NOTICE, ASSENT, AND FORM IN A 140 CHARACTER WORLD

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INTRODUCTION

Ever since online terms of use arrived on the contract law scene about fifteen years ago, judges have struggled to mold traditional contract law principles to the various new term presentation formats enabled by electronic communications. In the early days of electronic contracts, scholars expressed concern that vendors might use the electronic medium to make terms harder to find and less comprehensible.[1] This did not have to be the case; timely disclosure of terms can be easier and cheaper in the electronic environment,[2] the internet gives consumers easier access to information about the goods and services that they wish to purchase,[3] and a buyer from an online vendor is able to read the proffered terms in the comfort of her own home or office instead of trying to read them in the presence of a foot-tapping salesperson.[4] Moreover, a vendor presenting online terms is not limited to the eight-by-eleven inch paper format, and might be inclined or encouraged to present terms in a manner that buyers would more easily read and understand.[5]

* Professor, Widener University School of Law. The author would like to thank Danielle Kie Hart for organizing this symposium and inviting her participation, and Nancy Kim for her relentless pursuit of reason in the enforcement of online terms.

1. Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1807 (2000).

2. *Id.* at 1809.

3. *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 473-74 (2002) (noting that despite the proliferation of and ease of access to information online, consumers in 2002 had not yet taken advantage of "the full benefits of the electronic environment").

4. *See id.* at 468-69 (observing that even the online shopper of 2002 was likely distracted by other things as she sat at her computer to purchase goods or services).

5. Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1340 (2005) (suggesting the use of hyperlinks to define unfamiliar terms in online contracts). Of course, the converse is also true; vendors could also easily experiment with

Despite the ease of presenting online terms in a visually appealing format, today's electronically presented terms are even less comprehensible than those of fifteen years ago. At the same time that individuals have become accustomed to receiving information in small doses due to the proliferation of social media platforms such as Twitter, Instagram, Facebook and the practice of text messaging,[6] online terms have become more voluminous. Rather than using the online format to make their terms more appealing to the reader, purveyors of online terms are offering terms that are not only less readable because of their volume, but that include provisions that few people would expect to be contained in contracts of the sort being offered.

In her terrific book, *Wrap Contracts: Foundations and Ramifications*, Professor Nancy Kim examines this explosion in volume of online contract terms and offers some suggestions for improving the judicial approach to these terms. Professor Kim's emphasis on the importance of form may be the most significant contribution of her book. Although she makes many important observations in her book, in this essay, I will focus on three related observations. The first relates to the voluminous nature of online terms. Unhindered by the limitations of the paper form, websites engage in what Professor Kim dubs "contracting mania," which leads them to "stuff their online contracts with many pages of terms."[7] She then explains that these extra terms include those that are different from terms offered in physically limited paper forms, and include "crook" terms that purport to appropriate "benefits ancillary or unrelated to the consideration that is the subject of the transaction."[8] Both of these characteristics render online terms less readable than paper terms, yet courts, in finding that an individual has notice of online contract terms, have substituted "notice of notice" for notice of the purported contract terms.[9]

In this essay, I will briefly discuss the role of relationship between notice and assent in standard form contracting and then turn to some of the

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presentations that would make their terms less readable. *See* Hillman & Rachlinski, *supra* note 3, at 479.

6. *See* Karl Taro Greenfield, *Faking Cultural Literacy*, N.Y. TIMES, May 25, 2014 at SR 1, 6 (discussing a survey by the American Press Institute that revealed that "nearly 6 in 10 Americans acknowledge that they do nothing more than read news headlines"). The problem of information overload is not new; even before the proliferation of social media, commentators expressed concern about the ability of individuals to adequately process the information contained in standard forms. *See, e.g.*, Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 850 (2006).

7. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 58 (2013).

8. *Id.* at 50.

9. *Id.* at 132.

recent cases addressing the enforceability of online terms. This discussion will illustrate that although courts have wisely avoided making entirely new law for online contracts, they have largely ignored the "term creep" that has made online terms less, rather than more, readable. This is not surprising; it is probably safe to say that most challenges to online terms of use are challenges to choice of forum and arbitration clauses.[10] As a result, the worst examples of online terms have not made it to court.[11] It is remarkable, however, that few courts have engaged in any extended discussion of the presentation of the terms themselves rather than the presentation of the notice of the terms.

