

## Acceptance of Terms of Use Through Click Wrap, Browse Wrap, Scroll Wrap, and Sign In Wrap



Generally, two sides to a contract exhibit acceptance of such contract by signing their signatures on a document. Some contracts, however, may be accepted through other forms of action. Most western systems of contractual law allow for a contract to be entered into through a variety of actions, including signature, oral agreement, behavior, and others. Under the Uniform Commercial Code Section 2-204, "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."<sup>1</sup> These types of "accepting" a contract are specifically relevant with regards to the use of mobile applications, licensed software, and websites. The Terms of Use, or Terms of Services, are essentially leonine contracts ("take-it-or-leave-it"), whose nature makes the signing of a physical contract between the user and the application owner unfeasible.

These Terms of Use agreements have material ramifications because they can dictate a variety of terms critical both to users and software/application/website owners. Among other things, the agreements may govern where a lawsuit can be adjudicated, whether arbitration will be mandatory, whether a prohibition on copying a website's content will be enforceable, whether the mobile application owner can use your personal information, and whether a provision limiting use of the website for noncommercial purposes will be enforceable.

Over recent years, certain types of consent screen designs have been recognized as giving potential users conspicuous notice of the Terms and Use and allow the user to manifest assent to such Terms of Use.

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<sup>1</sup> UCC § 2-204.

This article reviews types of mobile application, licensed software and website designs which courts have recognized as providing or not providing the user the opportunity to consent to the requisite Terms of Use.

### Click-Wrap

Click-wrap Terms of Use agreements require the user to manifest assent by clicking an "I Accept" or "I Agree" button in a pop-up window or dialog box. A user indicates rejection by clicking cancel or closing the screen. Upon rejection, the user cannot use or purchase the product or service.

The Terms of Use do not always appear on the same screen or window as the "I Agree" button, but are always accessible before acceptance, such as through a hyperlink embedded on the screen or a pop-up screen prior to installation. In order to be deemed to have accepted the terms of service, the user must be put on notice that certain Terms of Use apply. If the Terms of Use are not visible and/or accessible, courts have found the notice requirement to be lacking and as such, the user may not be bound to the Terms of Use.

In **ProCD v. Zeidenberg**<sup>2</sup>, the United States Court of Appeals for the Seventh Circuit held that Zeidenberg, the user, knowingly accepted the offer and the terms contained within the software license by clicking through the dialog box shown on the screen. The court ruled that Zeidenberg was granted the opportunity to read the terms of the software license prior to clicking the acceptance box and that Zeidenberg could have rejected the terms of the contract and returned the software.

In **Steven J. Caspi, et al. v. The Microsoft Network, L.L.C.**<sup>3</sup>, the Appellate Division affirmed the determination of the Superior Court of New Jersey that the plaintiffs had entered into a binding contract by agreeing on-line via the click of a mouse to be bound by the terms of the Microsoft Network's subscriber agreement. Before a user could commence use of the Microsoft Network, one was required to first view a series of computer screens which set forth the terms of this subscriber agreement. These terms appeared in a scrollable window next to blocks containing the words "I Agree". Both the trial and appellate courts held that this design generated an enforceable contract between the defendants and their subscribers.

In **I.Lan Systems, Inc. v. Netscout Service Level Corp.**<sup>4</sup> the United States District Court for the District of Massachusetts held that the plaintiff is bound by the terms of a license agreement that appeared on its computer screen when it loaded the defendant's software, because the plaintiff indicated its assent to be bound thereby by clicking on an "I Agree" icon at the foot of the screen.

In **Harris v. comScore, Inc.**<sup>5</sup>, before users could download and install comScore's software, they were required to click a box acknowledging that they agreed to the terms of the license agreement, which could be accessed through a provided hyperlink. A dispute arose when the plaintiffs claimed that comScore had improperly obtained and used personal information from the plaintiffs' computers after they downloaded and installed the software. The defendant moved to dismiss the plaintiffs' complaint on the ground of improper

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<sup>2</sup> ProCD v. Zeidenberg 86 F.3d 1447, 7th Cir. (1996)

<sup>3</sup> Caspi v. Microsoft Network LLC Superior Court of New Jersey 732 A.2d 528, N.J. Super., )1999)

<sup>4</sup> I.Lan Systems, Inc. v. Netscout Service Level Corp. 183 F.Supp.2d 328, Civ. Act. No. 00-11489-WGY, 2002 US Dist. Lexis 209, D. Mass., ( 2002)

<sup>5</sup> Harris et al. v. comScore Inc., 1:11-cv-05807, U.S. District Court for the Northern District of Illinois.

venue, claiming the dispute should be adjudicated in Virginia because of the forum selection clause in the license agreement. The plaintiffs disagreed, contending that the terms of service were obscured during the installation process in such a way that the average consumer would not notice the hyperlinked terms.

