

Technology Transactions Lawyers: A New Hope

*Recent Developments for IP and
Technology Transactions Attorneys*

ACC's Deal or No Deal 2019: The Rise of the Deal

November 7, 2019

Panel Introduction

- Daren Orzechowski | White & Case LLP
- Shanti Ariker | Twilio
- Michael Cheng | Facebook



Online Contract Formation Issues and Updating Standard Terms

Formation of a Contract

- It is essential to the existence of a contract that there should be:
 - Parties capable of contracting
 - Their consent
 - A lawful object
 - A sufficient cause or consideration
[Cal Civ Code § 1550]



Common issues in online agreements

- Standard commercial terms (online)
 - Incorporation by Reference
- How do you form a binding agreement using standard commercial terms?
- How do you change/update the form?

Incorporation by Reference

- Under California law, parties may validly incorporate by reference into their contract the terms of another document. *Baker v. Aubry*, 216 Cal. App. 3d 1259 (1989).
- “[A]n offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains.” *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992 (1972).

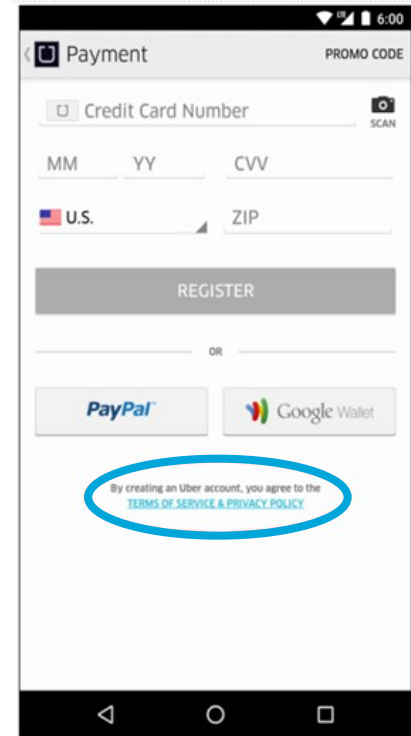
Incorporation by Reference

- Incorporation must be clear
 - “An offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions, of which he was unaware, contained in a document whose contractual nature is not obvious.” *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (quoting *Windsor Mills*).

Examples of What Constitutes Formation of a Contract

□ *Meyer v. Uber Techs*

- Reasonably conspicuous terms of service
- Spatially coupled (Terms of Service is near the mechanism for manifesting assent (i.e., the register button))
- Temporally coupled (Terms of Service is provided simultaneously to enrollment)



Examples of What Constitutes Formation of a Contract

□ *Holl v. United States Dist. Court*

- Even if extensive user navigation through hyperlinks was required to locate the arbitration clause, the arbitration clause incorporated by reference into a “terms of service” agreement was valid.

Re-Enter Password: *

How will this registration/profile be used? *

Select One

☐ By selecting this checkbox and the Continue button, I agree to the [UPS Technology Agreement](#) and the [UPS My Choice® Service Terms](#)

Add Promotion Code

Continue Cancel

Contact UPS | Country | View Full Site

Website Terms of Use | Privacy

Copyright © 1994-2016 United Parcel Service of America, Inc. All rights reserved.

Examples of What Constitutes Formation of a Contract

- UPS Technology Agreement (96 Pages)
 - Did not include relevant arbitration provision
- UPS My Choice Service Terms (3 Pages)
 - Refers to UPS Tariff/Terms and Conditions of Service (32 Pages)
 - Only available on ups.com → “Service Terms and Conditions” Link → “UPS Tariff/Terms and Conditions of Service Link Includes arbitration provision at issue”

Updating Terms After Formation

- No acceptance of modifications without notice
 - *Rodman v. Safeway Inc.*, 2015 U.S. Dist. LEXIS 17523 (N.D. Cal. Feb. 12, 2015) (citing *Douglas v. United States Dist. Court*, 495 F.3d 1062 (9th Cir. 2007))
 - Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side.
 - Even if a customer's continued use of a service could be considered assent to revised terms, such assent can only be inferred after [that customer] received proper notice of the proposed changes.

