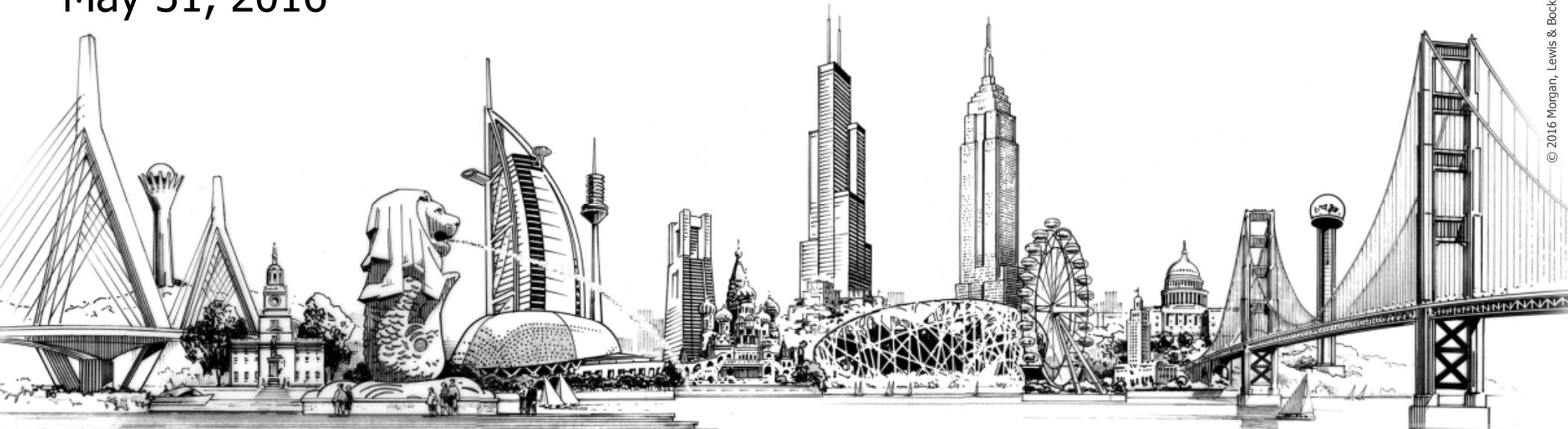


Morgan Lewis

DON'T GET TRICKED BY THE CLICK

Beth Herrington and Mark Altschul

May 31, 2016



Welcome and Introductions



Beth Herrington
Chicago
+1.312.324.1445
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Mark J. Altschul
Chicago
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Overview

- **Online Contracting**
- Shrink-Wrap/Browse-Wrap/Click-Wrap Overview
- Recent Case Law Developments
- Ecommerce Best Practices

Online Contracting Overview

- Traditional contract law principles apply to online contracts
- Offer, acceptance, consideration
- “Meeting of the minds”

