of E-Commerce Contract Clauses*, BICKLAW.COM, <http://www.bicklaw.com/publications/unconscionabletermsande-contracts.htm> (last visited Nov. 22, 2015).

<sup>181</sup> See Bick, *supra* note 180 (discussing the increasing frequency with which courts are invalidating electronic contracts using the doctrine of unconscionability); see also Jeffrey C. Fort, *Understanding Unconscionability: Defining the Principle*, 9 LOY. U. CHI. L.J. 765, 766-67 (1978) (tying the doctrine of unconscionability to the rise of form contracts and stating that other contract defenses to enforcement were ill-equipped to address issues inherent in form contracts).

evaluating whether a contract term is unconscionable, courts look to both procedural and substantive unconscionability.<sup>182</sup> Substantive unconscionability is characterized by overly harsh terms or one-sided results.<sup>183</sup> Procedural unconscionability focuses on the oppression or surprise aspects of unconscionability.<sup>184</sup> Oppression generally involves unequal bargaining power such that there is no real negotiation, while surprise refers to hidden contract terms that are unfair to one party.<sup>185</sup> Procedural unconscionability is largely implicated with electronic contracts that do not sufficiently notify consumers of the terms and conditions.<sup>186</sup>

The test is not exact, as courts tend to evaluate the amounts of procedural and substantive unconscionability on a sliding scale.<sup>187</sup> Many courts require some showing of substantive unconscionability, regardless of whether a strong showing of procedural unconscionability is present.<sup>188</sup> However, others may allow a strong showing of one type of unconscionability to counterbalance a deficiency in the other.<sup>189</sup> This presents a complicated question when evaluating electronic contracts, where the very structure of these contracts can raise procedural unconscionability concerns.<sup>190</sup>

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<sup>182</sup> *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1093-97 (9th Cir. 2009); *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015).

<sup>183</sup> *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280-81 (9th Cir. 2006); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002).

<sup>184</sup> *Nagrampa*, 469 F.3d at 1280.

<sup>185</sup> *Id.*; see also Fort, *supra* note 181, at 778 (discussing substantive unconscionability in relation to the commercial reasonableness of a contract term).

<sup>186</sup> See Anthony M. Balloon, Comment, *From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions*, 50 EMORY L.J. 905, 914 (2001) (discussing procedural unconscionability in relation to electronic contracts). Balloon identifies the process of entering into a contract as a central concern behind the validity of electronic contracts, which directly implicates procedural unconscionability. *Id.*

<sup>187</sup> See *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1134-35 (11th Cir. 2010) (finding tension in lower court approaches to unconscionability, with some using a sliding scale and others evaluating the two types independently, and requesting clarification on the appropriate analytical approach from the Florida Supreme Court); see also *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 73-76 (2010) (discussing the petitioner’s arguments that the disputed agreement as a whole was substantively unconscionable and finding against petitioner on this point).

<sup>188</sup> Swanson, *supra* note 176, at 367.

<sup>189</sup> *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (finding that the sliding scale means that the more important one of these elements is, the less important the other has to be); Elyse E. Echtman & Katie DeWitt, *Drafting Consumer Arbitration Clauses for Electronic Agreements*, N.Y.L.J., Aug. 18, 2015, at LEXIS.

<sup>190</sup> Balloon, *supra* note 186, at 914 (finding procedural unconscionability will have

Specifically, electronic contracts of adhesion inherently implicate the oppression prong of procedural unconscionability.<sup>191</sup> This is because only one party has bargaining power and there is no opportunity for the other party to negotiate.<sup>192</sup> Therefore, the oppression prong is already fulfilled for electronic contracts of adhesion simply by the nature of these contracts.<sup>193</sup> Consequently, the surprise prong has greater importance for determining unconscionability because it is not automatically satisfied in the way the oppression prong is.<sup>194</sup> Surprise involves hidden terms or terms that are not evident to consumers.<sup>195</sup> However, it is important to note that in some states, either oppression or surprise is sufficient to make a term procedurally unconscionable.<sup>196</sup>

Different kinds of contracts may trigger unconscionability concerns. Contracts where terms are deceptively organized or hard to read due to structure are specifically troubling with regard to procedural unconscionability.<sup>197</sup> For example, courts have not enforced paper contracts that induce parties to sign when the party is not aware that they are signing a contract.<sup>198</sup> Arguably, this idea can be applied to the world of electronic contracts when it is not clear to users that they are entering a contractual agreement.<sup>199</sup>

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a stronger impact than substantive unconscionability on electronic commerce).

