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Articles

Predicting the Enforceability of Browse-Wrap Agreements in Ohio

SAM S. HAN*

ABSTRACT

Internet-based commerce has now reached a level where Internet-based businesses, such as amazon.com or ebay.com, sometimes generate more revenue than their brick-and-mortar counterparts. In view of the growth in Internet-based businesses, the courts have been forced to address unconventional contracting mechanisms, such as shrink-wrap, click-wrap, and browse-wrap agreements. Much of the scholarly writing, as well as court opinions, reach a consensus that browse-wrap agreements will be enforceable if there is: (a) sufficient notice of the agreement terms; and (b) clear manifestation of assent to the terms. However, there is very little guidance on how much notice will constitute "sufficient notice." This article analyzes several websites that are likely to withstand judicial scrutiny, and attempts to objectively predict the minimum quanta of notice that is necessary to meet the threshold of "sufficient notice." While the article concentrates on Ohio, the analysis can be translated to 45 other states that have adopted the Uniform Electronic Transactions Act ("UETA"), since browse-wrap agreements fall within the UETA's definition of a contract.

I. INTRODUCTION

Statistics relating to the Internet are fascinating, to say the least. For example:

a. Internet-based sales were predicted to reach $204 billion in 2008.[1]

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1. Shop.org, Online Sales to Climb Despite Struggling Economy According to Shop.org/Forrester Research Study, http://www.shop.org/c/journal_articles/view_article_content?groupId=1&articleId=702&

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b. There are over six billion people worldwide, of which almost 1.5 billion access the Internet on a daily basis.[2]
c. Each of the top five websites[3] routinely attracts over 10% of Internet traffic,[4] or over twelve million visitors,[5] to each of those sites on a daily basis.
d. Of these websites, google.com and yahoo.com consistently hover at a 30% reach,[6] attracting approximately sixty million[7] and seventy million visitors,[8] respectively.
e. Looking only to the two largest commercial websites,[9] eBay, Inc. reported net revenues in excess of four billion dollars for the six months ending on June 30, 2008,[10] while Amazon.com, Inc., reported net sales in excess of eight billion dollars during the same period.[11]

The statistics go on and on.

Given the ubiquity of the Internet, it is not surprising that almost every major company has a website. These companies engage in commercial transactions over the Internet, as evidenced by the numbers for eBay, Inc.[12] and Amazon.com, Inc.[13] In short, Internet-based commercial transactions have become everyday occurrences, and websites have become valuable assets for

version=1.0 (last visited Jan. 8, 2008).

2. Internet World Stats, Internet Usage Statistics: The Internet Big Picture: World Internet Users and Population Stats, http://www.internetworldstats.com/stats.htm (last visited Jan. 8, 2008).

3. Alexa, Top sites: The top 500 sites on the web, http://www.alexa.com/site/ds/topsites (listing google.com, yahoo.com, facebook.com, youtube.com and live.com as the top five websites) (last visited Jan. 8, 2008).

4. Alexa, Website Traffic Comparisons, http://www.alexa.com/ (input google.com in dialogue box provided and click "lookup sites," then input yahoo.com, facebook.com, youtube.com and live.com into dialogue boxes and click "compare") (last visited Jan. 8, 2008) [hereinafter Website Traffic Comparisons].

5. *See* Quantcast, Quantcast Audience Profile of facebook.com, http://www.quantcast.com/facebook.com/traffic (last visited Jan. 8, 2008) (click day button and range button of 1 year).

6. Website Traffic Comparisons, *supra* note 4.

7. Quantcast, Audience Profile of google.com, http://www.quantcast.com/google.com/traffic (last visited Jan. 8, 2008) (click day button and range button of 1 year).

8. Quantcast Audience Profile of yahoo.com, http://www.quantcast.com/yahoo.com/traffic (last visited Jan. 8, 2008) (click day button and range button of 1 year).

9. Alexa, *supra* note 3.

10. eBay, Inc., Quarterly Report (Form 10-Q), at 3 (July 24, 2008), *available* at http://www.sec.gov/Archives/edgar/data/1065088/000095013408013257/f42336e10vq.htm [hereinafter eBay Quarterly Report].

11. Amazon.com, Inc., Quarterly Report (Form 10-Q), at 5 (July 25, 2008), *available* at http://www.sec.gov/Archives/edgar/data/1018724/000119312508157451/d10q.htm [hereinafter Amazon Quarterly Report].

12. *See generally* eBay Quarterly Report, *supra* note 10.

13. *See generally* Amazon Quarterly Report, *supra* note 11.

companies engaging in online transactions.

In an effort to govern the behavior of those who access these websites, companies routinely include notices such as terms-of-use provisions[14] or privacy-policy provisions.[15] These notices seek to bind those that visit the website to what is commonly designated as a "browse-wrap" agreement.[16]

Legal scholars have generally concluded that a browse-wrap agreement will be enforceable if the following two conditions are met: (a) there is sufficient notice of the terms of the browse-wrap agreement; and (b) there is proof of assent by the website visitor.[17] What is not addressed by those articles, however, is the question of how much notice constitutes sufficient notice for a particular browse-wrap agreement to be binding. In other words, not addressed is the quantum of notice that will suffice for a browse-wrap agreement to withstand judicial scrutiny. Of course, it would be a herculean task to examine every browse-wrap agreement on a case-by-case basis to determine whether each agreement is conspicuous enough to withstand scrutiny.

In order to simplify such a task, this paper seeks to determine a minimally-acceptable level of conspicuousness for browse-wrap agreements, such that any browse-wrap agreement that provides greater notice than this minimum threshold will likely withstand judicial scrutiny. In other words, we intend to recommend a workable guideline, such that one can predict (to some extent) whether a particular browse-wrap agreement gives sufficient notice to be enforceable against a website visitor.

In suggesting a minimally-acceptable threshold, we limit our analysis to one jurisdiction – Ohio. The reason being that contract law is forum-dependent, and what may be applicable in one jurisdiction may not necessarily be applicable in another jurisdiction. While a similar approach may be taken to determine minimally-acceptable thresholds for other jurisdictions, we leave

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14. *See, e.g.*, Your User Agreement, http://www.ebay.com (scroll to bottom of page and click "User Agreement") (last visited Jan. 9, 2008); Conditions of Use, http://www.amazon.com (scroll to bottom of page and click "Conditions of Use") (last visited Jan. 9, 2008).

15. *See, e.g.*, Privacy Policy, http://www.ebay.com (scroll to bottom of page and click Privacy Policy) (last visited Jan. 9, 2008); Amazon.com Privacy Notice, http://www.amazon.com (scroll to bottom of page and click Privacy Notice) (last visited Jan. 9, 2008).

16. *See* Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (describing the license agreement as "browse wrap license").