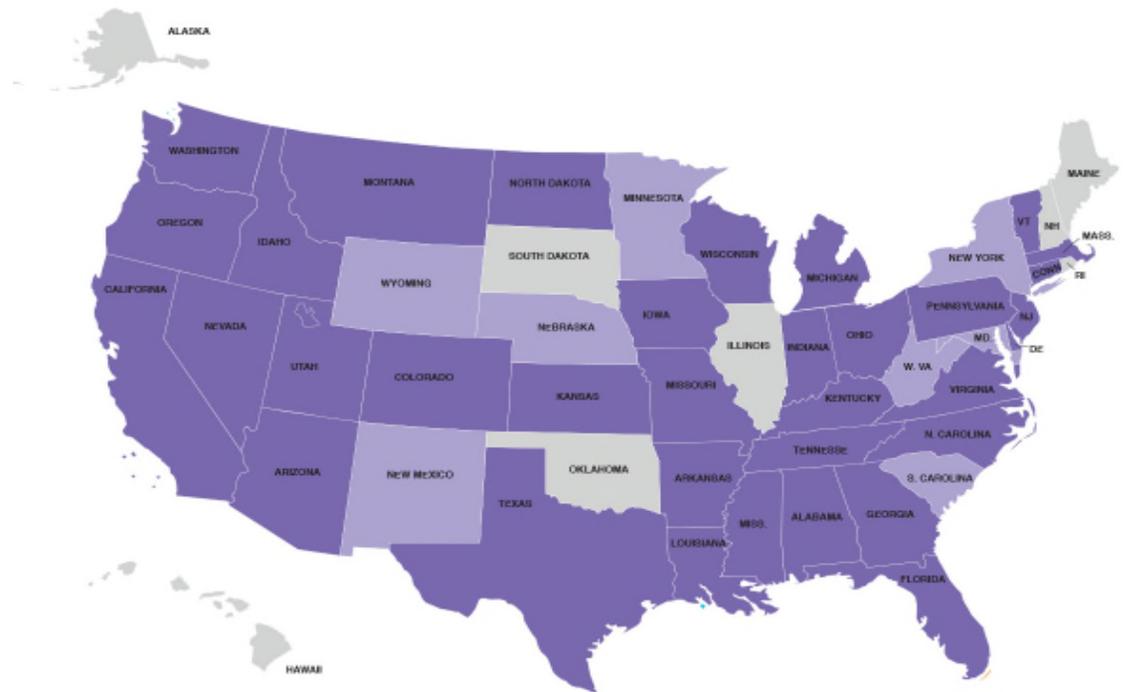
I Agree

I Have No Idea
What This Says



Online Contracting Overview

- Purpose of UETA
- Relevant UETA Rules
- Application to mobile devices



Online Contracting Overview

- ▶ Intentional E-Sign: Global and National Commerce Act
- ▶ Consumer Protection



Online Contracting Overview

- Points of attack: arbitration, forum selection, choice of law
- Contracts of Adhesion?
 - *Carnival Cruise Lines, Inc. v. Shute*
- “Illusory” Contracts
 - *Fagerstrom v. Amazon.com, Inc.*

Overview

- Online Contracting
- **Shrink-Wrap/Browse-Wrap/Click-Wrap Overview**
- Recent Case Law Developments
- Ecommerce Best Practices

Browse-Wrap/Click-Wrap/Shrink-Wrap Overview

- ✓ Definition of Shrink-Wrap Agreements
 - Notice of license agreement on product packaging
 - User actions accept Terms/Conditions
- ✓ Definition of Browse-Wrap Agreements
 - Hyperlinked terms on separate page
 - User doesn't have to view terms
- ✓ Definition of Click-Wrap Agreements
 - User affirmatively clicks box before proceeding
 - Terms/Conditions "take it or leave it"

Browse-Wrap/Click-Wrap/Shrink-Wrap Overview

	“Shrink-Wrap” agreements	“Browse-Wrap” agreements	“Click-Wrap” agreements
Notice provided by Offeror – how terms are presented to user	Outside of packaging	Hyperlink	User scrolls through
Manifestation of Assent by offeree	Customer actions after receiving product	Silence	Click on “I agree” box

Overview

- Online Contracting
- Shrink-Wrap/Browse-Wrap/Click-Wrap Overview
- **Recent Case Law Developments**
- Ecommerce Best Practices

Browse-Wrap Case Discussion

Specht v. Netscape Communs. Corp., 306 F.3d 17 (2d Cir. 2002)

- Early decision: cited by many browse-wrap cases
- No assent to license agreement before proceeding with invited download
- Reasonably conspicuous/unambiguous assent needed

Nguyen v. Barnes & Noble, 763 F.3d 1171 (9th Cir. 2014)

- Browse-Wrap
- Conspicuousness/placement of "Terms of Use" hyperlink, other notices given terms of use, and website's general design – notice?
- Must put users on notice of terms

Browse-Wrap Case Discussion

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

- Browse-Wrap
- Terms/Conditions located at each webpage -- capitalized, underlined hyperlink
- Hyperlink displayed among 14 other capitalized/underlined hyperlinks of same character
- Follows *Nguyen*: even close hyperlink to relevant buttons users must click on—without more—insufficient
- Conspicuous hyperlinks—without notice that linked page contains binding contractual terms—insufficient
- Motion to compel arbitration denied

Browse-Wrap Case Discussion

Friedman v. Guthy-Renker, LLC, 2015 U.S. Dist. LEXIS 24307 (C.D. Cal. Feb. 27, 2015)

- Browse-Wrap
- One Plaintiff checks box at time of purchase
- Text below box advises purchasers of agreement to credit card authorization; no reference to Terms/Conditions

Browse-Wrap Case Discussion

M1

Web Account Registration

Activate an online web account, and you'll enjoy the convenience of storing your shipping, billing, and credit card information for a fast and easy checkout. You can also view your past purchases and shipments, modify your shipping frequency and receive exclusive email offers and announcements which bring you the latest on new products, special offers, and tips.

