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DESIGNING A USER INTERFACE FOR CUSTOMER ASSENT

Stephen L. Sepinuck

Internet merchants – whether selling goods (e.g., Amazon), services (e.g., Uber; Grubhub), entertainment (e.g., Netflix), news (e.g., Bloomberg), or apps (e.g., Apple) – typically expect their customers to assent to standardized terms designed to minimize the seller’s potential liability.¹ Such terms might include an arbitration clause, a waiver of the right to jury, a disclaimer of consequential damages, and a waiver of class-wide proceedings, among other things.²

Although electronic contracting has existed for several decades, and judicial decisions about the process are legion, internet merchants continue to have problems. Recent decisions indicate that some merchants still fail to properly design their user interface to ensure that their customers assent to the proffered terms. As a result, their customers are not restricted by the terms designed to limit the merchant’s liability.

After providing some background on the relevant law, this article explores some of the recent decisions and provides advice to internet merchants – and their legal counsel – on how to design a user interface to ensure that customers assent to the seller’s standardized terms.

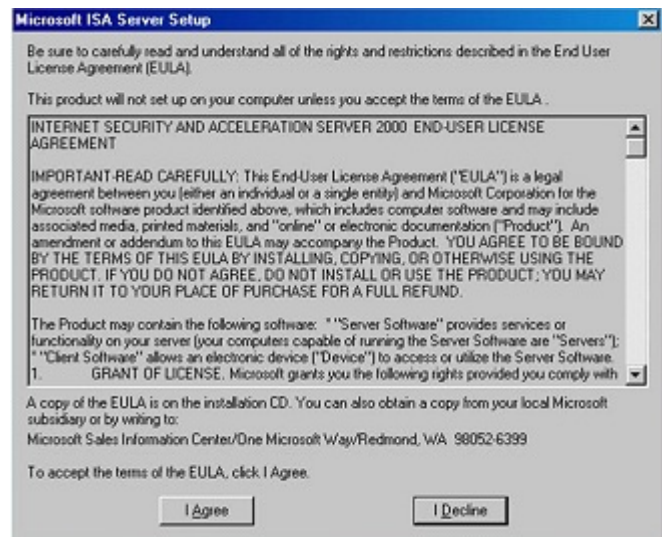
Background: Clickwrap, Browsewrap & Hybrid Processes

Prior to the internet, customers often purchased software at a retail store, where the product was sealed – “shrinkwrapped” – in cellophane or some other plastic. From the customer’s standpoint, the transaction was like buying goods. In reality, the customer was acquiring a software license, the terms of which were inside the box and which the customer had no way to

access prior to paying. Courts generally concluded that the customer was bound by those terms, and over time the term “shrinkwrap” was applied to any transaction in which the customer assents or pays before receiving the terms (i.e., “pay now, terms later”).

After the term “shrinkwrap” was coined, the suffix “wrap” began to be used to identify other novel methods of contract formation, much like how the “gate” in “Watergate” has been added to other words to describe a political scandal.³

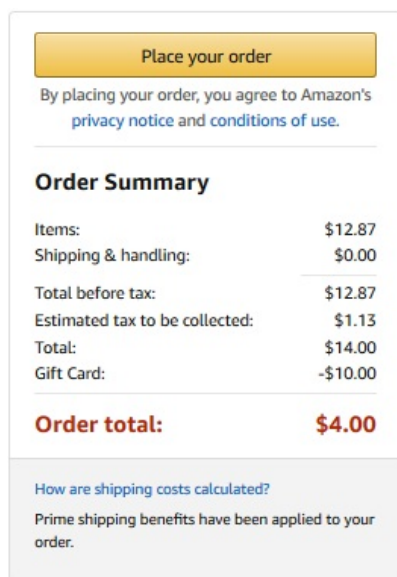
“Clickwrap” is a word that refers to an online interface in which a customer is required to signify assent to a transaction and the terms that govern it. The terms assented to might be in the dialog box on which the user signifies assent by clicking a button that says “I agree,” as in the following illustration from Microsoft (this form of clickwrap is sometimes referred to as “scrollwrap”⁴):



Alternatively, the terms might be accessible via a hyperlink placed near the box seeking assent, as in the example below from Amazon:

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Place your order

By placing your order, you agree to Amazon's [privacy notice and conditions of use.](#)

Order Summary

Items:	\$12.87
Shipping & handling:	\$0.00
Total before tax:	\$12.87
Estimated tax to be collected:	\$1.13
Total:	\$14.00
Gift Card:	-\$10.00

Order total: \$4.00

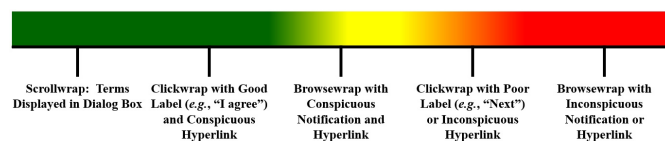
[How are shipping costs calculated?](#)

Prime shipping benefits have been applied to your order.

The term “browsewrap” refers to a situation in which a merchant asserts that a person assents to the terms posted on the merchant’s web site simply by accessing or using the site. In other words, somewhere on the site is a statement – perhaps conspicuous, perhaps not – advising users that, by accessing the site, they assent to terms posted or hyperlinked on the site. The theory is that the voluntary act of accessing the site with notice of the posted or referenced terms signifies assent to the terms.

