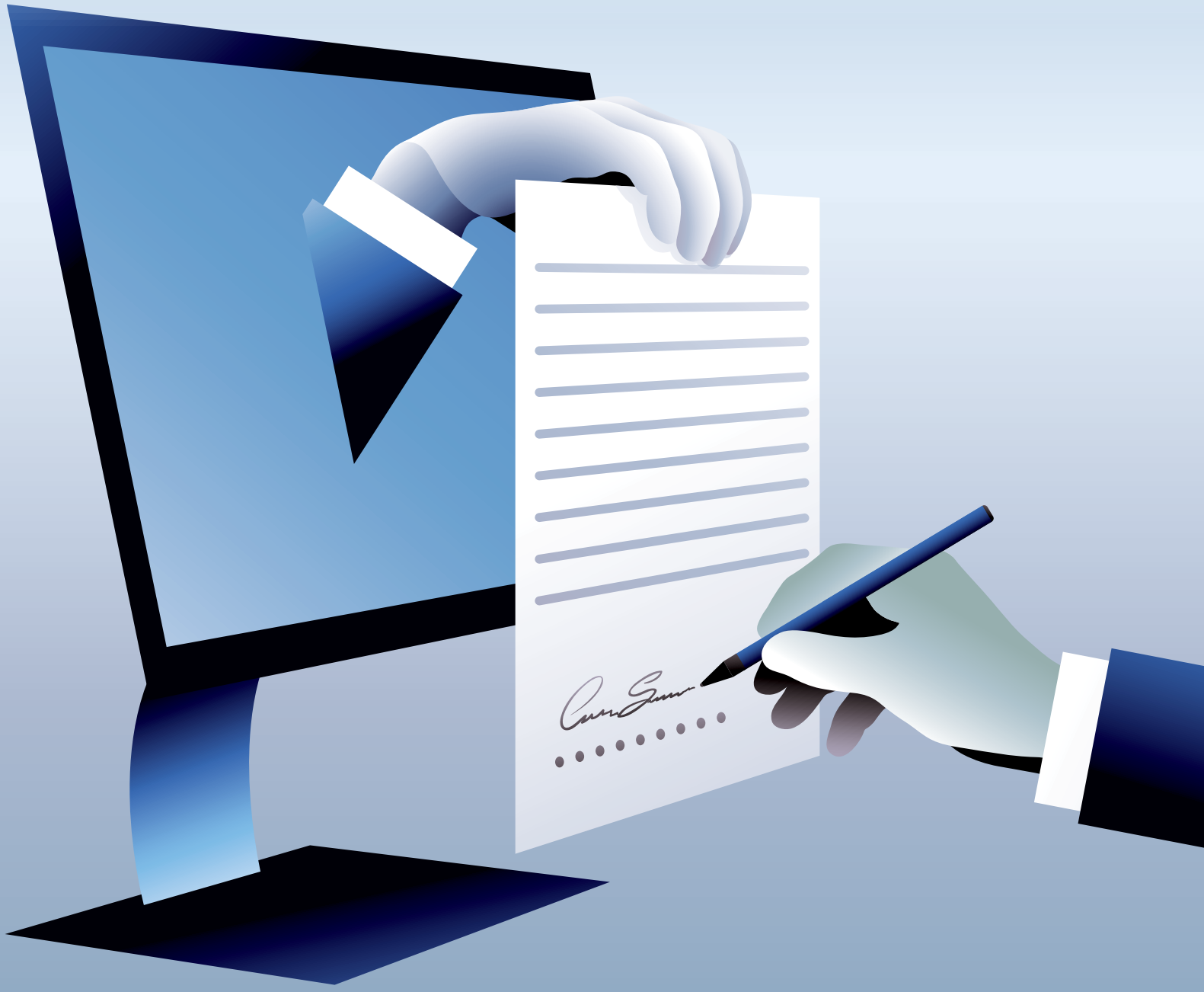
If Software Terms Are "Agreed To" and No One Is Around to Read Them, Is a User Legally Bound?

By Michael J. Serra



You may know the classic thought experiment: if a tree falls in the forest and no one is around to hear it, does it make a sound? That hypothetical question is meant to explore the concept of existence without perceived consciousness. In other words, participants must think critically about whether a sound exists without a human present to hear it because the concept of sound and existence may only be perceived through human senses.[1]

Did I lose you? No? Good, because this article addresses a different perception problem. This one, though, is not hypothetical. It is a common occurrence in modern society.

