PIC-WRAP: A PICTURE IS WORTH A THOUSAND TERMS IN ONLINE CONTRACTING

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I. INTRODUCTION

Every day internet users encounter contracts when interacting with websites and apps, often accepting terms with little thought in order to conduct their immediate business.[1] When signing up for a social media account, users often unknowingly agree to give up their legal protections and personal information to participate in the online environment.[2] When online shopping, consumers mindlessly surrender their privacy rights to be used by the vendor in targeted advertising or sold to third parties.[3] Whether engaging in social networking platforms like Facebook or ordering the latest must-have item on Amazon, online contracts have become a regular aspect of human existence.[4]

The Covid-19 pandemic accelerated the already growing centrality of online transactions.[5] As screen time surged, social networks and online retailers gained concentrated power in the digital marketplace.[6] Although many people have returned to their pre-pandemic routines, the convenience of having goods delivered to the front door and the communities created behind the screen remain prominent in contemporary life.[7] To take advantage of the apps and websites that have become so integral in today's society,[8]

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1 *See* Kevin Conroy & John Shope, *Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions*, 63 BOS. B.J. 23, 23 (2019).

2 Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOL. L. REV. 1, 3 (2021).

3 Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 434 (2020).

4 *See* Lindsay Sain Jones & Tim R. Samples, *On the Systemic Importance of Digital Platforms*, 25 U. PA. J. BUS. L. 141, 161 (2023) (tagging Facebook, Amazon, Google and Microsoft as tech giants increasingly dominating the internet).

5 *Id.* at 175.

6 *Id.*

7 *See id.* at 172-75 (discussing the path of the digital revolution and the resulting concentrations of power in the digital marketplace).

8 Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 140 (2022) (referencing websites that offer services necessary to thrive in modern society in the context of adhesive online contracts that contain mandatory arbitration and limited liability clauses).

consumers often subject themselves to terms and conditions that carry serious legal consequences.[9] For example, a typical social media user would have to read at least ten pages, on average, before reaching an arbitration clause that waives their Seventh Amendment right to a jury trial.[10] Yet, it is well known that consumers do not usually read online agreements at all.[11] In doing so, users unknowingly waive rights.[12] How can a contract be binding when one party is completely unaware of what they are agreeing to or that there is even an agreement at all?

The primary question courts consider—whether sufficiently conspicuous notice is provided to the reasonably prudent user—is fact specific, and different courts have varying interpretations of what is reasonable.[13] Furthermore, the reasonably prudent user is so far detached from the modern online consumer because most users do not take it upon themselves to read the contracts they agree to.[14] Even if they did attempt to read them, most contracts are not written in terms a layperson would understand.[15] When users are confronted with complex, non-negotiable terms by the online platforms they need to flourish in modern society, consent is not truly given, and assent is far from mutual.[16]

Companies have the resources and ability to change the current practice of online contracting by creating more binding and understandable

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9 *See* Conroy & Shope, *supra* note 1, at 23 (listing arbitration clauses, forum selection clauses, waivers, licenses, and indemnification provisions as examples of potentially harmful terms often included by proprietors of online platforms).

10 Instagram's arbitration clause, for example, essentially requires users to waive their right to a jury trial under the Seventh Amendment. *Terms of Use*, INSTAGRAM, https://help.instagram.com/581066165581870 (last visited Nov. 20, 2023); Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1433, 1498 (2014).

11 Matthew Hoffman, Comment, *Contract Law-Conspicuous Arbitration Agreements in Online Contracts: Contradictions and Challenges in the Uber Cases*, 43 U. ARK. LITTLE ROCK L. REV. 499, 511 (2021); *see also* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2289 (2019) ("[E]xisting literature mainly argues that consumers do not read standardized contracts.").

12 Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1433 (2014).

13 Dee Pridgen, *Ali's Restatement of the Law of Consumer Contracts: Perpetuating a Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 562 (2020) (discussing the uncertainty of outcomes and how the "notice and opportunity test" requires courts to involve themselves with the design of websites and apps); Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L. J. SCI. & TECH. 79, 91 (2008).

14 Clifford Fisher et al., *Evolution of Clickwrap & Browsewrap Contracts*, 48 RUTGERS COMPUT. & TECH. L.J. 147, 167 (2022); Jones & Samples, *supra* note 4, at 170.

15 Clifford Fisher et al., *Evolution of Clickwrap & Browsewrap Contracts*, 48 RUTGERS COMPUT. & TECH. L.J. 147, 167 (2022); Rustad & Koenig, *supra* note 12, at 1471; Jones & Samples, *supra* note 4, at 170; Kim, *supra* note 8, at 139.

16 *See* Kim, *supra* note 8, at 140 (discussing the lack of consent in the online environment).

agreements.[17] This Note offers an innovative suggestion, utilizing design elements of adequate notice to make online contracts more comprehensible and engaging by incorporating drawn illustrations of terms. Enhancing online terms with visual explanations has the capacity to benefit both parties by increasing enforceability for the company and improving accessibility for the user.[18]

Part II of this Note sets the backdrop of common-law contract formation, categorical wrap agreements, and the issue of online assent in contracts of adhesion. Part III sets forth brief case analyses of notice, a discussion of common practices used to circumvent notice, and problems with the current standard of enforcement. Finally, Part IV outlines "Pic-wrap," a proposal to increase notice by design.

II. FOUNDATION AND ISSUES IN BINDING AGREEMENTS

A. Getting Wrapped Up in Online Contracts

Common-law contract formation effectively consists of an offer, acceptance of that offer, and consideration.[19] Consideration is the "bargained-for exchange," which can be identified as a benefit to the promisor or a detriment to the promisee.[20] An offer is defined as a manifestation of intent to invite acceptance to enter into an agreement.[21] Acceptance is a manifestation of assent to the terms of the offer.[22] A valid offer and acceptance together form the common-law concept of mutual assent.[23] Article 2 of the Uniform Commercial Code loosens the common-law requirements of contract formation when it comes to the sale of goods; however, the parties' objective manifestation of assent to an agreement remains essential under both constructs.[24]

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17 Clifford Fisher et al., *Evolution of Clickwrap & Browsewrap Contracts*, 48 RUTGERS COMPUT. & TECH. L.J. 147, 162 (2022) (naming Apple and Amazon as entities with the opportunity and resources to make a difference in the current practice of online contracting).

18 Michael D. Murray, *Cartoon Contracts and the Proactive Visualization of Law*, 16 U. MASS. L. REV. 98, 105–06 (2021) ("With improved accessibility and comprehension of contract terms, visualization promotes greater acceptance of contracts. This would lead not only to better and more predictable contract performance and enforcement, but also to stronger relationships between parties.").

19 A.J. Zottola et al., *Online Contract Formation*, 22 J. INTERNET L. 3, 3 (2018) (discussing the application of traditional contract formation in the online setting).

20 RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981).

21 *Id.* at § 24.

22 *Id.* at § 50.

23 *Id.* at § 22.

24 *See* 1 WILLIAM D. HAWKLAND ET AL., HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES § 2-204:1.

