

2022 REPORT

Clickwrap Litigation Trends





Table of Contents

- 03** Introduction
- 04** How Online Agreements Perform In Court
- 07** Clickwrap Litigation: Trends by Agreements
- 10** Clickwrap Litigation: Trends by Industry
- 12** Defending Clickwrap In Court
- 13** Clickwrap Best Practices for 2022
- 15** The Future of Clickwrap Litigation
- 16** Conclusion

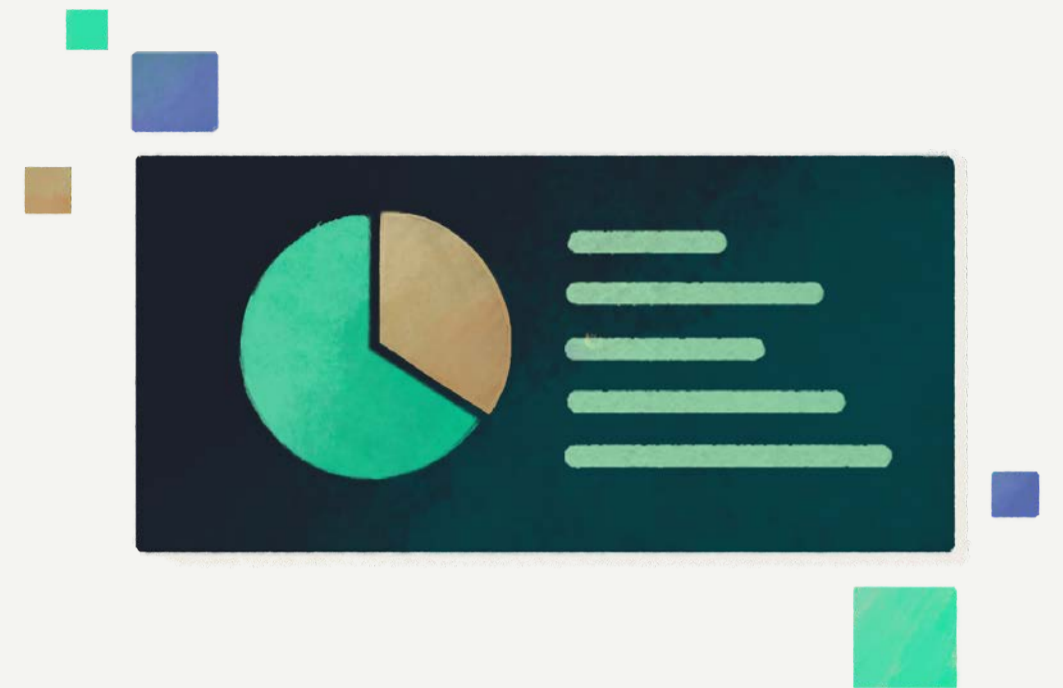
Introduction

Understanding how the courts assess online agreements is crucial in protecting businesses from risk. But this rapidly developing area of law reveals that many companies do not yet understand how best to design online agreements so that they are enforceable. With the best practices from this Clickwrap Litigation Trends Report, legal teams can help Product or other technical teams understand the requirements for generating enforceable online agreements.

Click-to-accept contracts – also known as clickwrap or clickthrough agreements – have been widely adopted by companies across industries. It is the most frictionless way for website and mobile app users to agree to standardized online terms. The most innovative businesses understand the need for and power of frictionless contracting, and have adopted clickwrap contracts into their business processes.

However, while click-to-accept agreements of all types have become more ubiquitous in the landscape of modern business, knowledge of best practices for using clickwrap agreements has lagged. Product and Legal teams engage in guessing games trying to figure out how to enforceably present agreements, capture user assent, and document acceptance. In 2021, online agreements of all kinds – clickwrap, sign-in-wrap, and browsewrap – had a 66% success rate of enforcement in court. Importantly, most of those unenforceable terms failed because of their nonoptimal screen design. This indicates that if businesses can master the nuances of optimal clickwrap design, they can ensure their online terms are enforceable.

Our Clickwrap Litigation Trends Report encapsulates the latest developments in how the courts analyze online agreements: what evidence they rely on to determine contract validity, common trends across industries, and success rates among the types of agreements. Our Report eliminates the guesswork from implementing powerful, secure, and enforceable clickwrap agreements and is a powerful resource for in-house legal teams at software and ecommerce companies, as well as companies in heavily regulated industries who are navigating online and digital-first transactions.



How Clickwrap, Browsewrap, and Sign-in-Wrap Perform in Court

Online agreements can be presented to and entered into by users through a variety of methods, and they are not all created equal under recent jurisprudence. There is a clear preference in courts for clickwrap agreements over both sign-in-wrap and browsewrap.

Clickwrap

Clickwrap agreements require the user to expressly agree to the contract by clicking a button or checkbox that states, “I agree.”¹ Clickwrap agreements can be presented to the user in a few different ways. For example, many websites include a hyperlink to the contract in the agreement language located next to the button or checkbox, which takes the user to a separate page that contains the contract.² Other websites include the contract in a scrollpane, which the user can scroll through to read prior to clicking “I agree.”³

Because users are required to take an affirmative action in order to agree to clickwrap terms, clickwrap agreements have a fairly high enforceability rate. For example, in *Liptak v. Accelerated Inventory Management, LLC*, the court found that Accelerated Inventory Management created a binding agreement by requiring borrowers to agree to the Borrower Agreement by clicking a button labeled, “I Agree.”⁴ Electronic Arts (EA) encountered similar success with creating enforceable agreements in *Ramirez v. Electronic Arts Inc.*, where EA required users to click a button indicating their assent to the terms in order to access all features of EA’s online games.⁵

The image shows a smartphone screen with a "Sign Up" form. The form has four input fields: "First Name", "Last Name", "Email", and "Password". Below the "Password" field, there are two checkboxes. The first checkbox is followed by the text "I have read and agree to the terms of use." The second checkbox is followed by the text "I have read and agree to the terms of use." A green button labeled "SIGN UP" is positioned at the bottom of the form.