Please note: it can take up to 2 days for your online account to become active.

Password

Password

What is the age of the person who will be using this product?

What is the gender of the user?

Female Male

Payment Information

Choose Payment Method*

Choose one... ▾

Card Number*

Expiration Date*

-Month- ▾ -Year- ▾

Your Total: \$35.94

* indicates a required field

By checking this box you are electronically signing your order and authorizing us to charge payments against credit card provided above.

Agree to terms*

COMPLETE YOUR ORDER



Browse-Wrap Case Discussion

M2

Web Account Registration

Activate an online web account, and you'll enjoy the convenience of storing your shipping, billing, and credit card information for a fast and easy checkout. You can also view your past purchases and shipments, modify your shipping frequency and receive exclusive email offers and announcements which bring you the latest on new products, special offers, and tips.

Please note: it can take up to 2 days for your online account to become active.

Password

Password

What is the age of the person who will be using this product?

What is the gender of the user?
 Female Male

Payment Information

Choose Payment Method*

Card Number*

Expiration Date*

Your Total: \$35.94

* indicates a required field

By checking this box you are electronically signing your order and authorizing us to charge payments against credit card provided above.

Agree to terms*

COMPLETE YOUR ORDER



Browse-Wrap Case Discussion

M3

Web Account Registration

Activate an online web account, and you'll enjoy the convenience of storing your shipping, billing, and credit card information for a fast and easy checkout. You can also view your past purchases and shipments, modify your shipping frequency and receive exclusive email offers and announcements which bring you the latest on new products, special offers, and tips.

Please note: it can take up to 2 days for your online account to become active.

Password

Password

What is the age of the person who will be using this product?

What is the gender of the user?
 Female Male

Payment Information

Choose Payment Method*

Card Number* Expiration Date*

By clicking this box you are electronically signing your order and authorizing us to charge payments against credit card provided above.

* indicates a required field

By checking this box you are electronically signing your order and authorizing us to charge payments against credit card provided above.

Agree to terms*

COMPLETE YOUR ORDER



Browse-Wrap Case Discussion

Friedman v. Guthy-Renker, LLC, 2015 U.S. Dist. LEXIS 24307 (C.D. Cal. Feb. 27, 2015)

- Browse-Wrap
- Three plaintiffs: Two check box at time of purchase
- Text below box advises purchasers of agreement to credit card authorization; no reference to Terms/Conditions
- Terms/Conditions inconspicuous and placed between similarly appearing hyperlinks for “money back guarantee” and “privacy policy”
- Court rejects motion to compel arbitration for one plaintiff

Browse-Wrap Case Discussion

Friedman v. Guthy-Renker, LLC, 2015 U.S. Dist. LEXIS 24307 (C.D. Cal. Feb. 27, 2015)

- One Plaintiff purchaser check a box at time of purchase that references “Terms and Conditions” in bold, underlined, and hyperlinked. Credit card authorization language changed to eliminate confusion

Browse-Wrap Case Discussion

CREDIT CARD INFO

Card Number*

Expiration Date*

Agree to [Terms and Conditions](#)*

By checking this box you are agreeing to the Terms and Conditions, electronically signing your order and authorizing us to charge payments against credit card provided above.



*indicates required field

Browse-Wrap Case Discussion

Friedman v. Guthy-Renker, LLC, 2015 U.S. Dist. LEXIS 24307 (C.D. Cal. Feb. 27, 2015)

- One Plaintiff purchaser check a box at time of purchase that references “Terms and Conditions” in bold, underlined, and hyperlinked. Credit card authorization language changed to eliminate confusion
- Court dismisses claims for this plaintiff under arbitration provision

Browse-Wrap Case Discussion

In Re Facebook Biometric Information Privacy Lit., 2016 U.S. Dist. LEXIS 60046, N.D. Cal. (May 5, 2016)

- Browse-Wrap
- Choice of law
- Contract formation analysis

Browse-Wrap Case Discussion

Case 3:15-cv-03747-JD Document 96-9 Filed 02/24/16 Page 2 of 2

[thefacebook]
login register about faq

Email:
Password:

Registration

To register for thefacebook.com, just fill in the four fields below. You will have a chance to enter additional information and submit a picture once you have registered.

Name:
Status:
Email: (school)
Password*: (choose)

I have read and understood the [Terms of Use](#), and I agree to them.