Assent refers to the mental state of agreement to a certain transaction.[25] Because judges and decision-makers cannot read minds, courts use an objective standard to determine when a party has consented to the terms of an offer based on observable indicators.[26] In the context of online contracts, courts look to indications of assent such as clicking to check a box, the continuing use of an online platform after being presented with a pop-up window, or sometimes merely browsing a website with a hyperlink at the bottom of the page.[27]

When downloading an app, visiting a website, or making a purchase online, consumers frequently stumble into binding contracts.[28] Agreements commonly labeled "Terms of Service" or "Terms of Use" are found in pop-up windows, on the homepage of websites, or in separate webpages accessible by hyperlinks.[29] These online contracts have often been categorized into two types of legal documentation: "click-wrap" and "browse-wrap." agreements.[30]

Click-wrap agreements allow a person to enter a binding contract at the click of a button.[31] By checking the box next to some acceptance message, such as "I agree," the user has given express assent to the terms of the contract.[32] Scroll-wrap contracts are a subcategory of click-wrap agreements that provide more notice by requiring the user to view the terms of the agreement through the construction and design of the website.[33] This variation of online contracts is often featured in a pop-up box, blocking the content of a given website until the user scrolls down to the bottom of the agreement, where they can manifest assent by checking a box next to the words "I agree" or by clicking a button with the same effect.[34] This format provides greater notice of the terms and existence of a contract.[35] On the other hand, browse-wrap agreements allow users to enter into a contract simply by their conduct, giving implied assent by continuing to interact with the app or

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25 Chunlin Leonhard, *Dangerous or Benign Legal Fictions, Cognitive Biases, and Consent in Contract Law*, 91 ST. JOHN'S L. REV. 385, 405 (2017) (discussing "consent" as an interchangeable term for "assent" or "agree").

26 *Id*. at 405-06.

27 *Id*. at 416.

28 Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 538 (2015).

29 Daniel D. Haun & Eric P. Robinson, *Do You Agree?: The Psychology and Legalities of Assent to Clickwrap Agreements*, 28 RICH. J.L. & TECH. 623, 626 (2022).

30 Zottola et al., *supra* note 19, at 7 (discussing the application of contract law in online settings).

31 *Id.*

32 *Id.*

33 Colin P. Marks, *Online Terms as in Terrorem Devices*, 78 MD. L. REV. 247, 257 (2019).

34 *See id.* (describing the typical format of scroll-wrap agreements).

35 *See generally id*.

website.[36] The terms of these contracts are accessible by hyperlink[37] and usually state that by continuing to use the provider's service or remaining on a given page, the user gives implied assent to be bound to the terms of the agreement.[38]

Existing analyses of case law suggest that browse-wrap contracts are less enforceable than their click-wrap and scroll-wrap counterparts,[39] yet they are the more common method of online contracting.[40] The difference in their likelihood of being upheld may be attributed to the structure of browse-wrap agreements, which gives the user less prominent notice of the presence of a contract and its terms and requires no affirmative action to manifest assent besides continued use of the website.[41] For online retailers, the decision is motivated by economics and expediency.[42] The fear of losing sales drives companies away from incorporating check boxes, displaying pages of lengthy terms, or otherwise delaying the customer from spending money.[43] In the context of social media platforms, providing less notice results in users unsuspectingly waiving "all meaningful rights, warranties, and remedies, while the social network provider asserts its interests to the limits of the law."[44]

"Hybrid-wrap" contracts combine elements of browse-wrap and click-wrap in varying degrees.[45] Social media platforms such as Facebook and X, formerly known as Twitter, utilize the hybrid-wrap format, displaying a hyperlink to their terms of service during the sign-up process[46] and requiring the user to click "sign up" to assent to the hyperlinked terms.[47] When the lines are blurred by contracts that do not fit into strict categories of click-wrap or browse-wrap, courts are forced to ditch the labels and determine

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36 Zottola et al., *supra* note 19, at 7.

37 Colin P. Marks, *There Oughta Be a Law: What Corporate Social Responsibility Can Teach Us About Consumer Contract Formation*, 32 LOY. CONSUMER L. REV. 498, 512 (2020).

38 Fisher et al., *supra* note 17, at 150.

39 *See* Rustad & Koenig, *supra* note 12, at 1451; Marks, *supra* note 33, at 258.

40 Marks, *supra* note 33, at 511-12; *see also* Marks, *supra* note 33, at 258.

41 Karanicolas, *supra* note 2, at 12.

42 Marks, *supra* note 33, at 258 (discussing the selection and favoritism of browse-wrap contracts by the websites that utilize them).

43 *Id.*

44 Rustad & Koenig, *supra* note 12, at 1451.

45 Karanicolas, *supra* note 2, at 13.

46 *Id.*; *see also* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2264-65 (2019) (describing sign-in-wrap contracts as a blend of click-wrap and browse-wrap contracts).

47 Allison S. Brehm & Cathy D. Lee, "*Click Here to Accept the Terms of Service*", 31 COMM. LAW. 4, 6 (2015); *see also* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2264-65 (2019) (describing sign-in-wrap contracts as a blend of click-wrap and browse-wrap contracts).

enforceability by focusing on whether there is adequate notice to support a finding of assent.[48]

B. The Issue: Online Assent in Contracts of Adhesion

United States contract law substantially lags behind the evolution of websites and apps that take advantage of the current state of the law by aggressively compromising consumer rights and remedies.[49] Courts have strained to extend the traditional contract law principles to adapt to the new settings brought on by technological advances.[50] However, attempts to stretch older common-law concepts in the setting of online contracts have ultimately undermined the foundations and doctrinal objectives of contract law.[51] Scholars argue that change is necessary, especially regarding the issue of online assent.[52]

Courts have examined different indications of assent when enforcing online contracts, including clicking a button, browsing a website, or simply noticing a term.[53] While arguably providing some evidence of assent, these indicators are not conclusive in determining the user's actual intent.[54] Clicking, for example, has become a reflexive and habitual activity.[55] Users may reflexively click icons to proceed with an online activity, not with the intention of entering a binding online agreement.[56]

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48 Allison S. Brehm & Cathy D. Lee, "*Click Here to Accept the Terms of Service*", 31 COMM. LAW. 4, 7 (2015); Matt Meinel, *Requiring Mutual Assent in the 21 Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. 180, 193 (2016) ("Ultimately, 'all these labels can take courts only so far,' for most cases will fall somewhere in between browsewrap and clickwrap, requiring fact-based inquiries that defy bright-line rules. Therefore, regardless of how a court classifies a fact pattern, the court's finding will be determined by the manifestation of assent by the reasonably prudent offeree.").

49 Rustad & Koenig, *supra* note 12, at 1515.

50 Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1141–42 (2019) ("With each small change in technology, courts tried valiantly to extend traditional contract law concepts and principles to these new settings. But much like the proverbial frog in the pot of boiling water, these attempts to stretch older terms and concepts to new situations ultimately kept the surface of contract law looking the same while obscuring a more fundamental break in function.").

51 *Id*.

52 *See* Rustad & Koenig, *supra* note 12, at 1515-16 (discussing the need for an update in the doctrine of mutual assent in the context of social network contracts); Nicolás Rojas Covarrubias, *Limits of Assent in Consumer Contracts: A (Regulatory) View from the South*, 32 LOY. CONSUMER L. REV. 581, 601 (2020) (suggesting a reevaluation of the role of assent as foundation in modern consumer contracts); Kim, *supra* note 8, at 88 (criticizing the assumption of assent to online adhesive terms for disregarding the centrality of consent in contract law).

53 Leonhard, *supra* note 25, at 416 (discussing "consent" as an interchangeable term for "assent" or "agree").

54 *Id*.

55 Kim, *supra* note 8, at 97-98.

56 *Id*. at 98.

