Browser Beware: Second Circuit Sizes Up 'Reasonable Smartphone User' in Uber Dispute"

by Steve Kramarsky

In the summer of 2017, over 20,000 people in the United Kingdom agreed to perform unpaid community service—tasks such as picking up animal waste from local parks, cleaning portable toilets, providing hugs to stray cats and dogs, and painting snail shells. Notably, however, this outpouring of civic generosity appears to have been entirely inadvertent. It occurred when public Wi-Fi provider Purple briefly inserted a new clause into its usual terms and conditions, requiring users to do 1,000 hours of community service in exchange for free Wi-Fi. Thousands of users took the deal, almost certainly without reading it. Kat Hall, "Wi-Fi Firm Purple Sneaks 'Community Service' Clause Into Its T&Cs," The Register (July 13, 2017). Purple does not intend to enforce the provision; it pulled the prank to get some publicity and to make the point that people don't actually read online terms and conditions. Though that is certainly true, under the right circumstances these contracts can nevertheless be enforceable.

It may seem odd that you can be bound by a contract you haven't even read, but that is the law in most states, including New York. Offerees are generally presumed, as a matter of law, to know and agree to the terms of the offers they accept—even when they have only "passively" accepted them. Passive acceptance can include using a website or signing up for a service that has mandatory terms or use, but does not include an explicit "I ACCEPT" button. In such cases, where users have neither read the terms nor explicitly accepted them, the Second Circuit has held, "the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue. In other words, where there is no actual notice of the term, an offeree is still bound by the provision if he or she is on inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent." Schnabel v. Trilegiant, 697 F.3d 110, 120 (2d Cir. 2012); see also Stephen M. Kramarsky, "Click Here to Waive a Jury Trial: 'Nicosia v. Amazon'," N.Y.L.J. (March 17, 2015).

Inquiry notice cases are tricky and can turn on their specific facts. But they are also essential to the function of the modern Internet economy. Almost all online services are governed by terms of service, almost no one reads them, and many of them include material obligations and waivers—including agreements to arbitrate disputes, which are often a source of contention. In a recent case in the Southern District of New York against ride-hailing company Uber and its CEO, the court denied Uber's motion to compel arbitration, holding that its sign-up process did not adequately notify users of its terms of service (which contained the arbitration provision). Meyer v. Kalanick, 200 F. Supp. 3d 408 (S.D.N.Y. 2016). The Second Circuit's review and vacatur of that decision examines these issues in the context of the "reasonable smartphone user," and it is worth a closer look.

'Meyer v. Uber'

In August 2017, the Second Circuit decided Meyer v. Uber Technologies, Nos. 16-2750-cv, 16-2752-cv, 2017 WL 3526682 (2d Cir. Aug. 17, 2017). The appeal originated from a decision by Judge Jed Rakoff in a federal class action lawsuit brought by an Uber user who alleged that the company was fixing ride prices in violation of the Sherman Act and New York's Donnelly Act. Uber and co-founder Travis Kalanick moved to compel arbitration under the company's Terms of Service, which contained a mandatory-arbitration clause and a class action waiver. Judge Rakoff denied the motion and, in a thoughtful opinion, explained that the court could not enforce the arbitration clause because the plaintiff and Uber had never formed an agreement to arbitrate.

Uber and Kalanick appealed. Meanwhile, Judge Rakoff stayed the action, noting "the need for further appellate clarification of what constitutes adequate consent to so-called 'clickwrap,' 'browsewrap,' and other such website agreements." Meyer v. Kalanick, 203 F. Supp. 3d 393, 396 (S.D.N.Y. 2016). The Second Circuit's resolution of the issue and its potential impact drew widespread attention, with commentators and amici curiae weighing in to express a wide variety of views.

Uber's App and Sign-up

Uber provides a smartphone app that permits users to hail rides. When users run the Uber app for the first time, they see a screen with a button that says "Register." Upon clicking that button, they are taken to a registration screen that prompts them to enter some basic information—name, email address, phone number, password—and then click "Next." Users are then taken to another screen, labeled "Payment," on which they either enter their credit card information or set up payments with third-party payment services PayPal or Google Wallet.

At the bottom of the payment screen, there is a button that says "REGISTER." Directly under the button is text saying "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." The text is black except for the capitalized words, which are a bright blue, underlined hyperlink. When clicked, the linked words take the user to a third screen that displays a scrollable version of Uber's current Terms of Service and Privacy Policy. Located within the Terms of Service, on the third screen, there is a section titled "Dispute Resolution" that contains the mandatory-arbitration clause and class-action waiver. Plaintiff did not recall seeing the link to the Terms of Service or clicking on it, and he declared he did not read them, but the parties agreed that he must have seen this screen in order to register and use the service.

Second Circuit's Decision

The Second Circuit reviewed the district court's conclusions de novo, because there were no disputed issues of fact and the district court's decision had been made as a matter of law.

