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The Assent-Comprehension Gap: Rethinking Meaningful Assent in Digital Standard-Form Contracts

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ABSTRACT

Digital contracting has made contractual assent almost frictionless. Consumers routinely enter into contractual relationships by clicking 'I Agree' to standard-form terms that may contain extensive provisions concerning liability, dispute resolution, automatic renewal, intellectual property, indemnification and termination. Contract law, however, generally does not require proof that a contracting party actually read or understood every contractual provision before becoming bound. This creates a persistent tension between the formal manifestation of assent and the informational circumstances in which that assent is obtained. This article examines that tension through the concept of the 'assent-comprehension gap', the distance between the legal significance attributed to an affirmative act of acceptance and the extent to which the contracting party could reasonably appreciate the consequences of that act. It argues that the solution lies neither in requiring actual comprehension nor in treating a single click as equally meaningful for every term in a standard-form agreement. Instead, it proposes a graduated model of meaningful assent, under which the procedural conditions surrounding acceptance become increasingly important as the materiality and consequences of a term increase. The article situates this proposal within Indian contract law and consumer protection law, considering the recognition of electronic contracting under the Information Technology Act, 2000. It engages with Robert A. Hillman's analysis of Internet standard-form contracts in India and the broader 'no-reading problem' literature, and draws on comparative clickwrap and browsewrap jurisprudence to illustrate how courts have approached the relationship between notice and affirmative assent. Building on this analysis, the article develops a five-factor framework based on materiality, prominence, complexity, consequence and transactional context, and concludes that this framework can preserve contractual certainty while preventing the act of clicking 'I Agree' from becoming detached from the significance of the obligations it is taken to create.

Keywords: *standard-form contracts, digital assent, meaningful assent, clickwrap, browsewrap, no-reading problem, electronic contracting, consumer protection, unfair contract terms, Indian Contract Act*

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I. INTRODUCTION

A consumer can now enter into a legally significant contractual relationship with less effort than it takes to order a cup of coffee.

A few clicks may create an account, activate a subscription, purchase software, book transportation or obtain access to an online platform. At the end of the process, the user may encounter a checkbox accompanied by the familiar words: 'I agree to the Terms and Conditions.' The click is instantaneous. The contractual document behind it may not be.

Modern digital agreements routinely contain provisions regulating liability, dispute resolution, termination, automatic renewal, intellectual property and limitations upon consumer remedies. The resulting relationship therefore contains an obvious asymmetry: the consumer's manifestation of assent may take a fraction of a second, while the agreement to which that assent is attributed may contain thousands of words of legal language.

This does not mean that digital contracts are inherently invalid. Indian law expressly recognises contracts formed through electronic means. Section 10A of the Information Technology Act, 2000 provides that a contract cannot be treated as unenforceable solely because electronic form or electronic records were used in its formation.¹ The Supreme Court has likewise recognised the legal significance of contractual arrangements evidenced through electronic communications.²

The more difficult question is what significance should be attributed to a user's affirmative act when the contractual environment makes meaningful engagement with particular provisions highly improbable.

The problem is often described as the 'no-reading problem': consumers routinely accept standard-form contracts without reading them. Yet the observation that consumers do not read contractual terms does not, by itself, establish that they have not assented to those terms. Contract law cannot realistically require proof that every party actually read and understood every provision before a contract becomes enforceable.

The problem therefore lies between two extremes.

At one extreme, a consumer's click could be treated as conclusive evidence that every provision received identical assent, regardless of how significant, unusual or obscure the provision may

¹ Information Technology Act, No. 21 of 2000, INDIA CODE (2000), § 10A.

² *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*, (2010) 3 SCC 1 (India).

be. At the other, contractual enforcement could be made contingent upon proof of actual comprehension, undermining the certainty required for modern commerce.

This article proposes a middle position.

It identifies an assent-comprehension gap: the distance between the objective act that the law recognises as assent and the practical circumstances in which that act occurs. The article does not argue that comprehension should replace assent. Rather, it asks whether the legal significance of assent should vary according to the materiality of the particular term and the quality of the notice surrounding it.

The distinction matters because a standard-form agreement may contain terms of radically different significance. A provision explaining how a password may be reset is not equivalent to one requiring mandatory arbitration. An ordinary description of service functionality is not equivalent to an automatic-renewal clause imposing recurring financial obligations.

A single click may therefore reasonably establish assent to an agreement as a whole without necessarily providing equally persuasive evidence that every materially significant provision received meaningful attention.

The problem has been examined by scholars in both general and India-specific contexts. Robert A. Hillman, writing specifically about Indian Internet commerce, argues that the low likelihood of consumers reading standard-form Internet contracts creates risks for consumers and proposes a disclosure-based response informed by the American Law Institute's *Principles of the Law of Software Contracts*.³ Hillman's earlier work with Jeffrey Rachlinski similarly examined whether the traditional law governing paper boilerplate could adequately address Internet contracting, ultimately arguing that existing doctrines such as blanket assent, unconscionability and reasonable expectations could remain applicable while recognising specific Internet-related concerns.⁴

The present article builds upon but does not replicate Hillman's analysis.

Hillman's India-specific proposal is principally concerned with disclosure: how problematic contractual terms should be brought to consumers' attention. The present article asks a related but distinct doctrinal question: what should the law infer from the consumer's act of assent when the significance of the term varies substantially from one provision to another?

³ Robert A. Hillman, *Consumer Internet Standard Form Contracts in India: A Proposal*, 29 NAT'L L. SCH. INDIA REV. 70, 70–86 (2017), <https://repository.nls.ac.in/nlsir/vol29/iss1/5/>.