II. NOTICE, CONSENT AND STANDARD FORM CONTRACT TERMS

Although electronically presented standard form contract terms are relatively new, their use is part of the natural progression of standard form terms in that new ways of doing business generate new ways of presenting the contracts that govern business. In the 1940s, Friedrich Kessler noted the inevitability of standard form contracts in an era of mass production and mass distribution.[12] If, as Kessler said in 1943, paper standardized contracts reflected the "impersonality of the market,"[13] their electronically presented successors reflect an economy in which transactions are, due to their computer automation, even more impersonal. Just as mass production and distribution drove the use of paper standard form terms, two developments related to the use of computers drove the use of electronic standard forms. First, increased computer use by individuals led to a demand for mass-market software programs, and second, individuals and businesses began to

10. From 2004 to 2010, I, with my co-author Bill Reynolds, surveyed electronic contracting cases for *The Business Lawyer* and found that most published opinions dealt with choice of forum and arbitration clauses. *See* Juliet M. Moringiello & William L. Reynolds, *Electronic Contracting Cases 2009-2010*, 65 BUS. LAW. 175 (2010); Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2008–2009*, 64 BUS. LAW. 317, 317 n.1 (2009) (listing the prior survey articles).

11. Some of the most egregious clauses see the light of day in the popular press and social media, however. *See, e.g.*, Gregory S. McNeal, *Controversy over Facebook Emotional Manipulation Study Grows as Timeline Becomes More Clear*, FORBES, (June 30, 2014, 11:54 PM), http://www.forbes.com/sites/gregorymcneal/2014/06/30/controversy-over-facebook-emotional-manipulation-study-grows-as-timeline-becomes-more-clear/ (explaining the Facebook data use policy, which purported to obtain user consent to the use of user information for research).

12. Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

13. *Id.*

use computers to enter into transactions.[14] Although these developments placed electronic forms on the standard form spectrum, they also gave rise to two of the significant differences between paper and electronic forms described by Professor Kim: the unchaining of contract terms from the space limitations of paper[15] and the use of online terms to arguably wrest rights from the consumer.

Even in the paper world, standard forms have been the object of some scorn. If no one reads standard terms, then a contract cannot possibly be an exchange of promises.[16] That said, beginning in the early 20th century, courts enforced signed standard form terms so long as the form itself communicated that the terms were contractual in nature, the party to whom the terms were presented had a reasonable opportunity to read the terms, and the drafting party did not affirmatively cause the other party to misunderstand the terms.[17] Although some scholars called for greater regulation of standard form terms,[18] others were content with the judicial application of some version of Karl Llewellyn's view that a consumer gives express assent to negotiated terms and implicit (or "blanket") assent to conscionable standard terms.[19]

Newer methods of presenting contract terms challenge the appropriateness of the notion of blanket assent. Many commentators accept the idea of blanket assent to standard forms presented before money changes hands because the buyer has the ability to see the terms and get a sense of their scope before committing to her purchase.[20] This justification does not apply, however, when the buyer does not see the terms until after purchase. A classic example occurs when a buyer orders goods over the

14. 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, 454 (2013).

15. Although paper terms could be as long as online terms, their length would be far more noticeable if they were presented on multiple sheets of paper.

16. *See* Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 628 (2002).

17. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1185 (1983).

18. *See* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 149-50 (1970) (suggesting that treating standard form terms as part of the products they accompany would open the door to regulation of the terms).

19. *See, e.g.*, Barnett, *supra* note 16, at 638 (positing that an agreement is the intent to be bound by terms that the individual is likely to have read and to unread terms that do "not exceed some bound of reasonableness"); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 743 (2002) (stating that contract law has "responded effectively" to standard-form terms by "following Karl Llewellyn's conception to enforce bargained-for terms and conscionable boilerplate provisions, while barring egregious terms").