* You can choose any password. **It should not be your school password.**

about contact jobs announce advertise terms privacy
a Mark Zuckerberg production
Thefacebook © 2005



Browse-Wrap Case Discussion

Full Name:

I am:

High School:

Graduation Year:

Date of Birth:

Email:

Sign up using your school email if you have one.

Create Password: ?
Password strength

Security Check:

I have read and agree to the [Terms of Use and Privacy Policy](#)

Problems signing up? [Check out our help pages](#)



Browse-Wrap Case Discussion

Case 3:15-cv-03747-JD Document 96-11 Filed 02/24/16 Page 2 of 2

Sign up for Facebook

It's free and anyone can join.

Full Name:

Birthdate:

Your Email:

New Password:

I have read and agree to the [Terms of Use and Privacy Policy](#)



Browse-Wrap Case Discussion

First Name:

Last Name:

Your Email:

New Password:

I am:

Birthday:

Why do I need to provide this?



Browse-Wrap Case Discussion

Security Check



[Back](#)

[Sign Up](#)

By clicking Sign Up, you are indicating that you have read and agree to the [Terms of Use](#) and [Privacy Policy](#).



Browse-Wrap Case Discussion



Searching **nawasco**

Text in the box: Searching nawasco

[← Back](#)

You didn't correctly type the text in the security check box.

By clicking Sign Up, you are indicating that you have read and agree to the [Terms of Use and Privacy Policy](#).

A red arrow points to the text "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Use and Privacy Policy."

Browse-Wrap Case Discussion

In Re Facebook Biometric Information Privacy Lit., 2016 U.S. Dist. LEXIS 60046, N.D. Cal. (May 5, 2016)

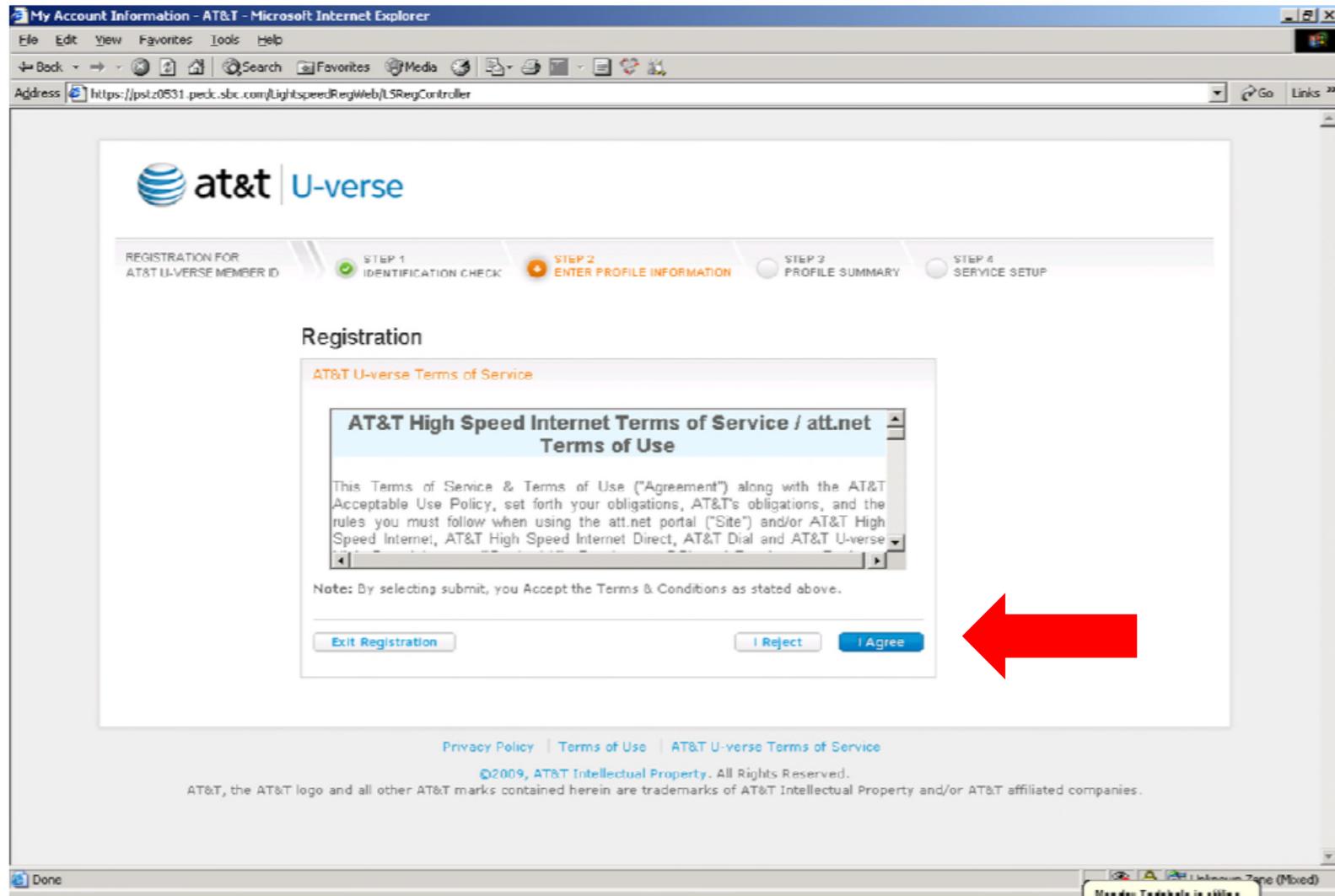
- Browse-Wrap
- Choice of law
- Contract formation analysis
- Facebook emailed changes to terms of service to Plaintiffs and gave a “jewel notification” on the individual Facebook user newsfeed
- Parties assent to Facebook’s user agreement
- Court still refuses to enforce the parties’ agreed-upon choice of law provision