¹ *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009). Similar language like “I accept” is also common and enforceable.

² See *Loewen v. Lyft Inc.*, 129 F. Supp. 3d 945, 949 (N.D. Cal. 2015).

³ See *Feldman v. Google*, 513 F. Supp. 2d 229, 233 (E.D. Pa. 2007).

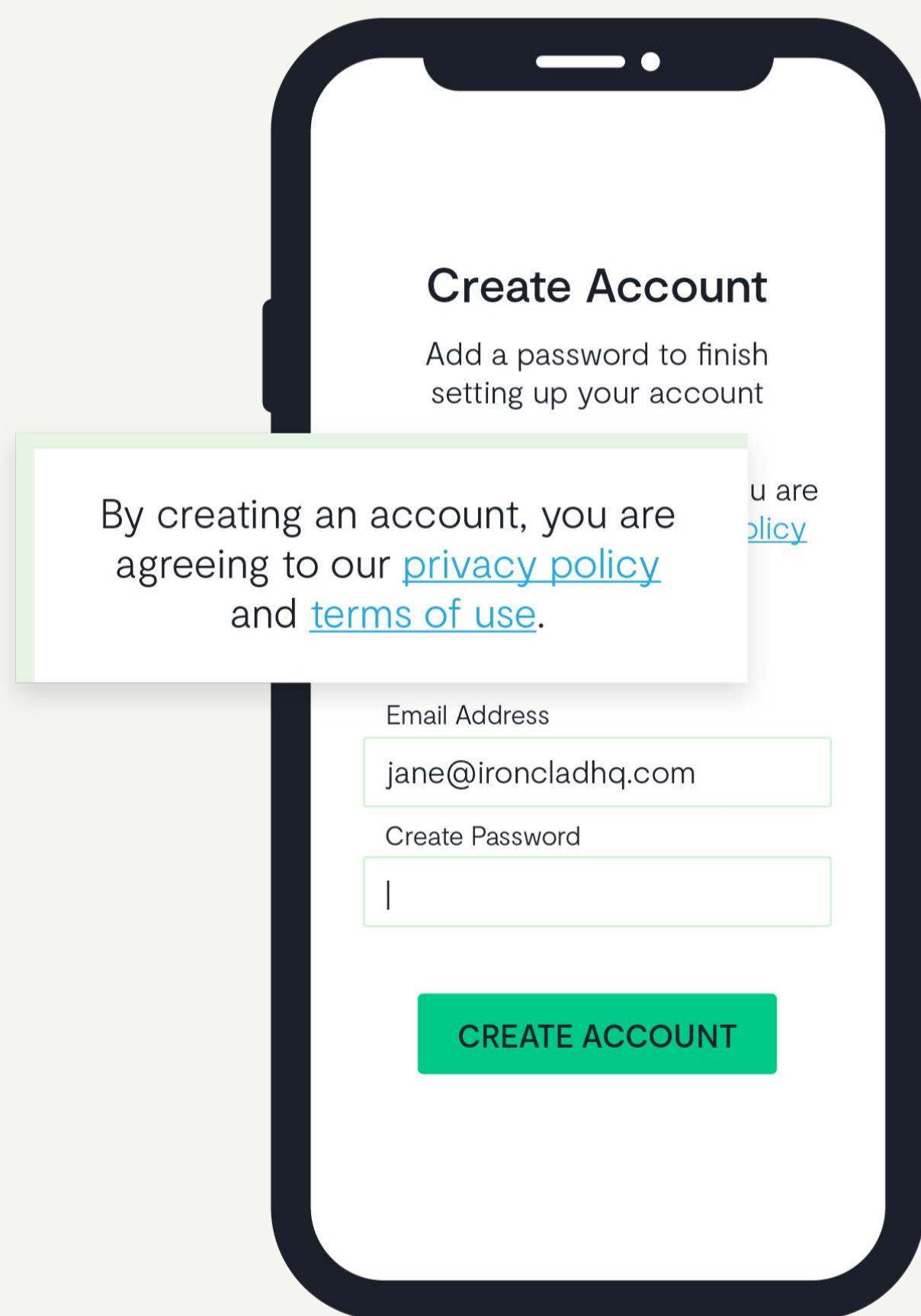
⁴ *Liptak v. Accelerated Inventory Mgmt., LLC*, No. 2:20-cv-967, 2021 BL 58695, 2021 US Dist Lexis 31008, *3 (W.D. Pa. Feb. 19, 2021).

⁵ *Ramirez v. Elec. Arts Inc.*, No. 20-cv-05672-BLF, 2021 BL 81563, 2021 US Dist Lexis 43032, 2021 WL 843184, *4 (N.D. Cal. Mar. 05, 2021).

Sign-in-wrap

Sign-in-wrap agreements are often referred to as a “hybrid” between clickwrap and browsewrap agreements.⁶ Users are not required to affirmatively agree to a contract by clicking a button or checkbox. Instead, sign-in-wrap agreements notify the user of the existence of the contract and advise the user that by clicking the button to proceed to the next screen, the user agrees to the contract.⁷ Websites can integrate sign-in-wrap agreements into any action that requires the user to click a button to proceed. Some of the more common actions include logging in, signing up, and registering.⁸

Because the user’s acceptance of the terms is not the primary purpose of the action that the user takes to agree to them, sign-in-wraps are enforced less frequently than clickwrap agreements. For example, the court declined to enforce Uber’s terms in *Thornton v. Uber Technologies, Inc.*, because Uber’s terms were presented to users via a sign-in-wrap that failed to adequately put users on notice of the terms and their agreement to them.⁹



However, companies that implement sign-in-wrap agreements with best practices in mind still enjoy a comfortable success rate with respect to their sign-in-wrap agreements. For example, the court in *Wilcosky v. Amazon.com, Inc.* enforced Amazon.com’s sign-in-wrap agreement, reasoning that Amazon.com afforded users reasonable notice of the terms by alerting users of their agreement to the terms both when users placed an order on Amazon.com and when users registered for an Alexa account.¹⁰ The court similarly reasoned in *Coulter v. Experian Information Solutions, Inc.*, that Experian’s sign-in-wrap, which informed users that “by clicking ‘Submit Secure Order’: I accept and agree to [Experian’s] Terms of Use agreement,” afforded consumers reasonable notice of the terms and an opportunity to manifest assent to the terms.¹¹

⁶ *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 366 (E.D.N.Y. 2015).