⁴ Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 429–95 (2002), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-77-2-Hillman-Rachlinski.pdf>.

The article therefore proposes a concept of meaningful assent.

Meaningful assent does not require actual understanding. Nor does it invalidate every unread term. Instead, it suggests that the strength of the inference drawn from a consumer's affirmative conduct should be proportionate to the significance of the contractual provision being enforced.

The proposed framework is graduated rather than binary. Ordinary terms should continue to be governed largely by conventional principles of objective assent. Material terms should receive enhanced notice. Exceptionally consequential provisions may justify a distinct acknowledgement.

The argument is particularly relevant in India. The Indian Contract Act, 1872 provides the basic framework governing consent and free consent, while Indian jurisprudence has recognised that standard-form contractual relationships may raise questions concerning unequal bargaining power and unconscionability.⁵ The Consumer Protection Act, 2019 separately recognises the concept of an 'unfair contract', including certain terms that impose unreasonable charges, obligations or conditions that disadvantage consumers.⁶ The Information Technology Act, 2000 provides legal recognition to electronic contracting.

Together, these principles provide a legal environment in which the relationship between formal assent and meaningful notice can be examined.

The article therefore asks three related questions.

First, does the existing law of contractual assent adequately account for the informational characteristics of digital standard-form contracting?

Second, can the law distinguish between formal assent to an agreement and meaningful assent to particularly material provisions within that agreement without undermining contractual certainty?

Third, what criteria should courts and regulators employ when determining whether the presentation of a digital contractual term provided a sufficiently meaningful opportunity for assent?

To answer these questions, the article develops a five-factor framework based on materiality, prominence, complexity, consequence and transactional context.

The framework is deliberately proportionate. It does not require every contractual term to receive separate acknowledgement. Instead, it recognises that contractual terms exist along a

⁵ Indian Contract Act, No. 9 of 1872, INDIA CODE (1872), §§ 10, 13–23.

⁶ Consumer Protection Act, No. 35 of 2019, INDIA CODE (2019), § 2(46).

spectrum of significance. The greater the legal or economic consequence of a provision, the stronger the justification for ensuring that the provision is reasonably salient before the consumer's affirmative act is treated as meaningful assent to that provision.

The article proceeds as follows. Part 2 examines the relationship between assent and comprehension in standard-form contracting and explains why the traditional duty-to-read principle does not completely resolve the digital problem. Part 3 examines the architecture of electronic contracting, including clickwrap and browsewrap arrangements. Part 4 considers the Indian legal framework governing consent, standard-form contracts, consumer protection and electronic contracting. Part 5 examines Hillman's contribution and the broader no-reading literature. Part 6 develops the concept of meaningful assent and proposes a graduated model. Part 7 sets out the five-factor framework. Part 8 applies that framework to common digital contractual provisions. Part 9 addresses objections concerning freedom of contract, uncertainty, transaction costs and paternalism. Part 10 considers judicial and regulatory implications. Part 11 concludes.

The central claim is modest but consequential: contract law need not require consumers to understand everything they agree to, but it should be cautious about treating a generic click as equally meaningful assent to provisions whose consequences are anything but generic.

II. THE ASSENT-COMPREHENSION GAP IN STANDARD-FORM CONTRACTING

A. The Traditional Conception of Assent

Contract law necessarily relies upon some form of objective manifestation.

Section 13 of the Indian Contract Act, 1872 provides that parties consent when they agree upon the same thing in the same sense. Section 14 defines free consent by reference to circumstances including coercion, undue influence, fraud and misrepresentation.⁷

The statutory framework demonstrates that contractual consent is not simply a matter of subjective belief. The law must identify when conduct has sufficient legal significance to create obligations.

This objective orientation serves an important function. Commercial parties must ordinarily be able to rely upon the apparent commitments of others. If contractual obligations could be avoided whenever a party subsequently asserted that she had not subjectively understood a provision, contractual certainty would be seriously compromised.

⁷ Indian Contract Act, No. 9 of 1872, INDIA CODE (1872), §§ 13–14.

The law therefore cannot sensibly require a court to reconstruct the precise mental state of every contracting party.

But an objective approach does not necessarily mean that all objective acts of acceptance have identical evidentiary significance.

Consider two hypothetical contracts.

In the first, a consumer purchases a low-value digital service. The terms provide basic rules governing account use, payment and cancellation. The user sees a clear link to the terms immediately beside an affirmative acceptance button.

In the second, a consumer purchases a service under an agreement containing a mandatory arbitration clause, an automatic-renewal provision, an extensive indemnity and a broad exclusion of liability. The same 'I Agree' button appears beneath a hyperlink to the agreement, with none of those provisions identified separately.

In both cases, the consumer has clicked 'I Agree.'

Yet it does not necessarily follow that the legal circumstances surrounding the two acts are identical.

The first question is whether a contract was formed.

The second is whether the relevant provision was incorporated.

But a third question may arise where a materially consequential provision is challenged: what circumstances justify attributing the consumer's affirmative act to that particular provision?

This third question lies at the heart of the assent-comprehension gap.

B. The Duty-to-Read Problem

The common-law tradition has historically recognised a strong principle that a person who signs a contractual document is ordinarily bound by its terms even if she did not read them.

The rule has obvious practical justification. Contractual documents would become unreliable if parties could routinely avoid their obligations by asserting that they had failed to read them.

But digital contracting complicates the factual assumptions underlying the traditional rule.

A signed document ordinarily places the signature in physical proximity to the contractual text. Digital contracts may separate the acceptance mechanism from the text through hyperlinks, expandable menus, scrolling windows and multi-screen interfaces.

The consumer may therefore have formal access to the contractual terms without encountering them in a manner that makes their significance apparent.