Click-Wrap Case Discussion

Hancock v. AT&T, 701 F.3d 1248 (10th Cir. 2012)

- Click-Wrap
- Forum selection/arbitration clauses
- Reasonable notice of terms and affirmative assent
- Cannot access internet service without registration

Click-Wrap Case Discussion

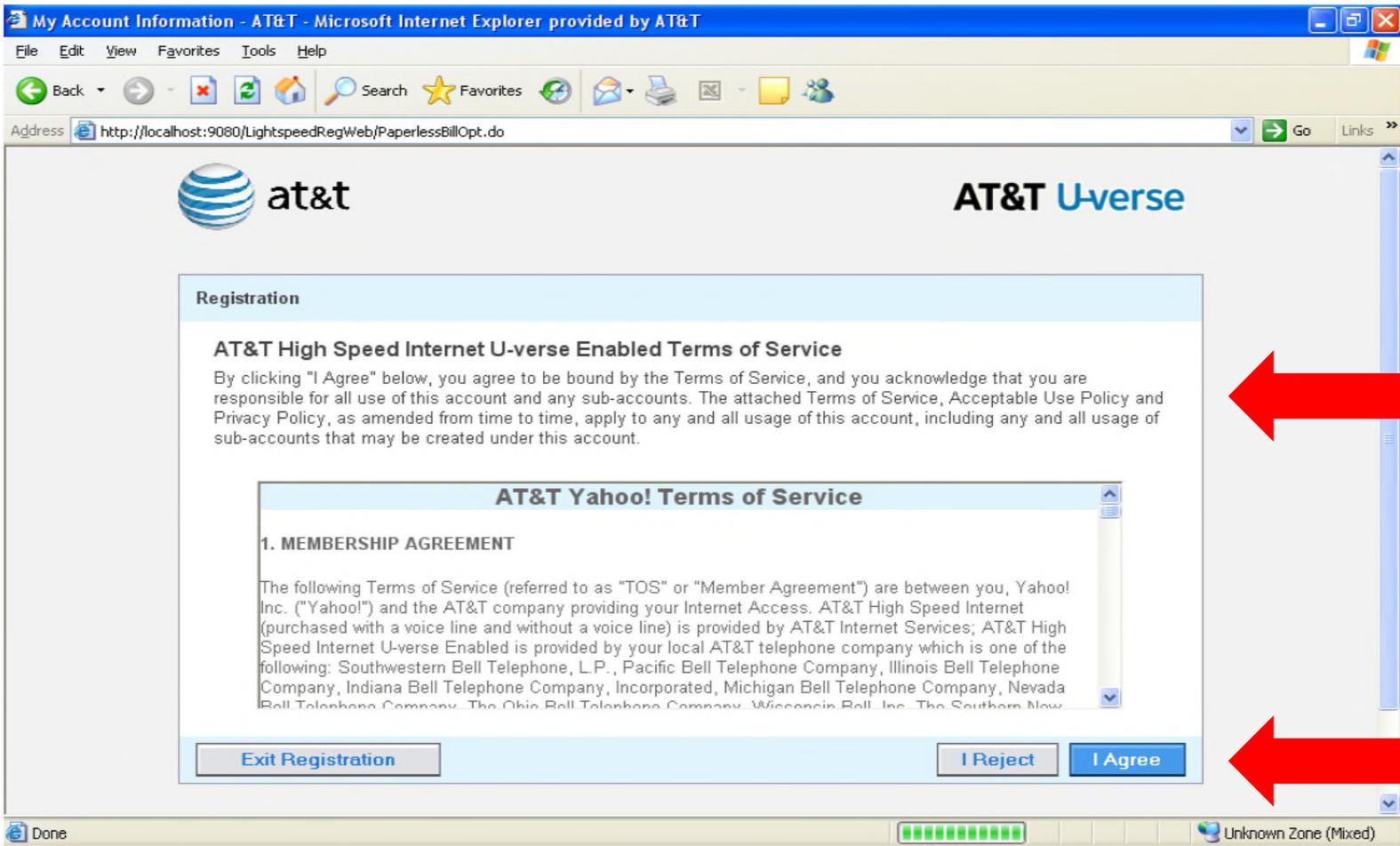


Click-Wrap Case Discussion

Hancock v. AT&T, 701 F.3d 1248 (10th Cir. 2012)

- Click-Wrap
- Forum selection/arbitration clauses
- Reasonable notice of terms and affirmative assent
- Cannot access internet service without registration
- Customer clicks “I Agree” button to continue registration

Click-Wrap Case Discussion



Click-Wrap Case Discussion

Hancock v. AT&T, 701 F.3d 1248 (10th Cir. 2012)

- Click-Wrap
- Forum selection/arbitration clauses
- Reasonable notice of terms and affirmative assent
- Cannot access internet service without registration
- Customer clicks “I Agree” button to continue registration
- Court affirms dismissal based on forum selection/arbitration clauses

Click-Wrap Case Discussion

Tompkins v. 23andMe, Inc., 2014 U.S. Dist. LEXIS 88068, (N.D. Cal. June 25, 2014)

- Click-Wrap (with Browse-Wrap elements)
- Arbitration clause
- Customer first orders/pays for DNA kit; no requirement to view terms of service or click to accept terms of service. No contract
- Customer creates account and registers online. Customers must (i) check a box affirming that they have “read and agree to the [TOS] and Privacy Statement” and (ii) click “I accept the terms of service” in all capital letters.

Click-Wrap Case Discussion



Yes, I have read and agree to the [Terms of Service](#) and [Privacy Statement](#).

start exploring your free account



Terms of Service

When you sign up for 23andMe's service you agree to our Terms of Service. [Click here](#) to read our full Terms of Service.