Courts have almost uniformly enforced clickwrap agreements. That is, they have concluded that by clicking “I agree” or its equivalent the customer manifests assent to the displayed or hyperlinked terms, provided the customer is presented with reasonable notice of the terms.⁵ In doing so, they have analogized to agreements printed on paper and ruled that, to be bound, the customer need not actually read the terms or click on a hyperlink that makes the terms available as long as the customer has notice of the terms’ existence.⁶ In contrast, courts have enforced a browsewrap process of contractual assent in only about half of the cases, and only if the user interface includes both a prominent statement about the existence of the terms and a conspicuous hyperlink to the terms.⁷

Unfortunately, the universe of possibilities does not neatly divide into these categories, and is instead better viewed as a continuum between active assent (clickwrap) and implied assent (browsewrap), with varying levels of the terms’ conspicuousness:



Indeed, the process used by Amazon has been described as a “hybrid between a clickwrap and a browsewrap agreement.”⁸ On Amazon’s site, the customer is neither required to click an “I agree” box after being presented with a list of terms nor simply left to browse the page that includes a statement that, by using the site or placing an order, the customer assents to Amazon’s hyperlinked privacy notice and terms. Instead, as shown in the illustration above, the customer is asked to click a button that says “Place your order” immediately above language that states that “[by] placing your order, you agree to Amazon’s . . . conditions of use,” and which includes a hyperlink to those conditions. But not all courts regard this process as a sufficient indication of customer assent.⁹ Many smart phone apps similarly use a hybrid process in which a customer expressly signs up to use an internet product or service, often entering payment information in the process, and during the sign-up process a screen states that the customer is agreeing to terms accessible via hyperlink, but no action by the customer is required to signify assent to those terms.¹⁰

Recent Cases

Three decisions from this year illustrate that some merchants continue to encounter difficulty in demonstrating to courts that customers have assented to the merchants’ standard terms.

Maree v. Deutsche Lufthansa AG,¹¹ decided by a federal district court in California, involved terms allegedly agreed to through a clickwrap process. Maree, an individual, purchased on Expedia.com a ticket for air travel on Lufthansa. After the flight was cancelled, she brought a class action against Lufthansa, which moved to compel arbitration based on an arbitration clause in Expedia’s Terms of Use, apparently on the theory that Lufthansa was a third-party beneficiary of the contract between Expedia and Maree. The court denied the motion. In doing so, the court described in detail how Expedia’s process appeared to its customers at the time Maree purchased her ticket:

Exhibit 1 shows several pages of boxes in which a user must input personal and credit card information to book a flight. On the fourth page, the website presents the user with a large, square button outlined in gold that says “**Complete Booking>**” in large, bold font. Above and below the button are several rows of text in black and blue font. Immediately above the button are three lines of text that say: “By selecting to complete this booking I acknowledge that I have read and accept the above Rules & Restrictions, Terms of Use and Privacy Policy and Government Travel Advice.” The phrases “Terms of Use,” “Privacy Policy,” and “Government Travel Advice” are in blue text in the same size font, and include an adjacent box icon. Terms of Use is not highlighted, underlined, in all

caps, or displayed in a clickable box. The user does not have to click on the link or check a box affirmatively assenting to the Terms of Service. There are seven lines [of] blue and black text below the button, two lines of which are bolded, blue, and in a bigger font size than the Terms of Use, but smaller than the “**Complete Booking**” button. These features do not render Expedia.com’s Terms of Use sufficiently noticeable to put a reasonable user on inquiry notice of its provisions.

* * *

Expedia.com’s Terms of Use are not highlighted, underlined, in all capital letters, or displayed inside of a conspicuous and clickable box. And . . . Expedia.com’s Terms of Use hyperlink appears on a cluttered page nestled between several lines of extraneous, colored and bolded text.¹²

The court, troubled by the label of the button Maree clicked – “Complete Booking” rather than “I agree” – and the clutter of text and links near that button, concluded that Expedia’s website did not sufficiently put Maree on notice that she was agreeing to arbitrate claims.¹³

The other two cases involved Uber. In *Kauders v. Uber Technologies, Inc.*,¹⁴ a couple sued Uber after three drivers refused to provide them rides because one of them is blind and was accompanied by a guide dog. Uber moved to compel arbitration. After some procedural wrangling, the matter was appealed to the Massachusetts Supreme Judicial Court.

The court detailed the online registration process that the couple had used to create an Uber account, and through which Uber claimed the couple had agreed to arbitrate disputes.¹⁵ Using the Uber app, a customer must register with Uber before the customer can request transportation services. This process involved three steps, each on a separate screen. The first screen, entitled “Create an Account,” invites the customer to enter an e-mail address, a mobile telephone number, and a password. After doing so, a button labeled “Next” was enabled. That button revealed the second screen.

The second screen, entitled “Create a Profile,” was much like the first. It required the customer to enter a first and last name and the option to upload a photograph. After doing so, a button labeled “Next” was enabled and sent the customer to the third screen.

The third screen was entitled “Link Payment,” and required the customer to enter a credit card number or the information needed to pay by Paypal. Text at the bottom of the screen stated, “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” The first part of the sentence was far less prominently displayed than the words “Terms & Conditions and Privacy Policy,” which were in a rectangular

box and in boldface font. According to Uber, this presentation was used to indicate that the box was a clickable hyperlink. If a user clicked this box, the user would be taken to a screen that contained other clickable buttons, labeled “Terms & Conditions” and “Privacy Policy.” Once at this linked screen, if the user clicked the “Terms & Conditions” button, the terms and conditions would appear on the screen. After the customer entered the payment information, a button labeled “Done” was enabled. Clicking this button completed the registration process.

The court ruled that the process did not provide customers with reasonable notice of Uber’s standard terms, and hence the arbitration clause included in those terms did not bind the Kauders. In so ruling, the court stressed several aspects of the registration process:

- The customer was not required to indicate “I agree” or its equivalent. Such an act, the court noted, notifies customers of the significance of their actions.¹⁶ Clicking “Done,” in contrast, carries no such obvious significance.¹⁷
- Customers registering through the app likely understood that it would connect them with drivers for future short-term, small-money transactions, an understanding reinforced by language displayed during the registration process, but they might not understand that, by registering, they were entering into a contractual relationship with Uber.¹⁸
- Although the third screen did state the customer was agreeing to Uber’s Terms & Conditions, the customer was not required to scroll through or link to the terms, and the statement about the consequences of registering was “oddly displayed” less prominently than other information on the screen.¹⁹
- The purpose of the third screen, as suggested by its title, was for the customer to enter payment information. Nothing about it conveyed to the customer that following the link would reveal an extensive set of terms to which the user was agreeing.²⁰
- The notice and hyperlink on the third screen might not be visible to the customer at all, depending on what payment method the customer entered.²¹