17. *See generally* Drew Block, *Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites*, 14 LOY. CONSUMER L. REV. 227 (2002); Michael Dessent, *Browse-Wraps, Click-Wraps and Cyberlaw: Our Shrinking (Wrap) World*, 25 T. JEFFERSON L. REV. 1 (2002); Dan Streeter, Comment, *Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses*, 39 SAN DIEGO L. REV. 1363 (2002); Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003); Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements all They are Wrapped up to Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173 (2007).

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those analyses for another day.

With that said, this paper begins with an examination of the Uniform Electronic Transactions Act ("UETA"), which governs electronic transactions and has been statutorily enacted in Ohio.[18] Thereafter, we examine the evolution of the browse-wrap agreement, along with judicial decisions relating to the browse-wrap agreement. From there, examples of Ohio websites, which are likely to withstand scrutiny, are reviewed. We then parse this information to determine a minimally-acceptable threshold for notice, such that any notice that is more conspicuous than this minimum threshold will likely be sufficient to fulfill the notice requirement.

II. THE UNIFORM ELECTRONIC TRANSACTIONS ACT

The function of the judiciary is to interpret constitutional or statutory text. Thus, if there is a constitutional or statutory provision that addresses browse-wrap agreements, that text serves as a starting point for the analysis. As noted by other scholars, the UETA deals with the validity of all electronic transactions,[19] which arguably include browse-wrap agreements. As such, we begin with the text of the UETA, specifically as it has been enacted in Ohio.[20]

A. History and Purpose of the UETA

Since Ohio has adopted the UETA, as proposed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), we begin our analysis with the NCCUSL version of the UETA. Since the UETA has been exhaustively discussed by others,[21] we only examine the relevant portions of the UETA here.

The prefatory note to the UETA expressly recites:

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18. OHIO REV. CODE ANN. § 1306.01-23 (2009).

19. *See* Dessent, *supra* note 17, at 3; *see generally* Juliet M. Moringiello & William L. Reynolds, *Cyberspace Law: Survey of the Law of Cyberspace: Internet Contracting Cases 2004-2005*, 61 BUS. LAW. 433 (2005). It is worthwhile to note that at least one scholar opines that the UETA does not give any guidance on the formation of electronic contracts. *See, e.g.*, Melissa Robertson, *Is Assent Still a Prerequisite for Contract Formation in Today's E-Conomy?*, 78 WASH. L. REV. 265, 280 n.131 (2003). However, that generalization seems to be overly broad in view of the plain language of the UETA. We posit that the UETA does indeed set forth provisions for contract formation, and our position is set forth in greater detail in the body of this paper.

20. Since both the NCCUSL and Ohio refer to their respective texts as "Uniform Electronic Transactions Act," we distinguish the two in this paper by referring to the NCCUSL version simply as UETA and the Ohio version as the Ohio-UETA.

21. *See generally* Shea C. Meehan, *Consumer Protection Law and the Uniform Electronic Transactions Act (UETA): Why States Should Adopt the UETA as Drafted*, 36 IDAHO L. REV. 563 (2000) (providing a more comprehensive analysis of the UETA).

> With the advent of electronic means of communication and information transfer, business models and methods for doing business have evolved to take advantage of the speed, efficiencies, and cost benefits of electronic technologies. These developments have occurred in the face of existing legal barriers to the legal efficacy of records and documents which exist solely in electronic media. Whether the legal requirement that information or an agreement or contract must be contained or set forth in a pen and paper writing derives from a statute of frauds affecting the enforceability of an agreement, or from a record retention statute that calls for keeping the paper record of a transaction, such legal requirements raise real barriers to the effective use of electronic media.[22]

Thus, by its own terms, the UETA arose from a need to accommodate electronic commerce, including communications by electronic means and electronic information transfer. The UETA further recites: "It is important to understand that the purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures. It is NOT a general contracting statute - the substantive rules of contracts remain unaffected by UETA."[23] Hence, the UETA was never intended to supersede any existing laws in the various jurisdictions. Rather, the UETA's intent was to extend the applicable law in these various states, such that anything that could be done by pen-and-paper, with certain exceptions, could just as easily be done by ones-and-zeros.

We now turn to the Ohio-specific UETA (hereafter "Ohio-UETA"), which has been codified in the Ohio Revised Code.[24]

B. Enactment of the UETA by Ohio

The Ohio-UETA resulted from H.B. No. 488, which was introduced to the Ohio legislature on October 27, 1999.[25] The purpose of the bill was to enact sections within the Ohio Uniform Commercial Code ("UCC") that would

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22. UNIF. ELECT. TRANSACTIONS ACT, 7A U.L.A. 212 (2002) (prefatory note) (approved by NCCUSL 1999).

23. *Id.*

24. § 1306.01-1306.23.

25. Status Report of Legislation, H.R. 488, 123d Leg. (Ohio 1999), available at http://lsc.state.oh.us/coderev/hou123.nsf/House+Bill+Number/0488?OpenDocument. The proponents of the bill were Reps. Terwilleger, Amstutz, Householder, Harris, Gardner, Tiberi, Carey, Mottley, Corbin, Metzger, Hollister, Van Vyven, Willamowski, Olman, DePiero, Luebbers, Thomas, Trakas, Goodman, Hoops, Austria, Damschroder, Hartnett, Sykes, Maier, Brading, Peterson, Mead, Schuler, Metelsky, Taylor, Jolivette, Buehrer, and Flannery. *See id.*

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accommodate electronic records and signatures.[26] Thus, when first introduced, it was designated as the "Electronic Records and Signatures Act."[27] While the originally-introduced bill may have had a different name, its purpose did not evolve much; namely, it purported to facilitate electronic communications.[28] On April 5, 2000, as reported by the House Financial Institutions, the legislature recommended for passage the Ohio-UETA for use of electronic records and signatures.[29] That report did nothing more than highlight various portions of the act, often verbatim regurgitating the language of the eventually-enacted Ohio-UETA.[30]

On April 11, 2000, the bill passed the house with a unanimous 97-0 vote, exactly as reported on April 5, 2000.[31] On May 17, 2000, it was reported by the Senate Finance & Financial Institutions, and on the same day passed the Senate without modification and by a unanimous 33-0 vote.[32] The bill was: (a) passed by the General Assembly on May 23, 2000;[33] (b) approved by the governor on June 14, 2000;[34] and (c) became effective as of September 14, 2000.[35] In short, the legislative history recites verbatim the language of the eventually-enacted Ohio-UETA. As such, we presume that the plain and ordinary meaning of the Ohio-UETA controls, and it is to the text of the Ohio-UETA that we now turn our attention.

C. Applicability of the Ohio-UETA

It should be noted at the outset that the Ohio-UETA expressly disclaims

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26. Ohio H.R. 488 (preamble) (stating that the bill "provid[ed] for regulation of electronic signatures, including digital signatures, and electronic records; creat[ed] the Electronic Commerce Commission to regulate security and enforcement relative to electronic records and electronic signatures; provid[ed] for state agency use of electronic records and signatures; and provid[ed] civil remedies and criminal penalties for violations[ ]").

