Excerpt from *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 21 (2d Cir. 2002)

Internet users and website operator brought putative class actions against computer software producer, alleging that "plug-in" software program, created to facilitate Internet use and made available on producer's website for free downloading, invaded plaintiffs' privacy by clandestinely transmitting personal information to the software provider when plaintiffs employed the plug-in program to browse the Internet. Defendants moved to compel arbitration and to stay court proceedings. The United States District Court for the Southern District of New York, 150 F.Supp.2d 585, Alvin K. Hellerstein, J., denied motion. Defendants appealed, and appeals were consolidated. The Court of Appeals, Sotomayor, Circuit Judge, held that: (1) users did not assent to terms of software license, including arbitration clause; (2) claims relating to plug-in program were not subject to arbitration agreement contained in license terms governing use of separate browser software; and (3) legal doctrine requiring nonsignatories to arbitration agreement to arbitrate when they have received direct benefit under contract containing arbitration agreement did not apply to require website owner to arbitrate.

Affirmed.

SOTOMAYOR, Circuit Judge.

This is an appeal from a judgment of the Southern District of New York denying a motion by defendants-appellants Netscape Communications Corporation and its corporate parent, America Online, Inc. (collectively, "defendants" or "Netscape"), to compel arbitration and to stay court proceedings. In order to resolve the central question of arbitrability presented here, we must address issues of contract formation in cyberspace. Principally, we are asked to determine whether plaintiffs-appellees ("plaintiffs"), by acting upon defendants' invitation to download free software made available on defendants' webpage, agreed to be bound by the software's license terms (which included the arbitration clause at issue), even though plaintiffs could not have learned of the existence of those terms unless, prior to executing the download, they had scrolled down the webpage to a screen located below the download button. We agree with the district court that a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants' invitation to download the free software, and that defendants therefore did not provide reasonable notice of the license terms. In consequence, plaintiffs' bare act of downloading the software did not unambiguously manifest assent to the arbitration provision contained in the license terms.

We also agree with the district court that plaintiffs' claims relating to the software at issue-a "plug-in" program entitled SmartDownload ("SmartDownload" or "the plug-in program"), offered by Netscape to enhance the functioning of the separate browser program called Netscape Communicator ("Communicator" or "the browser program")-are not subject to an arbitration agreement contained in the license terms governing the use of Communicator. Finally, we conclude that the district court properly rejected defendants' argument that plaintiff website owner Christopher Specht, though not a party to any Netscape license agreement, is nevertheless required to arbitrate his claims concerning SmartDownload because he allegedly benefited directly under SmartDownload's license agreement. Defendants' theory that Specht benefited whenever visitors employing SmartDownload downloaded certain files made available on his website is simply too tenuous and speculative to justify application of the legal doctrine that requires a nonparty to an arbitration agreement to arbitrate if he or she has received a direct benefit ***21** under a contract containing the arbitration agreement.

We therefore affirm the district court's denial of defendants' motion to compel arbitration and to stay court proceedings.

BACKGROUND

I. Facts

In three related putative class actions,[1] plaintiffs alleged that, unknown to them, their use of SmartDownload transmitted to defendants private information about plaintiffs' downloading of files from the Internet, thereby effecting an electronic surveillance of their online activities in violation of two federal statutes, the Electronic

Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

Specifically, plaintiffs alleged that when they first used Netscape's Communicator-a software program that permits Internet browsing-the program created and stored on each of their computer hard drives a small text file known as a "cookie" that functioned "as a kind of electronic identification tag for future communications" between their computers and Netscape. Plaintiffs further alleged that when they installed SmartDownload-a separate software "plug-in"[2] that served to enhance Communicator's browsing capabilities-SmartDownload created and stored on their computer hard drives another string of characters, known as a "Key," which similarly functioned as an identification tag in future communications with Netscape. According to the complaints in this case, each time a computer user employed Communicator to download a file from the Internet, SmartDownload "assume[d] from Communicator the task of downloading" the file and transmitted to Netscape the address of the file being downloaded together with the cookie created by Communicator and the Key created by SmartDownload. These processes, plaintiffs claim, constituted unlawful "eavesdropping" on users of Netscape's software products as well as on Internet websites from which users employing SmartDownload downloaded files.