<sup>191</sup> Echtmen & DeWitt, *supra* note 189.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* (advising businesses using electronic contracts to make material terms like arbitration clauses and class action waivers very obvious and on the first page of these agreements to avoid invalidating under the surprise prong of procedural unconscionability).

<sup>195</sup> Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1093-94 (9th Cir. 2009) (“Surprise involves the extent to which the supposedly agreed terms were hidden from the party seeking to avoid enforcement of the agreement.” (quoting Motsinger v. Lithia Rose-FT, Inc., 156 P.3d 156, 160 (Or. 2007))); *see also supra* note 177 and accompanying text.

<sup>196</sup> For example, in California a showing of either oppression or surprise can fulfill the requirements for procedural unconscionability. *See* Geoffroy v. Wash. Mutual Bank, 484 F. Supp. 2d 1115, 1118 (2007) (“Procedural unconscionability analysis looks at ‘oppression or surprise.’” (emphasis added)).

<sup>197</sup> Davenport, *supra* note 179, at 139-42 (discussing various cases where deceptively arranged contracts or contracts with hard-to-read print were held invalid).

<sup>198</sup> *See, e.g.,* Int’l Transp. Ass’n v. Atl. Canning Co., 249 N.W. 240, 242-43 (Iowa 1933) (finding that the contract in question was structured in such a way as to induce the receiver not to read it).

<sup>199</sup> Such as when entering browsewrap agreements that do not make it clear to consumers that they are agreeing to terms and conditions. *See supra* notes 37-41 and accompanying text; *see also* Russell Korobkin, *Bounded Rationality, Standard Form*

The difficulty is then applying this somewhat amorphous analytic reasoning to sign-in-wrap contracts and other electronics contracts. For example, scholars have critiqued court-applications of unconscionability with regard to electronic commerce.<sup>200</sup> Some argue that current standards are too stringent to provide adequate consumer protection.<sup>201</sup>

In *Berkson*, Judge Weinstein appears to support the argument that unconscionability standards are too high to protect consumers.<sup>202</sup> Unlike the scholarship that identifies procedural unconscionability as the main concern with electronic contracts,<sup>203</sup> Judge Weinstein focuses on substantive unconscionability.<sup>204</sup> He finds that even a strong showing of procedural unconscionability cannot invalidate a contract without substantive unconscionability.<sup>205</sup> However, after a short summary, the remainder of the opinion does not mention unconscionability by name.<sup>206</sup>

Judge Weinstein does set forth general principles to be applied to sign-in-wrap contracts, including a discussion on the location of terms of use.<sup>207</sup> He finds that the terms of use cannot be enforced when they are contained in links not visible to users or in covert places on a website.<sup>208</sup> But it goes too far to say that this assertion by Judge Weinstein implicates unconscionability directly. Furthermore, he offers no specific discussion of unconscionability standards when applying the law to the facts.<sup>209</sup>

It is not uncommon for courts to invoke unconscionability sparingly, as it is a very high standard to meet.<sup>210</sup> However, when

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*Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1269 (2003).

<sup>200</sup> See, e.g., Korobkin, *supra* note 199, at 1207 (criticizing current court approaches to applying unconscionability and offering an alternative option).

<sup>201</sup> See generally Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041 (critiquing current judicial applications of unconscionability).

<sup>202</sup> See *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015).

<sup>203</sup> See, e.g., *supra* notes 186, 191–94 (discussing the works of scholars which identify procedural unconscionability as a primary concern for electronic contracts of adhesion).

<sup>204</sup> See *Berkson*, 97 F. Supp. 3d at 391-92.

