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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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ENFORCEABILITY OF BROWSE-WRAP CONTRACTS: A LEGAL OVERVIEW

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ABSTRACT

The enforceability of browse-wrap contracts, which are common in online transactions, is examined through legal research and case law inspection. Unlike click-wrap agreements, browse-wrap contracts do not require explicit user authorization and instead rely on implicit acceptance based on users' actions on a webpage. I examine the legal foundations of contract formation, focusing on the aspects of offer, acceptance, and consideration, and how they apply to browse-wrap contracts. The important question in our analysis is whether browse-wrap phrases are sufficiently apparent and users are reasonably aware of them. Recent judicial rulings and legislative acts provide insight into the enforceability of browse-wrap agreements. By analysing contracts, we can identify the elements that influence judicial decisions and their repercussions. It underscores the necessity for clarity, fairness, and user understanding in online contract formation. Through this examination, we illuminate the complexities and challenges inherent in regulating browse-wrap agreements in the digital era, highlighting the importance of balancing commercial interests with consumer rights.

Introduction:

When browsing online, users may come across terms and conditions (‘T&C’) presented on a separate page offering goods or services. Typically, these T&C are accessible through a hyperlink on the same page. Importantly, users aren’t obligated to actively review or indicate they’ve reviewed the T&C before accepting the contract. Consequently, the complete agreements cannot be displayed simultaneously unless the user clicks on the hyperlink for the terms, referred to as a Browse-Wrap Agreement (BWA). Since the end user isn’t obligated to take any additional action that would indicate acknowledgment of the T&C, enforcing the BWA becomes more challenging.[1]

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[1] Christina L Kunz, John E Ottaviani, and Elaine D Ziff, ‘Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements’ [2003] 9 Journal of Internet Law 3 <https://www.jstor.org/stable/40688197>.

The BWA only covers the access or use of contents that are available on a website or as a downloaded product. Only if the end user agrees to the T&C on the webpage, such end user can access the contents of the web page.[2] In most cases[3], the BWA on the website, contains a statement presuming that the end user's continuing usage of the website or downloaded software constitutes their consent to the T&C. It has also been discovered that the T&C listed in the BWA are plainly displayed on the website, but the existence of such BWA is buried or difficult to read on the webpage. Electronic contracts ('e-contracts') require all transactions to be completed electronically. It facilitates the electronic execution of agreements and transactions when the parties are physically apart. As a result, the primary goal is to use cutting-edge technology to create legally enforceable contracts at a far faster rate. In the current environment, electronic transactions ('e-transactions') are used for a range of reasons, including the recognition of digital signatures and electronic records, the filing of income-tax returns, the completion of admission forms, the payment of bills online, and others.[4] In addition to the BWA, other agreements such as the Shrink-Wrap Agreement and Click-Wrap Agreement (CWA) are routinely used as contracts in internet commerce,[5] and "the Information Technology Act" grants legal legitimacy to such e-contracts.[6] The CWA, or "Click Through Agreement" ("CTA"), is a type of agreement used for software licencing, websites, and other electronic media that requires users to agree to terms and conditions before utilising a website, completing an installation, or making an online purchase. Thus, these agreements often include the terms and conditions, followed by a tick box with the words "I agree" or "I accept" that the user must select. In India, CWAs have been employed more efficiently than BWAs. In the case of BWAs or CWAs, both parties' signatures are necessary to make any contract legitimate, which can be obtained using digital or electronic signature.[7]

As a result, it could be claimed that BWAs are associated with a website that appears as a hyperlink on the internet and requests acceptance from the online user by displaying specific terms and

[2] Tanisha Gautam, 'CLICKWRAP, BROWSEWRAP, AND SHRINKWRAP AGREEMENTS IN INDIA' 1.
[3] 'Wrap Contracts - Nancy S. Kim - Oxford University Press' <https://global.oup.com/academic/product/wrap-contracts-9780199336975?cc=in&lang=en&> accessed 28 March 2024.
[4] 'What Is Network Security? Definition, Importance and Types | TechTarget' (*Networking*) <https://www.techtarget.com/searchnetworking/definition/network-security> accessed 28 March 2024.
[5] ibid.
[6] The IT Act 2000, s 10.
[7] The IT Act 2000, s 2(p) defines "Electronic Signature" The authentication of an electronic record by a subscriber using the electronic method outlined in the second schedule, which encompasses digital signatures.

conditions. It might take the shape of an advertisement or promotion for any product or service. The study's significance stems from the BWA's ability to be enforced in court. In several situations, the court has construed the notion from a different perspective, which has unfortunately caused many concerns about the validity of the licence of terms and conditions in BWAs. In the following sections of the paper, the legal framework and judicial responses to BWA will be addressed in order to gain a better understanding of the enforcement mechanism and its effectiveness in the current environment.