In the time period relevant to this litigation, Netscape offered on its website various software programs, including Communicator and SmartDownload, which visitors to the site were invited to obtain free of charge. It is undisputed that five of the six named plaintiffs-Michael Fagan, John Gibson, Mark Gruber, Sean Kelly, and Sherry Weindorf-downloaded Communicator from the Netscape website. These plaintiffs acknowledge that when they proceeded to initiate installation[3] of Communicator, ***22** they were automatically shown a scrollable text of that program's license agreement and were not permitted to complete the installation until they had clicked on a "Yes" button to indicate that they accepted all the license terms.[4] If a user attempted to install Communicator without clicking "Yes," the installation would be aborted. All five named user plaintiffs[5] expressly agreed to Communicator's license terms by clicking "Yes." The Communicator license agreement that these plaintiffs saw made no mention of SmartDownload or other plug-in programs, and stated that "[t]hese terms apply to Netscape Communicator and Netscape Navigator"[6] and that "all disputes relating to this Agreement (excepting any dispute relating to intellectual property rights)" are subject to "binding arbitration in Santa Clara County, California."

Although Communicator could be obtained independently of SmartDownload, all the named user plaintiffs, except Fagan, downloaded and installed Communicator in connection with downloading SmartDownload.[7] Each of these plaintiffs allegedly arrived at a Netscape webpage[8] captioned "SmartDownload Communicator" that urged them to "Download With Confidence Using SmartDownload!" At or near the bottom of the screen facing plaintiffs was the prompt "Start Download" and a tinted button labeled "Download." By clicking on the button, plaintiffs initiated the download of SmartDownload. ***23** Once that process was complete, SmartDownload, as its first plug-in task, permitted plaintiffs to proceed with downloading and installing Communicator, an operation that was accompanied by the clickwrap display of Communicator's license terms described above.

The signal difference between downloading Communicator and downloading SmartDownload was that no clickwrap presentation accompanied the latter operation. Instead, once plaintiffs Gibson, Gruber, Kelly, and Weindorf had clicked on the "Download" button located at or near the bottom of their screen, and the downloading of SmartDownload was complete, these plaintiffs encountered no further information about the plug-in program or the existence of license terms governing its use.[9] The sole reference to SmartDownload's license terms on the "SmartDownload Communicator" webpage was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen.

Had plaintiffs scrolled down instead of acting on defendants' invitation to click on the "Download" button, they would have encountered the following invitation: "Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software." Plaintiffs Gibson, Gruber, Kelly, and Weindorf averred in their affidavits that they never saw this reference to the SmartDownload license agreement when they clicked on the "Download" button. They also testified during depositions that they saw no reference to license terms when they clicked to download SmartDownload, although under questioning by defendants' counsel, some plaintiffs added that they could not "remember" or be "sure" whether the screen shots of the SmartDownload page attached to their affidavits reflected precisely what they had seen on their computer screens when they downloaded SmartDownload.[10]

In sum, plaintiffs Gibson, Gruber, Kelly, and Weindorf allege that the process of obtaining SmartDownload

contrasted sharply with that of obtaining Communicator. Having selected SmartDownload, they were required neither to express unambiguous assent to that program's license agreement nor even to view the license terms or become aware of their existence before proceeding with the invited download of the free plug-in program. Moreover, once these plaintiffs had initiated the download, the existence of SmartDownload's license terms was not mentioned while the software was running or at any later point in plaintiffs' experience of the product.