You are making important representations when you use our service. [Click here](#) to read those representations. While they are all important, we would like to call your attention to three representations below:

Three Important Points You Agree to When Using Our Service:

- You understand that we do not provide medical advice. You should not change your health behaviors solely on the basis of information from 23andMe. Keep in mind that genetic research is not comprehensive and the laboratory process may result in errors.
- You may learn information about yourself that you do not anticipate. Once you obtain your genetic information, the knowledge is irrevocable.
- Our Privacy Statement describes what personal information we collect from you, how we use and protect it, and your rights and choices. Please read the full Privacy Statement [here](#).

I ACCEPT THE TERMS OF SERVICE

Click-Wrap Case Discussion

Tompkins v. 23andMe, Inc., 2014 U.S. Dist. LEXIS 88068, (N.D. Cal. June 25, 2014)

- Click-Wrap (with Browse-Wrap elements) arbitration clause
- Arbitration clause
- Customer first orders/pays for DNA kit; no requirement to view service terms or click to accept terms of service = **No contract**
- Customer creates account and registers -- must (i) check a box affirming that they have "read and agree to the [TOS] and Privacy Statement" and (ii) click "I accept the terms of service" in all capital letters
- Terms of Service were hyperlinked in blue where the customer was required to click
- Court finds agreement during registration process due to adequate notice in the Click-Wrap = **Court compels arbitration**

Click-Wrap Case Discussion

Savetsky v. Pre-Paid Legal Servs., 2015 U.S. Dist. LEXIS 17591 (N.D. Cal. Feb. 12, 2015)

