

Online Agreements: Clickwrap, Browsewrap, and Beyond

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HISTORY: SHRINKWRAP AGREEMENTS/LICENSES

- Contract terms printed on (or contained inside) software packaging covered in shrinkwrap.
- License, arbitration, forum selection, license, etc.
- Issue was whether terms became effective in different circumstances.

UCC

- § 2-204(1): A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
- § 2-207(1): A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

ProCD, Inc. v. Zeidenberg, **86 F.3d 1447 (7th Cir. 1996)**

- ProCD sold software with statement on packaging that additional restrictions inside. License terms prohibited commercial uses. Zeidenberg used commercially but argued he didn't agree to hidden terms.
- District court held license terms not valid.

Seventh Circuit reversed and held shrinkwrap licenses generally enforceable.

- UCC 2-204 allows contract in any manner sufficient to show agreement. Vendor as master of contract may invite acceptance by certain types of conduct.
- By using software, consumer accepted terms. Alternative was to reject terms and return software. License not pre-empted by copyright.

***Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000)**

- Gateway moved to compel arbitration under terms and conditions included in box.
- District court held shrinkwrap agreement not valid under Missouri and Kansas law.
 - UCC § 2-207 applicable even if only one form. No evidence that Gateway made shrinkwrap agreement conditional, or that Klocek expressly assented.

ENFORCEABILITY OF ONLINE CONTRACTS

Was There Assent?

CLICKWRAP/CLICKTHROUGH

- Agreements requiring user to consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the transaction.
- Generally enforceable.

Hancock v. Am. Tel. & Tel. Co., **701 F.3d 1248 (10th Cir. 2012)**

- 10th Circuit affirmed district court's finding clickwrap agreements enforceable.
- Clickwrap agreements did not conceal the terms, customers had opportunity to review, and manifested assent through I acknowledge and I agree buttons.

Sgouros v. TransUnion Corp., 817 F.3d 1029 (7th Cir. 2016)

Is your home address the same as your billing address? Yes No

Service Agreement

Welcome to the TransUnion Interactive web site, membership.tui.transunion.com, (the "Site"). This Service Agreement ("Agreement") contains the terms and conditions upon which you ("you" or the "member") may access and use

[Printable Version](#) 

You understand that by clicking on the "I Accept & Continue to Step 3" button below, you are providing "written instructions" to TransUnion Interactive, Inc. authorizing TransUnion Interactive, Inc. to obtain information from your personal credit profile from Experian, Equifax and/or TransUnion. You authorize TransUnion Interactive, Inc. to obtain such information solely to confirm your identity and display your credit data to you.

[I Accept & Continue to Step 3](#) 

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- District court held no contract had been formed.
- Seventh Circuit affirmed.
 - Website actively mislead consumers about which terms they were agreeing. Reasonable persons would think that they were agreeing to text about TransUnion obtaining personal information, not that same click also would constituted acceptance of Service Agreement.

Feldman v. Google, Inc.,
513 F. Supp. 2d 229 (E.D. Pa. 2007)

- Plaintiff sued Google on the basis that google did nothing to stop click fraud that the plaintiff suffered.
- Google moved to dismiss on the basis of a forum selection clause.

- “**Carefully read the following terms and conditions.** If you agree with these terms, indicate your assent below.”
- Scroll window where user could read entire contract. Preamble was visible without scrolling and stated that consent to terms listed constituted binding agreement with Google.
- Bottom of page was box saying “**Yes**, I agree to above terms and conditions” and “continue” button.

- District court dismissed finding that there was reasonable notice and manifestation of assent.
 - Although scrolling was required to see all terms, sufficient notice through boldface prompt to read terms carefully.
 - User had to affirmatively click agreement button before proceeding.

BROWSEWRAP/BROWSETHROUGH/ SCROLLWRAP/SCROLLTHROUGH

- No click action is required, assent is inferred merely from use of website.
- Less frequently enforced.

Long v. Provide Commerce, Inc., **245 Cal. App. 4th 855 (2016)**

- Defendant moved to compel arbitration pursuant to website's TOU available at bottom of every web page via "*TERMS OF USE*" hyperlink.
 - However, font was similar color to background, and hyperlink was next to 14 others of similar font, color, and size.

- District court denied petition to compel arbitration
- Court of Appeals affirmed.
 - California has an objective standard for mutual assent.
 - Absent actual notice, “the validity of [a] browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.”
 - Difficult to find the TOU hyperlink even when looking for it.
 - Dicta – Browsewrap agreement requires textual notice as opposed to hyperlink.

Major v. McCallister,
302 S.W.3d 227 (Mo. Ct. App. 2009)

- Defendant moved to dismiss due to forum selection clause in website's terms of use.
- “Submit for Matching Pros” button next to a blue hyperlink to the TOU and a notice stating “By submitting you agree to the Terms of Use.”
- The plaintiff completed the process but never looked at the TOU.

