MOBILE AND INTERNET CONTRACT FORMATION AND ENFORCEMENT

Excerpted from the forthcoming 2023 update to Chapter 21 (Obtaining Assent in Cyberspace: Contract Formation for Online and Mobile Click-Through and Other Unilateral Contracts)
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INTERNET AND MOBILE LAW AND LITIGATION TRENDS

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Ian C. Ballon
Greenberg Traurig, LLP

Silicon Valley:	Los Angeles:	Washington, D.C.:
1900 University Avenue, 5th Fl.	1840 Century Park East, Ste. 1900	2101 L Street, N.W., Ste. 1000
East Palo Alto, CA 914303	Los Angeles, CA 90067	Washington, D.C. 20037
Direct Dial: (650) 289-7881	Direct Dial: (310) 586-6575	Direct Dial: (202) 331-3138
Direct Fax: (650) 462-7881	Direct Fax: (310) 586-0575	Fax: (202) 331-3101

Ballon@gtlaw.com
<www.ianballon.net>
LinkedIn, Twitter, Facebook: IanBallon

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Ballon@gtlaw.com
LinkedIn, Twitter, Facebook: IanBallon

Silicon Valley
1900 University Avenue
5th Floor
East Palo Alto, CA 94303
T 650.289.7881
F 650.462.7881

Los Angeles
1840 Century Park East
Suite 1900
Los Angeles, CA 90067
T 310.586.6575
F 310.586.0575

Washington, D.C.
2101 L Street, N.W.
Suite 1000
Washington, DC 20037
T 202.331.3138
F 202.331.3101

Ian C. Ballon is a litigator who is Co-Chair of Greenberg Traurig LLP's Global Intellectual Property & Technology Practice Group and represents internet, mobile, entertainment and technology companies in intellectual property and technology-related litigation and in the defense of data privacy, security breach and AdTech class action suits.

Ian has been named by the *LA and San Francisco Daily Journal* as one of the Top 75 intellectual property litigators in California in every year that the list has been published (2009 through 2022). He has been listed in Best Lawyers in America consistently every year since 2003 and was named Lawyer of the Year for Information Technology in 2023, 2022, 2020, 2019, 2018, 2016 and 2013. In 2022, 2021, 2020, 2019 and 2018 he was recognized as one of the Top 1,000 trademark attorneys in the world for his litigation practice by *World Trademark Review*. In 2022, Ian was named to Lawdragon's list of the Top 500 Lawyers in America and he has been included on the *Daily Journal's* annual list of the Top 100 Lawyers in California. In addition, in 2019 he was named one of the top 20 Cybersecurity lawyers in California and in 2018 one of the Top Cybersecurity/Artificial Intelligence lawyers in California by the *Los Angeles and San Francisco Daily Journal*. He received the "Trailblazer" Award, Intellectual Property, 2017 from *The National Law Journal and he has been* recognized as a "Groundbreaker" in *The Recorder*'s 2017 Litigation Departments of the Year Awards. He was also recognized as the 2012 New Media Lawyer of the Year by the Century City Bar Association. In 2010, he was the recipient of the California State Bar Intellectual Property Law section's Vanguard Award for significant contributions to the development of intellectual property law. Ian was listed in *Variety's* "Legal Impact Report: 50 Game-Changing Attorneys" and has been named a Northern California Super Lawyer every year from 2004 through 2021 and a Southern California Super Lawyer for every year from 2007-2021. He has also been listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology.

Ian is also the author of the leading treatise on internet and mobile law, *E-Commerce and Internet Law: Treatise with Forms 2d edition,* the 5-volume set published by West (www.IanBallon.net) and available on Westlaw, which includes extensive coverage of intellectual property law issues. In addition, he is the author of *The Complete CAN-SPAM Act Handbook* (West 2008) and *The Complete State Security Breach Notification Compliance Handbook* (West 2009). In addition, he serves as Executive Director of Stanford University Law School's Center for the Digital Economy. He also chairs PLI's annual Advanced Defending Data Privacy, Security Breach and TCPA Class Action Litigation conference. Ian previously served as an Advisor to ALI's Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transactional Disputes (ALI Principles of the Law 2007) and as a member of the consultative group for ALI's Principles of Data Privacy Law (ALI Principles of Law 2020).

Ian holds JD and LLM degrees and the CIPP/US certification from the International Association of Privacy Professionals (IAPP).

E-COMMERCE & INTERNET LAW

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Volume 2

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Green Book Int'l Corp. v. Inunity Corp.,[1] although the issue of whether the defendant had a valid license was not contested for purposes of the motion for preliminary injunction before the court. In denying plaintiff's motion, Magistrate Judge Karol relied in part on the information posted on plaintiff's website during the relevant time period to interpret the parties' course of performance. Among other things, the *Inunity Corp.* case underscores the importance of retaining evidence of what the terms of an online agreement may be (especially because contract provisions on a website may be revised periodically).

21.03 Modern Law on the Enforceability of Unilateral Internet Contracts: Express and Implied Assent

21.03[1] Unilateral Contracts and terminology—In General

A contract is formed when there is a "meeting of the minds" and a manifestation of mutual assent.[1] While contracts may be negotiated between parties, most internet sites and mobile apps rely on unilateral contracts where standard terms are offered to users largely on a "take it or leave it" basis.[2] Unilateral contracts where express assent is obtained—such as *click-through, click-to-accept* or *clickwrap* agreements—are generally held by most courts to form binding contracts, provided the messaging to consumers is clear and they are not unconscionable[3] or otherwise unenforceable for reasons other than the absence of assent. By contrast, where express assent is not obtained, posted terms and

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[Section 21.02[10]]

[1]*Green Book Int'l Corp. v. Inunity Corp.*, 2 F. Supp. 2d 112 (D. Mass. 1998).

[Section 21.03[1]]

[1]*See, e.g.*, *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 288-89 (2d Cir. 2019) ("The manifestation of mutual assent must be sufficiently definite to assure that the parties are truly in agreement with respect to all material terms."). "Mutual assent may be manifested by written or spoken words, or by conduct, . . . and acceptance of contract terms may be implied through action or inaction . . . ." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (citations omitted) (applying California law).

[2]Arbitration or other clauses may be subject to an opt-out right set forth in the agreement, in which case the applicable provision should not be characterized as being offered on a "take it or leave it" basis.

[3]*See infra* § 21.04.

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conditions (sometimes called *browsewrap* or *browserwrap* licenses) are unlikely to be deemed binding by most courts unless the person against whom enforcement is sought admits to having been aware that use was conditioned on the terms (which in practice occurs only infrequently) or had reasonable notice[4] that use of a website, mobile device, or product was conditioned on terms and impliedly accepted those terms by conduct (such as accessing a site, app or service), purchasing a product or otherwise through performance.[5] Thus, in most cases where express assent is not obtained, a threshold question is whether notice of the terms was reasonable.

Lawyers whose clients are resistant to obtaining express assent for contracts formed online or via mobile apps often point out that it is hornbook law that contracts may be

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[4]As discussed in section 21.03[2], assent may be express or implied (also known as constructive notice, which may be inferred when the notice is objectively reasonable judged from the perspective of a reasonable consumer). In practice, if not necessarily black letter law, a licensor may sometimes bolster its argument for implied assent based on notice if the proposed agreement is an intellectual property license, rather than a mere contract, and access to the licensed intellectual property (including potentially content on a website) is conditioned on the license.*See supra* § 21.02[7].

An offeror, "as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance." *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996). Thus, for example, in shrinkwrap licenses and certain other contracts where a user may not have the opportunity to review the agreement in advance, notice is provided that the transaction is subject to terms and that a user has the right to return the product and cancel the transaction within a defined period of time (such as 30 days) if the terms are unacceptable. *See supra* § 21.02.

As analyzed more extensively in section 21.03[2], it is almost always preferable in litigation to have obtained express assent, rather than have to litigate the issue of implied assent.

[5]*See e.g.*, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (citing earlier opinions for the proposition that so-called "browsewrap" agreements, which "involve terms and conditions posted via hyperlink, commonly at the bottom of the screen, and do not request an express manifestation of assent" require "courts often to consider whether a website user has actual or constructive notice of the conditions."); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) ("Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." (citation and internal quotation marks omitted)); *see generally infra* § 21.03[2].

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formed either expressly or through implied assent. So long as there is an offer and acceptance (and consideration), which may be shown by posted terms accepted through conduct (such as accessing a site or service, where access may also form the basis for consideration) a binding agreement, in theory, should be formed.

In practice, however, when the enforceability of unilateral contracts is litigated, it is much easier and less expensive to enforce contracts where express assent has been obtained, and the outcome will be more certain, than when a site owner or service provider must prove implied assent. Although some users will truthfully acknowledge that they knew they were bound to contractual terms, many will not (and, as discussed later in this section, the party seeking to enforce the contract may not have the opportunity to establish this fact in discovery if a so-called browsewrap agreement is used, depending on the procedural posture of the case when enforcement is sought and the court where the issue is adjudicated). Indeed, some Internet users may well believe that unless they have clicked an "I accept" button or provided express assent through equivalent means they are not bound by any contractual restrictions. Whereas express assent may form the basis for obtaining summary judgment (or even prevailing at the outset of a case, on a motion to dismiss), disputes over implied assent may necessitate a trial, significantly increasing the cost of litigation and the risk of an adverse outcome. And in the Ninth Circuit, posted terms may be unenforceable as a matter of law[6] (absent evidence of actual knowledge of the terms, which may be impos-

[6] *See, e.g.*, *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019) (holding that users of the Huuuge casino smartphone app were not on constructive notice of Terms of Use accessible via the settings menu or scrolling through multiple screens of text before downloading the app); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014) (holding posted Terms accessible via a link from every page on the website did not put consumers on inquiry notice; "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice."); *see also Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 60-64 (1st Cir. 2018) (reversing the lower court's order compelling arbitration based on the finding that, as a matter of law, the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law, which the appellate panel held was a question to be decided by the court).

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sible to obtain where a defendant seeks to litigate the issue of contract formation at the outset of a case before it can take discovery, such as in connection with a motion to dismiss or motion to compel arbitration.[7]

Even judges, who presumably appreciate that contracts formed through implied assent are equally enforceable, are sometimes reluctant to find that a binding contract has been formed absent express assent—especially in consumer cases where a company seeks to enforce an agreement against individual Internet or mobile app users. Perhaps expressing a commonly held perception in some quarters, former Ninth Circuit Chief Judge Alex Kozinski noted in *dicta* in a different context that "[o]ur access to . . . remote computers is governed by a series of private agreements and policies that most people are only dimly aware of and virtually no one reads or understands."[8]

While online and mobile contract formation is now the norm for most consumers—perhaps best underscored by the fact that in one case a party challenged a company's practice of sending amendments to its credit card agreements by U.S. mail, rather than email, as unreasonable[9]—the different ways in which a company may present a contract to users provides opportunities for clever lawyers to challenge different formulations. As a consequence, some judges have gotten hung up on the legal jargon associated with online and mobile contract formation, rather than focusing on the legally salient issue of assent.

As discussed later in this chapter in section 21.03[2], the terms *browsewrap* and *clickthrough*—to refer to the myriad ways that a website or mobile app may present Terms of Service—are inadequate proxies for the legal concepts of express and implied assent (with the further qualification

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[7]Compelling consumer arbitration is analyzed in section 22.05[2][M] in chapter 22.

[8]*U.S. v. Nosal*, 676 F.3d 854, 861 (9th Cir. 2012) (*en banc*) (*dicta*).

[9]*See Samenow v. Citicorp Credit Services, Inc.*, 253 F. Supp. 3d 197, 208 n.10 (D.D.C. 2017) (compelling arbitration and declining to extend *Specht v. Netscape* to a case involving correspondence through U.S. mail, stating that *Specht* "is factually inapposite as it addressed the sufficiency of electronic notice in the context of agreements executed over the internet, and in fact noted that 'receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms' ").

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that implied assent may be based on actual or inquiry notice, with courts analyzing the reasonableness of the notice provided when actual notice cannot be established). As the inadequacy of the *browsewrap* and *clickthrough* terms became more apparent, some courts began referring to "hybrid" agreements where express assent was obtained in connection with completing a transaction but the actual contract was only accessible via a link (even though the presence of a link should not detract from the fact that express assent was obtained if a user was asked whether the user agreed to be bound, and responded affirmatively).

Some courts sought to further categorize the infinite number of ways that assent may be obtained for online and mobile contracts. For example, Judge Jack Weinstein expanded upon earlier case law that focused on *clickwap, browsewrap* and hybrid agreements to add to the list so-called *scrollwrap*[10] and *sign-in-wrap* agreements.[11]

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[10]A *scrollwrap* agreement, using Judge Weinstein's terminology, requires a user to scroll through the terms before the user can assent to the contract by clicking on an "I agree" button. *See Berkson v. Gogo LLC,* 97 F. Supp. 3d 359, 386, 398-99 (E.D.N.Y. 2015). Judge Weinstein would put in this category cases typically categorized as *clickwrap* agreements or involving express assent, such as *Feldman v. Google, Inc*., 513 F. Supp. 2d 229, 236–38 (E.D. Pa. 2007) (enforcing Google's AdWords clickwrap contract where there was reasonable notice of and mutual assent to the agreement; the contract was immediately visible in a scrollable text box below a prominent admonition in boldface to read the terms and conditions carefully and only assent if the user agreed to the terms, the terms were presented in twelve-point font and was only seven paragraphs long and was available in a printer-friendly, full-screen version; according to Judge Weinstein, "the plaintiff had the duty to read terms that were presented in a scroll box and required a click to agree and, therefore, the fact that the entire contract was not visible in the scroll box was irrelevant"); *Bar–Ayal v. Time Warner Cable Inc*., No. 03–CV–9905, 2006 WL 2990032, at *9–10 (S.D.N.Y. Oct. 16, 2006) (finding acceptance where scrolling though thirty-eight screens of text was required—essentially the entire agreement); *Moore v. Microsoft Corp*., 293 A.D.2d 587, 741 N.Y.S.2d 91, 92 (2d Dep't 2002) (holding that a contract was formed when "[t]he terms of the [agreement] were prominently displayed on the program user's computer screen before the software could be installed," and "the program's user was required to indicate assent to the [agreement] by clicking on the 'I agree' icon before proceeding with the download"); *In re RealNetworks, Inc*., No. 00–CV–1366, 2000 WL 631341, at *6 (N.D. Ill. May 8, 2000) (approving a license agreement placed in a pop-up window with scroll bar).

[11]*See Berkson v. Gogo LLC,* 97 F. Supp. 3d 359, 392-402 (E.D.N.Y. 2015). A *sign-in-wrap* agreement notifies a user of the existence of terms of use but instead of providing an "I agree" button, advises the user that

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These fine distinctions obscure, rather than shed light on, the legal issue of whether a company obtained express as-

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he or she is agreeing to the terms when registering or signing up for the site or service. *See id.* at 399-400. Judge Weinstein would put in this category *Fteja v. Facebook, Inc*., 841 F. Supp. 2d 829 (S.D.N.Y. 2012), where express assent was found but the court called the agreement a 'hybrid.' Judge Weinstein, analyzing self-described hybrid cases which he characterized as involving so-called sign-in-wrap agreements, explained that this type of agreement has been enforced based on "notice and an effective opportunity to access terms and conditions" in cases where (1) there is a hyperlink to the Terms next to the only button that will allow a user to continue use of the website, (2) the user registered or signed up for a service "with a clickwrap agreement and was presented with hyperlinks" to the Terms; or (3) notice of hyperlinked terms "is present on multiple successive webpages of the site." *Berkson v. Gogo LLC,* 97 F. Supp. 3d at 401. Stated differently, a "hybridwrap" presentation is one where a user is prompted to "manifest their assent to particular terms by engaging in some dual-purpose action, such as creating an account, . . . executing a purchase order, . . . or downloading an application." *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019) (citations omitted; enforcing Amazon.com's Conditions of Use), *aff'd*, 815 F. App'x 612 (2d Cir. 2020).

In commenting on the use of jargon by courts evaluating online contract formation, Professor Eric Goldman observed that he had counted 16 case references to "modified clickwrap" and 13 to "pure clickwrap" on Westlaw as of April 10, 2021. *See* Eric Goldman, *There Are Multiple Types of "Clickwrap." They Should All Be Enforceable–Calderon v. Sixt*, Technology & Marketing Blog, Apr. 10, 2021.

These permutations, based on holdings in past district court cases (rather than black letter law), are not really helpful in evaluating express or implied assent. Indeed, there is no real difference between category one and category two cases under Judge Weinstein's formulation—both involve express assent where the actual Terms are accessible via a link, rather than presented in full to a user, and the only issue should be whether implied assent has been obtained based on actual notice or inquiry notice (if notice was reasonably conspicuous), where assent is unambiguously obtained when a user clicks on a button to accept the Terms or open an account. In fact, Judge Weinstein devised category two based on (a) *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 454 (E.D.N.Y. 2013) (where a forum selection clause was held to be binding where the user had to assent to a clickwrap agreement and clicked a button marked "accept," next to which was a hyperlink to "terms of use," to sign up for the website service and to renew her membership), which should be considered express assent unless the messaging next to the button or reference to the terms is ambiguous, and (b) the lower court opinion in *Nicosia,* which was vacated on appeal. *See Nicosia v. Amazon.com, Inc.,* 84 F. Supp. 3d 142, 151–53 (E.D.N.Y. 2015) (enforcing an arbitration clause where the user clicked a box acknowledging terms when he initially signed up to use the website and was presented with hyperlink at the top of the page to "terms of use" multiple times after completing purchases), *vacated and remanded,* 834 F.3d 220 (2d Cir. 2016).

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sent or, if not, whether the other party had actual or inquiry notice such that implied assent may be inferred (and if contract formation was based on implied assent, was the notice reasonably conspicuous and manifestation of assent unambiguous).

Because different elements of a company's screen flow likely reflect business decisions that in many cases are immaterial to contract formation, attaching new legal terms to various alternative presentations moves the analysis further away from black letter law.

Further undermining predictability in online contract formation has been the hostility that many judges have for contracts formed with implied assent. In a number of cases, courts have effectively imposed higher standards for establishing implied assent online than for physical world transactions (perhaps reflecting their own personal discomfort, as

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Judge Weinstein's third category, where notice of hyperlinked Terms is present on multiple successive pages, was based on *Major v. McCallister*, 302 S.W.3d 227, 230–31 (Mo. Ct. App. 2009) (enforcing a forum selection clause where a link to Terms was presented on multiple successive webpages and the final step in the signup process required a user to click a button next to which was the phrase: "By submitting you agree to the Terms of Use").

The Second Circuit subsequently cautioned against focusing on terminology where "there are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories." *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). The appellate panel observed that "[w]hether terms are classified as clickwrap says little about whether the offeree had notice of them." *Id.* at 76, *quoting* Juliet M. Moringiello and William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 Md. L. Rev. 452, 466 (2013); *see also Fischer v. Instant Checkmate LLC*, 19 C 4892, 2021 WL 3033586, at *6 (N.D. Ill. July 19, 2021) ("In the end, decisions addressing differently constructed websites do not answer the dispositive question: 'whether the circumstances support the assumption that the [user] receive[d] reasonable notice of [the] terms.' "); *Acaley v. Vimeo, Inc.*, 464 F. Supp. 3d 959, 966-68 (N.D. Ill. 2020) (holding that Magisto's app reasonably gave notice that, by continuing to use the app to sign up for an account, a user assented to its Terms of Service, explaining that "[t]he characterization of an agreement as clickwrap or browsewrap is not dispositive, however; what matters is whether the website and app provided users with reasonable notice that their use constituted assent to the terms."; "A reasonable person would understand that the word 'starting' referred to the creation of an account—indeed, there appears to have been no way to start using the Magisto from that page without creating an account—and that by using Facebook to create an account he or she was accepting the terms of service.").

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consumers, or lack of familiarity with online contracting). In the physical world, courts have upheld small print on the back of a plane or cruise ticket that consumers may not even have noticed,[12] yet some judges who apparently are unfamiliar with smartphone apps have found a button with clear words manifesting assent, and a link to Terms of Use, inadequate to provide inquiry notice as a matter of law. As Southern District of California Judge Cynthia Bashant noted, in a case where the plaintiff "expend[ed] significant effort" arguing that a particular agreement was "of the 'browsewrap' variety[,] . . . what ultimately matters is the sufficiency of the notice provided, not the formalities of the 'browsewrap' or 'clickwrap' definitions."[13] As Southern District of New York Judge Vernon S. Broderick observed, "[a]lthough the Internet age has certainly introduced new twists with regard to entering into contracts, the fundamental elements of contract law, including mutual assent of the parties, have not changed."[14] Or as Massachusetts Judge Douglas P. Woodlock explained, "analysis of the Agreement's validity and enforceability turns more on customary and established principles of contract law than on newly-minted terms of classification."[15] In the words of Judge Cardozo, "[m]etaphors in the law are to be narrowly watched, for starting as ways to liberate thought, they end often by enslaving

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[12]*See Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991).

[13]*Fagerstrom v. Amazon.com, Inc.,* 141 F. Supp. 3d 1051, 1069 (S.D. Cal. 2015), *aff'd sub nom. Wisely v. Amazon.com, Inc.*, 709 F. App'x 862 (9th Cir. 2017).

[14]*Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 547 (S.D.N.Y. 2018) (enforcing Airbnb's amended Terms of Service agreement and compelling arbitration).

[15]*Cullinane v. Uber Technologies, Inc*., No. CV 14–14750–DPW, 2016 WL 3751652, at *6 (D. Mass. July 11, 2016), *rev'd on other grounds*, 893 F.3d 53, 60-64 (1st Cir. 2018) (reversing the lower court's order compelling arbitration based on the finding that the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law). Although the First Circuit reversed Judge Woodlock on the merits, the panel implicitly agreed with his commentary on new terminology. In discussing Judge Weinstein's categorization of four general types of online contracts in *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394-402 (E.D.N.Y. 2015), the First Circuit panel in *Cullinane* explained that its "analysis regarding the existence of an arbitration agreement is not affected by how we categorize the online contracts at issue here. 'While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.' " 893 F.3d at 61 n.10, *quoting Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

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it."[16]

The job of a lawyer drafting or revising unilateral Internet and mobile contracts is to act with knowledge of these perceptions and, where possible, force users to provide express assent (ideally by clicking on a clearly marked button denoting assent or agreement, and even better if a user must first scroll through the document and check a box to acknowledge being bound by it), such that a user cannot credibly argue that the user was unaware of the existence of an agreement (and any decision to avoid reading it would be deemed to have been made at the user's own peril). Where a company relies on implied assent, rather than express assent, it must do so knowing that regardless of hornbook law, the reality of consumer litigation is such that it will be more difficult to enforce the agreement than if express assent were obtained.

As discussed below in section 21.03[2], in almost every instance when a court has enforced a unilateral contract formed over the Internet based on implied rather than express assent, in either reported decisions or opinions otherwise accessible on Westlaw, there had been an acknowledgement by the party against whom enforcement was sought that he or she knew that the site or service had made available contractual terms that it contended governed a particular transaction. Where a party disputes that it knew about purported terms, and where it has even a plausible argument that it may not have noticed or been made aware of the terms, site owners or service providers have either failed to win enforcement of their unilateral contracts or have had to expend very substantial resources doing so.[17] Courts, as a practical matter, are more comfortable where express assent is obtained (and, even so, will closely scrutinize the language surrounding notice where express assent is sought to terms made accessible via link).[18]

Where a contract is not formed, rights limited by license

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[16]*Berkey v. Third Ave. Ry. Co*., 244 N.Y. 84, 94 (1926).

[17]*See infra* § 21.03[2].

[18]*See, e.g.*, *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 60-64 (1st Cir. 2018) (reversing the lower court's order compelling arbitration based on the finding that the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law where Uber's "Terms of Service & Privacy Policy" hyperlink "did not have the common appearance of a hyperlink" because it was not "blue and underlined" but instead was presented in a gray rectangular box in white bold text, and where the

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(such as restrictions on website access or use of software) will not be enforceable, arbitration clauses, venue selection and choice of law provisions will have no effect, and products sold subject to warranty disclaimers and damage limitations will be transferred without restriction. While some rights may be lost forever, where a unilateral agreement governs access or ongoing use, rather than a one-time transaction, a putative licensor may attempt to make the agreement binding prospectively (even though it may not govern prior transactions) by sending a letter or other communication that explicitly puts the putative license on notice that continued access or use will be governed by the terms of the purported agreement.

Agency issues and questions surrounding which parties may be bound when a person clicks assent to a unilateral contract are separately considered in subsection 21.03[3].

The enforceability of website policies, including privacy policies, is analyzed in section 21.03[4]. Contract formation issues involving minors are addressed in section 22.05[2][N] in chapter 22.

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content on the "Link Screen" and "Link Payment" screens contained other terms displayed with similar features, which diminished the conspicuousness of the "Terms of Service & Privacy Policy link and notice, in the view of the appellate court); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017) (finding an express contract enforceable because the notice to consumers was reasonable, holding that a reasonable mobile phone user should not be presumed to be someone who has never before entered into a mobile contract); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233-38 (2d Cir. 2016) (holding that the issue of the enforceability of a click-through contract could not be resolved on a motion to dismiss, where inquiry notice was disputed, where the user pressed a button that said "Place Your Order" (as opposed to "I accept," "Agree" or similar language) in close proximity to the text '[b]y placing your order, you agree to Amazon.com's privacy policy and conditions of use" but where the court found the number of links and messages on the page, which appeared in different font sizes and colors, made it unclear whether the notice was reasonably conspicuous); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-36 (7th Cir. 2016) (affirming denial of defendant's motion to compel arbitration where users were presented with a button and the words "I Accept & Continue to Step 3" but the "block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It sa[id] nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement."); *see generally infra* § 21.03[2].

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21.03[2] Express and Implied Assent: Forming and Amending Click-Through and Browsewrap Agreements

Internet contracts, like those on *terra firma*, require offer and acceptance or mutual assent. Assent may be manifested explicitly, or expressly (directly), such as by checking a box or clicking on a button, or impliedly (indirectly) through performance or other conduct. "To manifest tacit assent to a contract through conduct, one must '[intend] to engage in the conduct and know . . . or ha[ve] reason to know that the other party may infer from his conduct that he assents."[1] Although objectively easier to prove in litigation, express assent is theoretically not required. An "unambiguous manifestation of assent to license terms" is unnecessary if there is "an immediately visible notice" of their existence,[2] regardless of whether a user in fact reviews them.[3] Thus, in evaluating implied assent, the central issue (absent an admission of actual knowledge of the contract[4]) typically is whether reasonable notice was provided such that assent may be implied

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[Section 21.03[2]]

[1]*Southwest Airlines Co. v. BoardFirst, LLC,* No. 3:06-cv-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007), *quoting Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1291 (5th Cir. 1994), *quoting* Restatement (2d) of Contracts § 19(2).

[2]*Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009), *quoting Specht v. Netscape Communications Corp.*, 306 F.3d 17, 31 (2d Cir. 2002).

[3]*E.g.*, *Burcham v. Expedia, Inc.,* No. 4:07CV1963 CDP, 2009 WL 586513, at *2 (E.D. Mo. Mar. 6, 2009).

[4]*See, e.g.*, *Gutierrez v. FriendFinder Networks Inc.*, Case No. 18-cv-05918-BLF, 2019 WL 1974900, at *7-8 (N.D. Cal. May 3, 2019) (enforcing the Terms of Use of an adult website, and compelling arbitration, where a recording of a call with plaintiff established that he was told by Customer Service, in connection with restoring access to the site in 2013 after being suspended for a Terms of Use violation, that he was required to adhere to the Terms, which he acknowledged he knew was required; "Because the Terms clearly stated that continued use of the site would constitute acceptance of the Terms, Plaintiff's continued use of the site after being put on notice of the Terms and his need to comply with them constituted acceptance of the Terms."); *Cairo, Inc. v. Crossmedia Services, Inc.*, No. C 04-04825 JW, 2005 WL 756610, at *4-5 (N.D. Cal. Apr. 1, 2005) (following *Register.com* in holding that repeated use of a website with actual knowledge of the posted Terms of Use effectively binds a party to those terms); *see also Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (citing earlier opinions for the proposition that so-called "browsewrap" agreements, which "involve terms and conditions posted via hyperlink, commonly at the bottom of the screen, and do not request an express

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or inferred and a contract deemed formed through constructive assent.

The terminology frequently used by courts—*browsewrap* and *clickwrap*—are derived from the term *shrinkwrap*, which was a type of license used in the 1980s and 1990s when software was sold in a box and companies sought to bind users to terms once they opened the shrinkwrap that sealed the product and license terms.[5] The terms *browsewrap* and *clickwrap*, however, often create more confusion than they resolve because, in most unilateral contract cases, the relevant black letter contract law formation principles typically revolve around whether the party seeking to enforce the contract obtained express or implied assent. In theory, a *clickwrap* agreement requires a user to provide express assent by clicking a button with words of assent (such as "I agree") to access a site or service or purchase a good, service or subscription, whereas "[a] website's terms and conditions are considered a browsewrap agreement when, somewhere on the site, the terms and conditions are posted as a hyperlink, but the user does not need to expressly assent to those terms to use the site."[6] In practice, courts frequently garble these terms, often treating contract formation where express assent is obtained via a click-to-accept screen flow as

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manifestation of assent" require "courts often to consider whether a website user has actual or constructive notice of the conditions."); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014) (declining to enforce an arbitration clause contained in website Terms of Use where there was no evidence that the website user had actual knowledge of the agreement, despite the fact that the Terms were accessible via a link from the bottom of every single page of the website; "where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract."); *Arencibia v. AGA Service Co.*, Case No. 20-cv-24694-BLOOM/Otazo-Reyes, 2021 WL 1318225, at *6 (S.D. Fla. Apr. 8, 2021) ("Under Florida law, a browsewrap agreement, such as the one here, is enforceable 'when the purchaser has actual knowledge of the terms and conditions, or when the hyperlink to the terms and conditions is conspicuous enough to put a reasonably prudent person on inquiry notice.' ") (citing earlier cases).

[5]*See supra* §§ 21.01, 21.02 (analyzing shrinkwrap licenses and explaining the origin of the *browsewrap* and *clickwrap* terms).

[6]*Wu v. iTalk Global Communications, Inc.*, Case No. CV 20-7150 PSG (PJWx), 2020 WL 8461696, at *4 (C.D. Cal. Oct. 21, 2020), *citing Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014).

For example, in one case where the Ninth Circuit enforced Terms of Use based on express assent, the panel nonetheless felt compelled to explain that

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"browsewrap" if the Terms are made accessible via a link, rather than reproduced in full (even where the user cannot proceed with a transaction or access a site, service or mobile app, without providing that assent). Courts too often also struggle to come up with name variations when there are literally thousands of ways a website or mobile app can be configured to obtain express assent or provide reasonable notice for implied assent. While it is clear what the "gold standard" is for online and mobile contract formation—express assent where a user must scroll through the Terms before being required to check an unchecked box next to clear language indicating acceptance and then clicking a button reiterating acceptance— the large and increasing volume of court opinions analyzing these issues underscores that for an array of reasons companies often to choose to provide alternative, yet legally sufficient means for obtaining express or implied assent.

However characterized, *click-through*, *clickwrap, splash screen* or *click-to-accept* contracts—where a user must expressly assent to a unilateral agreement by clicking a button displayed next to or below a statement asking the user to accept or agree to the proposed contract (and in some cases also checking a box and/or scrolling through the entire agreement before being allowed to click the button)—have been upheld by both state[7] and federal courts[8] provided the text preceding the acceptance button or the presentation

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Ticketmaster's Terms of Use do not constitute a browsewrap agreement because they are not merely posted on Ticketmaster's website at the bottom of the screen. Although the Terms do not constitute a true pure-form clickwrap agreement as California courts have construed it (because Ticketmaster does not require users to click a separate box indicating that they agree to its Terms), Ticketmaster's website provided sufficient notice for constructive assent, and therefore, there was a binding arbitration agreement between Lee and Ticketmaster.

Lee v. Ticketmaster LLC, 817 F. App'x 393, 394-95 (9th Cir. 2020) ("Lee validly assented to Ticketmaster's Terms of Use, including the arbitration provision, each time he clicked the 'Sign In' button when signing into his Ticketmaster account, where three lines below the button, the website displayed the phrase, 'By continuing past this page, you agree to our Terms of Use,' as well as each time he clicked the 'Place Order' button when placing an order for tickets, where directly above the button, the website displayed the phrase, 'By clicking 'Place Order,' you agree to our Terms of Use,' where in both contexts, 'Terms of Use' was displayed in blue font and contained a hyperlink to Ticketmaster's Terms."). The legal issue, however, is assent, which in this case was express because the plaintiff repeatedly assented expressly in response to clear contract language.

[7]*See, e.g.*, *Net2Phone, Inc. v. Superior Court*, 109 Cal. App. 4th 583,

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588–89, 135 Cal. Rptr. 149 (2d Dist. 2003) (upholding a forum selection clause as a valid contract term even though subscribers had to access it via a hyperlink; and holding that the clause could be enforced against a representative plaintiff under California's unfair competition law even though he did not enter into the contract himself because he is "closely related to the contractual relationship"); *Newell Rubbermaid, Inc. v. Storm*, C.A. No. 9398-VCN, 2014 WL 1266827, at *6-9 (Del. Ch. Mar. 27, 2014) (granting temporary restraining order for employer based on confidentiality and solicitation restrictive covenants accepted by an employee through a clickwrap agreement when accepting an award of restricted stock units); *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1010–11 (D.C. 2002) (holding a thirteen-page clickwrap agreement enforceable with adequate notice provided of its terms where users were required to click "Accept" to agree to the terms in order to subscribe, there was an admonition in capital letters at the top of the agreement to read it carefully, the agreement appeared in a scroll box with only portions visible at any given time and the forum selection clause at issue was located in the final section in lower case font); *Leatherwood v. Cardservice Int'l, Inc.*, 929 So. 2d 616, 617 (Fla. App. 2006) (upholding the enforceability of a venue selection clause in a click-to-accept contract where the appellant clicked the "I accept" button); *Durrett v. ACT, Inc.*, 130 Haw. 346, 2011 WL 2696806, at *4-6 (Haw. Ct. App. July 12, 2011) (finding intent to submit to arbitration where a minor checked a box consenting to the terms of a standardized test company that included specific arbitration provisions) (unpublished disposition); *Telligman v. Review Bd. Indiana Dept. of Workforce Development*, 996 N.E.2d 858, 860-61 (Ind. Ct. App. 2013) (upholding enforcement of a clickwrap agreement used by the government for unemployment insurance claim filings); *Jallali v. National Board of Osteopathic Med. Examiners, Inc.*, 908 N.E.2d 1168, 1173 (Ind. App. 2009) (upholding clickwrap agreement under general contract principles); *Adsit Co. v. Gustin*, 874 N.E.2d 1018 (Ind. App. 2007) (enforcing a forum selection clause in website terms, where the court found the person who accepted the terms was acting as an agent for her daughter-in-law); *Caspi v. Microsoft Network, LLC*, 323 N.J. Super. 118, 732 A.2d 528 (1999) (upholding a forum selection clause (included in lower case letters at the end of the agreement) where subscribers to an online software were required to review license terms in a scrollable window and to click "I agree" or "I don't agree" before proceeding with the registration); *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 588, 741 N.Y.S.2d 91, 92 (N.Y. App. 2002) (enforcing Microsoft's EULA, and therefore dismissing plaintiff's claims, where the plaintiff was presented with the text of the agreement and required to click a button expressing assent to those terms before the software could be installed); *Hodges v. Condors Swim Club of Clarkstown, Inc.*, 986 N.Y.S.2d 865 (N.Y. Sup. 2014) (reversing nonjury trial judgment where lower court disregarded online membership agreement); *Cameron Int'l Corp. v. Guillory*, 445 S.W.3d 840, 848-49 (Tex. Ct. App. 2014) (applying Delaware law to grant temporary injunction enforcing a noncompete provision in a clickwrap agreement upon acceptance of restricted stock units); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. Ct. App. 2001) (dismissing a registrant's claim against a registrar on basis of a forum selection clause in a click-through contract where users were required to

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otherwise makes clear that a user is accepting the terms of a contract and not merely signifying readiness to proceed to

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scroll through the agreement before being able to click their acceptance); *see also West Consultants, Inc. v. Davis*, 310 P.3d 824, 827-28 (Wash. Ct. App. 2013) (enforcing a forum selection clause in a software clickwrap agreement over plaintiff's objections that argued it had not read the contract); *Hotels.com, L.P. v. Canales*, 195 S.W.3d 147, 154-57 (Tex. Ct. App. 2006) (remanding for further consideration of plaintiff's motion for class certification where the court found that a substantial portion of the proposed class likely was bound by an arbitration provision assented to when they booked hotel rooms online, where users were not required to open and view Hotels.com's User Agreement, but were given the option to do so, and were required to click "I agree to the Terms and Conditions" to complete a booking transaction).

In *Kauders v. Uber Technologies, Inc.*, 486 Mass. 557, 159 N.E.3d 1033 (2021), Massachusetts' Supreme Judicial Court adopted a two-part analysis for evaluating online contract formation, focused on whether there was (1) reasonable notice of the terms and (2) a reasonable manifestation of assent to those terms. Under this test, which strongly favors express assent, the burden of proof is on the party seeking to establish the existence of a contract. Reasonable notice (a) may be established by evidence of actual notice (which may be shown if the user has reviewed the terms or "somehow interact[s] with the terms before agreeing to them") or (b) "[a]bsent actual notice, the totality of the circumstances must be evaluated in determining whether reasonable notice has been given of the terms and conditions." 486 Mass. at 572-73, 159 N.E.3d at 1049. The totality of circumstances approach requires consideration of the form of the contract (including whether it appears to a consumer to be a contract) and "the nature, including the size, of the transaction, whether the notice conveys the full scope of the terms and conditions, and the interface by which the terms are being communicated. . . For Internet transactions, the specifics and subtleties of the 'design and content of the relevant interface' are especially relevant in evaluating whether reasonable notice has been provided." 486 Mass. at 573, 159 N.E.3d at 1049-50 (citations omitted). In examining the interface, Massachusetts requires an evaluation of "the clarity and simplicity of the communication of the terms. Does the interface require the user to open the terms or make them readily available? How many steps must be taken to access the terms and conditions, and how clear and extensive is the process to access the terms? . . . Ultimately, the offeror must reasonably notify the user that there are terms to which the user will be bound and give the user the opportunity to review those terms." 486 Mass. at 573, 159 N.E.3d at 1050.

In evaluating reasonable manifestation of assent, courts must "consider the specific actions required to manifest assent" focusing on (1) whether the user is "required to expressly and affirmatively manifest assent to an online agreement by clicking or checking a box that states that the user agrees to the terms and conditions[,] . . ." which is the "clearest manifestation[] of assent, . . ." or (2) "other less obvious manifestations of assent to the terms" which is judged by the totality of the circumstances. 486 Mass. at 573-75, 159 N.E.3d at 1050-51. In explaining its strong preference for express assent, the Supreme Judicial Court wrote:

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> Requiring a user to expressly and affirmatively assent to the terms, such as by indicating "I Agree" or its equivalent, serves several important purposes. It puts the user on notice that the user is entering into a contractual arrangement. This is particularly important regarding online services, where services may be provided without requiring compensation or contractual agreements, and the users may not be sophisticated commercial actors. Without an action comparable to the solemnity of physically signing a written contract, for example, we are concerned that such users may not be aware of the implications of their actions where agreement to terms is not expressly required. . . . Requiring an expressly affirmative act, therefore, such as clicking a button that states "I Agree," can help alert users to the significance of their actions. Where they so act, they have reasonably manifested their assent.
>
> Where no such express agreement is required by the offeror, we must turn to other less obvious manifestations of assent to the terms. This makes the task of the court more difficult. . . . In these cases, courts must again carefully consider the totality of the circumstances, and assent may be inferred from other actions the users have taken. Where the connection between the action taken and the terms is unclear, or where the action taken does not clearly signify assent, it will be difficult for the offeror to carry its burden to show that the user assented to the terms.