27. *Id.*

28. *See id.*

29. *Id.*; H.J. 1763, 1775, 123d Leg. (2000) (as reported by the House Committee on Financial Institutions, Apr. 5, 2000).

30. *See, e.g.*, H.R. 488 (reciting that "[a] contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements"). This language is found, verbatim, in section 1306.13(A) of the Ohio Revised Code. OHIO REV. CODE ANN. §1306.13(A). Other verbatim recitations are found throughout the legislative history. H.R. 488.

31. H.R. 488; Ohio H.J. 1784, 1788, 123d Leg. (Apr. 11, 2000).

32. H.R. 488; Ohio S.J. 1725, 1748, 123d Leg. (May 17, 2000).

33. Status Report of Legislation, H.R. 488, available at http://lsc.state.oh.us/coderev/hou123.nsf/House+Bill+Number/0488?OpenDocument (as passed by the Gen. Assem., May 23, 2000).

34. *Id.*

35. *Id.*

applicability to: (a) the execution of wills, codicils, or testamentary trusts;[36] (b) anything that is already covered by the Ohio Uniform Commercial Code (with certain exceptions);[37] (c) laws regulating commercial paper;[38] (d) banking regulations;[39] (e) laws relating to letters of credit;[40] (f) warehouse receipts, bills of lading, and other documents of title;[41] (g) investment securities;[42] and (h) secured transactions.[43]

Given these express exclusions, it is doubtful that a browse-wrap agreement can bind a party to any of the above-recited exceptions to the Ohio-UETA. The reason being that: (a) browse-wrap agreements are electronic records[44] that are created by an electronic signature;[45] and (b) the Ohio-UETA expressly excludes the use of electronic records and electronic signatures in the above-recited areas. Thus, it seems axiomatic that one cannot bring within the Ohio-UETA something that the Ohio-UETA expressly disclaims.

Insofar as this paper addresses the enforceability of browse-wrap agreements, we analyze the Ohio-UETA in the context of only those transactions that are not expressly excluded by the Ohio-UETA.

III. The Browse-Wrap Agreement

An exhaustive historical review of the browse-wrap agreement is beyond the scope of this paper. Thus, we limit our review to only select cases that highlight the evolution and the status of the browse-wrap agreement. This is done solely to provide background information on the substantive analysis that follows.

The Ohio legislature, by enacting the Ohio-UETA, has approved the use of electronic contracts, including the browse-wrap agreement. The prudence *vel non* of the Ohio legislature's policy decision to embrace electronic records (e.g., browse-wrap agreements), however, is beyond the scope of this paper and will not be discussed.

Finally, we note that our analysis is limited to contract-formation issues; we do not opine on whether a particular contract term is substantively repugnant. In other words, we address only the question of whether a contract

36. § 1306.02(B)(1).
37. *Id.*; § 1306.02(B)(2); Ohio Rev. Code Ann. Ch. 1301.
38. § 1306.02(B)(2); Ohio Rev. Code Ann. Ch. 1303.
39. § 1306.02(B)(2); Ohio Rev. Code Ann. Ch.1304.
40. § 1306.02(B)(2); Ohio Rev. Code Ann. Ch. 1305.
41. § 1306.02(B)(2); Ohio Rev. Code Ann. Ch. 1307.
42. § 1306.02(B)(2); Ohio Rev. Code Ann. Ch. 1308.
43. § 1306.02(B)(2); Ohio Rev. Code Ann. Ch. 1309.
44. *See* § 1306.01(G) (defining electronic record).
45. *See* § 1306.01(H) (defining electronic signature).

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has been formed, and whether the substantive terms of such a contract are binding is beyond the scope of this paper. We now turn our attention to the evolution of the browse-wrap agreement and select cases that address the predecessors to the browse-wrap.

A. Predecessors to the Browse-Wrap Agreement

The browse-wrap agreement finds its genesis in traditional adhesion contracts. As such, we begin our analysis with the enforceability of non-negotiated contracts of adhesion.

1. The Adhesion Contract: *Carnival Cruise Lines, Inc. v. Shute*

While *Carnival Cruise Lines, Inc. v. Shute*[46] may stand for many different propositions, it also stands for the proposition that non-negotiated contracts of adhesion will be enforceable, so long as the terms of the contract are reasonable.[47] It is enforceable despite the fact that a contract (as in *Shute*) is in fine-print and on the ticket itself, which likely provided notice to "only the most meticulous passenger."[48]

In *Shute*, despite the relative inconspicuousness of the contract terms, the Court upheld the forum-selection clause in the non-negotiated contract of adhesion, noting that the benchmark for enforceability was whether the clause was reasonable.[49] In doing so, the Supreme Court expressed that courts "must . . . account for the realities of form passage contracts."[50] Stated differently, the Court seemed to insinuate that modern-day realities would be a factor in considering the enforcement of adhesion contracts. While not expressly regurgitating the language of *Shute*, courts would evaluate commercial realities in determining the enforceability of shrink-wrap, click-wrap, and browse-wrap agreements.

2. The Shrink-Wrap Agreement: *ProCD, Inc. v. Zeidenberg*

One form of an adhesion contract, known as a shrink-wrap agreement, "gets its name from the fact that retail software packages are covered in plastic

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46. 499 U.S. 585 (1991).
47. *See id.* at 589-95.
48. *Id.* at 597 (Stevens, J., dissenting) ("I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs.").
49. *See id.* at 591-95.
50. *Id.* at 593.

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or cellophane 'shrinkwrap[.]'"[51] In *ProCD, Inc. v. Zeidenberg*,[52] the Seventh Circuit Court of Appeals upheld the validity of a shrink-wrap agreement, reciting a litany of examples showing the evolution of business transactions.[53] After providing these examples, the court rejected defendant's position, which would have required all of the licensing terms to be on the outside of the packaging (rather than inside of the shrink-wrap).[54] The Seventh Circuit noted that defendant's position "if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age."[55] Thus, due in part to the realities of modern-day transactions, the Seventh Circuit endorsed shrink-wrap agreements, despite the fact that shrink-wrap agreements are non-negotiated contracts of adhesion.

3. The Click-Wrap Agreement: *Specht v. Netscape Communications Corp.*

Subsequent to *ProCD*, click-wrap licenses emerged as another form of non-negotiated adhesion contracts. As noted in *Stomp, Inc. v. NeatO, LLC*:[56]

> A "clickwrap agreement" allows the consumer to manifest its assent to the terms of a contract by "clicking" on an acceptance button on the website. If the consumer does not agree to the contract terms, the website will not accept the consumer's order. Such agreements are common on websites that sell or distribute software programs that the consumer downloads from the website. The term "clickwrap agreement" is borrowed from the idea of "shrinkwrap agreements," which are generally license agreements placed inside the cellophane "shrinkwrap" of computer software boxes that, by their terms, become effective once the "shrinkwrap" is opened.[57]

The Second Circuit, in *Specht v. Netscape Communications Corp.*,[58] struck down a click-wrap agreement, finding that it provided inadequate notice "in the absence of reasonably conspicuous notice that [the offerees] are about to bind themselves to contract terms[.]"[59] In distinguishing *Specht* from *ProCD*, the Second Circuit expressed that unlike the defendant in *Specht*, "the purchaser in

51. ProCd, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).
52. *Id.*
53. *See id.* at 1450-52.
54. *See id.* at 1452-53.
55. *Id.* at 1452.
56. 61 F. Supp. 2d 1074 (C.D. Cal. 1999).
57. *Id.* at 1081 n.11.
58. 306 F.3d 17 (2d Cir. 2002).
59. *Id.* at 32.

