



TL;DR

Key Developments and Trends in Internet Law

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Topics

- I. The Communications Decency Act
- II. Dark Patterns
- III. Copyright
- IV. Computer Fraud and Abuse Act
- V. Online Contract Formation

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How the CDA Reduces Risk

The Communications Decency Act, 47 U.S.C. § 230

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected

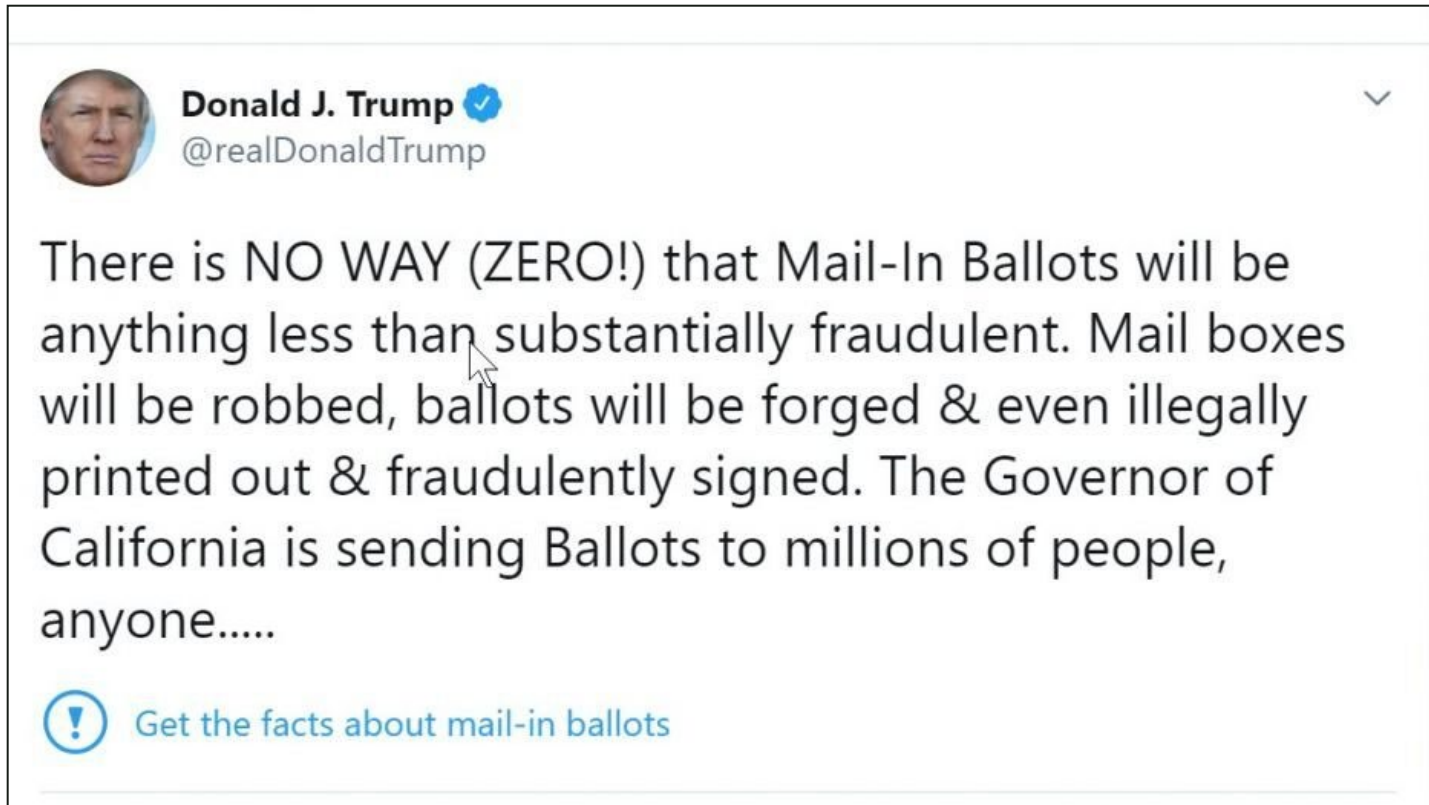
How the CDA Reduces Risk

Section 230(c)(1)—Publisher Treatment

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. **Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.**

Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)