486 Mass. at 574-75, 159 N.E.3d at 1050-51.

[8] *See, e.g.*, *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1, 8-10 (1st Cir. 2021) (affirming the district court order enforcing Terms of Service in a mobile app under Massachusetts law, and compelling arbitration, where "Emmanuel had reasonable notice of the mandatory arbitration provision in the Agreement that Handy seeks to enforce when she selected 'Accept' on that app at that time, such that . . . she was bound by it."); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 80 (2d Cir. 2017) (holding the parties bound by an arbitration agreement, but remanding the case on the issue of waiver; "The fact that clicking the register button had two functions—creation of a user account and assent to the Terms of Service—does not render Meyer's assent ambiguous. . . . Although the warning text used the term 'creat[e]' instead of 'register,' as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take."); *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482, 484-85 (9th Cir. 2020) (reversing the lower court's denial of Intuit's motion to compel arbitration, where, to access a TurboTax account during the relevant time period, a user, after entering a user ID and password, was required to click a "Sign in" button, directly under which appeared the text "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement," which the majority deemed to provide conspicuous notice, over the dissent's objection that, among other things, the appearance of links to two different products' terms of use on the sign-in screen, Turbo Terms of Use and TurboTax Terms of Use, was confusing); *Lee v. Ticketmaster LLC*, 817 F. App'x 393, 394-95 (9th Cir. 2020) (affirming the lower court's order compelling arbitration, holding that "Lee validly assented to Ticketmaster's Terms of Use, including the arbitration provision, each time he clicked the 'Sign In' button when signing into his Ticketmaster account, where three lines below the button, the website displayed the phrase, 'By continuing past this page, you agree to

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our Terms of Use,' as well as each time he clicked the 'Place Order' button when placing an order for tickets, where directly above the button, the website displayed the phrase, 'By clicking "Place Order," you agree to our Terms of Use,' where in both contexts, "'Terms of Use" was displayed in blue font and contained a hyperlink to Ticketmaster's Terms."); *In re Holl*, 925 F.3d 1076 (9th Cir. 2019) (denying a petition for mandamus where the lower court had compelled arbitration based on an agreement incorporated by reference into Service Terms accessible via a link, where to establish an account a user had to check a box agreeing that "[b]y selecting this checkbox and the Continue button I agree to the *UPS Technology Agreement* and the *UPS MyChoice™ Service Terms*" (where the two agreements were underlined in light blue)); *Hancock v. AT&T Co.*, 701 F.3d 1248, 1256–58 (10th Cir. 2012) (affirming dismissal based on enforceable forum selection and arbitration provisions in an agreement that consumers were required to accept by clicking on an "I Acknowledge" button on a website presented to the user on a technician's laptop prior to installation, where "basic contract law principles in Florida and Oklahoma indicate that if a clickwrap agreement gives a consumer reasonable notice of its terms and the consumer affirmatively manifests its assent to the terms, the consumer is bound by the terms."); *Fischer v. Instant Checkmate LLC*, 19 C 4892, 2021 WL 3033586, at *2, 5-6 (N.D. Ill. July 19, 2021) (compelling arbitration where the plaintiff assented to Terms of Use when she registered on the Instant Checkmate website and pressed a button marked "Continue" below which, in a smaller font (below a sentence that asked: "Already a member? Click here to login") was a gray line of italicized text stating: "By clicking 'Continue' you represent that you are over 18 years of age and have agreed to our terms of use, privacy policy, and limited license for services and you agree to receive email from InstantCheckmate.com" (with a hyperlink to the agreement provided via the words "terms of use" in blue text); "[N]o categorical rule prohibits providing notice of terms of service below rather than above the part of the webpage on which the user clicks. . . .The disclosure of the Terms of Use was certainly not the most prominent feature of Instant Checkmate's registration webpage, but the page provided reasonable notice, unambiguously referring to the Terms in legible text and providing easy access for users who cared to read further."); *In re Ring LLC Privacy Litigation*, Case No. CV 19-10899-MWF (RAOx), 2021 WL 2621197, at *4-6 (C.D. Cal. June 24, 2021) (compelling arbitration of those claims brought by plaintiffs who created a Ring account using the Ring App or website, because they were on inquiry notice of Ring's Terms of Service, but declining to compel arbitration of those claims brought by non-purchasers, who were not bound by the agreement); *Zheng v. Live Auctioneers LLC*, 20-cv-9744 (JGK), 2021 WL 2043562 (S.D.N.Y. May 21, 2021) (enforcing Live Auctioneers' website Terms and Conditions, and compelling arbitration of plaintiff's putative data breach class action suit, where "[t]he agreement came at the very top of the page and the plaintiff could not place accepted bids until clicking 'AGREE,' making clear that the plaintiff's acceptance of the terms was a condition precedent to continued use of the website. The 'AGREE' button was a distinctive orange color that stood out on the page. The Terms & Conditions, Privacy Policy, and Cookie Policy were capitalized, blue, and underlined, clearly indicating to a reasonably prudent internet user that

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those terms were hyperlinked. . . . The hyperlinked policies were available at the top of the webpage next to the 'AGREE' button. Moreover, the statement indicating agreement was concise; one short and plain sentence with hyperlinked policies . . . ('By using LiveAuctioneers, you agree to our Terms & Conditions, Privacy Policy, and Cookie Policy.')."); *Calderon v. Sixt Rent a Car, LLC*, Case No. 19-62408-CIV-SINGHAL/VALLE, 2021 WL 1325868, at *7 (S.D. Fla. Apr. 9, 2021) (compelling arbitration; "The agreement in this case . . . is not a pure clickwrap agreement; it included the Rental Jacket's terms and conditions in the form of a hyperlink that would direct Charnis to *another* page and did not expressly require Charnis to check a box stating that he agreed to the displayed terms. Nevertheless, Charnis manifested his assent by clicking the "BOOK NOW" button, which confirmed that he read and agreed to the Rental Jacket's terms and conditions, as displayed by the hyperlinked text in orange, which stands out against the white background."); *Britt v. ContextLogic, Inc.*, No. 3:20-cv-04333-WHA, 2021 WL 1338553, at *4-6 (N.D. Cal. Apr. 9, 2021) (enforcing Wish's Terms of Use, and compelling arbitration, where the plaintiff used a Facebook button to sign-in, as opposed to entering her email address and password, but the words "Wish Terms of Use" appeared in blue and were hyperlinked to Wish's terms of use); *Regan v. Pinger, Inc.*, Case No. 20-CV-02221-LHK, 2021 WL 706465, at *6-7 (N.D. Cal. Feb. 23, 2021) (enforcing defendant's ToS and compelling arbitration of plaintiff's TCPA claim; "Regardless of the precise label, based on the design and function of the Sideline App, . . . Plaintiff assented to the Sideline TOS by creating an account. . . . [T]he Sideline App sufficiently informed Plaintiff either (1) that by creating an account the user agreed to Sideline's TOS, or (2) that by clicking the 'Create Account,' 'For Professional Use,' 'For Personal Use,' or 'Login' button, Plaintiff was agreeing to the Sideline TOS. . . . Plaintiff was also repeatedly reminded that he agreed to the TOS by creating an account when Plaintiff clicked the 'Login' button upon returning to use the Sideline App. . . . As such, when Plaintiff created each account, Plaintiff assented to the Sideline TOS by creating that account."); *Wilcosky v. Amazon.com, Inc.*, No. 19-CV-05061, __ F. Supp. 3d __, 2021 WL 410705, at *8-10 (N.D. Ill. Feb. 5, 2021) (compelling arbitration of two plaintiffs' claims under the Illinois Biometric Information Privacy Act where they had assented to Amazon's Conditions of Use (which included an arbitration provision) on four separate occasions when they made purchases from the Amazon.com website); *Hansen v. Ticketmaster Entertainment, Inc.*, Case No. 20-cv-02685-EMC, 2020 WL 7319358 (N.D. Cal. Dec. 11, 2020) (holding that Hansen validly assented to the Ticketmaster TOU when he clicked the Sign In button, as required before he could move on to purchase tickets, and by so doing, he assented to the arbitration agreement contained in the ToU); *Ball v. Skillz Inc.*, Case No.: 2:20-cv-00888-JAD-BNW, 2020 WL 6685514, at *3-4 (D. Nev. Nov. 11, 2020) (compelling arbitration where the plaintiffs were notified when they created their mobile Skillz gaming app accounts that by doing so ("By tapping 'Next,' I agree to the Terms of Service and the Privacy Policy" which contained hyperlinks to those documents and appeared above a "Next" button) they would be bound by Terms of Service that were accessible via a link); *In re Wyze Data Incident Litigation*, Case No. C20-0282-JCC, 2020 WL 6202724, at *2-3 (W.D. Wash. Oct. 22, 2020) (compelling arbitration

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where Wyze obtained assent through a "clickwrap" contract that required users, when they created an account, to click a box indicating that agreed to Wyze's terms and conditions, which were available via a hyperlink); *Allen v. Shutterfly, Inc.*, Case No. 20-cv-02448-BLF, 2020 WL 5517172, at *5-7 (N.D. Cal. Sept. 14, 2020) (holding that plaintiff validly assented to the 2018 TOS, including the arbitration provision, each time she clicked the "Submit Payment" button when she purchased school portrait products on Lifetouch website, where "Terms and Conditions" appeared in blue text, as a hyperlink to the agreement, and was placed directly above the "Submit Payment" button, and consumers were presented with a statement that read: "by clicking 'Submit Payment' I agree to the Privacy Statement and Terms of Service[.]"); *Maynez v. Walmart, Inc.*, 479 F. Supp. 3d 890, 895-97 (C.D. Cal. 2020) (compelling arbitration where the plaintiff placed an order through the Walmart App and assented to terms by clicking the "Place Order" button below a notice with hyperlinks to terms of use: "By clicking Place Order, you agree to Walmart's Updated Privacy Policy and Terms of Use"); *Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 464 F. Supp. 3d 634, 640-43 (S.D.N.Y. 2020) (enforcing an online contract; "Plaintiff entered a valid, binding clickwrap agreement; the terms were 'reasonably conspicuous,' and Plaintiff was required to affirmatively agree to them. . . . [T]he top of the third page of Defendant's Terms & Conditions instructs users to 'review important account terms, disclosures, [ ] notices and account attestations,' and directs users to '[s]elect the links to review each item, or print and save copies for your records.' . . . Although not all of the terms are immediately visible on the webpage, the page contains blue hyperlinks that directed Plaintiff to PDFs of the relevant account documents. . . . The page states that '[t]hese documents apply to your new account,' indicating that in addition to the general CRA and Terms of Service agreements, Plaintiff would also be 'subject to additional agreements and disclosures that cover other products, services or account features for which [she] may be enrolled.' . . . Finally, the webpage included a box at the bottom of the page requiring Plaintiff to indicate affirmatively her assent to the terms and conditions before submitting her application . . . [and] the language 'I [ ] agree to these terms and conditions,' . . . is a 'clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms.' "); *Acaley v. Vimeo, Inc.*, 464 F. Supp. 3d 959, 966-68 (N.D. Ill. 2020) (holding that Magisto's app reasonably gave notice that, by continuing to use the app to sign up for an account, a user assented to its Terms of Service; "A reasonable person would understand that the word 'starting' referred to the creation of an account—indeed, there appears to have been no way to start using the Magisto from that page without creating an account—and that by using Facebook to create an account he or she was accepting the terms of service."); *Henricks v. Flywheel Sports, Inc.*, 19 Civ. 895 (PGG), 2020 WL 1285453, at *5 (S.D.N.Y. Mar. 18, 2020) (compelling arbitration based on Flywheel's Terms and Conditions, over plaintiff's objection that she did not recall visiting Flywheel's registration page, where Flywheel presented evidence that plaintiff created an account and that all website users were required to follow the same sign-up process to set up an account, which required users to check a box confirming agreement to the T&Cs next to a

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"distinctive" hyperlink marked "Terms and Conditions of Service" in blue lettering; noting that failing memories do not absolve a party from its contractual obligations); *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 830-33 (S.D.N.Y. 2020) (enforcing Postmates' TOS, and compelling arbitration, where the hyperlinked TOS on both the Postmates website and App were found "reasonably conspicuous to the prudent user" under *Meyer*, because users were presented with a relatively uncluttered white sign-up box, featuring clear text ("By clicking the Sign Up or Facebook button, you agree to our Terms of Service and Privacy Policy") below the spaces for a user's email and password, and above the "Sign Up" and "Facebook" buttons; "That the notice and hyperlinks are in a smaller font size does not render the disclaimer inconspicuous; the grey and black color contrast against the white background and are clear to the reasonably prudent user creating an account. . . . The hyperlinks to the TOS and Privacy Policy are in a darker, bolder font than the rest of the text, signifying to a reasonably prudent user that these would be clickable terms."); *Walker v. Neutron Holdings, Inc.*, Case No. 1:19-CV-574-RP, 2020 WL 703268, at *3-4 (W.D. Tex. Feb. 11, 2020) (compelling arbitration where "a reasonable user would view the Lime App sign-in screen and see that the User Agreement is part of the offer to proceed with the transaction by clicking 'NEXT' or 'Continue with Facebook.' "), *report and recommendation adopted*, 2020 WL 4196847 (W.D. Tex. Apr. 8, 2020); *Peter v. DoorDash, Inc.*, 445 F. Supp. 3d 580, 585-87 (N.D. Cal. 2020) (enforcing DoorDash's Terms and Conditions, and compelling arbitration, where the T&Cs and Privacy Policy were underlined in blue with a hyperlink to the documents and clearly visible on the sign up page where a user sets up an account, and where plaintiffs entered their names, email addresses, phone numbers, and passwords on a sign-up screen and clicked a "Sign Up" button below this information, which was directly above a statement reading: "By tapping Sign Up, Continue with Facebook, or Continue with Google, you agree to our Terms and Conditions and Privacy Statement."; rejecting the argument that the text informing users that signing up for an account would constitute agreement to the terms was "displayed as a gray font on a lighter-shade of gray background" and the font was "unreasonably small."); *Phillips v. Neutron Holdings, Inc.*, Case No. 3:18-CV-3382-S, 2019 WL 4861435, at *5 (N.D. Tex. Oct. 2, 2019) (enforcing Lime's User Agreement, and compelling arbitration, where the hyperlink to the User Agreement on Lime's sign-up screen was reasonably conspicuous and so placed the plaintiff on notice, the notice was legible, and the hyperlinked words "User Agreement & Terms of Service" were presented in a dark, bold font, which stood out from both the white screen and preceding gray text); *Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147 (D. Mass. 2019) (enforcing the shortened, 6-month timeline for a plaintiff to sue Spirit Airlines, where the contractual statute of limitations provision was included in Spirit Airline's Conditions of Carriage agreement, which was presented as a clickwrap agreement and assented to by the plaintiff when she used Spirit's online ticketless booking system to purchase a ticket); *In re Uber Technologies, Data Security Breach Litig.*, No. CV 18-3169 PSG (GJSx), 2019 WL 6317770, at *2-4 (C.D. Cal. Aug. 19, 2019) (enforcing Uber's ToU, and compelling arbitration of plaintiff's claims arising out of an alleged cybersecurity breach, based on plaintiff's initial assent plus notice of

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amended Terms and a revised arbitration provision sent by email); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254 (E.D.N.Y. 2019) (enforcing Amazon.com's Conditions of Use, and compelling arbitration, characterizing Amazon.com assent process as a "hybridwrap" that prompted users to manifest assent by engaging in a dual-purpose action, such as completing a transaction), *aff'd*, 815 F. App'x 612 (2d Cir. 2020); *Camilo v. Lyft, Inc.*, 384 F. Supp. 3d 435, 439-40 (S.D.N.Y. 2019) (compelling arbitration based on Camilo having clicked "I ACCEPT" to continue using the Lyft platform, knowing that he could not do so without accepting Lyft's new Terms of Service); *Sultan v. Coinbase, Inc.*, 354 F. Supp. 3d 156, 158-62 (E.D.N.Y. 2019) (compelling arbitration where the plaintiff created a Coinbase account online by entering his name, email address, and password, and affirmatively checked a box certifying that he was 18 years or older and agreed to Coinbase's User Agreement (which included an arbitration provision) and Privacy Policy, both of which were accessible via links); *Wickberg v. Lyft, Inc.*, 356 F. Supp. 3d 179, 183-85 (D. Mass. 2018) (compelling arbitration where the plaintiff, a Lyft driver, expressly assented to Lyft's 2016 Terms of Service when he enrolled online as a driver and clicked on a checkbox that stated "I agree to Lyft's Terms of Service" and where his timely opt-out of the arbitration provision in a 2018 version of the TOS did not change the fact that he remained bound by the arbitration provision in the earlier 2016 agreement); *West v. Uber Technologies,* Case No. 18-CV-3001-PSG-GJS, 2018 WL 5848903, at *3-5 (C.D. Cal. Sept. 5, 2018) (enforcing Uber's ToU and compelling arbitration where plaintiff was provided with reasonable notice of the Terms in the form of a clickable gray box and was given notice of the amended Terms and arbitration provision by email and continued to use the app for a year thereafter); *May v. Expedia, Inc.*, No. 16-CV-1211 (RP) (ML), 2018 WL 4343445, at *3 (W.D. Tex. Jul. 19, 2018), *report and recommendation adopted*, 2018 WL 4343427 (W.D. Tex. Aug. 27, 2018) (enforcing HomeAway's Terms and Conditions, and therefore compelling arbitration, where the website registration page "required the user to click a 'Continue' button to complete the transaction," and displayed a notice "directly above the 'Continue' button" that informed the user: "By clicking 'Continue' you are agreeing to our Terms and Conditions and Privacy Policy" (where the Terms and Conditions and Privacy Policy "were in blue, as opposed to black, font to indicate they were hyperlinks.")); *O'Callaghan v. Uber Corp.,* 27 Civ. 2094 (ER), 2018 WL 3302179, at *6-8 (S.D.N.Y. July 5, 2018) (enforcing Uber's driver agreement and compelling arbitration where Uber's electronic records showed that the plaintiff clicked "YES, I AGREE" on each of the four occasions when the operative agreements were updated and presented to him on the Uber App), *appeal dismissed*, 18-3277, 2019 WL 1958696 (2d Cir. Mar. 11, 2019); *Himber v. Live Nation Worldwide, Inc.*, 16-CV-5001(JS) (GRB), 2018 WL 2304770 (E.D.N.Y. May 21, 2018) (enforcing Live Nation's Terms of Use, including the arbitration provision in the TOU, where the homepage and virtually all interior pages of the website stated that use of the site was subject to the TOU (with a link to the TOU), and to buy tickets purchasers such as the plaintiff had to register an account by clicking a "Sign Up" or "Accept and Continue" button directly above which was language stating that the customer agreed to the TOU (with a link to the TOU), and after setting up an account,

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purchasers were required to click a "Sign In" button, which appeared directly above a notice stating that "[b]y continuing past this page, you agree to our Terms of Use," and to complete each purchase, a purchaser was required to click a "Place Order" button, directly below a notice stating that "By clicking 'Place Order', you agree to our Terms of Use."); *Domain Vault LLC v. Rightside Group Ltd.,* Civil Action No. 3:17-CV-0789-BT, 2018 WL 638013, at *2-4 (N.D. Tex. Jan. 30, 2018) (enforcing an arbitration provision contained in an online registration agreement, where the plaintiff had clicked an "I agree" button assenting on seven separate occasions to the agreement, over objections to the evidence presented of plaintiff's assent to the agreement), *appeal dismissed,* No. 18-10216, 2018 WL 4055963 (5th Cir. Mar. 28, 2018); *Plazza v. Airbnb, Inc*., 289 F. Supp. 3d 537, 547-54 (S.D.N.Y. 2018) (enforcing Airbnb's Terms of Service as a "hybrid" agreement and compelling arbitration based on an amended TOS where the plaintiff had to click on a check box with the text "I agree to the terms and conditions of the updated Terms of Service" and a red button which included in white text "I agree," holding "that Airbnb put Plaintiffs on reasonably conspicuous notice of the terms of the arbitration provision and that Plaintiff Plazza's actions in signing up, as well as Plaintiffs' explicit agreement to the modifications and continued use of Airbnb, manifested their assent."); *Broker Genius, Inc. v. Zalta*, 280 F. Supp. 3d 495, 521 (S.D.N.Y. 2017) (upholding the enforceability of a clickwrap agreement under *Meyer v. Uber*, but finding it was an inadequate means to protect plaintiff's trade secrets; "the Court concludes that the hyperlink to the Terms of Use was 'reasonably conspicuous' and that users are required to provide an 'unambiguous' 'manifestation of assent' by clicking on a box next to the words: 'I agree.' "); *Pincaro v. Glassdoor, Inc.*, 16 Civ. 6870, 2017 WL 4046317, at *6 (S.D.N.Y. Sept. 12, 2017) (holding plaintiffs bound by an amended arbitration provision where they expressly assented to Terms of Use that provided a prominent link to the Terms when they registered for accounts, and the original Terms of Use provided that the agreement was subject to amendment upon 30 days advance notice by email followed by continuous use, where plaintiffs in fact were sent notice by email in July 2016 of the new TOU and none of them opted out); *Nevarez v. Forty Niners Football Co., LLC*, 16-CV-07013, 2017 WL 3492110, at *8 (N.D. Cal. Aug. 15, 2017) (compelling arbitration where the user assented to terms in purchasing tickets and parking passes on the Ticketmaster website, which included a notice below the "Accept and Continue" button stating: "By continuing past this past, you agree to our terms of use," where the terms were hyperlinked and in blue text); *Cubria v. Uber Technologies, Inc.*, 242 F. Supp. 3d 541, 548 (W.D. Tex. 2017) (compelling arbitration of plaintiff's TCPA claim based on inquiry notice where "[t]he placement of the phrase 'By creating an Uber account, you agree to the Terms of Service & Privacy Policy' on the final screen of the account registration process was prominent enough to put a reasonable user on notice of the terms of the Agreement."; "Plaintiff clicked 'DONE' after entering her credit card information and passing over the 'Terms of Service & Privacy Policy' clickable button. Although 'DONE' is less precise than 'I agree' or 'I accept, ' the warning 'By creating an Uber account, you agree to the Terms of Service & Privacy' is unambiguous in alerting the user that creating the account will bind her to the 2013 TACs."); *Guan v.*

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Uber Technologies, Inc., 236 F. Supp. 3d 711, 723–26 (E.D.N.Y. 2017) (enforcing Uber's Terms of Service and compelling arbitration over objections that the agreement was unconscionable, where plaintiffs both acknowledged that they clicked on "YES, I AGREE" buttons when they signed up for Uber); *Peng v. Uber Technologies, Inc.*, 237 F. Supp. 3d 36, 47–51 (E.D.N.Y. 2017) (same); *Cordas v. Uber Technologies, Inc.*, 228 F. Supp. 3d 985, 988-91 (N.D. Cal. 2017) (holding that the plaintiff assented to Uber's click-through Terms & Conditions based on the declaration of an Uber engineer, over plaintiff's objection disputing what he saw and arguing that the T&Cs amounted to an unenforceable browsewrap agreement); *Seldon v. Airbnb, Inc.*, Case No. 16-cv-00933 (CRC), 2016 WL 6476934, at *5 (D.D.C. Nov. 1, 2016) (applying California law in holding that "Airbnb's mobile sign-up screen adequately placed Selden on notice of Airbnb's Terms of Service, and . . . he assented to those terms by clicking the sign-up box and using the service. The text 'By signing up, I agree to Airbnb's Terms of Service' is conspicuous. . . . It is placed in roughly the middle of the page, in close proximity to all three sign-up buttons. The text also appears in dark font, in sharp contrast to the white background. It is, moreover, clearly legible, appropriately sized, and unobscured by other visual elements. Although the text is not directly under the first or second alternative sign-up buttons, any reasonably-observant user would notice the text and accompanying hyperlinks."); *Moule v. United Parcel Service Co.*, Case No.: 1:16-cv-00102-JLT, 2016 WL 3648961, at *5 (E.D. Cal. July 16, 2016) (upholding the enforceability of "a modified clickwrap agreement, . . . [where] the screens asked the user to confirm acceptance of the UPS Terms, though the terms were not identified on the same page."); *In re Facebook Biometric Information Privacy Litig.*, 185 F. Supp. 3d 1155, 1165-67 (N.D. Cal. 2016) (upholding the enforceability of Facebook's Terms of Use agreement where plaintiffs Pezen and Patel were required to "click a box separately affirming that they had read and agreed to the Terms of Use" after being presented with a link to the agreement, and finding the agreement also binding on plaintiff Licata, who "had a different and more questionable experience" where "he was not required to click a box specifically and separately manifesting his assent to the user agreement. Instead, he was asked only to click a 'Sign Up' box with language under it that purported to put him on notice that clicking on it also constituted assent to the user agreement."); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 294-98 (D. Mass. 2016) (enforcing Lyft's Terms of Service agreement, including the arbitration provision set forth in the contract, where Lyft used a "clickwrap" agreement with a prominent "I accept" button presented at the bottom of the TOS), *aff'd on other grounds*, 918 F.3d 181, 187-90 (1st Cir. 2019) (holding that the agreement was not substantively unconscionable); *Whitt v. Prosper Funding, LLC*, No. 1:15-cv-136-GHW, 2015 WL 4254062, at *5 (S.D.N.Y. July 14, 2015) (enforcing an arbitration provision in an online registration agreement, pointing out that the plaintiff was not able to cite "authority indicating that a reasonably prudent website user lacks sufficient notice of terms of an agreement that are viewable through a conspicuous hyperlink," and noting that there is "an abundance of persuasive authority . . . supporting a proposition to the contrary."); *Defillipis v. Dell Fin. Servs.*, No. 3:14-CV-00115, 2016 WL 394003 (M.D. Pa. Jan. 29, 2016) (compelling arbitration on summary judg-

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ment, finding that a blue hyperlink leading to terms and conditions available next to a box that a customer had to click, in order to sign up for an account, was sufficient to provide notice to the customer); *Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1022 (N.D. Cal. 2015) (finding that the defendant consented to personal jurisdiction in California by accepting terms of service with a forum selection clause providing for litigation of disputes in California); *Appistry, Inc. v. Amazon.com, Inc.*, No. 4:13CV2547, 2015 WL 881507 (E.D. Mo. Mar. 1, 2015) (enforcing the venue selection clause in Amazon's Web Services Customer Agreement, as a valid clickthrough contract); *Friedman v. Guthy-Renker LLC*, No. 2:14-cv-06009-ODW(AGRx), 2015 WL 857800, at *5-6 (C.D. Cal. Feb. 27, 2015) (holding that plaintiff Henry-McArthur entered into a valid clickwrap contract with the defendant and was bound by the arbitration provision set forth in the agreement, where she was presented with "Terms and Conditions" language that was shown in bold, underlined, and hyperlinked to the agreement next to a checkbox that read "By Checking this box you are agreeing to the Terms and Conditions . . ."; also holding that a different plaintiff who did not see this language was not bound by the same Terms and Conditions); *Tresona Multimedia LLC v. Legg*, No. CV-14-02141-PHX-DGC, 2015 WL 470228, at *12 (D. Ariz. Feb. 4, 2015) (upholding forum selection clause in User Agreement on showing that defendant must have clicked a box when creating an account on plaintiff's website); *Garcia v. Enterprise Holdings, Inc.*, 78 F. Supp. 3d 1125 (N.D. Cal. 2015) (holding that the plaintiff could not have used the Zimride app without assenting to the app's Terms of Use and Privacy Policy); Crawford v. Beachbody, LLC, No. 14cv1583-GPC(KSC), 2014 WL 6606563, at *2-3 (S.D. Cal. Nov. 5, 2014) (upholding terms and conditions where the "PLACE ORDER" button was directly below the sentence, "By clicking Place Order below, you are agreeing that you have read and understand the Beachbody Purchase Terms and Conditions, and Team Beachbody Terms and Conditions."); *Yelp Inc. v. Catron*, 70 F. Supp. 3d 1082, 1092 (N.D. Cal. 2014) (enforcing a clause submitting to personal jurisdiction and venue in Yelp's terms of service agreement, in connection with entering a default judgment against the user who was alleged to have offered to create paid reviews of businesses to post on Yelp, in violation of the site's terms of service); *Mendoza v. Microsoft Inc.*, No. 2:14-cv-00316-MJP, 2014 WL 4540225, at *3 (W.D. Wash. Sept. 11, 2014) (analyzing and upholding arbitration clause and class action waiver in clickwrap agreement presented to users when accessing Xbox LIVE services); *Walsh v. Microsoft Corp.*, No. C14-424-MJP, 2014 WL 4168479 at *3 (W.D. Wash. Aug. 20, 2014) (same); *Goodwin v. Bruggeman-Hatch*, No. 13-cv-02973-REB-MEH, 2014 WL 3057090, at *2 (D. Colo. May 28, 2014), *report and recommendation accepted in relevant part*, 2014 WL 3057198 (July 7, 2014) ("In this case, the Court finds that Plaintiff is bound by Twitter's forum-selection clause. Plaintiff agreed to Twitter's Terms of Service when he registered a Twitter account."); *Starke v. Gilt Groupe, Inc.*, No. 13 Civ. 5497(LLS), 2014 WL 1652225, at *3 (S.D.N.Y. Apr. 24, 2014) (holding that plaintiff must arbitrate individual claims against Gilt because of arbitration clause in the terms of membership that plaintiff agreed to by clicking "Shop Now"); *Moretti v. Hertz Corporation*, No. C 13-02972 JSW, 2014 WL 1410432, at *3 (N.D. Cal. Apr. 11, 2014) ("[I]n the absence of an affirmative denial

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from Plaintiff that he did not check the Acceptance Box and clear evidence that Plaintiff could have not otherwise completed his car reservation, Plaintiff had notice and consented to the Terms of Use"); *Merkin v. Vonage America Inc.*, No. 2:13-cv-08026-CAS, 2014 WL 457942, at *3 (C.D. Cal. Feb. 3, 2014) (holding Vonage's Terms of Service to form a binding contract where Vonage presented evidence that agreement to its TOS was required for a user to be able to register for its service); *Day v. Microsoft Corp.*, No. C13–478–RSM, 2014 WL 243159, at *2-3 (W.D. Wash. Jan. 22, 2014) (granting defendant's motion to compel arbitration where the court found that plaintiff was obligated to accept terms in installing Windows 8 Pro and in creating a Hotmail account); *Sabino v. Kerzner Intern. Bahamas Ltd.*, No. 12–22715–CIV, 2014 WL 7474763, at *3-4 (S.D. Fla. Jan. 10, 2014) (finding that plaintiff agreed to forum selection clause when plaintiff's daughter checked a box that stated that she read and understood the terms, a link to the terms was emailed to plaintiff's daughter, and plaintiff signed a release upon checking into her vacation); *Peters v. Amazon Services LLC*, 2 F. Supp. 3d 1165, 1170-72 (W.D. Wash. 2013) (enforcing an arbitration agreement where no one could have opened a seller account without agreeing to a "Business Solutions Agreement" containing a forum selection clause and an enforceable arbitration provision); *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151, 156 (E.D.N.Y. 2013) (holding forum selection clause enforceable against email account holder where Google required all users to agree to terms of use before creating their email account); *Zaltz v. JDate*, 952 F. Supp. 2d 439 (E.D.N.Y. 2013) (granting defendant's motion to transfer in a case brought by a JDate subscriber, where the court found that, notwithstanding her failure to remember doing so, all users were required to assent to JDate's terms by (1) checking the box next to the statement "I confirm that I have read and agreed to the Terms and Conditions of Service" (which included a hyperlink to the Terms) and (2) clicking the "Accept and Continue" button); *In re Online Travel Co.*, 953 F. Supp. 2d 713, 718-19 (N.D. Tex. 2013) (granting the defendant's motion to compel individual arbitration based on the court's finding that website users manifested their assent to Travelocity's user agreement (which contained enforceable arbitration and class action waiver provisions) by clicking on a "button . . . located directly above a notice explaining that, by clicking the button, the user agrees to the policies set forth in the User Agreement, which was accessible via a hyperlink" and where it was impossible for a user to complete a transaction without providing affirmative assent to the User Agreement); *Chey v. Orbitz Worldwide, Inc.*, 983 F. Supp. 2d 1219, 1232 & n.6 (D. Haw. 2013) (enforcing the forum selection clause in Orbtiz's terms and conditions where the plaintiff was required to click on an "Agree and Book" icon referring to booking terms and conditions in order to book a flight); *Vernon v. Qwest Communications Int'l, Inc.*, 925 F. Supp. 2d 1185, 1191 (D. Colo. 2013) (finding assent and enforcing a click-through contract over plaintiffs' objections that they did not read it and it was hard to access); *5381 Partners LLC v. Shareasale.com, Inc.*, No. 12-CV-4263 (JFB)(AKT), 2013 WL 5328324, at *3-8 (E.D.N.Y. Sept. 23, 2013) (upholding the defendant website's Merchant Agreement where there was uncontroverted evidence that the plaintiff could not have become a merchant without agreeing to the Merchant Agreement and where a hyperlink to the agreement ap-

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peared adjacent to the activation button that users had to click on, near which appeared the warning that "[b]y clicking and making a request to Activate, you agree to the terms and conditions in the [agreement]"); *Serrano v. Cablevision Systems Corp.*, 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012) (" '[C]lick-wrap' contracts are enforced under New York law as long as the consumer is given a sufficient opportunity to read the end-user license agreement, and assents thereto after being provided with an unambiguous method of accepting or declining the offer."); *Talyancich v. Microsoft Corp.,* CV 12-00483 GAF FMOX, 2012 WL 1563884 (C.D. Cal. Mar. 28, 2012) (granting Microsoft's motion to dismiss for improper venue based in large part on the finding that the forum selection clause in its 'clickwrap' contract was valid); *Kraft Real Estate Investments, LLC v. HomeAway.com, Inc., 4:08-CV-3788*, 2012 WL 220271 (D.S.C. Jan. 24, 2012) (granting summary judgment for defendants (property rental websites) because all renters and potential advertisers had to assent to a click-through "I agree" button to access any of the websites, where a complete copy of the Terms of Service agreement was available via hyperlink directly below the button); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904 (N.D. Cal. 2011) (enforcing an arbitration provision in, and upholding the enforceability of, Zynga's Terms of Service, where the plaintiff admitted that "she was required to and did click on an 'Accept' button directly above a statement that clicking on the button served as assent to the YoVille terms of service along with a blue hyperlink directly to the terms of service."); *Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367 (S.D. Fla. 2011) (enforcing a venue selection clause in a clickwrap agreement); *Centrifugal Force, Inc. v. Softnet Communication, Inc.,* No. 08 Civ. 5463 (CM)(GWG), 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011) (holding that "by launching RightClick and selecting 'I agree,' BSI and Sofer accepted the terms of the license agreement and are now bound by those terms."); *CoStar Realty Information, Inc. v. Field,* Action No. 08:08-CV-0663-AW, 2010 WL 5391463 (D. Md. Dec. 2, 2010) (holding defendants liable for breaching a TOU agreement that they would have had to accept in order to gain access to plaintiff's service); *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213 (D. Haw. 2010) (holding the User Agreement for a videogame enforceable where the plaintiff had notice of it, was required to affirmatively agree to it by clicking "I agree," and had the opportunity to cease playing the game if he disagreed with the User Agreement but instead repeatedly reaffirmed his acceptance by continuing to play; applying Texas law); *Meier v. Midwest Recreational Clearinghouse, LLC,* No. 2:10-cv-01026-MCE-GGH, 2010 WL 2738921 (E.D. Cal. July 12, 2010) (granting defendants' motion to dismiss for improper venue and enforcing a forum selection clause in the Terms and Conditions of www.crankyape.com, which plaintiffs assented to in connection with submitting the winning bid for a recreational vehicle (RV), which was alleged in the suit to be in a different condition than as represented); *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039 (N.D. Cal. 2010) (enforcing Craigslist's TOU in entering a default judgment for Craigslist, where users could not post ads or create accounts without assenting to the TOU); *FreeLife Int'l, Inc. v. American Educational Music Publications Inc.,* No. CV07-2210-PHX-DGC, 2009 WL 3241795, at *3 (D. Ariz. Oct. 1, 2009) (enforcing a click-to-accept contract over the defendant's

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objections that he had not intended to enter into a contract); *Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009) (granting Expedia's motion to dismiss for improper venue, based on a forum selection clause in its User Agreement, over plaintiff's objection that he did not provide express assent despite evidence that it would have been technically impossible for him to have proceeded with a transaction without clicking on an "I agree" button); *Viente Taiwan, L.P. v. United Parcel Service, Inc.,* No. 4:08-cv-301, 2009 WL 3241795, at *2 n.1 (E.D. Tex. Feb. 17, 2009) (upholding the validity of a clickwrap agreement where the user was required to affirmatively manifest assent to conditions proposed by a software provider); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008) (explaining that a party may be bound by a clickwrap agreement if the terms are clear and acceptance is unambiguous, regardless of whether the party actually read the agreement); *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 480 (E.D. Va. 2008) (holding that "[b]y clicking 'I agree' to create a Turnitin profile and enter the Turnitin website, Plaintiffs accepted iParadigms' offer and a contract was formed based on the terms of the Clickwrap Agreement"), *aff'd in part and rev'd in part on other grounds*, 562 F.3d 630, 639 (4th Cir. 2009); *Realpage, Inc. v. EPS, Inc.*, 560 F. Supp. 2d 539, 545 (E.D. Tex. 2007) (upholding the enforceability of clickwrap license agreements (even where a user was not required to scroll down before providing assent) provided they also comported with the requirements of the Texas Business and Commerce Code, but declining to enforce the agreement at issue which failed for indefiniteness); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 235–38 (E.D. Pa. 2007) (enforcing Google's AdWords clickwrap contract where there was reasonable notice of and mutual assent to the agreement; the contract was immediately visible in a scrollable text box below a prominent admonition in boldface to read the terms and conditions carefully and only assent if the user agreed to the terms, the terms were presented in twelve-point font and was only seven paragraphs long and was available in a printer-friendly, full-screen version); *MySpace, Inc. v. TheGlobe.com, Inc.,* Case No. CV 06-3391-RGK (JCx), 2007 WL 1686966 (C.D. Cal. Feb. 27, 2007) (upholding the enforceability of MySpace's click-through Terms of Service contract, including its $50 per electronic message liquidated damages provision); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 781–83 (N.D. Tex. 2006) (holding clickwrap licenses to be valid and enforceable where it was not possible for a user to download plaintiff's software without clicking a button to accept a license); *Seibert v. Amateur Athletic Union, Inc.*, 422 F. Supp. 2d 1033, 1039–40 (D. Minn. 2006) (enforcing an arbitration provision in a click-to-accept membership agreement posted on the defendant's website where the plaintiffs, a coach and a player, authorized their agent to assent to the agreement on their behalf); *Salco Distributors, LLC v. iCode, Inc.*, No. 8:05 CV 642 T 27TGW, 2006 WL 449156 (M.D. Fla. Feb. 22, 2006) (enforcing a venue selection clause in a shrinkwrap and click-through software license, where the terms were printed on the outside of the envelope containing the software CD and were repeated in the form of a click-through agreement upon installation); *Davidson & Associates, Inc. v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164, 1176–78 (E.D. Mo. 2004) (upholding the terms of a clickwrap end user license agreements (EULA)

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the next screen, enter a site, download software or otherwise undertake some task not necessarily involving acceptance of a contract,[9] and if a checkbox is used, it is prominently

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and a Terms of Use agreement in connection with computer videogames and a network service for playing the game, where users were required to scroll through the agreements and then click "I Agree" to activate the game or use the service and where for most of the games the outside packaging stated that use of the game was subject to a EULA and use of the website service was subject to TOU), *aff'd on other grounds*, 422 F.3d 630 (8th Cir. 2005); *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157, 1162–63 (E.D. Cal. 2003) (enforcing a forum selection provision in a clickwrap agreement where the plaintiff was held bound by the terms of the contract because he clicked a box on the screen marked "I agree" signifying his assent); *DeJohn v. The.TV Corp. Int'l.*, 245 F. Supp. 2d 913, 921 (N.D. Ill. 2003) (holding Register.com's click-to-accept agreement enforceable where users were required to click on a box indicating that they had read, understood and agreed to the terms of the contract, which was accessible via a link placed directly above the box); *Siedle v. National Ass'n of Securities Dealers, Inc.*, 248 F. Supp. 2d 1140 (M.D. Fla. 2002) (granting a motion to dismiss where the plaintiff was bound by the terms of a click-through agreement to only use defendant's database for non-commercial, personal use); *i.Lan Systems, Inc. v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (upholding a clickwrap agreement in part because the licensee had clicked the "I agree" button); *In re RealNetworks, Inc., Privacy Litig.,* Civil No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000) (enforcing an arbitration provision in a clickwrap agreement where users were required to accept the terms in order to install software, the agreement came in a small pop-up window, in the same font-size as surrounding text and the arbitration provision was located at the end of the agreement); *Hotmail Corp v. Van$ Money Pie, Inc.*, 47 U.S.P.Q.2d 1020, 1025 (N.D. Cal. 1998) (granting a preliminary injunction based in part on breach of a terms of service agreement to which defendants had assented); *see also Altinex v. Alibaba.com Hong Kong Ltd.*, SACV 13-01545 JVS (RNBx), 2016 WL 6822235, at *10-11 (C.D. Cal. Mar. 25, 2016) (citing this treatise and this footnote in granting summary judgment for Alibaba on plaintiff's claims for direct patent infringement because "[b]ased on the foregoing facts, the foregoing relevant authority on clickwrap agreements, and Altinex's failure to present any countervailing evidence or persuasive argument, no reasonable consumer who accepts an offer on Alibaba's website could conclude that it is Alibaba that actually offered to sell the infringing product."); *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1080–81 (C.D. Cal. 1999) (writing in *dicta* that enforceable assent may be obtained by clicking an "accept" button).

[9]As discussed in section 22.03[2] in connection with best practices for presenting Terms of Use to form binding contracts, some courts, in older cases, have suggested that the length of time that a user is given to assent to a click-to-accept unilateral contract is a factor that should be considered in evaluating enforceability. *See, e.g.*, *In re RealNetworks, Inc. Privacy Litig.,* Civil No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000) (denying an intervenor's motion for class certification where the

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displayed and preferably left blank,[10] not prechecked to

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court found that RealNetworks had entered into an enforceable clickwrap contract with putative class members that provided for binding arbitration; citing the issue of whether a time limit is placed on reviewing terms as one of a number of factors considered by courts in evaluating the enforceability of a click-through contract); *see also Reynolds v. Credit Solutions, Inc.*, 541 F. Supp. 2d 1248, 1264 (N.D. Ala. 2008) (writing in *dicta* that "[t]here should be something wrong with binding a person with her click to a lengthy electronically-displayed proposal after barely enough time to scroll to the clicking point, much less the time within which to read and comprehend it."). Length of time, however, should not be relevant unless a site affirmatively "times out" if a user does not assent to an agreement within a specified period of time. *See infra* § 22.03[2]; *see generally infra* §§ 22.03, 22.04, 22.05 (addressing Terms of Use, their enforceability and drafting suggestions).

[10]*See, e.g.*, *In re Holl*, 925 F.3d 1076 (9th Cir. 2019) (denying a petition for mandamus where the lower court had compelled arbitration based on an agreement incorporated by reference into Service Terms accessible via a link, where to establish an account a user had to check a box agreeing that "[b]y selecting this checkbox and the Continue button I agree to the *UPS Technology Agreement* and the *UPS MyChoice™ Service Terms*" (where the two agreements were underlined in light blue)); *Hidalgo v. Amateur Athletic Union of United States, Inc.*, 468 F. Supp. 3d 646, 656-58 (S.D.N.Y. 2020) (compelling individual arbitration of plaintiff's putative data breach class action suit, where plaintiff had "reasonable notice" that by completing his application for AAU membership and becoming a member of the AAU, he would be bound by contractual language contained in the documents, including the binding arbitration provision, that could be accessed through the hyperlinks on the AAU application page, where (1) the application page was uncluttered, (2) "the fact that an applicant would have to scroll down through many pages of the application to reach the terms and conditions box" did not undermine the plaintiff's assent to those terms and conditions because "[a]n applicant for AAU membership would be unable to avoid the part of the application containing the hyperlinks leading to the AAU Code Book because the applicant would necessarily proceed through the application in linear fashion and could not complete the application without having reviewed that page[,]" (3) the agreement was "a clickwrap agreement in which an applicant necessarily checks the box adjacent to the acknowledgment of the terms and conditions to indicate his agreement with the AAU terms and conditions listed[,]" with clear language that "[b]y submitting an application, the applicant agrees to comply with the provisions of the AAU Code," contained in the "terms and conditions" box on the AAU application screen, and even though plaintiff allegedly had to "move the screen back and forth" and "zoom in and out" to reach the agreement on his iPhone, evidence was presented that "it would have been impossible for the plaintiff to complete his membership application without checking the box that gave assent to the terms and conditions[,]" and (4) notice about the terms and conditions of AAU membership "was both spatially and temporally coupled to the applicant's submission of an application"—specifically, "the check box in which a user manifested assent to the terms and conditions contained in

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indicate assent[11] (absent other factors that make the notice prominent and therefore sufficient even with a pre-checked box)[12] at least where it is clear what terms or agreements have been assented to.[13] There are no "magic words" that

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the AAU Code Book appeared in close proximity to the two hyperlinks to the AAU Code Book and all were contained within the box plainly labeled 'Terms and Conditions—Digital Signature.' "); *Friedman v. Guthy-Renker LLC*, No. 2:14-cv-06009-ODW(AGRx), 2015 WL 857800, at *5-6 (C.D. Cal. Feb. 27, 2015) (holding that plaintiff Henry-McArthur entered into a valid clickwrap contract with the defendant and was bound by the arbitration provision set forth in the agreement, where she was presented with "Terms and Conditions" language that was shown in bold, underlined, and hyperlinked to the agreement, next to a checkbox that read "By Checking this box you are agreeing to the Terms and Conditions..."; also holding that a different plaintiff who did not see this language was not bound by the same Terms and Conditions).

[11]*See, e.g.*, *Rojas v. GoSmith, Inc.*, Cause No.: 2:17-CV-281-JVB-JEM, 2020 WL 831585, at *4 (N.D. Ind. Feb. 20, 2020) (declining to enforce an arbitration provision contained in Terms of Service, where users were presented with a pre-checked box signifying assent to the Terms, because "Defendant did nothing that drew attention to the pre-checked box, which was not in bold typeface and was below the button clicked by Plaintiff, instead of appearing in the line of boxes to fill out to create an account. No evidence shows any indication that Plaintiff was advised to read the entirety of the webpage or that he needed to opt out of the agreement.").

[12]*See, e.g.*, *Lundbom v. Schwan's Home Service, Inc.*, Case No. 3:18-cv-02187-IM, 2020 WL 2736419, at *5-9 (D. Or. May 26, 2020) (holding that the plaintiff in a putative TCPA class action suit expressly consented to the defendant's food delivery "hybridwrap" (or "sign-in-wrap") agreement by completing a website registration form that included several pre-checked boxes, agreeing to receive calls and text messages, where Mobile Terms and Privacy Policy hyperlinks were displayed near the checkbox for phone communications; "Check-boxes are commonly used to express consent in web-based agreements."), *appeal dismissed*, No. 20-35480, 2020 WL 7048196 (9th Cir. Oct. 13, 2020); *La Force v. GoSmith, Inc.*, No. 17-cv-05101-YGR, 2017 WL 9938681 (N.D. Cal. Dec. 12, 2017) (holding that the plaintiff was bound by a website's mandatory arbitration provision where the website presented the relevant disclosure box pre-checked by default (next to the statement "I have read and agree to the terms & privacy policy.") and the user completed the registration process with the box checked).

[13]*See, e.g.*, *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482, 484-85 (9th Cir. 2020) (reversing the lower court's denial of Intuit's motion to compel arbitration, where, to access a TurboTax account during the relevant time period, a user, after entering a user ID and password, was required to click a "Sign in" button, directly under which appeared the text "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement," which the majority deemed to provide conspicuous notice, over the dissent's objection

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that, among other things, the appearance of links to two different products' terms of use on the sign-in screen, Turbo Terms of Use and TurboTax Terms of Use, was confusing); *Lee v. Ticketmaster LLC*, No. 18-CV-05987-VC, 2019 WL 9096442, at *1 (N.D. Cal. Apr. 1, 2019), *aff'd*, 817 F. App'x 393 (9th Cir. 2020) (affirming an order compelling arbitration where Ticketmaster provided sufficient notice for constructive assent by including a hyperlink to Terms of Use in a contrasting color adjacent to its "Place Order" button, informing a user that " 'continuing past this page' (i.e., placing an order) would indicate assent to the terms."); *Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 1021 (D. Colo. 2012) (enforcing a click-to-accept contract, as discussed later in this subsection), *appeal dismissed*, 733 F.3d 990 (10th Cir. 2013). *But see Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 60-64 (1st Cir. 2018) (reversing the lower court's order compelling arbitration based on the finding that the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law where Uber's "Terms of Service & Privacy Policy" hyperlink "did not have the common appearance of a hyperlink" because it was not "blue and underlined" but instead was presented in a gray rectangular box in white bold text, and where the content on the "Link Screen" and "Link Payment" screens contained other terms displayed with similar features, which diminished the conspicuousness of the "Terms of Service & Privacy Policy link and notice, in the view of the appellate court); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233-38 (2d Cir. 2016) (holding that the issue of the enforceability of a click-through contract could not be resolved on a motion to dismiss, where inquiry notice was disputed, where the user pressed a button that said "Place Your Order" (as opposed to "I accept," "Agree" or similar language) in close proximity to the text '[b]y placing your order, you agree to Amazon.com's privacy policy and conditions of use" but where the court found the number of links and messages on the page, which appeared in different font sizes and colors, made it unclear whether the notice was reasonably conspicuous); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-36 (7th Cir. 2016) (affirming denial of defendant's motion to compel arbitration where users were presented with a button and the words "I Accept & Continue to Step 3" but the "block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It sa[id] nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement."); *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454, 466-67 (S.D.N.Y. 2017) (denying defendant's motion to compel arbitration where notice of contract terms was held insufficient to bind the plaintiff because "the text is difficult to read: 'I agree to Lyft's Terms of Service' is in the smallest font on the screen, dwarfed by the jumbo-sized pink 'Next' bar at the bottom of the screen and the bold header 'Add Phone Number' at the top. The 'Terms of Service' are colored in light blue superimposed on a bright white background, making those . . . even more difficult to read."); *Harris v. Comscore, Inc.*, 825 F. Supp. 2d 924 (N.D. Ill. 2011) (declining to enforce the venue selection clause in a click-through contract where the plaintiff alleged that the hyperlink to the agreement was obscured such that the agreement was not readily accessible to the user).

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must be used, so long as assent is found[14] (although some

Applebaum relied in part on the lower court opinion that was reversed in *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), in concluding that a reasonable consumer would not have had notice of Lyft's Terms of Service, despite the fact that the plaintiff checked a box expressly assenting to the TOS before pressing the "Next" button. *Appelbaum* likely is no longer good law.

