Ensuring Enforceability of Online E-Commerce Agreements

By Barry Werbin

Online terms of service, terms of use or "terms and conditions" (collectively, "TOS") are ubiquitous—rarely do we see a website without some form of TOS, typically accessed through a link at the bottom of a site's home page. This runs the gamut from sites that are purely informational and passive, having no end-user interactions and posting no third party content, to those focusing on user-generated content ("UGC") and e-commerce, be it at the consumer or business-to-business level. But merely posting TOS on a site does not make them enforceable. To ensure enforceability, an end-user must either provide clear affirmative electronic assent to the TOS or have actual or constructive notice of conspicuously posted TOS before proceeding to interact with a site. Specific provisions of TOS, particularly waivers of material rights, must also pass muster under applicable state law.

In this context, online TOS are no different than any other form of contract, which, as we all learned in our first year of law school, requires both a clear offer and acceptance under applicable state law.[1] As the Second Circuit has observed: "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[2] In the context of the Internet, this "meeting of the minds" must occur digitally, such that courts can unequivocally conclude that a user had at least constructive, if not actual, notice of the TOS and an opportunity to review them before taking action on a website or in connection with an online purchase.[3] Even if TOS are deemed "accepted" by end-users, they still can be challenged—and often are from the defense side—as contracts of adhesion or as being unconscionable, either in whole or as to specific terms, such as forum selection and liability limitation clauses.

For a purely passive informational site, TOS typically only need to provide basic disclosures, including notice of intellectual property rights, company contact details and site administration information. Enforceability is therefore not a major concern. But once a site becomes interactive in any way, those TOS sitting at the bottom of a web page are meaningless unless they are reasonably communicated to, and form a legally binding contract with, end-users.

Among the most critical provisions in TOS from the provider's perspective are those concerning choice of law, mandatory forum selection, arbitration and class action waivers, warranty disclaimers and limitations of liability. Where UGC, merchant or other third party content is posted on a site, additional key terms will include content license terms dictating what usage rights are ceded to the service provider in that content, and a requisite "take-down" policy and agent designation under the Digital Millennium Copyright Act ("DMCA"), which is necessary for a non-publisher service provider to take advantage of the secondary liability "safe harbor" under the DMCA.[4] From an online provider's perspective, the enforceability of these types of material terms is critical to controlling exposure to potentially substantial liabilities and the costs attendant to litigating multiple claims throughout the country in different legal jurisdictions.

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Where such terms are material to a provider's business model, existing TOS and the applicable website interface should be reviewed carefully and revised as necessary to insure enforceability on an ongoing basis. TOS should also incorporate by reference, and hyperlink to, a website's applicable privacy policy, which then becomes part of the overall contract with an end-user.

Browsewrap vs. Clickwrap TOS

Online TOS generally fall into one of two categories: "browsewrap" or "clickwrap" agreements, although there are nuances within each category. "Browsewrap" refers to TOS that typically are posted on a site and do not require any affirmative assent by an end-user to use the site or its services.[5] Browsewrap TOS often sit passively as a hyperlink at the bottom of a website home page, but may also be brought to a user's attention and accessed through one or more links on a site, without requiring an end-user to affirmatively accept or read them. Browsewrap TOS that are merely posted on a site with no conspicuous notice to end-users of their existence are not enforceable because there is no evidence that an end-user consented to the TOS or even had actual knowledge of them.[6] Tell-tale signs of unenforceability include burying a TOS hyperlink in an inconspicuous location on a website so as not to provide reasonable notice of their existence to a user; making sure the TOS link itself is no more, and perhaps even less, prominent in terms of font size and color than other non-

material links on a site; and a failure to direct users to the TOS when they are subscribing for services, opening an account or making a purchase.[7]

Modified browsewraps have, however, been enforced on a case by case basis. This has occurred where a user was expressly notified that his or her continued activity on the site was subject to specified TOS and a conspicuous link was provided to access those TOS one or two clicks away. In these instances, legally sufficient constructive notice of the TOS was deemed provided to the end-user. For example, in dismissing a class action complaint, the Eastern District of New York recently enforced arbitration and class action waiver clauses in Amazon.com's TOS, a hybrid browsewrap/clickwrap agreement, as characterized by the court.[8] Amazon end-users were prominently notified at final checkout that by placing an order "you agree to Amazon's privacy notice and conditions of use." The words "conditions of use" were a colored hyperlink that took users to Amazon's TOS. To confirm a purchase, the user had to then click "Place your order," which was positioned just below the TOS notification. Although users were not required to specifically accept the TOS, the court held that the TOS notification and hyperlink were sufficiently conspicuous on the checkout page so as to notify an end-user each time a purchase was made that purchases were subject to the TOS and that this placed end-users at least on "inquiry" notice.

