

THE FEDERAL TRADE COMMISSION AND ONLINE CONSUMER CONTRACTS

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Consumer contracts have long posed a challenge for traditional contract enforcement regimes. With the rise in quick online transactions involving clickwrap and browsewrap contracts, these challenges only become more pressing. This Note identifies the problems inherent in the current system and explores proposals and past attempts to improve online consumer contract interpretation and enforcement. Ultimately, this Note identifies the Federal Trade Commission (“FTC”) as an appropriate and effective agency to provide the much-needed change to online consumer contract enforcement. Based upon its authority under Section 5 of the Federal Trade Commission Act to regulate unfair business practices, the broad discretion that Congress has afforded the FTC, and its successful incursion into the related field of online privacy law, the FTC is uniquely situated to promulgate a new online consumer contracting regime. This Note illustrates the basis and precedent for such a step and explores the form and effects of FTC involvement in online consumer contracts.

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I. INTRODUCTION

The pervasiveness of online clickwrap and browsewrap¹ contracting to the consumer experience raises questions about the process of contract formation and, more pressingly,

¹ Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 464 (2002) (“In browsewrap contracts, Internet users, if they bother to look, will find a ‘terms or conditions’ hyperlink somewhere on web pages that offer to sell goods and services. These contracts generally provide that using the site to purchase the goods or services offered (or just visiting the site) constitutes acceptance of the conditions contained therein. Clickwrap contracts require consumers to click through one or more steps that constitute the formation of an agreement.”).

the appropriate method of interpretation and enforcement. This new, online contract medium has invited legal theoreticians and policy makers to attempt to promulgate targeted enforcement regimes that treat online consumer contracts as a distinct class.² While the necessity of a specialized body of law for online consumer contracts is questionable,³ the rise of online consumer contracts exacerbates the problems of traditional consumer contracts, heightening the need for an interpretation and enforcement mechanism that balances the interests of consumer protection, contract autonomy, and efficiency. This Note identifies the problems inherent in treating consumer contracts as bargained-for contracts between commercially sophisticated parties and explores present approaches to interpreting online consumer contracts as well as theoretical solutions and failed proposals. Ultimately, this Note identifies enforcement by the Federal Trade Commission (“FTC”) as a promising solution to the consumer contract problem, based upon the FTC’s present exercise of authority in analogous situations and its unique regulatory and adjudicatory powers.

II. BACKGROUND ON END USER LICENSE AGREEMENTS AND CONSUMER CONTRACTS

A. Impact of Online Contracting on Consumer Contracts

Consumer and commercial contracts are apples and oranges. Consumer contracts, in fact, are not even properly categorized as contracts. The Restatement (Second) of Contracts requires a contract be the product of “a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”⁴ As the vast majority of

² See *infra* Part II.A.

³ See *infra* Part II.A.

⁴ RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981).

consumer contracts are contracts of adhesion, there is no meaningful bargaining process. Furthermore, the no-reading problem in consumer contracts undermines the notion that consumers even give proper consent. As Ronald J. Gilson, Charles F. Sabel, and Robert Scott unapologetically state, “legally unsophisticated parties by definition do not design contracts.”⁵

The fundamental differences between consumer and commercial contracts result in serious problems when contract law attempts to treat them as the same.⁶ Current contract rules presume that contracts have been negotiated⁷ and give deference to contractual terms based upon a theory of autonomy.⁸ While the autonomy theory of contracts may well be the appropriate approach for contracts between sophisticated parties, where each has bargained for its own interests, it does not rationally extend to consumer contracts where the consumer has no meaningful capacity to influence terms and is frequently unaware of what the terms are.⁹

Since the rise of online transactions, much attention has been given to the proper method for interpreting and enforcing online end user license agreements (“EULAs”). Jurisprudence surrounding e-contracting initially focused on the sufficiency of a click as a surrogate for a signature. This question was quickly resolved in the affirmative when Congress passed the ESIGN Act in 2000.¹⁰ By determining that clicking assent served the same function as a signature, courts and Congress brought online contracts within the

⁵ Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 75 (2014).

⁶ *Id.* at 76.

⁷ Russell A. Hakes, *Focusing on the Realities of the Contracting Process—An Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 112 (2011).

⁸ Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 556 (2003).

⁹ See Gilson, Sabel & Scott, *supra* note 5, at 27.

¹⁰ Electronic Signatures in Global and National Commerce Act § 101, 15 U.S.C. § 7001 (2012).

larger body of consumer contracts. Some have argued for different rules to govern online contracts, and the American Law Institute (“ALI”) went so far as to publish *Principles of the Law of Software Contracts*, suggesting a distinct interpretation regime. However, online contracts are fundamentally no different from traditional print contracts¹¹ and attempting to treat them differently is both unnecessary and unlikely to be successful.

The primary impact of the rise of online contracts upon consumer contracts is an exacerbation of the already existing issues of consumer contracts. Online contracting has done this in three primary ways. First, online contracts increase the problem of non-readership.¹² Second, online transactions have increased the ease and decreased the costs to sellers of including lengthy contracts. All consumer transactions involve lengthy contracts; however, prior to online contracting, these terms were frequently provided by default rules.¹³ The ease with which sellers can supply their own terms does not mean that contracts are now more complex, but it does mean that terms are increasingly supplied by a party with interests contrary to those of the consumer.¹⁴ This results in terms that are both more pro-seller and less consistent between transactions.¹⁵ Shultz and Wilde propose

¹¹ Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 989 (2008) (explaining that “[t]he customer’s decision to place an item in a shopping cart and ‘click here to buy’ provides the electronic parallel to the retail purchasing decision”).

¹² Robert A. Hillman & Maureen O’Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 103 (2011).

¹³ Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 883–84 (2014) (reviewing MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)).

¹⁴ *Id.*

¹⁵ Bakos, Marotta-Wurgler, and Trossen empirically find that term bias does not correlate with price. While this does not indicate exploitation of buyers by sellers, it does suggest that online consumer purchases are inaccurately priced, as price ought to reflect the quality of contract terms.

a compelling model in which sellers are motivated by competitive forces to provide a satisfactory product complete with satisfactory contract terms.¹⁶ Under this theory, seller-dictated terms would not harm consumers. However, Schultz and Wilde also identify an exception to the incentive to provide satisfactory terms when an insufficient number of consumers are adequately informed of contract terms.¹⁷ Online consumer contracts fall within this exception, as discussed below. Third, online transactions lack the same degree of formalism that is present in their print counterparts. While it is well established that a click legally does function as a signature, social psychology suggests that people give greater weight to contracts created with more formalism.¹⁸ If consumers consider online contracts less binding, then they are even less likely to weigh the terms or to invest in reading them.