One day before the decision in *Kauders*, a trial court in Pennsylvania ruled similarly for substantially similar reasons.²² That court did make an additional important point: that the hyperlink to Uber’s terms did not have the typical appearance of a hyperlink, *i.e.*, blue underlined text.²³

Advice to Merchants and the Legal Counsel

Good advice has been available for a long time on how to design an online interface to obtain customer assent. Twenty

years ago, the Working Group on Electronic Contracting Practices, within the Electronic Commerce Subcommittee of the Cyberspace Law Committee of the Business Law Section of the ABA, offered 15 clear recommendations for ensuring assent through a clickwrap process.²⁴ The group then followed that with strategies for ensuring assent through a browsewrap process.²⁵ Nevertheless, because technologies and commercial practices have developed since those recommendations were made, and some merchants continue to experience difficulty in binding their customers to the merchant's standard terms, it might be useful to offer a few suggestions.

1. Require Express Assent

Clickwrap agreements are far more likely to be enforceable than are browsewrap or hybrid agreements. Accordingly, the merchant should require the customer to affirmatively assent to the merchant's terms. There are several, more specific implications of this suggestion.

- **Distinguish Assent from Registration or Payment.**

One lesson of the Uber decisions is clear: the process should be such that a reasonable customer would understand that the customer is assenting to the merchant's terms, not merely registering to use the merchant's services or providing personal or payment information. This might mean that the process the customer is asked to complete contains one step more than would be required if assent were combined with some other activity. Merchants often resist that because, they assert, every extra step decreases the portion of customers who complete the process. So the question becomes which is more important, a greater number of registered customers or greater assurance that the merchant's standard terms – including the limitations on liability – are part of the merchant's contracts with its customers? This is, of course, a business decision for the merchant to make. But transactional lawyers advising merchants should stress that separating the customer's assent to the merchant's terms from the customer's provision of personal or payment information is critical to ensuring that the customer has agreed to the merchant's standard terms.

- **Label Clearly.** The action seeking the customer's assent should be clearly labeled as such. A button with the words "I agree" or "I accept" is far better than a button that says "Done," "Next," or "Enter."²⁶

2. Make the Existence of and Access to the Standard Terms Conspicuous

Courts have made it clear when dealing with clickwrap, browsewrap, and hybrid processes that both the existence of the merchant's proffered terms and the means of accessing them must be conspicuous. This does not mean that the customer

needs to read the terms or even that the terms must be displayed in a dialog box through which the customer may or must scroll. A prominent hyperlink is sufficient. Again, however, more specific advice is possible.²⁷

- **Place the Hyperlink Close to Where the Customer Signifies Assent.** The hyperlink to the standard terms should be placed close to the button through which the customer signifies assent.

- **Identify the Hyperlink as a Hyperlink.** Most internet users understand that blue text, particularly blue underlined text, is likely to be a hyperlink.²⁸ Follow that convention. If the customer does not understand that the hyperlink to the merchant's standard terms is a hyperlink, then a court is unlikely to conclude that the customer had reasonable notice of the terms.

- **Avoid Clutter.** The hyperlink to the merchant's standard terms should not be near other hyperlinks or other distracting information. As difficult as it might be to find a needle in a haystack, it is far harder to find a specific needle in a haystack-size pile of other needles.

- **Avoid Double Clicks.** Because hyperlinked terms are enforceable only if a reasonable customer should have been aware of them, the more steps the customer must take to view the terms, the less likely a court is to treat the customer as having assented to them. In short, make all the merchant's terms available through a single hyperlink. While some courts have enforced terms that were accessible only by following a chain of two or more hyperlinks,²⁹ others have refused to charge customers with notice of terms that could be accessed only through multiple clicks.³⁰ This latter approach might be based in part on the reluctance of some courts to allow contracting parties to incorporate a separate agreement by reference absent clear evidence that the parties so intended.³¹

- **Remember that the Customer's Interface Can Affect the Appearance of the Terms.** When a merchant prints standard terms on paper, the merchant controls how those terms appear to anyone who receives the paper. But web pages look different depending on the device on which they are accessed and the settings on the device. A merchant's web page will often look different depending whether the customer accesses it using a large desktop monitor, a small laptop, or one of the various-sized smart phones. Moreover, on all of those devices, the customer can control the size of fonts. On top of that, the size and color of fonts is irrelevant to visually impaired customers who interact with the merchant's page through a text-to-speech application. Accordingly, when designing the web page or app, the merchant needs to take into account the fact that the customer's interface might affect how the terms appear, and hence whether they are conspicuous.

3. *Distinguish Between Making the Standard Terms Conspicuous and Making a Specific Term Conspicuous*

The cases on assent through clickwrap, browsewrap, and hybrid processes discuss whether the merchant's standard terms are sufficiently conspicuous that a reasonable customer ought to have noticed them. But some laws require that, to be effective, a specific term must be conspicuous. That is, the term must stand out from other terms in the agreement. For example, Article 2 of the U.C.C. requires that a written disclaimer of the implied warranty of merchantability be conspicuous.³² It is an open question whether any term accessible only by hyperlink can satisfy this standard if the customer never triggers the hyperlink.

On the one hand, it is certainly true that a term printed on paper – say in a larger font or different color from surrounding text, or in all capital letters – can be conspicuous even if the person to whom the paper is provided does not read it. And an online customer who chooses not to access a merchant's standard terms which are available only by hyperlink is very much like the customer who declines to read the terms printed on a written form. If such hyperlinked terms include a warranty disclaimer in a larger font, contrasting color, or all capital letters, it would seem that the law should treat that term as conspicuous.

On the other hand, having to follow a hyperlink in order to access a merchant's standard terms requires more effort than simply receiving a written form. Moreover, contrasting typeface on a written form is readily apparent to anyone briefly glancing at the form, at least if the form consists of only one page or the contrasting typeface is on either the first page of, or immediately above the signature line, on a multi-page form. But contrasting typeface in a hyperlinked, electronic document might require a substantial bit of scrolling before it is noticeable.