Recent Developments



Limiting to CDA: Executive Order

- Executive Order 13925, “Preventing Online Censorship” (May 28, 2020)
 - “[T]he policy of the United States” is to “ensure that” the CDA “is not distorted to provide liability protection for online platforms that ... stifle viewpoints with which they disagree.”
 - A service provider’s actions are not “taken in good faith” under Section 230(c)(2), if those actions are either: (a) “deceptive, pretextual, or inconsistent with” the provider’s terms of service; or (b) “taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard.”
 - If a service provider “restricts access to content” in a way that is not protected by Section 230(c)(2), it “may also not be able to claim protection under” Section 230(c)(1)
 - Orders: 1) federal departments must ensure application of CDA properly reflects policy; 2) review by Attorney General; 3) proposed rulemaking by FCC, NTIA; 4) limiting federal spending on offending platforms; 5) FTC review of “deceptive acts”

Limiting the CDA: Federal Legislation

- Over two dozen Section 230 reform/repeal bills introduced in 116th Congress.
 - Few got hearings. None passed either chamber.
 - “Ending Support for Internet Censorship Act” (Hawley, 2019)
 - “Platform Accountability and Consumer Transparency Act” (Thune, Schatz, 2020)
- Similar trend in this Congress
 - SAFE Tech Act (Warner, Hirono, Klobuchar, 2021)
 - Justice Against Malicious Algorithms Act (Pallone, 2021)



Limiting the CDA: State Legislation

- Florida SB 7072 (May 2021)
 - Bars (certain) platforms from de-platforming or removing posts from political candidates based in Florida—among other things
 - Preliminarily enjoined (July 2021) for violating First Am. and Section 230(c)(1)
- Texas HB 20 (Sept. 2021)
 - Prohibits social media cos. over a certain size from “censor[ing]” a user based on viewpoint.
 - Allows private and AG lawsuits
 - No exceptions, e.g., for Holocaust denial
 - Preliminarily enjoined (Dec. 2021) for violating First Am.



Limiting the CDA: Courts

- Enigma v. Malwarebytes
 - 9th Cir. holds 230(c)(2) does not apply for blocking software where there is allegation that decision was done out of anti-competitive malice, even if other good faith reasons apply.
 - Thomas, J. cert. statement (Oct. 2020)
 - Agrees with denial of cert., but calls into question interpretation of 230(c)(1) and *Zeran*
 - Suggests 230(c)(1) should not apply where platform “distributes” content it knows is illegal
 - Suggests lower bar for when content should be considered the platform’s rather than the user (e.g., if platform is involved in editing/selecting).

Limiting the CDA: Courts

- Biden v. Knight First Amend. Institute (2021)
 - Thomas, J. concurrence
 - “[S]ome commentators have suggested that immunity provisions like § 230 could potentially violate the First Amendment to the extent those provisions preempt state laws that protect speech from private censorship. According to that argument, when a State creates a private right and a federal statute preempts that state law, ‘the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.’”
 - Discusses why “the similarities between some digital platforms and common carries . . . may give legislators strong arguments for similarly regulating digital platforms.”

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Dark Patterns

What are dark patterns?

“[A] user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice...” Cal. Civ. Code 1798.140; Colo. SB 190 § 6-1-1303 (9)

“Features of interface design crafted to trick users into doing things that they might not want to do, but which benefit the business in question.” (Norwegian Consumer Council)

“User interface design choices that benefit an online service by coercing, steering, or deceiving users into making unintended and potentially harmful decisions” (Mathur 2019 (Princeton University Study))

Dark Patterns

Fake countdown timers



Dark Patterns

Misdirection

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Dark Patterns

Obscured renewing subscription

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Item No. M09559

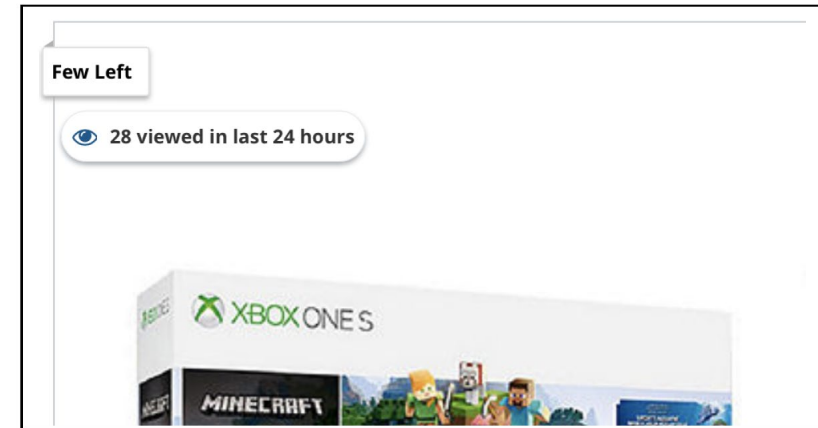
Item Description

Luscious Chardonnay ADD-ON
Item #: M09559 - 12 btls

WSJwine 1 Year Advantage Delivery Membership
Item #: 15245UL

Dark Patterns

- **Fake activity messages**
- **Messages indicating low stock or high demand**
- **Obstruction—making sign up easy and cancellation hard**