Software is so ubiquitous that even my 92-year-old great aunt has a Facebook page. Whether they know it or not, anyone using software (i.e., the user) must agree to some form of terms and conditions. But who reads those? Not my great aunt.

A recent study found that only between 0.05 percent and 0.22 percent of online shoppers even attempt to access online terms.[2] The irony is that software providers, their lawyers, and courts all know this. That leaves us with the "fallen tree" problem this article intends to address. Specifically, when are courts likely to find users legally bound by terms when everyone presumes he or she has not read them?

Presenting the terms

Software providers use various methods to present terms. Over time, courts have found it useful to group certain presentations as categories with quirky names. Differentiating these categories depends upon how users perceive the terms.

- It all started with "shrinkwrap." This practice involves incorporating contract terms in plastic or cellophane packaging, thereby providing notice when tearing open the box.[3] You may have experienced this when purchasing software at a retail store (e.g., tax preparation software sold at Staples).
- Thinking outside the box sometimes involves "clickwrap." That presentation requires users to click an "I agree" or "I accept" button after being presented with terms and conditions.[4]
- "Browserwrap," on the other hand, does not involve an affirmative act like clicking a button. Software providers rely on the assumption that users assent to terms when accessing the software.[5]
- "Sign-inwrap" falls somewhere between clickwrap and browserwrap. It requires users to affirmatively register or sign in before accessing software but does not require clicking a button to accept the terms.[6] Rather, the registration or sign-in page contains language stating that users agree to terms by creating an account.

At a Glance

Whether they know it or not, anyone anywhere using software must agree to some form of terms and conditions. But who actually reads those? Practically no one. Software providers, their lawyers, and courts all know this. So, when are courts likely to find users legally bound by terms when everyone presumes he or she has not read them?

Guidance from courts

"While new commerce on the internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[7] The key for binding software terms is the same for any contract, that is, establishing reasonable notice of the terms and a manifestation of assent to be bound. That sounds easy enough, but businesses are not run by lawyers. They are run by businesspeople. Businesspeople do what their customers want, and those same businesspeople believe customers (or in this case, users) do not want to be bothered with onerous legal terms. Users want to crush candies and "like" cat videos. Here are some highlights on how courts have viewed each presentation of terms to help guide lawyers working with those well-intentioned businesspeople.