⁷ *Id.* at 399.

⁸ *Id.*

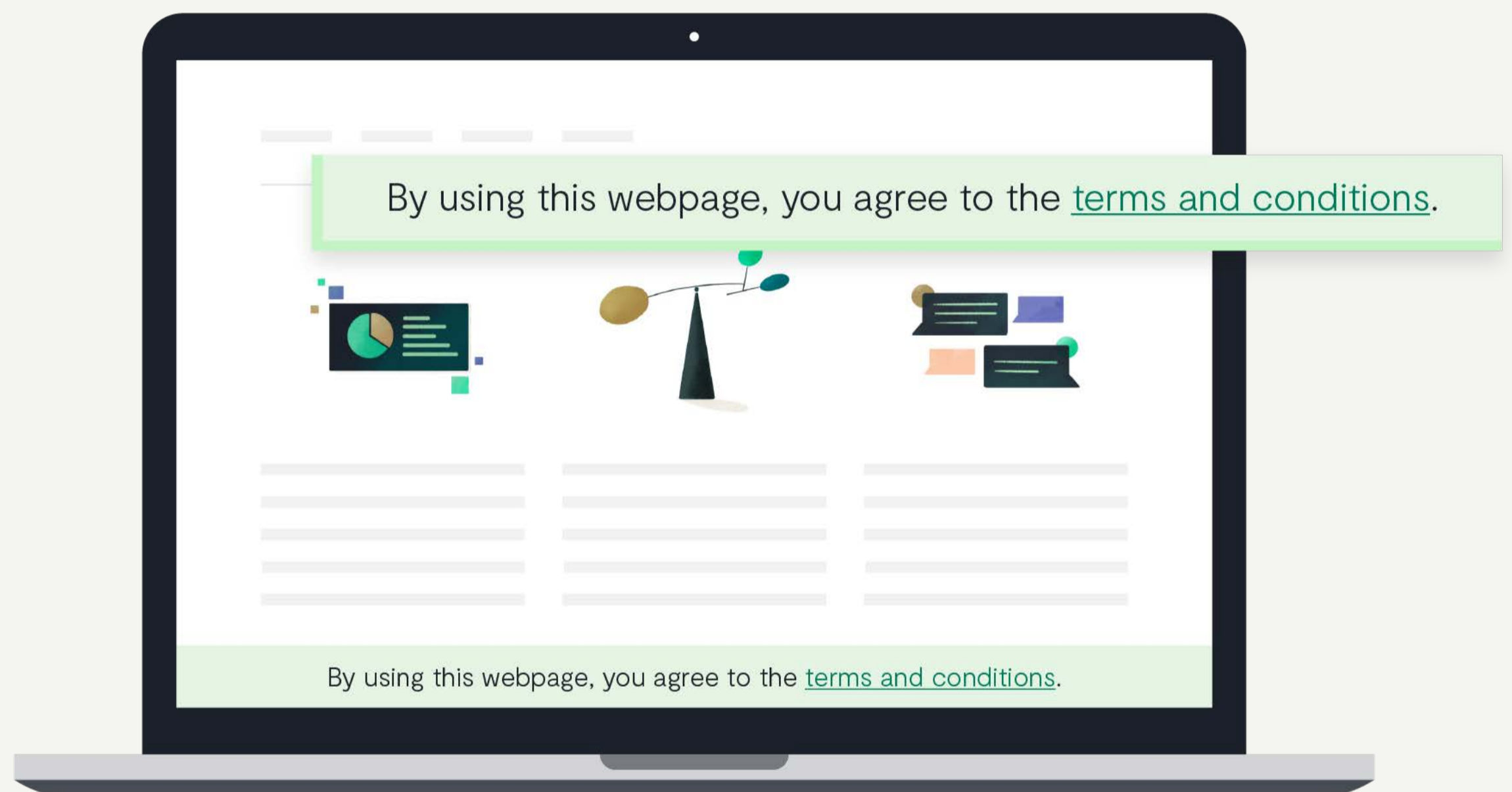
⁹ *Thornton v. Uber Techs., Inc.*, 359 Ga. App. 790, 858 S.E.2d 255, 794–95 (Ga. Ct. App. 2021).

¹⁰ *Wilcosky v. Amazon.Com, Inc.*, 517 F. Supp. 3d 751, 763–68 (N.D. Ill. 2021).

¹¹ *Coulter v. Experian Info. Sols., Inc.*, No. 20-1814, 2021 BL 66845, 2021 WL 735726, *5 (E.D. Pa. Feb. 25, 2021).

Browsewrap

Browsewrap agreements do not require the user to affirmatively signify assent to the website's contract terms through clicking a button or checking a box.¹² Rather, users agree to the website terms simply by using the website.¹³ Websites that rely on browsewrap agreements typically include a notice and a link to the terms somewhere on the screen (typically the bottom of the screen), which states that by using the website, the user is assenting to the website's terms and conditions.¹⁴



¹² *Nicosia v. Amazon.com, Inc.*, 834 F. 3d 220, 233 (2d Cir. 2016).

¹³ *Nguyen v. Barnes & Noble, Inc.*, 763 F. 3d 1171, 1176 (9th Cir. 2014).