[14]*See, e.g.*, *Meyer v. Uber Technologies, Inc.,* 868 F.3d 66, 77-80 (2d Cir. 2017) (upholding the enforceability of mobile Terms of Service, finding the notice provided reasonably conspicuous and assent unambiguous, where users were required to press a button marked "Register" over objections that the language was not clear enough, emphasizing that, "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone."); *Fischer v. Instant Checkmate LLC*, 19 C 4892, 2021 WL 3033586 (N.D. Ill. July 19, 2021) (rejecting the argument, in enforcing Terms of Use and compelling arbitration, that a button marked "Continue" failed to provide reasonable notice); *Javier v. Assurance IQ, LLC*, Case No. 4:20-cv-02860-JSW, 2021 WL 940319, at *2-4 (N.D. Cal. Mar. 9, 2021) (dismissing plaintiff's claims under the California Invasion of Privacy Act (CIPA) and California Constitution, where the plaintiff had given click-through assent to Assurance's Privacy Policy, over the objection that clicking a button marked "View My Quote" instead of "I agree" made the agreement a browsewrap rather than clickwrap agreement); *see also, e.g., Dohrmann v. Intuit, Inc*., 823 F. App'x 482, 484-85 (9th Cir. 2020) (reversing the lower court's denial of Intuit's motion to compel arbitration, where, to access a TurboTax account during the relevant time period, a user, after entering a user ID and password, was required to click a "Sign in" button, directly under which appeared the text "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement," which the majority deemed to provide conspicuous notice); *Lee v. Ticketmaster L.L.C.,* 817 F. App'x 393, 394-95 (9th Cir. 2020) (affirming the lower court's order compelling arbitration, holding that "Lee validly assented to Ticketmaster's Terms of Use, including the arbitration provision, each time he clicked the 'Sign In' button when signing into his Ticketmaster account, where three lines below the button, the website displayed the phrase, 'By continuing past this page, you agree to our Terms of Use,' as well as each time he clicked the 'Place Order' button when placing an order for tickets, where directly above the button, the website displayed the phrase, 'By clicking "Place Order," you agree to our Terms of Use,' where in both contexts, "'Terms of Use" was displayed in blue font and contained a hyperlink to Ticketmaster's Terms.").

The Second Circuit in *Meyer,* in addressing concerns raised about the sufficiency of the language used, wrote in part that:

> The fact that clicking the register button had two functions—creation of a user account and assent to the Terms of Service—does not render Meyer's assent ambiguous. The registration process allowed Meyer to review the Terms of Service prior to registration, unlike web platforms that provide notice of contract terms only after the user manifested his or her assent. Furthermore, the text on the Payment Screen not only included a hyperlink to the Terms of Service,

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judges will be more comfortable with traditional language such as "Agree" or "Accept"[15]). Indeed, texting a code in response to a call for action that incorporates by reference Terms and Conditions has been held sufficient to establish express assent.[16] The same principles also may be applied to find consent (in addition to, or in lieu of, contractual assent) to a Privacy Policy.[17]

> but expressly warned the user that by creating an Uber account, the user was agreeing to be bound by the linked terms. Although the warning text used the term "creat[e]" instead of "register," as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take.

Meyer, 868 F.3d at 80. In short, courts look to substance over form, and should not be wedded to particular verbiage.

[15]*See, e.g.*, *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1, 8-10 (1st Cir. 2021) (affirming the district court order enforcing Terms of Service in a mobile app under Massachusetts law, and compelling arbitration, where "Emmanuel had reasonable notice of the mandatory arbitration provision in the Agreement that Handy seeks to enforce when she selected 'Accept' on that app at that time, such that . . . she was bound by it.").

[16]*See Greenberg v. Doctors Associates, Inc.*, 338 F. Supp. 3d 1280 (S.D. Fla. 2018) (compelling arbitration of a TCPA putative class action suit where the plaintiff acknowledged that he was presented with an offer for a free 6-inch sub and accepted the terms by opting in to receive text messages from Subway "after seeing Subway's call to action" by texting "Offers2" to 78929 "to join Subway's text club" and plaintiff admitted that the Subway offer contained a "disclaimer" stating that Terms and Conditions (which included an arbitration provision) "would be found at subway.com/subwayroot/TermsOfUse.aspx."; and rejecting the argument that the notice was not conspicuous where the offer quoted in the Complaint plainly stated "By clicking 'Sign me up' you agree to receive email promotions and other general email messages from Subway Group. In addition you agree to the Subway Group Privacy Statement and Terms of Use."); *Winner v. Kohl's Department Stores, Inc.*, No. 16-1541, 2017 WL 3535038, at *7 (E.D. Pa. Aug. 17, 2017) (granting defendant's motion to dismiss plaintiff's TCPA claim and holding that plaintiff was bound by mobile texting terms disclosed in a call-to-action offer stating, "See Kolhs.com/mobile for mobile Terms and Conditions" and therefore had provided consent to receive text messages).

[17]*See, e.g.*, *Silver v. Stripe, Inc.*, Case No. 4:20-cv-08196-YGR, 2021 WL 3191752, at *2-5 (N.D. Cal. July 28, 2021) (dismissing wiretap claims under California, Florida, and Washington state law (Cal. Penal Code §§ 631(a), 635; Fla. Stat. Ann. § 934.03(2)(d) (permitting interception of a communication "when all of the parties to the communication have given prior consent"); Wash. Rev. Code Ann. §§ 9.73.030(1) (a)-(b) (permitting interception with "the consent of all the participants")), where plaintiffs provided consent by assenting to Instacart's Privacy Policy, which set forth, among other things, that instacart could share information payment

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Where a state or federal law requires a signed writing, a unilateral online contract, such as a Terms of Use agreement, may be used to satisfy the requirement pursuant to the federal e-SIGN statute, where express assent is obtained.[18]

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processor partners and third parties); *Javier v. Assurance IQ, LLC*, Case No. 4:20-cv-02860-JSW, 2021 WL 940319, at *2-4 (N.D. Cal. Mar. 9, 2021) (dismissing plaintiff's claims under the California Invasion of Privacy Act (CIPA) and California Constitution, in a putative data privacy class action suit arising out of Assurance's use of TrustedForm javascript, which allegedly could be pasted into a form page to record "keystrokes, mouse clicks, data entry and other electronic communications," where the plaintiff had given click-through consent to Assurance's Privacy Policy, which made clear that Assurance tracked activity on its website and stated that it may use third party vendors to do so, over plaintiff's objection that the process involved merely a browsewrap agreement because the plaintiff pressed a button that said "View My Quote" rather than "I agree"); *Cooper v. Slice Technologies, Inc.*, 17-CV-7102 (JPO), 2018 WL 2727888, at *5 (S.D.N.Y. June 6, 2018) (dismissing with prejudice plaintiffs' Wiretap and Cal. Penal Code § 631(a) claims where plaintiffs consented to the alleged disclosure of anonymized data, as set forth in defendant's Privacy Policy; "All of the Complaint's statutory claims depend on a lack of consent. *See* 18 U.S.C. § 2511(2)(d) (exempting from the ECPA communications for which 'one of the parties to the communication has given prior consent to such interception'); 18 U.S.C. § 2702(b)(3) (allowing a provider to divulge information 'with the lawful consent of the originator or an addressee or intended recipient of such communication'); Cal. Penal Code § 631(a) (prohibiting wiretaps 'without the consent of all parties to the communication'); . . ."); *Smith v. Facebook, Inc*., 262 F. Supp. 3d 943, 953, 955 (N.D. Cal. 2017) (dismissing plaintiff's putative class claims under the California Information Privacy Act, based on consent provided pursuant to Facebook's Data Policy and Cookie Policy), *aff'd*, 745 F. App'x 8 (9th Cir. 2018) ("He who consents to an act is not wronged by it." (quoting Cal. Civ. Code § 3515)); *Garcia v. Enterprise Holdings, Inc*., 78 F. Supp. 3d 1125, 1135-37 (N.D. Cal. 2015) (dismissing plaintiff's California Invasion of Privacy Act claim with leave to amend where the defendant—app provider's Terms of Use and Privacy Policy provided consent for the alleged disclosures); *see generally infra* §§ 26.14 (Privacy Policies), 26.15 (data privacy litigation).

[18] *See Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc.*, 722 F.3d 591, 601 (4th Cir. 2013) (holding that a person who "clicks Yes" in response to an electronic Terms of Use agreement prior to uploading a copyrighted photograph will be deemed to have *signed* a *written* transfer of the exclusive rights of copyright ownership in those photographs consistent with section 204(a) of the Copyright Act, provided the TOU agreement is enforceable); *see also Dish Network L.L.C. v. TV Net Solutions, LLC*, No. 6:12-cv-1629-Orl-41TBS, 2014 WL 6685366, at *8 n.16 (M.D. Fla. Oct. 10, 2014) (holding that a copyright assignment effectuated by an exchange of emails was valid under the federal e-SIGN statute); *see generally supra* § 15.02[2] (analyzing the federal e-SIGN statute, 15 U.S.C.A. §§ 7001 et seq.).

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The enforceability of a click-through agreement may be decided at trial, on motion for summary judgment or at the outset of the case on a motion to dismiss or another preliminary motion, such as a motion to compel arbitration or change venue based on a forum selection clause.

Venue selection provisions in click-to-accept contracts have been enforced in a number of lawsuits at the outset of a case.[19] Some judges more readily enforce forum selection

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[19]*See, e.g.*, *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011) (affirming dismissal based on the venue selection clause in Google's AdWords contract); *Hancock v. AT&T Co.*, 701 F.3d 1248 (10th Cir. 2012) (affirming dismissal based on venue selection and arbitration provisions in a click-through contract); *Manopla v. Raymours Furniture Co.*, Civil Action No. 3:17-cv-7649-BRM-LHG, 2018 WL 3201800 (D.N.J. June 29, 2018) (enforcing a venue selection clause contained in a "clickwrap agreement," and transferring a TCPA suit to the Northern District of New York, because notice was sufficiently conspicuous to bind the plaintiff; the application form to defendant's Sweepstakes Agreement contained two hyperlinks to the Sweepstakes Agreement—the first stated "I have read and agreed to the Official Rules" and was featured next to the check-box, which a user had to affirmatively click in order to complete the form, while the second was featured at the bottom of the form and "was signaled by blue ink, telling a user that clicking the words 'Click Here' would send a user to a different page containing the Sweepstakes Agreement, and most importantly, the forum-selection clause."); *CR Assocs. L.P. v. Sparefoot, Inc.*, No. 17-10551-LTS, 2018 WL 988056, at *3-6 (D. Mass. Feb. 20, 2018) (enforcing a venue selection clause in a click-through Terms of Service agreement); *Song fi Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 59-60 (D.D.C. 2014) (enforcing forum selection clause in YouTube's Terms of Service against closely related non-parties to the agreement); *Taxes of Puerto Rico, Inc. v. TaxWorks, Inc.*, 5 F. Supp. 3d 185 (D.P.R. 2014) (granting transfer on grounds of forum selection clause in clickwrap contract); *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151, 156 (E.D.N.Y. 2013) (enforcing a forum-selection clause in a click-through contract where Google required "all users, after seeing a screen listing the terms or a link to the terms, to agree to the terms of use before creating an email account."); *Chey v. Orbitz Worldwide, Inc.*, 983 F. Supp. 2d 1219, 1232 & n.6 (D. Haw. 2013) (enforcing the forum selection clause in Orbtiz's terms and conditions where the plaintiff was required to click on an "Agree and Book" icon referring to booking terms and conditions in order to book a flight); *Talyancich v. Microsoft Corp.,* CV 12-00483 GAF FMOX, 2012 WL 1563884 (C.D. Cal. Mar. 28, 2012) (granting Microsoft's motion to dismiss for improper venue based on the venue selection clause in its Xbox Live click-through contract); *Rassoli v. Intuit Inc.,* CIV.A. H-11-2827, 2012 WL 949400 (S.D. Tex. Mar. 19, 2012) (enforcing the forum selection clause in Intuit's click-through contract and therefore granting its motion to dismiss or transfer); *Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894 (S.D. Ill. 2012) (enforcing the venue selection clause in Facebook's Terms of Service agreement against an underage (minor) plaintiff); *Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d

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clauses in click-to-accept contracts because the consequences of finding an agreement to be binding in connection with a motion to change venue may seem less severe than enforcing a contract on the merits. Conversely, some judges are more reticent about enforcing arbitration provisions (and even venue selection clauses) in unilateral contracts and therefore will scrutinize contract formation issues more closely.[20]

1367 (S.D. Fla. 2011) (enforcing a venue selection clause in a clickwrap agreement); *Meier v. Midwest Recreational Clearinghouse, LLC,* No. 2:10-cv-01026-MCE-GGH, 2010 WL 2738921 (E.D. Cal. July 12, 2010) (granting defendants' motion to dismiss for improper venue and enforcing a forum selection clause in the Terms and Conditions of www.crankyape.com, which plaintiffs assented to in connection with submitting the winning bid for a recreational vehicle (RV), which was alleged in the suit to be in a different condition than as represented); *Beard v. PayPal, Inc.,* Civ. Action No. 09-1339-JO, 2010 WL 654390 (D. Or. Feb. 19, 2010) (transferring the case to Northern District of California based on a venue selection clause in PayPal's click-through contract); *Brodsky v. Match.com LLC,* No. 09 Civ. 5328, 2009 WL 3490277 (S.D.N.Y. Oct. 28, 2009) (enforcing the forum selection clause in an online dating site's click-through contract); *Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009) (granting Expedia's motion to dismiss for improper venue, based on a forum selection clause in its User Agreement, over plaintiff's objection that he did not provide express assent despite evidence that it would have been technically impossible for him to have proceeded with a transaction without clicking on an "I agree" button); *Person v. Google*, 456 F. Supp. 2d 488, 496–97 (S.D.N.Y. 2006); *Nazaruk v. eBay, Inc.*, No. 2:06CV242, 2006 WL 2666429 (D. Utah Sept. 14, 2006); *Salco Distributors, LLC v. iCode, Inc.*, No. 8:05 CV 642 T 27TGW, 2006 WL 449156 (M.D. Fla. Feb. 22, 2006) (enforcing a venue selection clause in a shrinkwrap and click-through software license, where the terms were printed on the outside of the envelope containing the software CD and were repeated in the form of a click-through agreement upon installation); *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1010 (D.C. 2002).

Enforcement of venue selection clauses was made easier by the U.S. Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 571 U.S. 49, 62-64 (2013); *see generally infra* §§ 22.05[2][G] (forum selection provisions in Terms of Use agreements), 54.02[1] (analyzing *Atlantic Marine* and the enforcement of venue selection clauses in greater detail).

[20]*See infra* § 22.05[2][M] (analyzing arbitration provisions in unilateral contracts). In theory, the nature of the proceeding should not dictate the outcome of whether an online or mobile contract is enforceable (except where the burden of proof or evidence that may be considered is different—for example, for a summary judgment motion, the movant must show by admissible evidence that there is no dispute on any material fact, whereas in evaluating a motion to dismiss a court assumes as true all well pled facts and any documents or materials incorporated by reference but generally does not consider conflicting evidence). In practice, what is rea-

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Even where express assent is obtained, courts may be reluctant to find a binding contract formed where it is unclear what document or documents constitute the agreement[21] or where the language surrounding a request for express assent is deemed to be unclear.[22] At the very least,

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sonable notice in internet or mobile contract formation may vary based on the perceptions and life experiences of the judge (or jury) evaluating it (and, for some judges, implicitly, the consequences of enforcing or invalidating an agreement).

[21]*See, e.g.*, *Harris v. Comscore, Inc.*, 825 F. Supp. 2d 924 (N.D. Ill. 2011) (declining to enforce the venue selection clause in a click-through contract where the plaintiff alleged that the hyperlink to the agreement was obscured such that the agreement was not readily accessible to the user); *see also Chartis Seguros Mexico, S.A. de C.V. v. HLI Rail & Rigging, LLC*, 3 F. Supp. 3d 171, 193 (S.D.N.Y. 2014) (declining to enforce terms posted on a website that were not clearly incorporated by reference in the bill of lading; "KCSR's reference to the Rules Publication does not explain what it is or how it might be found. In particular, KCSR never mentions its website—the sole source of the Rules Publication—in the Price Quote or in the BOLs. Instead, the only guidance to locate the Rules Publication on KCSR's website was within the document itself . . . ."); *Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos.*, 409 S.W.3d 181, 190 (Tex. Ct. App. 2013) (declining to enforce a forum selection clause included in additional terms where the signed contract merely stated that "[a]dditional benefits, qualifications and details . . . are available for your review at our website").

[22]*See, e.g.*, *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 60-64 (1st Cir. 2018) (reversing the lower court's order compelling arbitration based on the finding that the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law where Uber's "Terms of Service & Privacy Policy" hyperlink "did not have the common appearance of a hyperlink" because it was not "blue and underlined" but instead was presented in a gray rectangular box in white bold text, and where the content on the "Link Screen" and "Link Payment" screens contained other terms displayed with similar features, which diminished the conspicuousness of the "Terms of Service & Privacy Policy link and notice, in the view of the appellate court); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233-38 (2d Cir. 2016) (holding that the issue of the enforceability of a click-through contract could not be resolved on a motion to dismiss, where inquiry notice was disputed, where the user pressed a button that said "Place Your Order" (as opposed to "I accept," "Agree" or similar language) in close proximity to the text '[b]y placing your order, you agree to Amazon.com's privacy policy and conditions of use" but where the court found the number of links and messages on the page, which appeared in different font sizes and colors, made it unclear whether the notice was reasonably conspicuous); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-36 (7th Cir. 2016) (affirming denial of defendant's motion to compel arbitration where users were presented with a button and the words "I Accept & Continue to Step 3" but the "block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his

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complexity in presentation can complicate enforcement. For example, in *Grosvenor v. Qwest Corp.*,[23] the court enforced an ISP's click-through contract (other than the arbitration provision), despite reservations about the formation process, because consumers were also given 30 days to cancel. The court held that the defendant had provided ample, adequate warning to users of the consequence of assenting to the contract,[24] but expressed reservations about whether users had been given an adequate opportunity to review applicable terms before giving their assent, where users were presented a menu of various different agreements, with the key terms made available via links, and it was not clear that users assenting to the ISP service agreement yet had Internet access, to be able to review terms that were only accessible via links, at the time they were asked to assent to them.[25] The court's concerns ultimately were offset by the fact that users

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personal information. It sa[id] nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement.").

[23]*Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 1021 (D. Colo. 2012), *appeal dismissed*, 733 F.3d 990 (10th Cir. 2013) (dismissing Qwest's appeal for lack of jurisdiction).

[24]Prior to clicking their assent to the contract, users were told the following:

> Your click below on "I Accept" is an electronic signature and acknowledges: (1) you agree the Qwest Agreement contains the terms under which service and equipment are provided to you, (2) you understand and agree to such terms, (even if you don't read them), and (3) you understand and agree to the Install Agreements. Federal and some state laws provide for certain disclosures and the relevant language from the federal act is in this scroll box or at www.qwest.com/legal/electronicsignatures.html. You may get a paper copy of the agreements free of charge by printing from this page and www.qwest.com/legal. Qwest does not otherwise provide you with a paper copy. A standard connection to the Internet/World Wide Web, a device that sends and accepts standard email, and a software program . . . [are required].

Further, below the box, the following text appeared:

> "Your click on 'I Accept' is an electronic signature to the agreements and contracts set out herein. Please review the material in the above box for important, binding legal information." The user may then click on a button that says "I Accept" or a button that says "Cancel." The software installation will not proceed unless the user clicks on the "I Accept" button.

Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021, 1027 (D. Colo. 2012), *appeal dismissed*, 733 F.3d 990 (10th Cir. 2013).

[25]The court explained:

> From the upper portion of the installation window, the user would be aware that there are "terms [of service] including arbitration and limits on Qwest's liability" that accompany the user's use of the internet service. The user would also reasonably understand that those terms are not being presented in the

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were given 30 days to cancel if they did not agree to the terms of service.[26]

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window itself; rather, the user would understand that those terms—collectively referred to as the "Qwest Agreement"—must be viewed at the web address of www.qwest.com/legal. In addition, the user would recognize that there are additional agreements—referred to as the "Install Agreement"—as reflected in the scroll box. Both the immediately-visible terms of the Install Agreement as well as information found below the scroll box indicate to the user that clicking on the "I Accept" button manifests the user's acceptance of both the Qwest Agreement and the Install Agreement. . . .

[A] user activating Qwest internet service would become aware of the terms of the agreement (and manifest assent) through the following steps: (i) the installation software directs the user to "Please read the terms . . . at www.quest.com/legal . . . that governs . . . the service(s) and equipment you ordered."; (ii) the user would navigate to the linked page (the "legal" page); (iii) the user, installing Qwest high-speed internet service, would then click on the "High-Speed Internet Subscriber Agreement" link on that page, thus being taken to yet another page; (iv) the user would review that subscriber agreement; and (v) the user would return to the installation software and manifest assent to the subscriber agreement by clicking "I Accept." The question, then, is whether these facts constitute "reasonably conspicuous notice" of the agreement's terms.

Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021, 1027-28 (D. Colo. 2012), appeal dismissed, 733 F.3d 990 (10th Cir. 2013). The court explained its concern about whether a binding contract had been formed, writing:

Mr. Grosvenor could not review Qwest's terms of service simply by clicking on the link www.qwest.com/legal; doing so would have only taken him to a page where he would have to continue to search for a link to the applicable contractual terms. The Court cannot say that, as a matter of law, requiring a user to navigate through two links in order to review the terms of an offer prevents any contractual formation, each additional step required of the user tips against a finding that the terms were sufficiently conspicuous. . . . [P]erhaps more importantly, the fact that a user must navigate to a web page in order to ascertain terms of an offer is particularly difficult where the software being installed is the means by which the internet can be accessed. In the absence of some other means of accessing the internet, Qwest's program did not allow Mr. Grosvenor to go to www.qwest.com/legal or review the applicable documents. The record does not reflect whether Mr. Grosvenor had other operative internet service when he began installation of Qwest's software. In the absence of other operative internet service, Mr. Grosvenor had no way of assessing the terms of Qwest's agreements until he completed installation of the software, and completion of the software installation would not occur until Mr. Grosvenor manifested his acceptance of the terms or the agreement. Under these circumstances, there is no assurance that a user could view the operative terms prior to agreeing to them. Thus, despite the representations made as to the effect of pressing the "I Accept" button, the Court has some doubt that doing so created an enforceable contract.

854 F. Supp. 2d at 1029.

[26]The court explained that the defendant's conduct constituted an objective manifestation of assent to the contractual terms:

Although the presentation of the terms is hardly a model of clarity, the Court nevertheless finds that they were sufficiently conspicuous as to permit a reasonable user the opportunity to review them and either agree to them or to cancel the internet service. Among other things, the installation software

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Unilateral contracts where express assent is not obtained, such as posted Terms of Service or so-called *browsewrap* agreements, may be enforceable, if the party against whom enforcement is sought has actual knowledge of the existence of the agreement (regardless of the sufficiency of website or mobile notice)[27] or if assent may be fairly implied based on

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> conspicuously warned users of the *existence* of contractual terms that accompanied the service, specifically mentioning arbitration as one of the issues addressed. The software provided users with a link by which a reasonable user could locate—albeit with some effort—the relevant contractual language, and required that the user affirmatively express its acceptance of Qwest's terms. To the extent that presentation of the terms via the installation software can be said to be impractical or unclear, the Welcome Letter would be sufficient to cure a reasonable user's confusion. That letter expressly identified arbitration as one of the important terms to be reviewed by the user, sufficiently identified the particular link on the "legal" page that contained the agreement, and arrived at a time when the user would certainly be able to access the internet to view the identified terms. The letter provided that the user's continued use of the service after 30 days effectively manifested assent to the agreement's terms. . . . Although the Court declines to opine as to whether either presentation of the terms—the software installation and the Welcome Letter—would, of itself, be sufficient, it finds that the combination of the two presentations rendered the contractual terms specifically clear that a reasonable user would be deemed to have understood the terms and assented to them.

Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021, 1030 (D. Colo. 2012), *appeal dismissed*, 733 F.3d 990 (10th Cir. 2013); *see also Bassett v. Electronic Arts*, 93 F. Supp. 3d 95, 107–08 (E.D.N.Y. 2015) (validating amended terms where defendant's practice was to provide users with actual notice and the opportunity to opt-out of changes by sending defendant written notice within thirty days of the change in terms). *Cf. Howard v. Ferrellgas Partners, L.P.*, 92 F. Supp. 3d 1115, 1137–39 (D. Kan. 2015) (finding terms binding where the plaintiff had been given 30 days from the time he received the agreement to terminate service, but he failed to do so, in a case that does not involve an online contract).

[27]As noted earlier in this section, actual knowledge provides independent grounds for enforcement (although it is only infrequently litigated in cases involving unilateral consumer contracts because the consumer often denies knowledge). *See, e.g.*, *Gutierrez v. FriendFinder Networks Inc.*, Case No. 18-cv-05918-BLF, 2019 WL 1974900, at *7-8 (N.D. Cal. May 3, 2019) (enforcing the Terms of Use of an adult website, and compelling arbitration, where a recording of a call with plaintiff established that he was told by Customer Service, in connection with restoring access to the site in 2013 after being suspended for a Terms of Use violation, that he was required to adhere to the Terms, which he acknowledged he knew was required; "Because the Terms clearly stated that continued use of the site would constitute acceptance of the Terms, Plaintiff's continued use of the site after being put on notice of the Terms and his need to comply with them constituted acceptance of the Terms."); *Cairo, Inc. v. Crossmedia Services, Inc*., No. C 04-04825 JW, 2005 WL 756610, at *4–-5 (N.D. Cal. Apr. 1, 2005) (following *Register.com* in holding that repeated use of a website with actual knowledge of the posted Terms of Use effectively

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conduct (such as continuing to use or access a website, database or service or downloading a product such as software) after a party is put on notice (based on actual notice or potentially, if constructive or inquiry notice may be inferred, based on a reasonable person standard) that access or use is subject to terms and conditions.

One could argue that Internet users (or at least sophisticated users) generally should be held to inquiry notice that website access or use typically is conditioned on Terms and Conditions, Terms of Use or Terms of Service posted on a website and made accessible via a link, which is usually located at the very bottom of the homepage (and, in the case of leading social media sites, from the bottom of every single

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binds a party to those terms); *see also, e.g., Nicosia v. Amazon.com, Inc.,* 834 F.3d 220, 233 (2d Cir. 2016) (citing earlier opinions for the proposition that so-called "browsewrap" agreements, which "involve terms and conditions posted via hyperlink, commonly at the bottom of the screen, and do not request an express manifestation of assent" require "courts often to consider whether a website user has actual or constructive notice of the conditions."); *Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171, 1176 (9th Cir. 2014) ("Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." (citation and internal quotation marks omitted)); *Arencibia v. AGA Service Co*., Case No. 20-cv-24694-BLOOM/Otazo-Reyes, 2021 WL 1318225, at *6 (S.D. Fla. Apr. 8, 2021) ("Under Florida law, a browsewrap agreement, such as the one here, is enforceable 'when the purchaser has actual knowledge of the terms and conditions, or when the hyperlink to the terms and conditions is conspicuous enough to put a reasonably prudent person on inquiry notice.' ") (citing earlier cases); *see also, e.g.*, *Meyer v. Uber Technologies, Inc.,* 868 F.3d 66, 77-80 (2d Cir. 2017) (analyzing reasonable notice for mobile contract formation and concluding that, "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found.").

As Second Circuit Judge Denny Chin explained, in writing for himself and Circuit Judges Robert Sack and Raymond J. Lohier, Jr., "[w]here there is no actual knowledge of contract terms, an offeree is still bound by the provision if he or she is on *inquiry* notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent." *Nicosia v. Amazon.com, Inc*., 834 F.3d 220, 233 (2d Cir. 2016) (emphasis in original), *quoting Schnabel v. Trilegiant Corp*., 697 F.3d 110, 120 (2d Cir. 2012).

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page on a site).[28] The resistance shown by courts in early cases to drawing this inference arguably should not apply now that the practice of posting Terms is so well established and understood by Internet users.

Nevertheless, courts to date generally have been unwilling to infer assent[29] based merely on Terms posted on a website

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[28]*See infra* § 22.03[2] (discussing this issue in the context of common industry and best practices).

[29]*See, e.g.*, *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 60-64 (1st Cir. 2018) (reversing the lower court's order compelling arbitration based on the finding that the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law where Uber's "Terms of Service & Privacy Policy" hyperlink "did not have the common appearance of a hyperlink" because it was not "blue and underlined" but instead was presented in a gray rectangular box in white bold text, and where the content on the "Link Screen" and "Link Payment" screens contained other terms displayed with similar features, which diminished the conspicuousness of the "Terms of Service & Privacy Policy link and notice, in the view of the appellate court); *Starke v. Squaretrade, Inc.*, 913 F.3d 279, 292-97 (2d Cir. 2019) (holding an arbitration provision in post-transaction Terms & Conditions unenforceable because the plaintiff was not provided with reasonable notice); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016) (reversing the lower court's order dismissing plaintiff's complaint, holding that whether the plaintiff was on inquiry notice of contract terms, including an arbitration clause, presented a question of fact where the user was not required to specifically manifest assent to the additional terms by clicking "I agree" and where the hyperlink to contract terms was not "conspicuous in light of the whole webpage."); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 22–24 (2d Cir. 2002) (declining to enforce an arbitration provision and finding assent lacking where users of Netscape's website were urged to download free software by clicking on a button labeled "Download" but would not even have seen an invitation to review the license agreement available by hyperlink unless they scrolled down to the following page, where the full terms, which warned users that they should not download the software if they did not agree to be bound and included the arbitration provision, were only accessible via that link, and where the defendants alleged that they in fact were unaware that the free software was provided subject to terms); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-36 (7th Cir. 2016) (affirming denial of defendant's motion to compel arbitration where users were presented with a button and the words "I Accept & Continue to Step 3" but the "block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It sa[id] nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement."); *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019) (affirming the denial of defendant's motion to compel arbitration where its Terms of Use, which contained the arbitration provision, were accessible from settings in the defendant's

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mobile app); *McGhee v. North American Bancard, LLC*, 775 F. App'x 718 (9th Cir. 2019) (affirming denial of defendant's motion to compel arbitration where the link to the user agreement, on defendant's Terms and Conditions webpage, did not require any affirmative action to demonstrate assent and simply contained the invitation to "View the User Agreement here"); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014) (declining to enforce an arbitration clause contained in website Terms of Use where there was no evidence that the website user had actual knowledge of the agreement, despite the fact that the Terms were accessible via a link from the bottom of every single page of the website); *Adwar Casting Co. v. Star Gems Inc.*, 17-CV-6278(DRH)(SIL), 2018 WL 5084826, at *6 (E.D.N.Y Oct. 18, 2018) (declining to enforce Terms and Conditions accessible from a link "referenced on the bottom of every page of the website, in a category called 'Information' and . . . underneath links to the 'help' page and the 'Careers at Adwar' page."); *Friedman v. Guthy-Renker LLC*, No. 2:14-cv-06009-ODW(AGRx), 2015 WL 857800, at *5 (C.D. Cal. Feb. 27, 2015) (holding that plaintiff Friedman was not bound by the defendant's online Terms and Conditions under *Nguyen*, but that plaintiff Henry-McArthur, who was presented with different messaging, was bound by the contract); *Rodman v. Safeway, Inc*., No. 11-cv-03003-JST, 2015 WL 604985, at *10-12 (N.D. Cal. Feb. 12, 2015) (holding that a 2011 amendment to its online agreement was not binding on class members where Safeway.com provided no notice to the class of the amendment); *Savetsky v. Pre-Paid Legal Services, Inc.*, No. 14-03514 SC, 2015 WL 604767, at *4 (N.D. Cal. Feb. 12, 2015) (declining to enforce arbitration terms where there was no evidence that plaintiff noticed the "sample member contract" on the website, he never acknowledged the existence of such a contract, and a consumer could go through the entire sign-up process without "even being aware a member contract exist[ed]"); *Hussein v. Coinabul, LLC*, No. 14 C 5735, 2014 WL 7261240, at *3 (N.D. Ill. Dec. 19, 2014) (declining to enforce forum selection and choice of law provisions in Terms of Service where the link to the terms was one of ten links at the bottom of every page and users were not otherwise notified about the existence of the terms); *Olney v. Job.com, Inc.*, No. 1:12-cv-01724-LJO-SKO, 2014 WL 4660851, at *4-6 (E.D. Cal. Sept. 17, 2014) (granting defendant's motion to dismiss where, despite defendant's alleged "sophisticated and personal knowledge of browsewrap agreements on websites . . . ," Job.com provided "no facts beyond the existence of hyperlink to the terms on Job's website to demonstrate that TPDs were put on notice that the use of the website alone would be interpreted as agreement to the terms."); *Edme v. Internet Brands, Inc.*, 968 F. Supp. 2d 519, 525–26 (E.D.N.Y. 2013) (declining to enforce a forum selection clause where there was no evidence that would show how a user was presented with the defendant website's Terms of Use); *Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *6-9 (N.D. Cal. Oct. 9, 2013) (granting Google's motion to dismiss breach of contract claim where plaintiff pled only the existence of a link to terms; "The SAC provides no grounds, beyond the mere existence of a link, for the Court to find that Defendants were put *on notice* that mere use of the website would be interpreted as agreement to the Terms of Service. The SAC does not allege the size or typeface of the link, the perhaps central or obvious location of the link on the page, or even the

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text of the link, but merely alleges the existence of such a link. . . .Because browsewrap agreements, where enforceable, are a powerful means of binding users with very little affirmative assent, a complaint must state facts establishing the means by which the link in question would give notice to a reasonably prudent internet user."); *IT Strategies Group, Inc. v. Allday Consulting Group, L.L.C.*, 975 F. Supp. 2d 1267, 1283 (S.D. Fla. 2013) (finding that an explicit warning about security and confidentiality did not put plaintiff on notice that there were additional terms governing use of the website); *In re Zappos.com, Inc. Customer Data Security Breach Litig.*, 893 F. Supp. 2d 1058, 1062–65 (D. Nev. 2012) (denying the defendant's motion to stay the litigation and compel arbitration where the arbitration provision was contained in posted Terms of Use accessible from every page of the Zappos.com website between the middle and bottom of the page, visible if a user scrolled down, based on the court's finding that no contract had been formed); *Van Tassell v. United Marketing Group*, 795 F. Supp. 2d 770 (N.D. Ill. 2011) (declining to compel arbitration where the court found notice of terms inadequate); *Koch Indus., Inc. v. Does,* No. 2:10CV1275DAK, 2011 WL 1775765, at *9 (D. Utah May 9, 2011) (dismissing plaintiff's breach of contract complaint over allegedly improper use of material posted on its website because "[t]he Terms of Use on Koch's website were available only through a hyperlink at the bottom of the page, and there was no prominent notice that a user would be bound by those terms. Koch's Complaint neither alleges nor produces evidence of any manifestation of assent to those terms. . . . [And] Koch does not identify a single case imposing 'contractual' speech restrictions on noncommercial web users."); *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va. 2010) (dismissing a breach of contract claim alleging breach of a browsewrap agreement where plaintiff's Terms of Use were "displayed on secondary pages of its website" and could "be accessed only through one of several dozen small links at the bottom of the first page" which the court found did not provide either actual or constructive notice and did not afford the defendant an "opportunity to review" the agreement, which under Virginia's enactment of UCITA is defined as "available in a manner that ought to call it to the attention of a reasonable person"); *Williams v. MetroPCS Wireless, Inc.*, No. 09-22890-CIV, 2010 WL 62605 (S.D. Fla. Jan. 5, 2010) (declining to compel arbitration based on a provision in website Terms and Conditions accessible on the MetroPCS Wireless website via a link, which the court held was not a binding contract, where the plaintiff denied under oath that she was given a copy of the Terms when she signed up for service (despite MetroPCS's purported customary practice of providing a copy along with a Welcome Guide), she did not visit the MetroPCS website and she claimed to have relied on advertisements for MetroPCS that emphasized that a contract was not required to obtain service); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366–67 (E.D.N.Y. 2009) (denying a motion to dismiss or stay the case based on an arbitration provision in posted Terms and Conditions, where the plaintiff denied actual notice of the Terms and Conditions and the defendant failed to present evidence showing constructive notice), *aff'd mem.,* 380 F. App'x 22 (2d Cir. 2010); *Fractional Villas, Inc. v. Tahoe Clubhouse,* No. 08cv1396-IEG-POR, 90 U.S.P.Q.2d 1384 (S.D. Cal. Feb. 25, 2009) (declining to enforce a venue selection clause where the defendant

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or accessible from a mobile app absent objective evidence

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denied ever visiting the website, where the browsewrap agreement containing the provision was posted and the plaintiff could not present any evidence to the contrary); *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 485 (E.D. Va. 2008) (declining to enforce an indemnification provision contained in defendant's Usage Policy, which was accessible via a link from every page on the website, where there was no evidence to impute knowledge of the terms to the plaintiffs and where the clickwrap agreement for the site, which unlike the Usage Policy was held enforceable, did not incorporate the Policy by reference and included an integration clause that stated that the clickwrap agreement "constitutes the entire agreement . . . with respect to usage of this website."), *aff'd in part and rev'd in part on other grounds*, 562 F.3d 630, 639 (4th Cir. 2009); *Ticketmaster Corp. v. Tickets.com, Inc.,* CV 99-7654 HLH (BQRx), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000) (dismissing Ticketmaster's breach of contract claim, which had sought to enforce linking restrictions in its Terms of Use, in the first case to ever consider the enforceability of posted Terms, where Ticketmaster's TOU was accessible via a link that appeared in "small print" on the bottom of Ticketmaster's home page, but granting leave to amend to allege that Tickets.com had knowledge of the terms and impliedly agreed to them, which Ticketmaster eventually did, as discussed later in this sub-section); *Roller v. TV Guide Online Holdings, LLC*, No. CV-12-306, 2013 Ark. 285 (Ark. 2013) (declining to enforce venue selection clause in agreement that neither party disputed was a 'browsewrap' agreement); *Hoffman v. Supplements Togo Management, LLC*, 419 N.J. Super. 596, 18 A.3d 210 (N.J. App. 2011) (declining to enforce a choice of law provision at the end of a disclaimer that appeared at the bottom of a product description page that users were unlikely to think to scroll down to; although prominent in size, "the forum selection clause was unreasonably masked from the view of the prospective purchasers because of its circuitous mode of presentation."), *cert. granted,* 209 N.J. 231, 36 A.3d 1062 (N.J. 2012); *Okeke v. Cars.com*, 40 Misc. 3d 582, 585, 966 N.Y.S.2d 843, 846 (N.Y. Civ. Ct. 2013) (following Hines in holding TOS not binding where there was "no evidence that Okeke possessed actual or constructive knowledge of referenced terms. As such, the Court finds that Cars fails to make a showing, at this stage of the proceedings, that Okeke is barred from pursuing his claims in the instant forum or the action must be dismissed pursuant to warranty or liability restrictions."); *Jerez v. JD Closeouts, LLC,* 36 Misc. 3d 161, 169–70, 943 N.Y.S.2d 392, 398 (N.Y. Nassau Dist. Ct. 2012) (declining to enforce a forum selection clause where it was "buried" and "submerged" on a webpage that could only be found by clicking on an inconspicuous link on the company's "About Us" page, requiring multiple clicks through different layers of webpages); *see also Sullivan v. All Web Leads, Inc.*, Case No. 17 C 1307, 2017 WL 2378079, at *7-8 (N.D. Ill. June 1, 2017) (denying defendant's motion to dismiss, holding that the defendant failed to obtain prior express written consent, as required by the TCPA to send certain marketing text messages, where the consent language was buried below the "Submit" button such that a reasonable consumer would assume he or she merely was consenting to submit information from a health questionnaire in order to obtain a health insurance quote).

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that a party knew of the terms (such as an admission to that effect) or received a demand letter or other written communication putting the party expressly on notice,[30] or where

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Specht v. Netscape Communications Corp., 306 F.3d 17, 22–24 (2d Cir. 2002) is often cited for the proposition that posted Terms generally are not enforceable. This characterization overstates the holding. Nevertheless, *Specht*, which is discussed earlier in the text, is *not* a good example of a case that would have been decided differently had the court recognized inquiry notice of industry custom and practice. *Specht* involved Terms that were buried deep inside a website and presented in a way where it was not clear to users which of a number of different posted agreements might apply.

While *Specht* involved a presentation that was confusing, the plaintiff in *Hoffman v. Supplements Togo Management, LLC*, 419 N.J. Super. 596, 18 A.3d 210 (N.J. App. 2011) (discussed above) alleged that the defendant's presentation of its venue selection provision was affirmatively deceptive. *Hoffman* was brought by a lawyer/serial litigant who ordered an herbal remedy called "Erection MD" and then filed suit in New Jersey seeking certification of a class action under New Jersey's Consumer Fraud Act alleging false advertising. Relying on *Specht,* the court found the venue selection provision "presumptively unenforceable" but remanded the case for further proceedings in case additional evidence showed that the plaintiff in fact had notice. The court explained that "defendants' website was evidently structured in an unfair manner so that the clause would not appear on a purchaser's computer screen unless he or she scrolled down to display the 'submerged' clause before adding the product to his or her electronic 'shopping cart.' " *Hoffman v. Supplements Togo Management, LLC*, 419 N.J. Super. 596, 598, 18 A.3d 210, 212 (N.J. App. 2011). The provision appeared below the fold, below an "ADD TO SHOPPING CART" button and was in the court's view "unreasonably masked from the view of prospective purchasers . . . ." 419 N.J. Super. at 611, 18 A.3d at 219. Needless to say, to form a binding contract based on implied assent, notice should be made reasonably accessible to users and not hidden where they would not expect to find it.

[30]*See, e.g.*, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (holding that the district court was within its discretion in finding that the plaintiff was likely to prevail on the merits for purposes of granting a preliminary injunction where the defendant received actual notice of purported restrictions on access to a database but continued to repeatedly access the database on a daily basis even after receiving notice); *Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007) (holding that the defendant was bound by posted Terms that formed a non-exclusive license to access Ticketmaster's website where the defendant acknowledged that it was on notice that its access to the site was subject to Terms); *Southwest Airlines Co. v. BoardFirst, LLC,* No. 3:06-cv-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007) (holding that the defendant, operator of a site that offered a service to enhance Southwest Airline's passengers' ability to obtain a boarding pass with a high boarding priority level, had knowledge of and therefore was bound by Southwest's website Terms and Conditions of Use which prohibited third

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a consumer was given oral notice,[31] repeated notice[32] (or

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parties from accessing user accounts for commercial use, at least as of the time it was sent a cease and desist letter); *Cairo, Inc. v. Crossmedia Services, Inc.,* No. C 04-04825 JW, 2005 WL 756610, at *4–5 (N.D. Cal. Apr. 1, 2005) (following *Register.com* in holding that repeated use of a website with actual knowledge of the posted Terms of Use effectively binds a party to those terms); *Ticketmaster Corp. v. Tickets.com, Inc.,* CV99-7654-HLH (VBKx), 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003) (finding a triable issue of fact precluding summary judgment on the issue of whether the defendant was bound by posted Terms of Use where express assent was not obtained but the defendant had been put on written notice of the conditions governing use of the internal pages of plaintiff's website and thereafter continued to access them); *see also Snap-on Business Solutions Inc. v. O'Neil & Associates, Inc.*, 708 F. Supp. 2d 669, 681–83 (N.D. Ohio 2010) (denying in part defendant's summary judgment motion because a reasonable jury could conclude that the defendant had actual or constructive knowledge of the Snap-on EULA where it accessed Snap-on's websites, which contained a single page access screen where users were required to input their user names and passwords and then click an "Enter" button to proceed, below which was found the message that "The use of and access to the information on this site is subject to the terms and conditions set forth in our legal statement" and a green box with an arrow that users could click to access the EULA); *Microstar v. Formgen, Inc.*, 942 F. Supp. 1312, 1318 (S.D. Cal. 1996) (upholding a license restriction permitting users to create new levels in a videogame, but prohibiting their distribution for commercial purposes, even though end users were not required to read or manifest assent to the terms of the license before uploading the software, where the defendant conceded that he was aware of the license restrictions).

[31]*See, e.g.*, *Silverman v. Move Inc.*, Case No. 18-cv-05919-BLF, 2019 WL 2579343, at *11-12 (N.D. Cal. June 24, 2019) (granting defendant's motion to compel arbitration where Move's Terms and Conditions were provided via a link in an email sent to the plaintiff and plaintiff did not dispute that the Move account executive to whom she spoke on the phone when she placed her order, informed her that she would be receiving written confirmation of her order and that it would contain "all of the details and important information about [her] purchase and agreement with Move," which the court deemed sufficient to put plaintiff on inquiry notice of the Terms); *Ferrie v. DirecTV, LLC*, No. 3:15-CV-409 (JCH), 2016 WL 183474, at *11 (D. Conn. Jan. 12, 2016) (compelling arbitration and ruling that plaintiff "would have been on inquiry notice of the additional terms" containing the arbitration provision based on plaintiff's review of DirecTV advertisements that referenced "Additional Details" or "Additional Offers Details" that hyperlinked to the terms and conditions, and where, among other things, he was told by phone when he signed up that he would receive a confirming email).