This distinction matters.

The proposition that a person who voluntarily enters into a contract cannot ordinarily escape it merely because she failed to read it is different from the proposition that every contractual term is necessarily adequately incorporated merely because the consumer could theoretically have located it somewhere on a website.

The latter proposition gives insufficient attention to the conditions through which digital assent is produced.

The no-reading problem is therefore not simply a question of consumer responsibility.

It is also a question of contractual design.

C. Standard-Form Contracts and Information Asymmetry

Standard-form contracting is not inherently objectionable.

Modern commerce depends upon standardisation. A digital platform serving millions of users cannot negotiate an individual agreement with each user. Standardised contractual terms reduce transaction costs, facilitate scalability and permit services to be offered rapidly and consistently.

The difficulty arises because standardisation also concentrates control over the contractual process in the hands of the drafting party.

The provider ordinarily determines:

1. the substantive terms of the agreement;
2. the language in which those terms are expressed;
3. the length and structure of the document;
4. the placement of important provisions;
5. the design of the acceptance interface; and
6. the point at which the consumer is asked to manifest assent.

The consumer typically possesses little or no ability to alter those terms.

The resulting relationship therefore differs from the classical model of two parties negotiating the terms of an agreement with relatively comparable informational and bargaining positions.

The Supreme Court's decision in *Central Inland Water Transport Corp. v. Brojo Nath Ganguly* is important in this context. The Court considered the consequences of unequal bargaining

power and recognised circumstances in which an unfair and unreasonable contractual term could be scrutinised on grounds including public policy.⁸

The significance of *Central Inland Water Transport* for digital contracting is not that every online agreement is unconscionable.

Rather, it demonstrates that formal contractual consent does not necessarily exhaust the legal analysis when the surrounding circumstances substantially constrain meaningful choice.

Digital standard-form contracts can present precisely such a context.

D. From Unread Contracts to Meaningful Assent

The concept of meaningful assent must therefore be distinguished from actual comprehension.

Actual comprehension asks:

Did the consumer actually understand the provision?

Meaningful assent asks a different question:

Did the contracting process provide a reasonable basis for attributing the consumer's affirmative act to the provision, given its significance and the manner in which it was presented?

The distinction is crucial.

Actual comprehension is difficult to establish. A consumer may read a provision and misunderstand it. Another may understand a provision despite not reading every word. Courts cannot realistically conduct a psychological inquiry into the precise state of comprehension of every contracting party.

Meaningful assent, by contrast, can be evaluated objectively.

A court can examine:

- whether the term was visible
- whether it was presented near the acceptance mechanism
- whether the language was unusually complex
- whether the term imposed an unusual obligation
- whether the consequences were substantial
- whether the transaction gave the consumer a reasonable opportunity to appreciate those consequences.

⁸ *Central Inland Water Transport Corp. v. Brojo Nath Ganguly*, (1986) 3 SCC 156 (India).

This does not eliminate the duty to read.

It limits the extent to which the formal availability of contractual text should automatically resolve every question concerning the significance of assent.

III. DIGITAL CONTRACTING AND THE ARCHITECTURE OF ASSENT

A. Electronic Contracts under Indian Law

Digital contracting is not legally exceptional merely because it occurs through software rather than paper.

Section 10A of the Information Technology Act, 2000 provides that where proposals, acceptances and related contractual communications are expressed electronically, the resulting contract cannot be treated as unenforceable solely because electronic means were used.⁹

The provision performs an important function. It establishes technological neutrality in the recognition of contractual relationships.

The Supreme Court's decision in *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.* further demonstrates the legal significance of electronic communications in contractual formation. The dispute concerned whether communications exchanged between the parties evidenced a concluded contractual arrangement, and the Court recognised the legal significance of the electronic correspondence in determining contractual formation.¹⁰

The legal significance is straightforward: Indian law does not require contractual assent to take the physical form of a signature on paper.

But technological neutrality should not be confused with technological irrelevance.

Electronic contracting changes how terms are displayed, how users interact with them and how acceptance is recorded. The fact that a contract can be formed electronically therefore does not answer whether every term presented through a digital interface receives the same degree of notice.

B. Clickwrap

A clickwrap agreement typically requires the user to take an affirmative action indicating acceptance of contractual terms.

A familiar structure is:

☐ I agree to the Terms of Service

⁹ Information Technology Act, No. 21 of 2000, § 10A.

¹⁰ *Trimex International FZE Ltd.*, (2010) 3 SCC 1.

Create Account

The user may be required to tick the box before the account can be created.

Clickwrap therefore offers relatively strong evidence of affirmative conduct.

The user did not merely browse a website. The user performed a specific action associated with acceptance.

But the strength of the clickwrap mechanism depends upon what the action reasonably communicates.

If the checkbox clearly states that the user is agreeing to identifiable terms and the terms are readily accessible, the inference of assent is comparatively strong.

If the interface obscures the existence or significance of the terms, the fact of clicking may establish less.

The distinction is especially important where the contract contains a provision whose consequences are substantially different from those a consumer might reasonably associate with the transaction.

C. Browsewrap

Browsewrap arrangements are structurally different.

In a browsewrap arrangement, the website may state that continued use constitutes agreement to terms, while the terms themselves are accessible through a hyperlink.

The user's conduct may therefore consist simply of using the website.

The problem is immediately apparent.

A user may not know that continued browsing is being characterised as contractual acceptance.

Comparative jurisprudence has therefore frequently distinguished between circumstances in which users are required to click an acceptance mechanism and circumstances in which terms are merely available somewhere on a website.