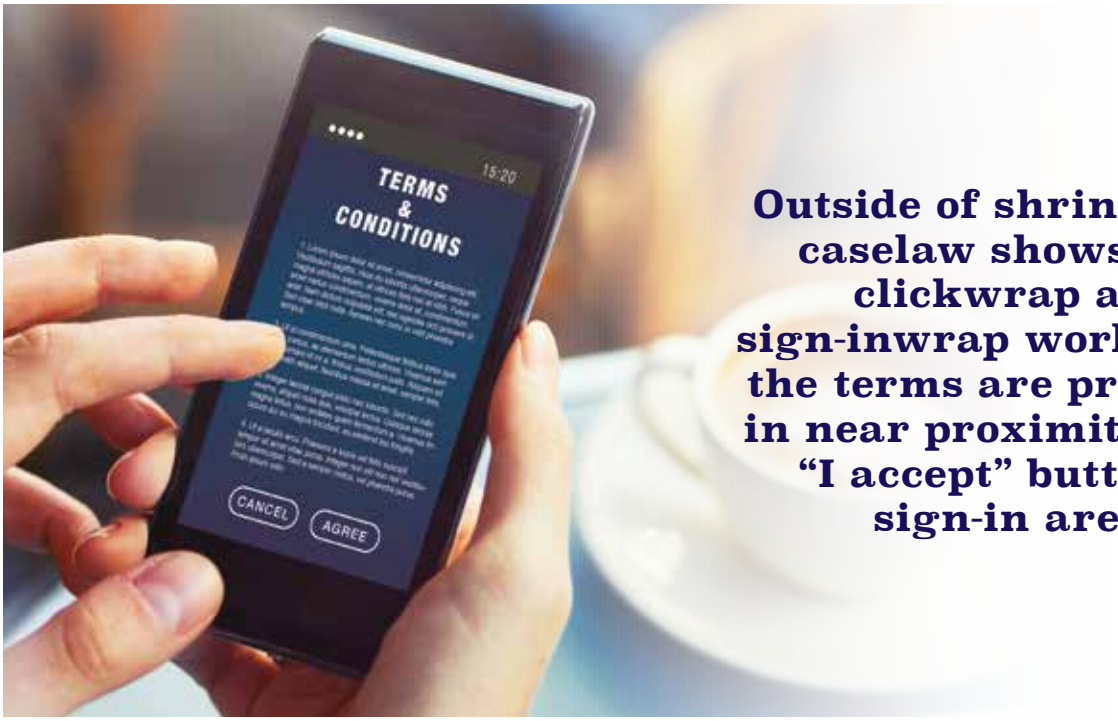
Shrinkwrap

Shrinkwrap terms are generally enforceable. Courts consistently follow the Seventh Circuit's reasoning in the seminal case *ProCD, Inc v Zeidenberg*.[8] There, a user argued he was not bound by shrinkwrap terms because he did not have access prior to purchase. The court disagreed, concluding that he received reasonable notice upon opening a box containing printed terms and assented when accessing the software regardless of whether he actually read those terms.[9]

Clickwrap and sign-inwrap

Web-based platforms are making shrinkwrap rare. Clickwrap and sign-inwrap are now more common and almost as widely endorsed. Courts generally find that clicking a button that says "I accept" creates an affirmative manifestation of asset.[10] Similarly, registering or signing in usually constitutes valid assent. Thus, the discussion in most clickwrap and sign-inwrap cases involves proper notice of the terms.

Presenting terms on the same page as the acceptance button should work. That was the finding in *AV v iParadigms, LLC*, where the court enforced limitations on liability when the terms were directly above a click-through button labeled "I agree."[11] Other cases have found that hyperlinking to terms



Outside of shrinkwrap, caselaw shows that clickwrap and sign-inwrap work best if the terms are presented in near proximity to the "I accept" button or sign-in area.

near the accept button was also effective. For example, the court in *Swift v Zynga Game Network, Inc* enforced terms accessible via hyperlink located "immediately under the 'I accept' button."[12]

A good analogy for affirming hyperlinked terms in clickwrap and sign-inwrap is found in *Fteja v Facebook, Inc*.[13] Mr. Fteja sued Facebook, and Facebook moved to transfer venue relying on a clause in its hybrid clickwrap/sign-inwrap terms. The court granted the motion because Facebook requires users to click a button immediately below a statement that read "By clicking Sign Up, you are indicating that you have read and agreed to the Terms of Service" with a link to those terms. The court correlated this presentation of terms to Facebook maintaining "a roadside fruit stand displaying bins of apples" and "[f]or the 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 sale by this fruit stand. For those terms, turn over this sign.'"[14] The court concluded that "[i]n those circumstances, courts have not hesitated in applying the terms against the purchaser" and "[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."[15]

Specht v Netscape Communications Corp serves as one high-profile example of clickwrap failure.[16] Second Circuit Judge Sonia Sotomayor (before her promotion) affirmed the lower court's decision to deny Netscape's motion to compel arbitration based on a clause in its clickwrap. The central issue was notice because "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."[17] Netscape's terms were not conspicuous enough for proper notice. Unlike a situation where the users had "an immediately visible notice of the existence of license terms,"[18] these users merely saw "a screen containing praise for the product and, at the very bottom of the screen, a 'Download' button."[19]

Browserwrap

Browserwrap is the toughest to enforce. A good illustration is found when reviewing the lower court and appeals court decisions in *Cullinane v Uber Technologies*.[20] Uber's mobile application contained the words "By creating an Uber account, you agree to the Terms of Service & Privacy Policy" which "appear[ed] in bold white lettering on a black background, and are surrounded by a gray box indicating a button."[21] Clicking on the button that says "Terms of Service & Privacy Policy" links users to terms stating that "by using any of Uber's services, the user expressly acknowledge[s] and agree[s] to be bound by the terms and conditions of the Agreement."[22]

Uber moved to dismiss certain claims based upon an arbitration provision in its browserwrap and the lower court held

that Uber's terms were enforceable.[23] Revisiting a prior analogy, it found that "[t]he language surrounding the button leading to the Agreement is unambiguous in alerting the user" that accessing Uber's application was "akin to the apple eater taking a bite of the apple" at the hypothetical fruit stand discussed in *Fteja v Facebook, Inc*.[24]

The First Circuit reversed, finding that Uber's presentation was inadequate. "Even 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."[25] In the First Circuit's view, biting an apple cannot bind a consumer to terms that he or she is unable to easily differentiate from other content.