Legal framework governing electronic contracts:

A contract is a legal arrangement made up of an offer from one party and an acceptance by the other. When another person accepts a proposition to do or refrain from doing something, it becomes a promise.[8] Also, when an agreement is legally enforceable, it becomes a contract.[9] Furthermore, to make an agreement enforceable, some communication is required from the promiser to the promise,[10] i.e., to make it a contract. Technology has led to changes in contracting, including the use of e-contracts instead of BWAs.

According to the "information technology law" in India, any written, typewritten, or printed information that is made available to a user in electronic form for future reference qualifies as an electronic record ('e-record').[11] Broadly speaking, it refers to any written, typewritten, or printed document that is equally legitimate in electronic format.[12] However, as the "Indian Contract Act", 1872, regulates the formation and performance of contracts in India, any agreement must abide by its terms in order to be upheld in court.

Therefore, regardless of what is stated in the law, the requirement for e-records will be satisfied if the information or matter is provided in an electronic format that can be accessed and used for future reference. This means that any written, typewritten, or printed record will also be considered to be in compliance. The older Contract Act also contained the acceptable and legally recognised form of an e-contract.

[8] The ICA 1872, s 2(b)
[9] The ICA 1872, s 2(h)
[10] Bhagwandas Goverdhandas Kedia v M/s Girdharilal Parshottamdas and Others [1966] AIR 543.
[11] The IT Act 2000, s 4.
[12] Ibid

It is worth noting that the Indian Contract Act of 1872 contains no clear provision for regulating this form of BWA. However, *according to a report*, a recommendation was made to create a new *chapter IVA and introduce section 67A*,[13] which would give the judiciary the authority to prohibit enforcement of a contract or any part of it that it considers unconscionable. However, because it is still under progress, India's judiciary has not been vigorous in enforcing BWAs.

When it comes to BWA, it is the agreement that takes the shape of a “term of use” (TOU) or “terms of service” (TOS), which is typically found in the corner of a website in the form of a link. These types of contracts are often not deemed legally binding in the majority of countries. However, the Indian Contract Act defines “offer[14]” as the legal principles that apply to it and requires that an offer be made to the offeree.[15] Similarly, in user agreements, the TOS must be expressly stated and accessible to the user, and simply linking to the website's terms will not count as notice to the user.[16] A few major IT businesses, like Apple[17], Google[18], and Microsoft[19], have modified their TOU and TOS to better facilitate effective communication with their website users. The idea that contract conditions should not be altered without the user’s consent and assent is one that is well-applied. The reason for this is that the user only agreed to those specific terms, making the contract “voidable.”[20]

In the United States, website design aspects are critical to BWAs, as evidenced by existing American jurisprudence. In the United States, courts have scrutinized aspects such as the proximity and repetition of terms like the presentation of hyperlinks,[21] including factors like font size, color, and background,[22] as well as the placement of hyperlinks on webpages. The issue of placing hyperlinks at the bottom of webpages,[23] which hampers effective communication with consumers, has been a

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[13] 103rd report of Law commission 1984‘353.Pdf’ <https://patnahighcourt.gov.in/bja/PDF/UPLOADED/BJA/MISC/353.PDF> accessed 28 March 2024.
[14] ICA 1872, s 2(a).
[15] Lalman Shukla v Gauri Dutt [1913] 11 All LJ 489.
[16] ‘8 Common Issues with Terms and Conditions Agreements’ (*Privacy Policies*) <https://www.privacypolicies.com/blog/common-issues-terms-conditions/> accessed 28 March 2024.
[17] ‘Legal - Website Terms of Use - Apple’ (*Apple Legal*) <https://www.apple.com/in/legal/internet-services/terms/site.html> accessed 28 March 2024.
[18] ‘Privacy Policy – Privacy & Terms – Google’ <https://policies.google.com/privacy?hl=en-US> accessed 28 March 2024.
[19] ‘Microsoft Privacy Statement – Microsoft Privacy’ <https://privacy.microsoft.com/en-ca/privacystatement> accessed 28 March 2024.
[20] ICA 1872, s 2(i).
[21] Nguyen v Barnes & Noble Inc [2014] 763 F.3d 1171.
[22] Pollstar v Gigmania [2000] 170 F Supp 2d 974.
[23] Specht v Netscape Communication Corp [2002] 306 F.3d 17.

recurring concern. Consequently, US courts have been more effective in acknowledging and enforcing Browse-Wrap Agreements (BWAs) compared to India. Later in this paper, we will explore specific court rulings illustrating this contrast.