B. Problems with Online Consumer Contracts

Perhaps the greatest problem with enforcing consumer contracts as commercial contracts is that consumers are not even aware of the terms to which they agree. To overcome the gaping hole in the assent requirement of valid contracts, courts have relied upon the long-standing duty to read. In 1875, the United States Supreme Court declared,

It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. . . . A contractor must stand by the words of his contract; and, if he will not read

See Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 29 (2014).

¹⁶ *See generally* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

¹⁷ *Id.* at 660.

¹⁸ Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1297 (2015).

what he signs, he alone is responsible for his omission.¹⁹

While true for bargained-for commercial contracts, this moral imperative leads to irrational and inefficient results when applied to EULAs. The duty to read doctrine creates a presumption “that the signer read, understood, and assented” to the terms of the contract.²⁰ Empirical evidence shows that this assumption is wholly inaccurate. In a comprehensive survey of consumer contracting practices, Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen found between 0.05% and 0.22% of shoppers access EULAs.²¹ Of those who do access the EULAs, most do not spend enough time on the page to read the terms.²²

Not willing to abandon the duty to read doctrine, some online consumer contract reformers and courts have attempted to brush aside the obvious problem of non-readership by emphasizing opportunity to read.²³ Their approach keeps with autonomy theory and asserts that a valid contract is formed if consumers are given a sufficient opportunity to read the contract terms. The ALI adopted this approach.²⁴ However, this emphasis on increasing the accessibility of terms is misplaced. As Bakos, Marotta-Wurgler, and Trossen so aptly point out, the cost of becoming informed regarding the terms of a contract is comprised primarily of the burden of reading and understanding the terms, not of accessing those terms.²⁵ Marotta-Wurgler substantiates this claim empirically, finding that readily accessible terms presented in the manner advocated by the

¹⁹ Upton v. Tribilcock, 91 U.S. 45, 50 (1875).

²⁰ Fivey v. Pa. R.R. Co., 52 A. 472, 473 (N.J. 1902).

²¹ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 32.

²² *Id.*

²³ See, e.g., Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010 (D.C. 2002); Alabi v. DHL Airways, Inc., 583 A.2d 1358, 1362 (Del. Super. Ct. 1990).

²⁴ PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 (AM. LAW INST. 2009).

²⁵ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 1.

ALI are only 0.36% more likely to be read than terms accessible via a hyperlink.²⁶ An opportunity to read that is practically never taken advantage of provides a hollow foundation for finding assent.

As tempting as proposals to increase contract readership are from an autonomy standpoint, this solution would be at odds with efficiency principles. Not reading EULAs is more often than not the rational choice. As Avery Katz theorizes, for a consumer, not reading a contract is typically the rational choice because of the exceptionally low probability of ever triggering any of the clauses contained in the agreement.²⁷ Victoria Plaut and Robert Bartlett provide another point in favor of not reading, reporting that consumers often choose not to read because they believe all terms to be the same or irrelevant.²⁸ While this belief does not in and of itself prove rationality, the theory of the rational consumer—flawed though it may be—endows it with at least a degree of self-proof. Florencia Marotta-Wurgler and Robert Taylor's data on contract length suggest another approach to concluding that failure to read is the rational choice. They report that, on average, EULAs have become several hundred words longer between 2003 and 2010.²⁹ This lengthening is a result of a tendency of firms to add on new terms instead of replacing old, less functional terms. It also reflects an increasing level of complexity in consumer contracts.³⁰ This data suggests that, even if it was once rational to read, unless the benefits of reading had a

²⁶ Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendation of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 165 (2011).

²⁷ Avery Katz, *Your Terms or Mine? The Duty to Read Fine Print in Contracts,* 21 RAND J. ECON. 518, 520 (1990).

²⁸ Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements,* 36 L. & HUM. BEHAV. 293, 305 (2012).

²⁹ Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts,* 88 N.Y.U. L. REV. 240, 253 (2013).

³⁰ *Id.*

significant margin on costs or unless benefits of reading have increased, it is no longer rational to do so. The increased length and complexity of consumer contracts have increased the cost of reading. As the sufficiency of the benefits is already in question, this trend provides more evidence in favor of the rationality of the failure to read.

The fact that not reading is likely the rational choice does not mean that the current consumer contract regime is efficient. In fact, the interaction of consumers with EULAs can be characterized as a market failure. It is a basic principle of contracts that pro-buyer terms should command a higher price and that pro-seller terms should result in a discount.³¹ Based on this theory, some have argued that mandatory pro-consumer terms would ultimately be against the consumer's interests because of ensuing increases in price. This argument depends on the assumption that price will accurately reflect the contract terms. In an empirical survey, however, Bakos, Marotta-Wurgler, and Trossen found no correlation between EULA term bias and price.³² Of course there are issues of interpretation, including the possibility that contract terms have too small of an impact on price to be distinguished from other noise; however, this evidence does at least point towards a market failure. Furthermore, in the case that contract terms have too small of an impact on price for the effect to be observable, there should be no statistically significant increase in price were mandatory pro-consumer terms to be imposed.

In contrast to Bakos, Marotta-Wurgler, and Trossen's findings, James Anderson and Frank Gollop's study of the impact of warranty on price did yield a correlation.³³ Yet, for

³¹ Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, WIS. L. REV. 679, 699 (2004) (arguing that contract terms are a part of the purchased good or service).

³² Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 29.

³³ See generally James E. Anderson & Frank M. Gollop, *The Effect of Warranty Provisions on Used Car Prices*, in EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS 67, 67–102 (Pauline M. Ippolito & David T. Scheffman eds., 1986).

several reasons, this finding does not invalidate the conclusions of Bakos, Marotta-Wurgler, and Trossen. It is possible, and even likely, that comprehensive warranties provide consumers with such a significant benefit and impose such a great cost upon sellers that they may be accurately priced even while other terms are not. Alternately or additionally, Anderson and Gollop only studied warranties on used cars—a sample group that is not representative of consumer contracts as a whole, as it seems likely they would frequently involve expensive invocation of warranty rights—and that involved print and not online contracting.

If one accepts that the price does not accurately reflect the contract terms in consumer contracts, the next natural question is what allows this exploitation and market failure? Ian Ayres and Alan Schwartz provide an explanation in their empirical finding that consumers are, on the whole, overoptimistic about their contract terms.³⁴ This overoptimism results in consumer willingness to overpay.³⁵ Robert Hillman and Jeffrey Rachlinski corroborate this through their reciprocal finding that consumers consistently underestimate bad outcomes.³⁶ Defenders of the efficiency of EULA terms argue that pro-seller contract terms would rarely be the optimal technique for exploiting market power.³⁷ However, if consumers are undervaluing favorable terms and overestimating the favorability of terms, then sellers are imposing terms that reduce their costs rather than choosing to increase price; they are taking advantage of a narrow but pervasive market failure.

The next question to be answered is why does this consumer error go uncorrected? Marotta-Wurgler offers the

³⁴ Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 *STAN. L. REV.* 545, 554 (2014).