Updating Terms After Formation

- District Courts: individualized notice and continued use constitutes acceptance
 - *Sacchi v. Verizon Online LLC*, No. 14-cv-423-RA, 2015 U.S. Dist. LEXIS 21349, at *20 (S.D.N.Y. Feb. 23, 2015)
 - Original terms provided for notice by email
 - Email notice provided new terms explicitly to be accepted by continued use
 - Continued use constituted acceptance
 - *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016)
 - Email and “jewel notification” on individual newsfeed was sufficient notice

Formation: Issue of State Law

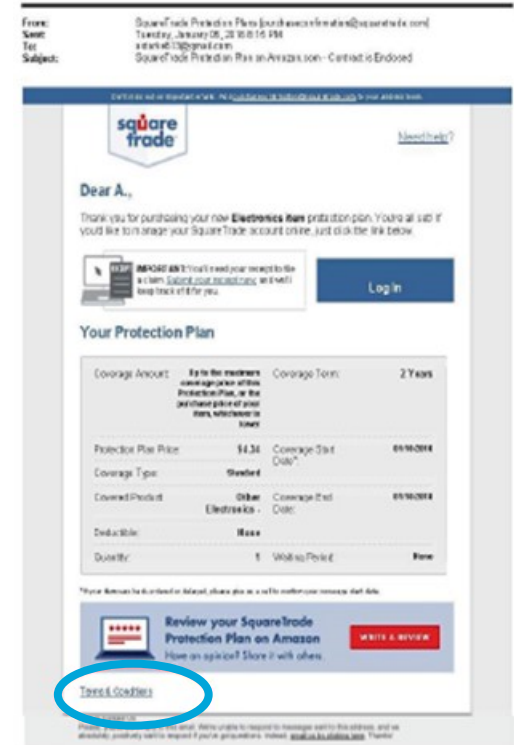
- Formation law similar in California, New York, and Illinois
 - *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 388 (E.D.N.Y. 2015)
 (“In the instant case, the substantive contractual laws of New York, California, and Illinois are at issue. These states laws are substantively similar with respect to the issue of contract formation.”)
- Agreement to updated terms issue has not yet been litigated under Delaware law

Starke v. Squaretrade, Inc.: Facts

- Starke purchased a SquareTrade protection plan from Amazon. After a dispute arose, SquareTrade moved to compel arbitration.
- Amazon purchase page stated that “Service Contract [would] be delivered via email and not mailed” and it would “come from SquareTrade Warranty Services ... within 24 hours of purchase.”

Starke v. Squaretrade, Inc.: Facts

- T&C accessible on Amazon purchase page prior to the purchase did not have arbitration provision.
- Additional Service Contract provided via hyperlink in post-purchase email did have arbitration provision.
- Nothing in post-purchase email directed attention to Service Contract hyperlink.



Starke v. Squaretrade, Inc.: Issue

Was there a “meeting of minds” with respect to the arbitration clause?

- Starke argued: SquareTrade hoodwinks customers by providing additional and more restrictive post-sale terms via deliberately obscure hyperlink.
- SquareTrade argued: Starke had reasonable notice because Amazon purchase page notified him that he would receive his “Service Contract” via email and the email from SquareTrade contained a hyperlink to the relevant terms.