Therefore, for it to be a legally binding agreement, all modifications must be disclosed to the user explicitly and solely. The concept of communication and knowledge has been interpreted and decided by courts as well; this topic will be covered in more detail in the article's following sections. "The Information Technology Act, 2000 is similar[24] to *Section 11*[25] *of the UNCITRAL* Model Law on Electronic Commerce 1996 and follows the necessary prerequisites under the Indian Contract Act, 1872 with regard to offer, unconditional acceptance, lawful purpose and consideration, capacity of parties, and free consent."[26] Additionally, e-contracts would be considered valid under this Act if there are no additional requirements imposed by another law.

In the landmark Judgement of "Carlill v Carbolic.",[27] The court determined that a contract is an agreement that is legally binding and that it arises from a proposition that is accepted when two thinking people get together. In terms of the parties' ability, in "*Mohri Bibi",*[28] The court ruled that any agreement made with an individual who is a minor or under the age of 18 years would be void from the outset. The validity of e-contracts is also established under the Indian Evidence Act, 1860, which considers electronic recordings and recognises them as documentary evidence.[29]

In 2008, "the Central Government through an amendment,[30] validated the contracts through electronic means, which provides that in the process of contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, which are expressed in the electronic form ('e-form') or by means of an e-record, such contract shall not be deemed unenforceable, solely on the ground that such e-form or its means was used for that purpose". The use of electronic contracts is expected to increase in the ever-evolving world of today, when new technology developments occur every other day. This will inevitably lead to a rise in the number of

[24] The IT Act 2000, s 10A.
[25] The Model Law 1196, Art.11.
[26] ICA 1872, s 11-13.
[27] Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256.
[28] Mohri Bibi v Dharmodas Ghose [1903] 30 IA 114.
[29] IEA 1872, s 65(B)(1).
[30] The IT (Amendment) Act 2008, s 10A.

legal disputes that need to be resolved in court. In 2010, the Sc in "*Trimex International"*[31] upheld the aforementioned facts and recognised the concept of offer and acceptance via e-mail as a lawful contract in the absence of a formal agreement.

Furthermore, given the legal framework relating to e-contracts, it can be argued that the Information Technology Law in India does not supply or cover all aspects of online contracts and must also examine the legal procedure for mobile applications and software[32]. As a result, various changes are required to the current legal framework governing e-contracts in order to control and prohibit e-contract difficulties, such as BWA challenges. Furthermore, additional clarifications about the licence terms and conditions for Internet users are required, which will be covered in subsequent sections of this study.

Enforceability of browse-wrap terms and conditions is under scrutiny.

Today, end users are surrounded by technology, technological improvements, and regular upgrades. Previously, documents and agreements were drafted in written or paper form; however, the information technology revolution has modernised and modified the methods of entering into contracts by bringing them in electronic form, i.e., e-contract.[33] However, it can be claimed that such technological advancement through e-contracts has created a number of obstacles and issues that need to be addressed.

For example, most smart website operators include the terms and conditions on their website to ensure that website visitors or end users have the fundamental information they need before purchasing the products or services accessible on their website. Businesses operating online must ensure that their terms and conditions are on their websites and appropriately brought to the attention of their end users, or else the terms and conditions may become unenforceable.

In terms of BWA, the T&C are merely placed on the website, being commonly available by a

[31] Trimex International FZE Ltd. Dubai v Vedanta Aluminium Ltd [2010] 3 SCC 1.
[32] Reserve Bank of India, information Security, Electronic Banking, Technology Risk Management and Cyber' (2011).available at https://rbidocs.rbi.org.in/rdocs/content/PDFs/GBS300411F.pdf
[33] Maren K Woebbeking, 'The Impact of Smart Contracts on Traditional Concepts of Contract Law' (2019) 10 JIPITEC <https://www.jipitec.eu/issues/jipitec-10-1-2019/4880>.