On the heels of its Amazon decision, however, Senior Judge Jack B. Weinstein of the Eastern District of New York refused to enforce hybrid browsewrap TOS and an arbitration clause contained therein in a class action involving in-flight WiFi service fees, where an end-user was not required to click through to TOS which were posted eight pages down after a sign-in screen.[9] The court assessed an average Internet user's "capacity and understanding" and concluded that average end-users would not have been informed that they were binding themselves to any TOS. As a result, forum selection and arbitration clauses in the TOS were not enforceable. As an evidentiary matter, the court placed the burden on the defendant to show "special circumstances indicating that the plaintiffs were aware, or should have been aware, of such clauses because of their special knowledge."

"Clickwrap" agreements, on the other hand, require users to affirmatively "accept" TOS as an express condition to initially engage with a website, whether to purchase or sell goods online, post videos, subscribe to video-on-demand services or download games. Clickwraps are generally enforced because end-users must affirmatively accept the TOS that are conspicuously posted on or linked to directly from the same page as the acceptance mechanism (such an "I accept" icon), even if they chose not to read the TOS.[10] In some cases, the site will require an end-user to scroll through the TOS before acknowledging acceptance (sometimes referred to as a "scrollwrap" agreement), a procedure that ensures enforceability.[11] The more direct the end-user's interaction is with the TOS and the acceptance procedure, the most secure the website owner will be in enforcing its TOS.

Formation of a Valid TOS Agreement

The starting point is whether a valid and enforceable online contract is formed. As the Second Circuit made clear in an early case addressing online contracts: "Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract."[12] This manifestation of assent can be direct in the form of TOS that are clearly presented to an end-user for prior review and must be affirmatively "accepted," as in a traditional clickwrap agreement scenario. Here, state courts and federal courts applying state contract law are nearly unanimous in upholding such direct acceptance as creating a binding agreement.

New York courts have regularly upheld the validity of such clickwrap agreements. As an example, in a 2008 criminal proceeding involving alleged online deceptive advertising, the New York Supreme Court held that the TOS posted on the website of Direct Revenue, LLC, constituted a binding agreement and all end-users were bound by express disclosures in the TOS respecting the use of pop-up ads and other practices, as well as limitations on liability. This all precluded any claims of misrepresentation and deceptive business practices and required dismissal of fraud claims.[13] All website users were required to click a "Yes" button within a dialog box to confirm their assent to the TOS, which they had the opportunity to read. As the court emphasized, "[u]nder New York law, such contracts are enforced so long as the consumer is given a sufficient opportunity to read the EULA [end-user license agreement], and assents thereto after being provided with an unambiguous method of accepting or declining the offer..."[14]

Assent also can be established where a site provides prominent notice that use is subject to the posted TOS, which are accessible through one or two clearly identifiable links, and the user then must click a link acknowledging this disclosure without being compelled to read the TOS themselves. A recent example is *5381 Partners v. Sharesale.com*, involving an online merchant agreement that was enforced where there was clear and uncontroverted evidence that the user could not have become a merchant and used the site without first affirmatively agreeing to the applicable merchant terms by clicking a box confirming agreement with the TOS, even if such terms were not actually read.[15]

On the other hand, the absence of a means for a user to affirmatively accept posted TOS will preclude the formation of an enforceable online contract, unless there is unequivocal evidence that a user had actual or constructive knowledge of a website's TOS. In defending a con-

sumer complaint tied to an online purchase, for example, Barnes & Noble recently lost a bid to enforce an arbitration clause in its browsewrap agreement TOS, which were accessible through links at the bottom of its website pages, because its site "did not provide reasonable notice of its Terms of Use" and consumers were not prompted to assent thereto.[16] In that case, the Ninth Circuit, applying both New York and California law, emphasized that even in the absence of affirmative consent, such as through an "I accept" button, the TOS would likely have been enforceable if the user had actual notice of the agreement. In the absence of actual knowledge, the enforceability of browsewrap TOS depends "on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract"—and this, in turn, "depends on the design and content of the website and the agreement's webpage."[17]

Similarly, the New Jersey Appellate Division refused to enforce a forum selection clause in TOS where the "clause was unreasonably masked from the view of the prospective purchaser because of its circuitous mode of presentation" and was not visible on the purchaser's computer without scrolling down to a submerged portion of a webpage where a disclaimer containing the clause appeared.[18] In that case, there also was no requirement before concluding a purchase that the plaintiff had to affirmatively accept the posted terms, putting a final nail in the TOS coffin.