<sup>205</sup> See *id.* at 392.

<sup>206</sup> See *id.* at 393-413.

<sup>207</sup> See *id.* at 401-02.

<sup>208</sup> *Id.*

<sup>209</sup> See *id.* at 403-13.

<sup>210</sup> See Oakley, *supra* note 201, at 1064 (finding that courts use the doctrine of unconscionability infrequently).

considering sign-in-wrap contracts where users are subject to oppression and surprise, the unconscionability doctrine can provide consumer protection. As with notice and assent and the average Internet user standard, the principles of unconscionability might require some adjustment in their application to electronic commerce.

### III. THE BERKSON SIGN-IN-WRAP TEST: THE RIGHT SOLUTION?

Recognizing the complicated issues surrounding sign-in-wrap contracts provides helpful guidance for adequately structuring them. As the law currently stands, I argue that the primary concerns are clarification of the requirements for notice and assent and a definition of the average Internet user standard.<sup>211</sup> A secondary concern is the use of unconscionability as a method for ensuring that these contracts are fair to consumers.<sup>212</sup> However, using the unconscionability doctrine presents difficulties because of the demanding requirements.<sup>213</sup> Due to this difficulty, I argue that courts should focus on contract formation when evaluating electronic contracts to ensure that they are structured in such a way that actually gives users notice of the terms.<sup>214</sup>

#### A. The Berkson Test

Judge Weinstein offers an initial test in *Berkson* for assessing the validity of sign-in-wrap contracts.<sup>215</sup> He lays out a four-part inquiry for evaluating sign-in-wraps, and extends it to electronic contracts of adhesion more generally.<sup>216</sup> The first step is to assess whether there is “substantial evidence” that a user understood she was agreeing to actual terms and conditions.<sup>217</sup> The second step looks at the design of the website, and asks if the terms of use are clearly available to the consumer.<sup>218</sup> Step three also focuses on the design of the website, but looks at the actual manifestation of assent, which for these contracts is usually clicking “I agree.”<sup>219</sup> This step asks if the structure of the

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<sup>211</sup> See *infra* Part III.B.

<sup>212</sup> See *infra* Part III.B.

<sup>213</sup> See *infra* Part III.B.

<sup>214</sup> See *infra* Part III.B.

<sup>215</sup> See *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 402 (E.D.N.Y. 2015) (providing a four-part inquiry in analyzing sign-in-wraps).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

manifestation of assent somehow confuses or minimizes the importance of the contract details.<sup>220</sup> Finally, step four asks if the contract clearly draws material terms to the user’s attention, specifically those that might affect the user’s rights.<sup>221</sup> The specific rights curtailed by automatic payment renewals, forum selection clauses, and prohibitions on class actions require heightened notice under this test.<sup>222</sup>

This approach would be effective because it specifically focuses on contract formation. The test advocates for stronger requirements in order to have valid electronic contracts, which would arguably offer more protection for consumers. Such was the case in *Berkson* where the court found for the plaintiffs, reasoning that there was no contract in the first place.<sup>223</sup>

Scholar Nancy Kim also supports this approach, as it applies a tougher standard to contract formation rather than easily finding a contract.<sup>224</sup> Thus, if courts are stricter on their requirements for contract formation, plaintiffs do not have to rely on unconscionability for protection from unfair terms.<sup>225</sup> This method would be especially effective when considering the difficulties for plaintiffs in meeting unconscionability’s high standards.<sup>226</sup>

In his review of contract formation and assent, Judge Weinstein relies in part on a 2003 study by the Uniform Commercial Code Committee of the Business Law Section of the American Bar Association.<sup>227</sup> The project discussed notice and implied assent in the realm of electronic form contracts.<sup>228</sup> Although the project focused on

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 403-05 (applying the law to the facts of the two plaintiffs and concluding that plaintiff Welsh did not manifest assent because of the ambiguous structure of the sign-in-wrap contract, and that plaintiff Berkson was not aware that he was binding himself to terms when he signed into the website).