Hypothetically, a comparison to oral contracting can be made where an individual interrupts the offeror by exclaiming, "I accept," before the offeror can finish informing them of the terms of the agreement. Likewise, suppose that individual walks around accepting anything in earshot that resembles an offer. Are those oral contracts binding? This is effectively the type of assent users are giving online.[57] Before one could possibly finish reading the agreement, the box is checked at the click of a button, and the user has explicitly assented to the online contract. A similar question was posed in the article *Evolution of Clickwrap & Browsewrap Contracts*, which asks, "If one party does not even know what they are agreeing to, can they assent to the contract?"[58] When the average user is unaware of what they are agreeing to, it has negative implications for both the user and the companies utilizing wrap agreements.[59]

Another analogous consideration is adhesion contracts, also known as boilerplate or standard form contracts.[60] These allow companies to bypass the traditional notions of negotiation and autonomy by offering take-it-or-leave-it conditions to the consumer.[61] Wrap agreements fall under the parameters of adhesion contracts, as the user has no choice but to agree to the conditions of the contract if they want to use the online resource or service.[62]

Contracts of adhesion first evolved to keep up with changes in the marketplace, such as industrialization and the mass production of goods.[63] Then came the rise of technology and the digital age, which allowed for further efficiency and cost-effectiveness.[64] On the internet today, entities can make an offer to invite acceptance to their terms, which is then accepted by billions of people.[65] Due to their ability to bind such large masses of users, digital platform Terms of Use agreements are the most widely used contracts in history.[66]

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57 *See generally* Fisher et al., *supra* note 17, at 165 (examining whether a party can assent without knowledge of what they are agreeing to).

58 *Id.*

59 *Id.* at 167.

60 CFI Team, *Adhesion Contract*, CFI, https://corporatefinanceinstitute.com/resources/valuation/adhesion-contract/ (last visited Feb. 9, 2024).

61 Aaron E. Ghirardelli, *Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts*, 93 OR. L. REV. 719, 723 (2015); *see also* Kim, *supra* note 8, at 88.

62 Haun & Robinson, *supra* note 29, at 644; *see also* Kim, *supra* note 8, at 103.

63 Kim, *supra* note 8, at 90.

64 *Id.* at 90-91.

65 *See* Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L.J. 135, 140 (2021) (discussing contracts mediated by the internet having a "one-to-many" ratio between the party putting a contract on the web and the parties that agree to them); Jones & Samples, *supra* note 4, at 171.

66 Jones & Samples, *supra* note 4, at 171.

It is necessary that these agreements be contracts of adhesion, as it would be impracticable and inefficient to negotiate with every individual counterparty.[67] For example, Facebook has more users than any one country has citizens,[68] with almost three billion people participating in the platform.[69] During the sign-up process, each account holder must agree to Facebook's Terms of Use agreement,[70] generating perhaps the most widely accepted contract of all time.[71]

Online contracts of adhesion present the consumer with an ultimatum to either accept the terms set forth by the service provider or be denied access to the platform or service.[72] In other words, the use of apps and websites is contingent on the terms set forth by the company or service provider.[73] These conditions are woven into several pages of terms that commonly go unread and are thoughtlessly accepted by the user.[74] Users have credited their failure to read the terms and conditions to the nature of these agreements, which gives them no other choice but to agree if they want to view the "desired page" of the online platform.[75] Failure to read, however, is not a defense when it comes to the enforceability of written contracts.[76] Online contracts have been enforced notwithstanding the user's failure to click on the hyperlink and view the terms.[77] In fact, wrap contracts have been upheld despite the apparent absence of any knowing assent so long as the user is put on notice that a contract exists.[78]

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67 *See* Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L.J. 135, 140 (2021) (noting the necessity that contracts presented by one party and accepted by many parties because "there is obviously no time to negotiate the deals with every counterparty.").

68 Jones & Samples, *supra* note 4, at 169.

69 *Id*. at 146.

70 Karanicolas, *supra* note 2, at 13.

71 Jones & Samples, *supra* note 4, at 146 ("[W]ith almost three billion users, Facebook's terms-of-use agreement is perhaps the most widely accepted contract in human history.").

72 Haun & Robinson, *supra* note 29, at 626-27.

73 Kim, *supra* note 8, at 103.

74 Aaron E. Ghirardelli, *Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts*, 93 OR. L. REV. 719, 723 (2015).

75 Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUM. BEHAV. 293, 296 (2012) (showing that in one study, 23.1% of participants listed having no choice as a self-reported explanation for not reading a click through agreement. Other explanations included the time it would take to read the agreement (31.3%) and "[b]ecause they're all the same and boring" (29.9%)).

76 Matthew Hoffman, *Contract Law-Conspicuous Arbitration Agreements in Online Contracts: Contradictions and Challenges in the Uber Cases*, 43 U. ARK. LITTLE ROCK L. REV. 499, 504 (2021); *see also* Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 111 (2008).

77 Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 111 (2008) (discussing the effect of design on enforceability of online agreements).

78 Preston, *supra* note 28, at 535.

III. THE CURRENT CLIMATE OF ONLINE CONTRACTING

A. Case Analyses of Notice: Continued Confusion

The standard of "reasonable notice" has been the bedrock of online contract enforcement since the beginning of the Internet era.[79] As click-wrap, browse-wrap, and hybrid-wrap agreements have continued to blur lines in modern contracting, less importance has been given to categorizing these contracts; instead, the focus has shifted to the conspicuousness of the terms to resolve enforceability issues.[80] Courts are willing to infer constructive notice if a reasonably prudent user would be on inquiry notice of the terms of the agreement.[81]

In deciding the enforceability of wrap agreements, courts have used elements of design to determine if the placement and format of text have sufficiently called the user's attention to the existence and terms of a contract.[82] To examine the notice requirement, courts have increasingly included screenshots in their opinions to illustrate how users engage with the design of a given website or app.[83] Considerations relevant in determining whether there was sufficient notice include font size, hyperlink labeling, screen layout, color, presentation, and user experience.[84]

In *Meyer v. Uber Technologies*, Inc., the U.S. Court of Appeals for the Second Circuit held, as a matter of law, that inquiry notice is established where such notice is reasonably conspicuous and the manifestation of assent is unambiguous.[85] In this case, a blue hyperlink was presented to the user on an uncluttered screen along with a button to "Register" directly above the

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79 Bekele v. Lyft, Inc., 918 F.3d 181,187 (1st Cir. 2019); *see also* Kauders v. Uber Technologies, Inc., 159 N.E.3d 1033, 1049 (Mass. 2021); *see also* Sgouros v. TransUnion Corp., 817 F.3d 1029, 1034-35 (7th Cir. 2016); *see also* Meyer v. Uber Technologies, Inc., 868 F.3d 66, 75 (2d Cir. 2017). Kim, *supra* note 8, at 85 ("Courts typically apply the standard of reasonable notice to assess the enforceability of adhesive online terms.").

80 Matt Meinel, *Requiring Mutual Assent in the 21 Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. 180, 193 (2016); *see also* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014) ("[W]hether the website puts a reasonably prudent user on inquiry notice of the terms of the contract . . . depends on the design and content of the website and the agreement's webpage."); *see also* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016) (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29-30 (2d Cir. 2002)) ("[C]licking on a . . . button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the . . . button would signify assent to those terms.").

81 Karanicolas, *supra* note 2, at 12; *see also Nicosia*, 834 F.3d at 236 (quoting Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012)).

82 Tasker & Pakcyk, *supra* note 77, at 95 (discussing the effect of design on enforceability of online agreements).

83 Nancy S. Kim et al., *Notice and Assent Through Technological Change: The Enduring Relevance of the Work of the ABA Joint Working Group on Electronic Contracting Practices*, 75 BUS. LAW. 1725, 1738 (2020); *see, e.g.*, *Meyer*, 868 F.3d at 81-82; *Sgouros*, 817 F.3d at 1031-32.