One observation gleaned from the case law is that courts scrutinize browsewrap-type TOS more closely in matters involving consumers, rather than those concerning more sophisticated merchants and other businesses. This was recently emphasized by Senior Judge Weinstein in *Berkson v. GoGo LLC*, who wrote: "Because of the passive nature of acceptance in browsewrap agreements, courts closely examine the factual circumstances surrounding a consumer's use."[19] There, Judge Weinstein refused to enforce TOS against consumers where the "design and content of the website, including the homepage, did not make the 'terms of use' readily and obviously available.... The hyperlink to the 'terms of use' was not in large font, all caps, or in bold...Nor was it accessible from multiple locations on the webpage."[20]

Preserving Evidence of the TOS Offer and Acceptance

As with brick and mortar contracts, evidence will need to be presented to a court or arbitration forum of a valid set of TOS that were in place as of the date and time of the underlying online transaction—the "offer"—and an actual or constructive acceptance of those terms. From an evidentiary perspective, this is accomplished through the admission of such documentation as business records under Rule 803(6) of the Federal Rules of Evidence or applicable state evidentiary rules.[21]

Careful business records should be maintained of end-users' click-throughs and acceptances of a site's TOS where affirmative acceptance is required. This is typically done by maintaining logs of subscribers and their IP and email addresses. Those logs will be critical to produce in any litigation where enforceability of the TOS is being challenged. Like any business records, in a litigation context these end-user logs will need to be authenticated as valid business records to be admissible. This will require either live testimony or, in the context of motions to dismiss or for summary judgment, an affidavit or declaration from the company's custodian of such records or by an officer or employee familiar with the manner in which such end-user records are created and maintained in the ordinary course of business.

Second, because TOS are often revised on an ongoing basis, it is important to establish and maintain a history file of all TOS versions by date range and how such changes were communicated to end-users.[22] This versioning is important because the TOS that were originally accepted by an end-user may not be the same TOS in effect down the road when litigation begins. The necessity for business records validation applies here as well to the actual TOS that were in effect at the time of the user's initial assent. This too should be established with oral or written testimony that creates a foundation for admissibility of the specific TOS in issue as a business record. For example, in a recent case in the Eastern District of New York, a Declaration of Kellogg's in-house counsel was sufficient to establish the authenticity of TOS that were found to be binding on a plaintiff who had submitted an idea for a new product through Kellogg's online portal and was not compensated.[23] Whether future amendments to TOS will themselves be binding on users who originally accepted an earlier version is discussed below.

It may also be possible to obtain admissions during discovery through requests to admit, or a stipulation that these types of records qualify as business records for purposes of admissibility. In some cases, a plaintiff may admit in pleadings to opening an online account and try to use the TOS affirmatively to make a case, while maintaining, perhaps inconsistently, that certain specific provisions of the TOS should nevertheless be unenforceable because they are unconscionable or against public policy, also discussed below.

For example, in *Register.com, Inc. v. Verio, Inc.*, the Second Circuit found sufficient evidence of a binding agreement where Verio admitted it had been aware of Register.com's TOS, the TOS were clearly posted on Register.com's site and the site clearly notified users that by submitting queries to its WHOIS database users agreed to abide by the TOS, despite Verio not being required to click on an acceptance icon.[24] The Second Circuit emphasized that this admission of notice, coupled with Verio's acceptance of the benefits from using the site, created a binding ac-

ceptance of Register.com's contractual offer in the form of its TOS. And in the same Kellogg case noted above, the Second Circuit pointed to the plaintiff's fatal admission that Kellogg's TOS were a legally binding agreement, leaving only plaintiff's authenticity objection, which was belied by the declaration of Kellogg's counsel.[25]

In the absence of actual user logs, indirect evidence of acceptance of TOS can be offered through other business records evidence by showing an end-user was presented with a clear and conspicuous interface that expressly required acceptance of the TOS in effect at the time and that the mechanics of the site would have made it impossible for the user to continue without having accepted such terms.[26] In a hybrid browsewrap situation where an end-user is presented with conspicuous notice that his or her further actions on the site are governed by TOS, which in turn are accessible through an obvious hyperlink within such notice, the mechanics of that interaction and a foundation for the end-user interface in effect during the relevant time period can also be established through business records testimony.

In short, at a minimum there must be sufficient unequivocal evidence that (1) the end-user, especially a consumer, was clearly presented at the outset with prominent notice of TOS that would govern use of the site and bind the user, (2) a link to the TOS was conspicuously and proximately placed in the same context as that notice, such that it stood out from other content on the applicable website page, (3) the TOS link took the user directly to the TOS (one click) and (4) the TOS themselves were clear and unequivocal, and prominently highlighted (such as by all caps or bold type) any material rights being waived by the user, such as liability limits and exculpation, mandatory arbitration and warranty disclaimers.