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ProCD was confronted with conspicuous, mandatory license terms every time he ran the software on his computer[.]"[60] Thus, while the particular agreement in *Specht* was inadequate, the Second Circuit seemingly approved of online agreements, as long as there would be "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers[.]"[61] However, as shown in greater detail below, this language approving of "reasonably conspicuous notice" would be a harbinger of the Second Circuit's subsequent decision in *Register.com v. Verio, Inc.*[62]

B. Judicial Decisions Relating to the Browse-Wrap Agreement

While a click-wrap agreement appears on a computer screen and prohibits a user from proceeding until the user has manifested their assent to the terms and conditions, "a browse wrap license is part of the web site and the user assents to the contract when the user visits the web site."[63] Thus, unlike a click-wrap agreement,

> [a] defining feature of a browsewrap license is that it does not require the user to manifest assent to the terms and conditions expressly - the user need not sign a document or click on an 'accept' or 'I agree' button. A party instead gives his assent simply by using the website.[64]

The following cases exemplify how the courts have handled browse-wrap agreements.

1. Register.com, Inc. v. Verio, Inc.

Shortly after deciding *Specht*, in which the Second Circuit ruled that a particular shrink-wrap license was unenforceable because of inadequate notice, [65] that same court upheld the enforceability of a browse-wrap agreement in *Register.com, Inc. v. Verio, Inc.*[66] Distinguishing *Register* from *Specht*, the Second Circuit held that the defendant, Verio, unlike the defendant in *Specht*, was "fully aware of the terms on which Register offered the access."[67]

Additionally, defendant Verio assented to the terms of the browse-wrap agreement by "daily submitting numerous queries, each of which resulted in its

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60. *Id.* at 33.
61. *Id.* at 35.
62. 356 F.3d 393 (2d Cir. 2004).
63. *Pollstar*, 170 F. Supp. 2d at 981.
64. Sw. Airlines Co. v. BoardFirst L.L.C., No: 06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex.) (citing *Pollstar,* 170 F. Supp. 2d at 981).
65. *Specht*, 306 F.3d at 30.
66. 356 F.3d 393.
67. *Id.* at 402.

receiving notice of the terms Register exacted."[68] In holding so, the Second Circuit provided the following analogy:

> The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples - 50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.
>
> P sues D in contract for the price of the apples taken. D defends on the ground that on no occasion did he see P's price notice until after he had bitten into the apples. D may well prevail as to the first apple taken. D had no reason to understand upon taking it that P was demanding the payment. In our view, however, D cannot continue on a daily basis to take apples for free, knowing full well that P is offering them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.
>
> Verio's circumstance is effectively the same.[69]

The Second Circuit noted that, "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[70] Thus, when a user is "offered access to information subject to terms of which they [a]re well aware[,]" then "[t]heir choice [i]s either to accept the offer of contract, taking the information subject to the terms of the offer, or, if the terms [a]re not acceptable, to decline to take the benefits."[71]

In short, the Second Circuit enforced the browse-wrap agreement in *Register* since: (a) the defendant was aware of the terms (i.e., there was sufficient notice to the user) and (b) the defendant had taken the information (i.e., there was a manifestation of assent).[72]

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68. *Id.* at 401.
69. *Id.*
70. *Id.* at 403.
71. *Register.Com*, 356 F.3d at 403.
72. *See id.* at 402-06.

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2. *Southwest Airlines Co. v. BoardFirst, LLC*

In a recent case, *Southwest Airlines Co. v. BoardFirst, LLC*,[73] the Northern District of Texas recognized the evolution of commercial transactions in enforcing browse-wrap agreements.[74] Recognizing that "browsewraps have become more prevalent in today's increasingly e-driven commercial landscape,"[75] the court succinctly summarized that "one general principle that emerges is that the validity of a browsewrap license turns on whether a website user has actual or constructive notice of a site's terms and conditions prior to using the site."[76] Indeed, the enforceability of the particular browse-wrap agreement in *Southwest* turned on the fact that "[t]here [wa]s no dispute that BoardFirst . . . had actual knowledge of Southwest's Terms[.]"[77] The broad language of the Ohio-UETA bolsters this general principle set forth in *Southwest*.

C. *The Formation of a Browse-Wrap Contract in Accordance with the Ohio-UETA*

The evolution of an "e-driven commercial landscape,"[78] as addressed by the above-recited cases, affects the construction of the Ohio-UETA because the statute itself requires the Ohio-UETA to be construed "consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices[.]"[79] Thus, as browse-wrap agreements become more prevalent and commercial practices expand so that companies adopt browse-wrap agreements, the Ohio-UETA must be construed to cover those expanded commercial practices.

The typical parties in the context of a browse-wrap agreement are: (1) an owner or operator of a website, who has packaged the website's terms-of-use provisions into a browse-wrap agreement; and (2) a visitor to the website. The Ohio-UETA provides guidance on determining whether these two parties do, in fact, enter into a binding contract.

The browse-wrap agreement is an "electronic record" under the Ohio-UETA since it is information that is stored in an electronic medium[80] and can be sent and received "by electronic means."[81] A binding contract is formed

73. 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007).
74. *See generally Southwest*, 2007 WL 4823761.
75. *Id*. at *5.
76. *Id*. (internal citations omitted).
77. *Id*. at *7.
78. *Id*. at *5.
79. § 1306.05(B).
80. *See id.* § 1306.01(M).
81. *See id.* § 1306.01(G).

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when the visitor electronically signs the browse-wrap agreement by performing an action that is "logically associated with a [browse-wrap agreement] and executed or adopted by [the visitor] with the intent to sign the [browse-wrap agreement]."[82] Whether the visitor electronically executed the browse-wrap agreement "shall be determined from the context and surrounding circumstance at the time of its creation, execution, or adoption[.]"[83] The context and surrounding circumstances include: (a) repeatedly visiting the website; (b) clicking through to links on the website; (c) printing or saving the information on the website; or (d) any other action that relates to the website. In fact, a contract is also formed when a visitor uses a program (known as a web-crawler) to automatically access the information on the website.[84] A binding contract can be formed "even if no individual was aware of or reviewed . . . the resulting terms and agreements[,]"[85] as long as the visitor "performs actions that the [visitor] is free to refuse to perform[.]"[86]

The broad language of the Ohio-UETA bolsters the general principle from *Southwest*, namely that "the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site."[87] In other words, as long as the owner can prove that the browse-wrap agreement was sufficiently conspicuous, then any action by the visitor will be deemed to be an acceptance of the terms of the browse-wrap agreement. With that in mind, we now turn our attention to various websites that we expect to be valid and enforceable in Ohio.