- Lower court dismissed the case.
- Appellate court affirmed.
- The blue hyperlink next to the phrase “By submitting you agree to the Terms of Use” constituted immediately visible notice of the existence of the license terms and thus there was constructive notice.

SIGN-IN WRAP

- User is notified of the existence and applicability of a website's TOU when proceeding through the website's sign-in or login process.
- User is not necessarily required to view the TOU and there is no "I accept" box. Rather, language that by creating account, user agrees to TOU that can be navigated from sign-in screen.
- Mixed success on enforcement.

Cullinane v. Uber Techs., Inc.,
No. CV 14-14750-DPW
(D. Mass. July 11, 2016)

- Plaintiff represented class that downloaded Uber phone app and allegedly was charged an inflated toll.
- Uber sought to compel arbitration pursuant to TOS.

CANCEL LINK CARD DONE

1234 5678 9012 3456

scan your card enter promo code

By creating an Uber account, you agree to the

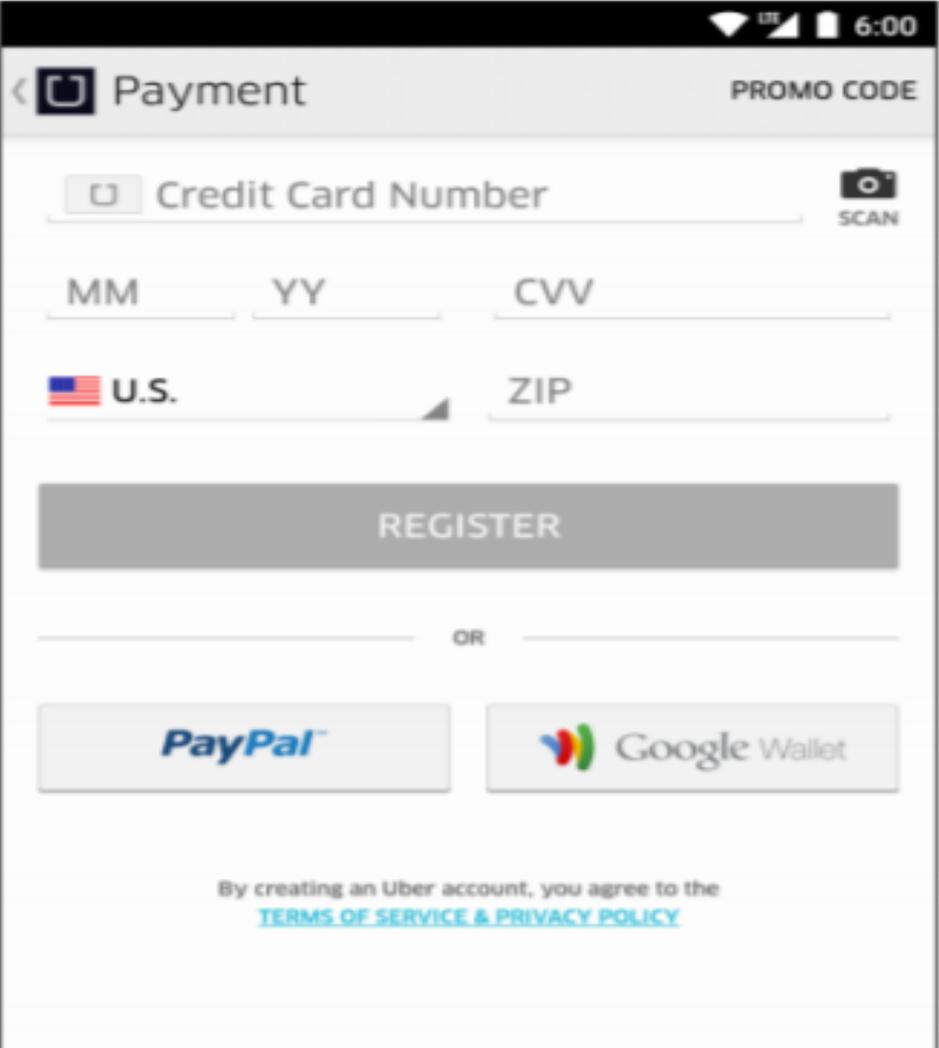
[The Terms of Service & Privacy Policy](#)

1	2 ABC	3 DEF
4 GHI	5 JKL	6 MNO
7 PQRS	8 TUV	9 WXYZ
	0	⌫

- District court found arbitration agreement enforceable.
 - Massachusetts modern rule of reasonableness.
 - Burden on party seeking to enforce.
 - “By creating an Uber account, you agree to the Terms of Service & Privacy Policy” on the final screen of the account registration process is prominent enough to put a reasonable user on notice of the terms of the Agreement.

***Meyer v. Kalanick*, No. 15 CIV. 9796 (S.D.N.Y. July 29, 2016)**

Plaintiff had registered through Uber's Samsung app.