- Browse-Wrap (with Click-Wrap and Shrink-Wrap elements)
- Motion to compel arbitration

Click-Wrap Case Discussion

California Plans Not in California? Choose another state or province

CA Legal Plan	Identity Theft Plan	Identity Theft Premium
\$19⁹⁵	\$14⁹⁵	\$29⁹⁵
Plan Details <ul style="list-style-type: none">• Legal advice/consultation• Letters/Phone Calls• Legal Document Review• Uncontested Divorce and Adoption Representation• Trial Defense• 24/7 Emergency Assistance• More Plan Details	Plan Details <ul style="list-style-type: none">• Covers Member, spouse, and Up To 6 Dependents• Single-Bureau Credit Monitoring• Personal Credit Score• Comprehensive Restoration• Identity Consultation• SafeGuard For Minors• More Plan Details	Plan Details <ul style="list-style-type: none">• Covers Member, spouse, and Up To 6 Dependents• Triple-Bureau Credit Monitoring• Personal Credit Score• Comprehensive Restoration• Internet Monitoring• Lost Wallet Assistance• More Plan Details
Product Discount <p>Get Identity Theft at a discounted price when you buy the legal plan</p> <input type="checkbox"/> Identity Theft Plan (details) only \$9.95/month	LegalShield Legal Plan <input type="checkbox"/> LegalShield Plan additional \$19.95/month Reduces Identity Theft Price to \$9.95/month	LegalShield Legal Plan <input type="checkbox"/> LegalShield Plan additional \$19.95/month Reduces Identity Theft Price to \$19.95/month
Plan Add-Ons <input type="checkbox"/> Trial Defense Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement - GoSmallBiz (details) only \$14.95/month	Plan Add-Ons <input type="checkbox"/> Trial Defense Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement - GoSmallBiz (details) only \$24.90/month	Plan Add-Ons <input type="checkbox"/> Trial Defense Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement - GoSmallBiz (details) only \$24.90/month
BUY NOW →	BUY NOW →	BUY NOW →
\$19.95/month <small>(+\$10.00 non-refundable enrollment fee charged with the first month's membership)</small>	\$14.95/month <small>(+\$10.00 non-refundable enrollment fee charged with the first month's membership)</small>	\$29.95/month <small>(+\$10.00 non-refundable enrollment fee charged with the first month's membership)</small>
Have an Independent Sales Associate contact me	Have an Independent Sales Associate contact me	Have an Independent Sales Associate contact me



Click-Wrap Case Discussion

LegalShield Legal Plan:

Expected and unexpected legal issues arise everyday. But with a LegalShield Legal Plan, a small monthly fee gets you access to advice and counsel on an unlimited amount of personal legal issues from attorneys with an average of 19 years experience.

The following provides a general overview of what our Legal Plan offers you and your family.

For more specific information, please view our member contract.

Who the Legal Plan covers:

- The member
- The member's spouse
- Never-married dependent children of the member or member's spouse, under 26 years of age who are permanent residents of the member's household or full-time students
- Dependent children under age 18 for whom the member or member's spouse is legal guardian
- Any dependent child, regardless of age, who is physically disabled or mentally incapacitated and unable to make legally binding decisions, unable to be employed, 51% or more financially dependent upon the member and member's spouse and lives at home with the member or member's spouse.

Advice, Consultation, Representation

Advice

- Toll-free phone consultations with your Provider Law Firm for any personal legal matter even on pre-existing conditions.

Letters and Phone Calls on Your Behalf

- A phone call or letter on an attorney's letterhead can help you get the

Click-Wrap Discussion

Savetsky v. Pre-Paid Legal Servs., 2015 U.S. Dist. LEXIS 17591 (N.D. Cal. Feb. 12, 2015)

- Browse-Wrap with Click-Wrap and Shrink-Wrap elements
- Motion to compel arbitration
- Plaintiff lacked actual notice of contract; did not acknowledge contract before purchase
- Contract language regarding cancellation was not an assent to the arbitration provision
- Motion to compel arbitration denied

Click-Wrap Case Discussion

Sgouros v. Transunion Corp., 2016 US App. LEXIS 5648 (7th Cir. Mar. 25, 2016)

- Click-Wrap
- Arbitration clause

Click-Wrap Case Discussion

Case: 1:14-cv-01850 Document #: 31-1 Filed: 10/24/14 Page 13 of 21 PageID #:222 PART LOGIN

TransUnion. | Credit Monitoring SA12

Your FREE credit score & SM credit report are only moments away

Transfer Your Score

Step 1 of 3 Tell us about yourself Step 2 of 3 Create your account Step 3 of 3 Notify your family

All fields are required (except where noted).