For example, the standard terms of the merchants mentioned at the beginning of this article – Amazon, Uber, Grubhub, Netflix, Bloomberg, and Apple – all include at least one term in all capital letters. But finding that term on my desktop computer required using the Page Down key between two and nine times.³³ Reaching that term from a smart phone would have required even more scrolling. Of course, many of these merchants are not selling goods and are not attempting to disclaim Article 2's implied warranty of merchantability. But Amazon is. A transactional lawyer should be careful before advising a merchant client that a disclaimer buried in hyperlinked terms satisfies the conspicuousness requirement of Article 2.

One way to address this would be to have two links from the main transaction page – one for General Terms and one for a Warranty Disclaimer – and have the customer expressly signify assent to both. It is doubtful that a merchant would want to draw that much attention to a disclaimer of warranties,

however, and many merchants might also balk at requiring the customer to take an additional action to complete a transaction. Another approach might be to have the warranty disclaimer as the first term displayed when a customer triggers the hyperlink to the standard terms. But merchants might also be reluctant to do that. Yet such reluctance would be telling. The goal underlying the conspicuousness requirement for a disclaimer of implied warranties is to change the buyer's reasonable expectations regarding the terms of the transaction.³⁴ If merchants are indeed unwilling to adopt these potential solutions or otherwise draw the customer's attention to warranty disclaimers, then their warranty disclaimers fail to satisfy the underlying objective of the conspicuousness requirement, and hence might be unenforceable.

4. *Keep Adequate Records*

Merchants frequently alter their standard terms. They also frequently revise their web sites, their apps, and their processes for obtaining customer assent. It is vital that they retain business records of the changes to the standard terms and also the processes used to obtain assent – including, for example, what the customer's screen would have shown during each stage of the process – so that, in the event of litigation, they can prove what the customer assented to.³⁵ In other words, the merchant needs to be able to show both what the customer saw (which, as noted above, might vary pending on the device the customer used) and what the customer did. Merchants who have failed to retain such records have had difficulty making the required showing, with the result that customers were not bound by the merchant's standard terms.³⁶

Conclusion

Transactional lawyers advising merchants often put significant effort into drafting standard terms for transactions between the merchants and their customers. But this effort might be wasted if the customers do not assent to – and hence are not bound by – those carefully drafted standard terms. To ensure that online customers do assent, transactional lawyers need to advise their merchant clients about the processes available for obtaining assent and perhaps work with the merchant's software developers to ensure that the process chosen will in fact work.

Stephen L. Sepinuck is a Professor at Gonzaga University School of Law.

Notes:

1. Another term common in standard agreements is a choice-of-law provision, see Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 *Akron L. Rev.*

[123](#), 127 (2008) (stating that “as a matter of fact, many, if not all, ‘wrap’ agreements contain a choice-of-law provision that subjects the rights and obligations of the parties to a specific law or legal system”). Each of the standard terms referenced *infra* in note 2 contains a choice-of-law provision: Amazon’s is Washington; Uber’s is California (except that the arbitration clause is governed by the user’s state of residence at the time the user assents to the agreement); GrubHub’s is New York; Netflix’s is Delaware; Bloomberg’s is New York; Apple’s is California.

2. Amazon’s [Conditions of Use](#) (dated May 3, 2021) include a disclaimer of implied warranties, a limit on the remedy for mis-described items to return of the item (presumably for a refund), a disclaimer of consequential damages, a choice of forum (state and federal courts in King County, Washington), and a waiver of the right to a jury trial. Uber’s [U.S. Terms of Use](#) (dated April 14, 2021) include a disclaimer of warranties and assumption of the risk, a disclaimer of consequential damages, and an arbitration clause that waives class actions. GrubHub’s [Terms of Use](#) (dated Dec. 14, 2020) include a disclaimer of warranties, a disclaimer of consequential damages, a limitation on liability to the amount the customer paid to GrubHub, an arbitration clause, and a waiver of class actions. Netflix’s [Terms of Use](#) (dated Jan. 1, 2021) include a disclaimer of all warranties, a disclaimer of consequential damages, and an arbitration clause that also waives class-wide proceedings. Bloomberg’s currently posted [Terms of Service](#) (undated) include a disclaimer of warranties, a disclaimer of consequential damages, a backup limitation of liability to the amount paid, and an arbitration clause with a waiver of class proceedings. Apple’s currently posted [Licensed Application End User Agreement](#) (undated) includes a disclaimer of warranties, a disclaimer of consequential damages, and a backup limitation of liability for personal injury to \$50.

3. See https://en.wikipedia.org/wiki/List_of_scandals_with_%22-gate%22_suffix.

4. See, e.g., *Applebaum v. Lyft, Inc.*, [263 F. Supp. 3d 454](#), 465–66 (S.D.N.Y. 2017); *Berkson v. Gogo LLC*, [97 F. Supp. 3d 359](#), 394–95 (E.D.N.Y. 2015).

5. See Restatement (Third) of the Law, Consumer Contracts, Tentative Draft, at 45–46 (April 18, 2019) (“courts routinely enforce clickwraps Out of a total of 92 cases, courts have enforced clickwraps in every case, absent fraud, unconscionability, or other intervening factors, such as insufficient notice”).

6. See *Nicosia v. Amazon*, [834 F.3d 220](#), 232 (2d Cir. 2016).

7. See Restatement (Third) of the Law, Consumer Contracts, Tentative Draft, at 48:

a comprehensive empirical analysis of all state and federal cases addressing the enforceability of

browsewraps in consumer transactions, starting with *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002)] in 2002 and ending with *Resorb Networks, Inc. v. YouNow.com*, 30 N.Y.S.3d 506 (N.Y. Sup. Ct. 2016) in April 2016, . . . reveals that browsewraps were enforced in all 13 cases in which the website included both a prominent statement of notice and conspicuous hyperlinks to the terms. Conversely, in 12 out of 13 cases in which the website lacked both a prominent statement of notice and conspicuous hyperlinks to the terms, courts refused to enforce the browsewraps on the basis of failure to provide sufficient notice.