³⁵ *Id.* at 554, 562–63.

³⁶ Hillman & Rachlinski, *supra* note 1, at 452–54.

³⁷ See Mann & Siebeneicher, *supra* note 11, at 985–87 (arguing that sellers tend to provide consumers with the terms they desire); Marotta-Wurgler & Taylor, *supra* note 29, at 261 (arguing that “sellers with market power will use their influence over price, not terms”).

conclusory explanation that market forces are too weak to protect consumers.³⁸ Additionally, it appears that non-market forces have been insufficient to provide an alternate policing mechanism. Some scholars have argued that an informed minority does or could provide an adequate policing mechanism.³⁹ Under this theory, if a sufficiently large minority reads and makes decisions based on contract terms, sellers will be incentivized to provide attractive terms in order to attract the marginal buyer.⁴⁰ This is a primary element of the principles proposed by the ALI.⁴¹ Despite the appeal of this theory as a remedy for non-readership, scholars have empirically shown that it does not hold.⁴² The percentage of consumers who do read EULAs is dramatically less than the percentage predicted to be necessary for an informed minority to have any impact.⁴³

Some scholars have also suggested that a company's concern for its reputation would cause it to employ fair and reasonable terms.⁴⁴ However, there are some sellers who are not sufficiently impacted by reputational concerns for this to have an adequate constraining effect.⁴⁵ For example, for companies who can exit the market at low cost, the optimal strategy may be to maximize profits in the short term, to accept any reputation damages, and then to exit.⁴⁶ Additionally, sellers who enjoy monopolies or quasi-

³⁸ Marotta-Wurgler, *supra* note 26, at 166 (“When too few buyers are sensitive to standard terms . . . there is no ‘informed minority’ of comparison shoppers that will induce sellers to internalize buyers’ preferences.”).

³⁹ Plaut & Bartlett, *supra* note 28, at 294.

⁴⁰ *See generally* Schwartz & Wilde, *supra* note 16.

⁴¹ *See* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 (AM. LAW INST. 2009).

⁴² Marotta-Wurgler, *supra* note 26, at 182.

⁴³ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 24.

⁴⁴ *See id.* at 7; Gillette, *supra* note 31, at 707.

⁴⁵ *See* Hillman & O'Rourke, *supra* note 12, at 101.

⁴⁶ RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 112–13 (6th ed. 2003).

monopolies may be relatively immune to reputation concerns.⁴⁷

A final non-market policing method involves fear of litigation.⁴⁸ Under this mechanism, sellers are incentivized to include only fair terms out of fear of costly litigation and ensuing reputational damage (this mechanism largely involves spillover with reputational policing mechanisms).⁴⁹ Given the low number of cases involving EULA terms,⁵⁰ there is a limited basis for any fear of litigation and thus such fear should have a minimal policing effect. Two primary factors likely limit EULA litigation. First, the state of the law in favor of enforcing EULA terms is well established.⁵¹ Consumers are unlikely to win suits and therefore less likely to bring them in the first place. Second, courts have consistently upheld the right of sellers to enforce arbitration clauses.⁵² Given these two minimizing factors, fear of litigation is unlikely to play the regulating role it might otherwise fill. Non-market factors almost undoubtedly play some role in constraining contract terms; however, it is both difficult to ascertain the degree of this impact and clear that it is not sufficient to entirely remedy the market failure as evidenced by the lack of correlation between terms and price.

⁴⁷ *Id.*

⁴⁸ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 7.

⁴⁹ *Id.*

⁵⁰ See Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 589 (2007) (noting that, by 2007, there were approximately fifty-eight cases regarding enforceability of clickwrap contract terms).

⁵¹ See Juliet M. Moringiello & William L. Reynolds, *What's Software Got to Do with It? The ALI Principles of the Law of Software Contracts*, 84 TUL. L. REV. 1541, 1543, 1552–53 (2010).

⁵² See, e.g., 9 U.S.C. § 2 (2012) (providing for the validity, irrevocability, and enforcement of agreements to arbitrate); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1226 (11th Cir. 2012).

III. CURRENT PROBLEMS WITH ONLINE CONSUMER CONTRACT ENFORCEMENT

The United States currently has no uniform system for interpreting and enforcing consumer contracts. Attempts to create a unified, codified approach have all failed to gain traction.⁵³ As a result, generalist courts have assumed the role of enforcing online consumer contracts.⁵⁴

A. Courts' Present Approach to Interpreting and Enforcing Consumer Contracts

When presented with consumer contracts, courts have interpreted them according to the standard rules of commercial contracts.⁵⁵ There are a handful of courts that have applied some differentiating principles; however, on the whole, courts have overwhelmingly applied general rules of contract interpretation with emphasis on the opportunity to read.⁵⁶ Within this standard framework, courts have attempted to offer a degree of consumer protection through a variety of different principles, including unconscionability and unfair surprise.⁵⁷ Unfortunately, these tools have very little bite. Unconscionability requires a showing of both procedural and substantive unfairness.⁵⁸ Sellers are frequently able to avoid a finding of unconscionability simply by including the potentially problematic term conspicuously in their EULAs, as courts follow the duty to read doctrine and consistently hold that terms clearly stated in the

⁵³ See, e.g., 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, 457 (2013).

⁵⁴ See *id.* at 457–58.

⁵⁵ See *id.*

⁵⁶ See, e.g., *id.* at 469–70; John M. Norwood, *A Summary of Statutory and Case Law Associated with Contracting in the Electronic Universe*, 4 DEPAUL BUS. & COM. L.J. 415, 449 (2006).

⁵⁷ See Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 5.

⁵⁸ *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121 (Cal. Ct. App. 1982).

contract are not procedurally unconscionable.⁵⁹ Unconscionability plays a minimal role in consumer protection as it is difficult to establish.⁶⁰ The same principle holds for unfair surprise as the objectionable terms are included in the EULA and the duty to read doctrine offers a ready defense.

When evaluating forum selection clauses, a class of terms that gives rise to a significant portion of online consumer contract litigation,⁶¹ courts perform a more rigorous substantive evaluation of the term. Buyers can overcome the presumption of enforceability by showing that “enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”⁶² While the unreasonable and unjust criteria appear to have potency for consumer protection, the application of this test to forum selection clauses in consumer clickwrap contracts is flawed as it is the same test that is applied to forum selection clauses in contracts between two commercially sophisticated parties.⁶³ This analysis presupposes that the parties otherwise formed a valid contract. Furthermore, courts have consistently refused to find forum selection clauses contained in clickwrap EULAs invalid for any of the reasons stated in the test.⁶⁴

B. Courts Are Ill Suited to Interpreting and Enforcing Consumer Contracts

As discussed in Part III.A of this Note, treating consumer contracts the same way as commercial contracts serves no autonomy function, violates principles of efficiency, and

⁵⁹ Plaut & Bartlett, *supra* note 28, at 293–94.