Even for a user who, unlike plaintiffs, did happen to scroll down past the download button, SmartDownload's license terms would not have been immediately displayed in the manner of Communicator's clickwrapped terms. Instead, if such a user had seen the notice of SmartDownload's terms and then clicked on the underlined invitation to review and agree to ***24** the terms, a hypertext link would have taken the user to a separate webpage entitled "License & Support Agreements." The first paragraph on this page read, in pertinent part:

> The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below this paragraph appeared a list of license agreements, the first of which was "*License Agreement for Netscape Navigator and Netscape Communicator Product Family* (Netscape Navigator, Netscape Communicator and Netscape SmartDownload)." If the user clicked on that link, he or she would be taken to yet another webpage that contained the full text of a license agreement that was identical in every respect to the Communicator license agreement except that it stated that its "terms apply to Netscape Communicator, Netscape Navigator, and Netscape SmartDownload." The license agreement granted the user a nonexclusive license to use and reproduce the software, subject to certain terms:

> BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE (THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT ("LICENSEE") IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

Among the license terms was a provision requiring virtually all disputes relating to the agreement to be submitted to arbitration:

> Unless otherwise agreed in writing, all disputes relating to this Agreement (excepting any dispute relating to intellectual property rights) shall be subject to final and binding arbitration in Santa Clara County, California, under the auspices of JAMS/EndDispute, with the losing party paying all costs of arbitration.

Unlike the four named user plaintiffs who downloaded SmartDownload from the Netscape website, the fifth named plaintiff, Michael Fagan, claims to have downloaded the plug-in program from a "shareware" website operated by ZDNet, an entity unrelated to Netscape. Shareware sites are websites, maintained by companies or individuals, that contain libraries of free, publicly available software. The pages that a user would have seen while downloading SmartDownload from ZDNet differed from those that he or she would have encountered while downloading SmartDownload from the Netscape website. Notably, instead of any kind of notice of the SmartDownload license agreement, the ZDNet pages offered only a hypertext link to "more information" about SmartDownload, which, if clicked on, took the user to a Netscape webpage that, in turn, contained a link to the license agreement. Thus, a visitor to the ZDNet website could have obtained SmartDownload, as Fagan avers he did, without ever seeing a reference to that program's license terms, even if he or ***25** she had scrolled through all of ZDNet's webpages.

The sixth named plaintiff, Christopher Specht, never obtained or used SmartDownload, but instead operated a website from which visitors could download certain electronic files that permitted them to create an account with an internet service provider called WhyWeb. Specht alleges that every time a user who had previously installed SmartDownload visited his website and downloaded WhyWeb-related files, defendants intercepted this information. Defendants allege that Specht would receive a representative's commission from WhyWeb every time a user who obtained a WhyWeb file from his website subsequently subscribed to the WhyWeb service. Thus, argue defendants, because the "Netscape license agreement ... conferred on each user the right to download and use both Communicator and SmartDownload software," Specht received a benefit under that license agreement in that SmartDownload "assisted in obtaining the WhyWeb file and increased the likelihood of success in the download process." This benefit, defendants claim, was direct enough to require Specht to arbitrate his claims pursuant to Netscape's license terms. Specht, however, maintains that he never received any commissions based on the WhyWeb files available on his website.

II. Proceedings Below

In the district court, defendants moved to compel arbitration and to stay court proceedings pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, arguing that the disputes reflected in the complaints, like any other dispute relating to the SmartDownload license agreement, are subject to the arbitration clause contained in that agreement. Finding that Netscape's webpage, unlike typical examples of clickwrap, neither adequately alerted users to the existence of SmartDownload's license terms nor required users unambiguously to manifest assent to those terms as a condition of downloading the product, the court held that the user plaintiffs had not entered into the SmartDownload license agreement. *Specht,* 150 F.Supp.2d at 595-96.

The district court also ruled that the separate license agreement governing use of Communicator, even though the user plaintiffs had assented to its terms, involved an independent transaction that made no mention of SmartDownload and so did not bind plaintiffs to arbitrate their claims relating to SmartDownload. *Id.* at 596. The court further concluded that Fagan could not be bound by the SmartDownload license agreement, because the shareware site from which he allegedly obtained the plug-in program provided even less notice of SmartDownload's license terms than did Netscape's page. *Id.* at 596-97. Finally, the court ruled that Specht was not bound by the SmartDownload arbitration agreement as a noncontracting beneficiary, because he (1) had no preexisting relationship with any of the parties, (2) was not an agent of any party, and (3) received no direct benefit from users' downloading of files from his site, even if those users did employ SmartDownload to enhance their downloading. *Id.* at 597-98.