See also *Wilson v. Huuuge, Inc.*, [944 F.3d 1212](#) (9th Cir. 2019) (declining to enforce a browsewrap agreement associated with a gaming app).

8. See *Nicosia v. Amazon*, [834 F.3d at 236](#) (concluding that reasonable minds could disagree about whether Amazon had provided reasonable notice of its terms and hence whether the customer was bound by the terms).

9. *Id.* But cf. *Nicosia v. Amazon*, [815 F. App’x 612](#) (2d Cir. 2020) (holding that even if the consumer was unaware of Amazon’s terms initially, after so many years in litigation, and after continuing to make purchases on Amazon over the years, the customer was now on notice of the terms and bound by them as a result, and assuming without deciding that the arbitration clause applied retroactively to the purchases at issue in the litigation because the plaintiff had forfeited any argument to the contrary).

10. See, e.g., *Colgate v. Juul Labs, Inc.*, [402 F. Supp. 3d 728](#), 763–66 (N.D. Cal. 2019) (referring to such a process as a “hybrid design” and concluding on the facts before it that the customer had not assented to the merchant’s terms).

11. [2021 WL 267853](#) (C.D. Cal. 2021), *appeal filed* (9th Cir. Feb. 23, 2021).

12. *Id.* at *3–4. The court’s opinion also included a screen shot of the Expedia site and compared it to screen shots reproduced in other cases.

13. *Id.* at *4.

14. [159 N.E.3d 1033](#) (Mass. 2021).

15. *Id.* at 1039–40.

16. *Id.* at 1050–51.

17. *Id.* at 1054.

18. *Id.* at 1051.

19. *Id.* at 1052.

20. *Id.* at 1053.

21. *Id.*

Prior to the decision in *Kauders*, the Court of Appeals for the First Circuit had applied Massachusetts law and ruled similarly in another case involving Uber. *See* Cullinane v. Uber Techs., Inc., [893 F.3d 53](#) (1st Cir. 2018). After the decision in *Kauders*, the First Circuit, again applying Massachusetts law, ruled differently in a case involving an individual who used an online platform to sign up to provide house cleaning services. Emmanuel v. Handy Techs., Inc., [992 F.3d 1](#) (1st Cir. 2021). The individual brought a class action alleging that she and other cleaners were employees to whom the company failed to provide the required minimum wage. The company moved to compel arbitration pursuant to the agreement allegedly created during the online registration process. The trial court granted the motion and the First Circuit affirmed.

The court distinguished *Kauders* by noting that Emmanuel had signified “Accept” at a time when her smart phone screen: (i) stated: “To continue, please accept the revised Independent Contractor Agreement”; and (ii) displayed a portion of the Agreement (the remainder of which could be viewed by scrolling). *Id.* at *9. The court also noted that, whereas the *Kauders* might not have understood that they were entering into an agreement with Uber, Emmanuel had, prior to using the app registration process, gone through various screening processes, including an online application, a telephone interview, a background check, and an in-person training session, and she was able to download the app only after receiving a PIN provided to her after she completed those steps. *Id.* at *10.

22. *Kemenosh v. Uber Technologies Inc.*, [2020 WL 254634](#), at *6 (Pa. Ct. Comm. Pleas 2021):

It is generally understood that Uber offers transportation in exchange for money. Therefore, the words “by creating an Uber account you are agreeing to the Terms of Service and Privacy Policy” convey that by creating an Uber account one is agreeing to pay money in exchange for transportation, and to the terms of a privacy policy. They do not convey an offer to arbitrate, or notify the user in any way that the offered Terms of Service contain a waiver of jury trial and an arbitration clause. Had [the customer] been required to open the hyperlink and scroll through the Terms of Service and Privacy Policy, which contained the arbitration agreement, there may have been an effective offer to arbitrate. Alternatively, if [the customer] had been required to check a box certifying that she had read and agreed to the Terms of Service and Privacy Policy, perhaps an offer to arbitrate would have been made. Or even if Uber had somewhere conveyed that [the customer] should read the Terms of Service . . . , an offer to arbitrate may have been properly conveyed. In this matter, however, Uber took none of these steps. While Uber's arbitration terms

were accessible if the user clicked through the “Terms of Service and Privacy Policy” link, the hyperlink contained no indication that it contained further essential terms other than the implicit agreement of offering transportation in exchange for money and a privacy policy.

23. *Id.*

24. *See* Christina L. Kunz, Maureen F. Del Duca, Heather Thayer, Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity Assent*, [57 BUS. LAW. 401](#) (2001) (hereinafter “*Click-Through Agreements*”).

25. *See* Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter, Jennifer Debrow, *Browse-wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, [59 Bus. Law. 279](#) (2003).

26. *See, e.g., Click-Through Agreements, supra* note 24, at 411–12; Applebaum v. Lyft, Inc., [263 F. Supp. 3d at 466](#).

27. *See* FTC, *.com Disclosures: How To Make Effective Disclosures In Digital Advertising* (March 2013) (available [here](#)).

28. *See, e.g.,* Whitt v. Prosper Funding LLC, [2015 WL 4254062](#), at *1, 4 (S.D.N.Y. 2015) (finding that the term “borrower registration agreement” in underlined and blue-shaded text was “conspicuously” rendered as a hyperlink); Fteja v. Facebook, Inc., [841 F. Supp. 2d 829](#), 835 (S.D.N.Y. 2012) (noting that underlining is an indication that the underlined text is a hyperlink). *But cf.* Applebaum v. Lyft, Inc., [263 F. Supp. 3d at 466](#) (rejecting the argument that a light blue color was sufficient to identify text as a hyperlink).

29. *See, e.g.,* Zamber v. American Airlines, Inc., [2020 WL 1445479](#) (S.D. Fla. 2020) (upholding the effectiveness of a forum-selection clause in a browsewrap agreement even though the customer needed to activate three hyperlinks to reach the clause). *See also* DeJohn v. The .TV Corp. Int'l, [245 F. Supp. 2d 913](#) (C.D. Ill. 2003) (enforcing a choice-of-law clause in a .TV Registration Services Agreement which was incorporated by reference in the hyperlinked agreement to which the plaintiff has signified assent).