[32]*See, e.g., Starkey v. G Adventures, Inc.*, 796 F.3d 193, 196-97 (2d Cir. 2015) (affirming the lower court's order dismissing plaintiff's case for *forum non conveniens*, after concluding that a hyperlink to a document containing a forum selection clause may be used to reasonably com-

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repeated notice *and* a right to return a product sold subject to Terms[33]).[34] Absent an admission of actual knowledge,

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municate that clause to a consumer, where G Adventures sent Starkey three emails: a booking information email, a confirmation invoice, and a service voucher, each of which linked to Booking Terms and Conditions that included a forum selection clause requiring resolution of disputes in Canada, and the booking information email contained the statement, "**TERMS AND CONDITIONS:** . . . All Gap Adventures passengers must read, understand and agree to the following terms and conditions" followed by a hyperlink with an underlined URL, and the links in the confirmation invoice and service voucher emails were preceded immediately by the message that "[c]onfirmation of your reservation means that you have already read, agreed to and understood the terms and conditions, however, you can access them through the below link if you need to refer to them for any reason."); *One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258 (5th Cir. 2011) (affirming a lower court ruling holding a company bound by Terms and Conditions posted on a website which were incorporated by reference in twenty-four separate repair service orders (RSOs), in a dispute that arose over performance of the ninth RSO, where the court found that a fair opportunity to review the Terms had been provided, over objections that reasonably conspicuous notice of the Terms had not been provided and the Terms were never reviewed); *Major v. McCallister*, 302 S.W.3d 227 (Mo. Ct. App. 2009) (enforcing a forum selection provision in a browsewrap agreement where each page on ServiceMagic's website included a link to ServiceMagic's Terms and Conditions, which were visible without scrolling, and the page where the plaintiff entered her contact information on defendants' construction contractor referral site included a second, blue link to the Terms, and the notice "By submitting you agree to the Terms of Use" next to the "Submit for Matching Pros" button; "When one party accepts the other party's performance, it gives validity to an agreement even if unsigned . . . .").

[33]*See Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 835 N.E.2d 113 (Ill. App. 2005) (holding an arbitration provision to be not unconscionable under Texas law, based on a provision in posted Terms and Conditions that were accessible via a blue hyperlink from each of the five pages that contained online forms filled out by plaintiffs in connection with their purchases, where the Terms were also printed on the back of plaintiffs' invoices, which were sent to plaintiffs in the shipping boxes with plaintiffs' computers, and the last three forms contained the statement that "All sales are subject to Dell's Term[s] and Conditions of Sale," and where Dell's "total satisfaction policy," which was included with the shipped materials, provided that purchasers could receive a full refund or credit if the computers were returned within 30 days, and none of the plaintiffs in fact returned their computers during that time period).

[34]While acceptance by conduct may be inferred from affirmative steps taken by a user in response to notice that particular actions will be subject to terms, acceptance generally may not be inferred through silence or inaction when terms are merely presented to users with a gift or promotional item that was not ordered or requested (such as a promotional

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whether a contract may be formed based on implied assent to Terms of Use or another unilateral contract ultimately may present a question of fact[35] unless the court may

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CD stamped with a purported license restriction) or in an unsolicited email or other communication (such as an email purporting to bind recipients to particular contractual obligations). *See UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1182 (9th Cir. 2011) (holding that title to promotional CDs that contained purported transfer restrictions stamped on the CDs was transferred when the CDs were given away; "It is one thing to say, as the statement does, that 'acceptance' of the CD constitutes an agreement to a license and its restrictions, but it is quite another to maintain that 'acceptance' may be assumed when the recipient makes no response at all.").

While assent generally will not be inferred from silence, a party's silence in response to an offer that dictates that silence or inaction will be deemed acceptance, may be enforceable. *See, e.g.*, *Rivera-Colon v. AT&T Mobility Puerto Rico, Inc.*, 913 F.3d 200 (1st Cir. 2019) (holding the plaintiff bound by an arbitration provision that her employer announced in an email message that provided she would be bound by the new arbitration agreement unless she opted out by clicking on an opt-out link and registering within 60 days of the date of the email, where she opened the document and confirmed that that she reviewed the arbitration provision but did not thereafter opt out), *citing* Restatement (Second) of Contracts § 69(1)(b) (providing that silence can operate as acceptance "[w]here the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer."); 2 Williston on Contracts § 6:53 ("If the situation for any reason is such that a reasonable person would construe silence as necessarily indicating assent, the offeree who keeps silent, knowing that its silence will be misinterpreted, should not be allowed to deny the natural interpretation of its conduct."); *Klein v. Verizon Communications, Inc.*, 920 F. Supp. 2d 670, 680 (E.D. Va. 2013) (holding that silence generally is not considered acceptance of an offer under Maryland law but may be where (1) the parties had agreed previously that silence would be acceptance, (2) the offeree had taken the benefit of the offer, or (3) because of previous dealings between the parties, it was reasonable that the offeree should notify the offeror if the offeree did not intend to accept), *rev'd on other grounds*, 674 F. App'x 304 (4th Cir. 2017) (reversing and remanding the case based on the determination that Virginia law, rather than Maryland's, applied); *Klein v. Verizon Communications, Inc.*, Case No. 1:12-cv-00757 (GBL/IDD), 2017 WL 5071306, at *1, 3-5 & n.1 (E.D. Va. Aug. 9, 2017) (compelling arbitration, on remand, under Virginia law, based on a 2012 amendment to an earlier contract sent to the plaintiff by email, where the original contract provided that amendments would be effective if sent by email to the user and the user thereafter continued to use the service, because, "although silence alone will not serve as acceptance of a contract, parties can demonstrate acceptance through some other 'objective manifestation of assent.' ") (citations omitted).

[35] *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016). Cases that fall into this category typically involve companies that require a user

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determine as a matter of law that there was reasonably conspicuous notice[36] and an objective manifestation of assent[37]

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to expressly assent to something, but do not use clear language such as "I agree" to be bound by Terms of Use or include too many different notices or a cluttered screen, as in *Nicosia*, such that a court is unwilling to find inquiry notice as a matter of law and the question is left for later resolution.

Assent may also present a factual question where a technical glitch leaves open the question of whether a user in fact had notice and will be bound by the terms of an agreement. *See, e.g.*, *Metter v. Uber Technologies, Inc.*, Case No. 16-cv-06652-RS, 2017 WL 1374579 (N.D. Cal. Apr. 17, 2017) (denying defendant's motion to compel arbitration where a pop up keypad for a user to input his or her credit card information allegedly obscured an alert about Uber's Terms of Service agreement, raising doubt about whether the plaintiff had notice of the Terms).

[36]What is *reasonably conspicuous* is analyzed throughout this section. Where it has been at issue, courts have found unilateral contracts to be enforceable where notice of the agreement has been reasonably conspicuous. *See, e.g.*, *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 77-79 (2d Cir. 2017) (holding notice to be reasonable under California law where "[t]he Payment Screen is uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account or to connect the user's pre-existing PayPal account or Google Wallet to the Uber account, and the warning that 'By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.' The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration. The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service. Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined. . . . In addition to being spatially coupled with the mechanism for manifesting assent—*i.e.*, the register button—the notice is temporally coupled. . . . As long as the hyperlinked text was itself reasonably conspicuous—and we conclude that it was—a reasonably prudent smartphone user would have constructive notice of the terms. While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice."); *Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 464 F. Supp. 3d 634, 640-43 (S.D.N.Y. 2020) (enforcing an online contract; "Plaintiff entered a valid, binding clickwrap agreement; the terms were 'reasonably conspicuous,' and Plaintiff was required to affirmatively agree to them. . . . [T]he top of the third page of Defendant's Terms & Conditions instructs users to 'review important account terms, disclosures, [ ] notices and account attestations,' and directs users to '[s]elect the links to review each item, or print and save copies for your records.' . . . Although not all of the terms are immediately visible on the webpage, the page contains blue hyperlinks that directed Plaintiff to PDFs of the relevant account documents. . . . The page states that '[t]hese documents apply to your new account,' indicating that in addition to the general CRA and Terms of Service agreements, Plaintiff would also

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be 'subject to additional agreements and disclosures that cover other products, services or account features for which [she] may be enrolled.' . . . Finally, the webpage included a box at the bottom of the page requiring Plaintiff to indicate affirmatively her assent to the terms and conditions before submitting her application . . . [and] the language 'I [ ] agree to these terms and conditions,' . . . is a 'clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms.' "); *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 830-33 (S.D.N.Y. 2020) (enforcing Postmates' TOS, and compelling arbitration, where the hyperlinked TOS on both the Postmates website and App were found "reasonably conspicuous to the prudent user" under *Meyer*, because users were presented with a relatively uncluttered white sign-up box, featuring clear text ("By clicking the Sign Up or Facebook button, you agree to our Terms of Service and Privacy Policy") below the spaces for a user's email and password, and above the "Sign Up" and "Facebook" buttons; "That the notice and hyperlinks are in a smaller font size does not render the disclaimer inconspicuous; the grey and black color contrast against the white background and are clear to the reasonably prudent user creating an account. . . . The hyperlinks to the TOS and Privacy Policy are in a darker, bolder font than the rest of the text, signifying to a reasonably prudent user that these would be clickable terms."); *Phillips v. Neutron Holdings, Inc.*, Case No. 3:18-CV-3382-S, 2019 WL 4861435, at *5 (N.D. Tex. Oct. 2, 2019) (enforcing Lime's User Agreement, and compelling arbitration, where the hyperlink to the User Agreement on Lime's sign-up screen was reasonably conspicuous and so placed the plaintiff on notice, the notice was legible, and the hyperlinked words "User Agreement & Terms of Service" were presented in a dark, bold font, which stood out from both the white screen and preceding gray text); *Temple v. Best Rate Holdings LLC*, 360 F. Supp. 3d 1289, 1304 (M.D. Fla. 2018) (holding that a hyperlink to the agreement's terms and conditions "was placed in a manner conspicuous enough to provide reasonable notice to a prudent user, thereby requiring the user to affirmatively acknowledge the [hyperlink] to the Agreement before proceeding."); *Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 547-54 (S.D.N.Y. 2018) (enforcing Airbnb's Terms of Service as a "hybrid" agreement and compelling arbitration based on an amended TOS where the plaintiff had to click on a check box with the text "I agree to the terms and conditions of the updated Terms of Service" and a red button which included in white text "I agree," holding "that Airbnb put Plaintiffs on reasonably conspicuous notice of the terms of the arbitration provision and that Plaintiff Plazza's actions in signing up, as well as Plaintiffs' explicit agreement to the modifications and continued use of Airbnb, manifested their assent."); *MetroPCS Communications, Inc. v. Porter*, 273 So. 3d 1025, 1028-29 (Fla. 3d Dist. 2018) (per curiam) (holding that a hyperlink located at the end of a short message was sufficiently conspicuous to put a user on notice that conditioned use of the service constituted assent to the terms and conditions).

Conspicuousness is a question of law. *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482, 484 n.3 (9th Cir. 2020). Nevertheless, as the Second Circuit observed, "[i]nsofar as it turns on the reasonableness of notice, the enforceability of a web-based agreement is clearly a fact-intensive inquiry." *Meyer*,

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(or inquiry notice that a reasonable person would have known about[38]). Even so, some courts will simply hold as a

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868 F.3d at 76 (concluding that on a motion to compel arbitration, the appellate panel could determine that an agreement to arbitrate existed "where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law."). In general, online agreements will be found "valid where the existence of the terms was reasonably communicated to the user." *Id.*

[37]*See, e.g.*, *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 76 (2d Cir. 2017) ("Insofar as it turns on the reasonableness of notice, the enforceability of a web-based agreement is clearly a fact-intensive inquiry." *See Schnabel*, 697 F.3d at 124. Nonetheless, on a motion to compel arbitration, we may determine that an agreement to arbitrate exists where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law. "). Cases that fall into this category such as *Meyer* could equally have been characterized as involving express assent (because they involve notice and a manifestation of assent, typically through a click-through format) except that, where assent has been challenged, courts have analyzed them as involving implied assent.

[38]*See, e.g.*, *Ferrie v. DirecTV, LLC*, No. 3:15-CV-409 (JCH), 2016 WL 183474, at *11 (D. Conn. Jan. 12, 2016) (compelling arbitration and ruling that plaintiff "would have been on inquiry notice of the additional terms" containing the arbitration provision based on plaintiff's review of DirecTV advertisements that referenced "Additional Details" or "Additional Offers Details" that hyperlinked to the terms and conditions). "Where an offeree does not have *actual* notice of certain contract terms, he is nevertheless bound by such terms if he is on *inquiry* notice of them and assents to them through conduct that a reasonable person would understand to constitute assent." *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019) (affirming the lower court's finding of no inquiry notice; emphasis in original). Under New York law, courts will determine whether an offeree is on inquiry notice of contract terms based on whether they were obvious and called to the offeree's attention, which "often turns on whether the contract terms were presented to the offeree in a clear and conspicuous way." *Id.* For web-based contracts, courts should "look to the design and content of the relevant interface to determine if the contract terms were presented to the offeree in [a] way that would put them on inquiry notice of such terms." *Id.* As explained by one court applying Second Circuit law,

> Courts will give effect to hybridwrap terms [that prompt a user to manifest assent in connection with a dual-purpose action, such as creating an account] where the button required to perform the action manifesting assent (e.g., signing up for an account or executing a purchase) is located directly next to a hyperlink to the terms and a notice informing the user that, by clicking the button, the user is agreeing to those terms. *See, e.g., May v. Expedia, Inc*., No. 16-CV-1211 (RP) (ML), 2018 WL 4343445, at *3 (W.D. Tex. Jul. 19, 2018), *report and recommendation adopted*, 2018 WL 4343427 (W.D. Tex. Aug. 27, 2018); *Church v. Hotels.com L.P*., No. 18-CV-18 (RMG), 2018 WL 3130615, at *2 (D.S.C. Jun. 26, 2018); *Bernardino v. Barnes & Noble Booksellers, Inc*., No. 17-CV-4570 (LAK) (KHP), 2018 WL 671258 (S.D.N.Y. Jan. 31, 2018), *appeal dismissed*, 763 F. App'x 101 (2d Cir. Mar. 7, 2019); *Selden v. Airbnb, Inc*., No. 16-CV-933 (CRC), 2016 WL 6476934, at *5 (D.D.C. Nov. 1, 2016); *Forby v. One*

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matter of law that inquiry notice was not obtained based on what the court deems to be inadequate notice.[39]

This is not a function of black letter law—because a contract equally may be formed (according to its terms) by express or implied assent. Rather, it reflects the practical difficulties of litigating implied assent cases, where a defendant who denies notice potentially may create factual disputes that preclude summary judgment and plant doubt in the mind of a judge and jury (or where the issue of reasonable notice is evaluated without discovery that could establish actual knowledge of the Terms). Whereas an express assent case often may be resolved through motion practice—even where the defendant claims not to have provided as-

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Technologies, LP, No. 15-CV-757 (DRH) (PMF), 2016 WL 1321194 (S.D. Ill. Apr. 5, 2016); *Crawford v. Beachbody, LLC*, No. 14-CV-1583 (GPC) (KSC), 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5, 2014); *Starke v. Gilt Groupe, Inc.*, No. 13-CV-5497 (LLS), 2014 WL 1652225, at *3 (S.D.N.Y. Apr. 24, 2014). The more the hybridwrap design diverges from this basic layout—such as by placing the notice further away from the action button, cluttering the screen with potentially distracting content, or omitting the language explicitly saying that by performing the action the user agrees to be bound by the terms—the less likely courts are to find that inquiry notice has been provided.

Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019) (granting defendant's motion to compel arbitration based on inquiry notice where the plaintiff's wife's friend, acting as the wife's agent with her log-in credentials, was shown a notice stating that by signing up for the MOM service users would be bound by the Amazon Prime Terms and Conditions, and because the plaintiff, who subsequently used his wife's account for the transaction at issue, was bound based on equitable estoppel), *aff'd*, 815 F. App'x 612 (2d Cir. 2020). What the court in *Nicosia* refers to as *hybridwrap* in fact is a contract presented for express assent in conjunction with completing a transaction or registering for an account (which is the most common way that assent is sought online or via a mobile app).

[39]*See, e.g.*, *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 60-64 (1st Cir. 2018) (reversing the lower court's order compelling arbitration based on the finding that the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law, which the appellate panel held was a question to be decided by the court); *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019) (holding that users of the Huuuge casino smartphone app were not on constructive notice of Terms of Use accessible via the settings menu or scrolling through multiple screens of text before downloading the app); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-79 (9th Cir. 2014) (holding posted Terms accessible via a link from every page on the website did not put consumers on inquiry notice; "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.").

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sent[40]—implied assent may require a more fact-specific inquiry that cannot easily be proven short of trial (and may be difficult to prove at all if the defendant denies that he, she or it had notice). This assessment is borne out by the leading implied assent cases involving unilateral contracts posted online.

In *Specht v. Netscape Communications Corp.*,[41] the Second Circuit declined to enforce posted Terms where users were invited to download free software by clicking on a button

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[40]*See, e.g.*, *DeVries v. Experian Information Solutions, Inc.*, Case No. 16-cv-02953-WHO, 2017 WL 733096, at *5-7 (N.D. Cal. Feb. 24, 2017) (holding that a binding contract was formed, despite the plaintiff's argument that he did not consent to or have notice of the arbitration provision, where he pressed a "Submit Secure Order" button, directly above which was the statement "Click 'Submit Secure Order' to accept the Terms and Conditions above, acknowledge receipt of our Privacy Notice and agree to its terms, confirm your authorization for ConsumerInfo.com, Inc., an Experian company, to obtain your credit report and submit your secure order," where the phrases "Terms and Conditions" and "Privacy Notice" were in blue, "a different color than the rest of the text, indicating that they were active hyperlinks that the consumer could click to be directed to another webpage" and where, when a consumer clicked on the "Terms and Conditions" hyperlink, "an additional window would open within the consumer's web browser containing the entire text of the Terms and Conditions," including the arbitration provision); *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *5-9 (N.D. Cal. June 25, 2014) (concluding that plaintiffs accepted terms of service when they created accounts or registered products, actions that would have required express assent, but finding that plaintiffs who merely purchased products or visited the website without registering or creating accounts would not be bound absent some evidence of assent), *aff'd on other grounds*, 840 F.3d 1016 (9th Cir. 2016) (affirming the lower court's order compelling arbitration and holding that 23andMe's terms of service agreement was not unconscionable, without addressing contract formation); *Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009) (granting Expedia's motion to dismiss for improper venue, based on a forum selection clause in its User Agreement, where the plaintiff denied that he had provided express assent but the evidence showed that it was impossible for users to access their Expedia accounts without providing express assent, there was a link to the user agreement provided on the page for the listing at issue in the suit, and the plaintiff offered no evidence to support the argument that he somehow did not provide express assent or that perhaps someone else had done so without his knowledge); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006) (holding the defendant bound by terms, over his objection, where it was impossible to install plaintiff's software without providing express assent to them).

[41]*Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

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labeled "Download," where the sole reference to license terms would only have been visible to users if they had scrolled down the page beyond the Download button, where a link to the terms[42] was placed next to a request to "[p]lease review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software" which plaintiffs alleged they had never seen.[43] The Second Circuit explained that "a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms . . . ."[44] Judge (now U.S. Supreme Court Justice) Sotomayor, writing for herself and Judges Leval and McLaughlin, agreed with the lower court's conclusion that a reasonably prudent Internet user in similar circumstances would not have known or learned of the existence of the license terms before responding to Netscape's invitation to download free software.[45]

Specht ultimately turned on the fact that the notice to users was hidden, rather than conspicuous.[46] In the words of the panel, "[p]laintiffs were responding to an offer that did

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[42]In fact, the link merely led to a page entitled "License and Support Agreements" which contained a list of links to various agreements. A user would have had to review the list of license agreements and select the correct one in order to proceed via link to the page that actually displayed the license that Netscape sought to enforce in *Specht v. Netscape*. *See Specht v. Netscape Communications Corp.*, 306 F.3d 17, 24 (2d Cir. 2002).

[43]*Specht v. Netscape Communications Corp.*, 306 F.3d 17, 23–25 (2d Cir. 2002).

[44]*Specht v. Netscape Communications Corp.*, 306 F.3d 17, 29–30 (2d Cir. 2002).

[45]*Specht v. Netscape Communications Corp.*, 306 F.3d 17, 32–35 (2d Cir. 2002).

[46]*Specht* plausibly could, but should *not* be read as requiring only "unambiguous manifestation of assent . . . ." *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms are essential if electronic bargaining is to have integrity and credibility."). The court's discussion of inquiry notice—and the Second Circuit's subsequent decision in *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004)—make clear that express assent, while easier to rely upon at trial, is not necessarily required. Inquiry notice or "actual notice of circumstances sufficient to put a prudent man on inquiry" provides grounds for holding a party bound by the terms of an agreement in the absence of express assent. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 30 n.14 (2d Cir. 2002) (citing Califor-

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not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms."[47] The court further elaborated that "the fact that, given the position of the scroll bar on their computer screens, plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms."[48] As the court explained, "in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms."[49]

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nia law).

[47]306 F.3d at 31.

[48]306 F.3d at 31–32.

[49]306 F.3d at 32. Similarly, in *dicta* in *Lee v. Intelius Inc.*, 737 F.3d 1254 (9th Cir. 2013), the Ninth Circuit affirmed the district court's finding that a consumer had not entered into a contract with Intelius where the language and placement of prompts to the consumer was confusing. Although the Ninth Circuit affirmed the district court's refusal to compel arbitration on different grounds—finding that the alleged contract did not comply with Washington law, which requires that the identity of the contracting parties be disclosed in writing—the *Lee v. Intelius Inc.* panel went out of its way to explain why the text and placement of messaging to the consumer in *Intelius* was inadequate.

In that case, Lee had sued Intelius (which impleaded Adaptive Marketing) alleging that he had unknowingly purchased a monthly subscription to "Family Safety Report" from Adaptive Marketing in connection with a one-time transaction with Intelius (when Lee purchased a background check and credit report on Intelius's website). After Lee provided his credit card number and clicked to confirm his purchase on the Intelius website, he was directed to a new page that displayed "Thank You" in large black letters and, in smaller, "but still prominent black letters, 'your order has been successfully completed.' " *Id.* at 1256. The top of that page contained Intelius's colored logo and name and in smaller black letters its marketing slogan, "Live in the Know." *Id.* at 1256-67. Adaptive's name appeared nowhere on that page. Immediately below the "Thank You" message was a dark blue banner on which was written in large white and orange letters, "Take our 2008 Community Safety Survey and claim $10.00 CASH BACK when you try Family Safety Report." The "survey" consisted of two questions: (1) "Does your neighborhood have a sex offender alert program?"; and (2) "What card type did you use for your Intelius purchase today?" (with users given the option of selecting "credit card" or "debit card"). Below the survey, on the left-hand side of the page, was a box with an instruction in prominent white letters against a green

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background: "Please type your email address below." Below that, in small, light grey print, was written, "By typing your email address below, it will constitute your electronic signature and is your written authorization to charge/debit your account *according to the Offer Details to the right*." *Id.* at 1257 (emphasis added by the court). Lee was not asked to resupply his credit card number. Below the spaces for Lee's email address was written, "also in small, light grey print, 'By clicking "Yes" *I have read and agree to the Offer Details displayed to the right* and authorize Intelius to securely transfer my name, address, and credit/debit card information to Family Safety Report, a service provider of Intelius.' " *Id.* (emphasis added by the court). Below this was a large orange button with the words, written in prominent white letters, "YES And show my report." Below the orange button was a smaller button with the words, written in smaller, underlined dark grey letters, "No, show my report." The "report" to which the buttons referred was the report that Lee had just purchased from Intelius. The offer details were contained to the right of the box in a beige-colored box containing two paragraphs,

> written in small, light grey print that did not stand out prominently from the beige background. The paragraphs were headed by the words, also in small, light grey print, "OFFER DETAILS." The first paragraph was quite long. Inter alia, the paragraph stated that there was a "7–day FREE trial period" of the Family Safety Report, followed by a "membership fee of $19.95 per month. . . so long as you remain a member." The second paragraph, labeled "Disclaimers," was only three sentences long. The first two sentences stated, "Family Safety Report does not provide the Registered Sex offender Report. The report is administered and provided by Intelius and is *subject to their Terms of Site Use* and *Terms & Conditions*." (Emphasis added.)
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> Immediately below these two paragraphs were two hyperlinks labeled, in small, underlined black print, "Privacy Policy" and "Terms and Conditions." If Lee had clicked the "Terms and Conditions" hyperlink, he would have been sent to yet another webpage. This webpage contained a detailed agreement titled "TERMS OF MEMBERSHIP AND MEMBERSHIP AGREEMENT." The first sentence stated, "The following is the Membership Agreement between the Provider of this Membership Program ('We' and 'Us') and the enrolled member of this Membership Program ('You')." The identity of the "Provider" was nowhere disclosed in the agreement; nor was the name Adaptive ever mentioned in the agreement. Paragraph 10 of the agreement was an arbitration clause.

Id. The Ninth Circuit, in writing in *dicta* that Lee had not entered into a contract to purchase the Family Safety Report, stated that "[t]he webpage to which Lee was directed after he completed his purchase of the Intelius background check was designed to deceive him and others like him." *Id.* at 1259. The panel emphasized that the language of the prominent "YES" button told Lee that the effect of clicking on the button would be to allow him to see the report he had already purchased, while the "critical text on the new webpage was written in small, light-colored print." *Id.* at 1260.

The court also noted that although the transaction at issue took place in 2008, since 2010 the "data pass" method of sharing customers' credit card information with third parties and the practice of authorizing financial transactions by email address alone have been prohibited by the Restore Online Shoppers' Confidence Act (ROSCA). *Id.* at 1261, *citing* 15 U.S.C.A. §§ 8401 *et seq.*

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In a subsequent case, *Schnabel v. Trilegiant Corp.*,[50] the Second Circuit similarly held that an arbitration provision was unenforceable under either Connecticut or California law where it had been included in an email message sent after the parties had entered into an online contract, advising that the failure to cancel would amount to consent to arbitration. Circuit Court Judge Robert Sack, writing on behalf of himself and Judges Livingston and McLaughlin, held that the email did not provide inquiry notice where the parties had no prior relationship that would have suggested emailing terms would become part of the contract and where, unlike in shrinkwrap cases,[51] the consumer had no opportunity to learn of the terms when it opened the product. The court noted that the accessibility of the arbitration provision via a hyperlink on the enrollment screen "might have created a substantial question as to whether the provision was part of a contract between the parties" but had not been properly preserved on appeal. Accordingly, the court declined to enforce the provision.

An arbitration clause included in post-sale T&Cs was similarly found unenforceable in a later Second Circuit case, *Starke v. SquareTrade, Inc.*[52] The Second Circuit held that the plaintiff did not have reasonable notice for several reasons. First, the court found that SquareTrade had not directed Starke's attention to the Terms & Conditions hyperlink that contained the post-sale T&Cs because the first screen he confronted during the course of the underlying transaction told him only that he would receive a "Service Contract" via email. Thereafter, he received an email from Amazon.com, notifying him that he would receive a "service agreement" from SquareTrade. Starke subsequently received an email from SquareTrade purporting to enclose his "Contract." In the view of the Second Circuit panel, "[n]one of these various communications put Starke on notice that his 'Service Contract' would come in the form of a hyperlink, rather than in the body of the email."[53]

Second, the email did not prominently notify him that the post-sale T&Cs were accessible via a link. Approximately half of the email was comprised of a chart entitled "Your

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[50] *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012).

[51] *See supra* § 21.02.

[52] *Starke v. SquareTrade, Inc.*, 913 F.3d 279 (2d Cir. 2019).

[53] *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 292-93 (2d Cir. 2019).

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Protection Plan," and "[n]othing else in the email" stood out as "obviously being related to Starke's Protection Plan, and none of the language in the cluttered email directed Starke's attention to the hyperlink containing the Post-Sale T&Cs."[54]

Third, the email did not signal to Starke that he should click on the link or advise him that he would be deemed bound by the linked document, and the link was buried at the bottom of the email directly above the email footer and far below the second sentence of the email where Starke was told " 'You're all set!' encouraging him to look no further."[55] Comparing other Second Circuit cases (which are discussed later in this section),[56] the panel wrote that "[l]ike the interface in *Nicosia*, and in sharp contrast with the screen in *Meyer*, the interface here is cluttered with diverse text, displayed in multiple colors, sizes and fonts, and features various buttons and promotional advertisements that distract the reader from the relevant hyperlink."[57] The panel also considered the case distinguishable from *Meyer* because the "Terms & Conditions" hyperlink "was neither spatially nor temporally coupled with the transaction . . . because it was not provided near the portion of the Amazon purchase page actually requiring Starke's attention (that is, the 'Add to Cart' button), or indeed anywhere on the purchase page."[58]

Circuit Judge Gerard E. Lynch, writing for himself, Circuit Judge Christopher F. Droney, and Judge William K. Sessions III of the District of Vermont (who was sitting by designation), also rejected the argument that Starke was bound based on course of dealings, because Starke had transacted with SquareTrade on six prior occasions. The panel explained that "[t]he fact that Starke received emails with the same inconspicuous hyperlink on more than one occasion does not lead us to conclude that Starke had either actual or

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[54]*Starke v. SquareTrade, Inc.*, 913 F.3d 279, 293 (2d Cir. 2019).

[55]*Starke v. SquareTrade, Inc.*, 913 F.3d 279, 294 (2d Cir. 2019). The court observed that "[t]he placement of the 'Terms & Conditions' hyperlink in the email makes it hard to escape the inference that SquareTrade hoped the reader's eye would be drawn elsewhere." *Id.*

[56]*See Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

[57]*Starke v. SquareTrade, Inc.*, 913 F.3d 279, 293 (2d Cir. 2019).

[58]*Starke v. SquareTrade, Inc.*, 913 F.3d 279, 294 (2d Cir. 2019).

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inquiry notice of the Post-Sale T&C."[59]

The appellate panel made clear that *Starke* was decided based on the "totality of the circumstances" in that case and "in no way" stands for the proposition "that the terms of a contract may not be provided by a hyperlinked document. So long as the purchaser's attention is adequately directed to a conspicuous hyperlink that is clearly identified as containing contractual terms to which the customer manifests assent by completing the transaction or retaining the product or service, a hyperlink can be an effective device for specifying contract terms."[60]

For guidance, the panel outlined steps that could be taken in similar circumstances to make post-sale T&Cs enforceable:

> To provide conspicuous notice of the Post-Sale T&C, SquareTrade could have simply included a noticeable hyperlink on the Amazon purchase page directing consumers to review the terms and conditions. *See, e.g.*, *Nicosia*, 834 F.3d at 237–38 (noting that "Amazon chose not to employ a clickwrap mechanism," which is "certainly the easiest method of ensuring that terms are agreed to"); *Starkey*, 796 F.3d at 197 n.3 (noting that it would have been "simpler to resolve" this question had a clickwrap mechanism been used). And, even if SquareTrade was committed to providing the Post-Sale T&C via email, it could have done so in several more conspicuous ways, including by providing the Post-Sale T&C in the body of the email, providing an attachment to the email with the Post-Sale T&C, or by providing the "Terms & Conditions" hyperlink at the top of the email in a bigger font notifying the customer that the hyperlink is where he will find his "Service Contract," and that by rejecting the Protection Plan within the specific period, he would be deemed to have accepted those terms.[61]

Inquiry notice of an arbitration clause in website Terms and Conditions likewise was found lacking by the Second Circuit, applying California law, where the URL for the Terms was reprinted exactly in small print on a display advertisement inviting customers to send a text message to sign up to receive coupons for a free sandwich at the

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[59] *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 296 (2d Cir. 2019). The court noted that, in one instance, Starke received a confirmation email in which the complete terms and conditions were reprinted, but that version of the T&Cs did not contain the arbitration provision at issue. *See id.*

[60] *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 296-97 (2d Cir. 2019).

[61] *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 294 (2d Cir. 2019).

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restaurant where the sign was displayed.[62]

In *Nguyen v. Barnes & Noble Inc.*,[63] the Ninth Circuit held that an arbitration provision in a browsewrap contract was unenforceable even though it was accessible via a link from the bottom left hand corner of every single page on the defendant's website and from a link in close proximity to the buttons a user was required to click on to complete an online purchase.[64] The court explained that, absent evidence that the website user had actual knowledge of the agreement, "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."[65] The court further elaborated that "[w]hether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage."[66] Judge Noonan, writing for himself and Judges Wardlaw and Arizona District Court Judge Silver (who was sitting by designation), rejected the proposition that "the proximity or conspicuousness of the hyperlink alone is . . . enough to give rise to constructive notice."[67] Instead, the panel held that

> where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.[68]

The panel also rejected the argument that Nguyen was on inquiry notice because he was familiar with other websites governed by similar posted browsewrap terms, including his

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[62]*See Soliman v. Subway Franchisee Advertising Fund Trust, Ltd.*, 999 F.3d 828 (2d Cir. 2021).

[63]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

[64]*See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1174 (9th Cir. 2014).

[65]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

[66]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). Citing earlier cases, the panel observed that "[w]here the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement." *Id.*

[67]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178 (9th Cir. 2014).

[68]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178-79 (9th Cir. 2014).

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own personal website, *kevinkhoa.com*.[69] Citing other online contracting cases, the panel noted that, by contrast, courts are more amenable to enforce so-called browsewrap agreements where a website contains "an explicit textual notice that continued use will act as a manifestation of assent of the user's intent to be bound . . . ."[70]

The *Nguyen* court set a high bar for pleading and proving the existence of an online contract based on implied assent by not even allowing the merchant to attempt to prove that the plaintiff in that case was on inquiry notice based on his knowledge of how other websites operate, including his own.[71] The opinion, in part, may reflect the greater level of scrutiny given to arbitration provisions compared to other types of contracts. It also reflects a view of what constitutes reasonable notice as a matter of law that was hard to reconcile in 2014, when *Nguyen* was decided, and is even more difficult to do so today.[72]

The Ninth Circuit extended *Nguyen* five years later in holding that the Huuuge casino smartphone app's arbitration provision was not binding on a user who sued under

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[69]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014).

[70]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

[71]Unlike in *Nguyen*, the district court in *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190 (D. Mass. 2015), *aff'd on other grounds*, 873 F.3d 313, 323–25 (1st Cir. 2017), held that a user had inquiry notice of posted Terms and Conditions where the user upload page contained blue links to the Terms at the bottom of each page, and the links were conspicuously visible without scrolling beyond the "continue" button to the next screen and on the final screen prior to submission. 99 F. Supp. 3d at 196–98 (distinguishing *Nguyen*).

[72]The Ninth Circuit panel relied in part on "courts' traditional reluctance to enforce browsewrap agreements against individual consumers . . . ," which, in turn, it based on a law review article from 2011, and a second law review article from 2006 which surveyed cases decided in the preceding five years. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178 (9th Cir. 2014). What constituted reasonable notice to consumers 10-20 years ago, however, should not guide modern views of online contracting, given the greater sophistication of consumers today and the extent to which they routinely engage in internet and mobile commerce. *See Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 77–80 (2d Cir. 2017) (discussing a reasonable mobile phone user and how, in 2017, "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found.").

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Washington state's gambling and consumer protection laws, where the user claimed not to have had actual knowledge of the Terms of Use and the appellate panel found no constructive notice because the plaintiff

> was not required to assent to Huuuge's Terms before downloading or using the app—or at any point at all. Huuuge did not notify users that the app had terms and conditions, let alone put them in a place the user would necessarily see. Instead, a user would need to seek out or stumble upon Huuuge's Terms, either by scrolling through multiple screens of text before downloading the app or clicking the settings menu within the app during gameplay.[73]

Emphasizing that it is the movant's burden to establish the existence of an arbitration agreement, and characterizing the TOU at issue as a browsewrap agreement governed by the Ninth Circuit's decision in *Nguyen,* the panel rejected Huuuge's argument that anyone playing its game would have seen a link to its TOU in the app's setting menu, writing sarcastically that that there was "no reason to assume that users will click on the settings menu simply because it exists."[74] The court also rejected Huuuge's alternative argument for discovery, to establish actual knowledge, opining

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[73]*Wilson v. Huuuge, Inc.,* 944 F.3d 1212, 1220 (9th Cir. 2019).

[74]*Wilson v. Huuuge, Inc.,* 944 F.3d 1212, 1221 (9th Cir. 2019). Judge M. Margaret McKeown, writing for the unanimous panel, summarized the Ninth Circuit's view of the law after *Nguyen*, and Huuuge's deficient presentation, as follows (citing *Nguyen*):

> Users are put on constructive notice based on the conspicuousness and placement of the terms and conditions, as well as the content and overall design of the app. *Id*. at 1177. For example, courts will not enforce agreements where the terms are "buried at the bottom of the page or tucked away in obscure corners of the website," especially when such scrolling is not required to use the site. *Id*. (citing to *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 23 (2d Cir. 2002)). Similarly, courts decline to enforce agreements where the terms are available only if users scroll to a different screen, *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), complete a multiple-step process of clicking non-obvious links, *Van Tassell v. United Mktg. Grp.*, 795 F. Supp. 2d 770, 792-93 (N.D. Ill. 2011), or parse through confusing or distracting content and advertisements, *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 293 (2d Cir. 2019); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 237 (2d Cir. 2016). Even where the terms are accessible via a conspicuous hyperlink in close proximity to a button necessary to the function of the website, courts have declined to enforce such agreements. *Nguyen*, 763 F.3d at 1178-79.
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> Huuuge's app is littered with these flaws. When downloading the app, the Terms are not just submerged—they are buried twenty thousand leagues under the sea. Nowhere in the opening profile page is there a reference to the Terms. To find a reference, a user would need to click on an ambiguous button to see the app's full profile page and scroll through multiple screen-lengths of similar-looking paragraphs. Once the user unearths the paragraph referencing the Terms, the page does not even inform the user that he will be bound by those

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that "Huuuge wanted it both ways—if it won the motion to compel, great; if it didn't win, only then did it want discovery."[75]

Although the Ninth Circuit panel was critical of the placement of the TOU in the Huuuge app, reasonable app users arguably know that Terms typically are accessible from settings in most mobile apps. This presumably could have been presented through expert testimony. Under *Nguyen,* however, district courts in the Ninth Circuit, unlike the Second Circuit, seemingly need not even evaluate reasonableness if

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terms. There is no box for the user to click to assent to the Terms. Instead, the user is urged to read the Terms—a plea undercut by Huuuge's failure to hyperlink the Terms. This is the equivalent to admonishing a child to "please eat your peas" only to then hide the peas. A reasonably prudent user cannot be expected to scrutinize the app's profile page with a fine-tooth comb for the Terms.

Accessing the terms during gameplay is similarly a hide-the-ball exercise. A user can view the Terms through the "Terms & Policy" tab of the settings menu. Again, the user is required to take multiple steps. He must first find and click on the three white dots representing the settings menu, tucked away in the corner and obscured amongst the brightly colored casino games. The "Terms & Policy" tab within the settings is buried among many other links, like FAQs, notifications, and sound and volume. The tab is not bolded, highlighted, or otherwise set apart.

Wilson v. Huuuge, Inc., 944 F.3d 1212, 1220–21 (9th Cir. 2019).

[75] *Wilson v. Huuuge, Inc.,* 944 F.3d 1212, 1220 (9th Cir. 2019); *see also Benson v. Double Down Interactive, LLC*, 798 F. App'x 117, 118-19 (9th Cir. 2020) (applying *Wilson v. Huuuge* in affirming the denial of defendant's motion to compel arbitration, holding that the plaintiff never received either actual or constructive notice of defendant's Terms of Use). The court in *Benson* explained:

As in *Wilson*, a user would have to closely scrutinize Double Down's page on the Apple App Store in order to find the Terms of Use during the downloading process. There is no reference to them on the opening screen of Double Down's page; instead, they are buried at the bottom of the page and accessible only after scrolling past multiple screens and images that a user need not view to download the platform." . . . And during gameplay on Double Down's mobile platform, finding the Terms of Use is just as much of a "hide-the-ball exercise" as it was in *Wilson*: A user must first locate a small settings menu in a corner of the screen that is "obscured amongst the brightly colored casino games," and then find the "Terms of Use" heading in the pop-up settings menu, which is not "bolded, highlighted, or otherwise set apart" from the four other headings in that menu. . . . Benson also never received constructive notice of Double Down's Terms of Use. When a user first connects to the Facebook platform, the Terms of Use are accessible through a gray "App Terms" hyperlink on a pop-up screen that is below and smaller than all other text on the screen.

Id. (citations and footnote omitted). The appellate panel, in the nonprecential opinion, also rejected the arguments that the *Terms of Use* hyperlink and accompanying notification that were accessible during gameplay on the Facebook platform, or plaintiff's repeated use of the website and mobile application, were relevant to establishing reasonable notice. *See id.* at 119.

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the Terms fall into the category of a so-called browsewrap agreement (or one where implied, rather than express assent, is sought). The panel in *Wilson v. Huuuge* plainly believed that something closer to express assent (clear notice next to a button) would be required for inquiry notice.[76]

In courts in the Ninth Circuit, where constructive or inquiry notice may be decided as a matter of law based on the layout of a website or app with no opportunity for remand for discovery and consideration of actual notice,[77] it could be a strategic mistake after *Wilson v. Huuuge* for companies not to seek proof of actual knowledge before moving to compel arbitration (or making any motion dependent on enforcement of online or mobile Terms) if they cannot meet the high bar established by circuit court case law. Of course, as a practical matter, plaintiffs represented by competent counsel rarely concede actual knowledge.

The Ninth Circuit's approach in *Nguyen*—where notice of Terms was found on every single page of a website—and *Huuuge* (where the Terms were accessible from the settings in the app) arguably represents the high water mark of judicial hostility to online contract formation based on implied assent and constructive notice.

By contrast, in *Register.com, Inc. v. Verio, Inc.*,[78] the Second Circuit held that Verio was bound by Register.com's posted Terms, even though express assent was neither sought nor obtained, because Verio acknowledged that it was aware that Register.com purported to condition use of its site on posted Terms. In that case, Register.com, a domain name registrar, was contractually required to make the

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[76]The lower court had emphasized that the notice provided to consumers ("Read our Terms of Use") did not explicitly state that downloading or using the app would be construed as assent (and the notice was not found in close proximity to the download button). *See Wilson v. Huuuge, Inc.*, 351 F. Supp. 3d 1308, 1314-15 (W.D. Wash. 2018), *aff'd,* 944 F.3d 1212 (9th Cir. 2019). The Ninth Circuit noted this as well as the fact that Huuuge, in its app store listing, provided the URL where its Terms could be accessed, rather than a live link (which presumably would not have been allowed by the app store provider). *See id.* at 1214. Nevertheless, the TOU was accessible from settings in the app.

[77]*Cf. Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 226 (2d Cir. 2016) (remanding for consideration of whether the plaintiff had actual notice of Amazon's Terms); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254 (E.D.N.Y. 2019) (compelling arbitration, on remand from the Second Circuit, following discovery), *aff'd*, 815 F. App'x 612 (2d Cir. 2020).

[78]*Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

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contact information of domain name registrants from the WHOIS database available free of charge to the public for any lawful purpose. When the database was queried, however, Register.com displayed a purported restriction on use in the results screen. Specifically, users were shown a restrictive legend purporting to prohibit recipients from using the data to transmit "mass unsolicited, commercial advertising or solicitation via email" (or in connection with mail or telephone solicitations).[79]

Verio used bots (or intelligent agent software) to access the site and copy the contact information of new registrants, who it then solicited via email, telemarketing and direct mail marketing solicitations.

Verio acknowledged that it was aware of the restrictions that Register.com purported to impose on users, but argued that it was not bound by them because the legend did not appear on the screen until after Verio had queried the database and received the desired information. Judge Leval, writing for a majority of the panel,[80] however, found Verio bound by the terms, writing that:

> It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.[81]

The court distinguished *Specht v. Netscape*, writing that in

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[79]*Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 396 (2d Cir. 2004). Register.com initially prohibited solicitation by email, mail or telephone. Its agreement with ICANN, however, prohibited it from restricting access to the data for any lawful purpose except mass unsolicited email. *See supra* § 11.02. Register.com therefore narrowed its policy to just prohibiting email solicitations.

With respect to the earlier policy, the Second Circuit rejected Verio's argument that it could not be held liable for telephone and mail solicitations given the terms of Register.com's agreement with ICANN because that agreement provided that there were no third-party beneficiaries. The Second Circuit therefore analyzed Verio's potential liability on the assumption that Register.com was legally authorized to demand that users of WHOIS data from its system refrain from using it for mass solicitation by mail and telephone, as well as by email.

[80]Judge Fred I. Parker participated in deliberations but passed away before the decision was finalized. A draft opinion that he had prepared, which would have reversed the lower court, was included in an appendix to the decision as, in effect, a dissenting opinion. *See* 356 F.3d. at 395 n.1 & 406-44 (Draft Opinion of Judge Parker).

[81]*Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402 (2d Cir. 2004)*, cit-*

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that case "[t]here was no basis for imputing to the downloaders of Netscape's software knowledge of the terms on which the software was offered" whereas in this case Verio had "admitted that, in entering Register[.com]'s computers to get the data, it was fully aware of the terms on which Register[.com] offered the access."[82]

Judge Leval emphasized that Verio's argument that it never became contractually bound might have been persuasive "if its queries addressed to Register[.com]'s computers had been sporadic and infrequent."[83] He explained:

> If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register's conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. Furthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio's argument fails.
>
> The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples—50 cents apiece." D does not pay for the

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ing Restatement (Second) of Contracts § 69(1)(a) (1981) ("[S]ilence and inaction operate as an acceptance . . . [w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation."); 2 Richard A. Lord, Williston on Contracts § 6:9 (4th ed. 1991) ("[T]he acceptance of the benefit of services may well be held to imply a promise to pay for them if at the time of acceptance the offeree has a reasonable opportunity to reject the service and knows or has reason to know that compensation is expected."); Arthur Linton Corbin, Corbin on Contracts § 71 (West 1 vol. ed. 1952) ("The acceptance of the benefit of the services is a promise to pay for them, if at the time of accepting the benefit the offeree has a reasonable opportunity to reject it and knows that compensation is expected."); *Jones v. Brisbin*, 41 Wash. 2d 167, 172, 247 P.2d 891 (1952) ("Where a person, with reasonable opportunity to reject offered services, takes the benefit of them under circumstances which would indicate, to a reasonable man, that they were offered with the expectation of compensation, a contract, complete with mutual assent, results."); *Markstein Bros. Millinery Co. v. J.A. White & Co.*, 151 Ark. 1, 235 S.W. 39 (1921) (holding a buyer of hats bound to pay when he failed to return the hats to the seller within five days of inspection, as the seller had requested in a clear and obvious notice statement).