<sup>224</sup> Nancy Kim, *Class Actions, Arbitration and the Importance of Contract Formation*, CONTRACTSPROF BLOG (June 8, 2015), [http://lawprofessors.typepad.com/contractsprof\\_blog/2015/06/class-actions-arbitration-and-the-importance-of-formation.html](http://lawprofessors.typepad.com/contractsprof_blog/2015/06/class-actions-arbitration-and-the-importance-of-formation.html).

<sup>225</sup> *Id.*; see also Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 472 (2008) (arguing for an assent-based analysis focusing on contract formation rather than relying on unconscionability to deal with unbargained for and unfair terms with form contracts).

<sup>226</sup> See *supra* text accompanying notes 182–86 (discussing the requirements of unconscionability).

<sup>227</sup> *Berkson*, 97 F. Supp. 3d at 384.

<sup>228</sup> See generally Christina L. Kunz, et al., *Browse-wrap Agreements: Validity of*

browsewrap contracts, notice issues inherent in browsewrap contracts necessarily emerge for sign-in-wraps because they are hybrid browsewrap/clickwrap contracts.<sup>229</sup> The authors submitted a proposed test for valid and reliable assent to browsewrap contracts.<sup>230</sup> The first requirement that they identified was adequate notice of the proposed terms,<sup>231</sup> which directly relates to contract formation.

The proposed test asserts that notice in electronic contracts will require both adequate physical structure of the website and content in the terms.<sup>232</sup> When it comes to website structure, the authors suggest a scroll box first, as that ensures users will have to at least scroll through terms to assent.<sup>233</sup> Barring that, hyperlinked terms are generally acceptable, assuming the hyperlink is clear to the reasonable user.<sup>234</sup> As for content, it is important for users to be aware that terms and conditions are mandatory and actually bind consumers.<sup>235</sup> The more straightforward the website is, the more likely the terms will be enforced.<sup>236</sup> It is the difference between “by clicking to the next screen, you agree to the terms and conditions,” and “please read the terms and conditions.”<sup>237</sup> The simple act of making an electronic contract more straightforward and clear can protect users and provide more concrete standards for businesses in structuring their contracts.

Nevertheless, Judge Weinstein’s test is left incomplete, as he fails to fully address the average Internet user standard. Though he

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*Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003) (discussing the suggested requirements of notice and assent for electronic form contracts). The project was completed in collaboration with the Joint Working Group on Electronic Contracting Practices, within the Electronic Commerce Subcommittee of the Cyberspace Law Committee. *Id.*

<sup>229</sup> See *supra* notes 44–53 and accompanying text (discussing Judge Weinstein’s assertion that plaintiffs were not given adequate notice under the hybrid browsewrap/clickwrap contracts). However, the project authors do point out that clickwrap agreements provide more reliable methods of formulating assent. Kunz et al., *supra* note 228, at 280.

<sup>230</sup> Kunz et al., *supra* note 228, at 281 (laying out the four-part implied assent test).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 291.

<sup>233</sup> *Id.* at 293.

<sup>234</sup> *Id.* (finding that hyperlinks are usually relatively noticeable to users, as they are underlined and a different color text, and the “nature of the hyperlink itself indicates that a link exists to another page” (quoting Stephen S. Wu, *Incorporation by Reference and Public Key Infrastructures: Moving the Law Beyond the Paper-Based World*, 38 JURIMETRICS 317, 320 (1988))).

<sup>235</sup> See *id.* at 294 (finding that notice of the terms should not be ambiguous or come across as a “mere invitation” rather than an imposition of actual conditions).

<sup>236</sup> *Id.*

<sup>237</sup> See *id.* (providing examples of adequate notice in terms of content).

specifically focuses on users’ interactions with sign-in-wrap contracts,<sup>238</sup> he avoids defining such a standard because of the lack of targeted empirical evidence.<sup>239</sup> Nonetheless, Judge Weinstein’s conclusion that Internet purchasers require clearer notice does seem to be supported by the available studies that evaluate user comprehension in the digital arena.<sup>240</sup> A modified “*Berkson test*” that takes these studies into account would provide a more comprehensive solution to the problems inherent in sign-in-wrap contracts.