84 Nancy S. Kim, *Online Contracting*, 72 BUS. LAW. 243, 252 (2017).

85 Meyer v. Uber Technologies, Inc., 868 F.3d 66, 75 (2d Cir. 2017).

warning that "by creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY."[86] The court determined this language and screen design provided adequate conspicuousness of notice based on the perspective of a reasonably prudent smartphone user.[87]

Another dispute arising out of the same popular transportation app resulted in the opposite outcome.[88] In *Cullinane v. Uber Technologies*, Inc., the U.S. Court of Appeals for the First Circuit found that the user-plaintiffs were not provided with adequate reasonable notice of the terms of the agreement.[89] The court noted that Uber strayed away from the standard method of informing users of the existence and location of terms and conditions.[90] Instead, the hyperlink was displayed in bold white font and set apart within a gray box.[91] These features may have been adequate to draw enough attention for sufficient notice if the hyperlink was accompanied by an otherwise plain design and minimal other content.[92] In this case, however, the screen included other text with similar design features[93] and text that was more attention-grabbing than the hyperlink.[94]

The contrasting outcomes of the two Uber cases illustrate how subtle distinctions in the fact-intensive examination of design can make or break a finding of sufficient notice in the eyes of the courts.[95] The following cases further demonstrate how strict courts can be in evaluating sufficient notice; it is hard to know how conspicuous an online contract must be for it to be binding.[96]

In *Nguyen v. Barnes & Noble Inc.*, an online agreement was held unenforceable by the U.S. Court of Appeals for the Ninth Circuit despite a link to the provision visible near where the user was required to click to complete their order.[97] This link was also featured in the bottom corner of

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86 *Id.* at 76.

87 *Id.* at 78-79.

88 *See* Cullinane v. Uber Techs., Inc., 893 F.3d 53, 62 (1st Cir. 2018) (noting the presentation of the "Terms of Service & Privacy Policy" did not reasonably notify the plaintiffs of the terms of the agreement).

89 *Id.* at 63.

90 *Id.* at 62 ("Uber chose not to use a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen.").

91 *Id.* at 57, 63.

92 *Id.* at 63.

93 *Id.* (explaining that the font size and bold typeface of the terms "scan your card" and "enter promo code" were displayed similarly to the "Terms of Service & Privacy Policy.").

94 Cullinane v. Uber Techs., Inc., 893 F.3d 53, 63 (1st Cir. 2018) ("The inclusion of the additional payment option and the placement of a large blue PayPal button in the middle of the screen were more attention-grabbing and displaced the hyperlink to the bottom of the screen.").

95 Dee Pridgen, *Ali's Restatement of the Law of Consumer Contracts: Perpetuating a Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 566-67 (2020).

96 *See id.* at 562.

97 Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1179 (9th Cir. 2014).

every page of the defendant's website.[98] Still, the court held that without evidence that the user had actual knowledge of the contract, the enforceability of the browse-wrap agreement depends on whether the reasonably prudent user would be put on inquiry notice of the contract terms based on the design and content of the website.[99] In *Nguyen*, notice was insufficient because the proximity and visibility of the hyperlink alone were not enough to infer that the consumer was aware they were entering into a binding agreement.[100] The Ninth Circuit relied heavily on traditional categorizations rather than providing a visual analysis of inquiry notice.[101] The outcome demonstrates the reluctance of some courts to infer assent without an express manifestation, such as clicking "I accept" or some other equivalent.[102]

Still, providing the user with the opportunity to express acceptance is not enough to ensure enforceability unless there is sufficient notice of the applicable terms of the agreement.[103] For example, in *Sgouros v. TransUnion Corp*., the U.S. Court of Appeals for the Seventh Circuit concluded an online agreement was unenforceable despite the user clicking an "I accept" button because the website failed to call the user's attention to their purchase being subject to any terms or conditions of sale.[104] The court provided helpful insight that the agreement might have been binding if the location of the agreement or hyperlink to the agreement were positioned next to an "I accept" button clearly pertaining to that agreement.[105]

More recently, in *Oberstein v. Live Nation Ent., Inc.*, a notice was displayed above action buttons that allowed the user to create an account, sign in to an account, and complete a purchase.[106] The language indicating the existence of a contract was clear, communicating to the user that by clicking on the button below, "you agree to our Terms of Use."[107] Additionally, the "Terms of Use" were accessible at each of the three independent stages via hyperlinks displayed in bright blue font, sufficiently distinguishing it from surrounding text.[108] The U.S. Court of Appeals for the Ninth Circuit affirmed that a reasonable user would have been put on notice

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98 *Id.* at 1178.

99 *Id.* at 1177-79.

100 *See id.* at 1178-79.

101 2 IAN C. BALLON, E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS ch. 21, 61 (2nd ed. 2020 update).

102 *Id.*

103 *Id.* ("Even where express assent is obtained, courts may be reluctant to find a binding contract formed where it is unclear what document or documents constitute the agreement or where the language surrounding a request for express assent is deemed to be unclear.").

104 Sgouros v. TransUnion Corp., 817 F.3d 1029, 1036 (7th Cir. 2016).

105 *Id.*

106 Oberstein v. Live Nation Ent., Inc., 60 F.4th 505, 515 (9th Cir. 2023).

107 *Id.*

108 *Id.* at 516.

by the conspicuously displayed text denoting "that continued use will act as a manifestation of the user's intent to be bound."[109] The court added that the crucial conspicuousness of the hyperlink made the presence of the Terms readily apparent.[110] Based on those features, the court held that the Ticketmaster and Live Nation website design satisfied the standard of reasonably constructive notice.[111]

As these examples illustrate, the caselaw surrounding the parameters of adequate notice is contradictory and confusing.[112] Whether the reasonably prudent user has been provided with sufficiently conspicuous notice varies because courts have differing opinions on what is reasonable.[113] Accordingly, the current standard of deciding the enforceability of online contracts has generated uncertainty in the predictability of outcomes when the user challenges a website or app design.[114] Design is central to the issue of enforceability and can be utilized by online platform providers to increase notice by drawing more attention to the terms and existence of a contract.[115]

B. Using Design to Circumvent Notice: Keeping Online Contracts Under Wraps

Although design practices can be utilized to promote enforceability by providing more notice to the user,[116] there has been an increasing use of design techniques to keep consumers in the dark.[117] "Dark patterns"[118] are manipulative design tactics that steer user conduct toward making potentially harmful decisions they might not have otherwise chosen.[119] These patterns can be observed in areas leading up to an actual agreement via deceptive marketing practices[120] and are prominent in online contracting.[121]

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109 *Id.* (quoting Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014)).

110 *Id.*

111 *Id.* at 517.

112 *See* Pridgen, *supra* note 95, at 562 (discussing the uncertainty of outcomes and how the "notice and opportunity test" requires courts to involve themselves with the design of websites and apps).

113 *Id.*

114 *See id.*

115 *See generally* Kim, *supra* note 84, at 252.

116 *See id.* at 252-53.

117 FED. TRADE COMM'N, BRINGING DARK PATTERNS TO LIGHT 1 (2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf (discussing the growing use of manipulative design practices in online commerce).

118 *Id.* at 2 (indicating that the term "dark patterns" was coined by user design specialist, Harry Brignull, in 2010).

119 *Id.*

120 *See id.* at 22-23 (depicting several examples of deceptive marketing practices such as displaying a baseless countdown timer to create a false sense of urgency to check out or formatting advertisements to look like unbiased product reviews).

121 *See id.* at 22-23, 25-26 (listing dark pattern variants such as hiding information, additional costs, automatic subscriptions in lengthy terms of service documents or nondescript hyperlinks and

Companies utilize manipulative design to hide information in dense Terms of Service documents by requiring excessive scrolling for certain conditions to become visible and tucking language between more prominent, bolded paragraphs.[122] For example, social media providers often bury arbitration clauses deep within their Terms of Use agreements.[123] "On average, a consumer would have to read more than ten single-spaced pages (4615 words) before reaching the first word of the arbitration clause."[124]

Dark patterns can be encountered across all types of digital user interfaces but are particularly concerning in the online expanses of data privacy and retail.[125] The Federal Trade Commission (FTC) has scrutinized the use of dark patterns, suing companies for such deception and unfairness in the marketplace.[126] Recommendations to stay on the right side of the law include (1) ensuring that transactional procedures require an affirmative, unambiguous act by the user; (2) refraining from hiding key terms in a general terms and conditions document or behind a hyperlink; and (3) obtaining informed consent from consumers instead of using dark patterns to impair user decision making.[127] The FTC notes that manipulating users into agreeing to something by using design techniques that undermine autonomy does not effectuate express informed consent.[128]

C. Flaws in the Current Standard for Online Contract Enforcement

In civil matters, the standard courts apply to determine consumer assent to online contracts involves "constructive notice and the opportunity to read."[129] This standard is low and shows little to no resemblance to the "meeting of the minds" or mutual assent necessary for common-law contract formation.[130] The deviation from the old theoretical framework has been

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subverting privacy preferences by asking users to give consent without informing them of what they are agreeing to share in a clear, understandable way).