IV. EXAMPLES OF OHIO WEBSITES WITH BROWSE-WRAP AGREEMENTS THAT LIKELY PROVIDE SUFFICIENT NOTICE

While we could have selected browse-wrap agreements from other jurisdictions, which have already been litigated and held to be enforceable, we chose instead to focus on various Ohio websites. Our reasons for selecting the following websites are provided along with our analyses of the websites. Additionally, in performing our quantitative analyses of the various web pages, we used the Hypertext Markup Language ("HTML") source for the respective web pages.[88] As such, the analysis included both a visual inspection as well as

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82. *See id*. § 1306.01(H).

83. *Id*. § 1306.08(B).

84. *See* § 1306.13(A) (stating that "[a] contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements").

85. *Id*.

86. *Id*. § 1306.13(B).

87. *Southwest*, 2007 WL 4823761, at *5 (internal citations omitted).

88. *See* Wikipedia, HTML element, http://en.wikipedia.org/wiki/HTML (last visited Sept. 2, 2009).

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a review of the HTML code associated with the websites.

A. Example Browse-Wrap Agreements Used by the Ohio Legislature

As noted earlier, the Ohio-UETA was passed unanimously by both the Ohio Senate and the Ohio House of Representatives.[89] We presume that those who enacted the Ohio-UETA knew how to provide sufficient notice for browse-wrap agreements, insofar as browse-wrap agreements fall within the definition of "electronic records" under the Ohio-UETA.[90] Therefore, we examine the Ohio legislature and judiciary's websites to determine the minimum notice threshold.

1. The Ohio Senate

The website for the Ohio Senate[91] includes a disclaimer,[92] which is set forth in its entirety in Appendix A. Insofar as the disclaimer sets forth an agreement between the user and the General Assembly of Ohio, the disclaimer is a browse-wrap contract that is governed by the Ohio-UETA.[93]

The link to the disclaimer is found at the bottom of the web page, in a font color that is no different from the font colors for the other links on that web page, and in a font size that is smaller than the default font size for most web pages.[94] The text is white contrasted onto a dark blue background.[95] While the link to the disclaimer is in the same font size as the other substantive links (e.g., "Leadership," "Your Senators," "Committees," etc.), the disclaimer is not emphasized while the other substantive links are in bold.[96] As a result, the link to the browse-wrap agreement is less pronounced than the substantive links.

It is also worthwhile to note that the link to the Ohio Senate's browse-wrap agreement is found only on the front page of the Ohio Senate's website.[97] Therefore, when a visitor follows any links to other parts of the website, the disclaimer is conspicuously absent.[98] As such, if a visitor bypasses the front

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89. H.R. 488. This bill was passed by the House on April 11, 2000 and passed by the Senate on May 17, 2000. Status Report of Legislation, OH. B. An., H.R. 488 123d Leg., available at http://lsc.state.oh.us/coderev/hou123.nsf/House+Bill+Number/0488?OpenDocument.

90. § 1306.01(G).

91. The Ohio Senate, http://www.senate.state.oh.us (last visited Sept. 2, 2009).

92. *Id.* (containing a link to the website disclaimer at the bottom of the page, which can be accessed by clicking on the word "Disclaimer").

93. *See* § 1306.01(D), 1306.01(G).

94. The Ohio Senate, *supra* note 91.

95. *Id.*

96. *Id.*

97. *Id.*

98. *See, e.g.*, The Ohio Senate Leadership, http://www.senate.state.oh.us/leadership (last visited Sept. 2, 2009) (containing no disclaimer).

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page and goes directly to one of those internal links, there is arguably no enforceable contract formed because the link to the browse-wrap agreement was never visible to the visitor. Conversely, if a visitor accesses the internally-linked pages from the home page of the Ohio Senate's website, it is likely that the visitor was provided with constructive notice of the Ohio Senate's browse-wrap agreement.

2. The Ohio House of Representatives

The website for the Ohio House of Representatives[99] also includes a disclaimer,[100] which is set forth in its entirety in Appendix B. Again, insofar as the disclaimer is set forth as an agreement, it will likely fall within the definition of a contract, as defined in the Ohio-UETA.[101] Unlike the Ohio Senate's disclaimer, the link to the Ohio House of Representatives' disclaimer appears on each internally-linked page within the domain for the House of Representatives.[102] It is found at the bottom of every web page, and is in all bold, capital letters.[103] The disclaimer is in the same font color as several other links at the bottom of the web page, and the font size is the same as the remainder of the text on the page.[104] Also, the font color is different from the substantive text found on the website.[105] Because the disclaimer is in bold and in all capital letters, it is more pronounced than the other substantive links on the website.

3. The Ohio General Assembly

The website for the Ohio General Assembly[106] also includes a disclaimer,[107] which is set forth in its entirety in Appendix C. Again, the

99. The Ohio House of Representatives, http://www.house.state.oh.us (last visited Sept. 2, 2009).

100. *Id.* (containing a link to the website disclaimer at the bottom of the page, which can be accessed by clicking on the word "Disclaimer").

101. *See* § 1306.01(D), 1306.01(G).

102. The Ohio House of Representatives, *supra* note 102 (containing a link to the website disclaimer at the bottom of the page, which can be accessed by clicking on the word "Disclaimer").

103. *Id*.

104. *Id.*

105. *Id*. (The substantive text is generally in plain text is a normal font size. Nowhere is the democratic ideal more evident than in the House of Representatives—the body of state government closest to the individual. As you spend time visiting our web site and browsing its many resources, may you catch a glimpse of the work that is conducted on your behalf.).

106. 128th General Assembly of the State of Ohio, http://www.legislature.state.oh.us (last visited Jan. 9, 2009) [hereinafter General Assembly].

107. 128th General Assembly of Ohio Website Disclaimer, http://www.legislature.state.oh.us/disclaimer.cfm (last visited Sept. 2, 2009) [hereinafter General Assembly Disclaimer].