30. *See, e.g.,* Compass iTech LLC v. eVestment All LLC, [2016 WL 10519027](#) (S.D. Fla. 2016) (although a customer signified assent to a data input agreement by clicking “Accept” on multiple occasions, that assent did not extend to terms accessible only by hyperlink from within the data input agreement).

31. *See, e.g.,* State ex rel. U-Haul Co. v. Zakaib, [752 S.E.2d 586](#), 598 (W. Va. 2013) (the terms in a referenced addendum were unenforceable):

To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

32. See U.C.C. § 2-316(2). See also *id.* § 1-201(b)(10) (defining “conspicuous”).

33. Specifically, I had to hit the Page Down key the following number of times on the web sites mentioned:

Amazon	4
Uber	9
GrubHub	8
Netflix	5
Bloomberg	5
Apple	2

34. See, generally, Scott J. Burnham, *Incorporating the Doctrine of Reasonable Expectations in Article 2*, [11 Duq. Bus. L.J. 217](#), 235–36 (2009).

35. See, e.g., [Click-Through Agreements](#), *supra* note 24, at 417.

36. See, e.g., *Snow v. Eventbrite Inc.*, [2020 WL 6135990](#) (N.D. Cal. 2020); *Nager v. Tesla Motors, Inc.*, [2019 WL 4168808](#) (D. Kan. 2019).



THE PEB GETS ACTIVE

Pursuant to an [agreement](#) between the Uniform Law Commission and the American Law Institute, the Permanent Editorial Board for the Uniform Commercial Code (the “PEB”) is charged with, among other things, “preparing and publishing supplemental Comments or Annotations to the Uniform Commercial Code . . . to reflect the correct interpretation of the Code.” Because the PEB works deliberately, it also tends to work slowly. It issued only one commentary in the almost five-year period from May 2014 through December 2018: [PEB Commentary No. 19](#) (April 11, 2017) (dealing with the Hague Securities Convention’s effect on the law governing indirectly held securities).

But since then, the PEB has been unusually active. It issued one commentary in 2019, two in 2020, and one already in 2021:

[PEB Commentary No. 20](#) (Jan. 24, 2019) (Consignments); [PEB Commentary No. 21](#) (March 11, 2020) (Use of the term “assignment” in Article 9);

[PEB Commentary No. 22](#) (Aug. 24, 2020) (Effect of a disposition under § 9-610 if the transferee does not act in good faith); and

[PEB Commentary No. 23](#) (Feb. 24, 2021) (Protected Series under the Uniform Protected Series Act)

Each of the first three of these commentaries disavows one or more wrongly decided judicial opinions affecting secured transactions. The last provides welcome guidance on how U.C.C. Article 9 applies to a protected series.

On March 4 of this year, the pace picked up even more, as the PEB released drafts of four additional commentaries:

[Role of § 1-305\(b\) in Supporting Enforcement and Obligations](#);

[Scope of Article 9 Choice-of-Law Rules Regarding Characterization of Transactions](#);

[Sections 9-203\(b\)\(2\) and 9-318](#); and

[Sections 9-309 and 9-322\(a\)\(1\)](#).

The last three of these are particularly relevant to transactional lawyers who plan and document secured transactions.

The draft commentary on choice of law seeks to make clear that the parties to a transaction governed by the UCC have the freedom to select the law that governs their rights with respect to the transaction, but not the law that governs the rights of third parties. This can be important. For example, in determining whether a domestic transaction structured as a lease of goods is in reality a sale with a retained security interest – and hence subject to U.C.C. Article 9 – the parties cannot avoid the issue by artfully choosing the law of Germany to govern, relying on the fact that German law would treat the transaction as a lease regardless of the economic realities of the deal. For further information on this topic, see Stephen L. Sepinuck, *What Choice Do I Have? – Choice-of-Law Clauses Governing Attachment of a Security Interest*, [10 The Transactional Lawyer 9](#) (June 2020).

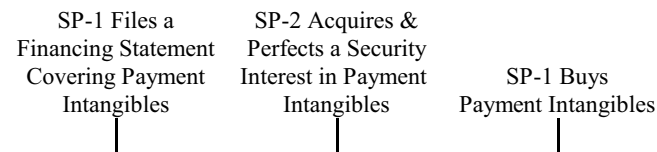
The remaining draft commentaries deal with an issue that has periodically bedeviled listers ever since revised Article 9 was adopted: what is the effect of pre-filing a financing statement as to receivables that are later sold? Consider the following scenario:

SP-1 Files a Financing Statement Covering Accounts	SP-2 Buys Accounts	Debtor Purports to Grant SP-1 a Security Interest in Accounts

The issue is whether SP-1 in fact acquires a security interest in the accounts previously sold to SP-2. One of the requirements

for attachment of a security interest is that the debtor has rights in the collateral or the power to convey rights, *see* § 9-203(b)(2), and the argument is that the debtor no longer had any such rights upon selling the accounts to SP-2. Nevertheless, the draft commentary on §§ 9-203(b) and 9-318 concludes SP-1 does acquire a security interest in the accounts. In essence, because SP-1 filed an otherwise proper financing statement covering accounts before SP-2 bought the accounts, the debtor retained the *power* to transfer rights in the accounts to SP-1 even though the debtor retained no *rights* in the accounts. The implication of this for transactional lawyers is clear. Search for and do not ignore filed financing statements; they effectively save a spot in the line of priority for the filer, even if the filer acquired no security interest at the time of filing.

Now consider this somewhat related scenario:



The draft commentary on §§ 9-309 and 9-322 concludes that even though SP-1's filed financing statement was unnecessary to perfect – because SP-1's interest was automatically perfected pursuant to § 9-309(3) – the financing statement nevertheless preserved SP-1's place in the priority line. Consequently, SP-1's interest has priority over SP-2's interest. Moreover, because SP-1 later bought the payment intangibles outright – rather than obtain a security interest in them to secure a loan – SP-1 acquired full ownership of the payment intangibles, leaving SP-2 with no interest in them. Again, the lesson for transactional lawyers is the same: search for and pay heed to filed financing statements. Absent the filing of a termination statement authorized by the filer, or execution of an intercreditor agreement, the SP-2s of the world cannot rely on having priority even if they are the first to obtain a security interest.