Amendments to TOS

Amending TOS over time is a thorny issue and one that can get a provider into real trouble. As ubiquitous as TOS are, so are embedded clauses often giving the provider *carte blanche* to amend the TOS at any time without further notice. For fairly obvious reasons, such unilateral amendment clauses are disfavored by courts. On the other hand, a unilateral right to modify TOS will generally be upheld where that right is exercised in good faith, fairly and in a manner that does not frustrate the purpose of the contract.

A prominent example involved end-user claims made against Zappos based on a data breach by hackers, where the court refused to enforce an arbitration clause in a browsewrap TOS because end-users did not agree to it—a TOS hyperlink was buried at the bottom of pages that could not be viewed without scrolling and was in a small font, and the website never directed an end-user to the TOS—and Zappos reserved the right at any time to amend the terms without notice.[27] This unilateral right to amend was held to render the contract illusory "because Zappos can avoid the promise to arbitrate simply by amending the provision, while Zappos.com end-users are simultaneously bound to arbitration."[28] In another case, the Ninth Circuit refused to enforce amended TOS on a telecom provider's website that added an arbitration clause because end-users were neither provided direct notice of the amendment nor required to visit the site as a condition to continuing to use the provider's services.[29]

On the other hand, a California state court recently upheld amendments to Instagram's TOS where end-users who had affirmatively accepted Instagram's initial TOS received an email 30 days in advance notifying them that the TOS were being amended and that continued use of the platform thereafter would bind users to the amended terms.[30] Applying California law, the court noted that the original TOS provided that Instagram reserved the right to amend its TOS by email notification, and the plaintiff received the requisite notice and then continued to upload photos despite the "opt-out" option.

Similarly, an arbitration clause in Electronic Arts' TOS that was amended was enforced where registered users were presented with a link to the amended TOS and were required to click an "accept" button or opt out as a condition of continuing their use of the online game platform.[31]

While perhaps burdensome administratively and requiring enhanced technical resources, to insure enforceability of future amendments to TOS each update should be made clearly known to existing end-users when they log on or place an order; the end-users should be directed to an obvious link to the amended TOS without the need to scroll down; and there should be a conspicuous notice that continued use of the site binds the user to the amended terms. Alternatively, an email blast could be sent to all end-users of record, provided such users are not able to "opt-out" from receiving such important administrative notices; even still, some end-users may not receive the email if their spam filters quarantine it.

Contracts of Adhesion and Unconscionability

A common refrain in attacks on TOS enforceability is that they are contracts of adhesion, which should not be enforced as a matter of public policy. While the term "contract of adhesion" may conjure up another hazy first year law school contracts lecture, it is often a misunderstood doctrine that is far from black and white. Indeed, contracts of adhesion abound in our society in both the online and brick and mortar world. Determining whether a contract is one of adhesion is only the beginning of the analysis to determine its enforceability, as contracts of adhesion are generally valid and enforceable under applicable state law in the absence of other factors that render them otherwise. Because online TOS are not "negotiable"—not unlike a consumer finance contract, extended warranty

agreement or a myriad other "form" agreements on paper—they all would be rendered meaningless if "adhesion" were the sole test of enforceability. It is only where a contract of adhesion, or specific terms therein, are deemed "unconscionable" under applicable state law that they will not be enforced.

Courts in New York, California and New Jersey, for example, examine contracts of adhesion from the perspective of unconscionability at two levels: procedural and substantive. To be deemed unenforceable, contractual provisions in these jurisdictions must be found to be *both* "procedurally" and "substantively" unconscionable, and are subject to a reasonableness standard.[32]

"Procedural" unconscionability addresses the manner in which parties enter into a contract and considers factors such as the parties' respective bargaining power, the degree of economic compulsion, sophistication (including age and literacy), any hidden or unexpected contractual provisions and any public interest affected by the contract.[33] Procedural inadequacies can include an end-user's age, literacy and lack of sophistication, whether the TOS are hidden, bargaining tactics employed and the particular setting existing during the contract formation process.[34]

"Substantive" unconscionability focuses, for example, on whether "inequality amounting to fraud [is] so strong and manifest as to shock the conscience and confound the judgment of any man of common sense."[35] The doctrine focuses on fundamental fairness as to the overall TOS or specific clause contained therein, and whether the terms of a contract are unreasonably favorable to the other party.[36]

Particular Material Terms: Forum Selection

The biggest challenges to TOS typically arise in the context of a provider seeking to enforce choice of law, forum selection, exculpation, liability limitation, warranty disclaimer and arbitration clauses. While a detailed discussion of each is beyond the scope of this article, the principles of valid contract formation and unconscionability discussed above play a key role in determining enforceability. Even where TOS as a whole might be enforceable, specific provisions may be held unconscionable and not enforced under substantive state law applicable to contracts in general. For example, waivers of claims based on gross negligence, intentional wrongdoing, fraud, malice and reckless indifference to the rights of others are not enforceable under New York law, even in commercial contracts.[37]