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disclaimer sets forth an agreement that likely falls within the confines of the Ohio-UETA.[108] The link to the disclaimer is found at the bottom of the web page, in the same font color as the other text on the web page and in the smallest absolute font size available.[109] The text is in default black,[110] contrasted against a white background.[111] Additionally, while the link to the disclaimer is underlined to show that it is a hyperlink, the absolute font size is three sizes (out of a total seven sizes[112]) smaller than the substantive text and is neither in bold nor italics (i.e., there is no special emphasis).[113] Similar to the link for the browse-wrap agreement for the Ohio House of Representatives,[114] the link to the browse-wrap agreement for the Ohio General Assembly is located on every page within the primary domain.[115]

B. Example Browse-Wrap Agreements Used by the Supreme Court of Ohio

In addition to those who enacted the Ohio-UETA, one would imagine that those who will eventually rule on the enforceability of browse-wrap agreements, namely the judiciary, would implement a browse-wrap agreement that would withstand their own scrutiny. As such, another presumption that we made was that the browse-wrap agreements used by the Ohio judiciary would provide sufficient notice to any visitors to their respective sites.

The most comprehensive example of a browse-wrap agreement is found on the website for the Supreme Court of Ohio.[116] Unlike any of the websites

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108. *See* § 1306.01(D), 1306.01(G).

109. General Assembly, *supra* note 111. The HTML source shows that the absolute font size is "1," which is the smallest available absolute font size. *See* Font, http://library.thinkquest.org/20941/font.html (last visited Sept. 6, 2009); General Assembly, *supra* note 111 (The actual HTML source for this segment of the web page is: "Please send questions and comments to the <a href=mailto:webmaster@lis.state.oh.us >Webmaster< /a>.
© 2008Legislative Information Systems | Disclaimer
Index of Legislative Web Sites[.]").

110. General Assembly, *supra* note 106, at 21. There appears to be no text-color encoding, thereby leading us to presume that the text is in the default black color.

111. General Assembly, *supra* note 106. The source code provides that the computer code for the background color is #ffffff, which is the code for the color white. *See* Computer Hope.com, HTML Color Codes and Names, http://www.computerhope.com/htmcolor.htm (last visited Sept. 1, 2009).

112. Guide to Learning HTML, Changing Font Size, http://library.thinkquest.org/28461/fontsize.htm (last visited Oct. 2, 2009).

113. General Assembly, *supra* note 106. The HTML source for the substantive text shows the font size to be "4." *See id.*

114. *See* The Ohio House of Representatives, *supra* note 99.

115. *See, e.g.*, The 128th General Assembly of the State of Ohio, Search for Legislative Information: Find Bills by Number, http://www.legislature.state.oh.us/search.cfm [hereinafter Find Bills by Number].

116. The Supreme Court of Ohio and The Ohio Judicial System, http://www.sconet.state.oh.us (last visited Oct. 2, 2009) (accessable using the following website also: http://www.supremecourt.ohio.gov)

https://digitalcommons.onu.edu/onu_law_review/vol36/iss1/4

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for the Ohio legislature, the website for the Supreme Court of Ohio includes both the website's privacy policy[117] as well as the website's terms of use.[118] The privacy policy is set forth, in its entirety, as Appendix D, while the terms-of-use page is set forth, in its entirety, as Appendix E.

The Supreme Court of Ohio expressly indicates, in both its privacy policy and its terms-of-use, that visitors to the website are agreeing to the conditions set forth in those documents.[119] Additionally, the Supreme Court of Ohio expressly notes that use of the site (i.e., visiting the site) is sufficient to bind the visitor to those terms and conditions.[120] Hence, there is little doubt that both the privacy policy and the terms-of-use are browse-wrap agreements. Also, the level of detail in both of these documents, both as to what the document contains as well as to how the visitor is consenting to the terms contained therein, leaves little doubt that they are contracts within the meaning of the Ohio-UETA.[121]

The links to the browse-wrap agreements for the Supreme Court of Ohio are located at the bottom of the home page.[122] Unlike the home pages for the Ohio legislature's websites, there is a substantial amount of content on the home page for the Supreme Court of Ohio's website. Consequently, a visitor to the Supreme Court of Ohio's home page must scroll down to the bottom of the page to know that there is even a link to the two browse-wrap agreements. The link to the browse-wrap agreements is in a font color that is no different from the font color for any of the other links on the Supreme Court of Ohio's website and in a font size that is as large as the substantive text on the site.[123] The substantive text and the links are contrasted against a white background.[124]

[hereinafter Supreme Court of Ohio]. It should be noted that both of these sites, including all of their internal links, are identical to each other. As such, it seems as if they are either mirrored sites or simply a masked redirect from one site to the other. For purposes of this paper, we refer to http://www.supremecourt.ohio.gov and its internal links, since that is the link that is provided by the Supreme Court of Ohio in its terms-of-use page. The Supreme Court of Ohio & The Ohio Judicial System, Terms of Use, http://www.supremecourt.ohio.gov/Policy/conditions.asp (containing a link to the website disclaimer at the bottom of the page, which can be accessed by clicking on the word "Terms of Use").

117. Web Site Privacy Policy, http://www.supremecourt.ohio.gov/Policy (last visited Aug. 31, 2009) [hereinafter Privacy Policy].

118. Terms of Use, http://www.supremecourt.ohio.gov/policy/conditions.asp (last visited Aug. 31, 2009) [hereinafter Terms of Use].

119. Privacy Policy, *supra* note 117 ("By visiting the Supreme Court of Ohio Web site you are accepting the practices described in this notice."); Terms of Use, *supra* note 127 ("If you utilize our Web site, you accept these conditions.").

120. Privacy Policy, *supra* note 117 ("By visiting the Supreme Court of Ohio Web site you are accepting the practices described in this notice.").

121. *See* § 1306.01(A), 1306.01(D), 1306.01(G), 1306.08(A), 1306.08(B), 1306.13(A), 1306.13(B).

122. Supreme Court of Ohio, *supra* note 116.

123. *Id*. (notice that there appears to be no specific HTML coding for the font size.)

124. *Id.*

Published by DigitalCommons@ONU,

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Unlike the links to various headlines and other articles on the website, which are in bold, the links to the browse-wrap agreements are neither in bold nor italics (i.e., there is no special emphasis).[125] Similar to the links for the browse-wrap agreements for the Ohio House of Representatives[126] and the Ohio General Assembly,[127] the link to the browse-wrap agreements for the Supreme Court of Ohio are located on every page within the primary domain.[128]

V. THE MINIMUM THRESHOLD FOR SUFFICIENT NOTICE

Having reviewed the conspicuousness of browse-wrap agreements for both the Ohio legislature and the judiciary, we now summarize the factors that would likely marshal in favor of sufficient notice for a browse-wrap agreement.

A. Location

All of the websites that we reviewed included a browse-wrap agreement at the bottom of the web page. Indeed, a review of many commercial sites also shows the browse-wrap notice to be on the bottom of the web page.[129] Furthermore, the notice for Southwest Airline's website, which has already withstood judicial scrutiny,[130] is also at the bottom of Southwest's main web page.[131] Thus, one can reasonably conclude that the location of the browse-wrap notice should be at the bottom of the web page. If a visitor scrolls to the bottom of a particular web page where the visitor expects to see the browse-wrap notice and it is not there, it is questionable whether the visitor will spend much time scouring the remainder of the site to find a link to a browse-wrap agreement.

