Ironclad

2021 REPORT

Clickwrap Litigation Trends

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Introduction

> Like traditional paper contracts, online agreements are subject to the fundamental principles of contract law.[1]

In either context, there must be a mutual manifestation of assent to form a contract.[2] With respect to online contracts, courts have routinely recognized that an electronic click of a button or checkbox can sufficiently indicate the acceptance of an agreement.[3] However, the language and layout of the webpage must give the consumer reasonable notice that the click of a button or checkbox will indicate acceptance of the contract.[4]

Clickwrap litigation has risen sharply since first appearing in court in 2002, and includes clickwrap, sign-in-wrap, and browsewrap agreements. This rise reflects the increase in B2B and B2C companies operating online and needing to present their online agreements via clickwrap. Though each court takes its own approach when deciding a case, companies have the best shot of successfully defending their online terms if they provide screenshots, affidavits/declarations from key personnel, and/or back-end records of acceptance. This combination of evidentiary support best shows the court that the contract was accepted.

We've examined clickwrap litigation trends within the context of the economy and the global pandemic. Covid-19 has brought about frantic calls for sheltering in place and the closure of thousands of businesses across the globe. But it has also given rise to increased digital experiences, as nearly every business has either initiated or increased their capacity for transacting online. Ecommerce and online selling capabilities have become crucial to businesses that want to stay open. Which has meant that the use of clickwrap across industries has not only increased, but also changed.

And the increase in adoption also brings with it an increase in litigation. The overall success rate for companies trying to enforce their terms in court was just 60%, compared to 70% in 2019. Interestingly, this year saw more use of clickwrap in heavily regulated industries like finance, who made up

18% of clickwrap cases (compared to eCommerce and gig economy companies at 15% and 11% respectively). In this report, we also examine the parallels between this and the data on clickwrap transactions we get from Ironclad's clickwrap transaction platform.

Furthermore, we found that poor screen design is the most commonly violated best practice. 43% percent of companies failed to enforce their terms because their screens did not put users on notice of the terms. As a result, we've included a thorough assessment of effective screen design and other best practices to enforce your clickwrap agreements. Understanding how the courts evaluate these agreements can go a long way in helping you enforce your online terms.

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Part I

TYPES OF ONLINE AGREEMENTS

Clickwrap, Sign-in-Wrap, Browsewrap

While two judges may rule differently on the validity of a particular clickwrap agreement, there are discernable factors that courts consider when deciding on the enforceability of an agreement.

For example, judges often rule in favor of enforcing online agreements when the design and layout of the screen conspicuously provides the user with reas onable notice of the agreement, and the business can show that the user manifested assent. Likewise, courts mostly rule against cases where the business cannot prove that the user affirmatively manifested assent to the online legal agreement, and the screen is cluttered with the contractual language hidden. The presence or absence of these factors indicate which type of online agreement the website uses and whether the agreement will be enforceable.

Clickwrap Agreements

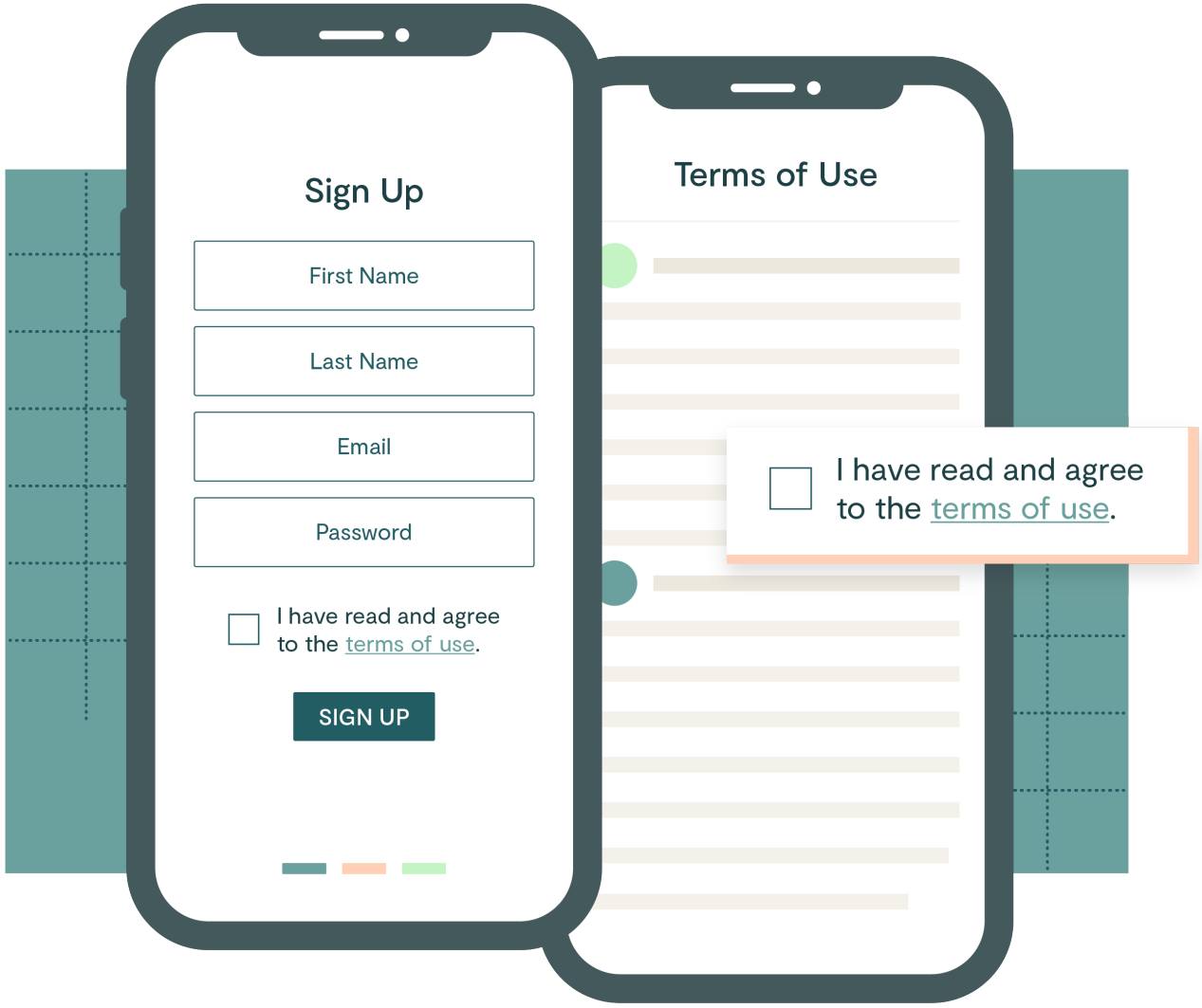
Clickwrap agreements require the user to affirmatively agree to the contract by clicking a button or checkbox that states, "I agree."[5] Websites that utilize clickwrap agreements present the contract terms to the user in a few different ways. For example, some websites include the contract in a scrollpane, which the user can scroll through to read prior to clicking "I agree."[6] Other 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.[7]

In 2018, clickwrap agreements had a 97% success rate. That rate dropped to 80% in 2019 and 70% in 2020. The main reason for this drop is the fact that courts are raising their evidentiary expectations by demanding more robust evidence, including individualized back-end records of acceptance, declarations or affidavits from higher-level employees with technology backgrounds, and either a detailed description of screen layout and design or a screenshot of the webpage containing the agreement. In raising their expectations, courts have made a distinction between good (successful) and bad (unsuccessful) clickwrap agreements.

Single Purpose Buttons

Clickwrap agreements employ a "single purpose" button or checkbox, where the user clicks a button or checkbox to agree to the terms of the contract. In these situations, user assent to the contract terms is the only purpose of the button. Because they explicitly require that the user manifest assent by clicking the button or checking the box, single purpose buttons and checkboxes are more frequently found to create a valid contract.