In *Specht v. Netscape Communications Corp.*, the Second Circuit considered an online licence and emphasised the importance of reasonable notice and unambiguous manifestation of assent.¹¹

In *Nguyen v. Barnes & Noble Inc.*, the Ninth Circuit similarly examined whether the design of a website provided sufficient notice of browsewrap terms. The court considered the

¹¹ *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 27–32 (2d Cir. 2002).

conspicuousness and placement of the terms hyperlink, other notices and the overall design of the website in determining whether a reasonably prudent user would have been placed on inquiry notice.¹²

These decisions do not constitute Indian law.

Their value is comparative. They demonstrate that courts can analyse the architecture of the acceptance process rather than treating the existence of contractual text somewhere on a website as automatically decisive.

D. The Interface as Part of the Contracting Environment

The digital interface should therefore be treated as part of the factual environment in which assent occurs.

The interface may determine:

- whether contractual terms are immediately visible
- whether the user must actively access them
- how the hyperlink is labelled
- whether the acceptance button appears before or after relevant information
- whether important terms are visually distinguished
- whether a summary is provided
- whether the user is given an opportunity to review the terms before acceptance.

These are not merely matters of website design.

They influence the evidentiary significance of the consumer's subsequent conduct.

The digital interface can therefore be understood as the architecture of assent.

A business does not merely draft the contract. It also designs the process through which the consumer encounters and accepts it.

This creates an asymmetry.

The party seeking enforcement controls the information architecture that precedes the acceptance.

That fact strengthens, rather than weakens, the case for examining the circumstances surrounding assent when particularly consequential provisions are disputed.

¹² *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177–79 (9th Cir. 2014).

E. Why Clicking Is Not the End of the Inquiry

A common objection is that a clickwrap mechanism solves the problem.

The consumer has clicked.

The consumer therefore agreed.

This reasoning is attractive because it offers a simple rule. But it risks collapsing several distinct questions.

A click may demonstrate:

1. that the user interacted with the interface;
2. that the user affirmatively selected an acceptance mechanism; and
3. that the user intended to proceed with the transaction.

It does not necessarily establish:

1. that the user knew about every term;
2. that the user understood every term; or
3. that every term was presented with a degree of prominence proportionate to its significance.

The proposed framework does not deny the evidentiary value of a click.

It asks courts to recognise that affirmative acceptance is strong evidence of assent, but the strength of that evidence may depend upon the circumstances in which the acceptance mechanism was presented.

IV. THE INDIAN LEGAL FRAMEWORK

A. The Indian Contract Act, 1872

The Indian Contract Act provides the foundational framework.

Section 10 establishes the basic requirements of enforceable agreements, while sections 13 and 14 address consent and free consent.¹³ Sections 15 to 18 in turn define coercion, undue influence, fraud and misrepresentation.

The statutory framework does not establish a general requirement that parties must actually read or understand every contractual provision.

That absence is significant.

¹³ Indian Contract Act, No. 9 of 1872, INDIA CODE (1872), § 10.

The proposed doctrine therefore should not be presented as a new statutory condition of contract formation.

Instead, meaningful assent should operate as a refinement of the existing analysis of incorporation, notice and enforceability.

B. Consent and Free Consent

Section 13 focuses on agreement upon the same thing in the same sense.

Section 14 then identifies circumstances in which consent is not free.

This structure reveals a fundamental principle: contractual law distinguishes between the existence of an apparent agreement and the conditions under which that agreement is legally meaningful.

Fraud and misrepresentation are obvious examples.

A person who agrees because a material fact has been deliberately misrepresented is not treated identically to a person who makes the same outward act with accurate information.

The proposed framework does not equate poor disclosure with fraud.

That would be doctrinally excessive.

Instead, it identifies a narrower procedural concern: where a contractual term is unusually significant, the adequacy of notice may affect whether the consumer's general acceptance can reasonably be treated as assent to that particular term.

C. Section 23 and Public Policy

Section 23 of the Contract Act renders certain agreements void where their object or consideration is unlawful, including where it is opposed to public policy.¹⁴

The Supreme Court's jurisprudence concerning unconscionable standard-form contracts is particularly relevant here.

In *Central Inland Water Transport*, the Court considered a standard-form employment provision in the context of unequal bargaining power and held that an unconscionable and unreasonable term could be opposed to public policy.¹⁵

The judgment recognised that standard-form agreements may be entered into by a party possessing superior bargaining power with numerous parties possessing little or no bargaining power.

¹⁴ *Id.* § 23.

¹⁵ *Central Inland Water Transport Corp.*, (1986) 3 SCC 156.

The case should not be overstated.

It does not establish that all standard-form consumer contracts are presumptively unconscionable.

Nor does it establish a general requirement of negotiated assent.

Its significance lies in recognising that contractual fairness cannot always be evaluated solely through formal equality of consent.

That principle provides a useful foundation for examining digital standard-form contracting.

D. Consumer Protection Act, 2019

The Consumer Protection Act, 2019 strengthens the relevance of this discussion.

Section 2(46) defines an ‘unfair contract’ as a contract between a manufacturer, trader or service provider and a consumer containing terms that cause a significant change in the rights of the consumer, including provisions involving excessive security deposits, disproportionate penalties, unilateral termination without reasonable cause, assignment to the detriment of the consumer and unreasonable charges, obligations or conditions that put the consumer at a disadvantage.¹⁶

This provision demonstrates that Indian consumer law already recognises the possibility that contractual terms can become objectionable because of their effect upon consumers.

The proposed meaningful-assent framework addresses a different but related problem.

A term may be substantively reasonable while being procedurally obscure.

Conversely, a term may be prominently displayed while being substantively unfair.

The two inquiries should therefore remain distinct.