Dark Patterns

2019 Princeton
University study of
53,000 product pages
from 11,000 shopping
websites found 11%
use dark patterns to
exploit shoppers

arXiv:1907.07032v2 [cs.HC] 20 Sep 2019

Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites

ARUNESH MATHUR, Princeton University, USA
GUNES ACAR, Princeton University, USA
MICHAEL J. FRIEDMAN, Princeton University, USA
ELENA LUCHERINI, Princeton University, USA
JONATHAN MAYER, Princeton University, USA
MARSHINI CHETTY, University of Chicago, USA
ARVIND NARAYANAN, Princeton University, USA

Dark patterns are user interface design choices that benefit an online service by coercing, steering, or deceiving users into making unintended and potentially harmful decisions. We present automated techniques that enable experts to identify dark patterns on a large set of websites. Using these techniques, we study shopping websites, which often use dark patterns to influence users into making more purchases or disclosing more information than they would otherwise. Analyzing ~53K product pages from ~11K shopping websites, we discover 1,813 dark pattern instances, together representing 15 types and 7 broader categories. We examine these dark patterns for deceptive practices, and find 183 websites that engage in such practices. We also uncover 22 third-party entities that offer dark patterns as a turnkey solution. Finally, we develop a taxonomy of dark pattern characteristics that describes the underlying influence of the dark patterns and their potential harm on user decision-making. Based on our findings, we make recommendations for stakeholders including researchers and regulators to study, mitigate, and minimize the use of these patterns.

CCS Concepts: • **Human-centered computing** → **Empirical studies in HCI: HCI theory, concepts and models**; • **Social and professional topics** → **Consumer products policy**; • **Information systems** → **Browsers**.

Additional Key Words and Phrases: Dark Patterns; Consumer Protection; Deceptive Content; Nudging; Manipulation

ACM Reference Format:

Arunesh Mathur, Gunes Acar, Michael J. Friedman, Elena Lucherini, Jonathan Mayer, Marshini Chetty, and Arvind Narayanan. 2019. Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites. *Proc. ACM Hum.-Comput. Interact.* 3, CSCW, Article 81 (November 2019), 32 pages. <https://doi.org/10.1145/3359183>

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<https://doi.org/10.1145/3359183>

Dark Patterns



Samuel Levine, Director,
Bureau of Consumer
Protection, FTC



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

“Firms that deploy dark patterns and other dirty tricks should take notice.” (Oct. 28, 2021)

Dark Patterns



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Enforcement Policy Statement (October 28, 2021)

Disclose clearly and conspicuously all material terms of the product or service, including how much it costs, deadlines by which the consumer must act to stop further charges, the amount and frequency of such charges, how to cancel, and information about the product or service itself that is needed to stop consumers from being deceived about the characteristics of the product or service. The statement provides detail on what clear and conspicuous means, particularly noting that the information must be provided upfront when the consumer first sees the offer and generally as prominent as the deal offer itself.

Obtain the consumer's express informed consent before charging them for a product or services. This includes obtaining the consumer's acceptance of the negative option feature separately from other portions of the entire transaction, not including information that interferes with, detracts from, contradicts, or otherwise undermines the consumer's ability to provide their express informed consent.

Provide easy and simple cancellation to the consumer. Marketers should provide cancellation mechanisms that are at least as easy to use as the method the consumer used to buy the product or service in the first place.

Dark Patterns



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC enforcement action against Age of Learning, Inc.

- ABCmouse misrepresented its cancellation terms
- Made it difficult for consumers to cancel their memberships
- \$10 million paid to settle

The screenshot shows a promotional banner for ABCmouse with a yellow ribbon icon and a green box stating "Special Offer 38% OFF Annual Membership!". Below this, a price tag shows "\$59⁹⁵ for 12 Months" with a checkmark icon. A "Payment Option" section offers "4 equal monthly installments of \$19⁷⁵ (Save 17%)". A link "Click Here" is provided for "Is this a gift?". Below the banner is a blue box with a cartoon girl and text: "In a recent study surveying more than 5,000 parents who use ABCmouse.com with their children, over 85% reported a significant positive impact on their children's learning." At the bottom of the banner are three award medals and the text "Award-Winning Curriculum!".