Clickwrap agreements require the user to affirmatively agree to the contract by clicking a button or checkbox that states, "I agree."[5]

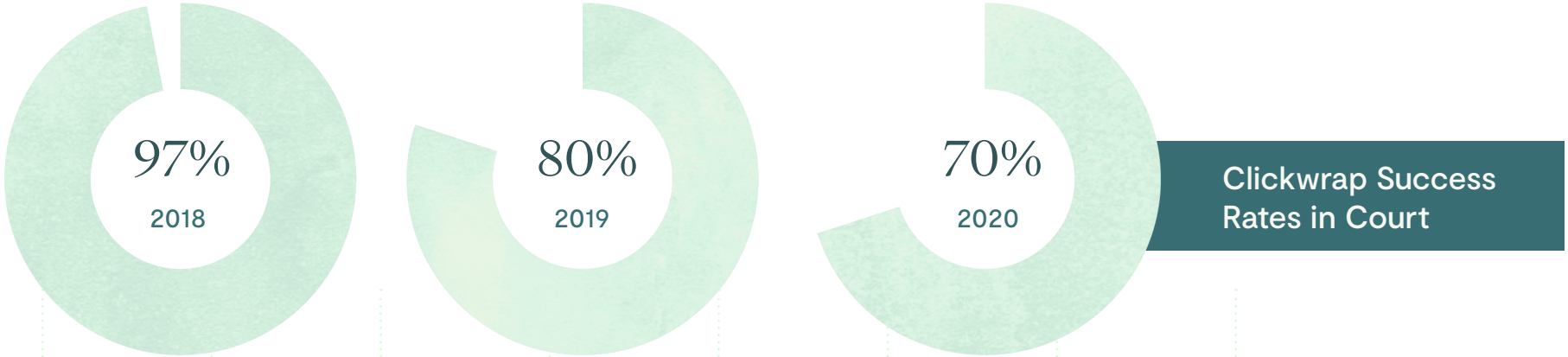


Clickwrap Enforceability: Case Law Examples

Courts routinely uphold clickwrap agreements as valid contracts when the user affirmatively manifests assent to the contract when clicking "I agree."[8] For example, the court in *Zaltz v. JDate* found that JDate users had manifested assent to JDate's terms when, as a required part of the registration process, the users checked a box next to the statement "I confirm that I have read and agreed to the Terms and Conditions of Service,"[9] which contained a hyperlink over the words "Terms and Conditions of Service." Additionally, in *Pazol v. Tough Mudder Inc.*, the court found that the parties had entered into a valid and enforceable agreement when Tough Mudder presented the Participation Agreement in three scroll windows and required each registrant to check a box indicating their acceptance of the Participation Agreement during the online registration process.[10]

> Generally speaking, courts uphold clickwrap agreements because they require the user to affirmatively manifest assent to the contract by clicking a button or checkbox.[14]

On the other hand, courts are more skeptical of—and scrutinize more closely—clickwrap agreements that do not require the user to review the terms of the contract before clicking the button or checkbox to accept (i.e., the terms are embedded in a hyperlink). But most courts still find such clickwrap agreements enforceable as long as the user is given an opportunity to review the terms, and the layout and language of the agreement puts the user on inquiry notice of the terms.[11] For example, the court in *Applebaum v. Lyft* found that Lyft's clickwrap agreement failed to provide sufficient notice of the contract because the hyperlinked terms on Lyft's screen were in a small font and colored light blue on a white background. This rendered the terms inconspicuous compared to the rest of the words on the screen, and therefore invalid.[12] Notably, many courts explicitly state that a user's failure to review the contract terms prior to acceptance does not invalidate the contract or constitute a valid defense to the user's breach of that contract.[13]



Generally speaking, courts uphold clickwrap agreements because they require the user to affirmatively manifest assent to the contract by clicking a button or checkbox.[14] This rings true even if the clickwrap agreement does not require the user to review the terms prior to accepting as long as the user is given an opportunity to review the agreement, and the language and layout of the agreement puts the user on inquiry notice of the terms.[15]

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Sign-in-Wrap Agreements

Sign-in-wrap agreements are a relatively new concept compared to clickwrap and browsewrap agreements. Courts often refer to them as a "hybrid" between clickwrap and browsewrap agreements.[16] Sign-in-wrap agreements do not require the user to affirmatively agree to a contract by clicking a button or checkbox. Rather, 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 is agreeing to the contract.[17] 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.[18]

Sign-in-wrap agreements had an overall success rate of 64% in 2020, compared to 65% in 2019 and 60% in 2018.

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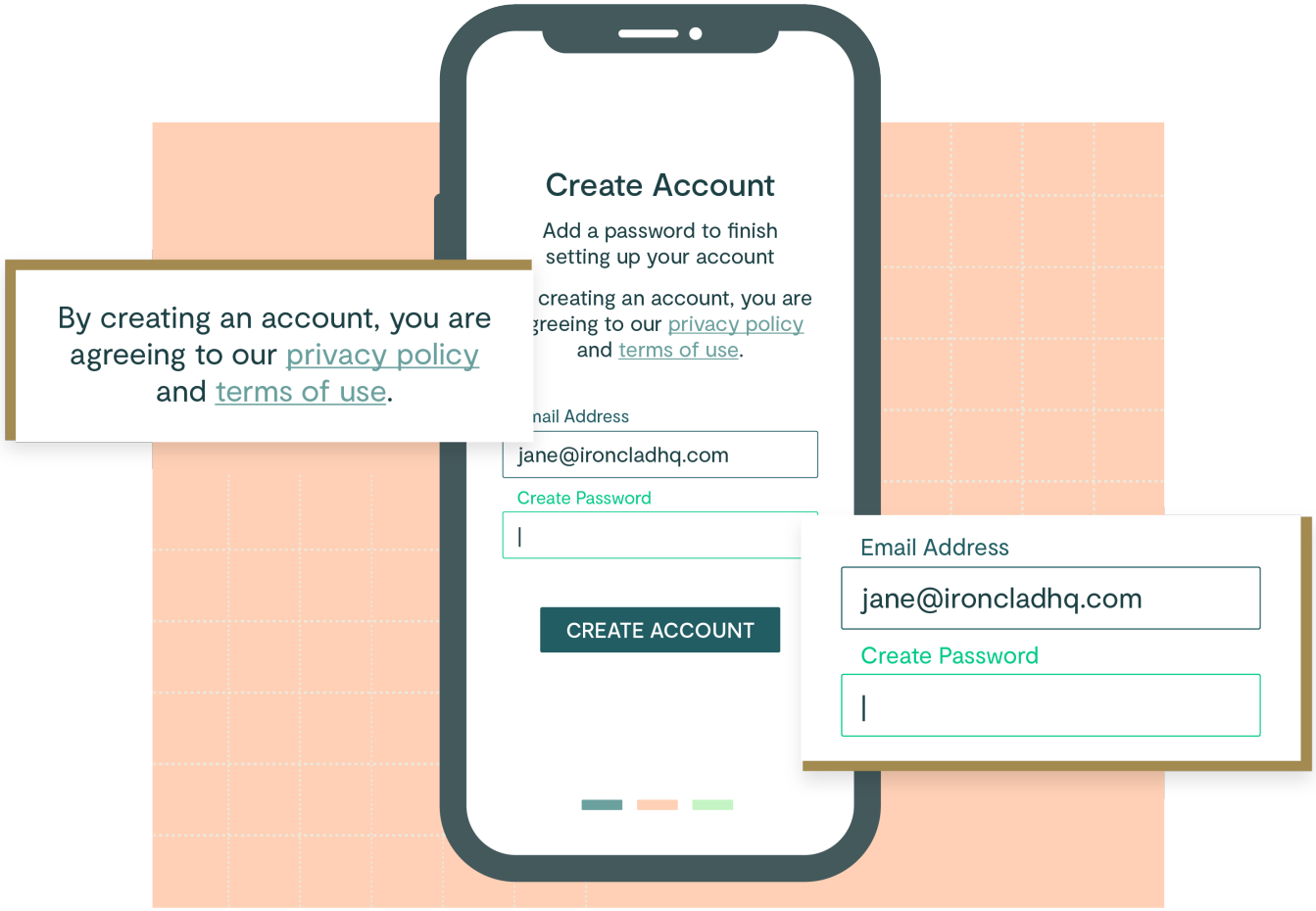
Dual Purpose Buttons

Sign-in-wrap agreements employ a dual-purpose button, where the user clicks a button to perform a specified task (such as logging in, signing up, signing in, or registering) and is notified that by clicking the button to perform that task, the user is also agreeing to the terms. In these situations, performing the task is the primary purpose of the button, not user assent to the contract terms. Rather, user assent to the terms is the *secondary* purpose of the button, giving the button dual purposes.