The comment period on the draft commentaries expired May 3. The PEB will, presumably, issue final versions later this year.



Recent Cases

SECURED TRANSACTIONS

Attachment Issues

In re Essential Financial Education, Inc.,

[2021 WL 1748202](#) (Bankr. N.D. Tex. 2021)

A security agreement that described the collateral as “all of the assets, including equipment, furniture, fixtures, and signs used by, at or in connection with, your Online Trading Academy Center and its related business” sufficiently described the equipment, furniture, fixtures, signs, and possibly the “proceeds of the Online Trading Academy Center,” but the security interest was unperfected because there was no filed financing statement. As such, the security interest was not a “valid lien” under the Uniform Fraudulent Transfer Act, and the debtor's transfers of the proceeds of the collateral to the secured party might be avoidable transfers.

In re Payroll Management, Inc.,

[2021 WL 2012645](#) (Bankr. N.D. Fla. 2021)

A security agreement describing the collateral as “all tangible and intangible property which is or may be used in the [debtor's] business . . . , including existing contracts and policies” did not cover the debtor's claim for damages arising from the *Deepwater Horizon* oil spill, which was a commercial tort claim, because such claims must be described with greater particularity. Even if the claim became a general intangible before the bankruptcy court approved a settlement agreement – when a class action settlement became final, the debtor did not opt out of the class, and the debtor submitted the necessary claim forms – the security agreement still did not cover the resulting right to payment because the phrase “intangible property” does not adequately describe “general intangibles.” Even if the debtor's right to payment was an existing contract when the security agreement was executed, the words in the collateral description, taken in context, indicate that the phrase “existing contracts and policies” referred only to insurance contracts.

In re JESCO Construction Corp.,

[2021 WL 1553980](#) (Bankr. S.D. Miss. 2021)

The grant of a security interest in up to \$600,000 of “net proceeds” of the debtor's pending litigation against British Petroleum did not create a security interest in the claim itself, merely in the proceeds of the claim. Because the claim was settled after the debtor's bankruptcy petition, § 552(a) of the Bankruptcy Code prevented the security interest from attaching. Even if the security interest had attached to the proceeds, the security interest would have been unperfected because the creditor failed to file a financing statement.

Perfection Issues*In re Wynn,*[627 B.R. 192](#) (Bankr. M.D. Ga. 2021)

A filed financing statement originally identifying the debtor as “Jerry W. Wynn,” instead of as “Wilson Jerry Wynn,” the name listed on the debtor’s driver’s license, was ineffective to perfect the security interest because a search under the debtor’s correct name would not have produced the filed financing statement. It did not matter that a certified search under the name “Wilson Wynn” would have produced the financing statement because a certified search includes more results than an search under the exact name discloses and is not the standard search done by the filing office. Although the secured party later amended the financing statement to include the debtor’s correct name, and thereby perfected its security interest, another secured party that had perfected in the interim had priority. It did not matter that the other secured party knew of the earlier security interest.

In re K&L Trailer Leasing, Inc.,[2021 WL 2013008](#) (Bankr. E.D. Tenn. 2021)

The bankruptcy trustee was not entitled to judgment on the pleadings in an action to determine the priority of a bank’s security interest in trailers because the bank’s security interest was perfected by filing as to the inventory of the original debtor, a used trailer seller, before the original debtor sold the trailers to related parties who knew of the security interest and used the trailers in a leasing business. The bank adequately alleged that the sales were not in the ordinary course of business, and therefore the related parties took subject to the bank’s perfected security interest. Although the current owner was not engaged in the business of selling trailers, that did not mean that the state certificate of title statute now controlled perfection. The focus is on the character of the collateral in the hands of the secured party’s debtor and obligor – in this case the original debtor – not on the character of the collateral in the hands of a transferee.

In re Leaver,[2021 WL 1235451](#) (Bankr. W.D. Wis. 2021)

A creditor that had a boarding lien on the debtor’s cattle, and which pursuant to a bankruptcy court-approved stipulation, retained its lien on the cattle despite releasing possession to the debtor, lost perfection. Upon releasing possession, the creditor lost its statutory lien. That was replaced by an Article 9 security interest, which properly attached because the debtor had authenticated the stipulation which adequately described the collateral as “animals in [the creditor’s] possession owned by [the debtor].” However, the security interest was not perfected because there was no basis for automatic perfection, no financing statement was filed, and nothing in the stipulation provided for perfection. Accordingly, a bank with a perfected security interest in all the debtor’s livestock now had priority in the cattle previously possessed by the creditor.

Priority Issues*Automotive Finance Corp. v. DZ Motors, LLC,*[2021 WL 1380605](#) (D.N.J. 2021)

A floor plan financier that had a security interest in an automobile dealer’s inventory and a filed financing statement covering that inventory had a perfected security interest in the luxury vehicle that the dealership purchased and continuously listed for sale on its website even though the owner of the dealership might have treated the car as his personal vehicle and at some point the vehicle was equipped with personal license plates rather than dealer plates. The dealership submitted seven requests to the financier to extend the due date on the loan for the vehicle, each of which included photographic evidence that the vehicle was still available for sale. The vehicle did not stop being inventory of the dealership when it was fraudulently sold to the wife of the owner, in a transaction financed by a credit union, because the dealership continued to list the vehicle for sale, the dealership made the payments of the credit union, and when the vehicle was later sold, the buyer made payment to the dealership, not to the wife. The financier’s security interest survived that fraudulent sale because neither the owner nor his wife was a buyer in ordinary course of business. The financier’s security interest also remained perfected and had priority over the security interest of the credit union, which committed conversion by refusing to remit the proceeds to the financier. However, the credit union was not liable for conversion for retaining the insurance proceeds received after another financed vehicle was totaled in an accident because the credit union was listed as the loss payee. The insurance payment was not proceeds of the vehicle for the financier because under § 9-102(a)(64)(E) proceeds includes insurance only “to the extent payable to the debtor or the secured party.”

