

# Online Contract Formation

Professor Eric Goldman

Associate Dean for Research

Santa Clara University School of Law

[egoldman@gmail.com](mailto:egoldman@gmail.com)



# Formation Basics

A person “assents” to a contract by objectively manifesting an [1] intent to be bound through [2] overt acts or words

# The -Wrap Taxonomy

Term	Ninth Circuit's Definition
"Browsewrap"	"the user accepts a website's terms of use merely by browsing the site, although those terms are not always immediately apparent on the screen. Courts consistently decline to enforce browsewraps"
"Clickwrap"	"the website presents its terms of use in a pop-up screen and the user accepts those terms by clicking or checking a box stating she agrees. Courts routinely enforce clickwraps"
"Scrollwrap"	"the user must scroll through all the terms before the website allows her to click a box to agree...[this] provides the strongest notice and are usually enforced"
"Sign-in-wrap"	"a sign-in wrap lives somewhere in the middle: the website provides a link to terms of use and indicates that some action may bind the user but does not require that the user actually review those terms"

Chabolla v. ClassPass Inc., 2025 WL 630813 (9th Cir. Feb. 27, 2025)

# “Browsewrap” (a/k/a “not a contract”) = ~0% chance



This is a screenshot of the eBay homepage. On the left, there is a vertical list of category links: "Toys & Hobbies", "Travel", "Video Games", "Everything Else", and "Giving Works", followed by a "Visit all categories" button. In the center, there are two featured items: a black game controller and a silver digital watch. Below these items are two buttons: "Visit the community" and "Visit the learning center". Below the featured items is a yellow banner titled "From our Sellers". Under this banner, there are two columns of product listings. The left column includes "5 Sets Antique Silver Leaf Tog...", "Tom Ford by Tom Ford; Graydon ...", and "BALTIMORE ORIOLES @ NY YANKEES...". The right column includes "NEW Lazy Town SUPER SPORTACUS ...", "Vintage Firestone 500 Board Ra...", and "NWT Cole Haan Small Double Sna...". At the bottom right of the "From our Sellers" section is a button that says "See all featured items".

[Argentina](#) | [Australia](#) | [Austria](#) | [Belgium](#) | [Brazil](#) | [Canada](#) | [China](#) | [France](#) | [Germany](#) | [Hong Kong](#) | [India](#) | [Ireland](#) | [Italy](#) | [Korea](#) | [Malaysia](#) | [Mexico](#) | [Netherlands](#) | [New Zealand](#) | [Philippines](#) | [Poland](#) | [Singapore](#) | [Spain](#) | [Sweden](#) | [Switzerland](#) | [Taiwan](#) | [Thailand](#) | [Turkey](#) | [United Kingdom](#) | [United States](#) | [Vietnam](#)

[Half.com](#) | [Kijiji](#) | [MicroPlace](#) | [PayPal](#) | [ProStores](#) | [Rent.com](#) | [Shopping.com](#) | [Skype](#) | [StubHub](#) | [StumbleUpon](#)

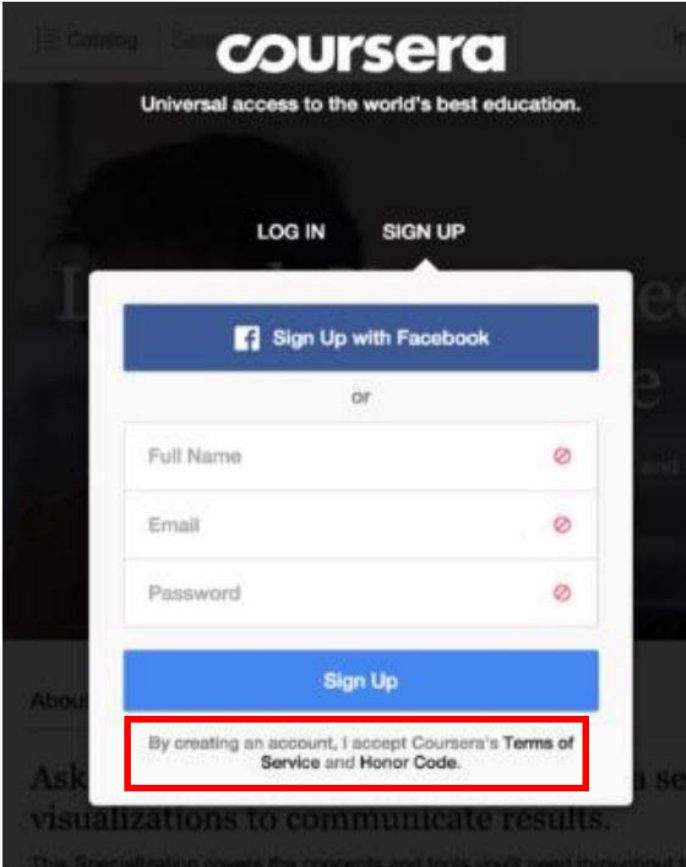
[Feedback Forum](#) | [Downloads](#) | [Gift Certificates & Gift Cards](#) | [Jobs](#) | [Affiliates](#) | [Developers](#) | [The eBay Shop](#) | [Live Auctions](#) | [eBay Mobile](#)