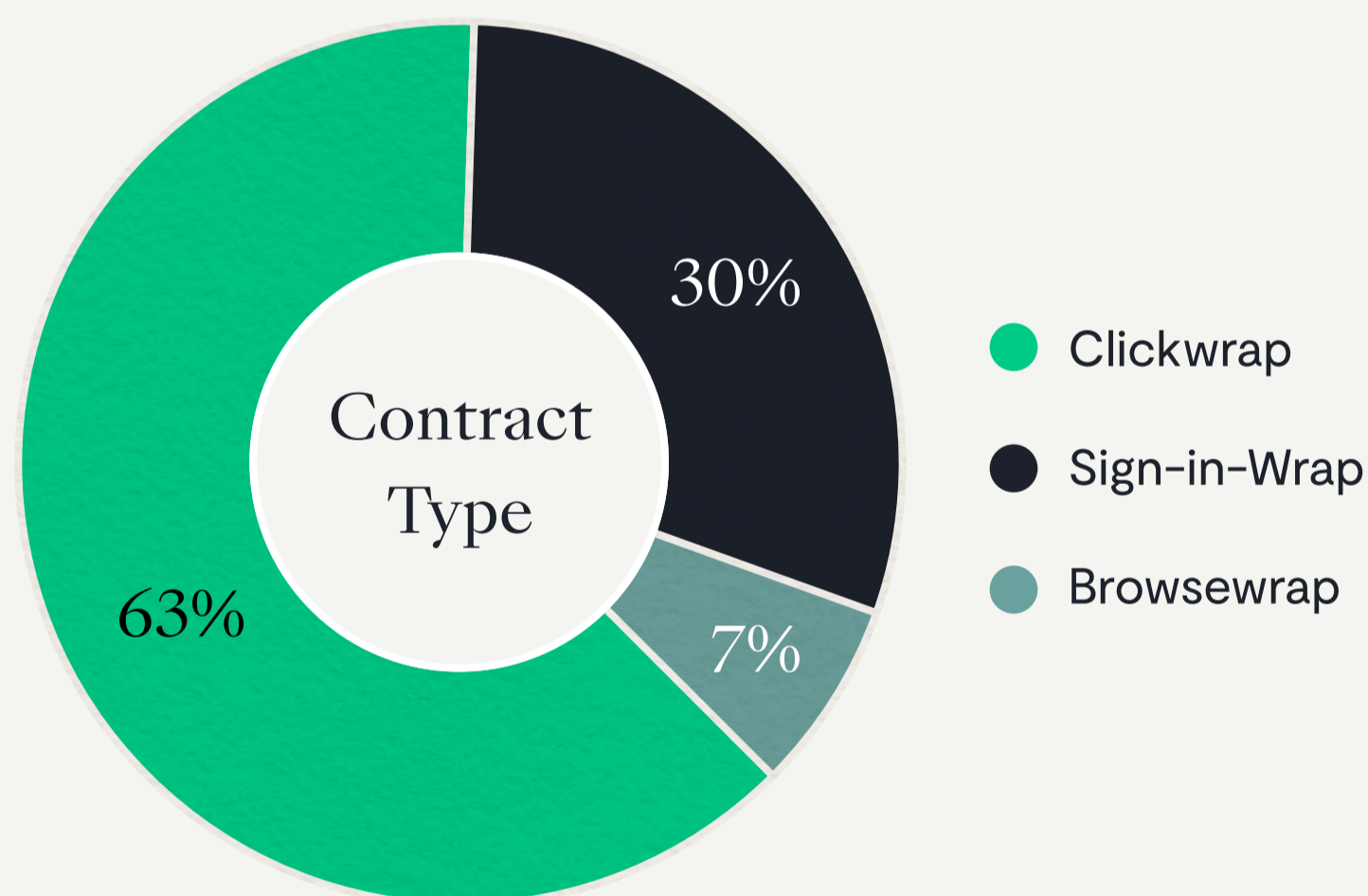
¹⁴ *Id.*

Clickwrap Litigation: Trends by Agreements

While there were 12% fewer clickwrap cases last year versus the year before, the volume of clickwrap-specific litigation is around the highest it's been since it first appeared in court more than twenty years ago. Well-designed clickwrap agreements were enforceable, but browsewraps have completely fallen off as a feasible way to present enforceable agreements. Here are some other trends we noticed in 2021.

Enforceability rate of online agreements

Online agreements, including clickwrap, browsewrap, and sign-in-wrap, have had an overall success rate of 66%.



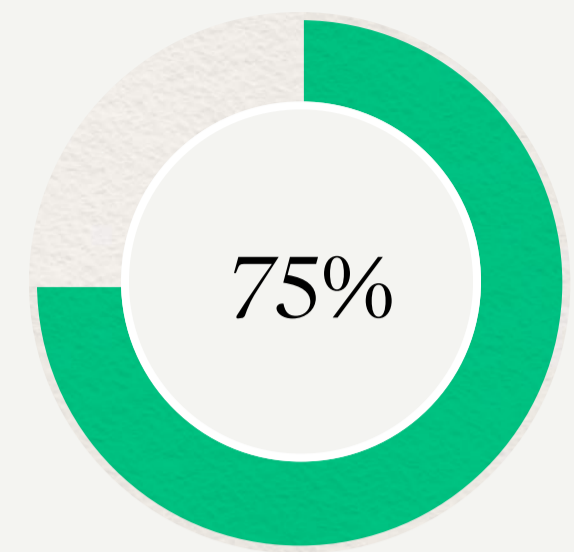
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Clickwrap

Clickwrap agreements were the most common online agreements used, and had the highest success rates of all the other types of agreements. 63% of online agreements litigated were clickwrap agreements. They were successful 75% of the time, compared to the 70% success rate they had in 2020. As discussed below, the most common reason courts did not enforce litigated clickwrap agreements was because of poor screen design, suggesting that if companies incorporated best practices in design the enforceability of clickwrap would increase substantially.