In re EAS Graceland, LLC,[2021 WL 1941658](#) (Bankr. W.D. Tenn. 2021)

A law firm that received a retainer from the debtor took the funds free of any security interest in a deposit account that a secured lender might have had because the firm did not act in collusion with the debtor to violate the secured lender’s rights.

Enforcement Issues*CapitalPlus Constr. Servs., LLC v. Blucor Contracting, Inc.,*[2021 WL 1723180](#) (E.D. Tenn. 2021)

A general contractor whose contract with a subcontractor required the general contractor to pay within 90 days after verifying the goods were on hand, and which signed and delivered to an accounts financier an acknowledgment that the goods had been inspected and accepted, was not liable to the financier to which the account had been assigned because the financier had no contract with the general contractor. The financier did not seek recovery as the assignee of the account but on a theory of breach of contract between it and the general

contractor. Although the general contractor agreed not to assert against the financier any defenses it might have against the subcontractor, there was no consideration for this promise and no mutuality of obligation between the financier and the general contractor because the financier did not promise to fund the subcontractor in return for the general contractor's promises. However, the general contractor was liable to the financier under the doctrine of promissory estoppel. Although the financier instructed the subcontractor to stop delivering goods to the general contractor, the general contractor had no claim against the financier for intentional interference with a business relationship because the financier had a security interest in the subcontractor's inventory and it was simply protecting its security interest.

Liability Issues

In re University Directories, LLC,

[2021 WL 1963936](#) (Bankr. M.D. Fla. 2021)

A bankruptcy trustee, who held a secured promissory note issued by the buyer of the debtor's assets, stated a claim for successor liability as a "mere continuation" against the entity that later purchased the buyer's assets at a UCC foreclosure sale because the sole manager and member of the buyer was also the sole manager and member of the subsequent purchaser. The trustee did not state a cause of action for tortious interference with contract, civil conspiracy, negligent misrepresentation, or fraud against the buyer, subsequent purchaser, or the sole member for conduct relating to the transaction by which the later buyer obtained from a bank secured financing that was contractually superior to the trustee's security interest, because the agreement with the trustee expressly permitted such financing by a bona fide arm's length third party, which the bank was.

BANKRUPTCY

In re Reviss,

[2021 WL 1821873](#) (Bankr. E.D.N.Y. 2021)

Because New York law does not permit assignment of a cause of action for personal injury, even though it does permit assignment of the proceeds of such a claim, a litigation finance company that loaned the debtor \$20,000 in return for an assignment of a portion of the proceeds of his personal injury claim could not acquire an equitable lien until the claim was settled, which occurred post-petition. Consequently, the debtor's claim was property of the estate and the debtor was entitled to claim an exemption in the settlement proceeds.

In re Fencepost Productions, Inc.,

[2021 WL 1259691](#) (Bankr. D. Kan. 2021)

The portion of a prepetition intercreditor agreement subordinating a creditor's debt to a bank was enforceable in

bankruptcy. The portion authorizing the bank to vote the subordinated creditor's claim in the debtor's bankruptcy was not enforceable; the agreement did not appoint the bank as the agent of the creditor because the bank had no fiduciary duty to act at the direction of the creditor and would instead be acting for its own benefit. However, because, due to the intercreditor agreement, there were no conceivable circumstances under which the creditor would receive any distribution from the estate, and thus the creditor would be litigating issues affecting the rights of third parties, the creditor lacked prudential standing to participate in the case.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

Fallang Family Ltd. P'Ship v. Privcap Cos.,

[2021 WL 1115388](#) (Fla. Ct. App. 2021)

An agreement that referred to "AAA rules and procedure" did not clearly and unmistakably supplant the court's power to decide what was arbitrable because the agreement did not attach any portions of the AAA rules, did not identify which subject-area version of AAA rules applied, and the AAA Commercial Arbitration Rules, had they been specified, authorize the arbitrator to decide issues of arbitrability but do not grant the arbitrator exclusive authority to do so.

KLS Diversified Master Fund, L.P. v. McDevitt,

[2021 WL 1240325](#) (S.D.N.Y. 2021)

Because a promissory note provided for interest up until the maturity date, but did not provide for interest after maturity, a guarantor was liable for interest at the contractual rate of 4% only until maturity. Thereafter, the guarantor was liable for interest at the statutory prejudgment rate of 9%.



Edited By:

[Stephen L. Sepinuck](#)

Professor

Gonzaga University School of Law

[Scott J. Burnham](#)

Professor Emeritus

Gonzaga University School of Law

John F. Hilson

Former Professor

UCLA Law School

COMMERCIAL LAW AMICUS INITIATIVE UPDATE

In April, the Commercial Law Amicus Initiative (“CLAI”) filed an *amicus curiae* brief with the Ohio Court of Appeals in the case of *The Cortland Savings and Banking Co. v. Platinum Funding Group, Ltd.* The brief, authored by Professor Stephen L. Sepinuck (Gonzaga University School of Law) with the assistance of third-year student Keith Opsal and second-year student Ian Brookwell, explains that there is no distinction between a security interest in a deposit account and a security interest in the “funds in” a deposit account. Accordingly, and contrary to the trial court ruling appealed from, a transferee of funds from a collateralized deposit account who does not act in collusion with the debtor to violate the secured party’s rights, and who therefore takes free of a security interest in the deposit account pursuant to § 9-332(b), does not somehow take subject to a security interest in the funds. Anyone who wants to review the brief may obtain a copy at CLAI’s website: amicusinitiative.org.

If you are aware of a case that you think CLAI should participate in as amicus curiae, please contact any of CLAI’s officers:

Stephen L. Sepinuck	President & Executive Director	sepinuck@gonzaga.edu
Kristen D. Adams	Vice President	adams@law.stetson.edu
Jennifer S. Martin	Treasurer & Secretary	jmartin@stu.edu



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