⁶⁰ *Id.*; see also Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 463 (2006).

⁶¹ Davis, *supra* note 50, at 589.

⁶² *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

⁶³ *Id.* at 2 (describing the plaintiff and defendant, two corporations).

⁶⁴ See, e.g., *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010 (D.C. 2002); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532–33 (N.J. Super. Ct. App. Div. 1999).

provides poor consumer protection.⁶⁵ Gilson, Sabel, and Scott explain, “[e]xtending the court’s inquiry beyond the contract’s four corners is necessary to prevent such necessarily passive parties from exploitation through adhesion to formal contract terms that do not reflect their real intentions.”⁶⁶ Some scholars have suggested ways for courts to provide this necessary consumer protection. Proposals include reinvigorating already employed tools such as construing the contract against the drafter, applying a looser unconscionability standard, evaluating the contracts for public policy impact, and applying the standards of good faith and fair dealing.⁶⁷ Despite the shortcomings of the present textualist approach adopted by courts and the appeal of simply encouraging courts to expand their present doctrines, a shift in courts’ interpretive approach is not the solution.

Courts are fundamentally ill suited to providing the sort of ex post review of intentions and interests that meaningful consumer protection requires.⁶⁸ As consumers do not provide meaningful assent to contract terms, consumer protection requires that a party besides the self-interested seller represent the consumer’s interests, be it ex ante or ex post.⁶⁹ The nature of the judicial system dictates that any court-provided consumer protection come ex post. This type of protection would require courts to evaluate terms for fairness and to make the ultimate determination that the consumer would have agreed to the contract had he been aware of and understood the terms. The problem with tasking courts with this type of evaluation is their poor positioning to determine consumer interests.⁷⁰ Courts are ill

⁶⁵ See *supra* Part III.A.

⁶⁶ Gilson, Sabel & Scott, *supra* note 5, at 27.

⁶⁷ Hakes, *supra* note 7, at 110–11.

⁶⁸ See Gilson, Sabel & Scott, *supra* note 5, at 75.

⁶⁹ Gillette, *supra* note 31, at 685.

⁷⁰ Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703–04 (1939) (reviewing OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

suited to making normative decisions regarding what consumers believe about the contracts they form.⁷¹

C. Proposals to Solve the Problem of Online Consumer Contracts

In addition to proposals to expand the role of the courts in protecting consumer rights, scholars and policy makers have proposed other methods of reforming consumer contract evaluation and enforcement. One attempt to address the problems posed by online consumer contracts was promulgated by members from the National Conference of Commissioners on Uniform State Laws in the Uniform Computer Information Transactions Act (“UCITA”).⁷² UCITA, proposed in 2002, was a proposal to revise several core elements of online consumer contracting.⁷³ The Act was an unmitigated failure; the ALI withdrew its support and only two jurisdictions ultimately adopted it.⁷⁴ Theorized reasons for the failure of UCITA include having too many cooks in the kitchen, persistent disagreement over whether a specific body of law is necessary for online contracting, and the fact that UCITA ultimately developed to be pro-seller.⁷⁵

Following the failure of UCITA, the ALI developed its own proposal to address the problems of online contracting in *Principles of the Law of Software Contracts* in 2009.⁷⁶ Following in the tradition of UCITA, this proposal has been widely ignored, receiving mention in only one court case.⁷⁷ Even had the ALI principles received greater attention, it is

⁷¹ See Ayres & Schwartz, *supra* note 34, at 557–58.

⁷² UNIF. COMPUTER INFO. TRANSACTIONS ACT, 7 U.L.A. 199 (2009).

⁷³ UNIF. COMPUTER INFO. TRANSACTIONS ACT § 114, 7 U.L.A. 280 cmt. 1 (2009).

⁷⁴ Moringiello & Reynolds, *supra* note 53, at 487–89.

⁷⁵ *Id.* at 491; James Honbuckle, *The Uniform Computer Information Transaction Act: State Legislatures Should Take a Critical Look Before Clicking Away Consumer Protections*, 23 WHITTIER L. REV. 839, 847 (2002).

⁷⁶ Moringiello & Reynolds, *supra* note 53, at 474.

⁷⁷ *Conwell v. Gray Loon Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 811 (Ind. 2009); Moringiello & Reynolds, *supra* note 53, at 490.

unlikely their adoption would have had a meaningful impact on consumer protection. The primary emphasis of the ALI principles regarding consumer contracting involved increased disclosure of terms to ensure the opportunity to read.⁷⁸ While this approach involves minimal costs and appears attractive as a way to bring consumer contracts within the traditional autonomy theory for contract enforcement, its effect would also likely be minimal.⁷⁹ As discussed earlier in this Note, it is the cost of reading and understanding contract terms and not the cost of accessing those terms that is the primary cost associated with becoming informed of contract terms.⁸⁰ Increased ease of access has no observable impact on the readership of terms.⁸¹ The ALI also emphasizes the role of the informed minority⁸²—an enforcement mechanism that has been empirically shown to be ineffective⁸³—and third party watchdog websites.⁸⁴ These watchdog websites, too, have proven ineffective if for no other reason than consumers overwhelmingly fail to access them.⁸⁵

IV. THE FEDERAL TRADE COMMISSION'S POTENTIAL ROLE

A. What a Good Solution Requires

Theorizing about ways to improve upon consumer contract interpretation is a popular hobby amongst academics.⁸⁶ Out of all of this theorizing, five general

⁷⁸ Marotta-Wurgler, *supra* note 26, at 165.

⁷⁹ See Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 6.

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 32.

⁸² Marotta-Wurgler, *supra* note 26, at 167.

⁸³ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 24.

⁸⁴ *Id.* at 32.

⁸⁵ *Id.* at 32–33.

⁸⁶ See generally Ayres & Schwartz, *supra* note 34; Davis, *supra* note 50; Gilson, Sabel & Scott, *supra* note 5.

approaches emerge. First is the camp advocating for consumer protection through increased disclosure.⁸⁷ The ALI's *Principles of the Law of Software Contracts* falls squarely within this school of thought.⁸⁸ Advocates of disclosure as the optimal remedy argue that it should decrease the non-readership problem,⁸⁹ provide a theoretical justification for enforcing contracts that one party does not understand,⁹⁰ create an informed minority, and allow watchdog groups to better advise consumers.⁹¹ They also advocate for protection through disclosure as a low-cost option.⁹² Unfortunately, as discussed in Part III.C, disclosure has failed to achieve its expected outcomes in any meaningful way.⁹³ Furthermore, as Omri Ben-Shahar and Carl E. Schneider argue, disclosure is not without cost.⁹⁴ Each additional disclosure takes away attention from already existing disclosures; increasing the visibility of one term makes other terms less conspicuous.⁹⁵ Additionally, courts might use the existence of heightened disclosure to tip the scale in favor of enforcement for the seller based upon the exculpatory effect of procedural fairness on substantive unfairness. Thus, disclosure could actually become a tool

⁸⁷ See generally PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 (AM. LAW INST. 2009); see also Hillman & O'Rourke, *supra* note 12, at 95.