WHITE BLACK LEGAL

hyperlink appearing on various pages of that website, or else at the foot of the website pages, with no necessity that a website user take any affirmation action to express acceptance to the T&Cs. In the Case of “*Bhagwandas V Girdharilal*[34]*”* , It was determined that an “oral contract is just as legitimate as a written contract; the only requirement is that they meet the essentials of a lawful contract”. In this case, it was determined that the ordinary acceptance of an offer and intimation constitutes a contract binding, and that this intimation must be made through some external manifestation. As a result, in the lack of explicit law, the enforceability of e-contracts cannot be disputed.

In the modern era, Courts in various jurisdictions have upheld the enforceability of Browse-Wrap Agreements (BWA) when it has been adequately demonstrated that an end user has acknowledged and accepted the relevant terms and conditions before proceeding with a transaction. Therefore, courts have placed greater emphasis on whether website users have received either ‘*actual or constructive notice’* of the terms and conditions prior to utilizing the website or finalizing the transaction. In subsequent chapters, the researcher will delve into the mechanisms employed by the courts to assess the enforceability of e-contracts, particularly BWA, on a case-by-case basis within the jurisdictions of India and the United States.

Approach Of Courts:

In “Specht v Netscape Communications”[35], **“**Plaintiffs acted upon Defendant’s invitation to download their free software, Smart Download. Because of the way Netscape had its download setup online, Plaintiffs were not required to read the full terms of the contractual agreement, including an arbitration clause, before they clicked the download button. When a suit was filed, Defendant tried to stay the court action and enforce the arbitration clause”.

“The Court held that there was no agreement to begin with because consent was not given.
Unlike bundled software and electronics, the court held that a reasonably prudent consumer would not assent to contractual terms that are so inconspicuous that they could completely overlook them. The license agreements were located on a submerged screen that the user would have needed to scroll through in order to read the full agreement and arbitration clause. As a consequence, the internet users’ act of downloading the software did not unambiguously manifest assent to the arbitration

[34] Bhagwandas Goverdhandas Kedia v Girdharilal Parshottamdas [1966] AIR SC 543; [1966] 1 SCR 656.
[35] Specht v Netscape Communications Corp [2002] 306 F.3d 17 (2d Cir).

provision in the license terms."

In "*Dewayne Hubbert v Dell Corporation"*.[36] , The Court of Appeal, referencing Texas law, asserts that consumers of Dell computers are obligated to adhere to the terms and conditions of sale presented and accessible on Dell's website at the time of purchase. Notably, "the court determines that plaintiffs are legally bound by these terms, even though the transactions were facilitated solely through a hyperlink on Dell's website, without the necessity for the customer to explicitly click an "I accept" button to signify consent". Furthermore, the Court concludes that through their "online laptop purchases, plaintiffs entered into a contractual agreement inclusive of the terms and conditions, as they were duly notified on Dell's website that their transactions were subject to these terms". Furthermore, it was determined that plaintiffs were obligated by the arbitration clause contained in the Terms, which required them to arbitrate issues resulting from the purchase of their computer before the National Arbitration Forum, so upholding the validity of the arbitration clause. Thus, the court dismissed plaintiffs' arguments that such a clause was procedurally and substantively unconscionable. As a result of this lawsuit, several e-contract principles were created, including the requirement that purchases be bound by contract conditions available by hyperlink.

In the case of, "*South west Airlines v Boardfirst LLC"*.[37]*,* Southwest Airlines does not have differentiated seating — one cannot get a better seat by paying more. Passengers are allowed to board based on a group classification they are assigned on a first come, first served basis. "Passengers in the "A" group get to board first, while passengers in the "C" group go last. One can check in to be assigned to a group up to 24 hours before a flight by visiting Southwest's Web site." Boardfirst.com was a web-based company that Southwest passengers could pay to log in for them in hopes of obtaining "A" group passes. Southwest objected to this practice, however, and filed suit in a Texas federal court against Boardfirst alleging violation of the Southwest Web site's terms of service. Southwest then moved for summary judgment on its breach of contract claim, and the court granted the motion.

"The first issue before the court was whether the "browse wrap" terms of service on the Southwest Web site, visible upon clicking a hyperlink at the bottom of the home page, constituted a valid contract

[36] Dewayne Hubbert v Dell Corp [2005] 359 Ill App 3d 976, 835 NE2d 113.
[37] Southwest Airlines v Boardfirst LLC [2007] Civ Act No 3:06-CV-0891-B (N.D. Texas).