The court began by framing the fundamental question: Under ordinary principles of contract law, did the parties form an agreement by mutually manifesting their assent to the relevant arbitration terms?1 This requires that the parties receive notice of the terms and provide objective indications of their assent to them. In cases like this, where a party did not actually read the terms (at least for purposes of the motion), the question is whether under the circumstances "a reasonably prudent user would be on inquiry notice of the terms." Meyer, 2017 WL 3526682, at *5.

On the web, these contract-formation concepts are so central and so familiar that courts have developed legal jargon around them: "clickwrap" and "browsewrap" (by lexical analogy with the "shrinkwrap agreements" that users accept by opening a physical software package) describe ways that websites attempt to form binding contracts with their visitors. Clickwrap agreements require users to "affirmatively assent[] to the terms of agreement by clicking 'I agree.'" Browsewrap agreements do not—the user accepts the agreements simply by browsing the site or using the service. Id. (citing Fteja v. Facebook, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) and Juliet M. Moringiello, "Signals, Assent and Internet Contracting," 57 Rutgers L. Rev. 1307, 1318 (2005)). Courts will generally enforce the former, but are more skeptical of the latter.

Though ubiquitous, the clickwrap and browsewrap dichotomy is not always useful, as the court here recognized. In this case, for example, Uber's registration process is not a browsewrap system (because users have to affirmatively click on a button to proceed), but it is also not a pure clickwrap because the button says "Register," not "I Agree," and the terms are behind a hyperlink positioned after the "Register" button. Considering these facts, the question for the court was one of reasonable inquiry: Was the notice of the arbitration provision reasonably conspicuous, and the manifestation of assent unambiguous? Unsurprisingly, the court has seen these cases before, and it found guidance in precedents such as Schnabel v. Trilegiant, 697 F.3d 110 (2012), and Nicosia v. Amazon.com, 834 F.3d 220 (2016).

The court first addressed whether Uber had provided reasonably conspicuous notice of its terms. With the facts undisputed, the court examined this objective standard from "the perspective of a reasonably prudent smartphone user." Meyer, 2017 WL 3526682, at *7 (citing Schnabel, 697 F.3d at 124). In support, the court quoted recent Supreme Court opinions acknowledging the ubiquity of smartphones, and also cited a non-partisan think tank's report documenting the prevalence of smartphones and their common uses. (Though unacknowledged by the opinion, that report came from an industry amicus brief, in which it and other studies were cited as support for reversal. See Brief of Amici Curiae Internet Association and Consumer Technology Association, Urging Reversal at 5-9, Meyer v. Kalanick(Nos. 16-2750 (L), 16-2752), 2016 WL 6575758, at *5-9.)

A reasonably prudent smartphone user, the court concluded, would be familiar with using an app, recognizing a hyperlink, and entering into a contract using a smartphone. With these assumptions, the court evaluated the design of Uber's payment page, which it found to be uncluttered and visually clear due to the high contrast of its text. It even examined actual size screenshots, to ensure that the text was readable

on plaintiff's Samsung Galaxy S5 phone. Finally, the court reasoned that consumers were accustomed to having terms presented to them during initial purchases or enrollments, and therefore a reasonable smartphone user would understand that Uber's liked-to terms were connected to the creation of a user account—even absent an "I Agree" button.

The court concluded that there was "ample evidence that a reasonable user would be on inquiry notice of the terms, and the spatial and temporal coupling of the terms with the registration button 'indicate[d] to the customer that he or she is … employing such services subject to additional terms and conditions that may one day affect him or her." Meyer, 2017 WL 3526682, at *9 (quoting Schnabel, 687 F.3d at 127) (alterations in original). There was notice, there was assent, and therefore there was a contract.

Trend Towards Enforceability

Across jurisdictions, there has been a flood of cases addressing online contract formation; at least one commentator has noted that there may be too many to keep up with. "Anarchy Has Ensued In Courts' Handling of Online Contract Formation (Round Up Post)," Technology & Marketing Law Blog (Aug. 30, 2016). Although individual opinions may attempt to provide guidance, there is substantial uncertainty about which common online commercial practices are sufficient to form a contract in a given jurisdiction, and which are just window-dressing.

In the Second Circuit, however, the opinions have been more considered and more stable. Where the parties are acting in good faith and there is no effort to hide the ball, there appears to a trend towards enforceability. First in Nicosia, then in Meyer (both authored by Judge Denny Chin), the court held that consumers will be judged by a standard of technological competence. The public is presumed to be familiar with the internet and the commercial transactions that take place on it, regardless of whether a particular litigant actually read the terms at issue, let alone understood them. How these presumptions evolve over time, and where they end up, is always uncertain. But for now, browser beware.

Endnotes:

1. Both the district court and the circuit held that California state law of contract formation governed the dispute, but that there was no material difference between California and New York law on this issue. The Second Circuit relied heavily on precedent applying New York law.

This article first appeared in the *New York Law Journal* on September 18, 2017.