122 *See id.* at 7 (describing the LendingClub's practice of hiding the existence of fees associated with its online loans as an example of dark patterns that hide material information).

123 Rustad & Koenig, *supra* note 12, at 1498.

124 *Id*.

125 Alfred R. Brunetti, *Dragging Dark Patterns into the Light Recognizing and Mitigating the Pervasive Risk of Manipulative Interface Design for Clients in the Digital World*, N.J. LAW., Aug. 2022, at 43 (2022).

126 *See* FED. TRADE COMM'N, *supra* note 117, at 1.

127 *Id.* at 14.

128 *Id.*

129 Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 874 (2016) (discussing mutual assent under the Restatement (Second) of Contracts and Article 2 of the UCC).

130 *See generally* Pridgen, *supra* note 95, at 543 (critiquing the proposed Restatement and quality of assent required to bind consumers to click-wrap and browse-wrap agreements as long as the other requirements of notice and opportunity to review terms are present); Heather Daiza, Comment, *Wrap Contracts: How they Can Work Better for Businesses and Consumers*, 54 CAL. W. L. REV.

embraced to incorporate electronic technologies in the contracting world, allowing a great deal of commercial convenience in online transactions.[131] However, "[b]y adopting an approach that mitigated the traditional rules of contract formation, courts have granted businesses an unfair advantage over consumers."[132] The modern rule is that users are bound to terms they have not seen as long as they had notice of some terms or reason to think there was a contract and were given means to access it.[133] This standard bears a striking resemblance to the rule that binds a person to terms that they negligently failed to read, otherwise known as the duty to read.[134]

1. Duty to Read: An Impossible Task

The duty to read is at the crux of enforcement of all written contracts and the terms they contain.[135] This rule ensures that manifesting assent to a contract legally binds that party to all the terms within the agreement, regardless of whether they read them.[136] The duty to read has some beneficial aspects, such as protecting the drafting party from the accepting party's negligence and providing an incentive for the accepting party to familiarize themselves with what they are agreeing to.[137] However, this rule becomes increasingly unfair in modern contracting because of the length and complexity of terms online.[138] "While a duty to read may seem reasonable in principle, it is fundamentally disconnected from the realities of modern living due to the sheer volume of contracting text that accompanies nearly every transaction."[139] The digitalization of consumer contracts removed barriers that previously kept companies from making their agreements too lengthy.[140] Most websites feature more than one agreement, instead utilizing a series of documents, including privacy policies, terms of service, and other interlocking agreements.[141] On average, it would take seventy-six working

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201, 239 (2017); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140 (2019).

131 *See* Amelia Rawls, *Contract Formation in an Internet Age*, 10 COLUM. SCI. & TECH. L. REV. 200, 219 (2009).

132 Ghirardelli, *supra* note 74, at 733.

133 Karnow, *supra* note 67, at 138 (stating the old rule spawned the current rule of online contract enforceability).

134 *See id.*

135 Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 746 (2016) (discussing the objective theory of assent).

136 *Id.*

137 Preston, *supra* note 28, at 565 (discussing the scope of the duty to read rule).

138 *Id.*

139 Karanicolas, *supra* note 2, at 10-11.

140 Kim, *supra* note 8, at 91.

141 Karnow, *supra* note 67, at 141 ("Most websites have a series of interlocking agreements: terms of service for the site, privacy policies, terms of sale or lease, and so on.").

days for a user to read only the privacy policies they have agreed to over the course of a year.[142]

Even if users took the time to review them, most online contracts are unreadable to the average person.[143] One study tested the readability of online consumer contracts by identifying 500 of the most popular websites in the United States and applying linguistic readability tests to their wrap agreements.[144] The results yielded that all but two of the 500 contracts (or 99.6%) were unreadable based on the recommended readability levels for consumer-related information.[145] In the context of consumer contracts, rationales for the duty to read include economic efficiency and fairness justifications.[146] However, if the contract is unreadable, these rationales fail, and the average user is left with no choice but to meaninglessly accept if they want to use the app or website.[147]

2. Notice as Proxy

As so eloquently stated, "[t]he relish for notice is irreconcilable with our knowledge that consumers do not, and cannot, read and comprehend even a fraction of the wrap contracts they encounter."[148] The lack of readability in many online contracts makes comprehension difficult, even for legal professionals.[149] The common practice of incorporating convoluted language and legalese in these agreements presents a barrier between the user and their ability to comprehend what they are agreeing to.[150] When a reasonable user does not know what the offer is, there is no real mutual assent.[151] Still, courts use the concept of adequate notice to bridge the gap between knowing acceptance and the oblivious user.[152] In doing so, they have effectively

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142 Opinion, *How Silicon Valley Puts the 'Con' in Consent*, N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/opinion/internet-facebook-google-consent.html.

143 Dustin Patar, *Most Online 'Terms of Service' Are Incomprehensible to Adults, Study Finds*, VICE (Feb. 12, 2019), https://www.vice.com/en/article/xwbg7j/online-contract-terms-of-service-are-incomprehensible-to-adults-study-finds.

144 *See generally* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

145 *Id.* at 2278.

146 *Id.* at 2296.

147 *See id.*

148 Preston, *supra* note 28, at 535.

149 Tasker & Pakcyk, *supra* note 77, at 144-45 ("A very large percentage of contracts found on the Internet contain convoluted legalese and long, compound sentence structures that are difficult to comprehend, even for experienced judges or counsel.").

150 *See* Fisher et al., *supra* note 17, at 166-67.

151 *Id.* at 151 (discussing often-found issues with browse-wrap agreements).

152 *See generally id.* at 147.

undermined the foundations of contract law by relying so heavily on constructive notice to conclude that there was mutual assent.[153]

The adequacy of notice is determined by a factual analysis of website design and contract presentation.[154] Some scholars argue that courts should not decide issues of reasonable notice because it is a fact-based question and is within the everyday experience of typical jury members.[155] Notwithstanding the factual inquiry or application of the reasonably prudent user, judges, not juries, are responsible for assessing reasonable notice.[156] Just as reasonable minds can differ, so can the outcomes when courts concern themselves with the design of apps and websites.[157] Accordingly, the more prominent notice of the contract and its terms, the more likely it is to be enforced.[158]

IV. PIC-WRAP: A PROPOSAL TO INCREASE NOTICE BY DESIGN

Currently, companies are using inconspicuous design features, [159] such as dark patterns,[160] for fear that making their terms too visible will slow down the user and cause a decrease in sales or use.[161] Instead of providing users with obvious notice of what they agree to by participating in the online world,[162] proprietors of apps and websites make terms as inconspicuous as

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153 Matt Meinel, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. 180, 188 (2016) (discussing the growth of concerning trends alongside wrap contract law development); *see also* Kim, *supra* note 8, at 98 (discussing that the consequence of relying on legal fictions of click assent and conspicuous notice is the morphing of constructive notice into constructive assent).

154 Kim, *supra* note 84, at 252.

155 Kim, *supra* note 8, at 101.

156 *Id.* (comparing the determination of reasonable notice to the determination of reasonableness when it comes to warnings in tort).