The "Easy Enrollment!" form is divided into three steps:

- 1 Create Your Family Account**
Fields: Email, Confirm Email, Password, Confirm Password.
- 2 Enter Your Payment Information**
Options: VISA, MasterCard, PayPal, Pay with Amazon.
Fields: Cardholder Name, Credit Card Number, Expiration Date (MM / YYYY), CVV, Billing Zip/Postal Code (with a note for international cards), Phone Number (Optional, but recommended).
- 3** I agree to the [Terms & Conditions](#)

Additional text in the form includes "Easy Cancellation: If your family does not absolutely love ABCmouse, you can cancel at any time." and "Your information is safe and protected." A blue "Submit" button is at the bottom right.

Dark Patterns

AB 390 (October 2021)

Strengthens protections under California's Auto Renewal Law by ensuring that consumers can cancel automatic renewal and continuous service subscriptions online.

Cal. Consumer Privacy Act (CCPA) regulations (Cal. Code Regs. Tit 11, Div. 1, Chp. 20, Section 999.315(h))

Ban the use of dark patterns to subvert or impair the process for consumers to opt out of the sale of personal information

Cal. Privacy Rights Act (takes effect January 1, 2023)

“Consent obtained through dark patterns does not constitute consent.”
Dark patterns are “a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice...” Cal. Civ. Code 1798.140(j) and (l)



Dark Patterns

Colorado Privacy Act

- Takes effect on July 1, 2023
- No consent obtained through dark patterns, meaning interfaces “designed or manipulated with the substantial effect of subverting user autonomy, decision making or choice.”
- No private right of action; enforcement via state AG and district attorneys



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Copyright small claims

Von Der Au v. Imber,

2021 WL 1131719 (W.D. Tex.
Mar. 24, 2021)

- Defense of fair use rejected;
- Summary judgment granted on liability, damages TBD
- **“The value of a license to use the Photograph is approximately \$900.”**



Copyright small claims

- Court may shift fees in considering “frivolousness, motivation, objective unreasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence.”

Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. 197, 197 (2016)

Copyright Alternative in Small-Claims Enforcement Act

Key provisions

- Creates Copyright Claims Board to hear small copyright cases
- Heard by panel of three Copyright Office members and two attorneys
- Limited to written discovery
- Limited review
- ***Faster, cheaper, easier***

SEC. 212. COPYRIGHT SMALL CLAIMS.

(a) SHORT TITLE.—This section may be cited as the “Copyright Alternative in Small-Claims Enforcement Act of 2020” or the “CASE Act of 2020”.

“§ 1502. Copyright Claims Board

“(a) IN GENERAL.—There is established in the Copyright Office the Copyright Claims Board, which shall serve as an alternative forum in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work, as provided in this chapter.

Copyright Alternative in Small-Claims Enforcement Act

Key limitations

- Caps on damages
 - \$30,000 limit per proceeding
 - \$15,000 limit per work
- Proposed annual limits to protect against abusive conduct
 - 10 proceeding cap by any party
 - 40 proceeding cap by any attorney
- **Notice and opt-out ability required**

SEC. 212. COPYRIGHT SMALL CLAIMS.

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“Whoever intentionally accesses a computer ***without authorization*** or ***exceeds authorized access***, and thereby obtains information” from a “protected computer” violates the CFAA.

18 U.S.C. § 1030(a)(2)

CFAA: “Exceeds Authorized Access” Circuit Split

Broad Reading

- First, Fifth, Seventh, Eleventh Circuits

Narrow Reading

- Second, Fourth, Ninth Circuits

CFAA: “Exceeds Authorized Access” Van Buren v. US

No. 19-____

IN THE
Supreme Court of the United States

NATHAN VAN BUREN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

CFAA: “Exceeds Authorized Access” Van Buren v. US

QUESTION PRESENTED

Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.

Van Buren v. United States (June 3, 2021)

Adopts the Narrow Reading

- An individual who has authorization to access a database but exceeds the scope of permissible access **does not violate** Section 1030(a)(2) of the CFAA

Van Buren v. United States (June 3, 2021)

“This provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them.”

CFAA: “Without Authorization” LinkedIn v. HiQ

No. 19-

IN THE
Supreme Court of the United States

LINKEDIN CORPORATION,

Petitioner,

v.