WHITE BLACK LEGAL

between Southwest and BoardFirst." Those terms of service, among other things, prohibited using the Southwest site for anything other than personal, non-commercial purposes.

Further, in *Cario v CrossMedia Services*.[38], The court recognized that the "Terms of Use" displayed on the defendant's websites establish a legally binding agreement between the operator of the website and its users. The notice on the website explicitly stated that by continuing to use the website, users would be entering into such an agreement. The plaintiff had both actual knowledge of these terms and imputed knowledge due to repeated use of the sites via a 'robot', thus making them legally bound by the terms. However, the court dismissed the plaintiff's declaratory judgment action due to improper venue, as the "Terms of Use" stipulated that any legal action must be initiated in Illinois, whereas the plaintiff filed the suit in California.

In "*Nguyen v. Barnes & Nobel*, Inc".,[39] The defendant—a major bookshop with a store and an online store where customers could buy books and other goods—had posted an ad for a "fire sale" of out-of-stock "Hewlett-Packard Touchpad tablets (Touchpads)" at a steep discount. After purchasing two Touchpads from the defendant's website, the plaintiff got an email confirming his transaction. Plaintiff got an email from the defendants the following day informing him that his order had been cancelled because of an unforeseenly high demand. Following that, the plaintiff filed a lawsuit in California State Court against the defendants, claiming that their misleading advertising and fraudulent business activities violated both New York and California laws.

WHITE BLACK LEGAL

Using the Federal Arbitration Act ("FAA"), the defendant filed a move to compel arbitration in lieu of standard court processes. The defendant contended in court that the plaintiff was subject to the "Terms of Use" (TOU) of the website, which were accessible by clicking on a hyperlink at the foot of every page. The TOU informed website visitors that by visiting any webpage, creating an account, or making any purchases, they were subject to arbitration. Despite the plaintiff's assertion that he has not viewed any TOU documents or clicked on the TOU URL. The District Court dismissed the defendants' application for arbitration and rejected their arguments. The defendant filed an appeal as a result.

[38] Cairo v CrossMedia Services [2005] Case No C04-04825 (JW).
[39] Nguyen v Barnes & Noble Inc [2015] 763 F.3d 1171.

On appeal, defendant appealed the District Court's denial of its petition to compel arbitration against plaintiff based on the arbitration agreement contained in its website's TOU. Having found no evidence that the website user was aware of the arbitration agreement, the Appellant Court dismissed the appeal. The Court further decided that the mere proximity of the hyperlink to pertinent buttons users must click on is insufficient to give rise to constructive notice if a website makes its terms of service available via a "conspicuous hyperlink" on every page of the website but otherwise gives no notice to its users or requires them to take any affirmative action to demonstrate assent.

The Court decided that nothing could suggest that the browse-wrap provisions at issue are enforceable by or against the plaintiff, let alone that they should give rise to constructive notice of the defendants' browse-wrap terms. Given the distinguishing facts, the District Court did not abuse its authority by rejecting the defendant's estoppel claim. Therefore, while upholding the decision of the District Court, the Appellate Court concluded that the plaintiff was not sufficiently notified of the defendant's Terms of Use (TOU), and consequently, did not engage in an arbitration agreement. To further explain the concept of constructive notice, in "*Joe Douglas v Talk America Inc*."[40], The Ninth Circuit Court of Appeals ruled that "customer is not bound by contractual amendments to service contract posted by long distance company on its website of which customer had no notice". The defendant agreed to offer phone service to clients previously served by AOL. The defendant then attempted to change the terms of its contracts with these customers by modifying the parties' contract provisions, increasing the applicable service rates and requiring consumers to arbitration any complaints they may have with the company.[41] They also incorporated a class action waiver and a New York choice of law provision, and they announced all of the modifications on their website.

On the surface, the plaintiff, a former AOL client, claimed that he continued to use the defendant's services after the transfer, but was given no notice of these contractual changes. The plaintiff also claimed that he did not need to visit the defendant's website since he had set up his account so that all necessary payments were automatically billed and paid by his credit card.

Based on the arguments presented by both parties, the Court reached on conclusion that the plaintiff could not be obligated to resolve disputes with the defendants through arbitration, specifically

[40] Joe Douglas v Talk America Inc [2007] Case No 06-75424 (9th Cir).
[41] Ibid at 2.