20. *See, e.g.*, Stephen E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1, 23 (2006).

phone and receives purported contract terms in the box in which the goods are delivered. These so called "rolling contracts"[21] are distinguishable from contemporaneous standard terms in an important way: when a purchaser buys goods in a "terms later" transaction, she has no way of knowing what she is getting into at the time she pays for her goods unless she spends the time to search for the terms on the internet before purchase. Rolling contracts therefore impose a "time and effort" barrier that does not exist when a seller presents its standard terms at the time of purchase.[22] This time and effort barrier throws the whole idea of the opportunity to read into doubt – if a buyer must expend a lot of time and effort to seek out the terms to which she will be bound, does she have a meaningful opportunity to read them?

Online terms add an important chapter to the history of the judicial treatment of standard form terms. Online terms test the standard form doctrine outlined above for some of the same reasons that rolling contracts challenge the doctrine. Notice and reasonableness are important foundations of standard from contract doctrine, notice because it tells the purchaser that there are terms to be read, and reasonableness because the purchaser will be bound to all reasonable terms whether she reads them or not. Online terms sometimes do not require any explicit manifestation of assent (such as a click), and as Professor Kim explains in detail in her book, they are long,[23] dense, and contain terms that few would expect to be part of a routine consumer transaction.[24] Therefore, although online terms are available to web site users before any purchase (unless the terms say that simple browsing of a web site constitutes acceptance of terms) the length and density of the terms impose a time and effort barrier similar to that imposed by rolling contracts. The common law of contracts is malleable enough to account for the factual differences between paper standard terms and online standard terms, but the existing case law focuses, as Professor Kim observes, on "notice of notice," rather than effective notice of the terms themselves. In the next section, I will discuss some of the recent judicial opinions to support her observation.

21. The facts of *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) present the typical rolling contract: a consumer orders goods in a telephone transaction and the goods arrive in a box along with standard form contract terms.

22. Friedman, *supra* note 20, at 23.

23. KIM, *supra* note 7, at 58.

24. *Id.* at 50.

III. THE MOST RECENT CASES

The most recent internet contracting opinions show that while the common law on "wrap contracts" is growing and perhaps maturing, it remains mired in some stale assumptions. One is that there are two distinct methods of presenting terms online: clickwrap and browsewrap.[25] Another is that online terms are nothing more than a twenty-first century version of standard form paper terms.

Many courts begin their analyses with the seminal browsewrap case of *Specht v. Netscape*[26] as a springboard to discuss the legal differences between clickwrap and browsewrap agreements. Here is where "wrap" terminology can be misleading. From the earliest days of internet contracting disputes, courts and scholars used the terms "clickwrap" and "browsewrap" to describe the different types of electronically presented terms, with clickwrap referring to terms to which party could accept only by clicking a web site button and browsewrap denoting terms for which no click was required and which often provided that a web site user accepted them merely by browsing the web site.[27] Professor Kim defends wrap terminology in order to emphasize that form matters (or should matter) in contract law because users will perceive the different types of wrap presentations differently.[28] Although she defends wrap terminology, she is not wedded to the traditional categories. In fact, she importantly expands the terminology by adding "multiwrap," a term that refers to the common practice of requiring a click to agree next to terms that are hidden behind a hyperlink.[29] Unfortunately, courts have been slow to embrace the idea of "multiwrap." Instead, they struggle to classify terms that look "somewhat like a browsewrap . . . but also somewhat like a clickwrap."[30]

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25. For an explanation of the terms clickwrap and browsewrap, see Christina L. Kunz, *et al.*, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 279-80 (2003).

26. 306 F.3d 17 (2d Cir. 2002). Cases citing *Specht* are too numerous to list, but some recent examples include *Hancock v. AT&T*, 701 F.3d 1248, 1256 (10th Cir. 2012) (citing *Specht* for the basic rules regarding the enforceability of clickwrap agreements), *Zaltz v. JDate*, 952 F. Supp. 2d 439, 452 (E.D.N.Y. 2013) (citing *Specht* for the proposition that terms that do not require a click to agree will be enforceable only if the user has notice of those terms), *Swift v. Zynga Game Network*, 805 F. Supp. 2d 904, 911-12 (N.D. Cal. 2011) (opining that *Specht* does not provide a good analogy when the terms are presented by "modified clickwrap," which includes hyperlinked terms adjacent to an "I agree" button).

27. *See* Moringiello & Reynolds, *supra* note 14, at 463-70 (explaining the use of the terms clickwrap and browsewrap over the years).

28. KIM, *supra* note 7, at 35-36.

29. *Id.* at 63-64.

30. Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012).

Although courts recognize that notice is key to acceptance of online terms, some ignore the factual differences between the online and paper environments. For example, at least two courts have stated that clicking a hyperlink to online terms is the modern equivalent of turning over a printed ticket to learn the content of the terms on the other side.[31] Although that is true in one sense (many people don't deal in paper), in a very important sense it is not true. The number of terms on a paper ticket is limited by the size of the paper. The number of terms on a web site is not so limited. Professor Kim importantly stresses this difference, and this is one of many ways in which her work can inform lawyers who litigate online contract disputes and the judges who decide those disputes.

The recent opinion in *Tompkins v. 23andMe, Inc.*[32] illustrates both the doctrinal confusion that can result from adherence to an electronic contracting lexicon that is limited to the terms "clickwrap" and "browsewrap" and the tendency of courts to hold that so long as there is notice of the notice of contract terms, a contract will be formed when the web site user takes the requested acceptance action. The dispute involved a personal genetics company that provided individuals with a genome profile developed from a DNA sample. Numerous customers of 23andMe filed class action complaints against the company alleging various false advertising and consumer protection claims, and the company moved to compel arbitration, citing the plaintiffs' agreement to arbitrate.

Many online contract disputes are about arbitration clauses. One unique aspect of *23andMe* is that the company presented its terms of service in two different ways at two different times to its customers. Each customer who bought a DNA kit online could proceed through the purchase process without ever seeing the terms of service. In order to see the terms, the purchaser would have had to scroll through a "significant amount of information" to find a hyperlink labeled "Legal" at the bottom of the web page.[33] In order to send a DNA sample for analysis, however, the customer was required to register on the 23andMe website, and during the registration process, the customer was presented with the statement "When you sign up for 23andMe's service, you agree to our Terms of Service. Click here [hyperlinked] to read our full Terms of Service." Below that statement was a button that displayed the statement "I accept the Terms of Service;" the customer could not proceed with the registration process without clicking that button.[34]

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31. *Zaltz*, 952 F. Supp. 2d at 454; *Fteja*, 841 F. Supp. 2d at 839.
32. Case No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014).
33. *Id.* at 2.
34. *Id.* at 3.

The court correctly applied a traditional browsewrap analysis in holding that the first set of terms was unenforceable. There was no reason for a website user to scroll down to see the link to the terms and the terms used the classic browsewrap language that purported to bind an individual who merely visited the website (which the individual of course would have done before seeing the terms).[35]

The company presented its second set of terms in the format described by Professor Kim as "multiwrap." The court did not acknowledge that a multiwrap presentation might present unique notice issues, but rather, like some courts in earlier disputes,[36] found that the terms looked like clickwrap terms, and thus, was not troubled by the fact that the only notice given by the click button was a notice that terms could be found elsewhere.[37] Yet, like rolling contracts, a multiwrap presentation sends no signal regarding the length and scope of the terms, and thus poses similar timing and effort challenges. Nevertheless, the court held that the purchasers had accepted the 23andMe terms of service because they had received notice (or, as Professor Kim says "notice of notice") of the terms.[38] This holding and reasoning are consistent with the judicial approach to multiwrap in other cases: so long as the web site calls the user's attention to the hyperlink behind which the terms can be found, a user who clicks "I agree" is bound regardless of how the terms themselves are presented.[39]

Like many wrap contracts cases, *23andMe* involved a challenge to an arbitration clause. Because the choice of forum (whether it is the choice of a location for litigation or a choice of arbitration rather than litigation) is a threshold issue in any dispute,[40] most courts that have opined on wrap contracts have had the chance only to analyze the choice of forum or arbitration clause and not the other paragraphs that have caused the explosion in the length of online terms. After the court in *23andMe* determined that the plaintiffs had accepted the terms of use, it analyzed whether the arbitration clause was unconscionable. In California, a court

35. *Id.* at 6-7.

36. *See, e.g.*, *Fteja*, 841 F. Supp. 2d at 829.

37. *23andMe*, 2014 WL 2903752 at 8. (relying on *Fteja*, 841 F. Supp. 2d at 839 for the proposition that "courts have long upheld contracts" that require a consumer to read terms that are "located somewhere else").

38. *Id.* at 14.

