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By [Andy Goldstein](#) | May 10, 2013

Courts continue to provide guidelines on how to create enforceable online agreements, and, perhaps more importantly, what does not create binding terms. Several recent cases have discussed the enforceability of “clickwrap” and “browsewrap” agreements.

We are all familiar with clickwrap agreements—the terms and conditions contained in the little pop-up boxes you encounter on a website which require you to click a button indicating you accept the terms. On the other hand, as a district court noted in *Nguyen v. Barnes & Noble, Inc.*, “Browsewrap agreements, as opposed to clickwrap agreements, are defined as ‘terms and conditions, posted on a Website or accessible on the screen to the user of a CD-ROM, that do not require the user to expressly manifest assent, such as by clicking ‘yes’ or ‘I agree.’”

As the 10th Circuit said in *Hancock v. AT&T*, Courts have held that “clickwrap agreements are increasingly common and ‘have routinely been upheld.’” As long as the consumer is given a sufficient opportunity to read the website’s terms and assents to them after being provided with an unambiguous method of accepting or declining the terms, and, unless the terms are unconscionable, the clickwrap agreement should be enforceable.

In *Hancock*, purchasers of AT&T’s U-verse service sued AT&T and challenged the forum selection and arbitration clauses in AT&T’s terms of service. Among other things, the customers could not access the U-verse online service without going through a registration process on the customer’s computer that gives the customer an opportunity to review the terms in a scrolling text box. The customer must click an “I Agree” button to agree to the terms and to activation of U-verse service. The 10th Circuit held that the customers had manifest their consent to AT&T’s terms and, accordingly, the terms were binding.

Another recent case, however, found that although an agreement was created by an online service’s clickwrap agreement, additional terms provided to the consumer he manifested his assent to the clickwrap agreement were not enforceable. In *Schnabel v. Trilegiant Corp.*, consumers filled out an enrollment screen and were required to click on a “Yes” button in order to demonstrate their agreement to the terms of service and to transmit their credit card information. The online service later emailed additional contract terms to the consumers. The 2nd Circuit held that a contract was formed at the moment the consumer clicked “Yes” and submitted his credit card information. However, the court did not uphold the additional terms because the consumer had no opportunity to review the terms and could not agree with or decline them.

As for browsewrap agreements, some courts have upheld them. However, two recent decisions did not find the terms of a browsewrap agreement enforceable, and these decisions provide some guidelines as to how to create a binding browsewrap agreement.

In *Van Tassell v. United Mktg. Grp.*, consumers brought a class action against an online retailer, and the retailer tried to enforce an arbitration provision in its browsewrap agreement. The retailer’s terms did not appear on either the retailer’s homepage or the checkout page. To find the retailer’s terms, consumers had to scroll down to the bottom of the homepage and click the “Customer Service” link, then scroll to the bottom the Customer Service page, or click on the “Conditions of Use, Notices & Disclaimers” link located near the end of a list of links on the page. The court held that “because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website’s terms and conditions.” The court further stated that “absent a showing of actual knowledge of the terms by the webpage user, the validity of a browsewrap contract hinges on whether the website provided reasonable notice of the terms of the contract.” Given the multiple steps that consumers had to go through to find the retailer’s terms and the fact that the link to the terms was “sandwiched between” other links, the court found that the consumers did not have reasonable notice of the retailer’s terms and, therefore, the arbitration provision was not binding.

Similarly, in *Nguyen v. Barnes & Noble*, a consumer sued Barnes & Noble over an online transaction, and Barnes & Noble moved to compel arbitration based upon an arbitration clause in its website’s terms of use. Barnes & Noble’s terms of use were located at the bottom of the webpage from which a consumer makes a purchase, and there was a hyperlink to the terms on the bottom left corner of each webpage. The court held that Barnes & Noble “did not position any notice even of the existence of its ‘Terms of Use’ in a location where website users would necessarily see it, and certainly did not give notice that those Terms of Use applied, except within the Terms of Use.” Accordingly, the court ruled that Barnes & Noble’s arbitration clause was not enforceable.

These recent cases provide some guidelines as to how to create an enforceable online contract:

If you use a browsewrap agreement, be sure that website users are put on notice of the terms.

You can have a hyperlink to the terms, but put the link at the top of your homepage, not at the bottom of the page. Do not make the website user scroll down to view the link.

Make sure that the hyperlink to the terms is prominent and not buried among other links. If the link to your terms is placed among other links, make sure the link to the terms is more prominent than the other links (for instance, use a larger font and/or different color for the link to the terms).

Do not require the website user to click through more than one page to find the terms or a hyperlink to them.

Present hyperlinks to the terms in more than one location, such as on the homepage and any checkout page.

If you use a clickwrap agreement, it is preferable to require the website user to scroll through the terms before clicking to accept the terms, rather than presenting a pop-up window showing only first few lines of the terms which the user can accept.

Whether you use a clickwrap agreement or a browsewrap agreement, any additional terms sent to the consumer by email or by paper mail after the consumer has agreed to the terms of the clickwrap or browsewrap agreement will not be binding unless the user can decline the terms.

If you want to greatly increase the enforceability of your terms, use a clickwrap agreement rather than a browsewrap agreement, which requires website users to manifest their consent to the terms, such as by clicking to accept the terms or entering consumer data, before the user can proceed with the website or conclude a transaction.

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