WHITE BLACK LEGAL

concerning the contractual revisions and the mandated rate increase imposed by the defendants. Consequently, the Court overturned the District Court's decision to compel arbitration and instead granted the plaintiff's writ of mandamus.

Similarly, In "Re Zappos.com"[42] case Customers who had their personal information stolen by hackers who were able to get past the plaintiff's security successfully filed a class action lawsuit under US state and federal laws seeking damages for the security breach. The plaintiff claimed that because the plaintiff's website requires users to attend arbitration sessions with the plaintiff, class action lawsuits are prohibited and therefore customers could not file a class action lawsuit.[43]

However, the arbitration and anti-class action lawsuit clauses from the plaintiff's website were deemed unenforceable by the U.S. District Court of Nevada. The TOU, according to the Court, is a BWA, and its enforceability is dependent upon: whether the user had constructive or actual knowledge of the provisions? The Court further noted that every page on the plaintiff's website featured a hyperlink to its "TOU" that could be seen by scrolling down from the middle of the page to the bottom.[44] The Court further reasoned that as the link was identical in size, font, and colour to the majority of insignificant links and users were not redirected to the "TOU" when creating an account, signing in, or completing a transaction, there were no differentiating characteristics of the link.

WHITE BLACK LEGAL

Finally, the Court determined that it could not prove that the website users had ever viewed, let alone agreed to, the TOU. The Court stated that the basic requirements for a contract, such as "acceptance" and a "meeting of the minds," have not yet changed because the terms and conditions apply online.

In 2017, a Florida State Appellate Court invalidated an online seller's "terms and conditions" in a disagreement with a buyer. The case[45] dealt with the enforceability of an arbitration clause in a "browse-wrap" agreement, which was a relatively new legal concept that no Florida court had before ruled on. As a result, the case is expected to have a significant impact on the e-commerce legal

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[42] Re Zappos.com, Inc. v Customer Data Security Breach Litigation [2018] MDL No 16-16860 D.C. No 3:12-cv-00325-RCJ-VPC.
[43] Ibid at 15.
[44] Ibid at 18.
[45] Vitacost.com Inc. v McCants [2017] Case No 4D16-3384 (Fla Dist Ct).

landscape.[46]

Further, in number of cases especially in "*Hoffman v. Supplements Togo Mgmt.*"[47], "*Specht v. Netscape Communications Corporation.*"[48] and "*Caspi v. Microsoft Network*",[49] The court has determined that the crucial consideration revolves around whether the plaintiff was reasonably notified of the relevant terms, contingent upon the design and arrangement of the website. Only then will the enforceability of the Browse Wrap be deliberated.

Finally, In "*Rushing V. Viacom*"[50] Here, it was claimed that Viacom had tracked and sold data on minors while they were playing a mobile game, in violation of privacy rules. Per Viacom's user agreement, Viacom requested a stay of proceedings pending arbitration. Since the user had to click on the "more" option in order to examine the arbitration conditions, the court determined that there was no clear evidence of actual or constructive notice to the user. making the controversial arbitration clauses of their browsing wrap agreement automatically invalid because, as a contractual rule, arbitration cannot be accepted by silence or inaction.

Even amid the COVID-19 pandemic, The US Court in "*Rachel Stover*"[51] case decided that because the plaintiff accessed a website with new terms in a browse-wrap agreement, they are not obligated to abide by the amended T&Cs. Court adopted the similar approach in *Skuse v. Pfizer*.[52]

In a similar vein, in *Wollen v. Gulf Stream*[53], According to the "New Jersey Appellate Division", in order for the online consumer contract to be enforceable, the business must demonstrate that the user or customer had awareness of and consented to all of the terms and conditions (both new and old). As a result, it highlighted how crucial it is for businesses to give their online customers adequate notice of all terms and conditions.[54] This case also considered whether the consumer is technologically proficient or a reasonably responsible internet user. The court did not invalidate the

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[46] 'Stanganelli J, How Not to Do Browse-wrap: A Parable, (DMN, March 22, 2017).' <https://www.dmnews.com/?s=browse+wrap> accessed 29 March 2024.
[47] Hoffman v Supplements Togo Mgmt [2011] 419 NJ Super 596, 605-7 (App Div).
[48] Specht v Netscape Communications Corp [2002] 306 F.3d 17 (2d Cir).
[49] Caspi v Microsoft Network [1999] 323 NJ Super 118 (App Div).
[50] Rushing v Viacom [2018] N.D. Cal 04492.
[51] Rachel Stover v Experian Holdings Inc [2020] Case No 19-55204 (9th Cir).
[52] Amy Skuse v Pfizer [2020] 244 NJ 30.
[53] Wollen v Gulf Stream Restoration and Cleaning [2021] N.J. Super. LEXIS 94 (App Div).
[54] Ibid at 34.