The Consumer Protection Act can address substantive unfairness.

Meaningful assent addresses the procedural circumstances in which a materially significant term is presented.

E. Electronic Contracting under the Information Technology Act

Section 10A of the Information Technology Act confirms that electronic means cannot, by themselves, undermine contractual validity.¹⁷

¹⁶ Consumer Protection Act, No. 35 of 2019, § 2(46).

¹⁷ Information Technology Act, No. 21 of 2000, § 10A.

The Act therefore establishes the legal legitimacy of electronic contracting without prescribing a comprehensive theory of digital assent.

This leaves room for courts to apply ordinary contractual principles to new technological forms. The central challenge is to ensure that technological neutrality does not become a justification for ignoring technological design.

A paper contract and a digital contract may be legally equivalent in their capacity to create obligations while differing substantially in how notice is provided.

V. HILLMAN, THE NO-READING PROBLEM AND THEORETICAL FOUNDATIONS

A. Hillman's India-Specific Contribution

Robert A. Hillman's work deserves particular attention because it addresses almost precisely the problem at the centre of this article.

In *Consumer Internet Standard Form Contracts in India: A Proposal*, Hillman examines the implications of the rapid expansion of Internet commerce in India and the likelihood that consumers will not read standard-form contractual terms. He argues that this creates opportunities for vendors to employ heavy-handed terms and concludes that the Indian legal framework does not adequately protect consumers in this environment.¹⁸

Hillman proposes a disclosure-oriented approach based upon the American Law Institute's *Principles of the Law of Software Contracts*.¹⁹

This contribution is significant for two reasons.

First, it establishes that the problem of Internet boilerplate is not merely an abstract American concern. It has a specific Indian dimension.

Second, it shifts attention from the unrealistic expectation that consumers will simply read everything towards the design of disclosure mechanisms that can make important terms more salient.

The present article accepts both premises.

But it proposes a different doctrinal endpoint.

Hillman's proposal is fundamentally concerned with how terms should be disclosed.

This article asks a subsequent question:

¹⁸ Hillman, *supra* note 3, at 70–72.

¹⁹ *Id.* at 73–85.

Once the law recognises that consumers are unlikely to process every standard-form provision, should the legal significance of a consumer's generic act of assent nevertheless remain identical for every provision?

The answer proposed here is no.

The significance of Hillman's work is therefore not that it supplies the complete solution to the assent-comprehension gap. Rather, it provides a strong foundation for recognising that digital contracting creates a problem of information and attention that ordinary assumptions about consumer reading cannot adequately address.

B. Hillman and Rachlinski: Continuity Rather Than Complete Technological Exception

Hillman and Jeffrey Rachlinski's earlier article, *Standard-Form Contracting in the Electronic Age*, considered whether Internet contracting required an entirely new doctrinal framework.²⁰

Their analysis is particularly important because it resists an overly simple technological determinism.

They concluded that the rational and cognitive reasons consumers fail to read paper standard forms also operate in electronic contracting. They therefore argued that traditional doctrines, including blanket assent, unconscionability and reasonable expectations, could remain relevant in the Internet environment.²¹

This creates an important starting point for the present proposal.

The assent-comprehension gap does not necessarily require a completely separate law of Internet contracts.

Instead, existing principles can be adapted to the distinctive factual circumstances created by digital interfaces.

The challenge is therefore one of doctrinal refinement rather than doctrinal replacement.

C. Ayres and Schwartz and the No-Reading Problem

Ian Ayres and Alan Schwartz similarly challenge the assumption that consumer protection can be achieved simply by encouraging consumers to read increasingly extensive disclosures.²²

²⁰ Hillman & Rachlinski, *supra* note 4.

²¹ *Id.*

²² Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 545–609 (2014), <https://www.stanfordlawreview.org/print/article/the-no-reading-problem-in-consumer-contract-law/>.

Their analysis focuses upon ‘term optimism’, circumstances in which consumers expect contractual terms to be more favourable than they actually are. They propose a system of ‘term substantiation’ and heightened warnings for unexpected and unfavourable provisions.²³

The importance of this work lies in its recognition that consumer attention is a scarce resource.

The law cannot realistically treat every provision in a lengthy standard-form contract as equally deserving of consumer attention.

The present article adopts that insight but develops it differently.

Rather than attempting to determine which terms consumers statistically misunderstand, the proposed framework asks courts to assess the significance of a disputed term through identifiable factors such as materiality and consequence.

The approaches are therefore complementary.

Ayres and Schwartz ask which terms should receive heightened attention.

The present article asks what should happen to the legal inference of assent when a term is sufficiently significant to warrant that heightened attention but is presented without it.

D. The Limits of Disclosure

Disclosure is often treated as the obvious response to information asymmetry.

But disclosure has diminishing returns.

A fifty-page agreement technically provides more information than a five-page agreement. Yet if the important provision is buried on page forty-seven in dense legal language, the additional information may have little practical effect.

The problem is therefore not simply insufficient information.

It is insufficiently prioritised information.

Meaningful assent should consequently focus upon the identification of what matters most.

This is where the present proposal departs most clearly from a simple ‘more disclosure’ approach.

The goal is not to make contracts longer.

It is to make the most consequential terms more salient.

²³ *Id.* at 545–609.

VI. RETHINKING MEANINGFUL ASSENT

A. Formal Assent Versus Meaningful Assent

The central distinction proposed by this article is between formal assent and meaningful assent.

Formal assent concerns the objective act by which a party indicates agreement.

Meaningful assent concerns the strength of the inference that the act should carry with respect to a particular contractual consequence.

The distinction does not mean that every contractual provision must be individually accepted.