157 Pridgen, *supra* note 95, at 562 (discussing the uncertainty of outcomes and how the "notice and opportunity test" requires courts to involve themselves with the design of websites and apps).

158 Kim, *supra* note 84, at 253 ("[B]usinesses should do more than provide notice of the existence of a contract if they want to increase the likelihood that specific terms will be enforced."); Preston, *supra* note 28, at 589 ("Notice to the user that terms exist is a start; notice about the content of the terms is better . . . ."); Conroy & Shope, *supra* note 1, at 24 ("[I]ncorporating multiple design features that promote notice of the terms and make clear the user's manifestation of assent will increase the likelihood that the terms will be enforced."); Fisher et al., *supra* note 17, at 167.

159 *See generally* Marks, *supra* note 33, at 289 (noting most sellers choose the type of wrap contract that is least effective at notifying buyers of the existence of terms by using browse-wrap).

160 *See generally* FED. TRADE COMM'N., *supra* note 117, at 1 (discussing the increasing presence of manipulative design practices in online commerce).

161 *See* Marks, *supra* note 33, at 258 (discussing the selection and favoritism of browse-wrap contracts by the websites that utilize them).

162 *See* Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 434 (2020) (discussing that consumers waive their privacy rights when shopping online, allowing their information to be used by third parties or the vendor in targeted advertising); *see also* Conroy & Shope, *supra* note 1, at

possible within the legal limits of enforceability.[163] Factors evidencing adequate notice include placement of terms on a website,[164] visibility of the hyperlink to an agreement,[165] color contrasting, font size, and user experience.[166] This Note suggests that online contract creators should take the design elements of adequate notice a step further. By illustrating contract provisions, users could gain the understanding necessary to truly consent, and companies could gain increased confidence that their agreements will be upheld.[167]

Visualization is the use of visual, illustrative, and explanatory content to communicate concepts within legal documents.[168] "The contracting context is well-suited to the use of visual expression."[169] This compatibility is especially true online, given the increasing use of visual communication across many technological platforms.[170] Memes, emojis, videos, and other graphics are included in messages and social media posts to communicate thoughts, feelings, and ideas.[171] In the modern age, the use of visual media is predominant in the delivery and reception of information.[172]

Incorporating visualization to communicate contractual content has the ability to generate agreements that are more user-friendly and engaging than the typical legalese in a black-and-white, text-only document.[173] This is partly because humans process visual information more effectively than

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23 (showing that users often agree to arbitration clauses, forum selection clauses, waivers, licenses, and indemnification provisions and other terms with significant legal consequences).

163 Marks, *supra* note 33, at 253 (showing that to ensure online agreements are binding, design efforts must accomplish the bare minimum: user awareness of the existence of a contract).

164 Leonhard, *supra* note 25, at 412.

165 Allison S. Brehm & Cathy D. Lee, "*Click Here to Accept the Terms of Service*," 31 COMM. LAW. 4, 6 (2015) (discussing Harris v. comScore, Inc., 825 F.Supp.2d 924, 926-27 (N.D. Ill. 2011), where the hyperlink to an agreement was obscured, therefore the challenged term was not reasonably communicated to the user).

166 Kim, *supra* note 84, at 252.

167 Murray, *supra* note 18, at 105-06 ("With improved accessibility and comprehension of contract terms, visualization promotes greater acceptance of contracts. This would lead not only to better and more predictable contract performance and enforcement, but also to stronger relationships between parties.").

168 *Id.* at 103 (discussing the visualization movement in Proactive Law).

169 Jay A. Mitchell, *Whiteboard and Black-Letter: Visual Communication in Commercial Contracts*, 20 U. PA. J. BUS. L. 815, 850 (2018).

170 *See* Ellie Margolis, *Visual Legal Writing*, 18 LEGAL COMM. & RHETORIC: JALWD 195, 196 (2021) (discussing the common use of memes, emojis, and other visual forms of expression to communicate ideas, thoughts, and feelings).

171 *Id.* ("As we have moved further into the twenty-first century, communication has become increasingly visual, using memes, emojis, video, and other visual forms to share thoughts, ideas, and feelings.").

172 Murray, *supra* note 18, at 109 (noting the shift toward using more visual images to communicate across a wide variety of platforms and resources in the twenty-first century).

173 Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 27 (2015); *Id.* at 173 (discussing the decision to use cartoon or comic form in the visualization of contracts).

reading text.[174] Moreover, images capture more attention than text alone.[175] Thus, companies that include them in their online contracts will increase notice by calling the user's attention to the terms of the agreement.[176]

A. Accessibility and Understanding

Effective information design requires an understanding of the audience to ensure the presentation and delivery of the content will serve them.[177] On the internet, where borders disappear and distance is immaterial, pictures function as a universal language in a multicultural environment.[178] The growing diversity of society supports the need to communicate effectively to audiences who do not share the same native language or background as the people for whom legal content was written in the nineteenth and twentieth centuries.[179]

Robert de Rooy is a pioneer in the development of cartoon contracts.[180] His initial creations used a combination of text and comic artwork to communicate employment contracts to audiences in South Africa who had limited English literacy skills.[181] Below is an excerpt from that cartoon contract.[182]

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174 *See* Murray, *supra* note 18, at 106-07 (discussing visuals as an effective tool to expand communication in contracts).

175 Cecilia A. Silver, *The Writing's on the Wall: Using Multimedia Presentation Principles from the Museum World to Improve Law School Pedagogy*, 126 DICK. L. REV. 475, 490 (2022) (discussing how museum curators use visual elements to attract visitor attention so educational messages can be conveyed).

176 *Id.*

177 Jay A. Mitchell, *Putting some product into work-product: corporate lawyers learning from designers*, 12 BERKELEY BUS. L.J. 1, 12 (2015).

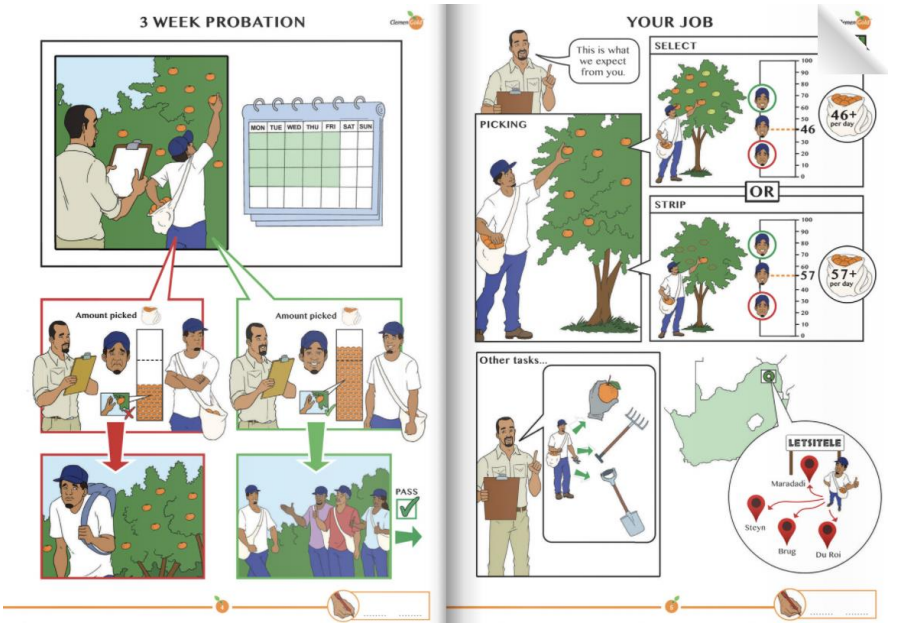
178 Ebru Uzunoglu, *Using Social Media for Participatory City Branding: The Case of @cityofizmir, an Instagram Project*, *in* GLOB. PLACE BRANDING CAMPAIGNS ACROSS CITIES, REGIONS, AND NATIONS 94, 97 (Ahmet Bayraktar & Can Uslay, ed., 2017).