Starke v. Squaretrade, Inc.: Outcome

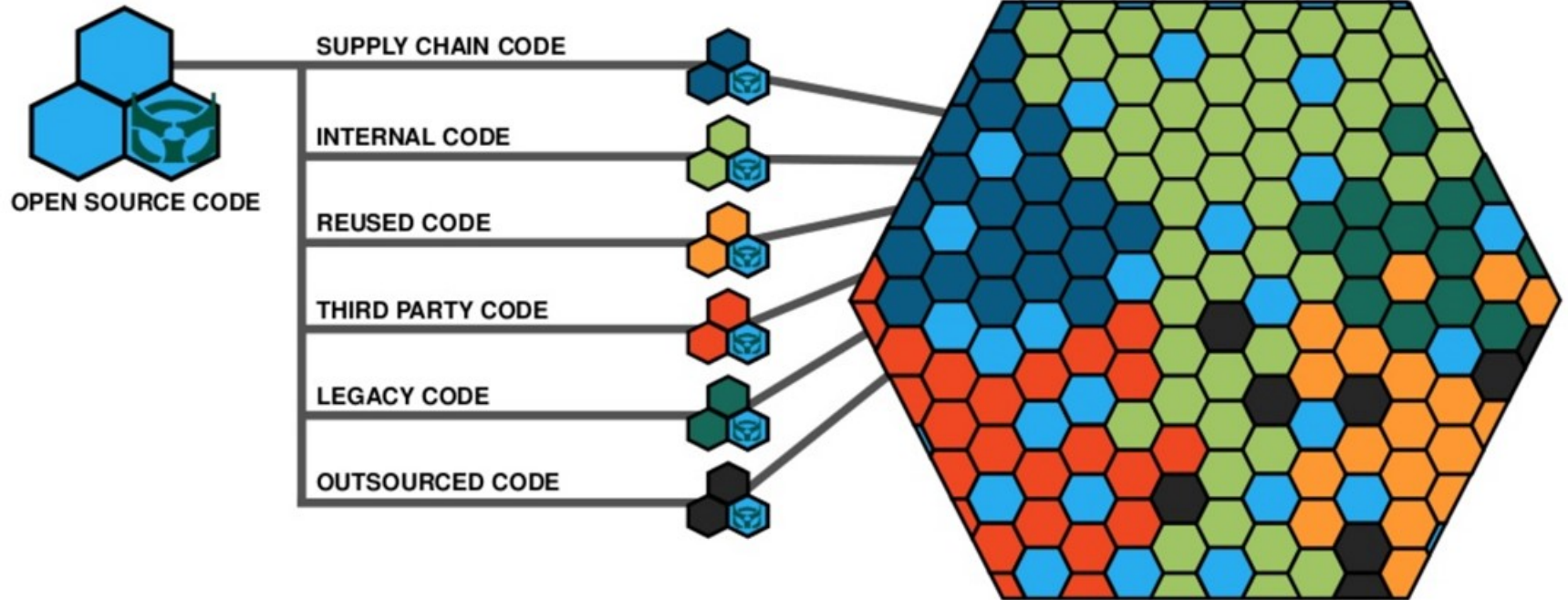
- Hyperlink to Service Contract in post-sale email had the smallest text and occurred after unrelated prompts
- Email failed to notify that link contained Service Contract or to instruct user to click the link
- Terms not temporally coupled to transaction
- Thus, distinguishable from *Meyer v. Uber Tech*

Starke v. Squaretrade, Inc.: Takeaways

- Any terms, including changes and updates, must be noticed and clearly and conspicuously referenced.
- Terms should be made available at the same time as transaction or enrollment.

Open Source & Contracting at Scale

For Software Organizations





LOOPHOLE

What you're missing

Positives

- ☐ Engineering Value
- ☐ Transactions & Leverage
- ☐ Product Leadership

Negatives

- ☐ Security
- ☐ Infringement
- ☐ Brand & PR

Types of Licenses

- Short and Simple
 - Do what you want
 - Leave the rest to chance
- More Certainty
 - Express patent license
 - Limitation on liability

The MIT License

License Copyright: Unknown.
License License: Unknown.
License Contact: Unknown.

SPDX short identifier: MIT

[Further resources...](#)



Begin license text.

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Comparing OSS Licenses

License	Compatibility with Product	LOL with Disclaimers	Express Patent License
Affero GPL / GPL 3.0	No	Yes	Yes
Apache 2.0	Yes	Yes	Yes
BSD License	Yes	Yes	No
Eclipse Public License	Limited	Yes	Yes
GNU GPL v. 2	No	Yes	No
GNU LGPL v. 3	Limited	Yes	Yes
MIT License	Yes	No	No
Mozilla Public License 2.0	Limited	Yes	Yes

Jacobsen v. Katzer: Fed. Cir. | Background

- Jacobsen made DecoderPro available under the Artistic License
- Katzer used DecoderPro in his competing software without attribution
- Jacobsen filed suit in N.D. Cal. alleging, *inter alia*, copyright infringement, seeking preliminary injunction
- The District Court denied injunction and dismissed
 - Holding breach of license is breach of contract, not copyright infringement

Jacobsen v. Katzer: Fed. Cir. | Holding

- Federal Circuit reversed, 535 F.3d 1373 (Fed. Cir. 2008)
 - If terms of license are conditions, they may limit license scope, and acts outside license scope are governed by copyright law.
 - If terms are merely covenants, by contrast, they are governed by contract law.

Jacobsen v. Katzer: Fed. Cir. | Holding

- The violated terms in the Artistic License were conditions
 - “The intent of this document is to state the *conditions* under which a Package may be copied.”
 - Artistic License used traditional language conditions: rights to copy, modify and distribute are granted “provided that” the conditions are met.