Keep in mind that waivers of material rights must be displayed conspicuously (using all-caps or bold lettering) to end-users to be enforced under state laws generally; even then, specific limitations may be unenforceable.[38] Drafting guidance is also provided by U.C.C. § 2-103(1)(b)—the source of pervasive ALL CAPS clauses in TOS and contracts generally—which defines "conspicuous" as including, for a person:

> (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Because of the frequency of challenges to forum selection clauses involving online transactions, some additional discussion of how courts have addressed that issue in an online context is instructive. Forum selection clauses are generally presumed valid in online TOS if an enforceable contract otherwise exists.[39] Indeed, in its *M/S Bremen* decision, the Supreme Court held that mandatory forum selection clauses should be enforced "unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[40] Courts have since presumed the validity of forum selection clauses absent a strong showing of unreasonableness.[41] In the online context, such clauses also must be reasonably communicated to an end-user to be enforceable.[42]

Courts have recognized that in the Internet context, providers would be at risk of being sued potentially in every state because of the national reach of online commerce and therefore have a reasonable basis upon which to require centralization of litigation in a single forum. Because TOS are governed by state contract law, however, the applicable state law under which TOS should be assessed cannot be based on the choice of law expressed in the TOS themselves until the TOS are deemed enforceable under the choice of law standard in force in the state where an action is commenced. Once enforceable, however, the stated choice of law will govern.[43] Often, this issue can be avoided where the substantive laws of competing states respecting TOS enforceability are the same.

A forum selection clause contained in Microsoft Network's TOS was upheld by the New Jersey Appellate Division, where a subscriber could register for the service only after scrolling through the TOS and clicking "I Agree." The court emphasized that "no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting [an end-user] to disavow particular provisions or the contracts as a whole."[44]

In a claim alleging improper removal of a posted video, YouTube's TOS were recently upheld by a California district court so as to enforce a forum selection clause.[45] In order to open an account and upload videos, YouTube presented all users with a link to its TOS and required

end-users to check a box stating "I agree to the Terms of Use and Privacy Policy." Although the plaintiffs argued that the TOS and forum selection clause were unconscionable, the court found neither procedural nor substantive unconscionability, emphasizing that plaintiffs had other options for posting videos online and did not lack "any kind of meaningful choice as to whether to upload their video to the YouTube website and agree to the conditions set forth by YouTube."[46] The court further noted that a lack of "bargaining power does not render the entire contract or the forum selection clause procedurally unconscionable."[47] Procedural unconscionability also did not exist because the YouTube TOS "were not obscured or hidden, Plaintiffs had a clear opportunity to understand the terms, and they did not lack a meaningful choice."[48] Similarly, there was no substantive unconscionability because neither the TOS as a whole nor its relevant terms were "so outrageously unfair as to shock the judicial conscience."[49]

Under New York law applicable to contracts in general, forum selection clauses in otherwise enforceable agreements are presumed valid unless enforcement would "be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court."[50] In *Starkey v. G Adventures, Inc.*, under New York law, the Second Circuit enforced TOS requiring that claims be brought in Canada where three trip booking confirmation emails were sent to the plaintiff and contained prominent statements that all bookings were subject to specific TOS, following which was a hyperlink to the applicable TOS containing the clause.[51]

On the other hand, in a case involving the purchase of closeout merchandise online, a New York court refused to enforce a forum selection clause specifying Florida courts where the clause was buried or "submerged" on website pages and was not specifically brought to an end-user's attention.[52] The online seller neither provided notice to the buyer that the TOS could be found at a given website address, nor structured its site so as to place the TOS "directly up front, in a conspicuous place, for all to see."[53] The court contrasted this with other cases in New York and New Jersey that have upheld TOS forum selection clauses where the existence of such clauses was reasonably communicated to end-users.

Final Takeaways

The challenge in drafting enforceable TOS is to meet the threshold standards potentially of every state where a website provider is engaged in national commerce. Well-established case law in New York, California and New Jersey, however, provides valuable guidance and reflect a widespread trend. Courts' assessments of waivers of particular material terms involving consumers are more circumspect and such terms are more susceptible to unconscionability challenges. To best the odds, always keep in mind the need to present and display TOS in as conspicuous a way as possible and require a convenient means of affirmative consent, where end-users cannot argue they did not have reasonable notice. Amendments to TOS that affect any material rights of an end-user must also be subject to a similar validation process. Material waivers should be prominent, clearly worded and distinct from other terms, and certainly consistent with the choice of state law specified in the TOS. In drafting, always keep in mind the principle of fair and reasonable notice and the fundamentals of contract formation. And maintain good business records to provide clear evidentiary support for valid online contract formation. Following these guidelines and keeping up to date on still-evolving case law will best ensure enforceability of an online povider's TOS.