In 2011 the United States District Court for the Northern District of Illinois ruled in favor of the plaintiffs, holding that the defendant did not provide adequate detail about how the hyperlinked agreement was accessible to the user. It was unclear that the user could reasonably find the hyperlink to the terms or manifest assent to it during the installation process. The court noted that it must accept the complaint's factual allegations as true, and thus declined to infer that clicking a box acknowledging that a user had read an agreement indicates that the agreement was reasonably available to the user, particularly when the plaintiffs alleged that the hyperlink to the agreement was obscured. The court concluded that the forum selection clause was not reasonably communicated and denied the defendant's motion.

In Israel, in **Malka v. Ava Financial**<sup>6</sup> the Tel Aviv District Court ruled that active Click-Wrap agreements are better evidence of a consumer's consent than passive Browse-Wrap agreements. If clicking on a link is required to view the terms of the contract, such link must be featured prominently for consumers to see. If such a link exists, even if a user is required to open such another link in order to read the Terms of Use in full, according to the precedent set in *Malka v. Ava Financial*, such a contract should be enforceable.

Recently the European Court of Justice ruled in **El Majdoub**<sup>7</sup> that Click-Wrap agreements are acceptable under certain circumstances as proof of the acceptance of general terms and conditions. According to the court, if click-wrapping makes it possible to print and save the text of those terms and conditions before the consummation of the contract, then it can be considered a communication by electronic means which provides a durable record of acceptance of the agreement.

### Scroll-Wrap

Like Click-Wrap agreements, Scroll-Wrap agreements require the user to click on an "I Agree" box that references the Terms of Use. A Scroll-Wrap is slightly different than a Click-Wrap in that the agreement can be physically viewed in a pop-up window and requires the user to scroll to the bottom of the agreement before clicking the "I Agree" box. (A Click-Wrap agreement requires clicking "I Agree", however it does not automatically display the terms but will usually hyperlink the reference to the terms). A Scroll-Wrap agreement was the subject of **Barnett v. Network Solutions, Inc.**<sup>8</sup>, where the court ruled to enforce a forum selection clause in the Terms of Use because the structure of the agreement required users to scroll through the terms and conditions before accessing the product.

The leading case in Canada on Scroll-Wrap agreements is **Rudder v. Microsoft**<sup>9</sup>. In *Rudder*, the plaintiffs filed a class action suit on behalf of Canadian MSN subscribers against Microsoft. Microsoft filed a motion for a permanent stay of the action, arguing that the Terms of Service Scroll-Wrap agreement provided that by accepting its terms (by clicking an "I Agree" icon) the plaintiffs agreed to the jurisdiction of the State of

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<sup>6</sup> *Malka v. Ava Financial* (Tel Aviv) 1963-05-11

<sup>7</sup> *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, Third Chamber (2015)

<sup>8</sup> *Barnett v. Network Solutions, Inc.*, 38 SW 3d 200 - Tex: Court of Appeals, 11th Dist. (2001)

<sup>9</sup> *Rudder v Microsoft Corp*, OJ No 3778 (Sup Ct J) (1999)

Washington. The plaintiffs argued that since the entire agreement was not visible on the screen at any one time, Microsoft had a duty to bring the forum selection clause to their attention. The Ontario Superior Court of Justice ruled that by obligating users to click the "I agree" icon, Microsoft ensured that an affirmative act was required to accept the terms of the contract. The Court also noted that the "I agree" icon was displayed at the same time portions of the Click-Wrap agreement were displayed on the screen.

### **Browse-wrap**

In a Browse-Wrap agreement, the terms and conditions are posted on the screen, typically as a hyperlink. Unlike a Click-Wrap or Scroll-Wrap agreement, where the user must manifest assent to the terms and conditions by clicking on an "I Agree" box, a Browse-Wrap agreement does not require this type of express manifestation of assent. Rather, a mobile app, software or web-site user purportedly gives his or her assent by simply using the application.

Because no affirmative action is required by the user to agree to the terms of a contract other than his or her use of the application, the determination of the validity of the Browse-Wrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions. Courts that have ruled on the issue have held that the validity of a Browse-Wrap agreement primarily depends on whether a website user has actual or constructive notice of the terms and conditions prior to using the website or other product.

In *In re Zappos.com Inc*<sup>10</sup>, the United States District Court for the District of Nevada ruled that the Zappos.com "Browse-Wrap" Terms of Use presentation was not prominent, and that no reasonable user would have read the agreement. The Court pointed out that on the Zappos website, a link to the Terms of Use appeared towards the bottom of each page (the court noted that when printed as a hard copy, the link appeared on page 3 of 4). This embedding did not make it reasonably obvious to the user where and how to find the terms. Additionally, the site did not give special mention of the Terms of Use when a user would sign up, log in or make a purchase, further indicating that there was no mutual agreement once the user gave Zappos personal and private information. The Court concluded that the Plaintiffs may not have known about the terms of use, arguing that no reasonable user would have clicked the link to read the terms of use prior to using the Zappos website.

In 2014, the United States Court of Appeals for the Ninth Circuit ruled in *Nguyen v. Barnes & Noble, Inc.*<sup>11</sup> that Barnes & Noble's Terms of Use Agreement, presented as a Browse-Wrap manner via hyperlink, was not enforceable since it failed to offer users reasonable notice of the terms. In *Nguyen*, the plaintiff filed a class action on behalf of consumers whose Touchpad orders had been canceled, alleging deceptive business practices and false advertising. Barnes & Noble moved to compel arbitration, based on the arbitration agreement in the website's terms of use.