The average Internet user standard could develop further if courts took into account the studies discussed in Part II.B. and others like them. For example, research has found that users focus on the first two paragraphs more so than others.<sup>241</sup> Taking this into account, courts could require that the most important information be contained in these paragraphs. Or, similar to the presentation of the terms in *Shute*, the first two paragraphs could offer a brief summary or even bulleted notice of the material terms contained therein.<sup>242</sup> Such material terms could include arbitration and forum selection clauses, as well as Judge Weinstein’s concerns regarding automatic renewals and class action prohibitions.<sup>243</sup> This would strengthen the first step of Judge Weinstein’s test because it provides the substantial evidence that the user knew she was agreeing to terms.

Furthermore, courts should have limitations on the amount of hyperlinks users have to click through when reading online contracts. As the DeStefano and LeFevre study suggested, the act of clicking through excessive hyperlinks actually decreases comprehension.<sup>244</sup> Because some contracts require 25-90 mouse clicks to read the whole document,<sup>245</sup> unnecessary hyperlinks are a legitimate concern. Especially for sign-in-wraps that by nature contain hyperlinks, taking

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<sup>238</sup> See *supra* notes 215–22 and accompanying text (discussing the four-part test Judge Weinstein advocates in *Berkson*).

<sup>239</sup> See *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 377-83 (E.D.N.Y. 2015).

<sup>240</sup> See *supra* notes 157–72 and accompanying text (discussing eye-tracking and digital comprehension studies that suggest users see and understand less in the digital context than the paper one).

<sup>241</sup> *F-Shaped Pattern*, *supra* note 158.

<sup>242</sup> However, there is some evidence to suggest that such a requirement for arbitration clauses may be barred by the Federal Arbitration Act. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempted a Montana statute that required obvious notice that the contract contained an arbitration clause on the first page).

<sup>243</sup> *Berkson*, 97 F. Supp. 3d at 402.

<sup>244</sup> See DeStefano & LeFevre, *supra* note 163, at 1619.

<sup>245</sup> Oakley, *supra* note 201, at 1052.

studies like this into account can provide standards that support user comprehension.

B. *Potential Drawbacks of the Berkson Approach*

There are counterarguments to focusing so much attention on contract formation that are worth noting. For instance, I argue that the goal of increasing judicial attention on notice in contract formation is to monitor electronic structure so that the consumers *know* that they are giving up certain rights. This is especially true when looking at step four of Judge Weinstein's test.<sup>246</sup> However, most consumers do not ever read these online contracts,<sup>247</sup> so regardless of increased notice, users are still not informed. Recognizing this reality then suggests that this heightened notice is merely formulaic, but not necessarily a solution for putting a user on notice. However, inquiry notice is the logical solution to this concern, which asserts that the mere opportunity to see and read the terms is sufficient.<sup>248</sup> Simply requiring business to be accountable to consumers in this way supports consumer protection, which is the bottom line of this modified *Berkson* test.

Another concern is that the push to increase notice by requiring mandatory website disclosure may in fact backfire.<sup>249</sup> Mandatory website disclosure refers to posted terms on Internet pages that users could read without making purchases.<sup>250</sup> However, requiring such disclosures still does not guarantee or even necessarily increase users' motivation to read through these terms.<sup>251</sup> Excessive disclosure in this way could then result in courts upholding terms that may be somewhat substantively unconscionable, but lack procedural

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<sup>246</sup> *Berkson*, 97 F. Supp. 3d at 402.

<sup>247</sup> Shmuel I. Becher and Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TECH. L. REV. 303, 314 (2008) (stating that in business-to-consumer transactions consumers do not read or cannot correctly evaluate SFCs prior to and at the time of their formation); see also Yannis Bakos, *Does Anyone Read the Fine Print?* (Net Inst., Working Paper No. 09-04, 2009), <http://econpapers.repec.org/paper/netwpaper/0904.htm> (conducting an empirical study and finding that consumers rarely even access license agreements, and even those that do access them do not spend time reading the terms).

<sup>248</sup> See *supra* notes 78–80 and accompanying text (defining inquiry notice).