Endnotes

1. *See, e.g., Express Indus. and Term. Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584, 589, 715 N.E.2d 1050, 1053 (1999) ("To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.").
2. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). As this court also emphasized: "To form a valid contract under New York law, there must be an offer, acceptance, consideration, mutual assent and intent to be bound." *Id.* at 427 (internal quotations omitted).
3. *See Starke v. Gilt Groupe, Inc.*, 2014 WL 1652225 (S.D.N.Y. April 24, 2014), where the court upheld Gilt Groupe's membership sign-up process, which included a sign-up box with a hyperlink to TOS through a single "click," where a user was prominently notified that membership was governed by the posted TOS. Plaintiff was deemed to have constructive notice of the TOS and was bound thereby because he was aware the TOS existed and governed his purchases, despite not actually having viewed or read the TOS.
4. 17 U.S.C. § 512. The DMCA, which applies only to copyright claims, absolves an online service provider from secondary infringement liability if the provider fully complies with the statutory conditions, which include posting and abiding by a notice and "take-down" process, and listing and recording with the Copyright Office an agent to receive DMCA claims. Section 512 also permits users who posted challenged content to contest wrongful takedowns. A broader discussion of the DMCA is beyond the scope of this article.
5. *See, e.g., Hines v. Overstock.com, Inc.*, 668 F.Supp.2d 362, 366-67 (E.D.N.Y.2009) ("Unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly…[a] party instead gives his assent simply by using the website."). *Hines* held that an online retailer's TOS were not enforceable because users were not prompted to review them and the TOS were not prominently displayed.
6. *See, e.g., In re Zappos.com, Inc., Customer Data Security Breach Litigation*, 893 F.Supp.2d 1058 (D. Nev. 2012) (browsewrap agreement was unenforceable where users were not required to take affirmative action to assent to the terms and there was no evidence that users consented to such terms or were even aware of the terms.).
7. *Id.* at 1064.
8. *Nicosia v. Amazon*, 84 F.Supp.3d 142 (E.D.N.Y. Feb. 4, 2015) (Second Circuit appeal pending as of the writing of this article). Note the Supreme Court held in *AT & T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011) that class-action waiver and mandatory arbitration

clauses were enforceable under the Federal Arbitration Act, which preempted California law that might otherwise find such clauses unconscionable in consumer contracts under the test set forth in *Discover Bank v. Superior Ct.*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76 (2005). *Accord American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) (FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery).

9. *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. April 8, 2015) (Second Circuit appeal pending as of the writing of this article; motion for preliminary approval of class action settlement granted at 2015 WL 7960042 (Dec. 4, 2015)).

10. *See, e.g., Whitt v. Prosper Funding LLC*, 2015 WL 4254062 (S.D.N.Y. July 14, 2015) (a reasonably prudent website user does not lack sufficient notice of terms of an agreement that are viewable through a conspicuous hyperlink adjacent to a clickable box indicating acceptance of the TOS); *Centrifugal Force, Inc. v. Softnet Commc'n, Inc.*, 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011) ("In New York, clickwrap agreements are valid and enforceable contracts."); *Rudgayzer v. Google Inc.*, 2013 WL 6057988 (E.D.N.Y. Nov. 15, 2013) (upholding Google's clickwrap agreement that required a "user's assent as a prerequisite for using the services," finding the terms were "reasonably communicated."); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 233 (E.D. Pa. 2007) (forum selection clause enforced in TOS between Internet advertising service and advertiser where TOS conspicuously notified users in bold at the top to "Carefully read the following terms and conditions," required users to click on an "accept" box and the TOS were presented in a scrollable window).

11. *See Berkson, supra*, 97 F. Supp. 3d at 395 -97 (also discussing at length variations of click-wrap and browsewrap agreements and degrees of enforceability).

12. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 32 (2d. Cir. 2002) ("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."). The Second Circuit applied California law to refuse enforceability of an arbitration clause in TOS that were buried at the bottom of a download web page.

13. *People v. Direct Revenue, LLC*, 2008 NY Slip Op. 50845 (Sup. Ct., N.Y. Co., 3/12/2008).

14. *Id.*

15. *5381 Partners v. Sharesale.com*, 2013 WL 5328324 (E.D.N.Y. Sept. 23, 2013). Although the end user argued that the merchant terms were not "readily visible" because one had to click a link to access those terms, the court found the agreement enforceable because the plaintiff "was shown precisely where to access the Merchant Agreement before it agreed to them, and it should have clicked on them." *See also Rudgayzer, supra.*

16. *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014). The TOS also provided for application of New York law, and the Ninth Circuit noted that its decision comported with both New York and California law. 763 F.3d at 1175.