⁸⁸ PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02(c) (AM. LAW INST. 2009).

⁸⁹ *Id.* § 2.02 cmt. h (“[A]ffording transferees the opportunity to read and compare terms prior to a transaction as well as during or, in the case of shrinkwrap, sometimes even after a transaction is likely the most promising of many imperfect solutions.”)

⁹⁰ See Moringiello & Reynolds, *supra* note 53, at 470.

⁹¹ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 33.

⁹² Cf. Omri Ben-Shahar & Carl E. Schneider, *The Futility of Cost-Benefit Analysis in Financial Disclosure Regulation*, 43 J. LEGAL STUD. S253, S255 (2014) (discussing mandated disclosure in various regulatory contexts).

⁹³ See *supra* Part III.C.

⁹⁴ Ben-Shahar & Schneider, *supra* note 92, at S256.

⁹⁵ *Id.* at S256–57.

used by sellers to impose their terms, especially because there is evidence that increased disclosure does not lead to increased reading of terms by consumers.⁹⁶

A second approach to overcoming the market failure discussed above involves creating a list of presumptively unenforceable terms. The European Union has adopted this approach in their Directive on Unfair Terms (“EU Directive”).⁹⁷ The EU Directive creates a non-exhaustive list of terms that are presumptively unfair and therefore unenforceable.⁹⁸ This approach benefits sellers by reducing the risk of litigation and increasing certainty regarding the enforceability of terms.⁹⁹ It benefits buyers by providing a third party to perform the review of terms that consumers are consistently unwilling to do for themselves.¹⁰⁰ While some praise the EU Directive as a good step towards consumer protection, it is not a panacea.¹⁰¹ Clayton Gillette approves of the EU Directive in theory, but refrains from a unilateral endorsement, explaining, “[t]he success of a pre-approval process . . . depends on the institutional capacity of the agency to consider the proposed contract as a whole as well as the effect of a particular clause within it.”¹⁰² A list of presumptively unenforceable terms certainly does provide a level of consumer protection, but Gillette’s concern regarding the importance of evaluating a contract as a whole and not just as individual terms provides a useful qualification on the approach’s effectiveness. Gilson, Sabel, and Scott, who are in favor of this European-style regime, also voice some concerns about its application.¹⁰³ Specifically, Gilson, Sabel, and Scott voice concern over the EU Directive’s lack of an

⁹⁶ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 34.

⁹⁷ Council Directive 93/13/EEC, 1993 O.J. (L 95) 29 (EC).

⁹⁸ *Id.* at art. 3, Annex.

⁹⁹ Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 986 (2005).

¹⁰⁰ *Id.* at 987.

¹⁰¹ *See id.* at 985–87; Gilson, Sabel & Scott, *supra* note 5, at 77–79.

¹⁰² Gillette, *supra* note 99, at 1001.

¹⁰³ Gilson, Sabel & Scott, *supra* note 5, at 77–79.

updating mechanism.¹⁰⁴ As technology evolves and sellers adapt to new restrictions on consumer contracts, the contract evaluation mechanism must be able to change to provide for the current needs of consumer protection. Otherwise, it is likely to become less effective by the year.

The third approach to consumer protection, pre-approval of individual contracts, answers some of Gillette's concerns about evaluating contract terms in isolation. Israel has adopted this method, albeit on a voluntary basis.¹⁰⁵ Under this policy, sellers can submit their contracts to a government tribunal and receive a seal of approval that they can place on their contract and use in marketing.¹⁰⁶ This approach has the advantage of allowing pro-seller terms to be included that would be excluded under a blacklisted terms approach but that, taken in context, are not anti-consumer.¹⁰⁷ Unfortunately, the Israeli program offers little insight into the effectiveness of such an approach as very few companies have elected to take advantage of the certification service.¹⁰⁸ The Israeli program does illustrate, however, that the advantages of a government-approved contract are insufficient to induce most sellers to voluntarily assent to such regulation.

A fourth approach to consumer protection involves a term auditing process whereby sellers of a certain size are required to survey their customers to learn what expectations they hold regarding the contract terms.¹⁰⁹ For all terms that substantially differ from consumer expectations, the seller would be required to highlight said term in a government-provided box similar to those used in mandatory credit disclosures.¹¹⁰ While this proposal

¹⁰⁴ *Id.* at 79.

¹⁰⁵ Standard Contracts Law, 5743–1982, §§ 12–13, 37 LSI 6 (1982) (Isr.).

¹⁰⁶ *Id.* §§ 12, 13, 15.

¹⁰⁷ Gillette, *supra* note 99, at 982.

¹⁰⁸ *Id.* at 985.

¹⁰⁹ Ayres & Schwartz, *supra* note 34, at 545.

¹¹⁰ *Id.*

minimizes the costs of becoming informed about terms, reduces bureaucratic intrusion into contracting, and maximizes the benefit of reading highlighted terms, it nonetheless falls short. The primary problem with this proposal is its theoretical and unproven nature. Additionally, it comes with the significant cost to sellers of having to conduct regular surveys of their customers. While interesting as a theoretical solution to the problem of consumer agency in contracting, the proposal should not be taken too seriously otherwise. The failure of less radical proposals (the ALI principles and UCITA) to gain support and acceptance suggests that there would be serious obstacles to realizing this proposal. Therefore, this Note will focus on other solutions to the consumer contracting problem.

The fifth distinct approach to consumer protection involves the use of mandatory default rules.¹¹¹ Margaret Radin unapologetically argues that EULAs simply are not contracts and that attempting to enforce them as such is an exercise in futility. She eschews all attempts to provide a surrogate for the consumer in the contract formation process and instead calls for a regime of mandatory default rules for all rights deemed to be essential to consumer protection.¹¹² In particular, Radin believes that the rights to a jury trial, to bring suit in a class action, to be covered by a substantial warranty, to receive expectation damages, and to fair-use rights should not be disclaimable.¹¹³ While this proposal does solve many of the problems of consumer contracting, the practical obstacles to implementing such a radical plan render the actual implementation of the plan unlikely. Additionally, as Omri Ben-Shahar explains, in addition to “unintended consequences of such a liability scheme on

¹¹¹ See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

¹¹² See *id.* at 213 (“[M]y preliminary suggestion is that a purported contract containing offending boilerplate should be declared invalid in toto, and recipients should instead be governed by the background legal default rules.”).