<sup>249</sup> Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of Standard Terms Backfire?*, 104 MICH. L. REV. 837, 837-39 (2006).

<sup>250</sup> *Id.* at 838 (discussing the mandatory disclosure structure and stating that it is not the same as a “clickwrap” structure).

<sup>251</sup> *Id.* at 839.

unconscionability.<sup>252</sup> The requirement of both procedural and substantive unconscionability would be unfilled because the user had notice, so some potentially questionable terms could be enforced.<sup>253</sup> Over-disclosure could therefore result in limiting consumer rights rather than expanding them.<sup>254</sup>

Still, the narrowing of consumer rights because of increased disclosure is not guaranteed.<sup>255</sup> In fact, requirements of increased notice could conceivably motivate businesses to act fairly because the terms of their contracts would be more apparent. While it could reduce the application of unconscionability, if there was greater focus on contract formation this concern would be somewhat mitigated.<sup>256</sup>

When it comes to the sign-in-wrap form of electronic adhesion contracts, there is a compelling case for closely scrutinizing contract formation with *Berkson’s* four-step test. Such an approach would take into account the differences between paper and electronic contracting methods that some courts have ignored. It would provide greater protection for consumers, and would give businesses more concrete standards to follow when creating electronic contracts. A modified test would also fully address the differences between consumers who agree to terms online versus in person by using empirical studies about internet users. The development of this “average Internet user” standard warrants further exploration, but current empirical studies support an approach that requires increased notice requirements.<sup>257</sup>

Furthermore, closer examination of contract formation addresses concerns with the strict standards of unconscionability. Even though procedural unconscionability may be high when it comes to the structure of some of these contracts, it is still a difficult standard to reach.<sup>258</sup> Focusing on the formation of electronic contracts rather than relying on unconscionability would also provide greater protection for consumers. In a world of developing e-commerce run in large part by these electronic adhesion contracts, a modified *Berkson* test would offer greater consumer protection and business accountability.

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<sup>252</sup> See *id.* at 854.

<sup>253</sup> See *id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 855-56 (describing the author’s disclaimer that he may be “unduly pessimistic” about the negative effects of mandatory disclosures for websites).

<sup>256</sup> As suggested by Judge Weinstein, as well as by scholars Nancy Kim and Edith R. Warkentine. See *supra* notes 224–25.

<sup>257</sup> See *supra* Part II.B (providing an overview of these studies).

<sup>258</sup> See *supra* Part II.C.

## IV. BEYOND BERKSON: CONSIDERING FUTURE IMPLICATIONS

## A. Adoption of the “Sign-in-Wrap” Nomenclature

In the year since the *Berkson* decision, several courts have adopted the term “sign-in-wrap” to describe these types of contracts.<sup>259</sup> In fact, in the *Resorb Networks, Inc.* decision the New York Supreme Court included a description of a “sign-in-wrap” contract alongside their descriptions of the more traditional clickwrap and browserwrap forms.<sup>260</sup> Ultimately, the *Resorb Networks, Inc.* court embraced the general reasoning of *Berkson* and held that the sign-in-wrap contract at issue did not provide users with notice or show a manifestation of assent.<sup>261</sup> However, to date no courts have implemented the *Berkson* four-part test or used the structured analysis to determine the validity of these contracts.

Furthermore, the U.S. District Court for the District of Massachusetts provided an opposing approach in *Cullinane v. Uber Technologies*.<sup>262</sup> While the court adopted the “sign-in-wrap” terminology, it declined to embrace the *Berkson* Test or even the general premise of *Berkson* that posits special considerations for electronic contracting.<sup>263</sup> Rather, the court stated that “analysis of the Agreement’s validity and enforceability turns more on customary and established principles of contract law than on newly-minted terms of classification.”<sup>264</sup> Such language clearly distinguishes this approach from *Berkson*’s more liberal willingness to take into account differences between paper and electronic contracting. In fact, the court here relied on reasoning from the competing *Fteja* decision in upholding the validity of the contract.<sup>265</sup>

