

## Enforceability of “Browse-Wrap” Agreements

### I. Introduction

A number of our clients have raised questions about the enforceability of what are known as “Browse-Wrap” Agreements. This memorandum examines whether the Terms of Use (TOU) referenced on a website (“Site”) are enforceable when a company or consumer has not taken any affirmative action to consent to those terms.

Electronic form contracts generally fall into one of two categories that have been coined “Click-Wrap” and “Browse-Wrap” Agreements.

Click-Wrap agreements present the customer with the terms and conditions and require the customer to assent to the agreement by clicking an “I Agree” icon or button prior providing access to a website or application. Under Click-Wrap Agreements the Site cannot be accessed or the program “cannot be obtained or used unless the icon is clicked. The enforceability of such [Click-Wrap] agreements appears well settled.”<sup>1</sup>

Browse-Wrap agreements are typically made a part of the Site but do not require any affirmative act by the user to indicate acceptance of the terms and conditions before using, viewing or downloading from the site. Browse-Wrap agreements require users to click on a hyperlink to view the TOU Site or product. Though courts have upheld Browse-Wrap agreements against consumers and businesses, it remains unclear what constitutes adequate notice of the TOU for an individual user.

### II. Analysis

#### Requirements of Enforceability

There are four requirements to ensuring the enforceability of electronic form contracts: (i) the user is given adequate notice of the existence of the proposed terms; (ii) the user has meaningful opportunity to review the terms; (iii) the user is given adequate notice that taking a specified action manifests assent to the terms; and (iv) the action specified in such notice is taken by the user.<sup>2</sup>

#### Adequate Notice of the Existence of the Proposed Terms

##### Case Law

Courts that have addressed the enforceability of Browse-Wrap Agreements have focused on whether the user had sufficient notice of the TOU. The enforceability of Browse-Wrap agreements hinges on whether the TOU are conspicuous and prominent.<sup>3</sup>

The leading cases in this area of law remain *Specht v. Netscape Communications Corp.* and *Register.com Inc. v. Verio Inc.*, which were both decided by the Second Circuit.<sup>4</sup> In *Specht*, the

<sup>1</sup> Patricia Bayer Cunningham and Erin C. Witkow. *Click with Caution: Liability for Breach of Click-Wrap and Browse-Wrap Agreements*, *The Computer & Internet Lawyer* Vol. 23 No. 6 (June 2006) at 1.

<sup>2</sup> Shawn J. Organ and Matthew C. Corcoran. *Your Web Site’s “Terms of Use”: Are They Enforceable?*, *Privacy & Data Security Law Journal* (Aug. 2008) at 693.

<sup>3</sup> Cunningham and Witkow, *supra* at 1.

defendant was an individual user who downloaded software and violated the TOU. The court did not enforce the Browse-Wrap Agreement against a consumer, ruling that the act of downloading is not an unambiguous indication of assent. In *Register*, the court enforced the Browse-Wrap TOU against a business that repeatedly visited the site, though the business took no action to indicate assent to the TOU. Due to the similarity of the Browse-Wrap agreements in *Specht* and *Register*, this lead to the appearance that Browse-Wrap agreements may only be enforced against businesses rather than individual consumers.<sup>5</sup> Recently, courts have begun to enforce Browse-Wrap agreements against consumers as well, but no clear criteria have been established for what constitutes adequate notice.<sup>6</sup>

### Suggestions for Adequate Notice

Though several courts have commented on the placement, color, format and style of the hyperlink, no court has established clear criteria for sufficient notice.<sup>7</sup>

Legal commentators suggest the hyperlink to TOU should be underlined, and in a different color from other hyperlinks.<sup>8</sup> It has also been suggested that use of language which “reads as a mere invitation, not as a condition,” may render a Browse-Wrap Agreement unenforceable.<sup>9</sup> TOU situated at the bottom of the webpage have been questioned, as the user may not see the notice of the terms unless they scroll through the entire page, yet there is argument that such placement is so common that placing the hyperlink at the bottom of the page is appropriate.<sup>10</sup>

Another potential issue is “Deep-linking,” wherein a user may bypass the homepage (or applicable landing page) containing the hyperlink to the TOU, and go a page located “deeper” in a website. In such an event a user may not have any notice of the TOU, unless such a link is located on every page.