179 Michael D. Murray, *A New Methodology for the Analysis of Visuals in Legal Works*, 16 FIU L. REV. 381, 428 (2022).

180 Murray, *supra* note 18, at 169-270 ("Robert de Rooy was one of the first attorneys to develop cartoon contracts—a hybrid combination of text and comic artwork—designed to simplify the content of the agreements and communicate that content to audiences with limited literacy skills in the native verbal language of the agreements.").

181 *Id.* at 169 (showing that Robert de Rooy created his initial cartoon contracts for South African agricultural growers who employed people with little education and limited literacy skills in English).

182 JINCOM EHS, CONTRACT 4-5 (Clemen Gold 2016), available at https://creative-contracts.com/clemengold/.



Throughout all thirteen pages, visual depictions put the audience on notice of their training process, probation policy, employment expectations, earnings, deductions, shift times, duration of employment, and payment breakdowns, including overtime and sick leave policies.[183] The cartoon contract not only effectively conveyed the terms to an audience with limited literacy skills[184] but also significantly reduced employee induction time from four hours to forty minutes.[185]

As the cartoon contract above demonstrates,[186] the use of visual imagery in legal documents can improve accessibility by communicating across language and cultural barriers.[187] Like the circumstances that sparked the creation of cartoon contracts,[188] users today enter into agreements made up of words they were never taught and concepts they do not understand.[189]

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183 *Id.* at 3-13.

184 Murray, *supra* note 18, at 169.

185 *ClemenGold Comic Contract*, CREATIVE CONTS., https://creative-contracts.com/clemengold/ (last visited Feb. 10, 2024).

186 *See* Murray, *supra* note 18, at 169 (providing that these initial cartoon contracts for agricultural growers in South Africa who employed people with little education and limited literacy skills in English were created by Robert de Rooy).

187 MICHEAL D. MURRAY, TOWARD A UNIVERSAL VISUAL LANGUAGE OF LAW, 1 (2021); Murray, *supra* note 179, at 428-29.

188 *See* Murray, *supra* note 18, at 169.

189 Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 832 (2022) ("Contract terms, however, are written in legal language that ordinary individuals cannot understand.").

By using visualization to make contracts more user-friendly, companies can make their agreements more accessible than those comprised of text alone.[190]

The possibility remains that users may continue not to read the contracts they enter, regardless of efforts to make them more understandable.[191] Still, providing more notice by illustrating contract provisions gives users an opportunity not only to review the contract but also to understand the content within. This can help combat the power imbalance between companies and consumers, making online agreements more equitable.[192] According to Professor Michael D. Murray, "even if there is unequal bargaining power, and the highly visual contract will not be negotiated or amended, the document is still readable and comprehensible by many more vulnerable and disadvantaged persons than a traditional text-only, legalese-and-boilerplate-ridden document that is an 'agreement' in name only."[193] Moreover, incorporating explanatory illustrations, or Pic-wrap, in the context of online consumer contracts has the potential to reconnect the dots using design elements of notice to increase comprehensibility, reinforcing the legitimacy of the duty to read and allowing the user to gain the understanding necessary to give meaningful assent.

B. Increasing Enforceability

Innovations in technology have allowed for mass online contracting in the modern world,[194]and these advances make it possible to incorporate visuals in the practice of law.[195] Digitalization has allowed for the expansion of contracts past their physical form.[196] For instance, terms can be presented through various formats,[197] and today's technology allows images to be implemented seamlessly in wrap agreements.[198] However, the legal profession is slow to adapt to change.[199] Despite the ease of inclusion,[200] speed of communication, and multi-lingual capabilities of illustrated contract

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190 Murray, *supra* note 18, at 173.

191 *See* Benoliel & Becher, *supra* note 144, at 2288 (addressing an important reservation in improving the readability of consumer contracts).

192 *See id.* (describing leveling the consumer-seller playing field as a worthwhile objective and noting that consumers have a right to know what they are agreeing to, even if they choose not to pursue that right).

193 Murray, *supra* note 18, at 197.

194 Kim, *supra* note 8, at 90-91.

195 Gerlinde Berger-Walliser et al., *From Visualization to Legal Design: A Collaborative and Creative Process*, 54 AM. BUS. L.J. 347, 349 (2017).

196 *See* Kim, *supra* note 8, at 90 (discussing the evolution of standard form contracts).

197 *See id.* (discussing the evolution of standard form contracts); *see also* Berger-Walliser et al., *supra* note 195, at 349.

198 Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 25 (2015).

199 *Id.* at 28.

200 *Id.* at 25.

terms,[201] "[t]here is little case law or other authority relating directly to the use of visuals in contracts."[202] Consequently, the incorporation of non-textual expressions in written agreements lacks the precedential certainty[203] relied on so heavily by lawyers when drafting enforceable contracts.[204] In this context, visuals should not replace textual communication but instead expand upon the language to engage users by illustrating concepts while maintaining the terms of the agreement.[205] Drafters concerned that adding visual content to their contracts would take away from the priority of the written terms could address this directly[206] by adding a clause such as, "This agreement has been prepared in writing and is accompanied by illustrated explanations. In the event of any questions of interpretation, the written terms shall apply and be binding upon the parties." Similarly, when the terms of a contract are provided in more than one language, it is common practice to provide such a provision to direct the parties to the governing terms in the event of ambiguity.[207]

In litigating whether a user is bound by the terms of an app or website, the company seeking to enforce the agreement bears the burden to prove adequate notice and manifestation of assent.[208] Evidence of what the user saw when interacting with a website or app can be presented as pivotal support for enforceability.[209] "While courts do not demand perfection, incorporating multiple design features that promote notice of the terms and make clear the user's manifestation of assent will increase the likelihood that the terms will be enforced."[210] Companies that use design to illustrate contractual content will be able to provide more evidence of their efforts to put the user on notice.[211] Additionally, courts may welcome the use of visuals in contracts as support for determining the mutual intention of the parties at the time of contracting.[212]

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201 Murray, *supra* note 179, at 428.

202 Mitchell, *supra* note 169, at 827.

203 *Id.* at 840 ("There seem to be rather few contract interpretation cases involving diagrams and other visuals. Those that do exist involve use of maps or other exhibits, not graphics used to capture substantive terms.").

204 *Id.* at 830 (identifying the focus for contract drafters on producing predictable content rather than effective communication devices).

205 Murray, *supra* note 18, at 197 (clarifying the aim of the visualization movement).

206 Mitchell, *supra* note 169, at 841 (discussing a solution to clarify the priority of text over visual terms in case of inconsistencies).

207 *Id.*

208 Conroy & Shope, *supra* note 1, at 25.

209 *Id.* (discussing that the party seeking to enforce the terms will need to provide evidence of what the user saw and did).

210 *Id.* at 24.

211 *See generally id.*

212 *See* Mitchell, *supra* note 169, at 842 (discussing the likeliness of a court welcoming the presence of a visual in a commercial contract as a resource for determining the intent of parties at the time of contracting).

Proprietors of apps and websites frequently make their use subject to terms and conditions that carry significant legal consequences.[213] The average user is not on notice that they are waiving important rights by entering into an online contract when key provisions cannot be understood without legal training.[214] Still, some of the most widely encountered online contracts include a standard clause for disputes to be resolved by mandatory arbitration, which is not commonly understood or recognizable in everyday life.[215] Instagram, for example, utilizes an arbitration clause, requiring users to waive their right to a trial by jury under the Seventh Amendment.[216] But if companies fail to call enough attention to an arbitration provision, that clause may not be upheld.[217] Whether the parties must resolve their disputes through arbitration or are able to take matters to court can significantly affect the outcome of a legal dispute.[218]

Contract drafters can better communicate complex concepts,[219] such as arbitration,[220] by using design elements of color, shape, symbols, and proximity to convey information and signal importance.[221] Below is an original example of a visual explanation that could accompany an arbitration clause:

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213 Conroy & Shope, *supra* note 1, at 23.