[82] *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402 (2d Cir. 2004).

[83] *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004).

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> apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.
>
> P sues D in contract for the price of the apples taken. D defends on the ground that on no occasion did he see P's price notice until after he had bitten into the apples. D may well prevail as to the first apple taken. D had no reason to understand upon taking it that P was demanding the payment. In our view, however, D cannot continue on a daily basis to take apples for free, knowing full well that P is offering them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.
>
> Verio's circumstance is effectively the same. Each day Verio repeatedly enters Register's computers and takes that day's new WHOIS data. Each day upon receiving the requested data, Verio receives Register's notice of the terms on which it makes the data available-that the data not be used for mass solicitation via direct mail, email, or telephone. Verio acknowledges that it continued drawing the data from Register's computers with full knowledge that Register offered access subject to these restrictions. Verio is no more free to take Register's data without being bound by the terms on which Register offers it, than D was free, in the example, once he became aware of the terms of P's offer, to take P's apples without obligation to pay the 50-cent price at which P offered them.[84]

Judge Leval also stressed that Verio's choice, like that of the defendant in the apple stand hypothetical, "was either to accept the offer of contract, taking the information [or apples] subject to the terms of the offer, or, if the terms were not acceptable, to decline to take the benefits."[85]

On the other hand, in *Nicosia v. Amazon.com, Inc.*,[86] the Second Circuit, following *Schnabel* and *Specht* and citing with approval the Ninth Circuit's ruling in *Nguyen,* reversed a lower court order dismissing plaintiff's complaint, holding that whether the plaintiff was on inquiry notice of contract terms, including an arbitration clause, under Washington law, which governed the dispute, presented a question of fact where the user was not required to specifically manifest assent to the additional terms by clicking "I agree" and where the hyperlink to contract terms was not "conspicuous

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[84] *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401–02 (2d Cir. 2004).

[85] *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

[86] *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

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in light of the whole webpage." Quoting *Schnabel,* Judge Denny Chin, writing for himself and Circuit Judges Robert Sack and Raymond J. Lohier, Jr., explained that "[w]here there is no actual knowledge of contract terms, 'an offeree is still bound by the provision if he or she is on *inquiry* notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent."[87]

Judge Chin reiterated the Second Circuit's preference for clickwrap agreements "which typically require[e] users to click an 'I agree' box after being presented with a list of terms of use" over a so-called "browsewrap" agreement, which "involve[s] terms and conditions posted via hyperlink, commonly at the bottom of the screen, and do not request an express manifestation of assent" which require "courts often to consider whether a website user has actual or constructive notice of the conditions."[88] He elaborated that "[w]hether there was notice of the existence of additional contract terms presented on a webpage depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous. . . . Thus, when terms are linked in obscure sections of a webpage that users are unlikely to see, courts will refuse to find constructive notice."[89] In this case, because Nicosia did not admit that he created an account with Amazon and disputed the accuracy and authenticity of the 2008 registration agreement, Judge Chin wrote that the district court erred in relying on it in evaluating Amazon's motion to dismiss.

At issue in *Nicosia* was a click through contract where the appellate court took issue with the placement and clarity of the language presented to a user. In that case, the Amazon Order Page included the heading "Review your order" near the top of the page, but Judge Chin noted that "the critical sentence appeared in smaller font: 'By placing your order, you agree to Amazon.com's privacy policy and conditions of use . . . [with t]he phrases 'privacy notice' and 'conditions of use' . . . in blue font, indicating that they are clickable links

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[87]*Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (emphasis in original), *quoting Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012).

[88]*Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (citing *Schnabel*, *Register.com* and *Specht*).

[89]*Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016).

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to separate webpages.' "[90] The page also included links to Amazon's privacy policy and Conditions of Use, which were featured in blue at the bottom of the page, next to Amazon's copyright notice.[91] The court noted, however, that unlike a typical click-through agreement, users were asked to click on a button that said "Place your order" rather than "I agree," which Judge Chin wrote "does not specifically manifest assent to the additional terms. . . ."[92] Judge Chin continued:

> Nothing about the "place your order" button alone suggests that additional terms apply, and the presentation of terms is not directly adjacent to the "Place your order" button so as to indicate that a user should construe clicking as acceptance. . . . The message itself—"By placing your order, you agree to Amazon's . . . conditions of use—is not bold, capitalized, or conspicuous in light of the whole webpage. . . . Proximity to the top of a webpage does not necessarily make something more likely to be read in the context of an elaborate webpage design. *See Nguyen,* 763 F.3d at 1179 ("[E]ven close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice."). There are numerous other links on the webpage, in several different colors, fonts, and locations, which generally obscure the message. . . . Although it is impossible to say with certainty based on the record, there appear to be between fifteen and twenty-five links on the Order Page, and various text is displayed in at least four font sizes and six colors . . . , alongside multiple buttons and promotional advertisements. Further, the presence of customers' personal address, credit card information, shipping options, and purchase summary are sufficiently distracting so as to temper whatever effect the notification has. *See Nguyen,* 763 F.3d at 1179 ("Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.").
>
> To draw on Judge Leval's analogy in *Register.com*, it is as if an apple stand visitor walks up to the shop and sees, above the basket of apples, a wall filled with signs. Some of those signs contain information necessary for her purchase, such as price, method of payment, and delivery details, and are displayed prominently in the center of the wall. Others she may quickly disregard, including advertisements for other fruit stands. Among them is a sign binding her to additional

[90] *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236 (2d Cir. 2016).

[91] *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236 (2d Cir. 2016).

[92] *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236 (2d Cir. 2016).

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> terms as a condition of her purchase. Has the apple stand owner provided reasonably conspicuous notice? We think reasonable minds could disagree.[93]

Judge Chin reiterated that the court was not holding that there was no objective manifestation of intent as a matter of law; just that "reasonable minds could disagree on the reasonableness of notice."[94] Amazon subsequently prevailed on remand in compelling arbitration, based on a finding that its Terms and Conditions were enforceable against Nicosia.[95] The Second Circuit's opinion in *Nicosia* nevertheless makes it potentially more difficult for service providers to obtain dismissal of complaints at the outset of a case where a plaintiff sues over matters covered by website or mobile Terms and Conditions if the user, no matter how implausibly, disputes that he or she entered into Terms, even where assent was a condition of the transaction at issue in the lawsuit. The Second Circuit opinion thus treats as plausible a scenario that typically would be *implausible* today—namely, that a consumer sophisticated enough to purchase goods or services online is nevertheless unaware that he or she will be bound by Terms when prompted to assent to an online contract. Purchasers of products on Amazon.com and other ecommerce websites are not like consumers at an apple cart who can ignore various signs placed before them and who, fifteen years earlier, in 2001, when *Register.com* was decided, might well have been less sophisticated about online contract formation than they are today.[96]

In contrast to *Nicosia,* the Second Circuit, in *Meyer v. Uber*

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[93]*Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 237 (2d Cir. 2016) (footnote omitted).

[94]*Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 238 (2d Cir. 2016).

[95]*See Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254 (E.D.N.Y. 2019) (granting defendant's motion to compel arbitration based on inquiry notice where the plaintiff's wife's friend, acting as the wife's agent with her log-in credentials, was shown a notice stating that by signing up for the MOM service users would be bound by the Amazon Prime Terms and Conditions, and because the plaintiff, who subsequently used his wife's account for the transaction at issue, was bound based on equitable estoppel), *aff'd*, 815 F. App'x 612 (2d Cir. 2020).

[96]As a different judge observed, perhaps more realistically in 2016, in enforcing an online contract:

> There is also a wider point to be made. . . . The act of contracting for consumer services online is now commonplace in the American economy. Any reasonably-active adult consumer will almost certainly appreciate that by signing up for a particular service, he or she is accepting the terms and conditions of the provider. Notifications to that effect—be they check boxes or hyperlinks—

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Technologies, Inc.,[97] held that Uber's presentation of its Terms of Service provided reasonably conspicuous notice as a matter of law under California law, in an opinion also written by Judge Chin. Writing on behalf of himself and Judges Raggi and Carney, Judge Chin explained that while the reasonableness of notice is a "fact-intensive inquiry" a court nevertheless may determine that inquiry notice has been established as a matter of law where (1) notice was reasonably conspicuous and (2) manifestation of assent was unambiguous.[98] For illustrative purposes, screen shots from both *Nicosia* and *Meyer v. Uber Technologies* are reprinted below:

> abound. To be sure, few people may take time to actually read the user agreements. But ignorance of the precise terms does not mean that consumers are unaware they are entering contracts by signing up for internet-based services. So, while the record is silent as to Mr. Selden's particular history with e-commerce, the prevalence of online contracting in contemporary society lends general support to the Court's conclusion that Selden was on notice that he was entering a contract with Airbnb in this case.

Seldon v. Airbnb, Inc., Case No. 16-cv-00933 (CRC), 2016 WL 6476934, at *5 (D.D.C. Nov. 1, 2016) (applying California law in holding that "Airbnb's mobile sign-up screen adequately placed Selden on notice of Airbnb's Terms of Service, and . . . he assented to those terms by clicking the sign-up box and using the service.. . .").

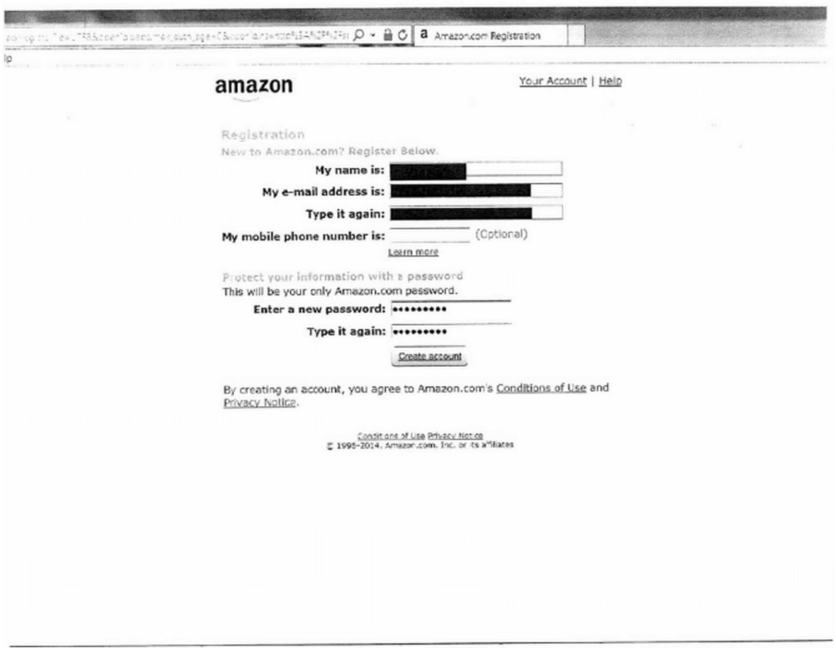
[97] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017).

[98] *See Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 76 (2d Cir. 2017). Judge Chin explained that

> Courts routinely uphold clickwrap agreements for the principal reason that the user has affirmatively assented to the terms of agreement by clicking "I agree." *See Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (collecting cases). Browsewrap agreements, on the other hand, do not require the user to expressly assent. . . . "Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." *Nguyen*, 763 F.3d at 1176 (citation omitted) . . . .

Meyer, 868 F.3d at 75. *Meyer* effectively abrogated a number of district court opinions from within the Second Circuit that pre-date *Meyer* and are inconsistent with it.

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Nicosia v. Amazon.com, Inc., 834 F.3d 220 (2d Cir. 2016)[99]

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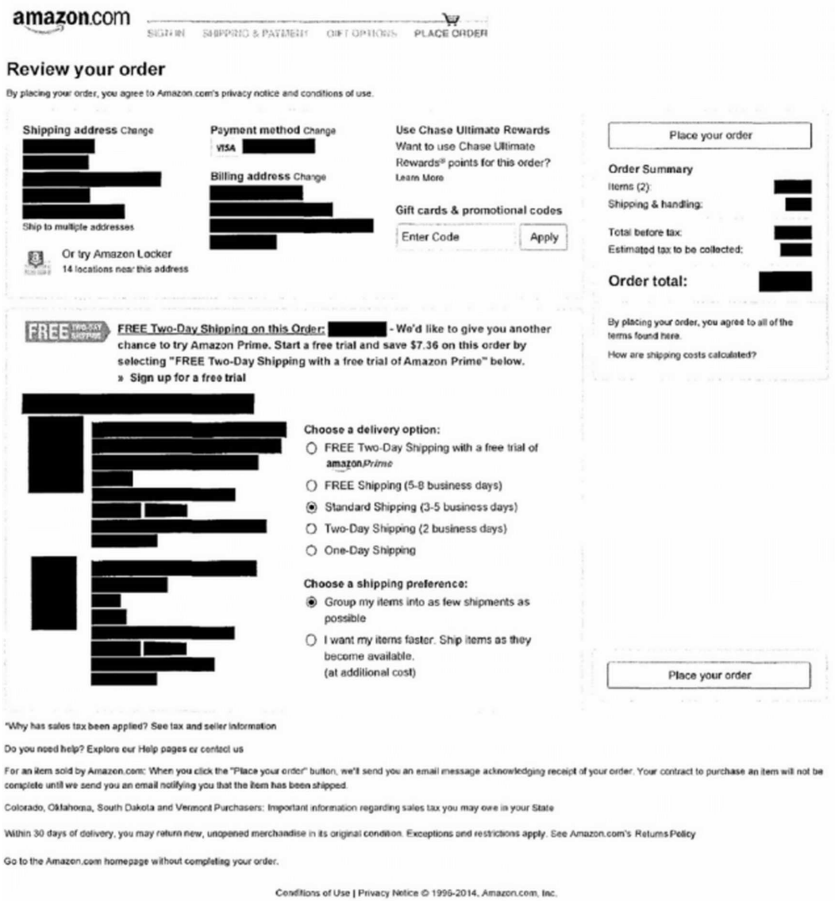
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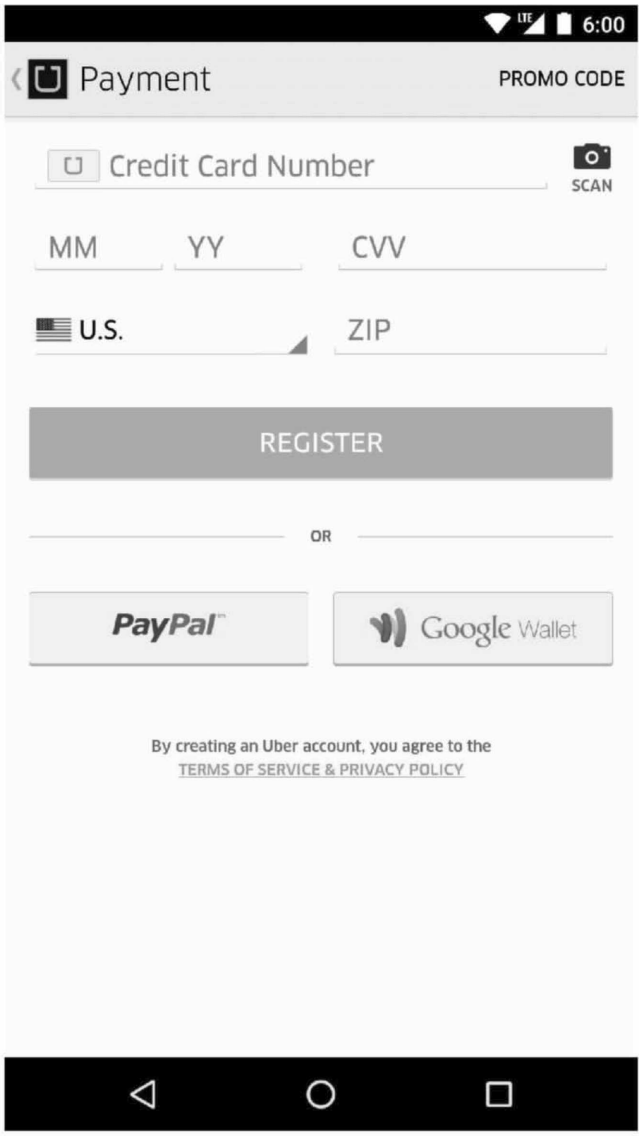
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Nicosia v. Amazon.com, Inc., 834 F.3d 220 (2d Cir. 2016)[101]

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Meyer v. Uber Technologies, Inc., 868 F.3d 66 (2d Cir. 2017)[102]

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Meyer v. Uber Technologies, Inc., 868 F.3d 66 (2d Cir. 2017)[103]

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Meyer v. Uber Technologies, Inc., 868 F.3d 66 (2d Cir. 2017)[104]

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Judge Chin characterized the Uber interface as follows:

> The Payment Screen is uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account or to connect the user's pre-existing PayPal account or Google Wallet to the Uber account, and the warning that "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration. The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service. Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined.[105]

This presentation, Judge Chin wrote, differed sharply from the screen interface considered in *Nicosia,* which he wrote "contained, among other things, summaries of the user's purchase and delivery information, 'between fifteen and twenty-five links,' 'text . . . in at least four font sizes and six colors," and several buttons and advertisements . . . . Furthermore, the notice of the terms and conditions in *Nicosia* was 'not directly adjacent' to the button intended to manifest assent to the terms, unlike the text and button at issue [in *Uber*] . . . ."[106] Judge Chin further observed that "[i]n addition to being spatially coupled with the mechanism

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[105]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 78 (2d Cir. 2017). The screen flow was described by the court as follows:

> The first screen, at which the user arrives after downloading the application and clicking a button marked "Register," is labeled "Register" and includes fields for the user to enter his or her name, email address, phone number, and a password (the "Registration Screen"). The Registration Screen also offers the user the option to register via a Google+ or Facebook account. According to Uber's records, Meyer did not sign up using either Google+ or Facebook and would have had to enter manually his personal information.
>
> After completing the information on the Registration Screen and clicking "Next," the user advances to a second screen labeled "Payment" (the "Payment Screen"), on which the user can enter credit card details or elect to make payments using PayPal or Google Wallet, third-party payment services. According to Uber's records, Meyer entered his credit card information to pay for rides. To complete the process, the prospective user must click the button marked "REGISTER" in the middle of the Payment Screen.
>
> Below the input fields and buttons on the Payment Screen is black text advising users that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." . . . The capitalized phrase, which is bright blue and underlined, was a hyperlink that, when clicked, took the user to a third screen containing a button that, in turn, when clicked, would then display the current version of both Uber's Terms of Service and Privacy Policy.

Id. at 69-71 (footnotes omitted).

[106]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 78 (2d Cir. 2017),

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for manifesting assent—*i.e.,* the register button—the notice is temporally coupled . . . . [N]otice of the Terms of Service is provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they apply . . . . [A] reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account."[107]

Judge Chin also found the language used by Uber to be reasonable, writing that " '[b]y creating an Uber account, you agree' is a clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms."[108]

In *Meyer*, the Second Circuit elaborated on what constitutes a reasonably prudent mobile smartphone user, in recognition of the extent to which most consumers download and use apps on smartphones, rather than based on the theoretical concerns about the adequacy of inquiry notice expressed in some other cases. Citing statistics showing that nearly two-thirds of American adults owned a smartphone in 2015 and 89% of smartphone users used their devices to access the Internet, Judge Chin held that "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found."[109]

Judge Chin also reframed in a more reasonable way the proliferation of wrap-formative buzzword terms to describe online and mobile contracts, writing that "[o]f course, there are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories."[110] While acknowledging Judge Weinstein's characterization of *scrollwraps* and *sign-in-*

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quoting Nicosia v. Amazon.com, Inc., 834 F.3d 220, 236-37 (2d Cir. 2016).

[107] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 78 (2d Cir. 2017).

[108] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

[109] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 77-78 (2d Cir. 2017).

[110] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017).

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wraps,[111] Judge Chin cautioned that classification of web-based contracts alone, however, does not resolve the notice inquiry."[112]

The Second Circuit will find a unilateral contract binding short of click-through assent or a party's admission that they were aware of the existence of terms, "where the existence of terms was reasonably communicated to the user."[113] While the reasonableness of notice is a "fact-intensive inquiry" Judge Chin explained that on a motion to compel arbitration a court may determine that an agreement to arbitrate has been formed as a matter of law "where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent [was] unambiguous . . . ."[114]

Judge Chin approved expressly the practice of making Terms of Service available only by hyperlink, writing that this "does not preclude a determination of reasonable notice."[115] He explained that "[a]s long as the hyperlinked text was itself reasonably conspicuous—and we conclude that it was [in *Uber*]—a reasonably prudent smartphone user would have constructive notice of the terms."[116] He added that, "[w]hile it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice."[117]

With respect to manifestation of assent, Judge Chin

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[111]*See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 395-99 (E.D.N.Y. 2015). A so-called *scrollwrap* agreement, according to Judge Weinstein, requires a user to scroll through the terms before the user can assent to the contract by clicking on an "I agree" button. *See id.* at 398.

A *sign-in-wrap* agreement, by contrast, notifies a user of the existence of terms of use but instead of providing an "I agree" button, advises the user that he or she is agreeing to the terms when registering or signing up for the site or service. *See id.* at 399-400; *see generally supra* § 21.03[1] (identifying different permutations for contract formation explained in court opinions and criticizing the use of jargon in place of principles of black letter law).

[112]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017), *citing* Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 Md. L. Rev. 452, 466 (2013).

[113]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 76 (2d Cir. 2017).

[114]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 76 (2d Cir. 2017).

[115]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 78 (2d Cir. 2017).

[116]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

[117]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

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concluded that "[a]lthough Meyer's assent to arbitration was not express, . . . it was unambiguous in light of the objectively reasonable notice of the terms . . . ."[118] Judge Chin explained:

> A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not. The fact that clicking the register button had two functions—creation of a user account and assent to the Terms of Service—does not render Meyer's assent ambiguous. The registration process allowed Meyer to review the Terms of Service prior to registration, unlike web platforms that provide notice of contract terms only after the user manifested his or her assent. Furthermore, the text on the Payment Screen not only included a hyperlink to the Terms of Service, but expressly warned the user that by creating an Uber account, the user was agreeing to be bound by the linked terms. Although the warning text used the term "creat[e]" instead of "register," as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take.[119]

Judge Chin also found that the "transactional context of the parties' dealings" reinforced this conclusion: "Meyer located and downloaded the Uber App, signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with Uber. The registration process clearly contemplated some sort of continuing relationship between the putative user and Uber, one that would require some terms and conditions, and the Payment Screen provided clear notice that there were terms that governed that relationship."[120]

Meyer and *Nacosia* provide the book ends for evaluating reasonable notice of mobile and online consumer contracts in the Second Circuit.[121] This analysis blurs the distinction between express and implied assent, focusing instead of the

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[118] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

[119] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 79-80 (2d Cir. 2017).

[120] *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 80 (2d Cir. 2017).

[121] *See, e.g.*, *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 292-97 (2d Cir. 2019) (holding an arbitration provision in post-transaction Terms & Conditions unenforceable because the plaintiff was not provided with reasonable notice where a hyperlink was provided but was spatially and temporally "decoupled" from the transaction and placed inconspicuously at the bottom of an email just above the footer and well below text inform-

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reasonableness of notice where a consumer claims to have been unaware of the existence of a contract.

A year after the Second Circuit decided *Meyer v. Uber Technologies, Inc.*,[122] the First Circuit, in *Cullinane v. Uber Technologies, Inc.*,[123] reached a different result in evaluating a very similar screen presentation.

In *Cullinane*, the First Circuit reversed the lower court's order compelling arbitration based on its finding that the notice of terms presented to consumers was not reasonably conspicuous under Massachusetts law, where Uber's "Terms of Service & Privacy Policy" hyperlink "did not have the common appearance of a hyperlink" because it was not "blue and underlined" but instead was presented in a gray rectangular box in white bold text, and where the content on the "Link Screen" and "Link Payment" screens contained other terms displayed with similar features, which, in the view of the First Circuit, diminished the conspicuousness of the "Terms of Service & Privacy Policy link and notice. Copies of the two screen shots at issue in that case—one or the other of which were seen by each of the plaintiffs in that case and both of which included links to Uber's Terms of Service and Privacy Policy with the language "By creating an Uber account, you agree to the Terms of Service & Privacy Policy"—are reprinted below:

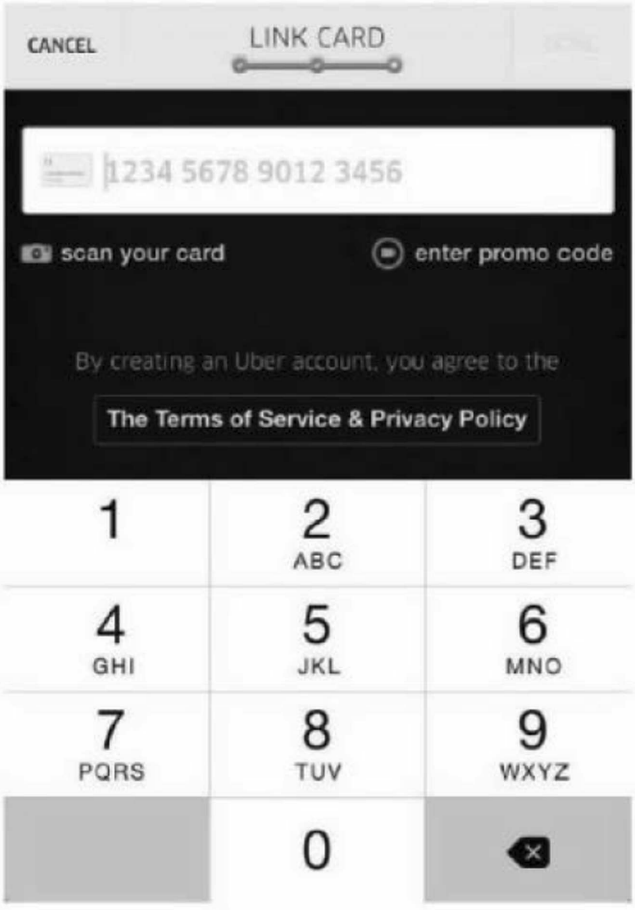
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ing the recipient that " 'You're all set!' encouraging him to look no further."); *Sultan v. Coinbase, Inc.*, 354 F. Supp. 3d 156, 158-62 (E.D.N.Y. 2019) (compelling arbitration where the plaintiff created a Coinbase account online by entering his name, email address, and password, and affirmatively checked a box agreeing to Coinbase's User Agreement (which included an arbitration provision) and Privacy Policy, both of which were accessible via links, where the court deemed the presentation to be closer to the one in *Meyer* than the interface at issue in *Nicosia*). In *Starke,* which is analyzed earlier in this section in connection with implied assent cases, the Second Circuit affirmed the lower court's order denying defendant's motion to compel arbitration, where the panel found that the notice provided more closely resembled the screen presentation in *Nicosia* than in *Meyer.* In so ruling, however, the panel emphasized that it was *not* holding that the format used in *Meyer* was the only effective way to use hyperlinks, although it noted "that the clean, uncluttered, and conspicuous labeling of the location and binding nature of the terms in the hyperlinked document [in *Meyer*] can be used as a model that this Court has found effective . . . ." *Id.* at 297.

[122]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017).

[123]*Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018).

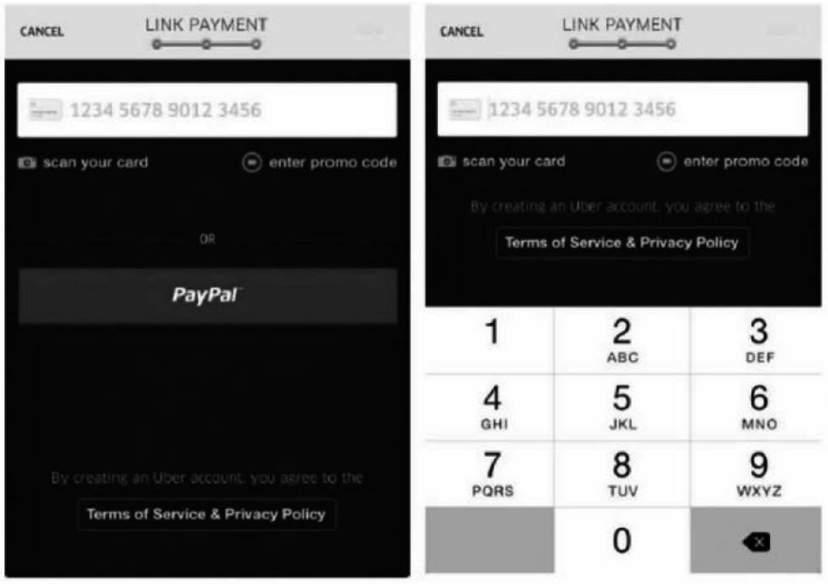
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Cullinane v. Uber Technologies, Inc., 893 F.3d 53 (1st Cir. 2018)[124]

[124]A color reproduction of this image is available on the website for this treatise, http://www.ianballon.com/uploads/3/7/5/7/37570981/case_samples.pdf.

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Cullinane v. Uber Technologies, Inc., 893 F.3d 53 (1st Cir. 2018)[125]

[125]A color reproduction of this image is available on the website for this treatise, http://www.ianballon.com/uploads/3/7/5/7/37570981/case_samples.pdf.

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The district court in *Cullinane* had granted Uber's motion to compel arbitration, holding that "[t]he language surrounding the button leading to the Agreement is unambiguous in alerting the user that creating an account will bind her to the Agreement. And the word 'Done,' although perhaps slightly less precise than 'I accept,' or 'I agree,' makes clear that by clicking the button the user has consummated account registration, the very process that the notification warns users will bind them to the Agreement."[126]

The First Circuit, in reversing the district court, cited to *Meyer v. Uber Technologies, Inc.*,[127] but did not discuss or analyze its holding (other than to note that the hyperlinks in that case had been displayed in blue), even though the contract formation process was similar. The First Circuit panel reached a decision that cannot easily be harmonized with *Meyer* except in the most superficial of ways.

Circuit Judge Juan R. Torruella, on behalf of himself and Judges Thompson and Kayatta, emphasized that the issue in *Cullinane* was whether the notice of the Terms of Service was reasonably conspicuous under Massachusetts law. Although there was no controlling case on that point from the

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[126]*Cullinane v. Uber Technologies, Inc.*, No. CV 14–14750–DPW, 2016 WL 3751652, at *7-8 (D. Mass. July 11, 2016), *rev'd*, 893 F.3d 53 (1st Cir. 2018). Judge Woodlock had explained:

> In analyzing online agreements, the Second Circuit has used the analogy of a roadside fruit stand displaying bins of apples; these apples have a sign above them displaying the price of the apples for potential consumers. *See Register.com*, 356 F.3d at 401. Judge Holwell, analyzing a sign-in-wrap-style agreement in *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012), refined this analogy further. "For purposes of this case, suppose that above the bins of apples are signs that say, 'By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign.' " *Fteja*, 841 F. Supp. 2d at 839. Judge Holwell observed that courts around the country, supported by established Supreme Court reasoning in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991), would not hesitate to enforce such a contract. In holding that the online sign-in-wrap agreement was enforceable, Judge Holwell wrote, "[T]here is no reason why that outcome should be different because Facebook's Terms of Use appear on another screen rather than another sheet of paper." *Fteja*, 841 F. Supp. 2d at 839. I agree. . . .
>
> [I]n the Uber sign-up process, clicking "Done" and ordering the app is akin to the apple eater taking a bite of the apple. Although an even more "unambiguous manifestation of consent," *Specht*, 306 F.3d at 35, might be for the apple eater also to check a box on a piece of paper next to the words, "I accept the terms on the other side of the sign above the apple basket," one bite of the apple is enough.

Cullinane v. Uber Technologies, Inc., No. CV 14–14750–DPW, 2016 WL 3751652, at *7 (D. Mass. July 11, 2016), *rev'd,* 893 F.3d 53 (1st Cir. 2018).

[127]*Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017).

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Massachusetts Supreme Judicial Court, the panel purported to rely upon *Ajemian v. Yahoo!, Inc.*,[128] a case in which an intermediate appellate court had declined to enforce a venue selection clause in a contract, finding its application to the Estate of the decedent who had entered into the agreement unconscionable. From that case, the appellate panel deduced that a court in Massachusetts likely would apply a two-step test to determine the enforceability of online contracts, considering first whether the contract terms were "reasonably communicated" and, if so, whether and how they were accepted.

Applying this test, the First Circuit panel found that Uber's Terms of Service had not been reasonably communicated to the plaintiffs. The court began its analysis by explaining that conspicuousness under Massachusetts law is an issue to be resolved by the court.[129] In a relatively summary opinion, Judge Torruella observed that "Uber chose not to use a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen."[130] But contract formation does not require a "click." And in fact, users were required to click "Done" following a prominent link and notice that "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." Unless the panel was confused about the actual screen flow at issue in the case, presumably it was troubled that the click required was prompted by "Done" (following notice and a link), even though no magic words are required to form a contract. In either case, the First Circuit's conclusion is difficult to harmonize with the Second Circuit's analysis in *Meyer,* where the court found a contract formed where the button said "Register."

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[128] *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 83 Mass. App. Ct. 565 (Mass. App. Ct. 2013).

[129] Judge Torruella wrote that:

> Under Massachusetts law, "conspicuous" means that a term is "so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it." Mass. Gen. Laws ch. 106, § 1-201(b)(10); *see also* Mass. Gen. Laws ch. 156 D, § 1.40 (defining the term "conspicuous" as "written so that a reasonable person against whom the writing is to operate should have noticed it"). Whether or not a term is conspicuous is for the court to decide. Mass. Gen. Laws ch. 106, § 1-201(b)(10).

Cullinane v. Uber Technologies, Inc., 893 F.3d 53, 62 (1st Cir. 2018).

[130] *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 62 (1st Cir. 2018).

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In *Cullinane*, Judge Torruella also found that the link and accompanying text—"By creating an Uber account, you agree to the Terms of Service & Privacy Policy"—was not conspicuous because it did not appear as a blue hyperlink, which is a difficult position to defend as a matter of law, in the absence of evidence to support this proposition. Indeed, because of the size of the notice, one could argue it was even more prominent in *Cullinane* than in *Meyer*.

Uber had argued in *Cullinane* that the notice—which appeared in bold white text set against a gray rectangular box—was reasonably conspicuous, both visually and contextually, because it was displayed in a larger font, in bold, contrasting in color, and highlighted by the box that appeared around it. Uber also argued that because the screen contained twenty-six words it would have been difficult for a user to miss the notice.[131]

Judge Torruella disagreed, writing that "Uber's 'Terms of Service & Privacy Policy' hyperlink did not have the common appearance of a hyperlink. While not all hyperlinks need to have the same characteristics, they are 'commonly blue and underlined.' . . . Here, the 'Terms of Service & Privacy Policy' hyperlink was presented in a gray rectangular box in white bold text. Though not dispositive, the characteristics of the hyperlink raise concerns as to whether a reasonable user would have been aware that the gray rectangular box was actually a hyperlink."[132] But, as noted, there was no evidence before the court that a reasonable smartphone user would not recognize a hyperlink unless it appeared in blue on a mobile app, or that a reasonable smartphone user would find use of colors other than blue inconspicuous. Instead, Judge Torruella was simply relying on *dicta* from an

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[131] *See Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 62-63 (1st Cir. 2018).

[132] *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 63 (1st Cir. 2018), *quoting CR Assocs. L.P. v. Sparefoot, Inc.*, No. 17-10551-LTS, 2018 WL 988056, at *4 n.4 (D. Mass. Feb. 20, 2018); *and citing Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 78 (2d Cir. 2017) ("[T]he hyperlinks are in blue and underlined."); *Adelson v. Harris*, 774 F.3d 803, 808 (2d Cir. 2014) ("[T]he hyperlinks were not hidden but visible in the customary manner, that is, by being embedded in blue, underlined text."); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012) ("The phrase 'Terms of Service' is underlined, an indication that the phrase is a hyperlink, a phrase that is 'usually highlighted or underlined' and 'sends users who click on it directly to a new location—usually an internet address or a program of some sort.' ").

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unreported district court case observing in a footnote that major search engines show links in blue if unopened and purple if read.[133] This hardly establishes as a matter of law that a reasonable smartphone user would not recognize a

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[133]*CR Assocs. L.P. v. Sparefoot, Inc*., No. 17-10551-LTS, 2018 WL 988056, at *4 n.4 (D. Mass. Feb. 20, 2018) was an unreported district court opinion enforcing a venue selection clause in a Terms of Service agreement where, in a footnote, the district court made the point that a sophisticated Internet business partner who has done business on the internet would understand that text highlighted in blue denotes a hyperlink to the referenced material. It does not, however, stand for the proposition that a reasonable mobile phone user or even a reasonable person would not understand that the words 'Terms of Service & Privacy Policy' in bold white on a gray background denotes a link to those documents. Nor do any of the other cases cited by Judge Torruella in *Cullinane*.

Meyer v. Uber Technologies, Inc., 868 F.3d 66, 78 (2d Cir. 2017), which among the cited cases was most factually similar to *Cullinane,* did not turn on the color of the link used, and is hard to reconcile with the First Circuit's opinion. *Meyer* also cited with approval the district court opinion reversed by the First Circuit in *Cullinane. See Meyer,* 868 F.3d at 76.

Adelson v. Harris, 774 F.3d 803, 808 (2d Cir. 2014) was an opinion certifying to the Nevada Supreme Court the question whether an Internet hyperlink to source material about judicial proceedings sufficed to qualify as a report for purposes of applying Nevada's common-law fair report privilege.

Judge Torruella, in *Cullinane,* appears to have relied heavily on District Court Judge Leo T. Sorokin's unreported decision in *CR Assocs. L.P. v. Sparefoot, Inc*., No. 17-10551-LTS, 2018 WL 988056 (D. Mass. Feb. 20, 2018) and the cases he cites in that unreported opinion, even though the First Circuit found that a contract in *Cullinane* had not been formed because of the absence of a box that users were required to click "stating that they agree to a set of terms . . ." accessible via a blue link, which were both conditions that Judge Sorokin found present in enforcing the forum selection clause at issue in *Sparefoot*.

Oddly, in enforcing the Terms of Service agreement in *Sparefoot,* Judge Sorokin relied on the lower court's opinion in *Cullinane v. Uber Technologies, Inc*., No. CV 14-14750-DPW, 2016 WL 3751652, at *6 (D. Mass. July 11, 2016) ("[A]n online contract in which website users are required to click on an 'I agree' box . . . permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent . . . . [B]ecause the user has 'signed' the contract by clicking 'I agree, ' every court to consider the issue has held [such] licenses enforceable."). *Sparefoot,* 2018 WL 988056, at *4.

It appears that in the absence of controlling Massachusetts or First Circuit case law, Judge Torruella largely adopted Judge Sororkin's analysis, while largely ignoring the Second Circuit's analysis in the factually similar *Meyer v. Uber Technologies, Inc*., 868 F.3d 66 (2d Cir. 2017) case, except to note that the links in that case were blue.

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link as prominent if it appeared in bold white on a gray background. This is especially true where the size of the notice was larger, and therefore more prominent, than a typical notice and link found in a mobile app, such as the one deemed sufficient by the Second Circuit in *Meyer*.

The *Cullinane* panel concluded that "[b]ecause both the 'Link Card'and 'Link Payment' screens were filled with other very noticeable terms that diminished the conspicuousness of the 'Terms of Service & Privacy Policy' hyperlink and the notice, . . . the terms of the Agreement were not reasonably communicated to the Plaintiffs."[134] In support of this conclusion, the court relied on court opinions from 1993—the same year that Mosaic, the web browser that popularized the World Wide Web, was released—and 1964, decades before computers were commonly used for contract formation, writing that "[e]ven though the hyperlink did possess some of the characteristics that make a term conspicuous, the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention. If everything on the screen is written with conspicuous features, then nothing is conspicuous."[135]

Judge Torruella conceded that while a white bold font within a gray rectangular box "may have been sufficient to accentuate a hyperlink found within a registration process interface with a plain design and limited content, that was not the case here." He noted in particular that the screen shots included the words "CANCEL" or "DONE" to complete the transactions and, at the top of a user's screen, the terms "scan your card" and "enter promo code," which were also written in bold with a similarly sized font as the hyperlink.[136] This design, the panel concluded, was not conspicuous under

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[134]*Cullinane v. Uber Technologies, Inc*., 893 F.3d 53, 64 (1st Cir. 2018).

[135]*Cullinane v. Uber Technologies, Inc*., 893 F.3d 53, 63-64 (1st Cir. 2018), *citing Stevenson v. TRW Inc.,* 987 F.2d 288, 296 (5th Cir. 1993) (interpreting the Uniform Commercial Code's definition of the term "conspicuous" in the context of a disclaimer and stating that a "disclaimer is not conspicuous . . . when it is the same size and typeface as the terms around it"); *Boeing Airplane Co. v. O'Malley,* 329 F.2d 585, 593 (8th Cir. 1964) (interpreting a state statute that contained a similar definition for the term "conspicuous" as the Massachusetts Uniform Commercial Code and finding that if a term "is merely in the same color and size of other type used for the other provisions," it fails to be a conspicuous term).

[136]*Cullinane v. Uber Technologies, Inc*., 893 F.3d 53, 63 (1st Cir. 2018).

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Massachusetts law. But this conclusion, like its view of blue as the preferred color for links for contract formation, appears to largely reflect the subjective view of the panel, rather than any objective evidence in the record.

This analysis also reflects a view of what a reasonable smartphone user would consider reasonably conspicuous that is quite different from the Second Circuit's view in *Meyer*.[137] Indeed, the First Circuit did not purport to consider a reasonable *smartphone user,* as the Second Circuit did in *Meyer*. Rather, it opined on reasonable notice to a reasonable person (which presumably includes people who do not use smartphones and therefore sets a higher bar than appropriate).

Cullinane may reflect in part the fact that Judge Torruella, who was 85 years old at the time he wrote the opinion, may not be a typical mobile app user—or perhaps even a mobile app user at all. In *Meyer,* the Second Circuit had recognized that because by 2015 a majority of American adults owned a smartphone, and the overwhelming majority of smartphone users used their phones to access the internet, "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone."[138] By contrast, the First Circuit, writing in 2018 in *Cullinane*, appears to have adopted a more stringent test for enforcement of unilateral online agreements rooted in greater skepticism of mobile commerce. For example, Judge Torruella emphasized that the Uber app was viewed by users on a 3.5 inch diagonal screen, making the notice

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[137]A reasonable mobile user, as defined by the Second Circuit in *Meyer* to mean someone who has used a mobile app before and is familiar with online contracting, likely would have viewed the notice in *Cullinane* as reasonably prominent. As readers can verify for themselves from the screen shots reproduced in this section, most mobile app users would recognize "scan your card" as a common prompt on various apps that allows users to turn on the camera function in their mobile phones to permit an app to record credit card information automatically, without the user having to manually input it. Similarly, mobile users would recognize "enter promo code" as a prompt to insert a promotional code to receive a discount (or as not relevant to them if they did not have one). Indeed, one could argue that reasonable mobile users know that commercial apps where a user is required to supply a credit card typically are subject to terms and conditions, which on mobile apps typically are accessible via links that refer to Terms of Use or Privacy Policies and therefore a link appearing in bold white text in a gray rectangular box likely would be conspicuous to a reasonable mobile app user.

[138]*Meyer v. Uber Technologies, Inc*., 868 F.3d 66, 77-78 (2d Cir. 2017).

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less conspicuous.[139] Needless to say, the same was likely true of the users in *Meyer*.

Cullinane also may reflect the hostility of some judges to enforcing arbitration agreements.[140]

Cullinane may be distinguished from *Meyer,* but only based on distinctions that may seem trivial to most mobile app users (such as the color of the font used for a link, the specific words chosen to complete a transaction, and the presence of other common features on a mobile screen to allow users to scan a credit card or input a discount code), which should not be material in evaluating contract formation.

Nevertheless, to meet the First Circuit test, a mobile app provider should use words that judges are more comfortable with—such as *Agree* or *I accept*—even though, as a matter of black letter law, no magic words are required to form a contract. Hyperlinks should be in blue—not because white, black or other colors are not conspicuous but because the First Circuit's decision in *Cullinane* otherwise will be cited as grounds to avoid enforcement. And the particular screen where the assent notice appears should be as uncluttered as possible. Alternatively, app providers simply need to require their users to affirmatively check a box next to clear language agreeing to be bound.

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[139] *See Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 57 (1st Cir. 2018).

[140] Although the First Circuit was silent on this point, the district court had observed that:

> The practice of avoiding consumer class action litigation through the use of arbitration agreements is the subject of current scholarly disapproval and skeptical investigative journalism. . . . Nevertheless, the legal foundation provided in Supreme Court jurisprudence regarding the Federal Arbitration Act for construction of arbitration agreements that bar consumer class actions is firmly embedded. . . .
>
> The plaintiff in this case extends an invitation to disassemble the judicial construct permitting a bar to class action litigation for consumer arbitration agreements. The invitation suggests teasing out distinctions that truly make no difference. This is not an institutionally authorized nor intellectually honest way to change practice and legal policy regarding the permissible scope of arbitration. Change, if it is to come, must be effected by a refinement through legislation and/or regulation that imposes restrictions on arbitration agreements, or by a reversal of direction on the part of the Supreme Court. It is not within the writ of the lower courts to replot the contours of arbitration law when the metes and bounds have been set clearly, unambiguously and recently by the Supreme Court.