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<sup>259</sup> See, e.g., *Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at \*6-9 (S.D.N.Y. July 29, 2016) (mentioning the “sign-in wrap” contract form and finding Uber’s electronic contract terms unenforceable for lack of notice and assent); *Salameno v. Gogo Inc.*, No. 16-CV-0487, 2016 WL 4005783, at \*4 (E.D.N.Y. July 25, 2016) (enumerating situations where sign-in-wrap contracts are enforceable); *Resorb Networks, Inc. v. YouNow.com*, 30 N.Y.S.3d 506, 512 (N.Y. Sup. Ct. 2016) (finding the contract in question qualified as a “sign-in-wrap” and did not give users “effective opportunity to access the Terms of Use”).

<sup>260</sup> *Resorb Networks, Inc.*, 30 N.Y.S.3d at 511-12.

<sup>261</sup> *Id.* at 512.

<sup>262</sup> See *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at \*7 (D. Mass. July 11, 2016).

<sup>263</sup> See *id.* at \*6-7.

<sup>264</sup> *Id.* at \*6.

<sup>265</sup> *Id.* at \*7.

These cases could indicate the beginning of a new line of jurisprudence specific to sign-in-wrap contracts, similar to the development of clickwrap or browsewrap case law. It is significant that courts have already taken up the “sign-in-wrap” terminology, whether they have implemented the specific *Berkson* reasoning or not. However, a case decided in July 2016 could complicate the development of this area of law, as it is in some tension with the *Berkson* decision.<sup>266</sup> That case, *Salameno v. Gogo Inc.*,<sup>267</sup> involved the same defendant as *Berkson*, was heard in the same court, and was handed down by the same judge, the prominent Judge Weinstein.

B. *The Wrench in the Analysis: Interpreting the Salameno Decision*

At first glance the *Salameno* case appears to mirror *Berkson* almost exactly — though it differed in that it concerned a motion to dismiss.<sup>268</sup> Still, the plaintiffs in the case challenged the validity of what was clearly a sign-in-wrap contract,<sup>269</sup> a contract that was in fact offered by the same defendant involved in *Berkson*. The plaintiffs contended that they did not receive adequate notice of the terms and therefore could not manifest assent.<sup>270</sup> Unsurprisingly, the plaintiffs relied “heavily” on the *Berkson* decision to support their arguments.<sup>271</sup>

However, Judge Weinstein refused to bite, opting instead to distinguish the two cases.<sup>272</sup> One important consideration for Judge Weinstein was the fact that Gogo emailed the plaintiffs with a hyperlink of the terms and conditions.<sup>273</sup> This factual difference would appear to address his concern in *Berkson* that the plaintiffs never had access to a hard copy or alternative form of the terms and conditions.<sup>274</sup> In a similar vein, the *Resorb Networks, Inc.* court that followed the *Berkson* decision considered an email sent by the

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<sup>266</sup> See generally *Salameno v. Gogo Inc.*, No. 16-CV-0487, 2016 WL 4005783 (E.D.N.Y. July 25, 2016) (finding clickwrap and sign-in-wrap agreements to provide notice of terms of use and arbitration clause).

<sup>267</sup> See generally *id.*

<sup>268</sup> See *id.* at \*1.

<sup>269</sup> *Id.* at \*3 (providing a description and images of the contract in question, where a hyperlink to the terms and conditions was located next to the “Sign In” button with the text “By clicking ‘Sign In’ I agree to the terms of use and privacy policy” with the underlined phrases hyperlinked).

<sup>270</sup> *Id.* at \*5.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at \*5-6.

<sup>273</sup> *Id.*

<sup>274</sup> *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359, 403 (E.D.N.Y. 2015).

defendants that contained a line stating that all people receiving the email should abide by the “Terms of Service.”<sup>275</sup> However, it did not include a link to the electronic contract, and thus did not provide notice.<sup>276</sup> The decisions of these courts on this issue suggests that if a seller emails an actual hyperlink of an electronic contract to consumers, that action can aid and potentially even prove notice for the purposes of contract validity.