The importance of the location of the notice is evident from the sites reviewed in this article. Namely, every website reviewed has the link to its browse-wrap agreement at the bottom of the web page.[132] In fact, the location of the browse-wrap notice is the only factor consistent for each of the websites that we have reviewed. Thus, we conclude that having a browse-wrap notice at the bottom of the web page is a significant factor in predicting whether there is

125. *Id.*

126. The Ohio House of Representatives, *supra* note 99.

127. General Assembly, *supra* note 106.

128. *See, e.g.,* Justices of the Supreme Court of Ohio, http://www.supremecourt.ohio.gov/SCO/justices/default.asp.

129. *See*, *e.g.*, Amazon.com, http://www.amazon.com (last visited Sept. 2, 2009); Ebay.com, http://www.ebay.com (last visited Jan. 9, 2009).

130. *See generally Southwest,* 2007 U.S. Dist. LEXIS 96230.

131. *See* Southwest Airlines, http://www.southwest.com (last visited Sept. 2, 2009).

132. The Ohio House of Representatives, *supra* note 99; The Ohio Senate, *supra* note 91; General Assembly, *supra* note 106; Supreme Court of Ohio, *supra* note 116.

sufficient notice of a browse-wrap agreement.

B. *Font Size and Emphasis*

For the four Ohio sites that we have reviewed,[133] we found that the font size ranged from the absolute smallest size possible[134] to a standard font size that was no different than any of the other written text.[135] In terms of emphasis or special treatment, the website for the Ohio House of Representatives is the only one that emphasized the link to its browse-wrap agreement.[136] From this, we conclude that emphasis of the link (e.g., bold, underlined, highlighted, etc.) is not a crucial factor in determining whether sufficient notice is provided to the visitor. Additionally, the font size need not be as large as the remainder of the text on the site, as long as it is sufficiently readable to the visitor.

Our conclusion is bolstered by the fact that the notice on Southwest Airlines' website is also in a font size that is smaller than the substantive text, and there is no special emphasis (e.g., bold) on the link.[137] Yet, that particular browse-wrap agreement has withstood judicial scrutiny.[138] While the Texas decision may not be binding in Ohio, it is worthwhile to note that the links to the browse-wrap agreements on the Ohio legislature and judiciary's sites support our conclusion that the font size and font emphasis are not significant factors in determining whether there is sufficient notice to uphold enforcement of a browse-wrap agreement.

C. *Font Color and Contrast*

Similar to the font size and emphasis, there was no commonality in the font color for the link on the four sites that we have reviewed. Recall, the Ohio Senate exhibited a white text on a dark blue background;[139] the Ohio House of Representatives chose a dark grey text on a white background;[140] the Ohio General Assembly had a simple black-text-to-white-background;[141] and the Supreme Court of Ohio selected a dark red text against a white background.[142]

As such, we conclude that the font color is not a significant factor in

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133. The Ohio House of Representatives, *supra* note 99; The Ohio Senate, *supra* note 91; General Assembly, *supra* note 106; Supreme Court of Ohio, *supra* note 116.

134. General Assembly of Ohio, *supra* note 106; *see* supra note 109 and accompanying text.

135. The Ohio House of Representatives, *supra* note 99; Supreme Court of Ohio, *supra* note 116.

136. The Ohio House of Representatives, *supra* note 99.

137. Southwest Airlines, *supra* note 131.

138. *See generally Southwest*, 2007 U.S. Dist. LEXIS 96230.

139. The Ohio Senate, *supra* note 86.

140. The Ohio House of Representatives, *supra* note 102.

141. General Assembly, *supra* note 111.

142. Supreme Court of Ohio, *supra* note 124.

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determining whether sufficient notice is provided to the visitor. Rather, so long as there is sufficient contrast between the font color and the background to make the link readily visible to the visitor, the link to the browse-wrap agreement will likely provide sufficient notice to the visitor.

VI. CONCLUSION

We have attempted to provide a quantitative review of how much notice constitutes sufficient notice for a particular browse-wrap agreement to be binding. In reviewing the factors that determine whether sufficient notice exists to render a browse-wrap agreement enforceable, we conclude that the location of the link is of primary importance. Should a visitor to a web page scroll to the bottom of the web page and find that there is no link or notice to a browse-wrap agreement, it is questionable whether the visitor will continue to look for the browse-wrap notice, especially when the visitor has arrived at a particular website for other purposes. Conversely, if the link to the browse-wrap agreement is located at the bottom of the web page, where one would expect to find it, then neither the font size nor font emphasis play a significant role in predicting whether the notice of the browse-wrap agreement is sufficiently conspicuous. In other words, if a link to a browse-wrap agreement is visible, readable, and located at the bottom of the web page (where one would expect it to be located), then the minimum quanta of notice is provided to the visitor and the browse-wrap agreement will likely be binding on the visitor.

We readily concede that our analysis is limited by the small number of websites that we have reviewed. However, given our presumption that the legislative and judicial branch in Ohio would properly implement their own notice provisions, we intentionally limited our analysis to a small number of websites. Of course, we had the option of reviewing all of the websites for each of the courts of common pleas that reside in each county within Ohio. However, it made little sense to review each of those sites when an analysis of the site for the Supreme Court of Ohio would be sufficient to show the judiciary's implementation of the browse-wrap agreement.

For future work, a similar review for corresponding websites in all of the states that have enacted the UETA may be of interest. The strengths and weaknesses of our specific review will likely be revealed as corresponding data from other jurisdictions that are examined. Additionally, it may be interesting to compare the notice provisions for states that have enacted the UETA with states that have not enacted the UETA (i.e., Georgia, Illinois, New York, and Washington).[143] Specifically, it may be interesting to know whether there is

143. UNIF. ELECT. TRANSACTIONS ACT, 7A U.L.A. 212, available at

any consistency within the states that have enacted the UETA or whether there is a disparity between UETA and non-UETA states.

As noted earlier, we leave the analysis of other jurisdictions for another day.

APPENDIX A: DISCLAIMER LINKED FROM ONLY THE HOME PAGE OF THE OHIO SENATE'S WEBSITE[144]

All users of this service agree to hold the General Assembly of Ohio and its agencies harmless from any and all claims, losses, damages, obligations or liabilities, directly or indirectly relating to this service, including, but not limited to the performance of or the use of this service, and/or the networked information available via this service, caused thereby or arising therefrom. In no event shall the General Assembly of Ohio and its agencies have any liability for lost profits or for indirect, special, punitive, incidental, or consequential damages or any liability to any third party, even if the General Assembly of Ohio and its agencies are advised of the possibility of such damages. The use of this service to engage in any activity which constitutes violation of local, state, and/or federal laws is strictly prohibited. External links to other sites are intended to be informational and do not have the endorsement of the General Assembly of Ohio and its agencies.