Sign-in-Wrap Enforceability: Case Law Examples

Because users are advised that clicking a button to proceed to the next screen indicates their assent to the contract—rather than affirmatively clicking a button to manifest assent—the enforceability of sign-in-wrap agreements is less certain than that of clickwrap agreements.

In *Cullinane v. Uber*, the court declined to find Uber's sign-in-wrap valid because the design and content of the screen did not render the sign-in-wrap agreement conspicuous enough to indicate to users that they were entering into a contract.[19] Similarly, in *Sgouros v. TransUnion*, the court found TransUnion's sign-in-wrap agreement invalid because the language of the agreement failed to notify the user that clicking the "Accept and Continue" button would create a contract.[20]

On the other hand, the court in *Plazza v. Airbnb* held Airbnb's sign-in-wrap agreement valid, reasoning that the agreement tended to provide the user with notice of the contract because the user was still required to click a button, even if manifesting assent was not the primary purpose of that button.[21] Additionally, the court in Fagerstrom v. Amazon found Amazon's sign-in-wrap valid because the language and placement of the agreement notified the user that by clicking the "Place your order" button, they were entering into an agreement.[22]

Though enforceability of sign-in-wraps is less certain, many courts enforce sign-in-wrap agreements under circumstances in which the language and layout of the webpage emphasizes the user's opportunity to access the contract and reasonably gives the user notice of the contract's existence.[23] For example, in *Meyer v. Uber*, the court found that the design and layout of Uber's registration screen, as well as the language used in the sign-in-wrap agreement, provided the user with reasonable notice that the user was agreeing to Uber's terms by clicking the "Register" button.[24] On the other hand, the court in *Nicosia v. Amazon* found Amazon's sign-in-wrap agreement invalid, as the layout

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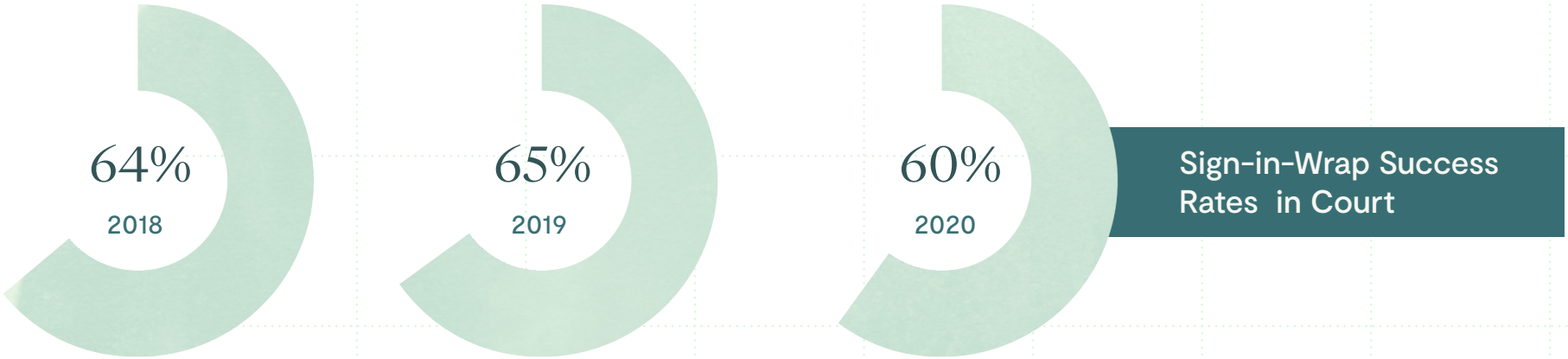


of the screen provided users with insufficient notice of the agreement.[25] Specifically, Amazon placed the agreement language at the top of the webpage and the "Place your order button" at the bottom, the agreement language was not particularly conspicuous, and nothing about the "Place your order" button indicated to the user that they were doing anything other than placing an order.[26]

Compared to clickwrap agreements, courts are generally less inclined to uphold the validity of sign-in-wrap agreements.[27] This is because courts have a harder time determining that a user affirmatively manifested assent to the agreement when the primary purpose of the button the user clicked was not acceptance of the website's terms, but rather the button's purpose was performance of a completely separate action (i.e., signing in, signing up, or registering). As a result, the enforceability of sign-in-wrap agreements depends on the design and layout of the webpage, as well as the language that indicates that the user is entering into an agreement.[28]

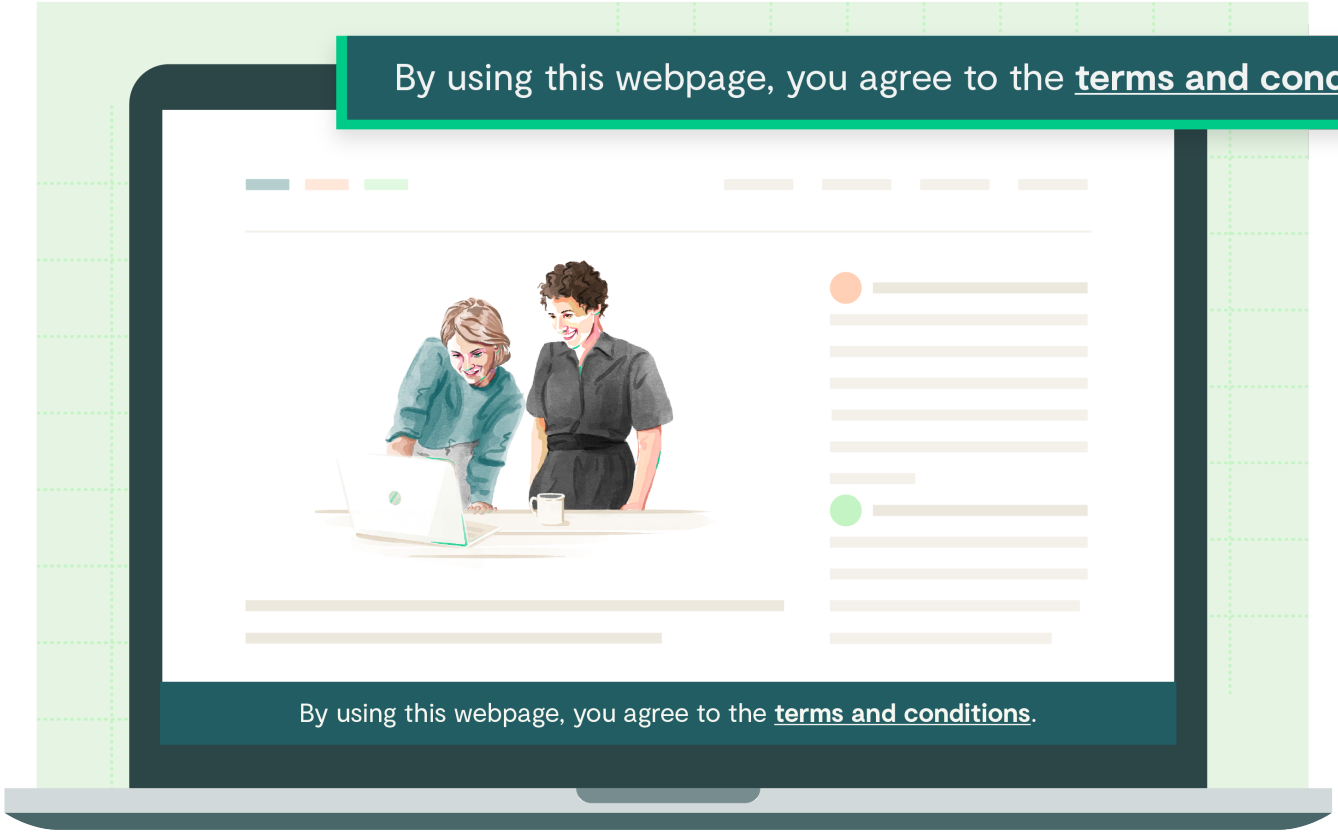
Browsewrap Agreements

Browsewrap agreements do not require the user to expressly signify any sort of assent to the website's contract terms through clicking a button or checking a box.[29] Instead, users assent to the website terms by using the website.[30] Websites that utilize browsewrap agreements typically include a notice somewhere on the screen, which states that by using the website, the user is assenting to the website's terms and conditions.[31] As part of the notice, websites include a hyperlink to the terms.[32] Both the notice and hyperlink to the terms are most often located at the bottom of the screen.[33]

Because browsewrap agreements do not require the user to take any sort of affirmative action to assent to the contract terms, they are rarely enforced and are not the best practice for online agreements.