Cullinane v. Uber Technologies, Inc., No. CV 14–14750–DPW, 2016 WL 3751652, at *1 (D. Mass. July 11, 2016) (footnotes omitted), *rev'd*, 893 F.3d 53 (1st Cir. 2018).

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Cullinane is emblematic of the continued discomfort by many courts with implied assent in mobile and online contract formation. This discomfort has been implicit (if not express) in online contract formation cases going back to the earliest decisions.

Cullinane remains good law in the First Circuit and its flawed analysis—that a blue underlined link is reasonably conspicuous but other type of links (such as a gray link in a box) are not—has been picked up by some other courts (whether or not they cite to *cullinane*).[141] Indeed, within the First Circuit, a district court in Massachusetts applying *Cullinane* even found blue underlined hyperlinks insufficient,[142] which is perhaps not suprising given the high bar established by *Cullinane* for contract formation. Needless to say, outside the First Circuit, some other courts have recognized that *Cullinane* sets an unreasonably high standard inconsistent with the Second Circuit's decision in *Meyer* and general contract formation principles.[143]

In one of the first cases to consider the effectiveness of

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[141]*See, e.g.*, *Benson v. Double Down Interactive, LLC*, 798 F. App'x 117 (9th Cir. 2020) (holding a gray hyperlink on a pop-up screen that was below and smaller than other text on the screen inadequate to provide actual or constructive notice).

[142]*See, e.g.*, *Theodore v. Uber Technologies, Inc.*, 442 F. Supp. 3d 433, 438-40 (D. Mass. 2020) (holding notice inadequate given the more prominent size of the request for a promo code).

[143]*See, e.g.*, *Margulis v. HomeAdvisor, Inc.*, Case No. 4:19-cv-00226-SRC, 2020 WL 4673783, at *5 (E.D. Mo. Aug. 12, 2020) (holding that adequate notice was provided where the Terms & Conditions were accessible via a blue link that was not underlined; distinguishing *Cullinane*); *In re Uber Technologies, Data Security Breach Litig.*, No. CV 18-3169 PSG (GJSx), 2019 WL 6317770, at *4 (C.D. Cal. Aug. 19, 2019) (enforcing Uber's ToU, and compelling arbitration of plaintiff's claims arising out of an alleged cybersecurity breach, based on plaintiff's initial assent plus notice of amended Terms and a revised arbitration provision sent by email; "As the Court noted before, 'the Cullinane decision departs dramatically both from what other courts have found regarding Uber's registration process, and from the overall legal landscape regarding assent to online agreements.' " *West*, 2018 WL 5848903, at *4. Rather, the Court agrees with the Second Circuit, which held in *Meyer* that a reasonably prudent smartphone user would recognize that a box with text inside labeled "Terms of Service" is clickable and would lead to a display of those terms."); *West v. Uber Technologies*, Case No. 18-CV-3001-PSG-GJS, 2018 WL 5848903, at *4 (C.D. Cal. Sept. 5, 2018) ("The Court agrees with Defendants that the *Cullinane* decision departs dramatically both from what other courts have found regarding Uber's registration process, and from the overall legal landscape regarding assent to online agreements. . . . Clickable buttons

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posted Terms of Use, *Ticketmaster Corp. v. Tickets.com, Inc.*,[144] in unreported but widely discussed opinions in that district court case, the court initially dismissed Ticketmaster's breach of contract claim against Tickets.com where Ticketmaster's TOU was accessible via a link that appeared in "small print" on the bottom of Ticketmaster's home page, but granted leave for Ticketmaster to amend its complaint to allege that Tickets.com had knowledge of the terms and impliedly agreed to them.[145] Thereafter, Ticketmaster changed the placement of the link to its notice to a prominent place on its homepage and warned users that proceeding beyond the homepage would be deemed agreement to Terms of Use that prohibited commercial use of the site.[146] Ticketmaster also reiterated the conditions imposed on access to its site in a letter to Tickets.com.

In a subsequent decision,[147] the court denied the defendant's motion for summary judgment on Ticketmaster's breach of contract claim, finding that a contract could have been formed when Tickets.com proceeded into the interior of the Ticketmaster site after knowing of the conditions imposed by Ticketmaster for doing so. In so ruling, the court emphasized that Tickets.com was "fully familiar with the conditions [Ticketmaster] claimed to impose on users," citing in particular Ticketmaster's letter and a response from Tickets.com stating that it did not accept the conditions, as well as the new and more prominent notice placed on Ticketmaster's homepage. The court ruled that there was sufficient evidence to defeat summary judgment "if knowl-

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come in all shapes and sizes, and courts properly apply a "reasonably prudent smartphone user" to the analysis.").

[144]*Ticketmaster Corp. v. Tickets.com, Inc.,* CV 99-7654 HLH (BQRx), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000).

[145]*Ticketmaster Corp. v. Tickets.com, Inc.,* CV 99-7654 HLH (BQRx), 2000 WL 525390, *3 (C.D. Cal. Mar. 27, 2000). Ticketmaster had sought to prevent Tickets.com, a competitor, from deep linking to internal pages on its website and from using bots to spider or crawl pages on its site and electronically extract factual information from the Ticketmaster site. *See supra* §§ 9.06, 5.05 (discussing the case at greater length).

[146]The notice read:

> Use of this site is subject to express terms of use, which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms.

[147]*Ticketmaster Corp. v. Tickets.com, Inc.,* CV99-7654-HLH (VBKx), 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003).

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edge of the asserted conditions of use was had by [Tickets.com], who nevertheless continued to send its spider into the [Ticketmaster] interior web pages, and if it is legally concluded that doing so can lead to a binding contract."

The court distinguished *Specht v. Netscape Communications Corp.*,[148] because plaintiff's Terms of Use "were not plainly visible or known to defendants." The court also suggested that *Specht* "involved a different set of circumstances, that of consumers invited to download free software from an internet site that did not contain a plainly visible notice of license terms."[149]

The *Ticketmaster* court lamented the result of its ruling, expressing a preference for "a rule that required an unmistakable assent to the conditions easily provided by requiring clicking on an icon which says 'I agree' or the equivalent." It acknowledged, however, that "the law has not developed in this way" and that "no particular form of words is necessary to indicate assent—the offeror may specify that a certain action in connection with his offer is deemed acceptance, and [the offer will] ripe[n] into a contract when the action is taken."[150]

In a later case also brought by Ticketmaster, *Ticketmaster LLC v. RMG Technologies, Inc.*,[151] Judge Audrey Collins of the Central District of California, in granting a motion for preliminary injunction, ruled that Ticketmaster was likely to prevail on the merits in establishing that a competitor had notice of posted Terms of Use but nonetheless accessed and used the Ticketmaster website in violation of those Terms.

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[148] *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

[149] *Ticketmaster Corp. v. Tickets.com, Inc.,* CV99-7654-HLH (VBKx), 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003).

[150] *Ticketmaster Corp. v. Tickets.com, Inc.,* CV99-7654-HLH (VBKx), 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (citing other cases). In addition to Internet contract cases, the court cited the shrinkwrap cases (*see supra* § 21.02), *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (*see supra* § 21.02; *infra* § 53.03[2]), and the fact that "[t]he Carriage of Goods by Sea Act, the Carmack Act, and the Warsaw Convention provide that limitations of liability on the bill of lading, air waybill, or airplane ticket are enforceable if the services are used by the customer." 2003 WL 21406289, at *2.

[151] *Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

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Judge Collins characterized Ticketmaster's Terms as creating a non-exclusive copyright license to Ticketmaster's copyrighted website. The homepage to the site included the warning that "[u]se of this website is subject to express Terms of Use which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms." The underlined phrase "Terms of Use" was a hyperlink to the full Terms of Use. In addition, the same phrase appeared on almost every page of the Ticketmaster site. Further, since 2003 users had to affirmatively agree to the Terms as part of the procedure for setting up an account and since mid-2006 had to expressly assent to the Terms any time they purchased tickets from the site. The defendant acknowledged that it had notice of the Terms of Use but argued that it was not bound by them and they were too vague to be enforced, which the court rejected. Because the defendant acknowledged that it was on notice of the Terms, the court found that it had assented to be bound by them by using the website.[152]

Likewise, in another dispute between business entities, this time involving a defendant's unauthorized copying of a photo from Corbis's website, a different court, in *Corbis Corp. v. Integrity Wealth Management, Inc.*,[153] declined to dismiss Corbis's breach of contract claim based on its browsewrap content license, writing that "it would be an unreasonable inference to assume based on Plaintiff's description of their business and their website, that visitors were *not* aware that they were being offered a business transaction in the form of an agreement to pay for the use of the images contained on the site."[154]

Implied assent also may be inferred where a defendant is given repeated notice of Terms and, in the case of the sale of goods under the U.C.C., potentially based on course of dealing. In *One Beacon Insurance Co. v. Crowley Marine*

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[152]Facebook's Terms of Use agreement was also treated as a copyright license in *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 WL 1299698 (N.D. Cal. May 11, 2009), but in that case Facebook used a click-through contract and the issue of assent was not specifically challenged. *See supra* § 5.03[2] (discussing the case in greater detail).

[153]*Corbis Corp. v. Integrity Wealth Management, Inc.*, No. C 09-708MJP, 2009 WL 3835976 (W.D. Wash. Nov. 16, 2009).

[154]*Corbis Corp. v. Integrity Wealth Management, Inc.*, No. C 09-708MJP, 2009 WL 3835976 (W.D. Wash. Nov. 16, 2009).

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Services, Inc.,[155] the Fifth Circuit affirmed a Texas district court ruling that Tubal-Cain was bound by Terms and Conditions posted on Crowley's website where the Repair Service Order (RSO) at issue contained a notice that it was subject to terms and conditions posted on Crowley's website at " www.crowley.com/Documents & Forms," despite objections that the Terms were never reviewed and were difficult to find. In that case, a dispute had arisen during the ninth of twenty-four jobs undertaken by Crowley for Tubal-Cain, where each of the eight preceding RSOs contained identical notices and where Crowley presented evidence that Crowley's Terms and Conditions had been posted on its website and were unchanged during performance of all twenty-four repair jobs.[156] For each requested job, Crowley had issued an RSO that referenced its Terms and Conditions and Tubal-Cain had issued an invoice.

The appellate panel held that under federal maritime law (which is based on common law contract principles) a contract had been formed comprised of an oral agreement (based on the request to perform repair work for the ninth job), Crowley's RSO, which incorporated by reference Crowley's Terms and Conditions, and Tubal-Cain's subsequent invoice, which did not object to the Terms and Conditions, based on a course of dealing from which the applicability of the Terms and Conditions could be inferred, and that by accepting the RSO and issuing an invoice for payment without objecting to the Terms and Conditions, Tubal-Cain ratified their course of dealing.

The Fifth Circuit held that Tubal-Cain had adequate notice of Crowley's insurance and indemnity terms, even though it never furnished Tubal-Cain with a hard copy, because the Terms and Conditions were referred to and incorporated by reference into the RSO. In so ruling, the court rejected Tubal-Cain's arguments that (1) the reference in the RSO failed to effectively identify the location of the indemnity and insurance provisions on Crowley's website and (2) the Terms and Conditions were hidden on Crowley's website in four-point font. The court explained that Crowley's

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[155]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258 (5th Cir. 2011).

[156]*See One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, Civil Action No. H-08-2059, 2010 WL 1463451 (S.D. Tex. Apr. 12, 2010), *aff'd*, 648 F.3d 258 (5th Cir. 2011).

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intent to incorporate the terms and conditions was "clear from the explicit incorporating language prominently placed on the face of the RSO in all capital letters" which clearly referred to Crowley's website, where the Terms and Conditions had been posted throughout the relevant time period and that the website "was easily navigated, and that a reasonable person would have been able to find the terms and conditions . . . ."[157]

The RSO referenced "www.crowley.com/Documents & Forms," but in fact to access the Terms and Conditions from that location a user would have to select "Vendor Relations" from a drop-down menu and then select "Purchase Order Terms and Conditions" to locate the correct document, which was displayed in four-point font.[158] The court conceded that "Crowley undoubtedly could have provided clearer directions to the location of the terms and conditions on the website . . .," but nonetheless held that notice was reasonable under the facts of the case where both parties were "commercial entities with sophisticated procedures in place for reviewing contracts" even though Tubal-Cain didn't implement the procedures in this case and had not actually reviewed the Terms and Conditions, and the Tubal-Cain employee responsible for reviewing the RSOs was "internet savvy."[159] The Fifth Circuit panel held that the fact that a party chooses not to review a contract, or terms and conditions, when given the opportunity to do so, does not negate the fact that they are bound by those terms.[160] Similarly, the appellate panel ruled that the small font size did not call into question the non-drafting party's consent because "[t]he font size could be enlarged on a computer screen, and the paragraph containing the indemnity provision was clearly labeled in bold text."[161]

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[157]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258, 269 (5th Cir. 2011).

[158]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258, 263 (5th Cir. 2011).

[159]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258, 269 (5th Cir. 2011).

[160]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258, 270 (5th Cir. 2011).

[161]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258, 270 (5th Cir. 2011); *see also, e.g., Pingel v. General Electric Company*, No. 3:14 CV-00632 (CSH), 2014 WL 7334588, at *10 (D. Conn.

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By contrast, in *Hines v. Overstock.com, Inc.*,[162] the court denied Overstock's motion to dismiss or stay based on an arbitration provision in posted Terms and Conditions, where the plaintiff denied she had actual notice and Overstock failed to present evidence showing constructive notice. The court wrote that "[d]espite Defendant's assertion that 'all customers to Overstock's website are *advised* of the company's terms and conditions prior to their entry onto the site, . . . neither the . . . Affidavit nor any other evidence submitted . . . refute Plaintiff's sworn statement that she was never advised of the Terms and Conditions and could not even see the link to them without scrolling down to the bottom of the screen—an action that was not required to effectuate her purchase."[163] As a preliminary ruling, *Hines* did not foreclose Overstock from deposing the plaintiff and otherwise seeking to prove actual or constructive notice by a subsequent motion later in the case or at trial. Nevertheless, the court's negative characterization of Terms posted via a

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Dec. 19, 2014) (finding assent to arbitration where an email accompanying the offer letter provided to the plaintiff/employee directed the plaintiff to visit its "Transfer Offer" website "to review important GE policies and to obtain the necessary paperwork need[ed] to accept [the] offer," which is where the arbitration provision could be found); *Tuscany South America Ltd. v. Pentagon Freight Systems, Inc.*, No. 4:12-CV-1309, 2014 WL 4794695, at *4-5 (S.D. Tex. Sept. 24, 2014) (defendant's references in written invoices and email communications to plaintiff about Terms and Conditions available on its website put plaintiff on notice about legal terms and, by not objecting, plaintiff manifested assent); *World Fuel Services Trading, DMCC v. M/V HEBEI SHIJIAZHUANG*, 12 F. Supp. 3d 792, 803-04 (E.D. Va. 2014) (interpreting online contract formation under Greek law and finding that specific reference to online general terms in a confirmation email validly incorporated by reference those online general terms); *Bush v. AT&T Corp.*, No. 12-6106-CV-SJ-DGK, 2012 WL 6016719, at *2 (W.D. Mo. Dec. 3, 2012) (finding plaintiff agreed to arbitration under Missouri law because parties can incorporate by reference, even when the reference is to terms made available over the Internet). *Cf. Chartis Seguros Mexico, S.A. de C.V. v. HLI Rail & Rigging, LLC*, 3 F. Supp. 3d 171, 193 (S.D.N.Y. 2014) (declining to enforce terms posted on a website that were not clearly incorporated by reference in the bill of lading; "KCSR's reference to the Rules Publication does not explain what it is or how it might be found. In particular, KCSR never mentions its website—the sole source of the Rules Publication—in the Price Quote or in the BOLs. Instead, the only guidance to locate the Rules Publication on KCSR's website was within the document itself . . . . ").

[162] *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009), *aff'd mem.*, 380 F. App'x 22 (2d Cir. 2010).

[163] *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (emphasis in original), *aff'd mem.,* 380 F. App'x 22 (2d Cir. 2010).

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link from the bottom of Overstock's homepage plainly evidences a degree of skepticism on the part of the New York court that was not shared by the Fifth Circuit in *One Beacon Insurance Co. v. Crowley Marine Services, Inc.*[164] or even the Washington court in *Corbis Corp. v. Integrity Wealth Management, Inc.*,[165] both of which were commercial cases.

In another consumer case, *Kwan v. Clearwire Corp.*,[166] a court in Washington declined to enforce an arbitration provision based on implied assent in a case where the parties had stipulated that whether the plaintiff in fact had provided click-through assent to Terms of Service (or whether a service representative had done so when he serviced her unit) was a disputed fact. In the absence of evidence of express assent, Clearwire had argued that Ms. Brown had assented to its TOS by using her modem after having received a confirmation email which noted the TOS on its website, and then retaining the modem for six months. The court declined to find implied assent where Clearwire's email did not contain a direct link to its TOS, but rather to Clearwire's homepage. To find the TOS, the court explained, "Ms. Brown would have had to negotiate her way through two more hyperlinks. Further, the reference to the TOS did not appear until the third page of the email Ms. Brown received."[167] Relying on *Specht v. Netscape Communications Corp.*,[168] the court declined to enforce the agreement (without prejudice to a later motion based on evidence that Ms. Brown expressly assented to the TOS), holding that "the breadcrumbs left by Clearwire to lead Ms. Brown to its TOS did not constitute sufficient or reasonably conspicuous notice of the TOS."[169]

Other courts likewise have declined to enforce agreements based on implied assent where the court viewed notice of the terms as inadequate because they were accessible at the bot-

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[164]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258 (5th Cir. 2011).

[165]*Corbis Corp. v. Integrity Wealth Management, Inc.*, No. C 09-708MJP, 2009 WL 3835976 (W.D. Wash. Nov. 16, 2009).

[166]*Kwan v. Clearwire Corp.*, C09-1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012).

[167]*Kwan v. Clearwire Corp.*, C09-1392JLR, 2012 WL 32380, at *9 (W.D. Wash. Jan. 3, 2012).

[168]*Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

[169]*Kwan v. Clearwire Corp.,* C09-1392JLR, 2012 WL 32380, at *9 (W.D. Wash. Jan. 3, 2012).

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tom of a webpage.[170]

Hines v. Overstock.com, Inc.[171] and *Kwan v. Clearwire Corp*.[172] underscore that in many consumer cases posted Terms are difficult to enforce absent an admission by the defendant that he or she had notice or evidence of reason to know that use was conditioned on terms (typically framed in terms of whether notice was reasonable). Indeed, in one case, a court, in denying enforcement of Terms of Use accessible via a link at the bottom of a webpage, reflected the hostility that many judges have for attempted contract formation based on implied assent to a unilateral contract, by pointing out explicitly that the defendant "could have structured the transaction so that the user manifests acceptance by clicking 'I accept' after the Terms are displayed, but it did not do that . . . ."[173]

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[170]*See, e.g.*, *Hite v. Lush Internet Inc.*, 244 F. Supp. 3d 444, 449-52 (D.N.J. 2017) (denying defendant's motion to compel arbitration, based on posted Terms of Use that were "not displayed unless the user finds and clicks on an obscure link at the bottom of the page" and "the website's admonition to users to read the terms is not on the home page but is only on the 'Terms of Use' section that appears if the hyperlink is noticed and selected[,]" because the Terms "were not so conspicuously placed that a reasonably prudent user of Defendant's website would have been on notice of the terms contained therein."); *Syndicate 1245 at Lloyd's v. Walnut Advisory Corp.,* Civ. Action No. 09-1697, 2011 WL 5825979 (D.N.J. Nov. 16, 2011) (declining to enforce a venue selection clause accessible via a hyperlink in email footers where every outgoing email sent by a Miller employee contained a footer noting that Miller's standard terms of business applied to all insurance related services carried out by Miller, but the defendant argued that the language at the bottom of each email was boilerplate language that had no bearing on the actual message in the email and Walnut claimed that it had no reason to click on any of the hyperlinks and, as a matter of fact, did not click on any of them); *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596, 18 A.3d 210, 220 (N.J. App. 2011) (declining to enforce a forum selection clause in a browsewrap agreement where terms and conditions were listed at the bottom of the webpage).

[171]*Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009), *aff'd mem.,* 380 F. App'x 22 (2d Cir. 2010).

[172]*Kwan v. Clearwire Corp.*, C09-1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012).

[173]*Hite v. Lush Internet Inc.*, 244 F. Supp. 3d 444, 452 (D.N.J. 2017). Reflecting his discomfort with the defendant's request to enforce posted Terms of Use, Chief Judge Jerome Simandle noted that a "purchase can readily be completed without the user viewing the terms which relinquish important and customary rights of trial by jury, court access, statutory periods of time to bring actions, availability of damages and remedies

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On the other hand, some judges' discomfort with proposed unilateral contracts where user assent is implied from use of a site extends even to commercial entities. For example, in *Cvent, Inc. v. Eventbrite, Inc.*,[174] a district court in the Eastern District of Virginia held that, absent credible allegations of actual or constructive notice, a siteowner could not even state a claim for breach of contract where plaintiff's Terms of Use were "displayed on secondary pages of its website" that could be accessed "only through one of several dozen small links at the bottom of the first page" which the court found did not provide either actual or constructive notice and did not afford the defendant an "opportunity to review" the agreement, which under Virginia's enactment of UCITA[175] is defined as "available in a manner that ought to call it to the attention of a reasonable person."[176]

The court in *Cvent* was concerned that to find the Terms of Use users had to scroll to the bottom of the homepage, search for the correct link among 28 that were presented and then further decide which of three alternative TOUs presented was applicable.

Read broadly, however, the court's holding in *Cvent, Inc. v.*

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provided by statute, and to bring or join a class action. Without viewing, the user can have no knowledge of the terms, including these waivers." *Id.*

[174] *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va. 2010).

[175] The Uniform Computer Information Transactions Act is a proposed uniform law that was only enacted in Virginia and Maryland (and is the subject of blocking statutes in four other states that enacted a choice of law provision intended to prevent its application in cases where choice of law principles otherwise would call for its application). *See supra* § 15.03.

[176] *See Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va. 2010). In *Cvent*, the court relied on screen shots that showed that the notice was merely one of 28 different links arranged in four columns "in extremely fine print" located at the bottom of the homepage for plaintiff's website, which required users to scroll down to the very bottom of the page. In addition to being presented in small print, below the fold at the very bottom of the homepage (which reflects common industry practice), Cvent listed its TOU among four columns of links, in the fourth column captioned "Company Info" above "Contact Us" and below "Privacy Policy" When users actually clicked on "Terms of Use" they were directed to a secondary page entitled "Terms of Use for Cvent Products," which presented three additional links to three different TOU: "Supplier Network Terms of Use," "Event Management Terms of Use," and "Web Survey Terms of Use." The court emphasized that users could only access these documents by clicking on these further links and that each of the documents was several pages long, making it difficult to evaluate which agreement purportedly applied.

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Eventbrite, Inc.[177]—that the plaintiff could not even state a claim for breach of contract by alleging posted terms accessible via one of a number of links at the bottom of a site's homepage because there could be no notice or opportunity to review an agreement presented in this fashion—is inconsistent with hornbook law that a contract may be formed by implied assent. A broad reading would imply that posting TOU on a website—which is a common industry practice and widely known and understood by both business and consumer users of websites—provides inadequate notice as a matter of law.

In implied assent cases, the issue of whether a user had adequate notice legitimately may defeat enforcement, but that question usually is not one that should be decided on a motion to dismiss (where the court only considers the allegations made in the complaint itself and all inferences reasonably flowing from those allegations). Implied assent may be found based on actual or constructive notice. Indeed, implied assent cases where the consumer-plaintiffs acknowledged that they knew that website access was conditioned on terms, which are discussed later in this section, belie a broad reading of *Cvent* as standing for the proposition that posted Terms of Use necessarily provide inadequate notice as a matter of law. The opinion therefore should be read narrowly as holding that when TOU are presented via one of a large number of links, and even when the proper link is located users then still have to decide which among several alternative posted agreements apply to their transactions, this presentation does not meet the specific statutory requirements for providing users with an "opportunity to review" a proposed unilateral contract under Virginia's unique, codified electronic contracts law, absent additional facts (such as actual knowledge). Even so, there are compelling arguments to be made why adequacy of notice—even in *Cvent* itself—should not be decided by a judge at the outset of the case without consideration of evidence such as whether the party against which enforcement is sought knew or should have known that its use of a site was subject to terms and conditions.

Nevertheless, some courts have read *Cvent* broadly as holding that a plaintiff cannot even state a claim for breach

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[177] *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va. 2010) (granting in part motion to dismiss).

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of contract based on Terms of Use that are merely posted at the bottom a website page.[178] Other courts apply it almost as broadly when evidence is presented (along with *Specht* and other cases discussed earlier in this section) for the proposition that Terms posted at the bottom of a website (or indeed even at the bottom of *every* page on a company's website[179]), without more, provide inadequate notice.

In *In re Zappos.com, Inc. Customer Data Security Breach Litigation*,[180] Judge Robert C. Jones of the District of Nevada followed *Cvent* in declining to enforce Terms of Use that were posted on the Zappos.com website. In *Zappos,* the TOU agreement was accessible via a link on every single page of the Zappos.com website, but the court emphasized that the link was only visible if a user scrolled down to the middle or bottom of each web page and, even then, the link was displayed "in the same size, font, and color as most other non-significant links."[181] Judge Jones deemed it significant that the website did not "direct a user to the Terms of Use when creating an account, logging in to an existing account, or making a purchase."[182] The court also made the questionable assumption that "[n]o reasonable user would have reason to click on the Terms of Use, even those users who have alleged that they clicked and relied on statements found in

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[178]*See, e.g.*, *Koch Indus., Inc. v. Does,* No. 2:10CV1275DAK, 2011 WL 1775765, at *9 (D. Utah May 9, 2011) (dismissing plaintiff's breach of contract complaint over allegedly improper use of material posted on its website because "[t]he Terms of Use on Koch's website were available only through a hyperlink at the bottom of the page, and there was no prominent notice that a user would be bound by those terms.").

Koch was a case that addressed anonymous speech critical of the plaintiff, which likely colored the court's brief analysis of plaintiff's contract claim in its unreported opinion. *Koch* is discussed in greater detail in section 37.02 in connection with compelling the disclosure of the identity of anonymous alleged tortfeasors and in section 6.14[5], which analyzes consumer criticism cases and fair use under the Lanham Act.

[179]*See In re Zappos.com, Inc. Customer Data Security Breach Litig.*, 893 F. Supp. 2d 1058, 1062–65 (D. Nev. 2012).

[180]*In re Zappos.com, Inc. Customer Data Security Breach Litig.*, 893 F. Supp. 2d 1058 (D. Nev. 2012).

[181]*In re Zappos.com, Inc. Customer Data Security Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012).

[182]*In re Zappos.com, Inc. Customer Data Security Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012).

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adjacent links, such as the site's 'Privacy Policy.' "[183]

In *Nguyen v. Barnes & Noble Inc.*,[184] which was discussed earlier in this section, the Ninth Circuit took a similar approach to the district courts in *Cvent* and *In re Zappos.com*, holding that an arbitration provision in a browsewrap contract was unenforceable even though it was accessible via a link from the bottom left hand corner of every single page on the defendant's website and from a link in close proximity to the buttons a user was required to click on to complete an online purchase.[185] The appellate panel concluded that the links were not conspicuous. The Ninth Circuit adopted a similar approach in *Wilson v. Huuuge, Inc.*,[186] where the court, as noted earlier in this section, rejected as a matter of law inquiry notice where an app provider made Terms of Use accessible from the app's settings (which itself was accessible from three dots in the upper corner of the app), even though reasonable mobile app users surely know this is where most app providers make Terms available.

In *Van Tassell v. United Marketing Group*,[187] Judge Ruben Castillo of the Northern District of Illinois declined to find constructive knowledge and therefore did not enforce posted Terms of Use against a user who made a purchase on the defendant's ChefsCatalyst.com website, holding that the way the proposed unilateral contract was presented provided inadequate notice. The court, in declining to compel arbitration based on an arbitration provision set forth in the TOU, made clear that posted Terms of Use are not *per se* unenforceable merely because express assent is not obtained. He correctly stated that legal proposition that "absent a showing of actual knowledge of the terms by the webpage user, the validity of a browsewrap contract hinges on whether the website provided reasonable notice of the terms of the contract."[188] In *Van Tassell,* he held that a multi-step process coupled with the absence of clear notice made the terms

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[183]*In re Zappos.com, Inc. Customer Data Security Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012).

[184]*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

[185]*See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1174 (9th Cir. 2014).

[186]*Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019).

[187]*Van Tassell v. United Marketing Group*, 795 F. Supp. 2d 770 (N.D. Ill. 2011).

[188]*Van Tassell v. United Marketing Group*, 795 F. Supp. 2d 770, 790–91

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unenforceable, at least at the outset of the case for purposes of evaluating a motion to compel arbitration. Judge Castillo explained that

> a user only encounters the Conditions of Use after scrolling to the bottom of the home page and clicking the "Customer Service" link, and then scrolling to the bottom of the Customer Service page or clicking the "Conditions of Use, Notices & Disclaimers" link located near the end of a list of links on the page. . . . Given the multiple steps necessary to finding the Conditions of Use, the Court finds that the Conditions of Use at issue here are even less obvious than those in *Specht*: instead of merely scrolling down to find the terms on a submerged screen when there was no reason to do so, the users of ChefsCatalog.com, also without any reason to do so, must scroll down the home page, make the illogical leap that "Customer Service" means binding "Conditions of Use" and click on that link. They must next scroll down a lengthy page containing unrelated information to find the Conditions of Use, or click on the "Conditions of Use, Notice & Disclaimers" link sandwiched between "Price Adjustments" and "CHEFS Gift Card & Product Giveaway" links. It may be true, as Pikes Peak claims, that the Customer Service page containing the Conditions of Use at the bottom of the page is accessible through numerous hyperlinks, including links such as "help," "customer service hours," "Catalog or Coupon Code," "Shipping Information," "Holiday Deliver," or "Return Policy," . . . but Pikes Peak fails to provide any explanation as to why a user of ChefsCatalog.com would logically click on any of those links to find the Conditions of Use, especially when they are not mentioned anywhere else on the site. *See Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1228 (N.D. Ill. 2005) (rejecting the defendants' argument that the plaintiff had the opportunity to view the user agreement when the "small button with [a] question mark in the corner of pop-advertisements" did not indicate that it linked to information about the user agreement).[189]
>
> This multi-step process to find the Conditions of Use is especially problematic because ChefsCatalog.com lacks any reference to the existence of the Conditions of Use or that they are

(N.D. Ill. 2011).

[189] *Sotelo* was a case brought over spyware that the plaintiff alleged had been downloaded with third-party bundled software, where the issue of whether the plaintiff assented to plaintiff's EULA, which contained an arbitration provision, presented a disputed factual question based on the plaintiff's contention that he had previously obtained the defendant's spyware from a third party. The court in *Van Tassell* cited *Sotelo* for the proposition that, absent actual knowledge, a pop-up box with a question mark provided inadequate notice to consumers of the existence of the EULA or its potentially binding effect.

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> binding on all users of the website outside of the Conditions of Use themselves . . . . This does not mean that the lack of a warning or reference to the terms at check out or elsewhere on a webpage makes a browsewrap contract *per se* unenforceable. Instead, in this case, the absence of any reference to the Conditions of Use coupled with the multi-step process to locate the Conditions of Use means that, like the plaintiffs in *Specht*, users of the ChefsCatalog.com website could complete their purchases without ever having notice that their purchases are subject to the website's Conditions of Use.[190]

The court in *Van Tassell* declined to compel plaintiffs to engage in arbitration where they asserted in sworn declarations that they "never saw the enrollment web pages or the Terms and Conditions, let alone agreed to be bound by them."[191] Given that the adequacy of notice was disputed, however, the court proposed that it conduct an evidentiary hearing to resolve the issue.[192]

Needless to say, where a company presents no evidence to explain how a proposed unilateral contract was presented to users and whether express or implied assent was obtained and the issue is disputed in litigation, a binding contract will not be found.[193]

Whether or not *Van Tassell* and *Zappos.com* were correctly decided, they at least involved determinations about the adequacy of notice based on the submission of evidence (and in the case of *Van Tassell,* the court proposed that an evidentiary hearing be scheduled to resolve contract formation issues). By contrast, *Cvent*'s broad holding wrongly presupposes that reasonable notice cannot be shown where TOU are posted via a link at the bottom of a website's homepage, even though Internet-savvy users (and likely a good percentage of the rest of the general population, as well as potentially the corporate defendant in *Cvent*) know that website Terms and Conditions typically are accessible via a link from

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[190] *Van Tassell v. United Marketing Group*, 795 F. Supp. 2d 770, 792–93 (N.D. Ill. 2011).

[191] *Van Tassell v. United Marketing Group*, 795 F. Supp. 2d 770, 788 (N.D. Ill. 2011).

[192] *Van Tassell v. United Marketing Group*, 795 F. Supp. 2d 770, 789 (N.D. Ill. 2011).

[193] *See, e.g.*, *Edme v. Internet Brands, Inc.*, 968 F. Supp. 2d 519, 526 (E.D.N.Y. 2013) (declining to grant a motion to transfer based on the venue selection clause in ModelMayhem.com's Terms of Use where the defendant presented no evidence to show how the TOU agreement was presented to users and whether express or implied assent was obtained).

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the bottom of a site's homepage. Although it may well be that notice was inadequate in *Cvent* because of the need to first search from among 28 links and then select among one of three different TOU presented, that determination should not have been made as a matter of law without reference to evidence, including evidence of the other contracting party's actual knowledge or its sophistication.

Even if *Cvent* rightly comes to be viewed as merely an aberrational decision, it nevertheless underscores judicial hostility to cases based on implied assent. Businesses that need to form binding unilateral contracts online should obtain express assent or, where that is not practical for business reasons, they should not rely on merely posting a proposed contract via a link on the bottom of a homepage, even though this is a common practice. Although *Cvent* could be distinguished and limited to the fact that users were required to click-through two sets of links that ultimately presented users with a confusing array of choices, it would be risky to assume that other courts (especially in the Eastern District of Virginia) would read *Cvent* this narrowly.

If express assent cannot be obtained, businesses, where possible, should post a prominent notice above the fold that use of a site is subject to Terms (as was done in *Ticketmaster v. Tickets.com*) or provide other notice to users (by email or otherwise) and make the Terms easily and readily accessible to users. Where multiple steps are required to locate a document, it is less likely that a court will find a unilateral contract enforceable against users who dispute that they knew use of a site or service was subject to Terms.

While the reasonableness of notice is the issue most frequently litigated in implied assent cases involving unilateral Internet contracts, at least one court ruled that posted Terms and Conditions were unenforceable for lack of consideration. In *Traton News, LLC v. Traton Corp.*,[194] a court in Ohio declined to enforce a venue selection clause in website Terms and Conditions, holding, as the alternative basis for its ruling, that plaintiff's browsewrap agreement was unenforceable for lack of consideration because the defendant in a trademark infringement suit did not obtain a benefit from visiting plaintiff's website but simply accessed it to "view what negative material was being posted about

[194] *Traton News, LLC v. Traton Corp.*, 914 F. Supp. 2d 901 (S.D. Ohio 2012).

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its company in order to protect its reputation."[195]

All of these cases—and in particular *Specht*, *Nguyen*, *Huuuge*, *Register.com*, *SquareTrade*, the two *Ticketmaster* cases, *Hines*, *Cvent*, *Van Tassell* and *Zappos*—underscore that courts are more apt to enforce online agreements where express assent is obtained. And *Nicosia*, *Meyer* and *Cullinane* underscore that even when express assent is sought, the messaging must be clear and unambiguous and the screen presentation uncluttered.[196] *Cullinane* also suggests that if the agreement is not presented directly to users, but only via a link, that the link should be blue against a white background (even though this requirement seems absurd to most internet and mobile users).

Absent express agreement, assent may be inferred from proof that a defendant had actual notice that use or access was conditioned on terms and continued to use or access a site or service thereafter.[197] Assent also may be shown by constructive or inquiry notice. As a practical matter, however, without objective evidence of notice or a party admission, it may be very difficult for a site owner or service provider to bind a party to posted terms. While inquiry notice may be shown by evidence of actual notice of circumstances sufficient to put a prudent person upon inquiry, it may, as a practical matter, be very difficult to prevail based on inquiry notice in an Internet case absent repeated notice or an admission by the defendant that he or she knew use

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[195]*Traton News, LLC v. Traton Corp.*, 914 F. Supp. 2d 901, 910 (S.D. Ohio 2012).

[196]*See also, e.g.*, *Arnaud v. Doctor's Associates Inc.*, 821 F. App'x 54, 56 (2d Cir. 2020) (holding that inquiry notice sufficient to place a reasonable user on notice was not provided where a link at the bottom of the registration page referenced "T&Cs" (for Terms and Conditions) in small font, without introductory language, and users clicked on a registration button that read "I'M IN.").

[197]*See, e.g.*, *Gutierrez v. FriendFinder Networks Inc.*, Case No. 18-cv-05918-BLF, 2019 WL 1974900, at *7-8 (N.D. Cal. May 3, 2019) (enforcing the Terms of Use of an adult website, and compelling arbitration, where a recording of a call with plaintiff established that he was told by Customer Service, in connection with restoring access to the site in 2013 after being suspended for a Terms of Use violation, that he was required to adhere to the Terms, which he acknowledged he knew was required; "Because the Terms clearly stated that continued use of the site would constitute acceptance of the Terms, Plaintiff's continued use of the site after being put on notice of the Terms and his need to comply with them constituted acceptance of the Terms.").

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was conditional on Terms, given the discomfort that many judges and juries have in the first place with enforcing unilateral contracts in the absence of express assent.

Indeed, even those few Internet cases that have held defendants bound by terms based on implied assent or acceptance by conduct do not provide irrefutable authority for binding parties to terms in the absence of express assent.

In *Register.com, Inc. v. Verio, Inc.*,[198] the Second Circuit merely found that the district court was within its discretion in concluding that Register.com was likely to prevail on the merits, for purposes of obtaining a preliminary injunction—not that Verio in fact necessarily was bound by the Terms. *Ticketmaster LLC v. RMG Technologies, Inc.*[199] likewise was decided on a motion for preliminary injunction (although the court's findings were stated in very strong terms). The other leading cases where defendants were held potentially bound to Internet Terms in the absence of express assent—*Southwest Airlines Co. v. Boardfirst, LLC*,[200] *Cairo, Inc. v. Crossmedia Services, Inc.*,[201] and *Ticketmaster Corp. v. Tickets.com, Inc.*[202]—are all unreported decisions.[203] In addition, virtually[204] all of these cases involved frequent and repeated access, making notice easier to establish, and acknowledgements or objective evidence showing that the defendant was aware of the terms sought to be enforced, which is not always easy to establish.

One Beacon Insurance Co. v. Crowley Marine Services,

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[198]*Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

[199]*Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

[200]*Southwest Airlines Co. v. BoardFirst, LLC,* No. 3:06-cv-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007).

[201]*Cairo, Inc. v. Crossmedia Services, Inc.,* No. C 04-04825 JW, 2005 WL 756610, at *4–5 (N.D. Cal. Apr. 1, 2005).

[202]*Ticketmaster Corp. v. Tickets.com, Inc.,* CV99-7654-HLH (VBKx), 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003).

[203]These three cases are discussed at greater length in an earlier footnote in this subsection.

[204]*Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 835 N.E.2d 113 (Ill. App. Ct. 2005), which was decided on a motion to dismiss, involved Terms and Conditions that were accessible via a link, but the Terms also were provided offline, consumers were given additional notices that their transactions were subject to Terms, and consumers were given the option to return their computers for a full refund or credit within 30 days.

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Inc.,[205] in addition to involving repeated notice, was a commercial case where the court alternatively found the agreement enforceable based on the parties' course of dealings.

While U.S. law does not specifically hold businesses to a different standard than consumers, as a practical matter actual or imputed notice may be analyzed differently depending on a party's sophistication. A judge or jury may be willing to find that a business had notice of terms, but find the same notice inadequate if the contracting party were a student of below average intelligence or a frail old lady accessing a site from a nursing home.

Similarly, different courts may find the same notice of a unilateral contract involving the same parties either enforceable or unenforceable based on their own judgment of reasonableness. One trier of fact, for example, could find that a frequent Internet user knows that most commercial websites have posted Terms that are accessible, if nowhere else, at least via a link from the bottom of the homepage of the site, and hold that user to have had notice if he or she accessed a site knowing that he or she should have checked the bottom of the homepage for a link to Terms of Use. On the other hand, Judge Brinkema, in *Cvent*, held that even a commercial entity could not be bound by posted Terms of Use if they were merely accessible via a link from the bottom of the homepage (albeit in a case that could be distinguished because the link to the Terms was merely one of 28 at the bottom of the page, and it in turn linked to another page containing links to three different agreements).

Absent express assent, a lawsuit to enforce a unilateral contract where the other party denies the existence of the contract, will turn on proof of actual or constructive notice, which tends to be fact-specific. While liberal pleading standards made it relatively easy in the past to plead sufficient facts to withstand a motion to dismiss,[206] today a plaintiff must show that a claim for relief is *plausible* on its face and

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[205]*One Beacon Insurance Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258 (5th Cir. 2011).

[206]*See, e.g.*, *Internet Archive v. Shell*, 505 F. Supp. 2d 755 (D. Colo. 2007) (denying a motion to dismiss where the defendant alleged that the plaintiff, by its conduct in copying material from her website for the "Wayback Machine," was impliedly bound by the terms of a copyright policy she posted to the site requiring third parties to pay her large royalty fees if they copied material from her site, among other things).

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courts are not required to accept mere legal conclusions[207] and therefore may look beyond the pleadings to screen shots of the actual alleged process for contract formation.[208] While (notwithstanding *Cvent*) a plaintiff should at least be able to state a claim in most jurisdictions based on posted Terms if they are clearly presented, prevailing on the merits in an implied assent case where the defendant denies that it was on notice of terms is by no means certain.

In the Second Circuit, a court may determine that inquiry notice has been established as a matter of law where notice was reasonably conspicuous and manifestation of assent was unambiguous,[209] but what constitutes *reasonably conspicuous* notice and *unambiguous* assent may be viewed differently by different judges. Consumer friendly judges and ones who are less tech-savvy are less likely to find notice conspicuous, for example, than technophiles who have downloaded numerous apps and are active smartphone users.

Implied assent cases also generally are more expensive to litigate than cases where express assent has been obtained. Where a case depends on proof of actual or constructive notice, factual disputes may preclude a final ruling on the merits short of trial. By contrast, where express assent is obtained, an Internet company may be able to obtain summary judgment more easily than if formation of a contract is disputed, thereby saving the time and the costs associated with trial.

Specht and *Hines* further underscore that even if a company potentially could prove implied assent at trial or following discovery on motion for summary judgment, it may be difficult or impossible to enforce venue selection clauses and even more so arbitration provisions, which typically are considered at the outset of a case, if the defendant denies that it had notice.[210] By comparison, in jurisdictions where those clauses will be enforced, a court may be more likely to

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[207] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007); *see generally infra* § 57.04[1] (analyzing these cases and their impact on pleading standards).

[208] *See Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va. 2010) (granting in part defendant's motion to dismiss).

[209] *See Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 76 (2d Cir. 2017).

[210] Enforcement of venue selection clauses was made easier by the U.S. Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 571 U.S. 49, 62-64 (2013);

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discount arguments that a contract was not formed where express assent has been obtained, even if the defendant had not actually reviewed the agreement (so long as an opportunity to do so was provided).[211]

Specht and *Cvent* also illustrate that using multiple different agreements can create confusion and ultimately undermine the enforceability of a potential contract. In *Specht*, the defendant failed to provide clear and conspicuous notice that its software downloads were subject to terms. Even the link that had been established for the applicable Terms of Use merely connected to a page where multiple Netscape agreements could be accessed via links. At that page, consumers interested in seeing the agreement would have had to figure out which of many different agreements applied to their download of software. Although most of the plaintiffs had entered into a separate click-through contract with Netscape for other purposes, the court declined to enforce the arbitration provision in the click-through contract in part because the court found that the underlying dispute did not specifically relate to that contract.

In *Cvent*, the court similarly found Terms of Use unenforceable where users had to scroll down to the bottom of the page to find a link to the Terms, the link was included among 4 columns (each containing seven links, for 28 in total), and the initial TOU link merely brought users to a second page where links to three separate TOU were presented (for suppliers, event management and web survey). While most readers of this text would not be overwhelmed by four columns of links, and would be able to find the one of 28 links for Terms of Use and then figure out which one of the three sets of Terms and Conditions presented on the next screen applied to them, *Cvent* underscores that not every judge would be able to do so (or consider this presentation to provide adequate notice). Terms and Conditions should be configured to give notice to a person of average intelligence, not simply to

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see generally infra §§ 22.05[2][G] (forum selection provisions in Terms of Use agreements), 54.02[1] (analyzing *Atlantic Marine* and the enforcement of venue selection clauses in greater detail). Enforcement of arbitration provisions in Terms of Use and other unilateral internet and mobile contracts is analyzed in section 22.05[2][M].

[211] *See* cases discussed later in this section. Enforcement of arbitration clauses is also governed by U.S. Supreme Court case law under the Federal Arbitration Act, which supersedes state law on contract formation. *See infra* §§ 22.05[2][M], 56.03.

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the peers of the engineers and lawyers who usually are responsible for their presentation.

Presenting users with more than one agreement to choose from may create confusion for consumers and courts. Incorporating by reference numerous other agreements or policies also can create confusion or jeopardize the enforceability of an agreement.