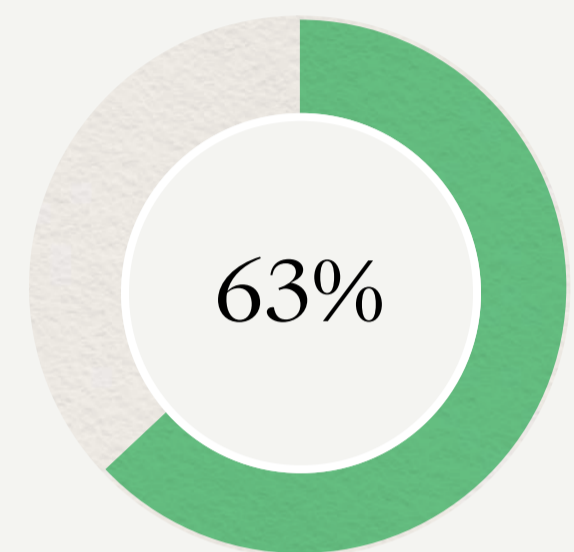
Win rate



Clickwrap

Sign-In-Wrap

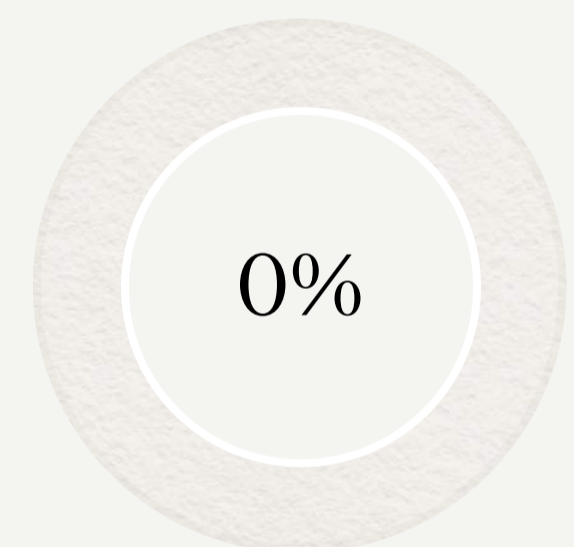
Sign-in-wrap agreements on the other hand are on the decline and made up only 30% of online-agreement cases in 2021. As noted in the previous section, the enforceability of sign-in-wraps is less certain than clickwrap agreements, and only 63% of them were enforced in 2021. By and large, companies are choosing to employ clickwrap agreements as the means for presenting their online terms compared to sign-in-wrap and browsewraps.



Sign-in-Wrap

Browsewrap

Browsewrap agreements, unsurprisingly, have a dismal enforceability rate in court. Because they do not require affirmative acceptance and users aren't put on notice about the existence of the agreement, browsewrap performs the worst of all online agreement presentations. Only 8% of litigated online agreements were browsewrap in 2021, and none were enforced.



Browsewrap

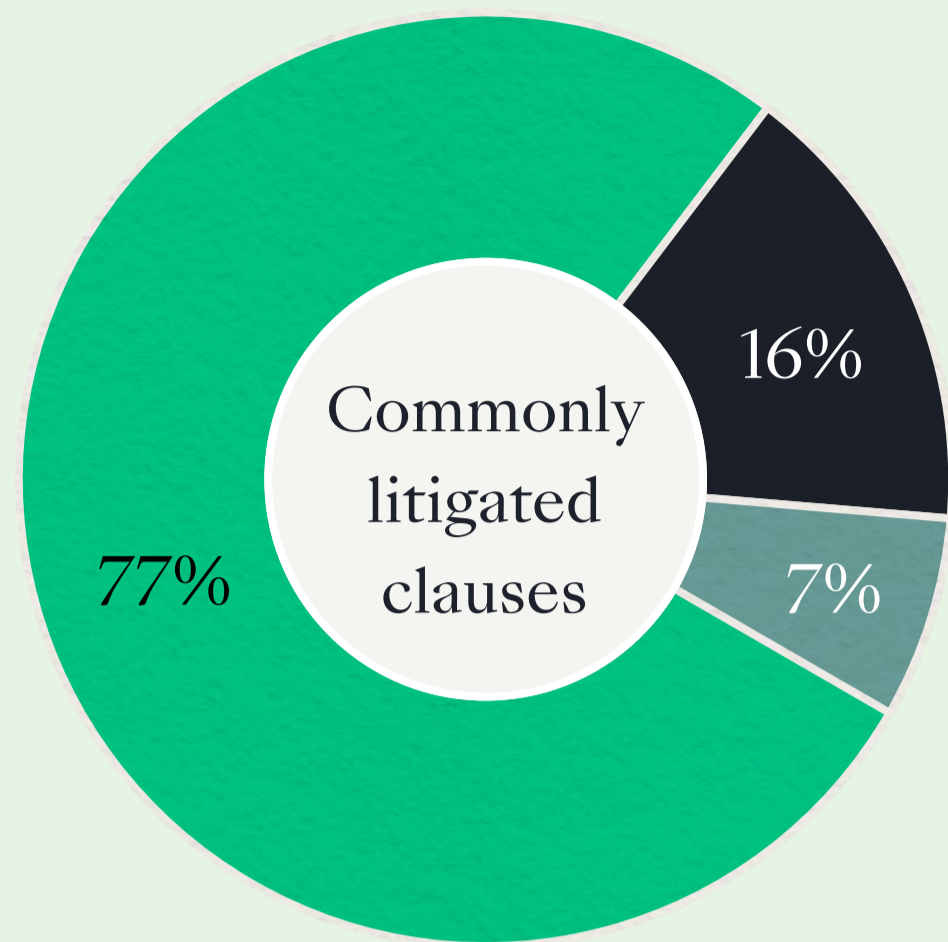
What shows up most frequently in court?

Commonly litigated agreements

As in 2020, the contracts at issue in most online-agreement cases were standard website terms. 59% percent of cases included "terms of use," "terms of service," or "terms and conditions." Employment agreements followed in a distant second, making up 14% of cases, with software agreements coming in third at 2%. Other agreements litigated included loan agreements, waivers, and borrower agreements.

Commonly litigated clauses

Businesses most commonly sought to enforce arbitration clauses in 2021, making up 77% of clauses litigated in online-agreement cases. Lagging far behind were Forum Selection clauses, at 16% of cases - notably, a significant increase from the year before - followed by general consent to the allegedly offensive conduct the business engaged in, at 7%.