That would make standard-form contracting practically impossible.

Instead, it means that the law should recognise different levels of procedural justification depending upon the significance of the provision being enforced.

B. The Assent-Comprehension Gap

The gap can be represented conceptually as follows:

Formal assent → contractual obligation

The traditional model may assume that the arrow is relatively straightforward.

The proposed approach inserts an additional inquiry:

Formal assent → adequate notice → meaningful attribution of assent → contractual consequence

This does not mean that actual comprehension becomes mandatory.

It means that the legal system should consider whether the circumstances surrounding the consumer's act make it reasonable to attribute the particular consequence to that act.

The distinction becomes especially important when the consequence is unusual, substantial or difficult to appreciate from the transaction itself.

C. A Graduated Model

The proposed model contains three categories.

Category I: Ordinary Terms

Ordinary terms should remain subject to conventional rules of contractual assent.

Examples include:

- routine account-management rules
- ordinary payment procedures

- technical service provisions
- basic usage restrictions
- administrative provisions.

A consumer who clicks an appropriately designed acceptance mechanism should ordinarily be bound by these terms.

Category II: Material Terms

Material terms are provisions that significantly affect the consumer's legal, financial or practical position.

Examples include:

- automatic renewal
- substantial cancellation fees
- important limitations on liability
- significant unilateral modification rights
- material restrictions on remedies.

These terms should receive enhanced notice.

Enhanced notice does not require a universal technological form. It may include:

- prominent placement
- plain-language summaries
- visual differentiation
- proximity to the acceptance mechanism; or
- a concise explanation of the practical consequence.

Category III: Exceptionally Consequential Terms

Some terms may be so unusual or consequential that a separate acknowledgement is justified.

Examples may include provisions that:

- substantially alter the forum for dispute resolution
- impose significant continuing financial obligations
- create unusually broad indemnification
- grant exceptionally broad rights over consumer content; or
- permit significant unilateral alteration of fundamental contractual rights.

For such terms, a separate acknowledgement could provide stronger evidence that the consumer's assent was meaningful.

D. Proportionality

The essential principle is proportionality.

The law should not demand maximum disclosure for every term.

Instead:

The stronger the contractual consequence, the stronger the procedural justification required before that consequence is attributed to a generic act of acceptance.

This approach preserves efficiency while recognising that not all contractual provisions are equal.

VII. A FIVE-FACTOR FRAMEWORK FOR MEANINGFUL DIGITAL ASSENT

A. Materiality

The first factor is materiality.

The court should ask how significantly the provision affects the consumer's legal or economic position.

Materiality should be assessed substantively rather than by reference to the technical length of the clause.

A short arbitration provision may be more material than an entire page of ordinary administrative provisions.

The relevant question is therefore:

How substantially would enforcement of this term alter the consumer's position?

Materiality is the gateway factor.

A trivial term should not trigger extraordinary procedural requirements merely because it appears in a long agreement.

B. Prominence

The second factor is prominence.

A materially significant term should be presented in a manner that makes it reasonably identifiable.

Relevant considerations include:

- location
- font size
- contrast
- headings
- hyperlink placement
- proximity to the acceptance button
- whether the user had to take an action to access the term
- whether the term was visually distinguished from surrounding text.

Prominence is not synonymous with aesthetic attractiveness.

Its purpose is to assess whether the consumer had a reasonable opportunity to notice the provision.

C. Complexity

The third factor is complexity.

Some provisions are difficult to understand even when they are visible.

Complexity can arise from:

- legal terminology
- multiple exceptions
- cross-references
- technical concepts
- lengthy sentence structures
- interaction with other contractual provisions.

The more complex a materially significant term is, the stronger the case for plain-language explanation.

The law should not require a consumer to possess legal training merely to understand the practical effect of a significant obligation.

D. Consequence

The fourth factor is consequence.

A term should receive greater procedural attention where breach or enforcement could cause substantial financial or legal harm.

Consider the difference between:

- a clause requiring users to keep passwords confidential
- a clause imposing a substantial indemnity obligation.

Both may appear in the same document.

But their consequences differ substantially.

The procedural requirements surrounding assent should therefore be capable of reflecting that difference.

E. Transactional Context

The fifth factor is transactional context.

The significance of a provision cannot always be determined in isolation.

Relevant considerations include:

- the value of the transaction
- whether the service is essential or discretionary
- whether meaningful alternatives exist
- whether the transaction is consumer-facing or commercial
- whether the user is likely to possess specialised knowledge
- whether the term is consistent with ordinary expectations concerning the transaction.

This factor prevents the framework from becoming mechanically formalistic.

A highly sophisticated commercial transaction involving negotiated terms should not necessarily be treated identically to a mass-market consumer subscription.

VIII. APPLYING THE FRAMEWORK TO COMMON DIGITAL CONTRACTUAL TERMS

A. Arbitration Clauses

Arbitration clauses provide a particularly useful example.

An ordinary consumer may not expect that a routine dispute concerning a digital service will be subject to mandatory arbitration rather than ordinary judicial or consumer-forum mechanisms.

The provision can therefore materially alter the consumer's procedural position.

Under the proposed framework, a mandatory arbitration clause would ordinarily qualify as a material term.

Where the clause is buried in lengthy Terms and Conditions, presented only through a generic hyperlink and expressed in technical language, the argument for treating the generic click as meaningful assent is comparatively weaker than where the provision is clearly identified before acceptance.

This does not mean that the clause must automatically be invalid.

Rather, the court should consider whether the drafting party provided sufficient notice given the provision's materiality and consequence.

B. Automatic Renewal

Automatic renewal provisions illustrate the economic importance of meaningful assent.