17. *Id.* at 1177 (also citing to *Specht*, 306 F.3d at 30-31).

18. *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596, 611 (App. Div. 2011). *See also Edme v. Internet Brands, Inc.*, 968 F. Supp. 2d 519, 525-26 (E.D.N.Y. 2013) (court refused to enforce forum selection clause in TOS under New York law because no evidence was presented to show how an end user was presented with the TOS on a website).

19. *Berkson, supra*, 97 F. Supp. 3d at 395.

20. *Id.* at 404.

21. *See* F.R.E. §803(6)("Records of a Regularly Conducted Activity"); N.Y. Civ. Prac. Law & Rules §4518 ("Business Records").

22. For example, in *Bassett v. Electronic Arts, Inc.*, 93 F. Supp. 3d 95, 99 (E.D.N.Y. 2015), registered users of EA Online were notified of amended TOS and required to click "I Accept" as a condition to proceeding, as they were required to do upon initial registration. Business records produced by EA reflected that Plaintiff had affirmatively accepted both the original and amended versions.

23. *Wilson v. Kellogg Co.*, 2015 WL 3937511 (E.D.N.Y. June 25, 2015); *aff'd on other grounds*, Summary Order No. 15-2237 (2d Cir. Jan. 13, 2016) ("Order") (also finding the TOS not unconscionable because the plaintiff "had the option not to accept Kellogg's Terms and Conditions, and to not submit his idea through Kellogg's website." 2015 WL 3937511, at *6 n.1.).

24. *Register.com, Inc., supra*, 356 F.3d at 401-03, 430.

25. *Wilson, supra*, Order at p.4.

26. *See, e.g., Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829, 834 (S.D.N.Y. 2012) (Facebook account sign-up process established through "[d]eclarations filed by Facebook employees, screenshots .... and Facebook's current website of which the Court takes judicial notice...."); *Moretti v. Hertz Corp.*, 2014 WL 1410432 (N.D. Cal. Apr. 11, 2014) (clear evidence that a consumer could not have completed an online transaction without checking a box accepting posted terms and conditions was sufficient to constitute notice and acceptance of a forum selection clause contained therein).

27. *In re Zappos.com, Inc., Customer Data Security Breach Litigation*, 893 F.Supp.2d 1058 (D. Nev. 2012).

28. *Id.* at 1065, also emphasizing that "[m]ost federal courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory and unenforceable, especially where there is no obligation to receive consent from, or even notify, the other parties to the contract."

29. *Douglas v. Talk America*, 495 F.3d 1062 (9th Cir. 2007).

30. *Rodriguez v. Instagram*, No. CGC-13-532875 (San Francisco Sup. Ct., Feb. 28, 2014).

31. *Bassett, supra*, 93 F. Supp. 3d at 99; 106-07 (citing various decisions under New York and California law finding unilateral amendments to arbitration clauses not illusory where fair notice was given).

32. *See AT & T Mobility LLC, supra*, 131 S.Ct. at 1746 (under California law); *Berkson supra*, 97 F. Supp. 3d at 391-92; *Allen v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813, 824 (Ct. App. 1996); *Sitogum Holdings, Inc. v. Ropes*, 352 N.J. Super. 555, 564-66 (Ch. Div. 2002); *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988) (procedural and substantive unconscionability require "'some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party...'").

33. *See, e.g., California Grocers Ass'n v. Bank of Am.*, 22 Cal. App.4th 205, (Ct. App. 1994); *Muhammad v. County Bank of Rehobath Beach*, 189 N.J. 1, 15 - 16 (2006); *Berkson, supra*, 97 F. Supp. 3d at 391 ("Whether procedural unconscionability exists is determined by what led to the formation of the contract.").

34. *See e.g., Muhammad*, 189 N.J. at 15.

35. *Berkson, supra*, 97 F. Supp. 3d at 391-92; *California Grocers Ass'n v. Bank of Am., supra*, 22 Cal. App.4th at 214, citing to an old New York Court of Appeals decision in *Osgood v. Franklin*, 1 Johns Ch. 1, 21 (N.Y. 1816). *Accord Sitogum Holdings, Inc. v. Ropes*, 352 N.J. Super. 555, 564-66 (Ch. Div. 2002).

36. *See, e.g., Gillman supra*, 73 NY2d at 10-12. *See also Whitt v. Prosper Funding LLC*, 2015 WL 4254062 (S.D.N.Y. July 14, 2015), finding enforceable an agreement to arbitrate contained in online TOS of peer-to-peer lending service where there was a conspicuous link to the applicable TOS adjacent to a box, which a user was required to click to acknowledge his or her acceptance of those terms, and further finding mandatory arbitration clause was not unconscionable based on plaintiff's alleged lack of resources.