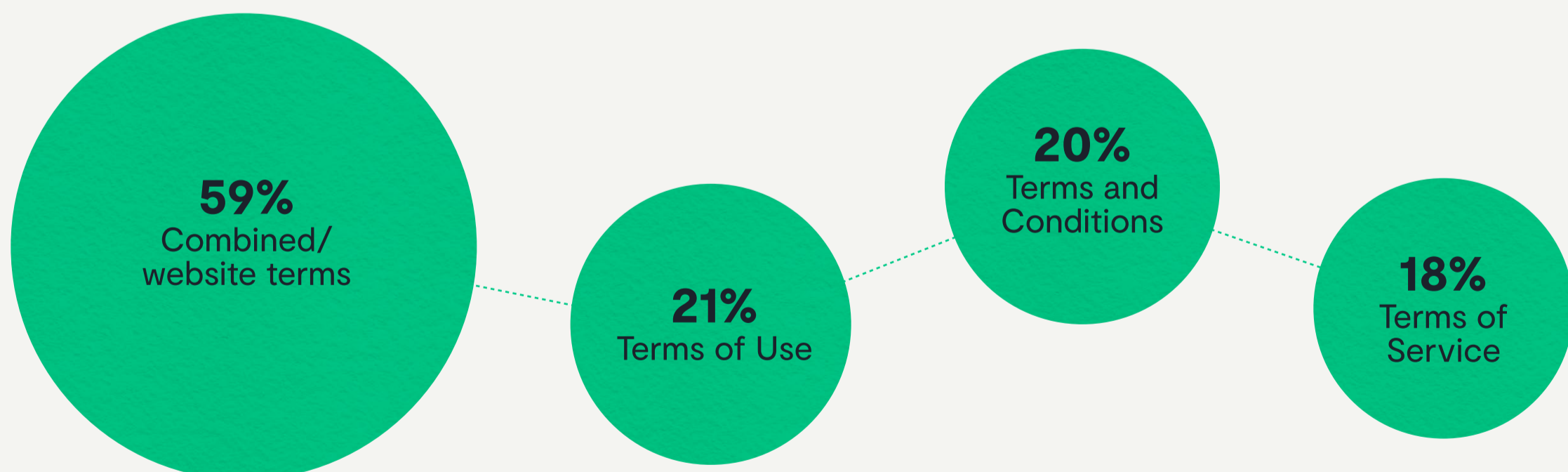


● Arbitration ● Forum Selection ● Consent

Most common reasons for non-enforcement

The most common reason a company's online terms weren't enforced in 2021 was because of poor screen design. Courts are often specific about what they consider reasonable and conspicuous notice, and many websites use deficient screen design that fails to meet the set standards. Poor version control and lack of evidence are also reasons for non-enforcement.

Most common contract type enforced



Clickwrap Litigation: Trends by Industry

Ecommerce was the most represented industry in clickwrap litigation in 2021, making up 13% of online-agreement cases. The pandemic expedited the demand for remote and digital-first experiences among all customer bases, but especially B2B, B2C, and D2C ecommerce companies.

It's no surprise that industries such as eCommerce, rideshare, and online marketplaces make up a significant portion of 2021 clickwrap cases. But the true tell of the cross-industry appeal of clickwrap is represented in the continued (and growing) presence of other heavily regulated industries in clickwrap litigation as well.

The (Un)usual Suspects

As in former years, Ecommerce represented the largest portion of online-agreement litigation in 2021, but notably the finance industry followed as a close second.

Ecommerce

Ecommerce companies made up 13% of clickwrap litigation in 2021. Companies like Airbnb, Amazon, and Walmart were called to defend the validity of their online terms in court. However, there was mixed success, largely due to misplaced reliance on browsewrap and sign-in wrap presentations.

While over 60% of companies were successful in enforcing their online terms, the 34% that lost had employed sign-in-wrap or browsewrap agreements. Conversely, the majority of successful cases used a clickwrap agreement to present their terms. This is unsurprising considering that clickwrap agreements tend to align more closely with the best practices that courts use to assess the agreements.

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Software

Software was also a relatively well-represented industry in clickwrap litigation in 2021, comprising 6% of cases. Companies like Ansys, Epson America, and TurboTenant defended their online terms in court, most of them successfully.

