

Meyer V. Kalanick – U.S. Court Of Appeals Rules That User Of Mobile App Assents To Terms Of Service By Registering For An Account



On August 17, 2017, the United States Court Of Appeals for the Second Circuit in Meyer v. Kalanick issued a decision according to which in certain circumstances the use of a mobile application is equivalent to the acceptance of that app's Terms of Service. The plaintiff, Spencer Meyer, sued Uber CEO Travis Kalanick, alleging antitrust violations. Kalanick responded by moving to join Uber as a defendant, and together the defendants moved to compel arbitration under the Uber Mobile Application Terms of Service. Such Terms of Service contained a mandatory arbitration clause, however the plaintiff argued that at no time did he view and consent to such Terms of Service.

The court considered use of the app from the perspective of a “reasonably prudent smartphone user” and discoursed characteristics of the apps design and function which support enforceability of contract terms for mobile apps. The court ruled that because the Uber app design gave the user reasonable notice of the Terms of Service, and the user choose to use the app, such use of the app is considered unambiguous consent to those Terms of Service.

The Court considered the use of applications on smartphones ubiquitous and analyzed the Uber app from the perspective of a reasonably sensible smartphone user who understands the use of hyperlinks. Uber’s registration screen contained the following statement:

“By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.”

The court ruled that the “capitalized phrase is bright blue and underlined and contains a hyperlink to a third screen containing a button that, when clicked displays the current version of Uber’s Terms of Service and Privacy Policy. The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration.” The entire screen, the court noted, including the notice of the Terms of Service, was clearly visible without the need to scroll the screen. The court noted that while the font of this language was small, “the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined.”

The court explicated that a reasonably prudent smartphone user understands that the conspicuous underlined text highlighted in blue is hyperlinked to another webpage with the Uber Application Terms of Service. The court held that such hyperlink gives the user constructive notice of the Terms of Service and that “a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account.”

The court distinguished the registration screen on the Uber application from other applications' screens, such as the Amazon screen in *Nicosia v. Amazon.com Inc.*, where the Amazon app's screen was saturated with information and links, and the notice of terms and conditions was not adjacent to the consent button. Furthermore, the notice of the terms and conditions on the Amazon page was not directly adjacent to the button intended to manifest assent to the terms, unlike the text and button in the Uber app.

The Uber decision provides useful guideposts for the design of user interfaces for mobile applications that include Terms of Services. Such recommendations include the following:

- Expressly and inconspicuously state that by creating an account and/or using the application, the user is agreeing to be bound by the hyperlinked terms of use;
- Implement a unpretentious design with minimal buttons and text; and
- Ensure the visibility of the entire screen, including the hyperlink to the terms of use, without the need to scroll down.

Mobile application designers can take from this case effective advice as to the design and format of an app's registration process. According to the Uber decision, emphasis should be placed on making the screen containing a link to a mobile app's Terms of Use clear,

uncongested, and conspicuous. Consent to a mobile application's Terms of Service should be upheld in court in event the app is designed in such a fashion.

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