Defendants took this timely appeal pursuant to 9 U.S.C. § 16, and the district court stayed all proceedings in the underlying cases pending resolution of the appeal. This Court has jurisdiction pursuant to § 16(a)(1)(B), as this is an appeal from an order denying defendants' motion to compel arbitration under the FAA. *Mediterranean Shipping Co. S.A. Geneva v. POL-Atlantic,* 229 F.3d 397, 402 (2d Cir.2000).

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III. Whether the User Plaintiffs Had Reasonable Notice of and Manifested Assent to the SmartDownload License Agreement

Whether governed by the common law or by Article 2 of the Uniform Commercial Code ("UCC"), a transaction, in order to be a contract, requires a manifestation of agreement between the parties. *See Windsor Mills, Inc. v. Collins & Aikman Corp.,* 25 Cal.App.3d 987, 991, 101 Cal.Rptr. 347, 350 (1972) ("[C]onsent to, or acceptance of, the arbitration provision [is] necessary to create an agreement to arbitrate."); *see also* Cal. Com.Code § 2204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such ***29** a contract.").[13] Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract. *Binder v. Aetna Life Ins. Co.,* 75 Cal.App.4th 832, 848, 89 Cal.Rptr.2d 540, 551 (1999); *cf.* Restatement (Second) of Contracts § 19(2) (1981) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."). Although an onlooker observing the disputed transactions in this case would have seen each of the user plaintiffs click on the SmartDownload

"Download" button, *see Cedars Sinai Med. Ctr. v. Mid-West Nat'l Life Ins. Co.,* 118 F.Supp.2d 1002, 1008 (C.D.Cal.2000) ("In California, a party's intent to contract is judged objectively, by the party's outward manifestation of consent."), a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent ***30** to those terms, *see Windsor Mills,* 25 Cal.App.3d at 992, 101 Cal.Rptr. at 351 ("[W]hen the offeree does not know that a proposal has been made to him this objective standard does not apply."). California's common law is clear that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." *Id.; see also Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.,* 89 Cal.App.4th 1042, 1049, 107 Cal.Rptr.2d 645, 651 (2001) (same).

[16] [17] [18] Arbitration agreements are no exception to the requirement of manifestation of assent. "This principle of knowing consent applies with particular force to provisions for arbitration." *Windsor Mills,* 101 Cal.Rptr. at 351. Clarity and conspicuousness of arbitration terms are important in securing informed assent. "If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." *Commercial Factors Corp. v. Kurtzman Bros.,* 131 Cal.App.2d 133, 134-35, 280 P.2d 146, 147-48 (1955) (internal quotation marks omitted). Thus, California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.

A. The Reasonably Prudent Offeree of Downloadable Software

[19] [20] [21] [22] Defendants argue that plaintiffs must be held to a standard of reasonable prudence and that, because notice of the existence of SmartDownload license terms was on the next scrollable screen, plaintiffs were on "inquiry notice" of those terms.[14] We disagree with the proposition that a reasonably prudent offeree in plaintiffs' position would necessarily have known or learned of the existence of the SmartDownload license agreement prior to acting, so that plaintiffs may be held to have assented to that agreement with constructive notice of its terms. *See* Cal. Civ.Code § 1589 ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."). It is true that "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." *Marin Storage & Trucking,* 89 Cal.App.4th at 1049, 107 Cal.Rptr.2d at 651. But courts are quick to add: "An exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term." *Id.; cf. Cory v. Golden State Bank,* 95 Cal.App.3d 360, 364, 157 Cal.Rptr. 538, 541 (1979) ("[T]he provision in question is effectively hidden from the view of money order purchasers until after the transactions are completed.... Under these circumstances, it must be concluded that the Bank's money order purchasers are not chargeable with either actual or constructive notice of the service charge provision, and therefore cannot be deemed to have consented to the provision as part of their transaction with the Bank.").