39. *See, e.g.*, Swift v. Zynga Game Network, 805 F. Supp. 904, 911-12 (N.D. Cal. 2011) (holding, without discussing the length of the contract terms, that a hyperlink presented adjacent to an "I agree" button provides a web site user notice and an opportunity to review terms).

40. *See* Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2005-2006*, 62 BUS. LAW. 195, 203 (2006) (discussing the ubiquity of forum selection clause disputes involving online contracts).

will hold that a contract clause is unconscionable only if it is tainted with both procedural and substantive unconscionability.[41] The court found that the clause was procedurally unconscionable in part because 23andMe provided its customers with "minimal notice"[42] of its terms of service – notice that the court had just pages before held adequate for contract formation. Notice of notice is not sufficient, however, to overcome a claim of procedural unconscionability, and in *23andMe*, the court held that the arbitration clause was procedurally unconscionable because it was buried at the end of the terms of service in a final section labeled "Miscellaneous." Although the court went into little detail about the length of the terms, the miscellaneous section was section number 28.[43] Despite the need to hunt for the arbitration clause, the court held that it was enforceable because it failed the substantive unconscionability test, in part because the court observed that forum selection clauses are "ubiquitous in online contracts and have the economic benefits of favoring both merchants and consumers."[44]

The recent cases illustrate that courts are ignoring some important factual differences between paper and electronic standard forms. In the next section, I will conclude by discussing why Professor Kim's work can be useful for judges considering online standard form terms.

IV. CONCLUSION, OR WHAT *WRAP CONTRACTS* CAN DO FOR WRAP CONTRACT JURISPRUDENCE

Professor Kim covers a lot of ground in her book, and two of her suggestions for improving wrap contract doctrine address the concerns I have highlighted above. In advocating for a duty to draft contracts reasonably, she recognizes that businesses can harness the internet's unique form to present terms in a visually appealing way that will give readers the notice that contract law requires. Electronic communication is not the same as paper communication, and Prof. Kim urges that reasonableness be based on how people behave.[45] Courts need to stop treating electronically presented terms as the new paper and delve more deeply into how today's consumers, many of whom, in a world of text messages, find e-mail to be unacceptably slow, perceive wrap contracts.

Freed from the spatial constraints of paper, online businesses can offer more, and often more oppressive, terms. In an online environment, personal

41. *23andMe*, 2014 WL 2903752, at 13.
42. *Id.* at 14-15.
43. *Id.*
44. *Id.* at 16 (internal quotations omitted).
45. KIM, *supra* note 7, at 179.

information about a site's users is gold, and businesses purport to seek consent for all sorts of uses of personal information. Businesses also attempt to allocate property rights in ways that individuals might not expect when they post photographs and other information to social media sites. To address these problems, Prof. Kim prescribes reinvigorating the doctrine of unconscionability.[46] Her suggestion is less a reinvigoration than a complete overhaul – an overhaul that may be needed because most litigation over online terms is focused on one type of clause, the choice of forum (including arbitration) clause. Using the traditional test for unconscionability, under which courts look for both procedural and substantive unconscionability, courts will never have the chance to consider the oppressive terms that are included in wrap contracts. Prof. Kim proposes to rework the test for unconscionability, pushing a presumption of unconscionability any time a vendor uses a coercive contracting form unless the terms have been pre-approved by a legislature or administrative agency or the vendor can prove that alternative terms were available.[47]

These suggestions, although optimistic, can be useful to judges as they continue to develop not only wrap contract doctrine, but standard form doctrine generally. We live in a world of truncated communication, and although it is doubtful that voluminous standard form terms ever invited reading, today, they clearly do not. Prof. Kim's work illustrates the need for research in areas outside of the law in order to determine how readers perceive online terms.[48] The answer today might be different from the answer even ten years ago, given the proliferation of short and quick communications media. Wrap contracts are often the most egregious examples of voluminous, reader-unfriendly terms, and *Wrap Contracts* contains myriad observations and suggestions for how to improve them by improving the law that governs them.

46. *Id.* at 203-10.

47. *Id.* at 208.

48. An example of the kind of research that is necessary can be found in Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014), in which the author employs methods from the psychology of judgment and decision-making in order to determine how consumers think about standard form terms.