Browsewrap Enforceability: Case Law Examples

The enforceability of browsewrap agreements is even less certain than that of sign-in-wrap agreements because no affirmative action is required for the user to assent to the browsewrap terms. The notion that users assent to the browsewrap terms simply by using the website is problematic because, oftentimes, users will use the website without ever knowing that a browsewrap agreement exists.[34] For example, the court in *Specht v. Netscape Communications* declined to hold Netscape's browsewrap enforceable because the hyperlink's placement at the bottom of the screen failed to put users on notice of Netscape's terms.[35] Similarly, in *Hines v. Overstock.com*, the court found Overstock.com's browsewrap unenforceable because the website failed to prominently display the link to the agreement in a way that would put users on notice of the website's terms and conditions.[36]



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However, when a user has actual notice of the agreement, courts tend to uphold browsewrap agreements.[37] But actual notice can be difficult to obtain and hard to prove. Actual notice often requires more than just the simple implementation of a browsewrap agreement. Namely, either the user must concede knowledge, or the website must show that it directly provided the user with notice, such as through a cease and desist letter. For example, the court in *Register.com v. Verio* found Register.com's browsewrap valid because Verio conceded that it had actual knowledge of Register.com's terms.[38] Additionally, the court in *Southwest Airlines v. BoardFirst* found that BoardFirst had knowledge of Southwest's terms because Southwest sent BoardFirst a cease and desist letter.[39]

If the user lacks actual notice of the terms, the validity of the agreement then depends on whether the user had inquiry notice of the contract's existence.[40] Whether a user is on inquiry notice depends on the design and layout of the webpage,[41] though courts are split on whether or not a good design and layout is enough to establish inquiry notice. For example, the court in *PDC Laboratories v. Hach Co.* found the browsewrap enforceable because the hyperlink was conspicuously displayed in contrasting text, and the checkout screen contained language telling the user to review the terms prior to completing the purchase.[42] On the other hand, the court in *Nguyen v. Barnes & Noble* held that Barnes & Noble's browsewrap was unenforceable despite the fact that the hyperlink was prominently placed next to the buttons users must click in order to complete online purchases.[43]

All in all, courts are unlikely to find browsewrap agreements enforceable unless the parties can establish actual or inquiry notice.[44] But establishing such notice often requires more than just a simple implementation of the browsewrap agreement.[45] Instead, the website owner must show that it did something additional to provide the user with notice, such as by sending a cease and desist letter[46] or including language on the screen to draw the user's attention to the hyperlinked terms.[47] As a result, the likelihood of a court enforcing a browsewrap is tenuous at best.

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Part II

Precedent Clickwrap Cases

In their opinions and analysis, courts routinely turn to several cases that are seen as defining the industry.

Specht v. Netscape Communications, Inc.[48]

This case is often credited as the first real clickwrap case, and dates back to 2002. The court in Specht recognized that the fundamental components of contract law remain present when contracting electronically, noting that "a transaction, in order to be a contract, requires a manifestation of agreement between the parties."[49] The court then made several important findings, which cases over the past two decades quote frequently:

- "A consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the button would signify assent to those terms."[50]
- "An offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious."[51]
- "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."[52]

Sgouros v. Trans Union Corp.[53]

The court here notes that many courts around the country recognize that clicking a button or checking a box is sufficient to signify acceptance of a contract.[54] The court further states that these agreements are fine, "as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement."[55] For example, when terms are displayed using a hyperlink, rather than embedded directly on the screen, the court notes that there should be a "clear prompt directing the user to read them."[56]

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Nicosia v. Amazon.com, Inc.[57]

This case is one of the most heavily cited. This court determined that "whether there was notice of the existence of additional contract terms presented on a webpage depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous."[58] When screens are cluttered with information, buttons, and links, courts are likely to find that users were not put on notice of the terms. Additionally, when the link to the terms appears in "obscure sections of a webpage that users are unlikely to see," courts are not likely to enforce them.[59] Finally, courts look at the words used on the screen, and whether the language indicates that the user is entering into an agreement.

Fteja v. Facebook, Inc.[60]

The court in this case noted that courts routinely uphold clickwrap agreements for the principal reason that the user has affirmatively assented to the terms of agreement by clicking "I agree."[61]

Meyer v. Uber Technologies, Inc.[62]

The court in this case reasoned that if the screen design is simple, with few buttons or links, courts are more willing to find that users were provided with adequate notice.[63]

Nguyen v. Barnes & Noble, Inc.[64]

The court in this case focused a lot of attention on the concept of inquiry notice, reasoning that where there is no evidence of actual notice, users are still bound to the terms "if a reasonably prudent user would be on inquiry notice of the terms."[65] Whether a user is on inquiry notice depends on the content and design of the screen the user encounters.[66] The court found that users are less likely to be on inquiry notice if the link to the terms is "buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it."[67] Additionally, users are less likely to be on inquiry notice if the website fails to prompt users to take an affirmative action to signify assent to the terms.[68]

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Part III

TYPES OF EVIDENCE

How to Enforce Your Online Terms in Court

There are three types of evidence typically presented to enforce terms in court:

- **Declarations/Affidavits**
  Sworn statements from key personnel about the company's contract acceptance methods
- **Back-end records of acceptance**
  Data captured that indicates who agreed to the contract, as well as other key data points that can show that the contract was accepted.
- **Screenshots**
  Images depicting what the screen looked like at the time the contract was presented to and accepted by the user

While each type of evidence has its own record of success, there are certain traits that make each more likely to be successful. For instance, a declaration is more likely to help enforce an agreement if it contains a great level of detail and the person providing the declaration is in a role that allows them to know pertinent details of the contract acceptance processes.[69] Likewise, back-end records are more likely to be successful if they prove that a specific user signed a particular agreement and give identifying details connecting that user to a specific contract and version.[70]

Declarations/Affidavits from Key Personnel

The first type of evidence used to enforce terms in court is declarations or affidavits. These are written statements or sworn testimony from key personnel familiar with the contract acceptance process. Companies in 67% of cases in 2019 produced declarations or affidavits that described the process by which users agreed to the company's terms. In 69% of these cases, companies produced high quality declarations or affidavits and successfully enforced their terms.