214 Rustad & Koenig, *supra* note 12, at 1471.

215 Jeremy M. Evans, LL.M, *Finding the Needle in the Haystack: Drafting Enforceable Arbitration Clauses in Online Entertainment Contracts*, 34 ENT. & SPORTS L. 8, 10 (2018).

216 *Terms of Use*, INSTAGRAM, https://help.instagram.com/581066165581870 (last visited Nov. 15, 2023); Rustad & Koenig, *supra* note 12, at 1433.

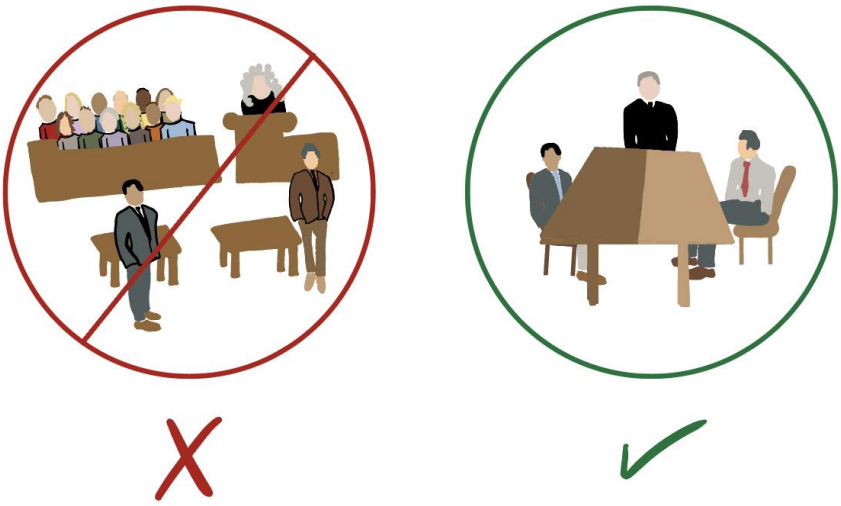
217 Alan Wingfield, Esq. & Chris Capurso, Esq., *E-SIGN works: How the legal system got electronic contracting laws right*, PRAC. INSIGHTS COMMENTS., Apr. 2021, at 3 ("Agreements that do not give adequate notification that the user is assenting to legally binding agreements—for example, that fail to draw the user's attention to an arbitration provision—may not be upheld.").

218 *See* Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, THE CTR. FOR AM. PROGRESS (Aug. 2, 2016), https://www.americanprogress.org/article/the-case-against-mandatory-consumer-arbitration-clauses/.

219 Margolis, *supra* note 198, at 26-27.

220 Evans, *supra* note 215, at 8, 10.

221 Mitchell, *supra* note 169, at 823.



In the arbitration illustration above, color was used to communicate the loss of the right to be tried by a jury and the underlying loss of diversity in the decision-making process.[222] Additionally, the shapes used in the illustration of attire speak to the formalities associated with a trial in comparison to the informal nature of arbitration.[223] The red and green symbols encompassing and accompanying the two depictions signal the rejection of a trial by jury and acceptance of arbitration as the means to resolve a conflict between the parties.[224] This type of design can be implemented by companies alongside the language of their agreement to (1) increase notice by drawing more attention to the content[225] and (2) provide supporting evidence of the user's intent to be bound to this part of the contract.[226] Promoting notice and clarity of the user's manifestation of assent in this way will increase the likelihood that the terms of an online agreement will be upheld.[227]

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222 Richard L. Jolly et al., *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79, 103-04 (2022) ("[J]uries bring diverse perspectives, life experiences, and a strong grounding in community norms to the fact-finding task.").

223 Evans, *supra* note 215, at 12 ("Arbitration is more informal than a lawsuit in court.").

224 Kim, *supra* note 8, at 137 ("Graphics communicate at a glance whether activity is permitted or prohibited. For example, an image in a circle with a red or black line through it indicates prohibition.").

225 *See generally* Silver, *supra* note 175, at 475.

226 Mitchell, *supra* note 169, at 842-43 (discussing the likeliness of a court welcoming the presence of a visual in a commercial contract as a resource for determining the intent of parties at the time of contracting).

227 *See* Conroy & Shope, *supra* note 1, at 24-26.

V. CONCLUSION

The lack of readability,[228] convoluted format,[229] and adhesive nature[230] of online agreements contribute to the growing rift between true assent and the current standard of reasonable notice.[231] Still, the standard of reasonable notice serves as a proxy for true assent and is used to assess the enforceability of online terms.[232] Careful design choices should be recommended by counsel to guard against enforcement challenges.[233] Including an "I Agree" button in close proximity to a vibrantly displayed hyperlink where the terms are accessible is a step in the right direction,[234] but "businesses should do more than provide notice of the existence of a contract if they want to increase the likelihood that specific terms will be enforced."[235]

With some effort in design and creativity, mandatory arbitration, forum selection, choice of law, privacy waivers, and other clauses can be drawn to visually emphasize the terms and conditions of an online agreement.[236] This would be best implemented in a scroll-wrap format, where the content is displayed to the user, who must scroll past the terms and accompanying illustrations to the bottom of the contract and check the "I agree" box in order to access the app or website.[237] Nonetheless, even if the contract is only viewable behind a blue underlined hyperlink,[238] adding explanatory images to online contracts is more conducive to the user's right to know what they agree to, even if they choose not to look before they click.[239] Companies should aim to satisfy the current standard of adequate notice by using design practices and incorporating visual explanations in their online contracts. This

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228 *See* Benoliel & Becher, *supra* note 144, at 2277-80 (revealing that 498 out of 500 (99.6%) of online consumer agreements of the most popular websites in the United States were deemed unreadable to the average user based on this study).

229 Karnow, *supra* note 67, at 141-44 (discussing the use of interlocking agreements spread across several lengthy documents online).

230 Jones & Samples, *supra* note 4, at 171.

231 *See generally* Preston, *supra* note 28, at 535 (debunking the idea that notice of the existence of contract should be the standard for measuring enforceability).

232 *See generally* Kim, *supra* note 8, at 85 (explaining that courts usually apply the standard of reasonable notice to assess the enforceability of adhesive online terms).

233 Conroy & Shope, *supra* note 1, at 26 ("Prudent counsel will do well to guard against such challenges through recommending careful design choices and electronic records retention.").

234 Julie A. Lewis, *Anatomy of a Privacy Policy*, 77 BENCH & B. MINN. 24, 27 (2020).

235 Kim, *supra* note 84, at 253.

236 *See* Murray, *supra* note 18, at 103 (describing visualization as a proactive approach with the capacity to uncover terms that may have been hidden by legalese and boilerplate for the benefit of all parties).

237 *See generally* Marks, *supra* note 33, at 257 (describing the typical format of scroll-wrap agreements).

238 Lewis, *supra* note 234, at 27.

239 *See* Benoliel & Becher, *supra* note 144, at 2288-91 (noting that consumers have a right to know what they are agreeing to, even if they choose not to pursue that right); *see also* Murray, *supra* note 18, at 196-97.

will improve the user's understanding, which is necessary for true mutual assent,[240] and will provide increased confidence for the company that its terms are binding.[241]

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240 Murray, *supra* note 18, at 105-06.

241 *See* Conroy & Shope, *supra* note 1, at 24-25.