¹¹³ See Ben-Shahar, *supra* note 13, at 892.

prices, affordability, and cross-subsidies,” “[t]o be practical, [Radin’s proposal] would have to overcome doctrinal distinctions reflecting deep-rooted policies that partition the universe of private actions between contract and tort law.”¹¹⁴ Furthermore, “to be relevant, [the proposal] would have to capture wrongful behavior not currently actionable under state consumer protection statutes.”¹¹⁵ Therefore, this Note will focus on other solutions to the consumer contracting problem.

B. Basis of the FTC’s Authority

Congress founded the FTC in 1914 to prevent unfair methods of competition.¹¹⁶ This authority is provided in Section 5 of the Federal Trade Commission Act (“Section 5”).¹¹⁷ The mission of the FTC broadened over time and, with the passing of the Wheeler-Lea Amendment in 1938, the FTC’s authority extended to cover unfair or deceptive acts regardless of any effect on competition.¹¹⁸ Specifically, the Wheeler-Lea Amendment codified the principle “that certain merchandising practices are forbidden by section 5 even though they are neither deceptive nor anticompetitive.”¹¹⁹ Section 5’s only substantive guideline for determining fairness grants the FTC broad discretion, allowing the Commission to find a practice unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹²⁰ Beyond this, the legislative record “provides

¹¹⁴ *Id.* at 902.

¹¹⁵ *Id.*

¹¹⁶ *See* *FTC v. Cinderella Career & Finishing Sch., Inc.*, 404 F.2d 1308, 1311 (D.C. Cir. 1968).

¹¹⁷ 15 U.S.C. § 45 (2012).

¹¹⁸ *See, e.g., Cinderella*, 404 F.2d at 1311; ROBERT M. LANGER ET AL., *Unfair Methods of Competition*, in 12 CONN. PRAC., UNFAIR TRADE PRACTICES § 2.4 (2015).

¹¹⁹ LANGER ET AL., *supra* note 118, at § 2.4.

¹²⁰ 15 U.S.C. § 45(n) (2012).

little concrete guidance in interpreting section 5¹²¹ and in fact shows that Congress intentionally chose not to provide the FTC with meaningful guidelines for interpreting the term “unfair.”¹²² In the years since the promulgation of the FTC Act, courts have upheld the FTC’s authority to interpret Section 5 for itself.¹²³ In *FTC v. Accusearch*, the court held that the FTC’s autonomy in interpreting unfairness was so expansive that the FTC need not show a violation of any particular law in order to find a practice unfair.¹²⁴ The FTC has broadly used this authority in applications including the Door-to-Door Sales Rule,¹²⁵ the Credit Practices Rule,¹²⁶ and the Holder-in-Due-Course Rule.¹²⁷

In addition to the FTC’s broad authority under Section 5 of the FTC Act, specific consumer protection statutes also empower the Commission.¹²⁸ These statutes include the Equal Credit Opportunity Act, the Truth-in-Lending Act, the Fair Credit Reporting Act, the Cigarette Labeling Act, the Do-Not-Call Implementation Act of 2003, the Children’s Online Privacy Protection Act, the Fair and Accurate Credit Transactions Act of 2003, and the Controlling the Assault of

¹²¹ David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1, 13 (1984).

¹²² *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–40 (1972).

¹²³ *See, e.g., FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1194 (10th Cir. 2009) (“[T]he FTCA enables the FTC to take action against unfair practices that have not yet been contemplated by more specific laws.”).

¹²⁴ *Id.*

¹²⁵ 16 C.F.R. pt. 429 (2015) (requiring door-to-door salespeople to furnish receipts and providing the buyer with right to cancel a contract within three days of formation).

¹²⁶ 16 C.F.R. pt. 444 (2015) (prohibiting unfair credit practices).

¹²⁷ 16 C.F.R. pt. 433 (2015) (subjecting any holder of a consumer credit contract to all claims which the debtor could assert against the seller).

¹²⁸ FED. TRADE COMM’N, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION’S INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY (2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [http://per ma.cc/ZC6U-EC2D] [hereinafter FTC OVERVIEW].

Non-Solicited Pornography and Marketing Act of 2003, among others.¹²⁹

C. Similar Implementations of the FTC's Authority

1. Computer Privacy

Closely related to EULAs¹³⁰—and thus a fruitful application for comparison—is the FTC's regulation of consumer online privacy rights. The FTC began its work on online privacy in 1995 at the urging of Congress.¹³¹ Interestingly, this invitation came with no explicit expansion of the FTC's powers.¹³² The FTC was therefore left to use its already existing Section 5 powers to police computer privacy.¹³³ Using this Section 5 approach, the FTC regulated privacy by bringing administrative complaints against online companies it felt violated Section 5 principles.¹³⁴ As of April 2014, the FTC had brought 170 privacy complaints against online sellers.¹³⁵ This appears to be an inconsequentially small number considering the prevalence of computer privacy problems; however, the FTC's impact extends beyond these individual cases.¹³⁶ FTC administrative decisions have

¹²⁹ *Id.*

¹³⁰ Scott Killingsworth, *Minding Your Own Business: Privacy Policies in Principle and in Practice*, 7 J. INTELL. PROP. L. 57, 91–92 (1999) (“It is no stretch to regard [a website's privacy] policy as an *offer* to treat information in specified ways, inviting the user's *acceptance*, evidenced by using the site or submitting the information. The website's promise and the user's use of the site and submission of personal data are each sufficient consideration to support a contractual obligation.”).

¹³¹ Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2046 (2000).

¹³² See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585, 602–04 (2014).

¹³³ *Id.* at 598–99.

¹³⁴ *Id.*

¹³⁵ *Id.* at 600.

¹³⁶ *Id.* at 583.

become a sort of common law for privacy¹³⁷ and “establish compliance requirements for companies to follow in avoiding similar actions being brought against them in the future.”¹³⁸ Thus, it is misleading to view the relatively small number of privacy-related cases as a proxy for the FTC’s impact on consumer online privacy. Additionally, the FTC has issued guidelines and press releases providing insight into what privacy practices it might consider unfair.¹³⁹ While these publications are generally vague, practitioners look to them as well as to past administrative rulings as guides on how to avoid FTC action.¹⁴⁰

In evaluating consumers’ rights to privacy online, the FTC has looked beyond the four corners of seller-drafted privacy policies to consider entire dealings,¹⁴¹ industry standards and other norms,¹⁴² and even consumer expectations.¹⁴³ The FTC will deem a privacy violation illegal even if it does not violate any written element of the seller’s privacy policy.¹⁴⁴ Increasingly, the FTC has found privacy rights to be embedded in consumer expectations of privacy.¹⁴⁵ While this approach does appear radical, it is certainly a more effective stance towards consumer protection than allowing self-interested sellers to determine consumer privacy rights through their privacy statements. In 2009, the FTC used this tactic in the revolutionary case *In re Sears Holdings*, where it found that Sears was engaging in a deceptive practice and violating Section 5, despite a

¹³⁷ *Id.*

¹³⁸ Susan E. Gindin, *Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC’s Action Against Sears*, 8 NW. J. TECH. & INTELL. PROP. 1, 2 (2009).