To-dos

- ❑ Data to know what you're using
- ❑ Analysis to determine action items
- ❑ Lightweight processes that build trust, credibility and opportunity



Open Source as a Product

For Software Organizations



QUALITY



SERVICE



DELIVERY

PRODUCT



INNOVATION



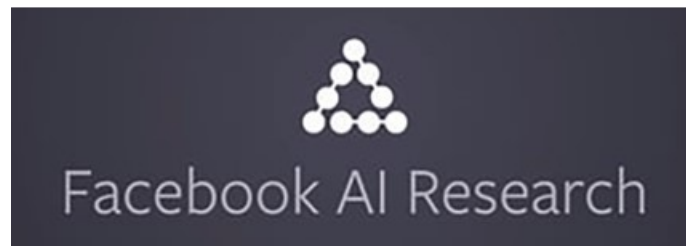
PROCESS



EFFICIENCY



- Used in almost every product
- Leveraged as product strategy





Device-Year-Class



Buck



Network
Connection Class



Yoga



PathPicker



Infer



Relay



Augmented Traffic
Control



HHVM



fresco



ComponentKit



React Native



Android-Shimmer



Rebound



pop



Docusaurus



Proxygen



Hack



Presto



Flow



Immutable-JS



GraphQL



Stetho



Nuclide



React



Redux



RocksDb



McRouter



Jest



osquery



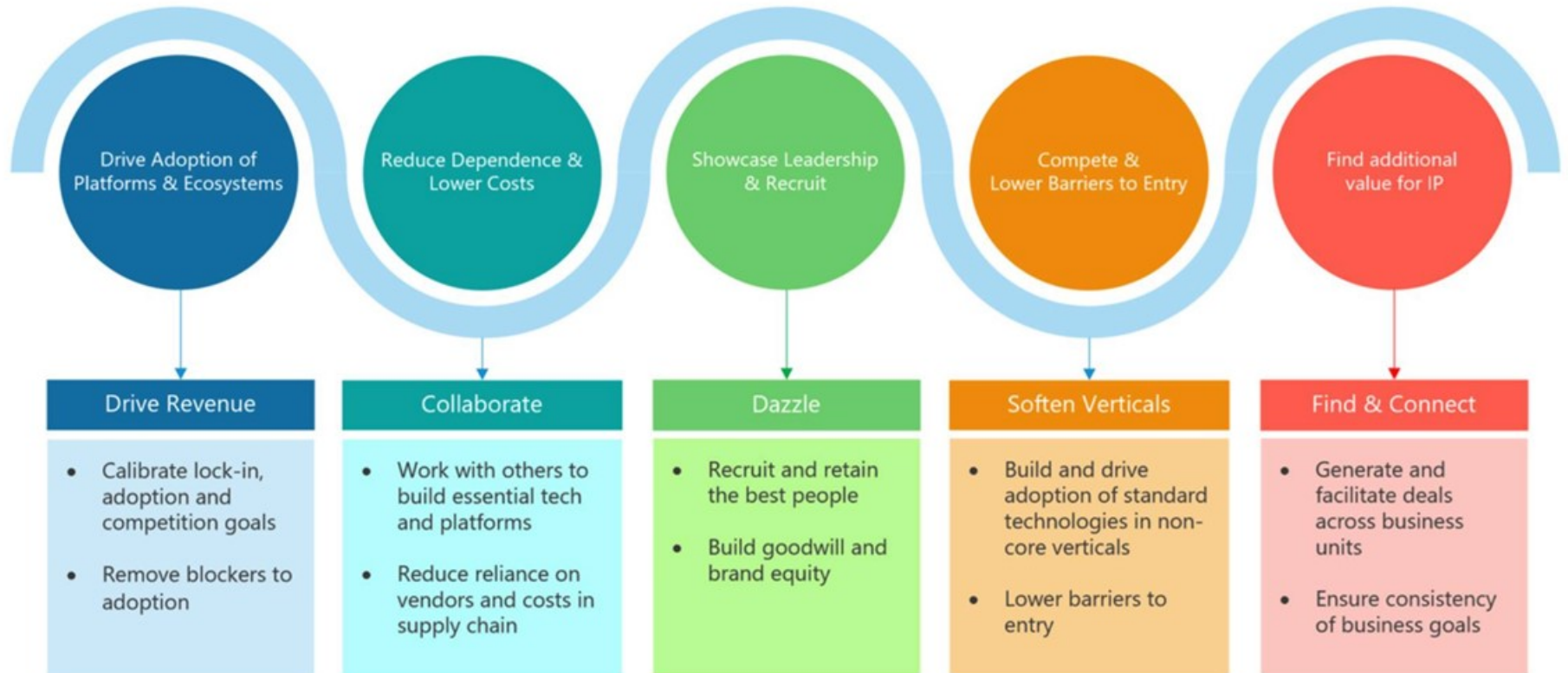
Prophet



create-react-app







hiQ Labs, Inc. v. LinkedIn Corp.: Implications on data scrapping

Data Scraping

- Process by which a program extracts data from another program or web page.
- Can be from a screen that is displayed, but can also crawl web pages.
- Often times is pulling publicly available data from web pages.
- Websites take defensive measures.
 - Defensive algorithms
 - Throttling of calls to APIs or sites
 - Terms of use or service

hiQ Background

- *HiQ Labs, Inc. v. LinkedIn Corp.*, 838 F.3d 985 (9th Cir. 2019)
- Computer Fraud and Abuse Act – Commonly asserted as a means of protecting data.
 - Liability for whoever “intentionally accesses a computer without authorization or authorized access, and thereby obtains ... information from any protected computer.” 18 U.S.C. § 1030(a)(2)(C).
 - “Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.” 18 U.S.C. § 1030(g).

hiQ Facts

- Data analytics company that, using automated means, scrapes data from public LinkedIn profiles to develop analytic products.
- May 23, 2017, LinkedIn sent a cease-and-desist letter, asserting that hiQ was in violation of LinkedIn's User Agreement and alleging that any "further access to LinkedIn's data would violate state and federal law, including CFAA."
- hiQ and LinkedIn were unable to agree on a resolution and declined to permit hiQ's access in the interim.

hiQ Facts

- hiQ filed a complaint, that among other things:
 - Asserted affirmative rights against the denial of access to publicly available LinkedIn profiles
 - Sought preliminary injunction
- District court granted hiQ's motion and ordered LinkedIn to withdraw its cease-and-desist letter.