The critical question the court decided upon was whether Nguyen assented to the terms of use, which included an arbitration clause. Nguyen had neither clicked the hyperlinked terms of use nor read them. Barnes & Noble claimed that Nguyen was on constructive notice of the terms. The court ruled that the proximity and

<sup>10</sup> re: Zappos.com, Inc., Customer Data Security Breach Litigation, 3:12-cv-00325-RJ-VPC, Dkt. 235, D. Nev. 1, (2015)

<sup>11</sup> *Nguyen v Barnes & Noble, Inc.*, 763 F.3d 1171, 9th Cir. (2014)

conspicuousness of the hyperlink alone was not enough to give constructive notice to the user. The court instructed that a textual notice of the terms of use, such as a final checkout screen reminding the user to review the terms, would likely give rise to sufficient notice. The court cautioned that website owners must ensure their sites put users on notice of any binding contractual terms in light of the "range of technological savvy of online purchasers."

In contrast to the above decisions, in 2013 the district court in the Western District of Virginia deemed a Browse-Wrap agreement enforceable. In **AvePoint, Inc. v. Power Tools, Inc.**<sup>12</sup>, the "Terms and Conditions" provided that "users may access, print and download materials and information on this Site solely for personal and noncommercial use." The plaintiff alleged that the defendant breached the terms and conditions in its Browse-Wrap agreement by downloading a copy of the plaintiff's software for competitive and commercial purposes. The defendant moved to dismiss on the grounds that the plaintiff had not alleged an enforceable contract.

In **AvePoint**, the court considered that the plaintiff alleged additional facts to support that the defendant had actual or constructive knowledge of the terms and conditions, instead of solely contending the existence of a link at the bottom of the plaintiff's website. Specifically, the plaintiff contended that the fact that the defendant exerted substantial effort in creating a fictitious profile and e-mail account to download the software suggested that the defendant was aware of the terms of use and understood that they prohibited commercial use of downloaded materials. The plaintiff also claimed that because the defendant had a similar Browse-Wrap agreement on its own website that restricts the use of downloaded software, the defendant should have known that the plaintiff's website had similar terms.

The **AvePoint** decision shows that while Browse-Wrap agreements are generally unenforceable, courts may enforce such agreements when there are factual allegations, independent of the exhibition of the agreement on the website or mobile application, that back a user's actual or constructive knowledge of a site's terms and conditions.

### Sign-In Wrap

Like a Click-Wrap agreement, a Sign-In-Wrap agreement includes text which states that acceptance of the "Terms of Use" is required in order to continue. Unlike a Click-Wrap agreement, however, the Sign-In-Wrap does not require the user to click on a box showing acceptance of the "terms of use," but instead includes a statement such as "By clicking "I Accept" I agree to the Terms of Use." These agreements merely notify the user of the existence Terms of Use and, instead of providing an "I Agree" button, advise the user that he or she is agreeing to the terms of services when registering or signing up.

Sign-In-Wrap agreements may be the most difficult to enforce. In **Nicosia v. Amazon.com, Inc.**<sup>13</sup>, the court noted that on the Amazon.com website there appeared to be between fifteen and twenty-five links, and various text was displayed in at least four font sizes and six colors, alongside multiple buttons and promotional

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<sup>12</sup> AvePoint, Inc. v. Power Tools, Inc. 981 F.Supp.2d 496 (2013)

<sup>13</sup> Nicosia v. Amazon. com, Inc., 834 F. 3d 220 - Court of Appeals, 2nd Circuit (2016)

advertisements. As a result, the court stated that in light of the website's design, it did not hold that there was no objective manifestation of mutual assent.

In **Specht v. Netscape**<sup>14</sup>, the Second Circuit Court of Appeals held a Sign-In Wrap contract unenforceable because the structure of the website required the user to search for the terms. Users of the site were urged to download free software available on the site by clicking on a tinted button labeled "download". Only if a user scrolled down the page to the next screen did he come upon an invitation to review the full terms of the program's license agreement, available by hyperlink. The court found that 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. Although consumers are bound to contracts in spite of them not being read, the terms of such contacts must be visible and accessible to user on notice.

### Summary

Courts have considered the presentation, form, and functionality of terms of use agreements in determining whether there is a clear manifestation of assent. In general, courts tend to find Click-Wrap and Scroll-Wrap contracts to be valid, while Browse-Wrap and Sign-In-Wrap contracts require courts to look more closely at the specific facts of the case, including the optical design and functionality of the application. Whether it is registering for a new social media account or downloading a new mobile application, one can hardly visit a website today without being asked to agree a listed set of "Terms of Use." By clicking on such boxes, or even in some cases just by using the application, users may be legally binding themselves to enforceable contracts, even if they are unconscious of the contents of those terms.

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<sup>14</sup> Specht v. Netscape Communications Corp., 306 F. 3d 17 - Court of Appeals, 2nd Circuit (2002)