BWA in general, nor did it render it an unsuitable option for enterprises. However, it has been determined that enterprises must conduct regular assessments of their websites to ensure that their chosen method of communication, referred to as "Terms and Conditions" (TAC), effectively facilitates the clear recognition of awareness and consent by the reasonably prudent customer or user. Such cases, as stated above, highlight how the judiciary has taken several measures to better grasp the statutes that govern BWAs. The first need is notice, followed by whether the terms were fair when the end user gave consent. When these two procedures have formed the information for the relevant contract, the third step for consumer protection occurs. The court has taken detailed procedures to ensure e-contracts are legally binding.

Therefore, in order to hold users accountable, the terms and conditions of BWA must be reasonable and within their comprehension. In the cases mentioned above, the BWA was upheld in situations where customers buying goods from a website were consistently alerted that all sales were subject to the TAC including to a prominent "hyperlink" to those "TAC" of sale across multiple pages. The court concluded that this repeated Dissemination put a reasonable user on notice of the TAC. In instances where notice was deemed inadequate, such as when the hyperlink to the terms and conditions was only visible upon scrolling to the subsequent screen, the court dismissed the validity of such Browse-Wrap Agreements (BWA) and deemed them unenforceable against the user. Therefore, the enforceability of a BWA is determined on a case-by-case basis according to court decisions, with no definitive "bright-line" rules regarding the adequacy of terms and conditions agreement conspicuity.

WHITE BLACK LEGAL

Conclusion:

Based on the preceding discourse and notable legal cases, establishing the legitimacy of a Browse-Wrap Agreement (BWA) involves a meticulous examination tailored to the particulars of each case, heavily contingent upon the implementation of specific website design elements. However, insights gleaned from these judgments shed light on how such design features can be strategically employed to enhance the likelihood of enforceability of the BWA. In one of the cases, the researcher attempted to highlight the court's observation regarding the BWA, which stated that online shops would be well-advised to provide a noticeable textual notice with their TOU URLs coming future. For example, online shops might want to consider plainly noting on each webpage (next to the "TOU" links) that simply using the website constitutes consent to the website's terms and conditions.

In brief, Browse-Wrap Agreements (BWAs) necessitate corporations to account for the entirety of the end user's interaction with their website. In the contemporary digital landscape, individuals engaging in online purchases or software downloads through various devices are likely to encounter BWAs. Judicial scrutiny has acknowledged the pivotal role these agreements play for companies operating in the online domain, emphasizing the importance for end users to meticulously review such agreements prior to consenting, typically by clicking acceptance on a designated webpage, denoted as a BWA. Legal analysis reveals that user assent to BWA terms can be implied through the user's utilization of the website, as highlighted in legal discourse. Consequently, BWA terms are typically accessible via hyperlinks present on the company's website pages. Courts have contextualized the concept of BWAs within the context of pervasive e-contract usage, prescribing prudent measures for internet users engaging in online transactions. Additionally, courts have effectively addressed criteria for establishing a valid, legally binding, and enforceable contract, particularly in the realm of e-contracts, while also safeguarding the interests of end users. Judicial oversight extends to holding corporations accountable for incorporating unfavourable terms and conditions on their websites, while affirming the enforceability of e-contracts. Within BWAs, end user acceptance of terms and conditions is presumed, yet courts have emphasized that such agreements are not binding or enforceable unless the website owner can furnish evidence of the user's actual knowledge and consent to the Terms and Conditions through the website interface. Therefore, it is necessary to establish regulations in India for BWAs similar to those used in the US, and the Indian judiciary must work more efficiently to recognise and uphold these BWAs. It has also been observed that, in addition to the necessity of consumer protection regulations, CWAs are accepted in India because, in contrast to BWAs, their express permission requirement is clear and unambiguous, making it a more suitable option for the majority of e-commerce platforms to implement and uphold. Indian courts have not yet examined the BWAs' binding nature.