¹³⁹ Solove & Hartzog, *supra* note 132, at 625–26.

¹⁴⁰ *Id.* at 621, 625–26.

¹⁴¹ Letter from James C. Miller III, Chairman, FTC, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Commerce (Oct. 14, 1983), *reprinted in* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174, 176 (1984).

¹⁴² Solove & Hartzog, *supra* note 132, at 636.

¹⁴³ *Id.* at 661, 666.

¹⁴⁴ *Id.* at 641.

¹⁴⁵ *Id.* at 666–67.

notification of the use of tracking software in its Privacy Statement and User License Agreement.¹⁴⁶ This considerable authority to enforce consumer expectations of privacy is founded upon Section 5 rather than any specific statute.¹⁴⁷

D. EULAs Are Appropriately Analogized to Areas Where the FTC Presently Exercises Its Authority

The power that the FTC possesses under Section 5 of the FTC Act and that it has exercised in a diverse array of consumer protection issues can naturally be extended to interpreting and enforcing EULAs. This application falls squarely within the FTC's mission of consumer protection¹⁴⁸ and meets the requirements for appropriate FTC action.¹⁴⁹ As the former chairman of the FTC, Deborah Majoras, has explained, the FTC's "obligation . . . is to identify and recognize the equivalents of good 'hand-offs' in the formulation of competition and consumer protection policy."¹⁵⁰ EULA interpretation and enforcement is an excellent candidate for FTC action under this guideline.¹⁵¹ As discussed in Part III.B of this Note, the inclusion and pricing (or lack thereof) of fine print terms in consumer contracts represents a market failure.¹⁵² As prices by and large do not reflect fine-print terms,¹⁵³ and consumers do not base their purchasing decisions on fine-print terms that should

¹⁴⁶ See Complaint at ¶¶ 9, 14, *In re Sears Holdings Mgmt. Corp.*, FTC File No. 082-3099, No. C-4264, 2009 WL 2979770 (F.T.C. Aug. 31, 2009).

¹⁴⁷ See Solove & Hartzog, *supra* note 132, at 598.

¹⁴⁸ Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911, 913–14 (2005).

¹⁴⁹ See Deborah Platt Majoras, *Celebrating the Federal Trade Commission: Introductory Remarks for the 90th Anniversary Symposium*, 72 ANTITRUST L.J. 755, 757 (2005).

¹⁵⁰ *Id.*

¹⁵¹ See *supra* Part III.B.

¹⁵² See *supra* Part III.B.

¹⁵³ See Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 29.

materially affect the value of products,¹⁵⁴ regulation of the consumer contracting process would be unlikely to adversely impact competition. Online sellers presently compete very little through their contract terms; therefore, regulating those terms would not supplant an effective market mechanism. In truth, FTC regulation would likely increase competition by removing seller discretion in this currently non-competitive area of contracting. Courts generally defer to the FTC's interpretations and application of its authority based on its evaluation of market impact.¹⁵⁵ Legal academics and economists have already done the bulk of the work for the FTC, showing that regulation of terms would have minimal adverse effect on market efficiency and would in fact improve it.¹⁵⁶

Additionally, it should not be an impediment to FTC regulation of EULAs that these online agreements fall within the domain of contract law. Privacy policies too are properly characterized as contracts, yet this designation has posed no impediment to the FTC's assuming the role of regulator.¹⁵⁷ Not only has the existence of privacy contracts not prevented the FTC from assuming the regulatory role in lieu of courts, it has also not prevented the Commission from ignoring the dickered terms and enforcing an alternate regime of consumer expectations.¹⁵⁸ Professors Solove and Hartzog note, "[w]hile contract law tends to give great weight to the boilerplate terms of a contract, the FTC does not appear to recognize any kind of significant presumption to exculpatory representations buried in dense legalese that run contrary to other representations or consumer expectations."¹⁵⁹ Not only does this tendency suggest the FTC as a natural protector of consumer rights in online contracts, it also highlights the strange situation that the

¹⁵⁴ See *id.* at 32.

¹⁵⁵ See Rice, *supra* note 121, at 18.

¹⁵⁶ See *supra* Part III.B.

¹⁵⁷ See Killingsworth, *supra* note 130, at 91–92.

¹⁵⁸ See Solove & Hartzog, *supra* note 132, at 671–72.

¹⁵⁹ *Id.*

FTC does not presently play such a role. This is all the more surprising as the privacy policies that the FTC does police are increasingly contained within EULAs.¹⁶⁰ Extending FTC oversight to the entirety of the EULA could not be a more natural exercise of FTC authority.

Furthermore, courts have looked favorably upon self-initiated extensions of the FTC's authority. In fact, Professor David Rice believes that "the principal long term influence of the courts, and the Supreme Court in particular, has been the validation of Commission interpretations that bring previously unregulated practices within the agency's substantive jurisdiction."¹⁶¹ It is true that Congress has viewed some FTC initiatives, such as the Cigarette Rule and the proposed children's advertising rule (known as "Kid Vid"), as inappropriate extensions of the FTC's authority.¹⁶² However, these instances do not suggest narrow FTC jurisdiction. In the instance of the Cigarette Rule, the FTC deferred to Congress, which had decided to take up the issue itself.¹⁶³ In the instance of Kid Vid, the FTC's attempt to regulate advertising to children led to Congress temporarily revoking the FTC's authority to promulgate rules based on its Section 5 powers.¹⁶⁴ This dramatic negative reaction by Congress was a result not only of the fact that "measures proposed by the agency . . . smacked of censorship, but the proceeding was also run in such a way that affected business interests could claim, with considerable justification, that

¹⁶⁰ *Id.* at 588.

¹⁶¹ Rice, *supra* note 121, at 17.

¹⁶² See Milkis, *supra* note 148, at 918, 925. In the Cigarette Rule, the FTC attempted to require health warnings on tobacco advertising. *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose*, 29 Fed. Reg. 8324, 8355 (July 2, 1964), withdrawn, 30 Fed. Reg. 9484 (July 29, 1965). In Kid Vid, the FTC sought to limit television marketing of sugary foods to children. *Children's Advertising: Proposed Trade Regulation Rulemaking and Public Hearing*, 43 Fed. Reg. 17,967, 17,969 (proposed Apr. 27, 1978).

¹⁶³ Milkis, *supra* note 148, at 918.

¹⁶⁴ *Id.* at 926.

they were not granted a fair hearing.”¹⁶⁵ Neither the problems associated with the Cigarette Rule nor those associated with Kid Vid would apply to regulation of consumer EULAs. Congress is not presently contemplating its own digital consumer protection regime and a consumer contract protection program would not raise censorship concerns. FTC rules could be implemented in a way that considers and integrates business interests.