A consumer may reasonably believe that purchasing a one-month subscription creates a one-month financial commitment.

An automatic-renewal clause transforms that relationship into an ongoing obligation.

The provision should therefore be prominently displayed before acceptance.

A simple disclosure such as 'Your subscription will automatically renew at ₹X per month unless cancelled before [date]' may provide substantially better notice than a lengthy clause buried in the Terms of Service.

The proposal does not prohibit automatic renewal.

It seeks to ensure that the recurring financial consequence is sufficiently salient before the consumer accepts.

C. Limitation-of-Liability Clauses

Limitations of liability are common in digital agreements.

Some are routine and reasonable.

Others can substantially restrict the consumer's remedies.

The framework therefore avoids treating all liability clauses identically.

A modest limitation applicable to foreseeable technical disruptions may be an ordinary term.

A clause purporting to exclude almost every category of liability, particularly where the consumer has limited alternatives, may be materially more significant.

The more substantial the restriction, the stronger the justification for enhanced notice.

D. Unilateral Modification Clauses

Digital platforms frequently reserve the right to modify contractual terms.

Such provisions should not automatically be treated as problematic.

A platform may reasonably need to update technical procedures, security requirements or administrative policies.

But a clause permitting unilateral modification of fundamental economic or legal obligations raises a different concern.

The framework therefore distinguishes between minor administrative modifications and substantive changes affecting price, liability, dispute resolution or fundamental rights.

Where the provider possesses a broad unilateral modification power, the significance of the provision increases.

E. Intellectual-Property Licences

Digital services frequently require users to grant licences over uploaded content.

The practical significance depends upon the scope of the licence.

A limited licence necessary to host and display content may be reasonably expected.

A perpetual, transferable or commercially expansive licence may materially alter the consumer's rights in her content.

The framework therefore directs attention to both scope and consequence.

The consumer need not understand every technical aspect of copyright law.

But a materially broad licence should not be rendered practically invisible within an otherwise routine registration process.

F. Indemnity Clauses

Indemnity provisions can create substantial financial exposure.

They are also often drafted in language that ordinary consumers may find difficult to understand.

Materiality, complexity and consequence therefore converge.

Where a consumer-facing digital service contains an unusually broad indemnity, the provider should have stronger reason to present the provision prominently and explain its practical effect.

IX. COUNTERARGUMENTS AND LIMITATIONS

A. Freedom of Contract

The strongest objection is that the proposed approach undermines freedom of contract.

Consumers, it may be argued, should be responsible for the agreements they accept.

That principle remains fundamental.

The proposed framework does not say that an unread term is automatically unenforceable.

It does not create a general right to disregard contractual obligations.

Instead, it asks whether the circumstances surrounding acceptance provide adequate grounds for attributing meaningful assent to a materially significant provision.

The distinction preserves contractual autonomy while recognising that autonomy is more meaningful where the contracting process provides reasonable information about significant consequences.

B. The Duty to Read

A related objection is that consumers have a duty to read.

There is considerable force in this argument.

Contractual certainty requires individuals to bear some responsibility for their agreements.

But a duty to read should not automatically become a duty to discover.

If a drafting party places a materially consequential term in a location where a reasonable user is unlikely to encounter it, the issue is not merely whether the consumer failed to read.

It is whether the drafting party provided meaningful notice in the first place.

The proposed framework therefore does not abolish the duty to read.

It places limits on the extent to which the duty can compensate for deficient contractual presentation.

C. Judicial Uncertainty

Another objection is that the framework introduces uncertainty.

Terms such as ‘materiality’, ‘prominence’ and ‘consequence’ require contextual judgment.

But contract law already uses standards involving reasonableness, fairness, unconscionability and public policy.

The five-factor framework reduces rather than creates uncertainty by identifying the considerations relevant to the inquiry.

Courts could also develop presumptive categories over time.

For example, mandatory arbitration, automatic renewal and substantial indemnity provisions could ordinarily be treated as material terms requiring enhanced notice.

D. Transaction Costs

Businesses may argue that enhanced disclosure increases transaction costs.

This concern is legitimate.

If every provision required separate acknowledgement, digital contracting would become cumbersome.

That is precisely why the proposed model is graduated.

Ordinary terms require no additional mechanism.

Only material and exceptionally consequential terms receive enhanced treatment.

Moreover, the drafting party controls the contractual interface.

It is therefore comparatively efficient to place the burden of designing appropriate notice upon the party already responsible for designing the contracting process.

E. Warning Fatigue

Another danger is warning fatigue.

If every provision receives a prominent warning, none receives meaningful attention.

The proposed framework therefore does not advocate maximum disclosure.

It advocates selective salience.

The objective is to direct attention towards provisions where misunderstanding is most consequential.

This is consistent with the insight underlying Ayres and Schwartz's work: the problem is not simply that consumers do not read; it is that the law cannot realistically expect them to process every provision in mass-market agreements.²⁴

²⁴ Ayres & Schwartz, *supra* note 22, at 545–609.

F. Paternalism

Consumer protection can become paternalistic if it assumes that consumers are incapable of making contractual choices.

The proposed framework does not make that assumption.

Consumers remain free to accept significant contractual provisions.

The proposal concerns the conditions under which that choice is presented.

The objective is not to replace consumer autonomy with judicial judgment.

It is to ensure that contractual autonomy is not reduced to a formal click detached from the information architecture that precedes it.

X. TOWARDS A PROPORTIONATE STANDARD OF DIGITAL ASSENT**A. Judicial Development**

The proposed framework can be developed through existing legal doctrines without requiring an entirely new statutory regime.

Courts could approach disputed digital terms through four stages.

First, determine whether a contract was formed.