37. *Baidu, Inc. v. Register.com*, 760 F. Supp. 2d 312, 317-18 (S.D.N.Y. 2010).

38. For example, U.C.C. §2-719(3) voids an exclusion of consequential damages for injury to person in the case of consumer goods as being "prima facie unconscionable," but not where losses are commercial. Under New York law, liability exculpatory clauses are unenforceable "when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing." *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377 (1983). In *Baidu, Inc., supra*, 760 F. Supp. 2d at 317-19 (S.D.N.Y. 2010), the court declined to enforce Register.com's TOS exculpation provisions as to claims for gross negligence or recklessness, despite both parties being sophisticated commercial entities. *See also* U.C.C. § 2-316(2), which requires that exclusions of the warranty of merchantability be "conspicuous."

39. *See, e.g., Zaltz v. JDate*, 952 F.Supp.2d 439, 451-52 (E.D.N.Y. 2013) (forum selection clause enforced where new dating site members had to check a box confirming they read and agreed with the site's TOS); *Fteja*, 841 F.Supp.2d at 838-40.

40. *M/S Bremen v. Zapata. Off-Shore Co.*, 407 U.S. 1, 10 (1972). In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), the Court also held that "forum-selection clauses contained in form... contracts are subject to judicial scrutiny for fundamental fairness" (enforcing forum selection clause printed on non-negotiated cruise ticket, which bore a prominent all-caps notice of important conditions of contract). Forum-selection clauses requiring transfer to another U.S. district court are enforced by a forum non conveniens motion to transfer under 28 U.S.C. § 1404(a). *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S.Ct. 568, 580 (2013). Forum selection clauses providing for exclusive jurisdiction in another country, however, are enforced through a motion to dismiss for improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure. *Martinez v. Bloomberg LP*, 740 F.3d 211, 216 (2d Cir. 2014).

41. *See, e.g., Carnival Cruise Lines, Inc., supra*, 499 U.S. at 593-94; *In re Exide Technologies*, 544 F.3d 196, 218 n.15 (3d Cir. 2008); *Park Inn Int'l, LLC v. Mody Ent., Inc.*, 105 F.Supp.2d 370, 373-74 (D.N.J. 2000) (collecting cases); *Leong v. MySpace, Inc.*, 2011 U.S. Dist. LEXIS 155117, *12-13 (C.D. Cal. Mar. 11, 2011) (holding that a forum-selection clause embedded within a "click-wrap" contract is enforceable); *Tradecomet.com LLC v. Google, Inc.*, 2010 WL 779325 (S.D.N.Y. Mar. 5, 2010), *aff'd* 647 F.3d 472 (2011) (upholding forum selection clause in Google Adwords online agreement).

42. *See, e.g., Song fi, Inc., supra*, 72 F.Supp.3d at 359; *Tradecomet.com LLC, v. Google Inc.*, 693 F.Supp.2d 370, 377 (S.D.N.Y. 2010) (enforcing a forum selection clause under California law in Google's AdWords TOS, noting that "clickwrap agreements that require a user to accept the agreement before proceeding are 'reasonably communicated' to the user for purposes of this analysis.").

43. *See Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2nd Cir. 2012) (in refusing to enforce TOS and an arbitration clause therein the court emphasized that: "Applying the choice-of-law clause to resolve the contract formation issue would presume the applicability of a provision before its adoption by the parties has been established."); *Song fi, Inc. v. Google Inc.*, 72 F.Supp.3d 53, 61-62 (N.D. Cal. 2014) ("However, it would be premature to apply the choice of law provision in the Terms of Service, which requires application of California law, given Plaintiffs' argument that it is unenforceable.").

44. *Caspi v. Microsoft Network*, LLC, 323 N.J. Super. 118 (App. Div. 1999).

45. *Song fi, Inc., supra.*

46. *Id.*, 72 F.Supp.3d at 62.

47. *Id.*

48. *Id.*, 72 F.Supp.3d at 63.

49. *Id.*

50. *Trump v Deutsche Bank Trust Co. Ams.*, 65 A.D.3d 1329, 887 N.Y.S.2d 121 (N.Y. App. Div. 2d Dep't 2009). *See* also notes 18, 37 and 42, *supra.*

51. *Starkey v. G Adventures, Inc.*, 796 F.3d 193, 198 (2d Cir. 2015).

52. *Jerez v. JD Closeouts, LLC*, 36 Misc.3d 161, 943 N.Y.S.2d 392 (Dist. Ct. Nassau Co. 2012).

53. *Id.*, 36 Misc.3d 161 at 170.

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