A declaration is more likely to be successful when the person providing it has pertinent knowledge of the system being described and/or is in a role that familiarizes them with the contract acceptance process. For example, the court in *Kourembanas v. InterCoast Colleges* enforced the defendant's arbitration agreement because InterCoast produced a declaration by the VP of Compliance and Academics, who had "working knowledge of … standard procedures and records relating to enrollment of its students," including the plaintiffs, and was able to aver the valid existence of a contract.[71] Likewise, the court in *Worthington v. JetSmarter* enforced JetSmarter's terms because the declaration submitted by JetSmarter came from the Chief Technology Officer, who was able to explain the full process by which people became members and accepted the Terms of Use and Membership agreements.[72] Additionally, in *Roberts v. Obelisk*, the declaration successfully detailed the full agreement signed by the plaintiff, illustrated what the screen looked like at the time of signing, and described the process by which the terms had to be signed before the products could have been ordered.[73] Also, the declaration

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in *Egan v. Live Nation Worldwide*, provided by the VP of Product Management at Live Nation, walked through the account set-up process, described the screen, buttons, and hyperlink, and stated that it was "impossible" to complete transactions on the site without first agreeing to the terms.[74] This level of detail successfully convinced the court to rule in favor of Live Nation and compel arbitration.[75]

Conversely, when the declarant does not have intimate and detailed knowledge of the process by which a user accepted a set of terms, or if the declarant is not in a position to have such knowledge, the court is less likely to rule to enforce the agreement. For example, in *Aerotech, Inc. v. Boyd*, the court declined to compel arbitration because the declarant did not have detailed knowledge of the system and was unable to testify to the system's authenticity and data integrity.[76] Additionally, the court in *Beattie v. TTEC Healthcare Solutions* refused to enforce TTEC's terms because the declarant was not directly involved in the contract acceptance process, and the declaration failed to detail what specific information was collected upon the contract acceptance and what (if any) security measures were in place to ensure the integrity of the system.[77]

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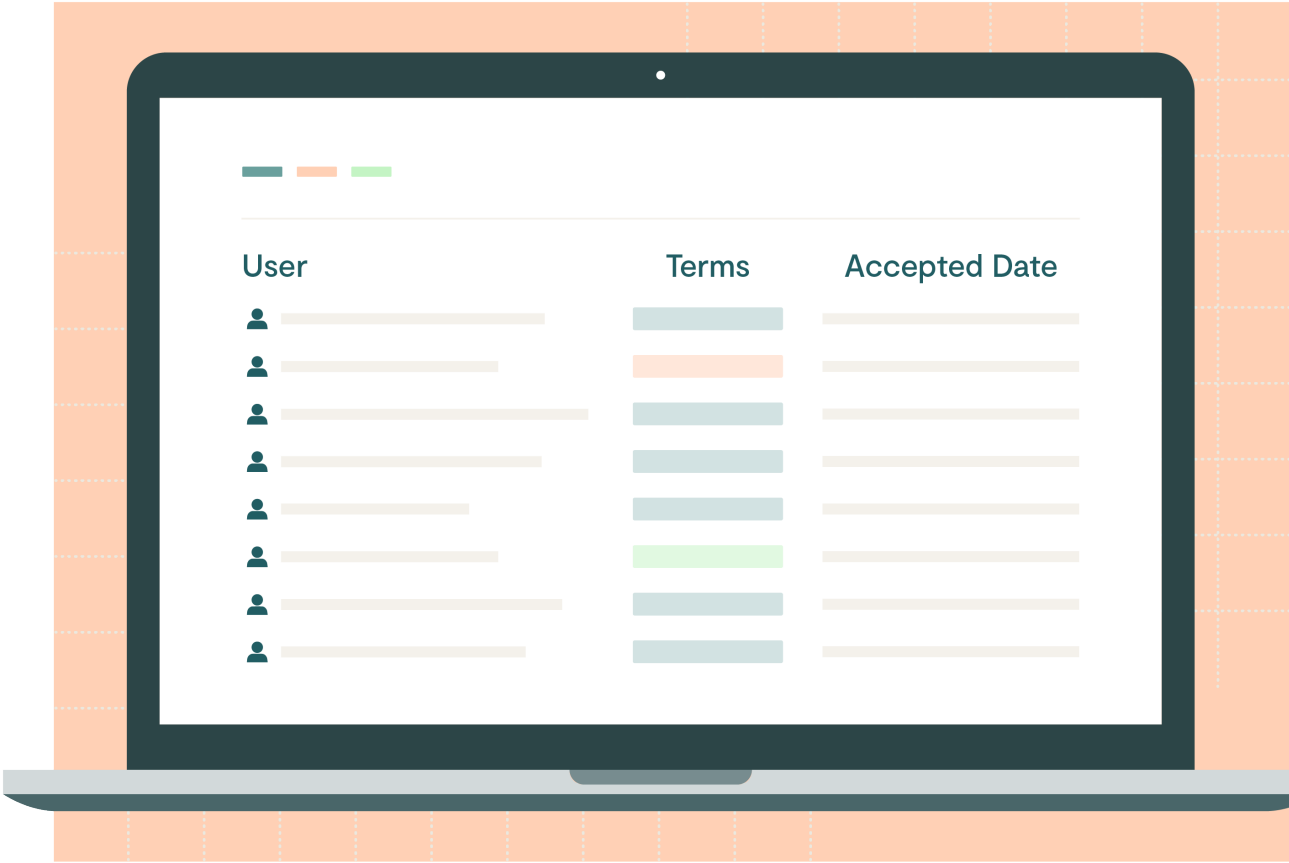
Back-End Records of Acceptance

Another type of evidence used is back-end records. Back-end records are records that contain data captured at the time of contract acceptance. This data indicates who accepted an agreement, when the agreement was accepted, and what version of the agreement that was live at the time of acceptance. In 24% of cases in 2019, companies produced back-end records to show user acceptance of the terms. Companies in 65% of these cases were able to produce robust back-end records and successfully enforce their terms.

When used as evidence to try to compel arbitration, back-end records are most successful when they showcase specificity and a high level of detail –- that is, that a particular user signed a particular agreement at a particular time. For example, the back-end records provided by Southwest Airlines in *Tanis v. Southwest* showed that when the employee checked a box that affirmed her acceptance of the terms, an electronic record was created that included the employee name, the employee ID, and the date and time that the employee executed the acknowledgement.[78] Similarly, in *Holley v. Bitesquad.com*, the back-end records provided by Bitesquad included sufficient detail to prove that the plaintiff accepted the agreement because the record consisted of an audit trail that included "the email address to which the employment packet is sent and the times at which it is sent, viewed, and signed by the employee."[79]

When used as evidence to try to compel arbitration, back-end records are most successful when they showcase specificity and a high level of detail – that is, that a particular user signed a particular agreement at a particular time.

On the other hand, back-end records that cannot prove which users signed which agreement and that do not provide details of individual acceptance are largely unsuccessful in court. For example, the court in *In re: Facebook Inc., Consumer Privacy User Profile Litigation* refused to enforce Facebook's terms because although Facebook could show the content of its terms and the sign-up flow for using the platform, Facebook was unable to provide individual records of acceptance to prove that specific users agreed to a particular version of the terms.[80] Likewise, the court in *Nager v. Tesla* declined to enforce Tesla's terms after Tesla was only able to produce "just some random document" that had no connection to the customer or transaction at issue, rather than individual records of acceptance.[81]