Second, determine whether the disputed provision was incorporated.

Third, where a materially significant term is challenged, assess whether the circumstances surrounding its presentation provided a sufficiently meaningful basis for attributing assent to it.

Fourth, independently assess whether the term is substantively enforceable under applicable law.

This sequence is important.

Formation, incorporation, meaningful assent and substantive fairness are distinct inquiries.

A term may fail at one stage without failing at another.

B. The Evidentiary Role of Interface Design

One advantage of the proposed approach is that it treats interface design as evidence rather than as a rigid legal category.

A court would not need to declare all clickwrap contracts valid or all browsewrap contracts invalid.

Instead, the interface would become one part of the factual inquiry.

The court could ask:

- Was acceptance affirmative?
- Were the terms accessible?
- Was the existence of the terms made clear?
- Was the material provision identified?
- Was it placed near the acceptance mechanism?
- Did the interface distinguish the provision?
- Did the provider offer a concise explanation of the practical consequence?

This approach is compatible with the comparative reasoning seen in *Specht* and *Nguyen*, without importing their holdings into Indian law.²⁵

C. Regulatory Intervention

Regulatory guidance could supplement judicial development.

Authorities could identify categories of terms that ordinarily deserve enhanced notice, including:

- automatic-renewal obligations
- significant cancellation penalties
- mandatory arbitration
- substantial limitations of liability
- broad indemnification
- extensive unilateral modification powers
- unusually broad intellectual-property licences.

Regulatory guidance need not prescribe a single interface.

Instead, it could establish a principle of proportionate prominence.

Businesses would remain free to innovate in interface design while being required to ensure that material contractual consequences are reasonably salient.

D. A Possible Model for Digital Platforms

A practical three-tier interface could be developed.

²⁵ *Specht*, 306 F.3d at 27–32; *Nguyen*, 763 F.3d at 1177–79.

Tier I: Standard Terms

The user receives ordinary access to the full Terms and Conditions.

Tier II: Material Terms

A concise summary appears before acceptance:

Important terms affecting you:

- Subscription automatically renews every month.
- Cancellation after renewal may result in a charge.
- Liability is subject to specified limitations.

The full agreement remains available.

Tier III: Exceptional Terms

The user provides a separate acknowledgement:

Important: This agreement contains a mandatory arbitration provision. By continuing, you acknowledge that disputes may be required to be resolved through arbitration.

This approach is technologically simple.

More importantly, it is legally proportionate.

E. Implications for Businesses

The framework may initially appear to impose additional obligations upon businesses.

But it can also improve contractual certainty.

Businesses would know that routine provisions remain protected by ordinary rules, while unusually consequential provisions require additional care.

This creates an incentive to draft contracts according to actual consumer significance rather than treating every provision as equally important.

It may also improve consumer trust.

A platform that clearly explains material contractual consequences is less likely to generate disputes arising from consumer surprise.

F. Implications for Consumers

Consumers would not be expected to become legal experts.

The framework would instead prioritise the information most likely to affect them.

This changes the regulatory question from ‘Did the consumer read the contract?’ to ‘Did the contracting process reasonably identify the provisions that materially affected the consumer’s position?’

The latter question is more compatible with the realities of digital commerce.

XI. CONCLUSION

Digital contracting has made contractual assent remarkably efficient.

The same efficiency, however, has created a growing distance between the act of acceptance and the complexity of the agreement accepted. A consumer may affirmatively click ‘I Agree’ to a lengthy standard-form contract containing provisions that vary enormously in their legal and economic significance.

The law should neither require consumers to prove actual comprehension of every contractual term nor assume that a single click necessarily carries identical legal significance for every provision contained within a standard-form agreement.

A more defensible approach is one of graduated meaningful assent.

Routine terms should remain subject to ordinary principles of objective assent. Material provisions should receive enhanced notice proportionate to their significance. Exceptionally consequential provisions may justify separate acknowledgement.

The proposed five-factor framework (materiality, prominence, complexity, consequence and transactional context) provides a structured method for determining when stronger procedural safeguards are justified.

This approach does not reject freedom of contract. It does not create a general duty to read. Nor does it make subjective comprehension a prerequisite for contractual validity.

Instead, it recognises a narrower proposition:

The greater the contractual consequence of a provision, the stronger the justification for ensuring that the provision is reasonably salient before assent is obtained.

The proposal builds upon, but remains distinct from, Robert Hillman’s India-specific work on Internet standard-form contracts. Hillman correctly identifies the difficulty created by consumers’ low likelihood of reading online terms and proposes disclosure mechanisms responsive to that problem. The present framework takes the next step by connecting the quality of disclosure to the legal significance attributed to assent.²⁶

²⁶ Hillman, *supra* note 3, at 70–86.

The proposal also responds to the broader no-reading literature. The law cannot realistically solve the problem by requiring consumers to process every provision in lengthy mass-market agreements. The better strategy is to allocate attention selectively towards terms whose significance makes misunderstanding particularly consequential.

Such an approach can operate within India's existing legal architecture concerning contractual consent, incorporation, public policy and consumer protection. It does not require the creation of an entirely separate law of digital contracts.

The central challenge of digital contracting is therefore not simply that consumers fail to read.

It is that the legal significance of a single affirmative act can become detached from the radically different consequences contained within the document to which that act is attributed.

Contract law need not solve that problem by demanding that consumers read everything.

It can instead require that what matters most be made sufficiently visible before the click that purports to bind them.

The objective should not be to make every consumer a lawyer.

It should be to make the act by which the consumer becomes contractually bound correspond, as far as reasonably possible, with the significance of the obligations that act creates.

That is the purpose of meaningful assent.