The screenshot shows the Uber app's payment registration interface. At the top, the status bar displays 'LTE', signal strength, battery, and the time '6:00'. The app header shows a back arrow, the Uber logo, and the title 'Payment', with a 'PROMO CODE' field on the right. Below the header, there is a 'Credit Card Number' input field with a 'SCAN' button to its right. Underneath are three input fields for 'MM', 'YY', and 'CVV'. Further down are two dropdown menus: one for the country (currently set to 'U.S.' with a flag icon) and one for 'ZIP'. A large grey 'REGISTER' button is centered below these fields. Below the button is a horizontal line with 'OR' in the center. At the bottom of the registration section are two buttons: 'PayPal' and 'Google Wallet'. At the very bottom of the screen, a small line of text reads: 'By creating an Uber account, you agree to the [TERMS OF SERVICE & PRIVACY POLICY](#)'.

- District court found arbitration agreement unenforceable.
- Distinguished *Culliane* stating TOS hyperlink and related language was not highlighted and barely legible.
- Possible to register and never click hyperlink. No presumption that person who clicks a box has notice of contents that require further action.

MIXED MEDIA

- Printed contracts that incorporate terms and conditions available online.

***Pentecostal Temple Church v.
Streaming Faith, LLC,
No. CIV.A. 08-554
(W.D. Pa. Sept. 16, 2008)***

Provision in Printed Contract

- “TERMS AND CONDITIONS: the terms of this Purchase Order will begin on the Effective Date This Purchase Order is subject to Streaming Faith' [*sic*] general terms and conditions of service, which are hereby incorporated into this Purchase Order by this reference and can be viewed at 'streamingfaith.com/gtos.pdf'.”

- District court held provision enforceable.
 - Under Third Circuit law, a customer on notice of contract terms available on a website is bound by those terms.
 - Purchase order is the product of several months of communications and multiple revisions.
 - The internet provisions were clearly incorporated by reference, and do not constitute hidden terms.

***Oak St. Printery, LLC v. Fujifilm N. Am. Corp.*, 895 F. Supp. 2d 613
(M.D. Pa. 2012)**

- Plaintiff sued for negligence in inspecting printers. Defendant moved to dismiss on the grounds of a forum selection clause.
- After the inspection, Defendant sent Plaintiff an invoice which said that it incorporated terms and conditions available at Defendants website. The terms listed on the website had a forum selection clause.

- District court held forum selection clause unenforceable.
- Contract was when Plaintiff hired Defendant and the invoice sent after was unilateral attempt to alter the terms.
- Ambiguous whether clause was reasonably conspicuous and whether plaintiff manifested assent.

MODIFICATION OF ONLINE CONTRACTS

***Douglas v. U.S. Dist. Court for Cent.
Dist. of California, 495 F.3d 1062 (9th Cir. 2007)***

- Contract later revised to add a class action waiver, arbitration clause, and choice of law provision, and posted on website.
- District court held that revisions were binding and enforceable.
- Ninth Circuit reversed
 - Unilateral change amounts to new offer which Douglas could not have accepted since he never visited website and didn't know existence.

Sacchi v. Verizon Online LLC,
No. 14-CV-423-RA (S.D.N.Y.
Feb. 23, 2015)

- Original printed agreement didn't have arbitration, but it did have revisions clause.

“We may revise the terms and conditions of this Agreement from time to time (including any of the policies which may be applicable to usage of the Service) by posting such revisions to the Website at the Resource Center under Announcements. You agree to visit these pages periodically to be aware of and review any such revisions.... [R]evisions to ... terms and conditions shall be effective upon posting. By continuing to use the Service after revisions are in effect, you accept and agree to the revisions and to abide by them. If you do not agree to the revision(s), you must terminate your Service immediately.”

- Verizon subsequently added arbitration clause and class action waiver. Posted revised agreement to website and emailed notice to Plaintiff.
- District court found revisions enforceable.
 - Under New Jersey law, silence may be deemed acceptance.
 - Verizon was allowed to revise under contract, email notification 6 months prior to revision was sufficient notice.

Harold H. Huggins Realty, Inc. v. FNC, Inc., 575 F. Supp. 2d 696 (D. Md. 2008)

- Original Agreement contained arbitration provision and modification provision.
- “This User Agreement may be modified at any time. Whenever changes are made, the revised agreement will be posted at this location. New terms will be effective 30 days after the changes are posted. You will be asked to acknowledge your acceptance of the changes the first time you log in after the changes have been made.”

- Defendant modified the agreement and left out the arbitration provision but argued the modification was ineffective.
- District court held revision was enforceable and thus no arbitration.
 - Ambiguous whether requirement that users acknowledge acceptance was a necessary condition. Only requirement was to post it on the website for 30 days.
 - Court would not allow the defendant to benefit from its own notice of changes provision.

QUESTIONS?