First Name

Middle name (Optional)

Last Name

Address and Unit Number

City

State Zip

Have you lived here for more than 6 months? Yes No

Email

Enter a valid Social Security number

Date of Birth (MM/DD/YYYY)

Please send me helpful tips & news about my service, including special offers from TransUnion and trusted partners! Yes No

Submit & Continue to Step 2

Already a member? [Log in to order](#)
Log in to speed up the process

“TransUnion Credit Monitoring has made me wiser with my credit (and subsequently money), and also helped me to diligently check for identity theft issues.”

Richard Y.

Quotes from consumers relate to their experience and may not reflect the experience of all users.

What you'll instantly receive:

Score **832**

Sample score

You have chosen:

FREE Credit Score & SM Credit Report with 7-day Credit Monitoring Trial, then \$17.95/month

You'll soon enjoy:

- UNLIMITED updates to your TransUnion Credit Report & Score
- Email updates of critical changes
- INSTANT email alerts sent as soon as TransUnion finds out someone's applied for credit in your name
- Lock & Unlock your TransUnion Credit Report
- Personalized Debt Analysis & Credit Trending
- UNLIMITED 24/7 access to ID theft specialists
- Up to \$1,000,000 ID theft insurance

Cancel anytime during the trial period at no additional cost, or do nothing to have your membership continue without interruption. Please note, lenders use many different credit scoring models. The score you get from us may not be the one your lender uses.

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Click-Wrap Case Discussion

TransUnion. | Credit Monitoring  SUPPORT LOGIN

Your FREE credit score & \$1 credit report are only moments away 8 TransUnion Secure Server

Step 1 of 3 Tell us about yourself **Step 2 of 3** Create your account **Step 3 of 3** Verify your identity

All fields are required

Credit card Number

Security Code

Expiration date (MM/YY)
MM / YY

Create a User Name - you may use your email address

Create Password

Confirm Password

Secret Question
-- choose a secret question --

Secret Answer

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

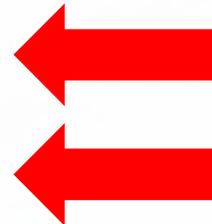
Service Agreement
Welcome to the TransUnion interactive web site, membership.tu.transunion.com, (the "Site"). This Service Agreement ("Agreement") contains the terms and conditions upon which you ("You" or the "Member") may access and use:

[Printable Version](#) 

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

I Accept & Continue to Step 3 

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Click-Wrap Case Discussion

Sgouros v. Transunion Corp., 2016 US App. LEXIS 5648 (7th Cir. Mar. 25, 2016)

- Click-Wrap
- Arbitration clause
- Website must “give user reasonable notice that a click will manifest assent to an agreement”
- Scroll box did not call attention to any arbitration agreement
- Website must “give user reasonable notice that a click will manifest assent to an agreement”
- Affirm trial court decision; no assent

Overview

- Online Contract Agreements
- Shrink-Wrap/Browse-Wrap/Click-Wrap Overview
- Recent Case Law Developments
- **Ecommerce Best Practices**

Ecommerce Best Practices: Ensure Contract Enforceability

- ✓ Utilize user check-box
- ✓ Consider user prohibition from proceeding with transaction if not manifest assent to terms
- ✓ Place Terms/Conditions immediately nearby in scrolling text box or a nearby hyperlink
- ✓ Use conspicuous (font size, **color**, font graphics) hyperlink
- ✓ Ensure conspicuous location of hyperlink

Ecommerce Best Practices: Ensure Contract Enforceability

- ✓ Once redirected from hyperlink, terms and conditions immediately displayed
- ✓ Repeated publication of Terms/Conditions and hyperlinks
- ✓ Terms/Conditions are in readable font
- ✓ Maintain a website update history
- ✓ Always coordinate between legal team and web design team

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	Los Angeles	Philadelphia	Singapore
Astana	Dubai	Miami	Pittsburgh	Tokyo
Beijing	Frankfurt	Moscow	Princeton	Washington, DC
Boston	Hartford	New York	San Francisco	Wilmington
Brussels	Houston	Orange County	Santa Monica	
Chicago	London	Paris	Silicon Valley	



Morgan Lewis

THANK YOU

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