- LinkedIn appealed focusing on whether district court abused its discretion in granting hiQ a preliminary injunction.

9th Cir. | *hiQ* Holding

□ Held:

- “[i]t is likely that when a computer network generally permits public access to its data, a user’s accessing that publicly available data **will not** constitute access without authorization under CFAA.”
- “without authorization” under CFAA is “when a person circumvents a computer’s generally applicable rules regarding access permissions, such as username and password requirements, to gain access to a computer.”

9th Cir. | *hiQ* Rationale

- CFAA looks at three categories of information:
 - Information for which access is open to the general public and permission is not required
 - Information for which authorization is required and has been given
 - Information for which authorization is required but has not been given

9th Cir. | *hiQ* Rationale

- Data sought by hiQ “is not owned by LinkedIn” and is not private.
 - Legislative history of CFAA support the district court’s “distinction between ‘private’ computer networks and websites, protected by a password authentication system and ‘not visible to the public,’ and websites that are accessible to the general public.”

9th Cir. | *hiQ* Rationale

- Giving companies like LinkedIn free “reign to decide, on any basis, who can collect and use data—data that they do not own, that they otherwise make publicly available to viewers, and that the companies themselves collect and use—risks the possible creation of information monopolies that would disserve the public interest.”

hiQ: Practical Questions

- Is data scraping legal?
 - The decision only affirms district court's decision to award hiQ a preliminary injunction and is focused on CFAA.
 - Other causes of action may be available:
 - Trespass to chattels claims
 - Copyright infringement
 - Misappropriation/Unjust enrichment
 - Breach of contract/privacy

Implications and Why This Matters

- Sets precedents that the data entered by users belong to the users
- Narrows down the definition of “authorization” in the CFAA
- Door is still open regarding whether data scraping is legal
- Be mindful of:
 - Types of data involved
 - Means of access to the data
 - How the data is collected
 - How each type of data is used

Questions?



Thank you

White & Case LLP

Daren Orzechowski
do@whitecase.com

3000 El Camino Real
5 Palo Alto Square, 9th Floor
Palo Alto, CA 94306
T +1 650 213 0355

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