What to consider when picking apples from fallen trees

Courts are consistent in finding that "failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract" but "the onus must be on the" providers "to put users on notice of the terms to which they wish to bind [them]."[26] Relying on the caselaw discussed above, here are some practical tips when advising software providers:

- Outside of shrinkwrap, caselaw shows that clickwrap and sign-inwrap work best if the terms are presented in near proximity to the "I accept" button or sign-in area.
- If the businesspeople insist on hyperlinking to the terms, ensure that those terms are discernible from other content found on the webpage. This can be done by incorporating different colors, font sizes, and typefaces. For example, the appeals court in *Cullinane* explained that it would have been more effective for Uber's hyperlink to be presented with "the common appearance of a hyperlink," i.e., "blue and underlined" instead of "a gray rectangular box in white bold text" matching other content on the same webpage.[27]
- Browserwrap should be avoided. If businesspeople are adamant about this presentation, providers can attempt to enforce terms that are conspicuously presented at the time a user downloads or accesses the applicable software.

The answer to the question about the fallen tree should now be obvious—it made a sound. We know that the tree fell and, based upon prior experience, we know that all things make a sound when they hit the earth. That same reasoning should apply to the problem of users not reading software terms. Users are accessing the software and, based upon their prior experiences with other products (like buying apples from a roadside fruit stand), those users should know that certain legal terms control. The real issue is effective presentation, so users know *which* terms apply. And, as we have seen, this can be tricky for businesspeople and lawyers alike. ■

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ENDNOTES

1. The fallen tree question is attributed to philosopher, writer, and Anglican bishop George Berkeley, Christie, *George Berkeley*, Philosophy for You <http://philosophyforyou.tripod.com/berkeley.html> (website accessed September 11, 2020).
2. *Berkson v Gogo LLC*, 97 F Supp 3d 359, 384 (ED NY, 2015) (citing Bakos et al, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J L Stud 1, 32 (2014), available at <https://pdfs.semanticscholar.org/fea5/724f14ce27cabde128964e9a645563f8c8bc.pdf> [https://perma.cc/UU86-LN5J] (website accessed September 11, 2020).
3. *Berkson*, 97 F Supp 3d at 366 n 1.
4. *Nguyen v Barnes & Noble*, 763 F3d 1171, 1175–1176 (CA 9, 2014).
5. *US v Drew*, 259 FRD 449, 462 n 22 (CD Cal, 2009).
6. *Berkson*, 97 F Supp 3d at 399.
7. *Register.com, Inc v Verio, Inc*, 356 F3d 393, 403 (CA 2, 2004).
8. 86 F3d 1447 (CA 7, 1996).
9. *Id.* at 1455.
10. *Hancock v AT&T Co*, 701 F3d 1248, 1256–1258 (CA 10, 2012).
11. 544 F Supp 2d 473, 480 (ED Va, 2008).
12. 805 F Supp 2d 904, 912 (ND Cal, 2011).
13. 841 F Supp 2d 829 (SD NY, 2012).
14. *Id.* at 839.
15. *Id.* at 840.
16. 306 F3d 17 (CA 2, 2002).
17. *Id.* at 29.
18. *Id.* at 31.
19. *Id.*
20. Unpublished memorandum and order of the United States District Court for the District of Massachusetts, signed July 11, 2016 (Civil Action No. 14-14750-DPW).
21. *Id.* at 2.
22. *Id.* at 3.
23. *Id.* at 6–7. Additionally, the lower court in *Cullinane* labeled this presentation of terms as sign-inwrap, but the author asserts that it more closely resembles browserwrap, *id.* at 7. The appeals court declined to give it a label, *Cullinane v Uber Technologies, Inc*, 893 F3d 53 (CA 1, 2018).
24. *Cullinane*, unpub op at 8.
25. *Cullinane*, 893 F3d at 63–64.
26. *Nguyen*, 763 F3d at 1179.
27. *Cullinane*, 893 F3d at 63.