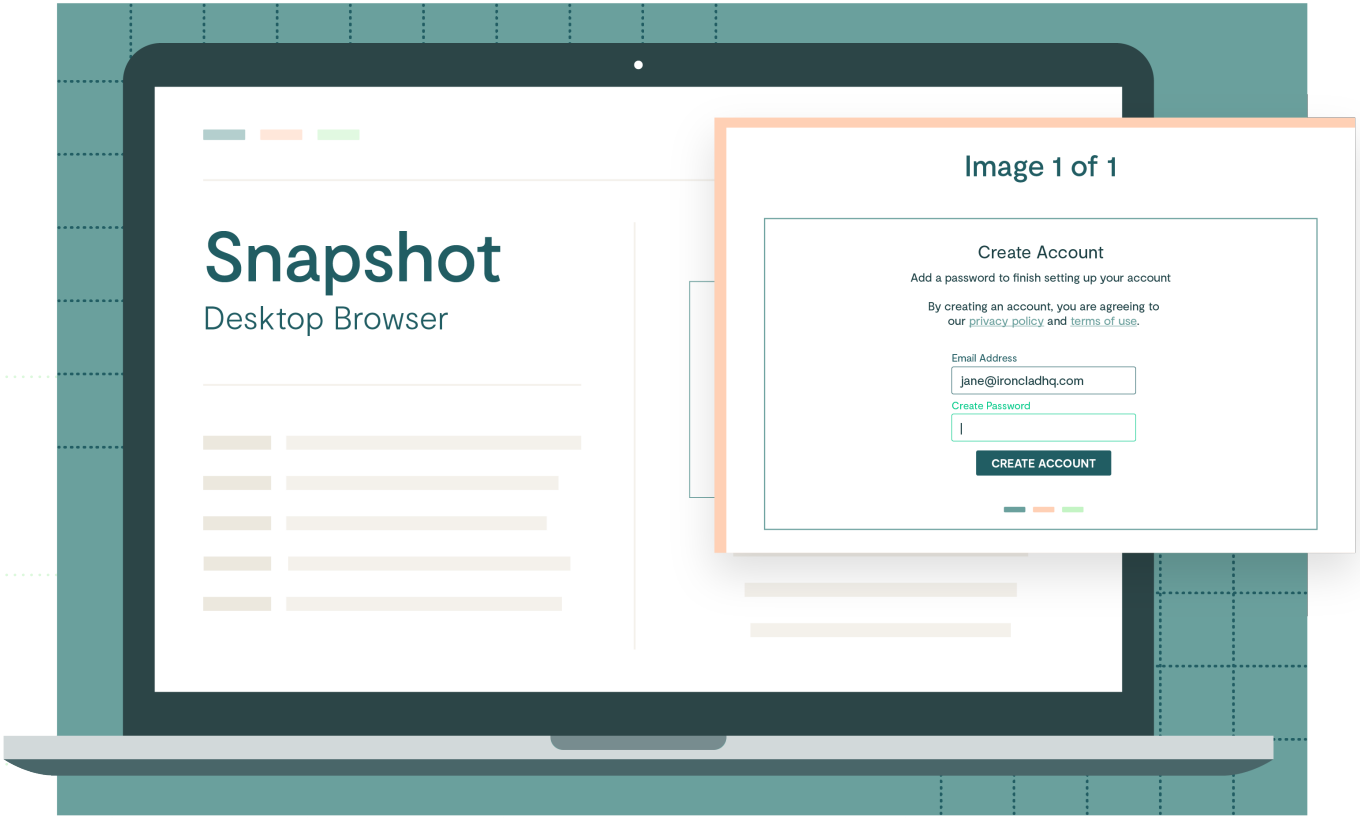
Screenshots

The third type of evidence used to enforce terms in court are screenshots. A screenshot is an image that displays what a screen looked like at the time of sign-up or check-out. In 29% of cases last year, companies produced screenshots to show user notice and acceptance of their terms. Companies in 61% of these cases were able to produce quality screenshots depicting a solid design and layout of the screen to successfully enforce their terms.

Courts often rule in favor of terms on a page designed to provide actual or inquiry notice to a user. As a result, if the screen design is poor, the screenshot tends to sway the court towards not enforcing the terms.[82]

Courts often rule in favor of terms on a page designed to provide actual or inquiry notice to a user. As a result, if the screen design is poor, the screenshot tends to sway the court towards not enforcing the terms.[82] On the other hand, if the screenshot shows that the screen is optimally designed, the court is highly likely to rule in favor of enforcing the terms.

For example, the screenshots provided to the court in *Epps-Stowers v. Uber Technologies* showed the sequence of screens a user would see when creating an Uber account and showed that the screen was designed in a way that would alert the user that they were entering into a contract via the registration workflow.[83] Likewise, in *Mucciariello v. Viator*, the court enforced Viator's terms when Viator produced a screenshot that showed a well-designed screen, which provided notice to users about the existence of terms.[84]



On the other hand, the court in *Wilson v Huuuge Inc.* declined to enforce Huuuge's terms because Huuuge's screenshot showed a screen so poorly designed that "the user would need Sherlock Holmes's instincts to discover the terms," and therefore afforded the user no notice that the user was entering into any sort of agreement.[85] Similarly, the court decided not to enforce Juul's terms in *Colgate v. Juul Labs, Inc.* upon finding that Juul's screen design failed to put users on notice of the terms because the hyperlink to the terms was "indistinguishable from the surrounding text" as it was not highlighted, underlined, in all caps, or in a separate box.[86]

Part IV

The Impact of the Pandemic on Clickwrap

The pandemic has brought about significant changes to the global landscape. Not least of which is the increase in online transactions. 2020 saw exponential increases in eCommerce and digital experiences. As a result, the need for, and usage of, clickwrap agreements skyrocketed.

Just 10 years ago, clickwrap was widely unknown in the mainstream. Only technical teams and advanced legal departments were aware of the power of clickwrap. Even then, some were unsure how to get their clickwrap agreements to adhere to sophisticated processes and robust recordkeeping without IT managing agreements and legal sweating over whether or not the right agreements were connected to the right hyperlinks or embedded in the correct flows.

Over time, clickwrap has become more commonplace, and more consumers are familiar with the phrase “by checking this box you accept our terms of service.” And thanks to the pandemic, more and more people are completing transactions digitally and assenting to online terms with the click of a button (or check of a box).

Pandemic = Growth of eCommerce = Growth of Clickwrap

As eCommerce becomes more prevalent globally, consumer expectations will change. In fact, according to a 2020 study by Shopify, more than 50% of consumers in North America not only prefer to transact digitally, but will also continue to primarily transact online, even after the current crisis has passed. Experts also believe that consumer patience is likely to decrease with the continued dependence on eCommerce.

Notably, eCommerce isn't limited to B2C transactions. In the age of massive digitally native experiences, more complex transactions take place online. A McKinsey study on self-service and remote buying found that consumers - including B2B buyers - now overwhelmingly prefer to do business online, and some are willing to spend up to $1 million in a single online purchase. The high value of this kind of contract means that the agreements associated with these purchases need to be seamlessly presented and securely managed, digitally. But unless businesses have sophisticated back-end solutions for managing their online terms, this move to digital can prove to be a nightmare for Legal teams.

The high value of this kind of contract means that the agreements associated with these purchases need to be seamlessly presented and securely managed, digitally. But unless businesses have sophisticated back-end solutions for managing their online terms, this move to digital can prove to be a nightmare for Legal teams.

Creation of a Category: Clickwrap Transaction Platforms

In part due to the growing demands of eCommerce, the increase in the significance of clickwrap agreements has led to the creation of a new category: Clickwrap Transaction Platforms (CTP). According to Aragon Research, who defined the category, Clickwrap Transaction Platforms "combine the ability to create, deliver, manage, track, and archive all the online terms and conditions that consumers and businesses agree to with a specified entity." The increase in clickwrap litigation and the stagnant number of companies who understand clickwrap best practices provide great arguments for the necessity of such a piece of legal technology.

The creation of this category is but one indication that both the use and necessity of clickwrap agreements will only continue to grow in significance. Understanding the state of clickwrap, litigation, and best practices, is a necessary foundation for protecting businesses transacting online.

COVID-Related Clickwrap Litigation

2020 has also introduced its fair share of COVID-related clickwrap litigation. Companies like Ticketmaster, Eventbrite, Uber, and others had to enforce their terms when consumers became frustrated with each company's response to the pandemic. Some companies fared better than others, but all were subject to the sharp eye of the courts and established best practices.

Hansen v. Ticketmaster

Ticketmaster, for example, was sued by a class of consumers who said the company violated the law by changing their refund policy after the pandemic started. Fortunately for Ticketmaster, their online agreement presentation established an enforceable and binding contract with users, and they were able to enforce an arbitration clause.[87]

Snow v. Eventbrite

On the other hand, when a class of consumers sued Eventbrite after shows were cancelled or postponed due to the pandemic, claiming that Eventbrite unlawfully withheld refunds, Eventbrite was unable to enforce the arbitration clause in their terms. Eventbrite was unable to provide the court with the exact versions of the terms consumers would have agreed to during the relevant time period, and Eventbrite wasn't able to show the court the exact screen that consumers would have seen. As a result, the court declined to find a valid agreement.[88]

Capriole v. Uber Technologies

Uber enforced their terms, which contained a forum selection clause, after a class of drivers sued the company for misclassifying them as independent contractors. This complaint was amended in light of the pandemic, alleging violations of the MA Earned Sick Time Law.[89]

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Part V

Clickwrap Trends Across Industries

Companies in different industries and verticals vary in their clickwrap sophistication levels. For example, a B2C eCommerce technology company might be more used to the need for clickwrap as part of their streamlined, digital processes than say a heavily regulated financial enterprise company. This influences the "common agreements litigated" and "common best practice violations" across industries and generally.