HIQ LABS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CFAA: “Without Authorization” LinkedIn v. HiQ

MONDAY, JUNE 14, 2021

CERTIORARI -- SUMMARY DISPOSITIONS

19-1116

LINKEDIN CORPORATION V. HIQ LABS, INC.

The motion of Electronic Privacy Information Center for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Van Buren v. United States*, 593 U. S. ____ (2021).

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Formation

Guiding principles:

- Notice
 - Actual or Constructive
 - Conspicuous **notice** that user is entering into a contract
 - Conspicuous **notice** of the terms

- Assent
 - Manifestation of **assent**

Clickwrap



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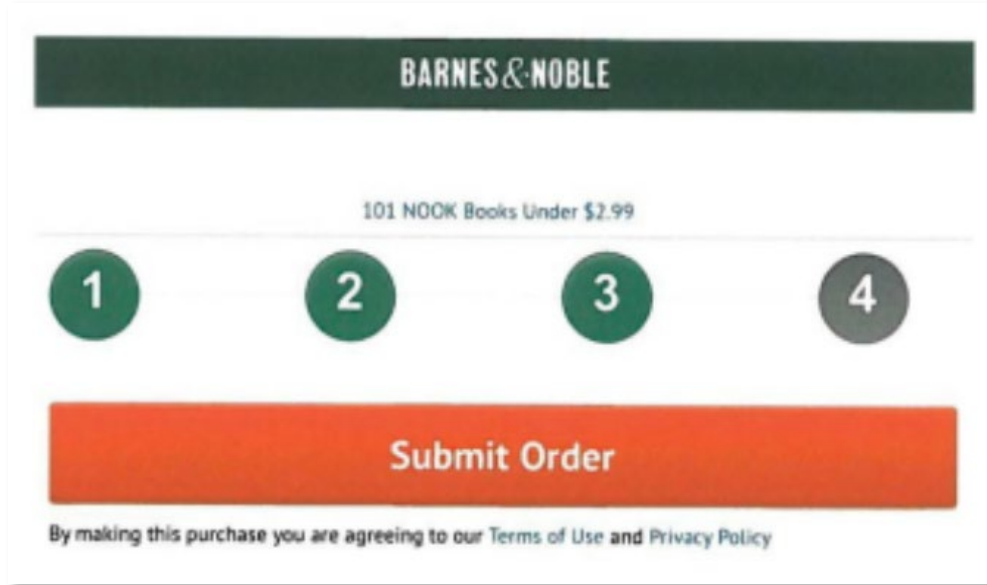
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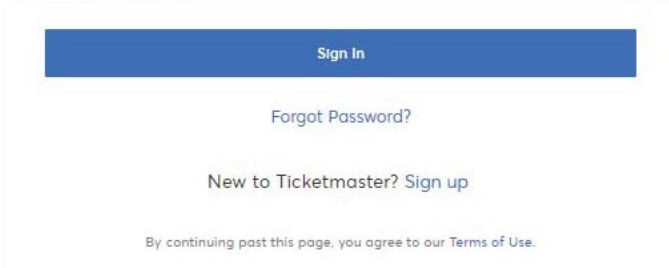
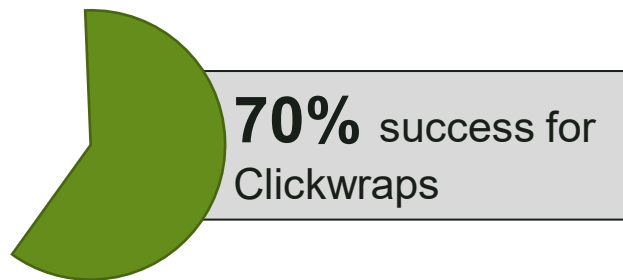
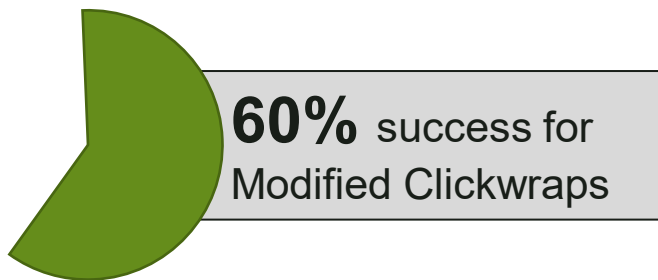
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Modified clickwrap



Inquiry remains highly fact bound



Recent Caselaw

Contract formation – modified clickwrap

ALLEN LEE, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

TICKETMASTER L.L.C., a Virginia corporation; LIVE NATION ENTERTAINMENT, INC., a Delaware corporation,

Defendants-Appellees.