APPENDIX B: DISCLAIMER LINKED FROM EVERY PAGE OF THE OHIO HOUSE OF REPRESENTATIVES WEBSITE[145]

All users of this service agree to hold the General Assembly of Ohio and its agencies harmless from any and all claims, losses, damages, obligations or liabilities, directly or indirectly relating to this service and/or the networked information available via this service, caused thereby or arising therefrom. In no event shall the General Assembly of Ohio and its agencies have any liability for lost profits or for indirect, special, punitive, or consequential damages or any liability to any third party, even if the General Assembly of Ohio and its agencies are advised of the possibility of such damages. The use of this service to engage in any activity which constitutes violation of local, state, and/or federal laws is strictly prohibited. External links to other sites are intended to be informational and do not have the endorsement of the General Assembly of Ohio and its agencies.

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http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/UniformElectronicTransactionsActs/tabid/13484/Default.aspx.

144. The Ohio Senate, *supra* note 91.

145. The Ohio House of Representatives Disclaimer, http://www.house.state.oh.us/index.php?option=com_content&view=article&id=45&Itemid=89 (last visited Sept. 2, 2009).

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APPENDIX C: DISCLAIMER LINKED FROM EVERY PAGE OF THE OHIO GENERAL ASSEMBLY'S WEBSITE[146]

All users of this service agree to hold the General Assembly of Ohio and its agencies harmless from any and all claims, losses, damages, obligations or liabilities, directly or indirectly relating to this service and/or the networked information available via this service, caused thereby or arising therefrom. In no event shall the General Assembly of Ohio and its agencies have any liability for lost profits or for indirect, special, punitive, or consequential damages or any liability to any third party, even if the General Assembly of Ohio and its agencies are advised of the possibility of such damages. The use of this service to engage in any activity which constitutes violation of local, state, and/or federal laws is strictly prohibited. External links to other sites are intended to be informational and do not have the endorsement of the General Assembly of Ohio and its agencies.

APPENDIX D: PRIVACY POLICY LINKED FROM EVERY PAGE OF THE OHIO SUPREME COURT'S WEBSITE[147]

Web Site Privacy Policy
By visiting the Supreme Court of Ohio Web site you are accepting the practices described in this notice.

Cookies
On some of our pages we may receive and store certain types of information whenever you interact with us. For example, we may use "cookies" to obtain certain types of information when you visit our site. Cookies are alphanumeric identifiers that we transfer to your computer's hard drive through your Web browser to enable our systems to recognize your browser and to provide a more personalized experience. For example, one of our search pages uses cookies to store elements of your last search using that page so that you will not have to re-enter as much information on your next search. Most browsers allow you to control when cookies are written to your computer. However, cookies allow you to take full advantage of our personalization features and we therefore recommend that you leave them turned on. Check under "Help" in your browser for more information.

Attorney registration information
The information an attorney provides on the Certificate of Registration is placed on the computer system of the Supreme Court of Ohio and is used to

146. General Assembly Disclaimer, *supra* note 107.
147. Privacy Policy, *supra* note 117.

administer the functions of the Supreme Court's Attorney Registration Section and Continuing Legal Education Office. An attorney's address and phone number also may be accessed by the Clerk's Office, in connection with the attorney's participation in cases, by other offices of the Supreme Court, in connection with other matters pending before the Supreme Court, or by ancillary agencies of the Supreme Court, including the Board of Commissioners on Grievances and Discipline and the Ohio Disciplinary Counsel, in connection with an attorney's involvement in a disciplinary matter.

All information provided on a Certificate of Registration is a public record, except to the extent provided in Gov. Bar R. VI, Section 1(G). Under this provision, an attorney's residence phone number and social security number are not public record. In addition, an attorney's residence address is not public record unless the attorney has not provided a business address to the Attorney Registration Section.

The Certificate of Registration includes a separate section for IOLTA (Interest on Lawyer's Trust Accounts) information. The Attorney Registration Section collects this information from attorneys pursuant to Gov. Bar R. VI, Sec. 1(F). All IOLTA information is forwarded to the Ohio Legal Assistance Foundation (OLAF). The IOLTA information assists OLAF in administering the legal aid fund established under Revised Code Section 120.52.

Agents
We sometimes contract with other companies and individuals to perform functions on our behalf. For example, we may hire a company or individual to develop a computer program, help maintain our computer network, or process online transactions. These parties have access to personal information needed to perform their functions, but may not use it for other purposes.

Protection of your personal information
We work to protect the security of your information during transmission by using Secure Sockets Layer (SSL) software, which encrypts information you input. We will reveal only the last 5 digits of your credit card numbers when confirming a transaction. However, we transmit the entire credit card number to the appropriate credit card company during order processing. We do not store your credit card numbers on our computers. In order to prevent unauthorized use of your credit card we suggest that you sign off when finished using a shared computer, and take care not to allow unauthorized access to your computer or your passwords.

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Access to your information
The Supreme Court of Ohio gives those who register online access to their registration information for the purpose of viewing and, in certain cases, updating that information.

Conditions of Use, Notices, and Revisions
If you choose to visit the Supreme Court of Ohio's Web site, your visit and any dispute over privacy is subject to this Policy and our Conditions of Use, including limitations on damages, arbitration of disputes, and application of the law of the state of Ohio. If you have any concern about privacy at the Supreme Court of Ohio's Web site, please send us a thorough description via our Feedback page, and we will try to resolve it. This notice and the Conditions of Use may change, and use of information we gather now is subject to the Privacy Policy in effect at the time of use. You should check our Web site frequently for changes.

Automatic collection of information
We may collect and analyze certain information automatically: the Internet protocol (IP) address used to connect your computer to the internet; login; email address; password; computer and connection information such as browser type and version, operating system, and platform; registration history; the full Uniform Resource Locators (URL) clickstream to, through, and from our Web site, including date and time; cookie number; pages you viewed, or what you searched for.

Public Record
Visitors should be aware that, subject to certain statutory exceptions, most documents and records maintained by the state of Ohio, including but not limited to electronic data, are public records under Ohio law. Therefore, information submitted through this Web site may be subject to disclosure pursuant to a public records request.

APPENDIX E: TERMS OF USE LINKED FROM EVERY PAGE OF THE OHIO SUPREME COURT'S WEBSITE[148]

Terms of Use
Welcome to the Web site of the Supreme Court of Ohio. We provide services to you via this Web site subject to the following conditions. If you utilize our Web site, you accept these conditions. Please read them carefully.

148. Terms of Use, *supra* note 118.

Privacy
Please review our Privacy Policy, which also governs your visit to the Web site of the Supreme Court of Ohio, to understand our practices.

Electronic communications
When you visit the Web site of the Supreme Court of Ohio or send e-mails to us, you are communicating with us electronically. You consent to receive communications from us electronically. We will communicate with you by e-mail or by posting notices on this site. You agree that any agreements, notices, disclosures, and other communications that we provide to you electronically may satisfy any legal requirement that such communications be in writing.

Copyright
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