E. Methods for FTC Interpretation and Enforcement of EULAs

Should the FTC elect to extend its authority to cover EULAs, it must decide between a rules regime or an enforcement action regime. Under the Magnuson-Moss Act of 1975, the FTC has the power to promulgate industry-wide rules and sue in state or federal courts.¹⁶⁶ In addition to this rule-making authority, the FTC also has the long-standing power under Section 5 to bring administrative actions against businesses it believes to be in violation of fair practice.¹⁶⁷

1. Promulgate Rules

The primary advantage of a rules-based approach is the relative ease of enforcement. Specific rules for what constitutes an unfair consumer contract term remove the burden from the FTC of having to prove that a company acted unfairly.¹⁶⁸ The FTC must only show that the company violated a discrete rule in order to prove its case. This approach would also bring American consumer contract law more in line with the European approach of greylisting

¹⁶⁵ *Id.* at 925–26.

¹⁶⁶ *Id.* at 923.

¹⁶⁷ 15 U.S.C. § 45 (2012).

¹⁶⁸ Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 671 (2008).

unsuitable terms.¹⁶⁹ However, there are practical impediments to the rules approach. Most significantly, promulgating rules has fallen out of practice with the FTC recently.¹⁷⁰ “[M]ost recent FTC regulations have been issued pursuant to specific mandates from Congress in legislation dealing with narrow issues rather than under its discretion to draft regulations under its broad authority to regulate unfair and deceptive acts or practices.”¹⁷¹ As regulation of consumer contracts must necessarily be based on the FTC’s Section 5 powers, a rules-based approach seems practically precluded even if it would be legally valid.

2. Enforcement Actions

The alternate form of enforcement, administrative judicial action, can have a similar effect to direct rule-making.¹⁷² It is true that enforcement actions offer “far less comprehensive protection, for [they] affect[] only the company targeted.”¹⁷³ However, “[a]ction against one company sends a warning to other companies that they also may be subject to an FTC enforcement action.”¹⁷⁴ Thus, enforcement actions can have as wide an effect as rules.¹⁷⁵ Furthermore, as a mass of administrative opinions accumulates, a common-law-style body of rules naturally develops. This has been the case for privacy actions.¹⁷⁶ Rules naturally emerge from administrative decisions that “establish compliance requirements for companies to follow in avoiding similar actions being brought against them in the future.”¹⁷⁷ This approach has the added advantage of

¹⁶⁹ See *supra* Part VI.A; see also Council Directive 93/13/EEC, 1993 O.J. (L 095) 29 (EC).

¹⁷⁰ Budnitz, *supra* note 168, at 671.

¹⁷¹ *Id.*

¹⁷² See Solove & Hartzog, *supra* note 132, at 586.

¹⁷³ Budnitz, *supra* note 168, at 671.

¹⁷⁴ *Id.*

¹⁷⁵ See Solove & Hartzog, *supra* note 132, at 587.

¹⁷⁶ *Id.* at 583.

¹⁷⁷ Gindin, *supra* note 138, at 2.

providing its own updating mechanism. The natural development of consumer contract rules through a common-law approach provides the flexibility to change with developing technology and consumer preferences. This is exactly the sort of updating mechanism that the European regime has been criticized for lacking.¹⁷⁸ A final stroke in favor of the enforcement action approach is the power of precedent. “Starting with the Reagan administration . . . [the FTC has] concentrated on attacking unfair and deceptive practices on a case-by-case basis.”¹⁷⁹

F. Limits on FTC Effectiveness

As natural a fit as online consumer contracts are for FTC regulation, there are several shortcomings to this approach. Among these flaws are (1) the absence of a private right of action under Section 5,¹⁸⁰ (2) the inability of the FTC to mandate civil penalties on its own,¹⁸¹ and (3) the FTC’s limited resources.¹⁸² All of these shortcomings can be minimized through concerted action between the FTC and the courts. As Gilson, Sabel, and Scott explain, “[w]hat a generalist court can do better . . . is to assess the facts in individual disputes and measure the distance between the baseline and the contractual terms and conditions in the disputed contract.”¹⁸³ Through a minimal number of administrative proceedings, the FTC can establish the baseline of which Gilson, Sabel, and Scott speak. Consumers can then bring cases against sellers in generalist courts under the common-law doctrines of unconscionability or unfair surprise.¹⁸⁴ The baseline provided by the FTC can be

¹⁷⁸ See Gilson, Sabel & Scott, *supra* note 5, at 79.

¹⁷⁹ Budnitz, *supra* note 168, at 671.

¹⁸⁰ 15 U.S.C. § 45 (2012).

¹⁸¹ *FTC Renews Support for Legislation to Raise Penalties in Data Privacy Cases*, 75 U.S. L. WK. 2613 (Apr. 17, 2007).

¹⁸² Solove & Hartzog, *supra* note 132, at 624.

¹⁸³ Gilson, Sabel & Scott, *supra* note 5, at 85.

¹⁸⁴ Bakos, Marotta-Wurgler & Trossen, *supra* note 15, at 5.

used to give teeth to the presently underutilized consumer protection doctrines.¹⁸⁵

V. CONCLUSION

The problems with present online consumer protection—or perhaps more accurately, the lack thereof—coupled with the failure of proposals for common-law reforms or more dramatic regulatory interventions suggests that an extra-judicial, extra-political approach is necessary. The FTC has the power to provide just such a consumer protection program. As a centralized, federal organization, the FTC is not encumbered by the same institutional inertia or deference for *stare decisis* that the judiciary is.¹⁸⁶ As a body one degree removed from the democratic process, the FTC additionally does not require political consensus on its action.¹⁸⁷ This freedom has allowed the FTC to make wildly popular regulations in the past, such as the do-not-call list¹⁸⁸ and the Holder-in-Due-Course rule,¹⁸⁹ which would have been unfeasible for Congress to pass and outside of the courts' authority.¹⁹⁰ Online consumer contracts are another similar area ripe for FTC intervention; the public desires government regulation and even believes their contracts are already regulated,¹⁹¹ and political and judicial bodies have thus far been unable to develop a solution.

¹⁸⁵ *Id.*

¹⁸⁶ See Solove & Hartzog, *supra* note 132, at 620.

¹⁸⁷ See, e.g., Milkis, *supra* note 148, at 937.

¹⁸⁸ 15 U.S.C. §§ 6151–55 (2012) (establishing a national registry to limit telemarketing calls).

¹⁸⁹ 16 C.F.R. pt. 433 (2015) (subjecting any holder of a consumer credit contract to all claims which the debtor could assert against the seller).

¹⁹⁰ See Milkis, *supra* note 148, at 937–38.

¹⁹¹ Wilkinson-Ryan & Hoffman, *supra* note 18, at 1278.