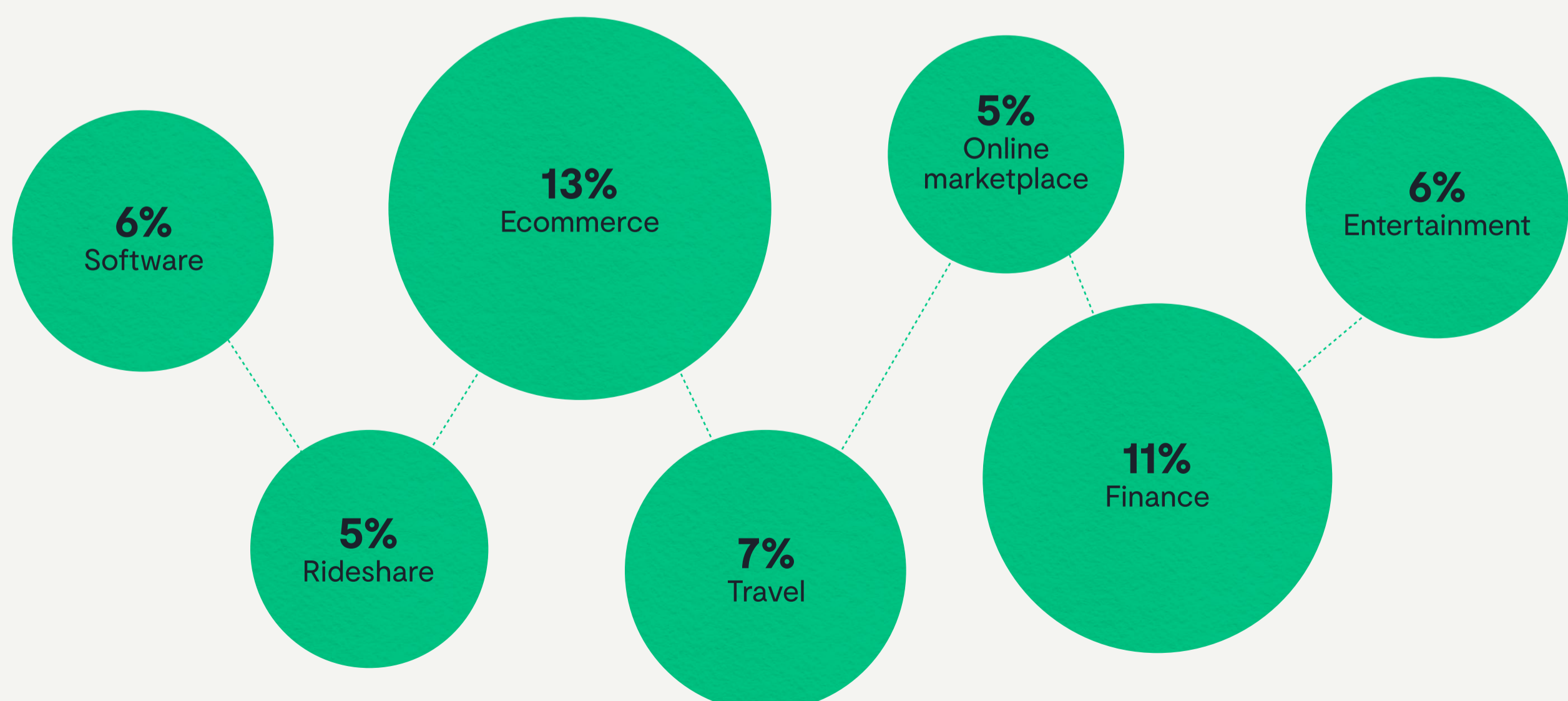
Notably, most software companies used clickwrap agreements, whether they won or lost. The 20% of companies that lost their clickwrap cases typically lost not because clickwrap is generally unenforceable but because the companies presented no evidence whatsoever of their user interface, or the time and date of a user's acceptance of the terms, or because the companies presented insufficient affidavits/declarations.

Finance

In 2021, the finance industry was the second most common industry involved in clickwrap litigation, making up 11% of cases. Companies like Stripe, H&R Block, and JP Morgan Chase had to defend and enforce their terms in court, with a 73% success rate. Not surprisingly, the vast majority of those companies that were unable to enforce their terms had used browsewrap agreements.

While the financial industry representation in clickwrap litigation is down slightly compared to 2020, there remains an important trend: clickwrap and other online agreements are likely to be a mainstay in our transactional world. Whereas before finance was hesitant to adopt clickwrap agreements, now clickwrap agreements show promise of continued adoption in other heavily regulated industries.

Industries Litigated



Defending Clickwrap in Court

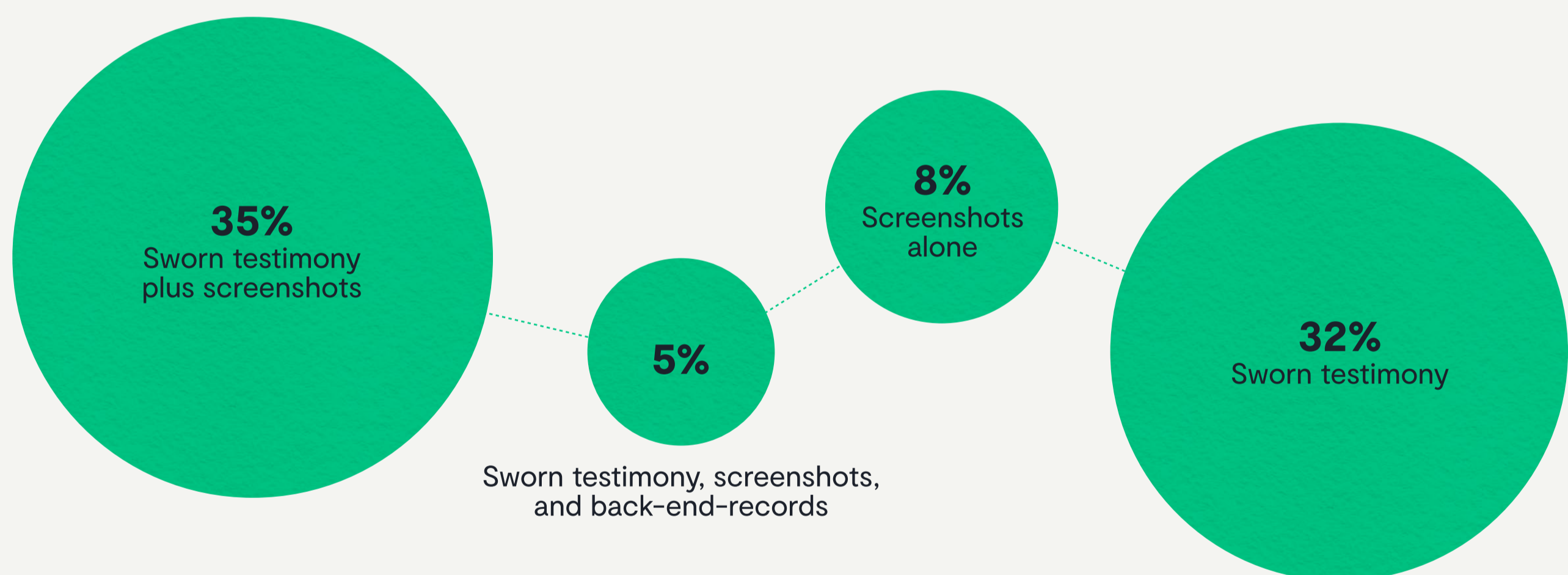
As we've noted in previous reports, courts typically consider three types of evidence when deciding whether to enforce clickwrap agreements:

- Sworn testimony (Affidavits/declarations/live testimony under oath)
- Screenshots of the user interface at the time of acceptance
- Back-end records of acceptance

In the past, back-end records were the ticket to enforcing online terms, because the records proved almost definitively that a user accepted a company's terms, when the user accepted the terms, and what version of the company's terms were live at the time of acceptance.