By contrast, when a single agreement is used, it is more difficult for a consumer to argue convincingly that he or she did not know which agreement applied.

A number of courts use the terms *clickwrap* or *browsewrap,* rather than the legally more precise terms *express* and *implied assent*, and therefore sometimes confuse the issues in the process. For example, some courts have upheld the enforceability of agreements where click-through assent was obtained that they nevertheless characterized as *browsewrap* or hybrid agreements because the actual agreement was not directly presented to the user, but was made available via a link.[212] This analysis, focused on the perceived difference between *clickwrap* and *browsewrap*—which are terms that

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[212]*See, e.g.*, *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 74-80 (2d Cir. 2017) (holding that Terms of Service accessible via a link were enforceable as a matter of law where notice was reasonably conspicuous and manifestation of assent unambiguous, but remanding the case on the issue of waiver; "The fact that clicking the register button had two functions—creation of a user account and assent to the Terms of Service—does not render Meyer's assent ambiguous. . . . Although the warning text used the term 'creat[e]' instead of 'register,' as the button was marked, the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action the user is about to take."); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236 (2d Cir. 2016) (assuming, without deciding, that the agreement at issue was a "hybrid" where the user was asked to click on a "Place your order" button after being told elsewhere on the page that "By placing your order, you agree to Amazon.com's privacy notice and conditions of use," with the latter phrase hyperlinked to the 2012 Conditions of Use, but concluding that however characterized the issue in the case was whether the plaintiff had inquiry notice of the Conditions of Use, which was a factual question that could not be decided on a motion to dismiss); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254 (E.D.N.Y. 2019) (granting defendant's motion to compel arbitration based on inquiry notice where the plaintiff's wife's friend, acting as the wife's agent and using her log-in credentials with permission, was shown a notice stating that by signing up for the MOM service users would be bound by the Amazon Prime Terms and Conditions, and because the plaintiff, who subsequently used his wife's account for the transaction at issue, was bound based on equitable estoppel; characterizing Amazon.com's assent

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process as a "hybridwrap" that prompted users to manifest assent by engaging in a dual-purpose action, such as completing a transaction), *aff'd*, 815 F. App'x 612 (2d Cir. 2020); *Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 547-54 (S.D.N.Y. 2018) (enforcing Airbnb's Terms of Service as a "hybrid" agreement and compelling arbitration, holding "that Airbnb put Plaintiffs on reasonably conspicuous notice of the terms of the arbitration provision and that Plaintiff Plazza's actions in signing up, as well as Plaintiffs' explicit agreement to the modifications and continued use of Airbnb, manifested their assent."); *DeVries v. Experian Information Solutions, Inc.,* Case No. 16-cv-02953-WHO, 2017 WL 733096, at *5-7 (N.D. Cal. Feb. 24, 2017) (holding that a binding contract was formed where the plaintiff pressed a "Submit Secure Order" button, directly above which was the statement "Click 'Submit Secure Order' to accept the Terms and Conditions above, acknowledge receipt of our Privacy Notice and agree to its terms, confirm your authorization for ConsumerInfo.com, Inc., an Experian company, to obtain your credit report and submit your secure order," where the phrases "Terms and Conditions" and "Privacy Notice" were in blue, "a different color than the rest of the text, indicating that they were active hyperlinks that the consumer could click to be directed to another webpage" and where, when a consumer clicked on the "Terms and Conditions" hyperlink, "an additional window would open within the consumer's web browser containing the entire text of the Terms and Conditions," including the arbitration provision); *Graf v. Match.com, LLC*, No. CV 15-3911 PA (MRWx), 2015 WL 4263957, at *4 (C.D. Cal. July 10, 2015) (holding that the plaintiff assented to an arbitration clause where evidence showed that all website users "were required to affirmatively agree to the Terms of Use when they clicked on a 'Continue' or other similar button on the registration page where it was explained that by clicking on that button, the user was affirming that they would be bound by the Terms of Use, which were always hyperlinked and available for review."); *Crawford v. Beachbody, LLC*, No. 14cv1583-GPC(KSC), 2014 WL 6606563, at *2-3 (S.D. Cal. Nov. 5, 2014) (upholding terms and conditions, in granting defendant's motion to change venue, where the "PLACE ORDER" button was directly below the sentence, "By clicking Place Order below, you are agreeing that you have read and understand the Beachbody Purchase Terms and Conditions, and Team Beachbody Terms and Conditions."); *CollegeSource, Inc. v. AcademyOne, Inc.,* Civil Action No. 10-3542, 2012 WL 5269213, at *10–11 (E.D. Pa. Oct. 25, 2012) (holding that the conduct alleged did not amount to a breach of CollegeSource's subscription agreement, which the court characterized as a browsewrap agreement even though before accessing CollegeSource's subscriber-only content users were presented with a box that stated "by signing in above, I agree to be bound by the terms of the . . . Subscription Agreement" which contained a link to the agreement, and it was impossible to access the content without signing in); *Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894 (S.D. Ill. 2012) (enforcing the venue selection clause in Facebook's Terms of Service agreement against a minor plaintiff, where users were required to assent to the TOS as a condition of establishing an account, but the court characterized the TOS as a browsewrap agreement because the actual TOS was available via a link at the time users agreed to be bound (as well as via a link from every page on the site "in underlined, blue text that

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have no inherent legal meaning—confuses the presentation of an agreement (which may be relevant to the issue of whether a user was given adequate notice of terms) and the legal issue of whether express or implied assent has been obtained.

In *Fteja v. Facebook, Inc.*,[213] for example, the court explained the sign up process for creating a Facebook account as follows:

> A putative user is asked to fill out several fields containing personal and contact information. *See* http://www.facebook.com. The putative user is then asked to click a button that reads "Sign Up." After clicking this initial "Sign Up" button, the user proceeds to a page entitled "Security Check" that requires a user to reenter a series of letters and numbers displayed on the page. Below the box where the putative user enters that letter-number combination, the page displays a second "Sign Up" button similar to the button the putative user clicked on the initial page. The following sentence appears immediately below that button: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." The phrase "Terms of Service" is underlined, an indication that the phrase is a hyperlink . . . .[214]

Although the court enforced Facebook's TOS, its analysis confuses the legal issue of assent with online contract jargon. By clicking a "Sign up" button agreeing to be bound by the TOS, a user provides express assent. By focusing on whether this process involved a so-called browsewrap or clickwrap agreement, rather than the underlying legal question of whether express or implied assent was obtained, the court mischaracterized the agreement. Indeed, the court (incorrectly) defined a so-called browsewrap agreement as one that "usually involves a disclaimer that by visiting the

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contrasts with the white background of the hyperlink.")); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838–41 (S.D.N.Y. 2012) (enforcing the venue selection clause in Facebook's Terms of Service agreement which the court considered to be hybrid, rather than either a click-through or browsewrap agreement, because users were not forced to review the agreement before clicking their assent to be bound by it; "Facebook's Terms of Use are somewhat like a browsewrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else—click 'Sign Up'—to assent to the hyperlinked terms. Yet, unlike some clickwrap agreements, the user can click to assent whether or not the user has been presented with the terms.").

[213] *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

[214] *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834–35 (S.D.N.Y. 2012).

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website—something that the user has already done—the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink."[215] To the contrary, most posted TOU are posted on the site itself—the difference is merely whether express assent is sought in the form of a click (or a checkbox and a click) responding to a question asking for assent or whether it is merely implied by a posted notice or other communication but not active assent. By contrast, the court characterized a click-through agreement as one where users were forced to review the terms prior to giving assent.[216] While it is a good practice to enhance the enforceability of a unilateral contract in litigation, express assent does *not* depend on a user being forced to actually review the contract before manifesting assent (and if it did, many contracts in the physical world could be avoided where contracting parties are merely given the opportunity to review an agreement but are not forced to do so).[217] The term "click-through" does not literally mean a user must click through the entire text of the agreement before manifesting assent. A click-through contract may be presented to users via a screen, button, pop-up window or checkbox, among other means. The key distinguishing feature of a so-called click-through contract is that express assent is obtained by a user clicking on some feature (or on a mobile device or tablet, pressing on the screen) to respond to a question asking if the user agrees to be bound by a contract, whether or not its terms are reprinted in full at the place where user assent is sought.

The *Fteja* court plainly confused cases where terms were posted on a website but express assent was not sought (or cases like *Specht,* where users pressed a button but the surrounding text did not make clear that assent was sought and the actual agreement was buried and difficult to find) from the facts of *Fteja* itself where express assent was sought for a single document that could easily be accessed by a user prior to manifesting assent.

The *Fteja* court analogized a link to a separate document

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[215] *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012).

[216] *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837–38 (S.D.N.Y. 2012).

[217] *But see Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing small print on the back of a cruise line ticket over the plaintiffs' objection that they never read those terms, including the venue selection provision at issue in that case); *see generally supra* § 21.02[4]; infra § 53.03[2].

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in the physical world, suggesting that by placing a link in connection with seeking assent a company was incorporating by reference a separate document,[218] when in fact a link merely makes the document immediately accessible to users. Incorporation by reference in the physical world requires a user to locate the other agreement and analyze its terms, which is time consuming. Incorporation by reference also requires a careful analysis of how one agreement impacts the other. By contrast, a link makes a single document immediately accessible and is in many instances the only practical way to make a unilateral contract accessible to users given screen size limitations—especially today where more people access the Internet via mobile devices than computers.

The danger of infusing terms like *click-through, clickwrap, browsewrap* and *browserwrap* with legal meaning is that courts will then analogize future cases to the descriptions given these hollow terms, rather than focusing on the contract law concepts that underlie these shorthand references—express and implied assent.

The language used by a company in presenting a purported unilateral contract may make the difference between a finding of express assent or implied assent (or no assent at all). For example, an invitation to press a button to download software (as in *Specht*) is quite different from an invitation to "click[ ] Sign Up, . . . indicating that you have read and agree to the Terms of Service" which was what was asked of users when they created the Facebook accounts at issue in *Fteja*.[219] Even if a click is obtained, if a user is not adequately put on notice that by clicking a button he or she will be deemed bound by an agreement, express assent will not be found (and whether there is an enforceable contract will then depend on whether implied assent may be found based on other notice provided to the user or his or her actual knowledge that use was governed by terms). But where assent is sought expressly, as it was in *Fteja,* the fact that the terms of the agreement are made available via a link, rather than a scroll down page, should be no more relevant than whether a contract formed by a person saying "I accept" was held in the offeree's hand at the time he manifested his as-

[218] *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012).

[219] *See Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834–35 (S.D.N.Y. 2012).

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sent to be bound.

Following *Fteja,* the court in *Zaltz v. JDate*[220] found that the plaintiff had assented to JDate's Terms and Conditions of Service, notwithstanding her failure to remember doing so, based on evidence that all users were required to assent by (1) checking the box next to the statement "I confirm that I have read and agreed to the Terms and Conditions of Service" (which included a hyperlink to the Terms) and (2) clicking the "Accept and Continue" button. The court, in analogizing the case to *Fteja,* explained that:

> Unlike the license terms at issue in *Specht,* defendant's reference to its Terms and Conditions of Service appear on the same screen as the button a prospective user must click in order to move forward in the registration process. . . . Plaintiff did not need to scroll or change screens in order to be advised of the Terms and Conditions; the existence of, and need to accept and consent to, the Terms and Conditions of Service was readily visible. Moreover, whereas Facebook's Terms of Use were referenced *below* the button a prospective user had to click in order to assent, defendant's reference to its Terms and Conditions of Service appear *above* the button . . . , thereby making it even more clear that prospective members of JDate.com are aware that by clicking the button to move forward in the registration process, they manifest their assent to the Terms and Conditions of Service referenced above.
>
> As to the fact that plaintiff had to click on a hyperlink to view the Terms and Conditions of Service (rather than view the terms on the same page where she had to indicate her assent to the terms), the Court agrees with the *Fteja* court's analogizing this situation to cruise tickets—plaintiff was shown precisely where to access the Terms and Conditions of Service before she agreed to them, and should have clicked on them in the same way that one is expected to turn over a ticket to learn of its terms.[221]

While placement above, rather than below a button may be generally desirable, courts should avoid absolute judgments on how requests for express assent to unilateral

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[220] *Zaltz v. JDate*, 952 F. Supp. 2d 439 (E.D.N.Y. 2013) (granting defendant's motion to transfer based in part on the venue selection clause in JDate.com's Terms and Conditions of Service).

[221] *Zaltz v. JDate*, 952 F. Supp. 2d 439, 453–54 (E.D.N.Y. 2013). The reference to cruise tickets is a reference to the U.S. Supreme Court's enforcement of pre-printed terms on the back of a cruise line ticket in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) over the plaintiffs' objection that they never read those terms, including the venue selection provision at issue in that case. *See generally supra* § 21.02[4][D]; *infra* § 53.03[2].

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contracts should be presented because sites and services are not homogenous. The legal issue of whether a notice is sufficiently prominent that a person's clicking a button in fact manifests assent should be evaluated based on a common sense, visual review of how the button is presented to users, not an artificial check list of where language is placed and whether users must scroll through it or access it via a link.

A "belt and suspenders" approach to online contract formation would have a user confront an agreement, scroll down to the bottom, check a box agreeing to be bound and click a button confirming assent to the contract[222] (and perhaps even providing additional click-through assent to individual material terms), but express assent equally may be obtained when a user is asked to do no more than click on a button marked "Yes" in response to a statement asking if the user agrees to be bound by a unilateral contract such as Terms of Use, even if the agreement is presented to the user above the button in the form of a link, rather than a scroll through box. The difference in the way a unilateral contract is presented to a user may reflect corporate culture—on the one hand a company's risk tolerance and on the other its marketing department's willingness to place obstacles between a user and access to a site or content or completion of a transaction. The relevant legal question, however, is whether express assent has been obtained (in the form of acceptance of an offer) or, if not, whether assent may be implied based on conduct such as use of a site or service, in which case the adequacy of notice (or more precisely, the opportunity for a user to review the terms, whether or not the user in fact chooses to do so) generally will determine whether a contract has been formed.[223]

Amending Unilateral Online and Mobile Contracts

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[222] *See infra* §§ 22.03, 22.04.

[223] In *Garcia v. Enterprise Holdings, Inc.*, 78 F. Supp. 3d 1125 (N.D. Cal. 2015), the court rejected plaintiff's argument that he was not bound by Zimride's Terms of Use agreement and privacy policy because the language surrounding the button he clicked to sign up for the app merely said "Okay." Judge Barbara Armstrong explained that this argument was only germane to a clickwrap agreement, not the browsewrap agreement at issue in that case. She explained that " '[u]nlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly; rather,' . . . the terms of the agreement are binding, even if the user did not actually review the agreement, provided that the user had actual knowledge of the agreement or the website put 'a reasonably prudent user on notice of the terms of the

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Once a unilateral contract has been formed, similar formation issues arise in connection with amendments. In general, the best practice is to obtain express assent to amendments, much as it is the best practice to obtain express assent initially.[224] In many instances, however, it may not be feasible to do so. Accordingly, a second best option would be to establish a process (agreed to in advance by contracting parties) for amendment that provides users with notice and a mechanism for either opting out or being deemed bound to the amendment if the amendment provisions are complied with. For example, if a contract provides that consumers will be sent notice of an amendment by email 30 days before the amendment is to take effect, and will be given the option to opt out (and therefore remain bound by the original terms), courts frequently will enforce contracts amended in this way provided assent to the amendment process is obtained initially, the process for notice of amendment is clear, and the contracting party follows its own procedures for amendment as set forth in the prior contract.[225]

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contract.' " *Id.* at 1137, *quoting Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176-77 (9th Cir. 2014).

[224]*See, e.g.*, *Trudeau v. Google LLC*, 816 F. App'x 68, 70 (9th Cir. 2020) (rejecting the argument that the arbitration provision in Google's 2017 ToS did not apply retroactively because the 2013 agreement purported to give Google the unilateral right to amend the ToS prospectively, where Trudeau also assented expressly to the 2017 ToS; "Even where a contract contains no express modification provision, ordinary principles of contract formation would allow the parties to a contract to modify it via bilateral agreement, and for valid consideration."); *Ekin v. Amazon Services, LLC*, 84 F. Supp. 3d 1172, 1173-75 & n.2 (W.D. Wash. 2014) (describing how customers who sign up for Amazon Prime must accept Amazon's Prime Terms and Conditions (T & Cs), by clicking a button next to text that states "you acknowledge that you have read and agree to the *Amazon Prime Terms and Conditions*," with the underlined portion of this sentence providing a hyperlink that directs customers to the T & Cs. The T & Cs incorporate Amazon's Conditions of Use (COU). Customers also accept the COU every time they make a purchase on Amazon.com; to make a purchase, customers must click a button next to text that says "by placing your order, you agree to Amazon.com's *privacy notice* and *conditions of use*," "the underlined portions also bearing hyperlinks to the eponymous documents."); *Brown v. Web.com Group, Inc.*, 57 F. Supp. 3d 345 (S.D.N.Y. 2014) (describing that defendant website when amending its terms informed its customers of the new agreement, linked to the agreement, and prevented customers from accessing their accounts until they reviewed and accepted the terms).

[225]*See, e.g.*, *In re. Uber Technologies, Data Security Breach Litig.*, No. CV 18-3169 PSG (GJSx), 2019 WL 6317770 at *4 (C.D. Cal. Aug. 19, 2019)

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In crafting amendment provisions, clear language explaining the amendment process will enhance to enforceability. Among other things, businesses should think through and account for how the amendment process will work in practice. For example, if amended Terms will be sent to users by email 30 days before they will take effect for those who don't opt out, it is a good practice to remind users that it is important that the company maintains a current email address for the user on file and to provide a means for users to update their information, to receive future amendment notices.

Where an amendment process is set forth in a unilateral contract that allows a party the option to decline the amendment (for example, by canceling one's account before the new

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(enforcing Uber's ToU, and compelling arbitration of plaintiff's claims arising out of an alleged cybersecurity breach, based on plaintiff's initial assent plus notice of amended Terms and a revised arbitration provision sent by email); *West v. Uber Technologies*, Case No. 18-CV-3001-PSG-GJS, 2018 WL 5848903, at *5 (C.D. Cal. Sept. 5, 2018) (enforcing amended Terms where the plaintiff received notice of updated Terms by email and continued to use the app for a year thereafter); *Pincaro v. Glassdoor, Inc.*, 16 Civ. 6870, 2017 WL 4046317, at *6 (S.D.N.Y. Sept. 12, 2017) (holding plaintiffs bound by an amended arbitration provision where they expressly assented to Terms of Use that provided a prominent link to the Terms when they registered for accounts, and the original Terms of Use provided that the agreement was subject to amendment upon 30 days advance notice by email followed by continuous use, where plaintiffs in fact were sent notice by email in July 2016 of the new TOU and none of them opted out).

In some instances, it may not be possible to obtain express assent to amendment procedures for legacy users. In those instances, courts may uphold amendments based on notice and continued use if a company can establish the notice was reasonable (such as by displaying a prominent notice on the homepage of a website above the fold for a period of time when a user in fact accessed the website, or by an in-app notice if users typically use the app and access messages, or through email notice if it is reasonable to assume the email was in fact received and reviewed and that the email address used was current), depending on the specific facts of a given case. *See, e.g.*, *In re Facebook Biometric Information Privacy Litig.*, 185 F. Supp. 3d 1155, 1165-67 (N.D. Cal. 2016) (upholding the enforceability of Facebook's amended user agreement where users with registered email addresses were provided email notice that the terms were changing, with a link to the new Terms of Use, users also received "jewel notification" of the update in the form of a new message in their user feeds, and Facebook posted notice on its governance page, where users were deemed to have assented to the new TOU by their continued use). A safer approach, where possible, is to establish a set amendment process initially, which is calculated to afford reasonable notice, and then follow that process, if express assent for amendments cannot be obtained.

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terms take effect), a number of courts have upheld the procedure.[226] Where an opt out right is provided (to negate arguments of procedural unconscionability), the language should make clear that a user can opt out of the new version but not opt out of a version to which the user is already bound.[227]

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[226]In addition to the cases cited in the preceding footnote upholding amendment based on a 30 day advance notice and opt-out right set forth in the original contract, *see, e.g.*, *Klein v. Verizon Communications, Inc.*, Case No. 1:12-cv-00757 (GBL/IDD), 2017 WL 5071306, at *1, 3-5 & n.1 (E.D. Va. Aug. 9, 2017) (compelling arbitration based on a 2012 amendment to earlier contracts, where the amendment was sent to the plaintiff by email and the original contract provided that amendments would be effective if sent by email and the user, thereafter, continued to use the service); *In re Facebook Biometric Information Privacy Litig.*, 185 F. Supp. 3d 1155, 1165-67 (N.D. Cal. 2016) (upholding the enforceability of Facebook's amended user agreement where users with registered email addresses were provided email notice that the terms were changing, with a link to the new Terms of Use, users also received "jewel notification" of the update in the form of a new message in their user feeds, and Facebook posted notice on its governance page, where users were deemed to have assented to the new TOU by their continued use); *Sacchi v. Verizon Online LLC,* No. 14-cv-423-RA, 2015 WL 765940, at *7-9 (S.D.N.Y. Feb. 23, 2015) (holding that an arbitration provision was enforceable because Verizon provided the plaintiff with notice of the contract modification with the proviso that continued use of the service after a set date would amount to acceptance of the modification and the plaintiff continued using the service); *Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182, 1188, 1200 (S.D. Cal. 2013) (granting a motion to compel arbitration where the relevant provision provided for notice of change of terms with a right to opt out and the credit cardholder did not opt out); *Daugherty v. Experian Information Solutions, Inc.*, 847 F. Supp. 2d 1189, 1191-96 (N.D. Cal. 2012) (same); *Hodson v. Bright House Networks, LLC,* No. 1:12-cv-01580-AWI-JLT, 2013 WL 1091396, at *6 (E.D. Cal. Mar. 15, 2013); *Klein v. Verizon Communications, Inc.*, 920 F. Supp. 2d 670, 680-84 (E.D. Va. 2013), *rev'd on other grounds*, 674 F. App'x 304 (4th Cir. 2017) (reversing and remanding the case based on the determination that Virginia—rather than Maryland—law applied); *see generally infra* § 22.04[1] (discussing these cases and others at greater length in the context of modifying Terms of Use agreements).

[227]*See, e.g.*, *Capriole v. Uber Technologies, Inc.*, 460 F. Supp. 3d 919, 928- (N.D. Cal. 2020) (compelling arbitration (except for public injunctive relief), based on an earlier agreement, where the opt-out language of the subsequent agreement provided that "If, at the time of your receipt of this Agreement, you were bound by an existing arbitration agreement with us, that arbitration agreement will continue to apply to any pending litigation, even if you opt out of this Arbitration Provision."; "Because Mr. Capriole signed the 2015 Arbitration Agreement, but did not opt out of it within 30 days (or ever), he had at the time of the 2020 Agreement an "existing agreement to arbitrate" his disputes with Uber. Opting out of the 2020 Agreement does not operate to opt him out of the prior 2015 agree-

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In *Klein v. Verizon Communications, Inc.*,[228] for example, Judge Gerald Bruce Lee of the Eastern District of Virginia, applying Maryland law (and subsequently reaffirming the same ruling under Virginia law[229]), upheld as enforceable and not unconscionable a modification provision in Verizon's Terms of Service contract that allowed it to amend the contract by providing notice to customers advising them of the proposed change and that their continued use of the service would be deemed acceptance. In that case, Verizon's TOS provided that notice of revisions could be given by email to the email address provided by customers to receive communications and that customers would be deemed to agree to abide by the contractual modifications by their continued use of the service. Verizon in fact sent the proposed contract modification that included the arbitration provision to the plaintiff pursuant to these guidelines, reiterating in its email notice that the plaintiff would be bound by the amendment if he continued to use the service after the date of the notice. The court explained that "Klein sufficiently assented to the terms because the previous agreement between the parties contained a clause allowing for contract modification assent through continued usage of Verizon's services and Klein continued to use Verizon's services after receiving email notification of the proposed modifications."[230] The court acknowledged that silence generally is not considered acceptance of an offer, but noted exceptions under Maryland law where (1) the parties had agreed previously that silence would be acceptance, (2) the offeree had taken the benefit of the offer, or (3) because of previous dealings between the parties, it was reasonable that the offeree should notify the

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ment."); *Wickberg v. Lyft, Inc.*, 356 F. Supp. 3d 179, 185 (D. Mass. 2018) (concluding plaintiff was bound by earlier arbitration agreement despite the fact he opted out of a subsequent arbitration agreement).

[228]*Klein v. Verizon Communications, Inc.*, 920 F. Supp. 2d 670, 680–84 (E.D. Va. 2013), *rev'd on other grounds*, 674 F. App'x 304 (4th Cir. 2017) (reversing and remanding the case based on the determination that Virginia—rather than Maryland—law applied).

[229]*See Klein v. Verizon Communications, Inc.*, Case No. 1:12-cv-00757 (GBL/IDD), 2017 WL 5071306, at *1 & n.1 (E.D. Va. Aug. 9, 2017).

[230]*Klein v. Verizon Communications, Inc.*, 920 F. Supp. 2d 670, 680 (E.D. Va. 2013), *rev'd on other grounds*, 674 F. App'x 304 (4th Cir. 2017) (reversing and remanding the case based on the determination that Virginia law, rather than Maryland's, applied).

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offeror if the offeree did not intend to accept.[231] Although the opinion ultimately was reversed and remanded based on a determination that Virginia law, not Maryland law, should have been applied, Judge Lee subsequently ruled the same way on remand. Applying Virginia law this time, Judge Lee held that, "although silence alone will not serve as acceptance of a contract, parties can demonstrate acceptance through some other 'objective manifestation of assent.' "[232] In so ruling, Judge Lee deemed it irrelevant whether Klein read the 2012 email providing notice of the amendment, given the parties' express agreement on how the contract could be amended and Klein's continued use of the service after receiving the 2012 email.[233]

By contrast, provisions that purport to allow a party to modify a contract unilaterally without either obtaining

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[231]*Klein v. Verizon Communications, Inc.*, 920 F. Supp. 2d 670, 680 (E.D. Va. 2013), *rev'd on other grounds*, 674 F. App'x 304 (4th Cir. 2017) (reversing and remanding the case based on the determination that Virginia law, rather than Maryland's, applied).

[232]*See Klein v. Verizon Communications, Inc.*, Case No. 1:12-cv-00757 (GBL/IDD), 2017 WL 5071306, at *4 (E.D. Va. Aug. 9, 2017), *citing Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC*, 752 F. Supp. 2d 721, 724 (W.D. Va. 2010) (citing *Phillips v. Mazyck*, 643 S.E.2d 172, 176 (Va. 2007)); *see also Durham v. National Pool Equipment Co.*, 138 S.E.2d 55, 58 (Va. 1964) ("assent may be inferred from the acts and conduct of the parties.").

[233]Klein had argued that he had not opened the 2012 email until the day before he filed suit. The court found, however

> that Klein sufficiently assented to the modifications of the 2012 Notification, including the arbitration clause, because the previous agreement between the parties allowed for contract modification via an email from Verizon and Klein's continued use of Verizon's services. By continuing to use the internet services provided by Verizon, Klein manifested his assent to the 2012 modification under the parameters specifically recognized as reflecting acceptance under the terms of his contract. . . . Likewise, whether Klein read the 2012 Notification in the nearly three-week span during which his use of Verizon's services manifested assent is irrelevant in deciding whether the nature of that assent is valid. Klein was on notice of the possibility of contract modification and the process by which it might occur from the change-in-terms clauses of the 2010 Agreement. His failure to read the 2012 Notification, or even open the message at all, does not invalidate his assent to the contents. *See Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 896 (W.D. Va. 2001) ("It is well settled that a party to a written contract is responsible for 'inform[ing] himself of its contents before executing it, . . . and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it.' ") (quoting *Corbett v. Bonney*, 121 S.E.2d 476, 480 (Va. 1961)).

Klein v. Verizon Communications, Inc., Case No. 1:12-cv-00757 (GBL/IDD), 2017 WL 5071306, at *4-5 (E.D. Va. Aug. 9, 2017).

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express assent or pursuant to a previously agreed-upon method reasonably calculated to provide actual notice (for example, merely by posting the new terms on a site) are problematic and may undermine the enforceability of the entire contract (if found to be illusory) or, at best, may be merely ineffective in accomplishing the stated objective of allowing amendment (if enforced subject to a duty of good faith and fair dealing).

A provision purporting to allow unilateral amendment pursuant to a notice posted online, which requires users to check back frequently for new terms that may apply and be bound by those new terms if they use the site in the future, is unlikely to be enforced[234] and have been found by some courts to render an agreement illusory,[235] and thus unenforce-

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[234]*See Stover v. Experian Holdings, Inc.*, 978 F.3d 1082 (9th Cir. 2020). In *Stover*, the Ninth Circuit held that a single website visit four years after the plaintiff assented to a contract containing a change-of-terms provision was insufficient to bind the parties to the terms of the amended agreement in force at the time of the subsequent visit. *But see Bassett v. Electronic Arts, Inc.*, 93 F. Supp. 3d 95, 106-08 (E.D.N.Y. 2015) (describing favorably EA's expressed obligation in its Terms of Service to provide passive notice of modifications of its Terms of Service; "Although EA did modify the Terms of Service on at least one occasion, that modification was reasonable under the circumstances, and consistent with EA's duty to act in good faith.").

[235]*See, e.g.*, *National Federation of the Blind v. The Container Store*, 904 F.3d 70, 86-88 (1st Cir. 2018) (holding terms and conditions illusory under Texas law where the plaintiff reserved the unilateral right to alter the terms of its loyalty program, including its arbitration provision, at any time; rejecting the argument that this provision was modified by the duty of good faith and fair dealing based on out-of-state authorities or that the agreement was not illusory because plaintiffs could terminate the agreement or because the clause could be severed from the rest of the agreement); *Diverse Elements, Inc. v. Ecommerce, Inc.*, 5 F. Supp. 3d 1378, 1382 (S.D. Fla. 2014) (holding that defendants' unfettered attempt to reserve the right to modify the contract without notice was invalid as a matter of law and rendered the contract illusory); *In re Zappos.com, Inc. Customer Data Security Breach Litig.*, 893 F. Supp. 2d 1058, 1065 (D. Nev. 2012) ("if a consumer sought to invoke arbitration pursuant to the Terms of Use, nothing would prevent Zappos from unilaterally changing the Terms and making those changes applicable to that pending dispute if it determined that arbitration was no longer in its interest."); *Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 1021, 1034 (D. Colo. 2012) (holding that "[b]ecause Qwest retained an unfettered ability to modify the existence, terms and scope of the arbitration clause, it is illusory and unenforceable.") (Colorado law), *appeal dismissed*, 733 F.3d 990 (10th Cir. 2013) (dismissing appeal for lack of jurisdiction); *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009) (Texas law); *see generally infra* § 22.04[1] (collecting cases).

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Except for *Diverse Elements*, these cases all involved motions to enforce arbitration provisions. Some judges are hostile to arbitration of consumer disputes and therefore will scrutinize contracts containing arbitration clauses more closely. *See infra* § 22.05[2][M] (analyzing case law on the enforceability of arbitration clauses in unilateral consumer contracts prior to and since the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). At the same time, when an arbitration clause includes an enforceable delegation clause, the issue may be delegated to the arbitrator to decide. *See infra* § 22.04[1] (analyzing the issue and delegation clauses).

In *Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2015 WL 604985 (N.D. Cal. Feb. 12, 2015), a class action suit alleging breach of contract by Safeway for charging higher prices for groceries on its online Safeway.com delivery service than it charged in the stores where the groceries were selected, Judge Jon S. Tigar, ruling on cross-motions for summary judgment, declined to enforce a 2011 special amendment to Safeway.com's online Terms and Conditions that notified users that Safeway.com was no longer offering the same prices online as in the physical stores, which Safeway had argued was binding on class members because, at the time of their initial registration, Safeway.com registrants agreed to be bound by any amended versions of the terms posted to the website. Safeway had posted the 2011 amendment on its website but had not sought express assent to the amendment or notified its registered users of the change at that time. Judge Tigar held that the provision in Safeway's original online agreement purporting to allow Safeway to change its terms prospectively was illusory, writing that "[t]he Safeway.com agreement did not give Safeway the power to bind its customers to unknown future contract terms, because consumers cannot assent to terms that do not yet exist." *Id.* at *10. In the alternative, Judge Tigar ruled that the special amendment was not binding based on plaintiffs' continued use of the site because class members were not provided adequate notice of the special terms. He explained that:

> Although it is true that a customer could, as matter of course, read the entirety of the Special Terms before every grocery purchase they make from Safeway.com, generally "[p]arties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side." [*Douglas v. United States District Court*, 495 F.3d 1062, 1066 (9th Cir. 2007).] Safeway has attempted to impose that obligation onto customers via a contractual term, to which users agree as a condition of their initial Safeway.com registration. If the Court gave that term effect, then every individual consumer would be expected to scrutinize the Special Terms every time she seeks to purchase groceries from Safeway.com. Such a burden would seriously compromise the convenience that makes online shopping a desirable alternative to the in-store experience.
>
> But beyond the impracticality of expecting consumers to spend time inspecting a contract they have no reason to believe has been changed, the imposition of such an onerous requirement on consumers would be particularly lopsided, as Safeway is aware that it has—or has not—made changes to the Terms and is the party to the contract that wishes for the new terms to govern. "[T]he onus must be on website owners to put users on notice of the terms to which they wish to bind consumers." *Nguyen*, 763 F.3d at 1179. Safeway is best positioned to make sure customers are aware of changes that Safeway has made to its

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able, or may be found unconscionable[236] unless implicitly modified by the duty of good faith and fair dealing.[237] In

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contract with Class Members. After making a change, Safeway can take any number of actions to alert users that the Special Terms they agreed to at registration have been altered. For instance, Safeway could ask customers to click to indicate that they agree to the new Special Terms or send all existing Safeway.com customers an email in order to ensure that every consumer is aware of a change in the Special Terms prior to making a purchase. When Safeway changed the Special Terms on November 15, 2011, it opted to do neither.

Rodman v. Safeway, Inc., No. 11-cv-03003-JST, 2015 WL 604985, at *11 (N.D. Cal. Feb. 12, 2015). Finally, Judge Tigar ruled that the amendment also was not made effective as of August 29, 2012, when an email was sent advising Safeway.com customers of the pricing change, because the email merely stated, under the heading "Helpful Information on Grocery Delivery Pricing and Promotions" that "Grocery delivery prices, promotions, discounts, and offers may differ from your local store." The court emphasized that the email did not specifically reference the change to the Special Terms, was only sent to those users who had opened a Safeway.com account within the preceding six months and was not factually accurate. *See id.* at *11 (noting that "the representation contained within the email, which stated that prices 'may differ from your local store,' was not even factually accurate, as Safeway in fact always added a markup to items sold in the online store as compared to items sold in the physical store.").

[236]*See, e.g.*, *Douglas v. United States District Court*, 495 F.3d 1062, 1067-69 (9th Cir. 2007) (holding, in the alternative, that if a unilateral amendment provision was not unenforceable it was likely unconscionable); *see generally infra* § 21.04. In *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016), the appellate court enforced an arbitration provision in 23andMe's Terms of Service agreement, but clarified that a unilateral modification clause *itself* may be unconscionable, and that a party may raise that argument in arbitration, but absent evidence of how the unilateral modification clause rendered the arbitration clause itself unconscionable, the clause would be enforced. *Id.* at 1033. The panel explained that "[a]lthough we have held that a unilateral modification provision itself may be unconscionable, *see Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003), we have not held that such an unconscionable provision makes the arbitration provision or the contract as a whole unenforceable." 840 F.3d at 1033; *see generally infra* §§ 21.04 (unconscionability), 22.04 (analyzing arbitration and amended Terms of Use), 22.05[2][M] (analyzing the enforceability of arbitration provisions in unilateral online and mobile contracts).

[237]*See Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016) (enforcing an arbitration provision in 23andMe's Terms of Service agreement as not unconscionable because the unilateral modification provision was modified by the duty of good faith and fair dealing and plaintiff had not shown how the arbitration clause was unconscionable based on a unilateral amendment); *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1062-67, 1071 (S.D. Cal. 2015) (compelling arbitration of a putative class action suit over online purchases, finding that the agreement was not illusory or unconscionable under Washington law based on Amazon's

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Douglas v. United States District Court,[238] for example, the Ninth Circuit held that "[p]arties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side. Indeed, a party can't unilaterally change the terms of a contract; it

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reservation of the right to modify the agreement at any time without prior notice because (a) both parties incurred performance obligations under the agreement, and those obligations remained in place based on the assent manifested by the parties and the consideration exchanged, and (b) Amazon's discretion was not unrestrained, but was limited by the duty of good faith and fair dealing), *aff'd sub nom. Wisely v. Amazon.com, Inc.*, 709 F. App'x 862 (9th Cir. 2017); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1317-18, 1320-21 (11th Cir. 2017) (applying *Fagerstrom* to reach the same result in granting in relevant part a motion to compel arbitration under Washington law with respect to a clause that allowed a bank to "change or add" its terms and conditions at any time subject to "notice of the change as we determine is appropriate, such as by statement message or enclosure letter, or as posted in the branch, and as required under applicable law" and holding that a clause permitting a bank to unilaterally modify its terms and conditions did not render the terms and conditions illusory, under either Ohio or Washington law, because the unilateral right was limited by the requirement of notice and the duty of good faith and fair dealing): *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 959-60 (N.D. Cal. 2015) (treating a unilateral modification provision as at least minimally substantively unconscionable but compelling arbitration where it was modified by the duty of good faith and fair dealing); *see also Engen v. Grocery Delivery E-Services USA Inc.*, 453 F. Supp. 3d 1231, 1238-41 (D. Mass. 2020) (holding that a unilateral amendment clause did not render Hello Fresh's Terms and Conditions illusory because such clauses are subject to the duty of good faith and fair dealing under New York law, but declining to enforce an agreement to arbitrate incorporated in a subsequent version of the Terms where the plaintiff visited the Hello Fresh website when the new Terms were in effect and received numerous emails with reference to Terms but was not shown to have had actual or inquiry notice of the new arbitration provisions); *Serpa v. California Surety Investigations, Inc.*, 215 Cal. App. 4th 695, 706-08, 155 Cal. Rptr. 3d 506, 514-16 (2d Dist. 2013) (holding that an arbitration provision in an employment agreement was not illusory because the employer's right to unilaterally modify the contract was modified by its duty of good faith and fair dealing). *But see National Federation of the Blind v. The Container Store*, 904 F.3d 70, 86-88 (1st Cir. 2018) (holding terms and conditions illusory under Texas law where the plaintiff reserved the unilateral right to alter the terms of its loyalty program, including its arbitration provision, at any time, and rejecting the argument that this provision was modified by the duty of good faith and fair dealing based on out-of-state authorities or that the agreement was not illusory because plaintiffs could terminate the agreement or because the clause could be severed from the rest of the agreement).

[238] *Douglas v. United States District Court*, 495 F.3d 1062 (9th Cir. 2007).

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must obtain the other party's consent before doing so."[239] Likewise, in *Stover v. Experian Holdings, Inc.*,[240] the Ninth Circuit held that the plaintiff was not bound by Experian's 2018 amended terms of use merely because she visited the website four years after assenting to the 2014 version of the terms, which provided that users would be bound by the terms of the then-current version when they visited the site in the future. The court found that notice had not been provided for the amended terms. In *Klein,* by contrast, the court upheld passive assent for amendments because the procedure for providing notice of amendments by email had been agreed upon initially and was followed by Verizon, even though assent to the original agreement could not have been obtained that same way.

Although not an Internet case, in *Frequent Flyer Depot, Inc. v. American Airlines, Inc.*,[241] an appeals court in Fort Worth, Texas upheld the enforceability of a provision in American Airlines' User Agreement that allowed it to change the terms of its frequent flyer program.[242] The court rejected arguments that this provision showed a fatal lack of mutuality, rendering the entire agreement unenforceable. The court

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[239]*Douglas v. United States District Court*, 495 F.3d 1062, 1066 (9th Cir. 2007). In *Douglas*, the plaintiff authorized the defendant to charge his credit card monthly. Because Douglas had no notice and did not assent to the modified Terms, the court held that they were not binding, notwithstanding a provision in the Terms purporting to allow Talk America to change the Terms and imploring users to check back frequently to review changes in the Terms. In reversing the district court's enforcement of an arbitration provision included in the revised Terms, the Ninth Circuit rejected the enforceability of the provision. The court noted that even if Douglas's continued use of Talk America's services could be deemed assent, "such assent can only be inferred after he received proper notice of the proposed changes." The court further commented in a footnote that a party would not know "when to check the website for possible changes to the contract terms without being notified that the contract has been changed and how. Douglas would have had to check the contract every day for possible changes. Without notice, . . . Douglas would have had to compare every word of the posted contract with the existing contract in order to detect whether it had been changed." *Id*. n.1. Even if a contract had been formed, the appellate panel ruled it was likely unconscionable. *See id*. at 1067–68; *see generally infra* § 21.04.

[240]*Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1085-86 (9th Cir. 2020).

[241]*Frequent Flyer Depot, Inc. v. American Airlines, Inc.*, 281 S.W.3d 215 (Tex. Ct. App. 2009).

[242]The agreement provided that American could "amend its rules of the Program at any time without notice" and stated that American could,

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held that American's agreement to provide rewards points and other undertakings demonstrated that there was no lack of mutuality. In the alternative, it held that because American had issued tickets against frequent flyer points it had performed such that "even if American's consideration was illusory when it entered into the applicable User Agreements, its subsequent performance under those agreements established consideration, rendering those agreements enforceable."[243] It is not clear, however, that this analysis would be followed in more liberal jurisdictions such as California.

On balance, depending on the court where the issue is considered and the specific facts of a given case, amendment-by-online-notice provisions may render an entire contract illusory or the amendment provision or entire contract unconscionable, and thus unenforceable, or, at best, may be ineffectual with respect to material amendments because, if subject to the duty of good faith and fair dealing, only those changes that would be expected by users would be deemed binding and enforceable, which typically would undermine the purpose of amending a unilateral contract, since amendments typically reflect changes in the law or a company's practices.[244]

> in its discretion, change the AAdvantage® program rules, regulations, travel awards, and special offers at any time with or without notice . . . . American Airlines may make one or more of [certain enumerated] changes at any time even though such changes may affect your ability to use the mileage credit or awards that you have already accumulated. American Airlines reserves the right to end the AAdvantage® program with six months' notice.

Frequent Flyer Depot, Inc. v. American Airlines, Inc., 281 S.W.3d 215, 224 (Tex. Ct. App. 2009).

[243] *Frequent Flyer Depot, Inc. v. American Airlines, Inc.*, 281 S.W.3d 215, 225 (Tex. Ct. App. 2009).

[244] As noted in some of the cases discussed in is section and as addressed in section 22.05[2][M], the issue of whether a contract is illusory or unconscionable may be delegated to the arbitrator by a court, where the dispute is subject to arbitration, provided the original arbitration agreement is enforceable or the amendment did not impact the arbitration agreement. *See, e.g.*, *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016) (delegating to the arbitrator the issue of whether a unilateral amendment provision was unconscionable where the challenge went to the enforceability of the agreement overall and not the validity of the arbitration provision); *Fischer v. Instant Checkmate LLC*, 19 C 4892, 2021 WL 3033586 (N.D. Ill. July 19, 2021) (compelling arbitration where the plaintiff assented to Instant Checkmate's 2013 Terms of Use when she registered on the Instant Checkmate website, but delegating to the

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Retaining Evidence of Assent for Use in Litigation

When companies rely on unilateral contracts, it is important to present notices to consumers clearly and conspicuously and keep adequate records. Inadequate records or conflicting evidence can prevent a party from being able to enforce a contract.[245]

Where express assent is sought, those records should include evidence of how a contract was presented to the user, what question was asked and what response was elicited. Where it is impossible to complete a transaction or obtain an account without agreeing to a unilateral contract, courts often will find that a contract was formed based on evidence of the account or transaction.[246] Courts have also rejected evidentiary objections where an employee with personal knowl-

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arbitrator, pursuant to the delegation clause in the ToU, the question of whether plaintiff was bound by later versions of the ToU where she allegedly visited the website on various dates when later versions of the agreement were in effect); *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994 (ARR)(RML), 2013 WL 3968765, at *5-6 (E.D.N.Y. July 31, 2013) (holding that where a contract contains an agreement to arbitrate the issue of whether the contract as a whole is illusory because one party retains the right to change it unilaterally in their discretion (as opposed to the agreement to arbitrate), the arbitrator, not a judge, should resolve the issue); *see generally infra* §§ 21.07, 22.05[2][M].

[245]*See, e.g.*, *Rowland v. Sandy Morris Financial & Estate Planning Services, LLC*, 993 F.3d 253 (4th Cir. 2021) (affirming the lower court's denial of defendant's motion to compel arbitration, because no agreement to arbitrate had been formed, where the parties had each provided assent via DocuSign, but produced to the court materially different versions, which the court characterized as "at best sloppy on the part of Morris and SMF and at worst duplicitous . . . ."); *see generally infra* § 21.07.

