

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. ...

In three related putative class actions, 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. . .

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, 101 Cal.Rptr. 347, 350 (Cal. Ct. App. 1972) ("Consent 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 a contract."). (1) 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, 89 Cal.Rptr.2d 540, 551 (Cal. Ct. App. 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 to those terms, see *Windsor Mills*, 101 Cal.Rptr. at 351 ("When 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, 107 Cal.Rptr.2d 645, 651 (Cal. Ct. App. 2001) (same).

1. The district court concluded that the SmartDownload transactions here should be governed by "California law as it relates to the sale of goods, including the Uniform Commercial Code in effect in California." *Specht*, 150 F. Supp. 2d at 591. It is not obvious, however, that UCC Article 2 ("sales of goods") applies to the licensing of software that is downloadable from the Internet. Cf. *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 675 (3d Cir. 1991) ("The increasing frequency of computer products as subjects of commercial litigation has led to controversy over whether software is a 'good' or intellectual property. The [UCC] does not specifically mention software."); Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, *PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series* (Feb.-Mar. 2001) (demonstrating the trend in case law away from application of UCC provisions to software sales and licensing and toward application of intellectual property principles). There is no doubt that a sale of tangible goods over the Internet is governed by Article 2 of the UCC. See, e.g., *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1263-64 & n.6 (N.D. Ala. 2000) (applying Article 2 to an Internet sale of bottles of beer). Some courts have also applied Article 2, occasionally with misgivings, to sales of off-the-shelf software in tangible, packaged formats. See, e.g., *ProCD*, 86 F.3d at 1450 ("We treat the [database] licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between 'contracts' and 'licenses' (which may matter under the copyright doctrine of first sale) is a subject for another day."); *i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 332 (D. Mass. 2002) (stating, in the context of a dispute between business parties, that "Article 2 technically does not, and certainly will not in the future, govern software licenses, but for the time being, the Court will assume that it does").

Downloadable software, however, is scarcely a "tangible" good, and, in part because software may be obtained, copied, or transferred effortlessly at the stroke of a computer key, licensing of such Internet products has assumed a vast importance in recent years. Recognizing that "a body of law based on images of the sale of manufactured goods ill fits licenses and other transactions in computer information," the National Conference of Commissioners on Uniform State Laws has promulgated the Uniform Computer Information Transactions Act ("UCITA"), a code resembling UCC Article 2 in many respects but drafted to reflect emergent practices in the sale and licensing of computer information. UCITA, prefatory note (rev. ed. Aug. 23, 2001) (available at www.ucitaonline.com/ucita.html). UCITA -- originally intended as a new Article 2B to supplement Articles 2 and 2A of the UCC but later proposed as an independent code -- has been adopted by two states, Maryland and Virginia. See *Md. Code Ann. Com. Law* § § 22-101 et seq.; *Va. Code Ann.* § § 59.1-501.1 et seq.

We need not decide today whether UCC Article 2 applies to Internet transactions in downloadable products. The district court's analysis and the parties' arguments on appeal show that, for present purposes, there is no essential difference between UCC Article 2 and the common law of contracts. We therefore apply the common law, with exceptions as noted.