***31** Most of the cases cited by defendants in support of their inquiry-notice argument are drawn from the world of paper contracting. *See, e.g., Taussig v. Bode & Haslett,* 134 Cal. 260, 66 P. 259 (1901) (where party had opportunity to read leakage disclaimer printed on warehouse receipt, he had duty to do so); *In re First Capital Life Ins. Co.,* 34 Cal.App.4th 1283, 1288, 40 Cal.Rptr.2d 816, 820 (1995) (purchase of insurance policy after opportunity to read and understand policy terms creates binding agreement); *King v. Larsen Realty, Inc.,* 121 Cal.App.3d 349, 356, 175 Cal.Rptr. 226, 231 (1981) (where realtors' board manual specifying that party was required to arbitrate was "readily available," party was "on notice" that he was agreeing to mandatory arbitration); *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Barrett Garages, Inc.,* 257 Cal.App.2d 71, 76, 64 Cal.Rptr. 699, 703 (1967) (recipient of airport parking claim check was bound by terms printed on claim check, because a "ordinarily prudent" person would have been alerted to the terms); *Larrus v. First Nat'l Bank,* 122 Cal.App.2d 884, 888, 266 P.2d 143, 147 (1954) ("clearly printed" statement on bank card stating that depositor agreed to bank's regulations provided sufficient notice to create agreement, where party had opportunity to view statement and to ask for full text of regulations, but did not do so); *see also Hux v. Butler,* 339 F.2d 696, 700 (6th Cir.1964) (constructive notice found where "slightest inquiry" would have disclosed relevant facts to offeree); *Walker v. Carnival Cruise Lines,* 63 F.Supp.2d 1083, 1089 (N.D.Cal.1999) (under California and federal law, "conspicuous notice" directing the attention of parties to existence of contract terms renders terms binding) (quotation marks omitted); *Shacket v. Roger Smith Aircraft Sales,*

Inc., 651 F.Supp. 675, 691 (N.D.Ill.1986) (constructive notice found where "minimal investigation" would have revealed facts to offeree).

As the foregoing cases suggest, receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Cal. Civ.Code § 19. These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to "Download Now!". What plaintiffs saw when they were being invited by defendants to download this fast, free plug-in called SmartDownload was a screen containing praise for the product and, at the very bottom of the screen, a "Download" button. Defendants argue that under the principles set forth in the cases cited above, a "fair and prudent person using ordinary care" would have been on inquiry notice of SmartDownload's license terms. *Shacket*, 651 F.Supp. at 690.

We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms. Thus, plaintiffs' "apparent manifestation of ... consent" was to terms "contained in a document whose contractual nature [was] not obvious." *Windsor Mills*, 25 Cal.App.3d at 992, 101 Cal.Rptr. at 351. Moreover, the fact that, given the position of the scroll bar on their computer screens, plaintiffs ***32** may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms. In their deposition testimony, plaintiffs variously stated that they used the scroll bar "[o]nly if there is something that I feel I need to see that is on-that is off the page," or that the elevated position of the scroll bar suggested the presence of "mere[ ] formalities, standard lower banner links" or "that the page is bigger than what I can see." Plaintiffs testified, and defendants did not refute, that plaintiffs were in fact unaware that defendants intended to attach license terms to the use of SmartDownload.

We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.[15] The SmartDownload webpage screen was "printed in such a manner that it tended to conceal the fact that it was an express acceptance of [Netscape's] rules and regulations." *Larrus*, 266 P.2d at 147. Internet users may have, as defendants put it, "as much time as they need[ ]" to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. When products are "free" and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's-length bargaining. In the next two sections, we discuss case law and other legal authorities that have addressed the circumstances of computer sales, software licensing, and online transacting. Those authorities tend strongly to support our conclusion that plaintiffs did not manifest assent to SmartDownload's license terms.