The more notable issue raised in *Salameno* concerned the type of user entering into the sign-in-wrap contract. Judge Weinstein gave significant weight to the fact that the plaintiffs in *Salameno* had “purchased and used Gogo’s product many more times,” in contrast to the plaintiffs in *Berkson* who had only signed in and used the products once.<sup>277</sup> Judge Weinstein concludes that because users who signed in to the website were presented with a link to the terms every time they signed in, multiple sign-ins were thus sufficient to give notice of the terms.<sup>278</sup>

*Berkson* is not entirely inconsistent with this approach. Judge Weinstein notes that courts have upheld sign-in-wrap contracts when the “user ‘signed up’ to the website with a clickwrap agreement and was presented with hyperlinks to the ‘terms of use’ on subsequent visits.”<sup>279</sup> However, relying on this piece of the *Berkson* analysis seems to prioritize step one of the *Berkson* Test, which looks for evidence that a user understood she was agreeing to terms,<sup>280</sup> over step two, which focuses on the design of the website and considers whether terms are plainly available to the consumer.<sup>281</sup>

Additionally, the *Salameno* decision specifically distinguished between “sophisticated” and “unsophisticated” users.<sup>282</sup> This focus on “sophisticated” users highlights an inconsistency in *Berkson* itself regarding the discretion of judges to determine who an “average Internet user” is. In *Berkson*, Judge Weinstein critiques courts that have “‘decided,’ based largely on speculation, what constitutes inquiry

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<sup>275</sup> *Resorb Networks, Inc. v. YouNow.com*, 30 N.Y.S.3d 506, 512 (N.Y. Sup. Ct. 2016).

<sup>276</sup> *See id.*

<sup>277</sup> *Salameno*, 2016 WL 4005783, at \*5.

<sup>278</sup> *See id.* (“Thus, unlike the plaintiffs in *Berkson*, the plaintiffs here were repeatedly warned that by using Gogo’s product they were agreeing to the terms of use, and they were repeatedly presented with a hyperlink to those terms.”).

<sup>279</sup> *Berkson*, 97 F. Supp. 3d at 401.

<sup>280</sup> *Id.* at 402.

<sup>281</sup> *Id.*

<sup>282</sup> *Salameno*, 2016 WL 4005783, at \*5-6.

notice of a website’s ‘terms of use.’”<sup>283</sup> Arguably, this is the exact analysis Judge Weinstein is employing in *Salameno*. The lack of clear standards for determining “sophisticated” vs. “unsophisticated” users, or alternatively who “average Internet users” are, reaffirms the need for the inclusion of a stronger “average Internet user” standard in the *Berkson* Test.<sup>284</sup> Going forward only time will tell how this decision will affect the seminal *Berkson* case.

#### CONCLUSION

Although the law remains unsettled in the area of sign-in-wrap contracts, the *Berkson* case presents a potential springboard for courts to re-consider electronic contract requirements. Judge Weinstein clearly wrote *Berkson* to evaluate and critique current judicial approaches to electronic contracts. *Berkson* therefore offers courts some direction for addressing the complicated issues that have developed with the rise of e-commerce. Chief among these concerns is the application of the common law to the world of electronic contracts, and the inherent questions such application raises. By focusing on contract formation and applying a more concrete average internet user standard, notice and assent concerns are somewhat mitigated and consumers have more protection.

However, market forces are still responding to this newer form of business over the Internet, which could impact consumers. Considerable differences still exist in lower court approaches to electronic contracts. Due to the recent *Salameno* decision, there are new questions about how *Berkson* should be applied when consumers are not “lay internet users.”<sup>285</sup> Furthermore, the hybrid sign-in-wrap may be the first in the development of new forms of electronic contracts that demand court attention. Embracing an approach that has stricter standards for contract formation would provide stronger guidelines for business and more security for consumers in this developing electronic realm.

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<sup>283</sup> *Berkson*, 97 F. Supp. 3d at 380.

<sup>284</sup> See *supra* Part III.A. (advocating a *Berkson* Test that takes into consideration scientific studies to determine average Internet user literacy).

<sup>285</sup> See *Salameno*, 2016 WL 4005783, at \*6.