While back-end records remain a strong piece of evidence to present, very few of the companies trying to enforce their terms in court produced back-end records as evidence of contract acceptance.

Evidence referenced/cited



Instead, most companies relied on either only sworn testimony (32%) or combined sworn testimony with screenshots of what the screen looked like at the time of signing (35%). Few companies used screenshots alone (8%), and even fewer used a combination of all three types of evidence (5%).

Clickwrap Best Practices for 2022

Our best practices were developed based on how courts have ruled on clickwrap cases over the years. We keep up to date on clickwrap litigation trends, and our team reads every clickwrap case that comes out. Annually, we update our best practices based on the trends we see.

Screen Design

Courts tend to favor screens that are optimally designed to put users on notice. The businesses that often have the most success are those that:

- Have simple and uncluttered screens
- Use contrasting colors for fonts and background; and
- Ensure font sizes are large enough to be conspicuous.

In addition, when the entire screen is visible at once and the language on the button matches the language of the notice, the courts are more likely to rule in favor of enforceability. And lastly, courts are not kind to companies who pre-check the checkbox.

Reasonable Notice

Courts are most concerned with whether users are put on reasonable notice that (1) there are terms, and (2) the user is agreeing to them by taking some explicit action. Companies that enforce their terms tend to alert users to the existence of the agreement with specifically clear language.



Opportunity to Read

In addition to providing users with reasonable notice, courts expect companies to provide users with an opportunity to read the terms prior to agreeing to them. Common ways companies give users an adequate opportunity to read the agreements include:

- Embedding the terms in a scrollpane directly on the screen
- Requiring users to click the hyperlink to the terms
- Advising users to read the terms prior to checking the box or proceeding through the process
- Making sure the hyperlink to the terms is clickable (do not require users to manually enter the URL into a web browser)
- Formatting hyperlinks to resemble traditional hyperlinks: [blue and underlined](#) (we know your design team is cringing).

All five of these options have been found acceptable in court, and none has proven more successful than another.

Objective Manifestation of Assent

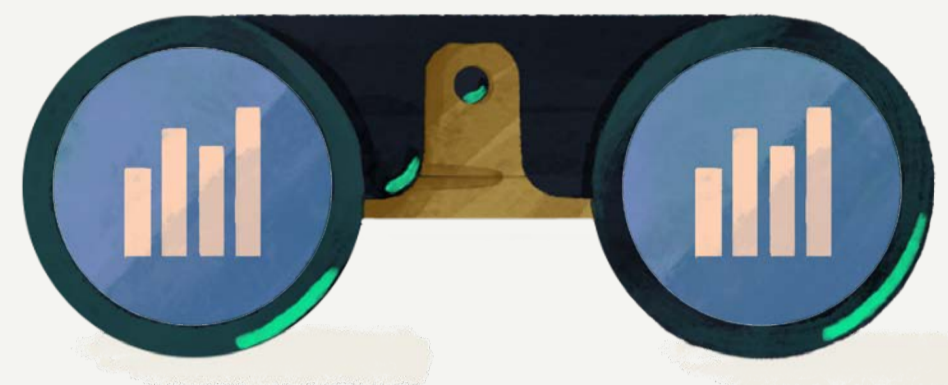
Another important aspect of creating an enforceable agreement is collecting the user's affirmative assent to the agreement. Courts often look favorably on companies that:

- Require users to check a box to manifest assent to the terms.
- Require users to agree to terms again after they've been modified.

Documentation

Courts appreciate when companies are able to provide an audit trail indicating who accepted their online terms, and when. As a result, it is important that a company be able to show who accepted which version of the terms, as well as what the screen looked like when the users encountered the contract acceptance process.

The Future of Clickwrap Litigation



We've paid attention to clickwrap litigation for several years. Based on what we've seen, we anticipate the following:

Increase in litigation

Since the inception of clickwrap caselaw several decades ago, there has been a near exponential increase in the number of cases involving companies' efforts to enforce their terms. Throughout 2022, we expect this number will continue to grow.

Increase in clickwrap agreements (vs. sign-in-wrap & browsewrap)

Historically, sign-in-wraps have been the favored agreement presentation as they don't disrupt conversion rates or sacrifice the user experience. As legal standards and evidentiary expectations surrounding these types of cases continue to develop, more and more companies will forgo their reliance on sign-in-wraps and choose to embed clickwrap agreements into their transactions and flows. These companies will balance the desire to create a frictionless experience for the user while also creating enforceable agreements by binding the user to their terms.

Browsewraps will likely become all but extinct in the next few years, as they are rarely found to create binding agreements. Sign-in-wraps will either be used far less or used for less important agreements (when balanced with a frictionless experience), as they are less likely to create binding agreements compared to clickwrap agreements.

Companies in heavily regulated industries will increasingly use clickwrap

In the past, companies in regulated industries like healthcare, banking, and finance have been hesitant to adopt and use clickwrap agreements. They've worried that having users agree to their terms via click would fail to render the agreement enforceable. Several years ago, Merrill Lynch tested the waters by having users agree to their terms via clickwrap when signing up for an account online. Not too long after a court found that users were indeed bound by Merrill Lynch's terms, a growing number of financial institutions followed suit.

Legislation

In the near future, there likely will be legislation relating to company interactions with consumers that requires the use of clickwrap agreements in order to comply. A good example of this is the [TLDR Act](#), introduced to Congress in January 2022, which would require businesses to make terms accessible and machine readable. In addition, there may eventually be legislation that codifies best practices laid out by courts with regards to clickwrap agreements and their presentation and implementation.

Conclusion

Doing business in 2022 means meeting the customer where they are and transacting as seamlessly as possible. As a result, innovative legal teams have no choice but to get more comfortable with online contracts and understand the risks in order to mitigate them. Knowledge of clickwrap litigation trends is crucial to modern businesses, especially legal teams whose job is to protect the business from unfavorable outcomes in court. By implementing best practices, legal teams can set their companies up for online success.