B. Shrinkwrap Licensing and Related Practices

Defendants cite certain well-known cases involving shrinkwrap licensing and related commercial practices in support of their contention that plaintiffs became bound by the SmartDownload license terms by virtue of inquiry notice. For example, in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.1997), the Seventh Circuit held that where a purchaser had ordered a computer over the telephone, received the order in a shipped box containing the computer along with printed contract terms, and did not return the computer within the thirty days required by the terms, the purchaser was bound by the contract. *Id.* at 1148-49. In *ProCD, Inc. v. Zeidenberg*, the same court held that where an individual purchased software in a box containing license terms which were displayed on the computer screen every time the user executed the software program, the user had sufficient opportunity to review the terms and to return the software, and so was contractually bound after retaining the product. *ProCD*, 86 F.3d at 1452; *cf. Moore v. Microsoft Corp.*, 293 A.D.2d 587, 587, 741 N.Y.S.2d 91, 92 (2d Dep't 2002) (software user was bound by license agreement where terms were prominently displayed on computer screen before software could ***33** be installed and where user was required to indicate assent by clicking "I agree"); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251, 676 N.Y.S.2d 569, 572 (1st Dep't 1998) (buyer assented to arbitration clause shipped inside

box with computer and software by retaining items beyond date specified by license terms); *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wash.App. 819, 970 P.2d 803, 809 (1999) (buyer manifested assent to software license terms by installing and using software), *aff'd,* 140 Wash.2d 568, 998 P.2d 305 (2000); *see also I.Lan Sys.*, 183 F.Supp.2d at 338 (business entity "explicitly accepted the clickwrap license agreement [contained in purchased software] when it clicked on the box stating 'I agree' ").

These cases do not help defendants. To the extent that they hold that the purchaser of a computer or tangible software is contractually bound after failing to object to printed license terms provided with the product, *Hill* and *Brower* do not differ markedly from the cases involving traditional paper contracting discussed in the previous section. Insofar as the purchaser in *ProCD* was confronted with conspicuous, mandatory license terms every time he ran the software on his computer, that case actually undermines defendants' contention that downloading in the absence of conspicuous terms is an act that binds plaintiffs to those terms. In *Mortenson,* the full text of license terms was printed on each sealed diskette envelope inside the software box, printed again on the inside cover of the user manual, and notice of the terms appeared on the computer screen every time the purchaser executed the program. *Mortenson,* 970 P.2d at 806. In sum, the foregoing cases are clearly distinguishable from the facts of the present action.

C. Online Transactions

Cases in which courts have found contracts arising from Internet use do not assist defendants, because in those circumstances there was much clearer notice than in the present case that a user's act would manifest assent to contract terms.[16] *See, e.g., Hotmail Corp. v. Van$ Money Pie Inc.,* 47 U.S.P.Q.2d 1020, 1025 (N.D.Cal.1998) (granting preliminary injunction based in part on breach of "Terms of Service" agreement, to which defendants had assented); *America Online, Inc. v. Booker,* 781 So.2d 423, 425 (Fla.Dist.Ct.App.2001) (upholding forum selection clause in "freely negotiated agreement" contained in online terms of service); *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118, 732 A.2d 528, 530, 532-33 (N.J.Super.Ct.App.Div.1999) (upholding forum selection clause where subscribers to online software were required to review license terms in scrollable window and to click "I Agree" or "I Don't Agree"); *Barnett v. Network Solutions, Inc.,* 38 S.W.3d 200, 203-04 (Tex.App.2001) (upholding forum selection clause in online contract for registering Internet domain names that required users to scroll through terms before accepting or rejecting them); *cf. Pollstar v. Gigmania, Ltd.*, 170 F.Supp.2d 974, 981-82 (E.D.Cal.2000) (expressing ***34** concern that notice of license terms had appeared in small, gray text on a gray background on a linked webpage, but concluding that it was too early in the case to order dismissal).[17]

***35** After reviewing the California common law and other relevant legal authority, we conclude that under the circumstances here, plaintiffs' downloading of SmartDownload did not constitute acceptance of defendants' license terms. Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility. We hold that a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload's license terms hidden below the "Download" button on the next screen. We affirm the district court's conclusion that the user plaintiffs, including Fagan, are not bound by the arbitration clause contained in those terms.[18]