[246]*See, e.g.*, *Maynez v. Walmart, Inc.*, 479 F. Supp. 3d 890, 895-97 (C.D. Cal. 2020) (compelling arbitration where the plaintiff placed an order through the Walmart App and assented to terms by clicking the "Place Order" button below a notice with hyperlinks to terms of use: "By clicking Place Order, you agree to Walmart's Updated Privacy Policy and Terms of Use[,]" where the court, over plaintiff's objection, credited the declaration of a Walmart's Director of Engineering that a customer could not complete the order without clicking the 'Place Order' button and that "the Check Out Process in the Walmart App described in this declaration was in a substantially identical format in April and May 2019," when Plaintiff made her purchase."); *Henricks v. Flywheel Sports, Inc.*, 19 Civ. 895 (PGG), 2020 WL 1285453, at *5 (S.D.N.Y. Mar. 18, 2020) (compelling arbitration based on Flywheel's Terms and Conditions, over plaintiff's objection that she did not recall visiting Flywheel's registration page, where Flywheel presented evidence that plaintiff created an account and that all website users were required to follow the same sign-up process to set up an account, which required users to check a box confirming agreement to the

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T&Cs next to a "distinctive" hyperlink marked "Terms and Conditions of Service" in blue lettering; noting that failing memories do not absolve a party from its contractual obligations); *Cordas v. Uber Technologies, Inc.*, 228 F. Supp. 3d 985, 988-90 (N.D. Cal. 2017) (holding that the plaintiff assented to Uber's Terms & Conditions based on the declaration of an engineer, from his personal knowledge as a manager responsible for overseeing the rider sign-up and registration process and records kept in the ordinary course of business, that a user could not have created an Uber account and taken rides using the Uber app without completing all of the steps in the registration process, based on technological constraints built into the app, including clicking "DONE" on the screen stating that "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy"); *Garcia v. Enterprise Holdings, Inc.*, 78 F. Supp. 3d 1125 (N.D. Cal. 2015) (holding that the plaintiff could not have used the Zimride app without assenting to the app's Terms of Use and Privacy Policy); *Merkin v. Vonage America Inc.*, No. 2:13-cv-08026-CAS, 2014 WL 457942, at *3 (C.D. Cal. Feb. 3, 2014) (holding Vonage's Terms of Service to form a binding contract where Vonage presented evidence that agreement to its TOS was required for a user to be able to register for its service, despite objections from plaintiffs that they did not recall entering into the agreement and did not read the TOS). *But see Metter v. Uber Technologies, Inc.*, Case No. 16-cv-06652-RS, 2017 WL 1374579 (N.D. Cal. Apr. 17, 2017) (denying defendant's motion to compel arbitration where a pop up keypad for a user to input his or her credit card information allegedly obscured an alert about Uber's Terms of Service agreement, raising doubt about whether the plaintiff had notice of the Terms); *Midwest Trading Group, Inc. v. GlobalTranz Enterprises, Inc.*, 59 F. Supp. 3d 887 (N.D. Ill. 2014) (denying GlobalTranz's motion for summary judgment based on the assertion that a customer could not book a shipment online without checking a box stating that he or she agreed to terms, where the plaintiff presented evidence that he was able to book a shipment from the company by email, without ever having to assent to terms); *see also Netstandard, Inc. v. Citrix Systems, Inc.*, Case No. 16-2343-CM, 2017 WL 2666168 (D. Kan. June 21, 2017) (declining to enforce the venue provision in two EULAs based on insufficient evidence of contract formation).

Even where objective evidence shows that a contract was formed, a person may seek to avoid the contract if the person can show that he or she was not the person who actually assented. *See, e.g.*, *Sitrrup v. Education Management LLC*, No. CV-13-01063, 2014 WL 4655438, at *12-13 (D. Ariz. Sept. 17, 2014) (denying cross motions for summary judgment where the defendant provided evidence that the employee had agreed to alternative dispute resolution but the plaintiff provided a sworn statement that she never received the email, never was informed about the ADR policy and was not at her computer when the acceptance was entered using her unique user name and password); *see generally infra* § 21.03[3] (analyzing who may be bound when assent is obtained). A challenge to contract formation must be based on admissible evidence, however, not merely conjecture. *See, e.g.*, *Goza v. Multi-Purpose Civic Center Facilities Board for Pulaski County*, No. 12-CV-6125, 2014 WL 3672128, at *3 (W.D. Ark. July 23, 2014) (rejecting as hypothesis the argument that the website may have malfunctioned on the day plaintiff used it, in the face of evidence that a

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edge verifies from business records that a given plaintiff expressly assented to Terms on a particular date and authenticated what the user interface looked like at that time.[247]

For agreements premised on implied assent, it is important to establish that users were given adequate notice. Where clear notice is not provided, it may be difficult for a party to prevail short of trial absent extrinsic evidence (and, as noted earlier in this section 21.03[2], if the issue of contract formation arises at the outset of the case, in the Ninth Circuit a court may hold that no contract was formed as a matter of law). In *Spam Arrest, LLC v. Replacements, Ltd.*,[248] for example, the court denied summary judgment to a party that could not clearly show that its notice to consumers was sufficiently conspicuous. In that case, Spam Arrest, in the period post-dating October 2011, referred to its Sender Agreement in a verification email it sent to users and on the verification page that preceded the box for entry of the verification code. The court held that a reasonable jury could reach different conclusions about whether the disclosures were sufficiently conspicuous because its use of a CAPTCHA[249] tended to obscure the disclosure of the Sender Agreement. Moreover, for the period prior to October 2011, it was possible for a sender to complete Spam Arrest's verification process without seeing any notice of the Sender Agreement. The court explained that "depending on the size and resolution of a sender's computer screen and the size

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user could not purchase tickets from the Ticketmaster.com website during the relevant time period without providing express assent to Ticketmaster's Terms of Use agreement).

[247]*See, e.g.*, *Fischer v. Instant Checkmate LLC*, 19 C 4892, 2021 WL 3033586, at *2-3 (N.D. Ill. July 19, 2021) (compelling arbitration where the plaintiff assented to Terms of Use when she registered an account on the Instant Checkmate website and pressed a button marked "Continue," ruling that the defendant had sufficiently authenticated screen shots where an engineer with personal knowledge acknowledged that Instant Checkmate had "limited historical screenshots" of its website, but verified that the screenshot submitted was "materially identical to the page . . . Adams would have seen" on the date she registered for her account).

[248]*Spam Arrest, LLC v. Replacements, Ltd.,* Master Case No. C12-481RAJ, 2013 WL 4675919 (W.D. Wash. Aug. 29, 2013).

[249]CAPTCHA—an acronym for a Completely Automated Public Turing test to tell Computers and Humans Apart—is software that distinguishes human website users from automated users and is intended to prevent automated creation of user accounts. *See Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1048 (N.D. Cal. 2010).

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and magnification of the sender's browser window, the sender might complete the verification process without encountering anything that would put her on notice of a contract."[250]

Where online contracts are revised periodically, it is also important to retain copies of all versions and be able to introduce those records in admissible form,[251] typically as documents maintained in the ordinary course of business.[252]

The importance of retaining adequate records to enforce unilateral mobile and online contracts is underscored throughout this section 21.03 and summarized briefly in section 21.07.

Concluding Observations

The law governing Internet contract formation is largely

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[250]*Spam Arrest, LLC v. Replacements, Ltd.,* Master Case No. C12-481RAJ, 2013 WL 4675919, at *9 (W.D. Wash. Aug. 29, 2013).

[251]*See, e.g.*, *WeR1 World Network v. CyberLynk Network, Inc.*, 57 F. Supp. 3d 926 (E.D. Wis. 2014) (denying summary judgment where the defendant was unable to produce a copy of the hosting service agreement as it existed at the time plaintiff signed up for service, therefore leaving it to the jury to determine which terms were in effect); *I.B. by and through Fife v. Facebook, Inc.*, No. C 12-1894 CW, 2013 WL 6734239, at *4 (N.D. Cal. Dec. 20, 2013) (denying Facebook's motion to dismiss in part because the terms Facebook was able to provide to the court were downloaded from its website in December 2012 although the plaintiffs alleged that they began purchasing Facebook Credits in 2011).

In some instances, the Internet Archive's Wayback Machine may provide evidence of what was posted on a given site at a particular point in time, which may be admissible if no objections are raised or if properly authenticated by a witness who can testify from personal knowledge about how the website works and the reliability of its contents. *See, e.g.*, *U.S. v. Gasperini*, 894 F.3d 482, 489-90 (2d Cir. 2018) (affirming the admissibility of Wayback Machine screen shots where the government presented testimony from the office manager of the Internet Archive, who explained how the Archive captures and preserves evidence of the contents of the Internet at a given time and testified to the authenticity of various screen shots admitted into evidence); *U.S. v. Bansal*, 663 F.3d 634, 667-68 (3d Cir. 2011) (affirming authentication of screen shots where a witness testified, from personal knowledge, about how the Wayback Machine worked and how reliable its contents were). Needless to say, a company can't be assured that the Wayback Machine will maintain records that one day may be needed in litigation. The best approach is for businesses to keep adequate records, in the ordinary course of business, with a view towards having admissible evidence when and if it is needed.

[252]*See infra* § 58.02[1] (analyzing the business records exception to the hearsay rule under the Federal Rules of Evidence).

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based on federal district court opinions—which may be persuasive authority but have no precedential value—and rulings from the Second, Fifth, Seventh and Ninth Circuits and a smattering of state courts. Nevertheless, because these cases are rooted in common law principles, it is unlikely that other circuits would vary significantly from the principles outlined in this section of the treatise. Most cases where contract formation turns on assent tend to be the fact-specific, rather than determined by substantial differences in the underlying substantive law.[253]

As a practical matter, absent repeated notice or an admission of knowledge or notice (which most defendants have an incentive not to provide), it may be difficult to enforce unilateral Internet contracts based on implied assent, particularly against consumers or before more liberal judges. While contracts based on implied assent are enforceable, it is usually easier and much less expensive to enforce contracts where express assent is obtained.

Where a contract is formed, its interpretation will be governed by traditional contract law principles.[254]

21.03[3] Determining Who May Be Bound When Express Assent is Obtained

Where a contract is formed, occasionally issues arise over who—in addition to, or in place of, the person who directly pressed the button to assent to the terms of a unilateral Internet contract—may be bound by its terms. For example,

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[253]In contrast to the issue of assent, unconscionability and contract interpretation issues may turn on the particular substantive law applied, in addition to the venue where a case is brought. *See generally infra* §§ 21.04, 22.05[2][M] & chapter 22. Liberal judges, and courts in more liberal jurisdictions, will be more hospitable to unconscionability defenses than courts in conservative states. In addition, in California the parol evidence rule allows oral testimony to explain the parties' intent without showing that a term is ambiguous, which is a more liberal standard for admitting oral testimony than applied in most other states.

[254]*See, e.g.*, *Attachmate Corp. v. Public Health Trust*, 686 F. Supp. 2d 1140 (W.D. Wash. 2010) (denying a motion to change venue based on a provision in the terms of purchase orders providing that "[a]ny litigation between the parties regarding the terms of performance of this contract shall take place in Miami Dade Country, Florida" where no showing had been made that the present lawsuit involved the terms of performance of the purchase orders as opposed to the EULAs, which did not contain any forum selection clause but provided that they would be governed in accordance with Washington law).

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where a person acts as agent for a disclosed principal in clicking on a button to accept a unilateral Internet contract, the principal, not the agent, likely is the proper party to the agreement.[1] Thus, for example, in *Adsit Co. v. Gustin*,[2] the court enforced a forum selection clause in Terms of Use, holding that a customer had accessed a website as agent for her daughter-in-law. Similarly, in another case a court enforced a forum selection clause against a plaintiff, who had alleged that her daughter had booked a trip online on behalf of both her daughter and herself (and in that capacity, the daughter had assented to the venue selection provision).[3] In *Hofer v. Gap, Inc.*,[4] the court found that the plaintiff was bound by Expedia's terms and conditions where her friend booked plaintiff's travel arrangements on Expedia's website on her behalf. In another dispute, a court enforced an arbitration provision in a click-to-accept membership agreement posted on a website where plaintiffs, a coach and a player, had authorized their agent to assent to the agreement on their behalf.[5] Assent also has been found

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[Section 21.03[3]]

[1]See*, e.g., BMMSoft, Inc. v. White Oaks Technology, Inc.*, No. C-09-4562 MMC, 2010 WL 3340555 (N.D. Cal. Aug. 25, 2010) (holding that if the defendant clicked the "I agree" button to accept plaintiff's EULA it did so as an agent for the U.S. government and therefore was entitled to partial summary judgment on plaintiff's claim for breach of the EULA).

[2]*Adsit Co. v. Gustin*, 874 N.E.2d 1018 (Ind. App. 2007).

[3]*See Sabino v. Kerzner Intern. Bahamas Ltd.*, No. 12–22715–CIV, 2014 WL 7474763, at *3-4 (S.D. Fla. Jan. 10, 2014) (enforcing forum selection clause where plaintiff alleged daughter booked a trip online on behalf of Plaintiff, herself, and her child).

[4]*Hofer v. Gap, Inc.*, 516 F. Supp. 2d 161, 175 (D. Mass. 2007) ("Although the details are not clear from the record, plaintiff obviously authorized LaRoche to go online and purchase airline tickets and hotel reservations. Nothing in that arrangement is remarkable in the slightest respect; family members, friends, and work colleagues routinely book travel plans for others, and it would be extraordinarily cumbersome to require that each traveler book his or her own ticket. Each such arrangement is necessarily an agency relationship: the person booking the tickets is acting as an agent on behalf of the other members of the traveling party. Implicit in that agency relationship is the power to bind the principal as to matters within the scope of the relationship, including the acceptance of the terms of a disclaimer.").

[5]*See Seibert v. Amateur Athletic Union, Inc.*, 422 F. Supp. 2d 1033, 1039–40 (D. Minn. 2006).

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based on actual implied authority.[6] Similarly, a friend using the plaintiff's wife's Amazon.com account and log-in credentials with her permission, was deemed to be the wife's agent binding her (and by extension, based on equitable estoppel, her husband, when he used the account) to the arbitration provision in the Amazon Prime Conditions of Use agreement that the friend had assented to when he enrolled the wife in a free trial program.[7]

The Eleventh Circuit ruled, in physical world dispute, that homeowners were bound by an arbitration provision in purchase terms conspicuously printed on the outside wrapping of every package of shingles, in a suit against the manufacturer, because their roofers acted as their agents when they purchased, opened, and installed the shingles.[8]

Of course, agency issues may present questions of fact and not all courts will assume that an employee is acting as an

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[6]*See, e.g.*, *CR Assocs. L.P. v. Sparefoot, Inc.*, No. 17-10551-LTS, 2018 WL 988056, at *3-6 (D. Mass. Feb. 20, 2018) (enforcing a venue selection clause in a Terms of Service agreement based on implied actual authority). In that case, the court explained that:

> Alves, Jr., had implied actual authority to contract on behalf of CR pursuant to an investigation of CR, which he had actual authority to conduct. Kenneth Alves, Sr., the father of Alves, Jr., is the general partner of CR . . . . As general partner, Alves, Sr., may "delegate whatever tasks . . . to employees or limited partners or whoever [he] see[s] fit to carry out [those] tasks." . . . In December of 2016, CR, through Alves, Sr., discovered Sparefoot's alleged unlawful use of CR's protected mark "Cross Road Storage." . . . Alves, Sr., delegated the investigation of "the issues that [he] discovered with Sparefoot using [CR's] trademark" to his son Alves, Jr. . . . Pursuant to this task, Alves, Jr., had authority to "investigate and report back." . . . "The details of [the investigation] [Alves, Sr.,] left up to [Alves, Jr.,]." . . . As part of the investigation, Alves, Jr. "went through the sign-up process with Sparefoot" . . . He testified that signing-up (including clicking "I agree to the Terms of Use") was "a reasonable part of [his] investigation" as "[i]t was necessary to obtain pricing" from Sparefoot. . . . Thus, Alves, Jr., was acting on CR's behalf, with authority to do so, when he investigated Sparefoot. Signing-up for Sparefoot, including agreeing to the terms of the combined ToS/ToU agreement, were incidental to the investigation; Alves, Jr., therefore had actual implied authority to bind CR with respect to the forum selection clause.

Id. at *5.

[7]*See Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 268-76 (E.D.N.Y. 2019), *aff'd*, 815 F. App'x 612 (2d Cir. 2020). Equitable estoppel, in connection with enforcement of arbitration agreements, is analyzed in section 56.03 in chapter 56.

[8]*See Dye v. Tamko Building Products, Inc.*, 908 F.3d 675 (11th Cir. 2018).

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agent for his or her employer if the issue is disputed.[9] Indeed, where a party alleges that the person who provided assent to a contract was not authorized to do so, the agreement may or may not be enforceable against that party, depending on the facts ultimately found by a judge or jury.[10] In some cases, a jury may have to decide whether a contract was formed if a party credibly challenges assent or notice.[11] In

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[9]*See, e.g., National Auto Lenders, Inc. v. SysLOCATE, Inc.*, 686 F. Supp. 2d 1318 (S.D. Fla. 2010) (declining to enforce venue selection and arbitration provisions in a click-through agreement posted on the plaintiff's website where the employees or subcontractors who assented to the agreement were held not to have had apparent authority to enter into the agreement and the defendant corporation did not ratify it), *aff'd mem.,* 433 F. App'x 842 (11th Cir. 2011). Under the doctrine of apparent authority, an agency will arise when the principal allows or causes others to believe that an individual has authority to conduct the act in question, inducing their detrimental reliance. *SysLOCATE, Inc.*, 686 F. Supp. 2d at 1322.

Under Florida law, for example, there are three elements needed to establish apparent agency: (1) a representation by the purported principal, (2) reliance on that representation by a third party, and (3) a change in position by a third party in reliance on such a relationship.

A ratification occurs when the benefits of the purportedly unauthorized acts are accepted with full knowledge of the facts and circumstances demonstrating the intent to adopt the unauthorized arrangement. *Spam Arrest, LLC v. Replacements, Ltd.,* Master Case No. C12-481RAJ, 2013 WL 4675919, at *11 (W.D. Wash. Aug. 29, 2013); *National Auto Lenders, Inc. v. SysLOCATE, Inc.*, 686 F. Supp. 2d 1318, 1323 (S.D. Fla. 2010), aff'd mem., 433 F. App'x 842 (11th Cir. 2011).

[10]*See, e.g.*, *Pederson v. Donald J. Trump for President, Inc.*, 465 F. Supp. 3d 929, 937 (D. Minn. 2020) (declining to compel arbitration where the Trump campaign presented evidence that someone entered plaintiff's name and cell phone number on its campaign website, but the plaintiff disputed that he did so; "The Campaign has not provided any additional information, such as location or IP data, to demonstrate that Pederson agreed to anything at all. The Campaign may eventually determine that it was Pederson who entered his information, but at this point the Campaign has not carried its burden to demonstrate there was a valid contract with Pederson."); *Lavitman v. Uber Technologies, Inc.*, No. SUCV201204490, 2015 WL 728187, at *3-4 (Mass. Super. Ct. Suffolk County Jan. 26, 2015) (denying motion to dismiss where plaintiff alleged the "express assent" manifested in his online registration was made by a recruiter working on behalf of defendant or an employee of defendant).

[11]*See, e.g.*, *Sitrrup v. Education Management LLC,* No. CV-13-01063, 2014 WL 4655438, at *12-13 (D. Ariz. Sept. 17, 2014) (denying cross motions for summary judgment where the defendant provided evidence that the employee had agreed to alternative dispute resolution but the plaintiff provided a sworn statement that she never received the email, never was informed about the ADR policy and was not at her computer when the ac-

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other cases, the court may simply reject plaintiff's arguments based on ratification.[12]

On the other hand, where a service representative assents to Terms in conjunction with loading an app on a phone for a user, a court may find that the user is not bound if he or she did not know or did not consent.[13]

In *Spam Arrest, LLC v. Replacements, Ltd.*,[14] where the plaintiff sought to bind a defendant to a contract providing for payment of $2,000 per unwanted email (and where there was a fact question about whether users were adequately

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ceptance was entered using her unique user name and password).

[12]*See, e.g.*, *Appistry, Inc. v. Amazon.com, Inc.*, No. 4:13CV2547, 2015 WL 881507, at *3-4 (E.D. Mo. Mar. 1, 2015) (enforcing the venue selection clause in Amazon's Web Services Customer Agreement, as a valid clickthrough contract, despite plaintiff's objection that it did not know about the agreement, which the court did not consider to be credible, and based on ratification, because the plaintiff continued to use Amazon's services after it had actual notice of the contract and its venue selection clause). "Ratification in agency is an adoption or confirmation by one person of an act [such as entering into a contract] performed on his behalf by another without authority." *Id.* at *4, *quoting Springfield Land and Dev. Co. v. Bass*, 48 S.W.3d 620, 628 (Mo. Ct. App. 2001) (internal quotations omitted).

[13]*See, e.g.*, *National Federation of the Blind v. The Container Store*, 904 F.3d 70, 84 (1st Cir. 2018) (affirming the lower court's order denying defendant's motion to compel arbitration where the plaintiffs were blind and could not access the keypad on which the terms and conditions of a loyalty program (including an arbitration provision) were displayed because they could not read them and the defendant allegedly did not have tactile keypads on its point-of-sale devices, where the plaintiffs alleged they were not told that the loyalty program was subject to agreement to arbitrate disputes and where the defendant did not present evidence that the terms in fact were communicated to them; "Based upon the lack of any evidence that the in-store plaintiffs had any knowledge, actual or constructive, that arbitration terms applied to their enrollment in the loyalty program, we conclude that the Container Store failed to meet its burden of establishing that an agreement to arbitrate was ever consummated between it and the in-store plaintiffs."); *Mohammed v. Uber Technologies, Inc.*, 237 F. Supp. 3d 719 (N.D. Il. 2017) (holding that the plaintiff was not bound by an arbitration agreement contained in Uber's Online Service Agreement where he alleged that a Driver Service Representative (DSR) at Uber's Chicago office downloaded the app to his phone and created an account for him, allegedly accepting the Service Agreement without showing Mohammed the prompts or the agreement; rejecting arguments that Mohammed was bound through the DSR, or based on course of conduct, equitable estoppel, or agency).

[14]*Spam Arrest, LLC v. Replacements, Ltd.,* Master Case No. C12-481RAJ, 2013 WL 4675919 (W.D. Wash. Aug. 29, 2013).

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informed that by filling out a CAPTCHA form they would be deemed to have entered into a contract with Spam Arrest), the court held that the plaintiff had failed to meet its burden on motion for summary judgment to show that a person with authority to bind the company actually had done so.[15]

Beyond traditional agency relationships, courts have found others bound by unilateral contracts. For example, in one case, a court held that a user was bound by America Online's Terms of Service agreement where he used his step-father's account and the step-father had expressly assented to the Terms of Service.[16] Similarly, in another case, a court held that a defendant was bound by UPS's click-to-accept contract even though a sales representative had loaded the software and clicked assent for the user.[17] Likewise, a user was held bound by an agreement where click-through assent was given on a website called up on a service technician's laptop prior to the technician's installation of television and telephone service.[18]

Unilateral Internet contracts also have been found to be binding where a person's claim to not having provided assent is not credible based on the way the site operates and the impossibility of accessing an account without providing express assent.[19] As a practical matter, some Internet companies with millions of users who assented to unilateral

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[15]*Spam Arrest, LLC v. Replacements, Ltd.,* Master Case No. C12-481RAJ, 2013 WL 4675919, at *11 (W.D. Wash. Aug. 29, 2013).

[16]*See Motise v. America Online, Inc.*, 346 F. Supp. 2d 563 (S.D.N.Y. 2004) (enforcing a forum selection clause).

[17]*See Via Viente Taiwan, L.P. v. United Parcel Service, Inc.,* No. 4:08-cv-301, 2009 WL 398729, at *2 n.1 (E.D. Tex. Feb. 17, 2009). *But see Marso v. United Parcel Service, Inc.*, 715 S.E.2d 871 (N.C. App. 2011) (denying summary judgment where the parties disputed whether the shipper clicked assent to UPS's online terms or whether he dealt with a salesperson who may have completed the forms herself).

[18]*See Hancock v. AT&T Co.*, 701 F.3d 1248, 1256-58 & n.6 (10th Cir. 2012). As the court observed, "[i]t does not matter which computer the customer uses to manifest assent to U-verse terms of service." *Id*. at 1257 n.6.

[19]*See, e.g., Domain Vault LLC v. Rightside Group Ltd.*, Civil Action No. 3:17-CV-0789-BT, 2018 WL 638013, at *2-4 (N.D. Tex. Jan. 30, 2018) (enforcing an arbitration agreement contained in an online registration agreement, where the plaintiff had clicked an "I agree" button assenting on seven separate occasions to the agreement, over evidentiary objections, where an employee established assent from database records maintained in the ordinary course of business and plaintiff's evidence was insufficient

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contracts have no other way to prove that express assent to a binding contract was obtained than establishing that it was technologically impossible for a user to establish an account without clicking an "I accept" or similar button and presenting evidence of the specific agreement in use on the date of acceptance. In many instances, courts will take judicial notice of the particular version of a Terms of Use agreement.[20]

A unilateral mistake or purported lack of intention to enter into a contract likewise will not invalidate an agreement where assent in fact has been provided.[21]

Courts have not been receptive to the argument that a unilateral contract where express assent was obtained is unenforceable merely because a defendant claims not to have read the contract, provided he or she had an opportunity to

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to rebut it), *appeal dismissed*, No. 18-10216, 2018 WL 4055963 (5th Cir. Mar. 28, 2018); *Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009) (granting Expedia's motion to dismiss for improper venue, based on a forum selection clause in its User Agreement, where the plaintiff denied that he had provided express assent but the evidence showed that it was impossible for users to access their Expedia accounts without providing express assent, there was a link to the user agreement provided on the page for the listing at issue in the suit, and the plaintiff offered no evidence to support the argument that he somehow did not provide express assent or that perhaps someone else had done so without his knowledge); *In re Online Travel Co.*, 953 F. Supp. 2d 713, 718–19 (N.D. Tex. 2013) (upholding the enforceability of Travelocity's user agreement based on a declaration stating that it was impossible for a user to complete a transaction without providing affirmative assent to the User Agreement, and copies of the versions of the agreement in effect during the relevant time period); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006) (holding the defendant bound by terms, over his objection, where it was impossible to install plaintiff's software without providing express assent to the them); *see generally infra* § 21.07 (proving the existence of Terms of Use and other unilateral internet or mobile contracts).

[20] *See, e.g.*, *Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 263 n.5 (S.D.N.Y. 2018) (taking judicial notice of Lyft's policies, as described on its website).

[21] See*, e.g., FreeLife Int'l, Inc. v. American Educational Music Publications Inc.,* No. CV07-2210-PHX-DGC, 2009 WL 3241795, at *3 (D. Ariz. Oct. 1, 2009) (enforcing a click-to-accept contract over objections that the defendant had not intended to enter into a contract with the plaintiff containing a non-disparagement clause, because the defendant's "private intention does not invalidate the contract. Burge never revealed this intention to FreeLife, and undisclosed intentions do not negate a contract or render it unenforceable.").

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do so.[22] Where notice was given and implied assent found, a party's failure to read the agreement likewise will not stand in the way of enforcement.[23] As a practical matter, however, in most cases where implied assent is litigated the defendant challenges, rather than concedes, the sufficiency of notice, arguing that he or she did not have a meaningful opportunity to review the agreement, which often presents factual questions that cannot be easily, quickly or inexpensively resolved at the outset of a case.

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[22]*See, e.g., Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009) (enforcing a forum selection clause over the plaintiff's objection that he neither read nor saw the Terms, where there was evidence that it would have been impossible for him to open an account without providing express assent to them; "Failure to read an enforceable online agreement, as with any binding contract, will not excuse compliance with its terms. A customer on notice of contract terms available on the internet is bound by those terms."); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008) (explaining that a party may be bound by a clickwrap agreement if the terms are clear and acceptance is unambiguous, regardless of whether the party actually read the agreement); *DeJohn v. The.TV Corp. Int'l*, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003) ("The fact that [plaintiff] claims that he did not read the contract is irrelevant because absent fraud (not alleged here), failure to read a contract is not a get out of jail free card."); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203–04 (Tex. Ct. App. 2001) ("By the very nature of the electronic format of the contract, Barnett had to scroll through that portion of the contract containing the forum selection clause before he accepted its terms . . . . It was Barnett's responsibility to read the electronically-presented contract, and he cannot complain if he did not do so."); *see also Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367 (S.D. Fla. 2011) (stating that the plaintiff admitted that its failure to read the agreement did not excuse compliance; enforcing a venue selection clause in a clickwrap agreement); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (noting that "[a]bsent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms.").

[23]*See, e.g., Major v. McCallister*, 302 S.W.3d 227 (Mo. Ct. App. 2009) (enforcing a forum selection provision in a browsewrap agreement where each page on ServiceMagic's website included a link to ServiceMagic's Terms and Conditions, which were visible without scrolling, and the page where the plaintiff entered her contact information on defendants' construction contractor referral site included a second, blue link to the Terms and the notice "By submitting you agree to the Terms of Use" next to the "Submit for Matching Pros" button; "When one party accepts the other party's performance, it gives validity to an agreement even if unsigned . . . ."); *see also, e.g.*, *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 79 (2d Cir. 2017) ("While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice.").

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21.03[4] Website Policies (Including Privacy Policies)

In addition to contracts that site owners and service providers intend to be binding—such as sales agreements, EULAs or some types of Terms of Use (TOU), Terms of Service (TOS) or Terms and Conditions (T&Cs)[1]—sites and services may post policies such as privacy policies,[2] codes of conduct, takedown or abuse policies[3] or other guidelines that

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[Section 21.03[4]]

[1]Terms of Use contracts, including substantive provisions and how to present them to maximize their enforceability, are analyzed in chapter 22.

[2]Privacy policies are analyzed in section 26.14 and elsewhere in chapter 26.

[3]*See, e.g.*, *Silver v. Stripe, Inc.*, Case No. 4:20-cv-08196-YGR, 2021 WL 3191752, at *2-5 (N.D. Cal. July 28, 2021) (dismissing wiretap claims under California, Florida, and Washington state law (Cal. Penal Code §§ 631(a), 635; Fla. Stat. Ann. § 934.03(2)(d) (permitting interception of a communication "when all of the parties to the communication have given prior consent"); Wash. Rev. Code Ann. §§ 9.73.030(1) (a)-(b) (permitting interception with "the consent of all the participants")), where plaintiffs provided consent by assenting to Instacart's Privacy Policy, which set forth, among other things, that instacart could share information payment processor partners and third parties); *Javier v. Assurance IQ, LLC*, Case No. 4:20-cv-02860-JSW, 2021 WL 940319, at *2-4 (N.D. Cal. Mar. 9, 2021) (dismissing plaintiff's claims under the California Invasion of Privacy Act (CIPA) and California Constitution, where the plaintiff had given click-through assent to defendant's Privacy Policy, which made clear that Assurance tracked activity on its website and may use third party vendors to do so); *Cooper v. Slice Technologies, Inc.*, 17-CV-7102 (JPO), 2018 WL 2727888, at *5 (S.D.N.Y. June 6, 2018) (dismissing with prejudice plaintiffs' Wiretap and Cal. Penal Code § 631(a) claims where plaintiffs consented to the alleged disclosure of anonymized data, as set forth in defendant's Privacy Policy; "All of the Complaint's statutory claims depend on a lack of consent. *See* 18 U.S.C. § 2511(2)(d) (exempting from the ECPA communications for which 'one of the parties to the communication has given prior consent to such interception'); 18 U.S.C. § 2702(b)(3) (allowing a provider to divulge information 'with the lawful consent of the originator or an addressee or intended recipient of such communication'); Cal. Penal Code § 631(a) (prohibiting wiretaps 'without the consent of all parties to the communication'); . . ."); *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943, 953, 955 (N.D. Cal. 2017) (dismissing plaintiff's putative class claims under the California Information Privacy Act, based on consent provided pursuant to Facebook's Data Policy and Cookie Policy), *aff'd*, 745 F. App'x 8 (9th Cir. 2018) ("He who consents to an act is not wronged by it." (quoting Cal. Civ. Code § 3515)); *Garcia v. Enterprise Holdings, Inc.*, 78 F. Supp. 3d 1125, 1135-37 (N.D. Cal. 2015) (dismissing plaintiff's California Invasion of Privacy Act claim with leave to amend where the defendant—app provider's Terms of Use and Privacy Policy provided consent for the

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they may or may not intend to form binding contracts.

As analyzed in section 21.03[2], merely because express assent is not obtained to terms that are posted on a site does not mean that the terms are not enforceable if reasonable notice is provided and implied assent may be inferred based on subsequent user conduct.[4] Where implied assent is not obtained, posted terms may amount to policy documents that provide notice of practices and procedures but may not be enforceable against users.

Even where a contract is not formed—and therefore may not be enforced *by* a site owner or service provider—some policies, such as privacy policies, potentially may be enforced *against* them, depending on the policy's specific terms (such as whether the site purports to affirmatively undertake or disclaim specific obligations) and the surrounding circumstances.[5] Policy documents also may be used against a

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alleged disclosures); *see generally infra* §§ 26.14 (Privacy Policies), 26.15 (data privacy litigation).

[4]*See supra* § 21.03[2].

[5]*See, e.g., Svenson v. Google Inc.*, Case No. 13–cv–04080–BLF, 2015 WL 1503429, at *8-10 (N.D. Cal. Apr. 1, 2015) (holding that the plaintiff stated a claim under both the unlawful and unfairness prongs of California's unfair competition statute, Cal. Bus. & Prof. Code § 17200, by alleging that the defendant failed to adhere to the terms of its own Privacy Policy in violation of Cal. Bus. & Prof. Code § 22576, which requires businesses that collect personal information from California residents to post a privacy policy); *Yunker v. Pandora Media, Inc.*, No. 11–CV–03113 JSW, 2014 WL 988833, at *5-6 (N.D. Cal. Mar. 10, 2014) (denying defendant's motion to dismiss plaintiffs' breach of contract claim premised on Pandora's alleged breach of its privacy policy); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159 (S.D. Cal. 2010) (denying a motion to dismiss claims for breach of contract and breach of the duty of good faith and fair dealing where plaintiffs alleged that they purchased flowers from a website subject to the Terms of Use, Privacy Policy and Rewards Policies posted on the site and that their personal financial information thereafter was transmitted to a third party in breach of these documents or, if permitted, that the relevant provisions were unconscionable); *Smith v. Trusted Universal Standards in Electronic Transactions, Inc.,* Civil No. 09-4567 (RBK/KMW), 2010 WL 1799456 (D.N.J. May 4, 2010) (holding that the plaintiff in principle could assert a breach of contract claim based on alleged violations by defendants of their privacy policies, but granting defendants' motion to dismiss because the plaintiff did not allege any loss flowing from the alleged breach); *Meyer v. Christie*, No. 07-2230-JWL, 2007 WL 3120695 (D. Kan. Oct. 24, 2007) (holding that while unilateral corporate policies generally do not support breach of contract claims, the plaintiff could sue for breach of a bank's privacy policy where the plaintiff had a long-term relationship with the bank, in the course of which he

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company in suits for false advertising or on other grounds.[6]

Of course, not all policy statements can be used against a company.[7] Indeed, some privacy statements are expressly incorporated by reference into binding online agreements where a site or service wants to negate privacy expectations, obtain consent for particular practices[8] or ensure that assent

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relied on the bank to preserve his confidential information in accordance with its privacy policy, and where, when the bank solicited his financial information in connection with its request that he act as guarantor of loans to ERP, the policy "was part and parcel of its offer to make the loan to ERP"); *In re JetBlueAirways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 325, 327 (E.D.N.Y. 2005) (holding that a privacy policy potentially can form the basis of a contract claim based on reliance, but granting defendant's motion to dismiss where plaintiffs could not allege any loss from the breach). *But see Jurin v. Google, Inc.*, 768 F. Supp. 2d 1064, 1073 (E.D. Cal. 2011) (dismissing with prejudice claims for breach of contract and breach of the duty of good faith and fair dealing arising out of the alleged breach by Google of its AdWords policy terms and conditions because a "broadly worded promise to abide by its own policy does not hold Defendant to a contract."); *Dyer v. Northwest Airlines Corp.*, 334 F. Supp. 2d 1196 (D.N.D. 2004) (holding that plaintiffs could not sue Northwest Airlines for breach of its privacy statement because it did not give rise to a contract claim and the plaintiffs did not allege that they in fact had accessed, read, or relied upon the privacy policy or that they had incurred any contractual damages arising from the alleged breach); *In re Northwest Airlines Privacy Litig.*, Civ. No. 04-126(PAM/JSM), 2004 WL 1278459, at *5-6 (D. Minn. June 6, 2004) (ruling the same way where plaintiffs alleged that they had relied on the privacy policy but had not actually read it).

The enforceability of Privacy Policies is addressed more extensively in section 26.14[2].

[6]*See infra* §§ 26.05, 26.14[2].

[7]*See, e.g.*, *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 910-12 (8th Cir. 2016) (affirming dismissal of plaintiff's claims for breach of contract and alleged violations of Minnesota's Consumer Fraud Act, where GameStop's Privacy Policy, which was incorporated in its Terms of Service, did not define PII to include plaintiff's Facebook ID and browser history, which were the data elements that plaintiff alleged had been improperly shared); *C.M.D. v. Facebook, Inc.*, No. C 12–1216 RS, 2014 WL 1266291 (N.D. Cal Mar. 26, 2014) (dismissing plaintiffs' claims for declaratory relief and under Illinois law where "all four claims require[d] plaintiffs to have a tenable basis for challenging the enforceability of Facebook's Statement of Rights and Responsibilities ('SRRs') that purport to govern the use of the Facebook site" and could not do so).

[8]*See, e.g.*, *Cooper v. Slice Technologies, Inc.*, 17-CV-7102 (JPO), 2018 WL 2727888 (S.D.N.Y. June 6, 2018) (dismissing with prejudice plaintiffs' claims under the Wiretap Act, Stored Communications Act, and Cal. Penal Code § 631(a) where plaintiffs consented to the alleged disclosure of anonymized data, as set forth in the terms of the defendant's Privacy Policy); *Cain v. Redbox Automated Retail, LLC,* 136 F. Supp. 3d 824 (E.D.

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Mich. 2015) (granting summary judgment in favor of Redbox on plaintiffs' Michigan Video Rental Privacy Act, breach of contract and unjust enrichment claims in a putative class action suit where the plaintiffs provided written permission to Redbox to allow it to disclose information as set forth in its Privacy Policy); *Garcia v. Enterprise Holdings, Inc.*, 78 F. Supp. 3d 1125, 1135-37 (N.D. Cal. 2015) (dismissing plaintiff's California Invasion of Privacy Act claim with leave to amend where the defendant—app provider's Terms of Use and Privacy Policy provided consent for the alleged disclosures); *In re Yahoo Mail Litigation*, 7 F. Supp. 3d 1016, 1027-31 (N.D. Cal. 2014) (dismissing with prejudice plaintiffs' Wiretap Act claim based on the allegation that Yahoo scanned and analyzed emails to provide personal product features and targeted advertising, detect spam and abuse, create user profiles, and share information with third parties, and stored email messages for future use based on explicit consent set forth in the Yahoo Global Communications Additional Terms of Service for Yahoo Mail and Yahoo Messenger agreement); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 2d 1190 (N.D. Cal. 2014) (dismissing Wiretap Act and SCA claims because plaintiffs consented to LinkedIn's collection of email addresses from users' contact lists through LinkedIn's disclosure statements); *Del Vecchio v. Amazon.com, Inc.*, No. C11-366-RSL, 2011 WL 6325910 (W.D. Wash. Dec. 1, 2011) (dismissing, with leave to amend, a trespass and CFAA claim based on the alleged use of browser and flash cookies where, among other things, the potential use of browser and flash cookies was disclosed to users in the defendant's "Conditions of Use and Privacy Notice"); *Kirch v. Embarq Management Co.*, No. 10-2047-JAR, 2011 WL 3651359, at *7-9 (D. Kan. Aug. 19, 2011) (holding, in granting summary judgment for the defendant, that the plaintiffs consented to the use by third parties of their de-identified web-browsing behavior when they accessed the Internet under the terms of Embarq's Privacy Policy, which was incorporated by reference into its Activation Agreement, and which provided that de-identified information could be shared with third parties and that the Agreement could be modified; and because the Policy was amended in advance of the NebuAd test to expressly disclose the use and allow users to opt out by clicking on a hypertext link), *aff'd on other grounds*, 702 F.3d 1245 (10th Cir. 2012), *cert. denied*, 569 U.S. 1013 (2013); *Deering v. CenturyTel, Inc.*, No. CV-10-63-BLG-RFC, 2011 WL 1842859 (D. Mont. May 16, 2011) (dismissing plaintiff's ECPA claim based on the terms of defendant's privacy policy and an email sent to subscribers advising them that the Policy had been updated, in a putative class action suit over sharing of cookie and web beacon data); *Mortensen v. Bresnan Communication, LLC*, No. CV 10-13-BLG-RFC, 2010 WL 5140454 (D. Mont. Dec. 13, 2010) (dismissing plaintiff's ECPA claim where the defendant-ISP provided notice to consumers in its Privacy Notice and Subscriber Agreement that their electronic transmissions might be monitored and would in fact be transferred to third parties, and also provided specific notice via a link on its website of its use of the NebuAd Appliance to transfer data to NebuAd and of subscribers' right to opt out of the data transfer (via a link in that notice)), *vacated on other grounds*, 722 F.3d 1151 (9th Cir. 2013) (holding that the lower court erred in declining to compel arbitration); *see generally infra* §§ 26.14 (privacy policies), 26.15 (privacy class action suits).

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is obtained to liability limitations, warranty disclaimers, arbitration provisions[9] or other contractual terms deemed material to a site or service. For example, some sites and services obtain express assent to their Privacy Policies or incorporate them by reference in Terms of Use or other unilateral contracts.

Where a policy is incorporated by reference into a contract, the policy potentially may establish both rights and obligations for the site or service and its users, and potentially may be enforced by either, depending on its terms. While a site owner or service provider may rely on a privacy contract to limit liability, compel arbitration or for other offensive or defensive purposes,[10] a contractual privacy policy also potentially could form the basis for a breach of contract suit against the company.[11]

Where a policy is incorporated by reference into a binding contract, the party seeking to enforce it may need to prove specifically what terms were in effect at the time the contract was formed, if the policy has changed over time. Where a site or service purports to incorporate by reference policies that may change over time, and to bind users to future changes, the contract could be invalidated as illusory.[12]

The legal consequences of a posted policy are analyzed more extensively in sections 22.02 (Terms of Use) and 26.14[2] (Privacy Policies).

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[9] *See infra* § 22.05[2][M][vi] (analyzing the enforceability of arbitration provisions in consumer contracts and providing drafting tips).

[10] *See generally infra* §§ 22.01, 22.03[2], 26.14.

[11] *See, e.g.*, *In re Google, Inc. Privacy Policy Litigation*, 58 F. Supp. 3d 968, 985-87 (N.D. Cal. 2014) (denying in part plaintiffs' motion to dismiss, allowing plaintiffs to proceed with their breach of contract claim premised on Google's alleged breach of its privacy policy).

[12] *See supra* § 21.03[2]; *infra* § 22.04[1] (analyzing cases).

Where a party reserves the right to modify an agreement, but allows the other party to reject the modification, the agreement should not be found illusory. *See, e.g.*, *Hodson v. Bright House Networks, LLC,* No. 1:12-cv-01580-AWI-JLT, 2013 WL 1091396, at *6 (E.D. Cal. Mar. 15, 2013). Likewise, where a proposed modification to a unilateral contract would only apply prospectively, when express assent is obtained from users, but not retroactively, a modification provision will not render an agreement illusory under Texas law. *See In re Online Travel Co.*, 953 F. Supp. 2d 713, 719–20 (N.D. Tex. 2013).

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ABOUT THE AUTHOR

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IAN C. BALLON



Ian Ballon is Co-Chair of Greenberg Traurig LLP's Global Intellectual Property and Technology Practice Group and is a litigator in the firm's Silicon Valley Los Angeles and Washington, DC offices. He defends data privacy, cybersecurity breach, AdTech, TCPA, and other Internet and mobile class action suits and litigates copyright, trademark, patent, trade secret, right of publicity, database, AI and other intellectual property cases, including disputes involving safe harbors and exemptions, platform liability and fair use.

Mr. Ballon was the recipient of the 2010 Vanguard Award from the State Bar of California's Intellectual Property Law Section. He also has been recognized by *The Los Angeles and San Francisco Daily Journal* as one of the Top Intellectual Property litigators in every year the list has been published (2009-2021), Top Cybersecurity and Artificial Intelligence (AI) lawyers, and Top 100 lawyers in California.

Mr. Ballon was named a "Groundbreaker" by *The Recorder* at its 2017 Bay Area Litigation Departments of the Year awards ceremony and was selected as an "Intellectual Property Trailblazer" by the *National Law Journal*.

Mr. Ballon was selected as the Lawyer of the Year for information technology law in the 2023, 2022, 2021, 2020, 2019, 2018, 2016 and 2013 editions of *The Best Lawyers in America* and is listed in Legal 500 U.S., Law Dragon and Chambers and Partners USA Guide. He also serves as Executive Director of Stanford University Law School's Center for the Digital Economy.

Mr. Ballon received his B.A. *magna cum laude* from Tufts University, his J.D. *with honors* from George Washington University Law School and an LLM in international and comparative law from Georgetown University Law Center. He also holds the C.I.P.P./U.S. certification from the International Association of Privacy Professionals (IAPP).

Mr. Ballon is also the author of *The Complete CAN-SPAM Act Handbook* (West 2008) and *The Complete State Security Breach Notification Compliance Handbook* (West 2009), published by Thomson West (www.lanBallon.net).

He may be contacted at BALLON@GTLAW.COM and followed on Twitter and LinkedIn (@lanBallon).

Contributing authors: Parry Aftab, Darren Abernethy, Viola Bensinger, Ed Chansky, Francoise Gilbert, Rebekah Guyon, Tucker McCrady, Josh Raskin, & Tom Smedinghoff.

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