No. 19-15673

D.C. No. 3:18-cv-05987-VC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Submitted June 10, 2020**
San Francisco, California

Before: THOMAS, Chief Judge, and SCHROEDER and BUMATAY, Circuit Judges.

ANDREW DOHRMANN; et al.,

Plaintiffs-Appellees,

v.

INTUIT, INC.,

Defendant-Appellant,

and

H&R BLOCK, INC.; et al.,

Defendants.

No. 20-15466

D.C. No. 3:19-cv-02546-CRB

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted July 16, 2020
San Francisco, California

Before: IKUTA and HURWITZ, Circuit Judges, and TAGLE,** District Judge.
Dissent by Judge TAGLE

Lee v. Ticketmaster L.L.C., 817 F. App'x 393 (9th Cir. 2020)

Constructive notice found

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SEC 230 ROW 11 SEAT 20-21





Order Details ▾

Total \$222.95

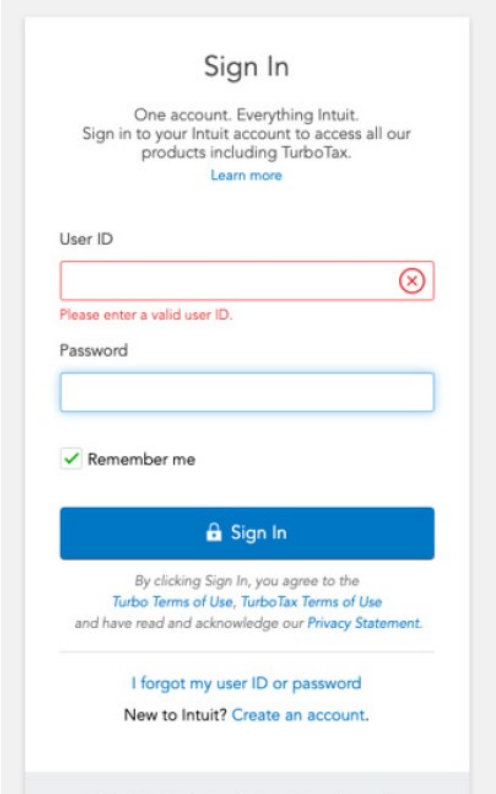
By clicking "Place Order", you agree to our [Terms of Use](#).

[Place Order](#)

Dohrmann v. Intuit, Inc., 823 F. App'x 482 (9th Cir. 2020)

Constructive notice found

- “The relevant warning language and hyperlink to the Terms of Use were conspicuous – they were the only text on the webpage *in italics*, were located *directly below* the sign-in button, and the sign-in page was relatively *uncluttered*.”



The screenshot displays the Intuit sign-in interface. At the top, the heading "Sign In" is centered. Below it, a message reads "One account. Everything Intuit. Sign in to your Intuit account to access all our products including TurboTax." with a "Learn more" link. The form includes a "User ID" field with a red border and a red "X" icon, accompanied by the error message "Please enter a valid user ID." Below this is a "Password" field. A "Remember me" checkbox is checked. A blue "Sign In" button is positioned below the fields. At the bottom, there is a disclaimer: "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use and have read and acknowledge our Privacy Statement." Below the disclaimer are two links: "I forgot my user ID or password" and "New to Intuit? Create an account."

Lower courts adopt *Lee* and *Dohrmann*

“While other persuasive authorities are all over the map . . . , it appears that the majority of California district courts take the *Dohrmann* and *Lee* approach. These courts hold that a modified . . . clickwrap . . . agreement constitutes a binding contract where the user is provided with an opportunity to review the terms of service in the form of a **hyperlink immediately above or below a button that must be clicked.**”

In re Ring LLC Priv. Litig., 2021 WL 2621197, (C.D. Cal. June 24, 2021)

Best Practices to Maximize Enforceability

Make It Conspicuous

- Clickwrap agreement is strongest
 - Separate checkboxes for acceptance of terms
- If modified clickwrap is used
 - Ensure close proximity between notice of terms and call to action button
 - If terms are hyperlinked, use blue, underlined or italicized text
 - Use large, conspicuous font
 - Avoid cluttered user interface or submerged terms

Keep clear records

Collect and preserve

- Back-end records showing who agreed, on what date
- Historical records of terms on any specific date
- Screenshots of UI showing clickthrough process required to agree to terms
- Provide clear notice (emails, in-app pop-ups) of amendments

All records are potential evidence in litigation.

Thank you