Most Common Agreements

The contract at issue in the majority of cases over the past year was the standard website terms. Fifty-eight percent of clickwrap cases involved “terms and conditions,” “terms of use,” or “terms of service.” Employment agreements were the second most common contract at issue, with 21% of cases involving contracts relating to employment.

> Arbitration clauses were the most common clause companies tried to enforce in 2020.

Arbitration clauses were the most common clause companies tried to enforce in 2020. Rulings on motions to compel arbitration comprised nearly 89% of clickwrap cases that came out this past year. Forum selection clauses were a distant second most common clause, with rulings on motions to transfer venue pursuant to a forum selection clause comprising only 6% of cases. Other common arguments included consent based on contract terms and enforcement of non-competes and non-disclosure agreements.

Hardest Hit Industries in Court

In 2020, finance was the top industry trying to enforce their terms in court, accounting for 18% of cases. These cases involved traditional financial institutions like credit unions and banks, as well as some fin-tech companies. Some notable mentions for this industry include Intuit, Wells Fargo, Upstart Network, and Merrill Lynch.

eCommerce came in at a close second, taking up 15% of cases. Some notable mentions for this industry include Amazon.com, Walmart, and Shutterfly. Gig economy companies, such as Uber and DoorDash, came in third with 11%. Other industries hit consistently include online marketplaces, travel, and gambling/online gaming.

eCommerce Data Analytics on Clickwrap

The meteoric rise of eCommerce and online transacting is reflected in the data we have about the usage of clickwrap and online agreements within our own platform. In the Ironclad's clickwrap transaction platform, for example, 90% of agreed events (i.e. anytime someone agrees to legal terms by either clickwrap or traditional e-signature, thereby creating binding contracts) were tied to eCommerce companies. Even more, 85% of tracked agreed events in the platform were clickwrap, with traditional eSignature and other acceptance types making up the other 15%. This reflects not only the global trends present in the eCommerce market, but also the increased use of clickwrap to collect acceptances to legal agreements during online transactions.

Finally, our clickwrap transaction platform also shows that there has been an increase in clickwrap usage over the course of 2020. Considering February as the pre-pandemic "standard," we noticed a steady and significant rise in average clickwrap usage by eCommerce and other companies from February and peaking at 4x the average in May. By June it leveled back out to half that peak volume, which was still 2x the pre-pandemic average. By and large, eCommerce and online marketplace companies were responsible for the increase.

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Other Notable Trends in 2020

Of the three main types of online agreements disputed in 2020, 63% were clickwrap agreements, 30% were sign-in-wrap agreements, and 6% were browsewrap agreements. 70% of clickwrap agreements were successful, 64% of sign-in-wrap agreements were successful, and 14% of browsewrap agreements were successful. Compared to 2019, clickwrap and sign-in-wrap agreements increased in popularity while the use of browsewrap agreements decreased significantly. Additionally, success rates for all three types of agreements decreased.

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Evidence that the court relies on in deciding whether to enforce the company's terms continues to fall into three main categories: sworn testimony (affidavits or declarations) by key employees, screenshots, and back-end records. Most companies used a combination of the three different types of evidence: 23% of companies relied on screenshots and sworn testimony, 14% of companies relied on a combination of all three types of evidence, and 12% relied on back-end records and sworn testimony. Additionally, 17% of companies relied solely on sworn testimony, and 9% relied solely on screenshots. Notably, 18% of companies either offered up no evidence or relied solely on what was written in the motions, complaints, answers, replies, etc. to support their stance of enforcing the terms.

Types of Evidence Used in Court in 2020

Part VI

Best Practices for Clickwrap Enforceability

We have developed a list of best practices to give companies the best chance at enforcing their terms in court. This list is based on precedent clickwrap cases, and has been updated over time to reflect up to date rulings from the court.

One of the most common best practice violations is poor screen design. Since screenshots are key evidence in enforcing online terms, the design of the screen and presentation of the terms on the screen is very important in defending terms. As a result, we've included a special section on best practices for screen design.

Common Best Practice Violations

The following are the more common violations of best practices we found in case law over the course of 2020.

Poor Screen Design

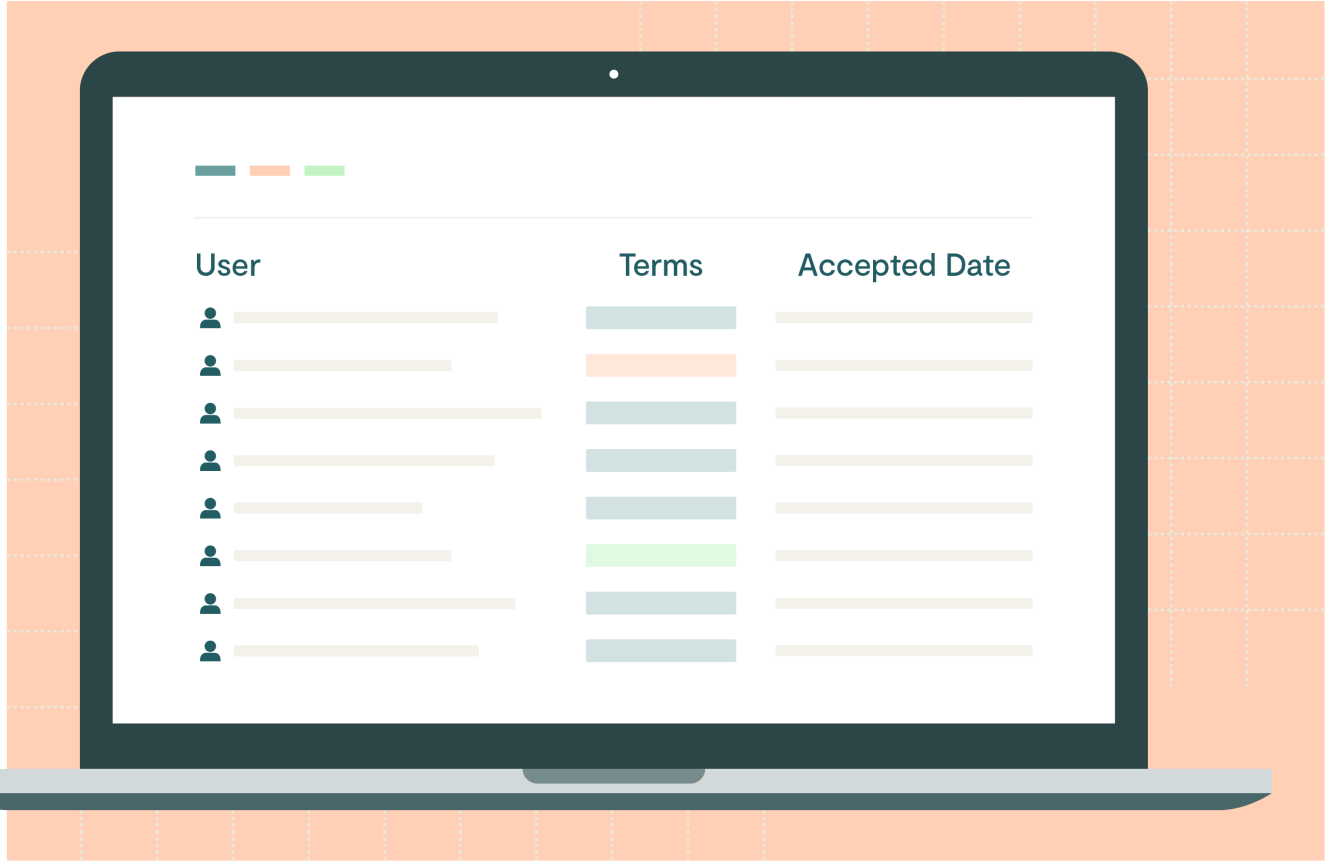
Poor screen design was the most commonly violated best practice in 2020. Forty-three percent of companies that were unable to enforce their terms lost because the screens failed to put users on notice of the terms. They did so by failing to make the agreement language and corresponding button conspicuous, using browsewrap agreements instead of clickwraps to alert users of the terms, choosing poor language to reference the terms, pre-checking checkboxes, and not spatially locating agreement language next to the corresponding button.