[About eBay](#) | [Announcements](#) | [Security Center](#) | [eBay Toolbar](#) | [Policies](#) | [Government Relations](#) | [Site Map](#) | [Help](#)

Copyright © 1995-2000 eBay Inc. All Rights Reserved. Designated trademarks and brands are the property of their respective owners. Use of this Web site constitutes acceptance of the eBay User Agreement and Privacy Policy.

eBay official time


# “Sign-In-Wrap” = 90% chance



The image shows a screenshot of the Coursera website's sign-up form. The form is a white modal box centered on a dark background. At the top, it has a blue button labeled "Sign Up with Facebook". Below this is a separator "or". The form contains three input fields: "Full Name", "Email", and "Password", each with a red "X" icon to its right. Below the input fields is a blue button labeled "Sign Up". At the bottom of the form, there is a red rectangular box containing the text: "By creating an account, I accept Coursera's Terms of Service and Honor Code."

# “Clickwrap” = 99% chance

Sign up for Schoology [Back](#)



Eric Goldman

egoldman@gmail.com

.....

.....

☐ Receive periodic Schoology updates

☐ By clicking **Register**, you are agreeing to our [Privacy Policy](#) and [Terms of Use](#)

**Register**

# The -Wrap Taxonomy Has Failed

- Incomplete taxonomy => courts miscategorize, make up new nodes, or ignore it entirely
- Courts pixel-police to exacting standards
- Due to the differences between “clickwrap” and “sign-in-wrap,” courts implicitly expect 2-click formation
  - Chabolla dissent: the decision “will drive websites to the only safe harbors available to them, the clickwrap or scrollwrap agreements”
- Formation = too important to get legally creative or cute  
<= *maximize your percentages*



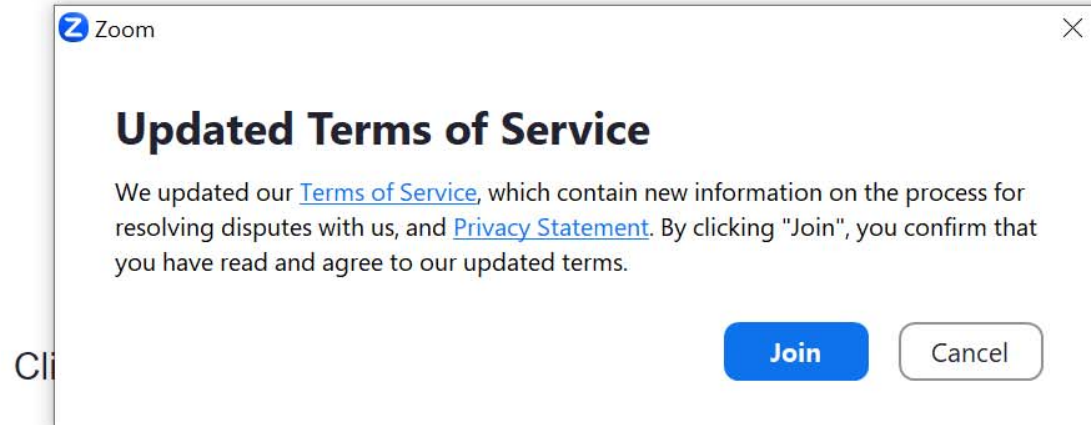
# Goldman's “Best Practices” for Formation



- Shout, don't whisper, the call-to-action
- Use clear conditional call-to-action wording
- 2-click processes are a formation “safe harbor”
- No formation leaks
- Keep admissible evidence

# Amending TOSes

- THE BAR KEEPS GOING UP, especially to show consumers were notified
  - Is email notice enough?
  - Don't be subtle or cute
- Follow TOS's specified procedures and keep good evidentiary records
- Consumers need bona fide options to say no



If you don't see a dialog, click **Launch Meeting** below

By joining a meeting, you agree to our [Terms of Service](#) and [Privacy Statement](#)

Launch Meeting

Don't have Zoom Client installed? [Download Now](#)