Lack of Back-End Records

The second most commonly violated best practice last year was lack of a robust back-end record. Twenty-six percent of companies that failed to enforce their terms lost because they were unable to produce a robust back-end record of contract acceptance. Notably, several of these companies were able to produce a record of initial contract acceptance, but were unable to do so for modifications to the terms.

Other Common Violations

Other best practice violations include failure to obtain affirmative assent to the terms (using sign-in-wrap instead of clickwrap), failure to disprove fraud, and failure to gather evidence in time to meet court deadlines.



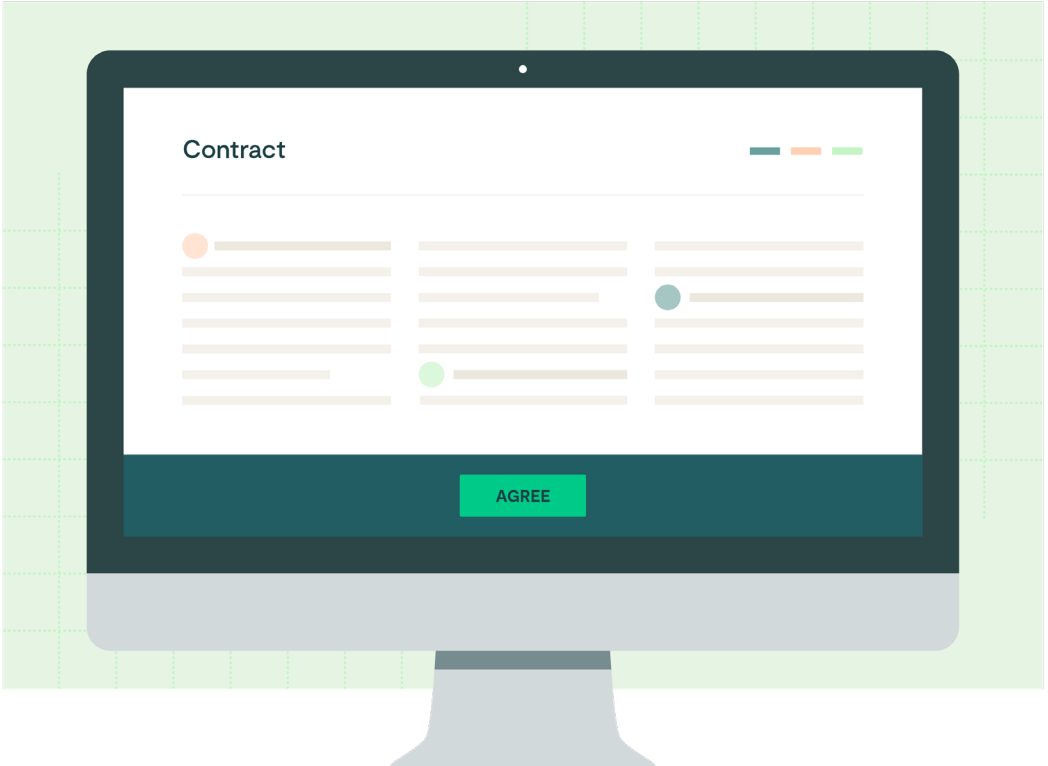
Screen Design Best Practices

Screen design is extremely important for companies seeking to enforce their terms in court. Oftentimes, the enforceability of online agreements hinges on whether the screen design put users on reasonable notice of the terms.[90] When evaluating screen design, courts consider a number of factors.

Cluttered or Clean?

One factor courts consider when evaluating screen design is whether the screen is cluttered or clean and simple.[91] When screens are cluttered with information, buttons, and links, courts are likely to find that users were not put on notice of the terms.[92] On the other hand, if the screen design is simple, with few buttons or links, courts are more willing to find that users were provided with adequate notice.[93]

For example, the court in *Meyer v. Uber Technologies, Inc.* liked that Uber's screen was "uncluttered," the links to the terms appeared "directly below the buttons for registration," and the entire screen was "visible at once," with no need to scroll.[94] Conversely, the court in *Nicosia v. Amazon.com, Inc.* did not like that Amazon.com's screen contained multiple buttons, messages, order and financial information, and approximately fifteen to twenty-five links.[95]



Opportunity to Review

Another factor courts consider when looking at screen design is whether the terms are available to users, and if users are afforded an opportunity to review prior to accepting them.[96] When the link to the terms appears in "obscure sections of a webpage that users are unlikely to see," courts are not likely to enforce them.[97] Likewise, if the terms are hyperlinked and the link does not resemble a traditional hyperlink, blue and underlined, courts are likely to find insufficient notice of the terms.[98]

For example, the court in *Cullinane v. Uber Technologies, Inc*. did not like that the link to the terms did not resemble a traditional hyperlink. The hyperlink was white text located in a grey rectangular box instead of "commonly blue and underlined." Finally, Uber's screen contained a number of similarly styled hyperlinks and buttons, and the court reasoned that "if everything written on the screen is written with conspicuous features, then nothing is conspicuous."[99] By contrast, the court in *Meyer v. Uber Technologies, Inc*. liked that Uber used a dark font that contrasted well against the white background, and the hyperlinks looked like traditional blue underlined hyperlinks.[100]

Language Used

A third factor courts consider when evaluating screen design is what words appear on the screen, and whether the language indicates that the user is entering into an agreement.[101] Additionally, when looking at the language used on the screen, courts consider whether users were required to take explicit action to indicate acceptance of the terms.[102]

For example, the court in *Meyer v. Uber Technologies, Inc*. liked that Uber unambiguously alerted users that by creating an Uber account, they agreed to the terms.[103] On the other hand, the court in *Nguyen v. Barnes & Noble, Inc.* noted that Barnes & Noble made the hyperlink to the terms conspicuous, but did nothing else to notify the user or require the user to take action to indicate acceptance of the terms. The court reasoned that although the terms were conspicuously available via hyperlink on each page of the website, users were not prompted to "take any affirmative action to demonstrate assent."[104] Likewise, the court in *Nicosia v. Amazon.com, Inc.* reasoned that though Amazon.com included language "By placing your order, you agree to Amazon.com's privacy notice and conditions of use," the "Place your order" button didn't immediately indicate to users that additional terms apply.[105]

Best Practices for Clickwrap Enforceability

Here are the overall best practices for clickwrap enforceability:

Screen Design

- Keep the screen simple and uncluttered.
- Use contrasting colors for fonts and background.
- Use conspicuous font sizes.
- Make the entire screen visible at once.
- Do not pre-check the checkbox.
- Use consistent language.

Reasonable Notice

- Alert users to the existence of the agreement with specifically clear language.

Opportunity to Read

- Embed the terms in a scrollpane directly on the screen.
- Require users to click the hyperlink to the terms.
- Advise users to read the terms prior to checking the box or proceeding through the process.
- Make sure the hyperlink to the terms is clickable (do not require users to manually enter the URL).
- Hyperlinks should resemble traditional hyperlinks: blue and underlined.

Objective Manifestation of Assent

- 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

- Be able to show who accepted which version of the terms.
- Be able to show what the screen looked like when users encountered the contract acceptance process.

Conclusion: Clickwrap Litigation

While the world is changing rapidly, one thing is for certain: clickwrap litigation is here to stay and on the rise. As more people depend on online transactions to have their needs met, more companies will use clickwrap agreements to present their terms to customers and users. Clickwrap agreements are the quickest way to collect acceptance to your company's online terms, but it can be tricky to do correctly if not following best practices. For example, if all you have is a button or a box for users to click, but no back-end apparatus to track these agreements or their versions over time, then success in court is unlikely.

While it is impossible (and foolish) to guarantee that adhering to the best practices laid out in this report will prevent litigation, it's true that following them will increase your chances of success. This prevents costly litigation and time sunk into discovery and preparing for court.

If you would like more analyses and insights like this or to continue the conversation, we'd love to hear from you.

Join our community of legal professionals or get in touch here.

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