### User Does Not Need to Read the Terms of Use to be Bound by the Agreement

As stated in *Burcham v. Expedia, Inc.*, 2009 WL 586513 (E.D. Mo.) at \*2 “Courts presented with [the legal effect of online agreements] apply traditional principles of contract law and focus on whether the plaintiff had reasonable notice of and manifested assent to the online agreement... Failure to read an enforceable online agreement, as with any binding contract, will not excuse compliance with its terms. (Citing to *Feldman v. Google, Inc.*, 513 F. Supp.2d 229, 236 (E.D. Pa.2007). A customer on notice of contract terms available on the internet is bound by those terms.”<sup>11</sup>

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<sup>4</sup> *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 592-593 (S.D.N.Y. 2001), *aff'd* 306 F.3d 17 (2d Cir. 2002); *Register.com Inc. v. Verio Inc.*, 356 F.3d 393 (2d Cir. 2004).

<sup>5</sup> Heather H. Bruser. “Other cases that have enforced browse-wrap agreements have similar fact patterns and it appears that the courts are more likely to enforce such agreements against businesses than against individual consumers.” *Form Contracts in an Online World: The Enforceability of Click-wrap and Browse-wrap Agreements* The Federal Lawyer (October 2008) at page 15.

<sup>6</sup> *Hubbert v. Dell Corp.* 359 Ill. App. 3d 976, 835 N.E.2d 113 (2005), the court upheld an arbitration clause against consumers which was contained in Terms and Conditions hyperlinked on Dell’s website though no affirmative action was taken by the users to assent to the Terms and Conditions. *Deaton v. Overstock.com, Inc.*, 2007 WL 4569874, at 1 (S.D. Ill. Dec. 27, 2007); *Net2Phone, Inc. v. The Superior Court of Los Angeles County*, 109 Cal. App. 4<sup>th</sup> 583, 588-89 (2003).

<sup>7</sup> Bruser, *Supra* at 14.

<sup>8</sup> *Id.*; *Pollstar v. Gigmania Ltd.* 170 F. Supp. 2d 974, 981. (E.D. Cal. 2000).

<sup>9</sup> *Specht v. Netscape Communications Corp.* 150 F. Supp. 2d at 596.

<sup>10</sup> *Southwest Airlines Co. v. Boardfirst, L.L.C.* 2007 WL 4823761 (N.D. Tex.) at \*4.

<sup>11</sup> *Schartz v. Comcast Corp.*, 256 F. App’x 515 (3d Cir.2007); *Pentecostal Temple Church v. Streaming Faith, LLC*, 2008 WL 4279842 (W.D.Pa. Sept. 16, 2008).

### **Meaningful Opportunity to Review the Terms**

Due to the nature of internet transactions, the user should already have ample time to review the TOU, as there are no time pressures, and the user is free to consider the contents of the TOU.<sup>12</sup> Accordingly, this requirement is not frequently discussed in either case law or in articles on the subject.

### **Adequate Notice of the Specified Action to Manifest Assent, and User's Assent to the Terms**

The drafter of the TOU may specify what action will constitute "assent" to the Browse-Wrap Agreement so long as the TOU makes it clear what constitutes acceptance. Frequently, viewing the website or use of the product is deemed acceptance.<sup>13</sup> Proving that the user accessed the Site or used the product may be accomplished through 'click-stream data' tracking the user's path through the Site or programming records establishing the user could not have gained access to the site or product without having first performed the action which constitutes acceptance.

### **III. Conclusion**

Though case law has not set forth reliable criteria for the formation of enforceable Browse-Wrap agreements against individual users, providing the individual user with adequate notice is central to an enforceable agreement. Therefore it is critical to the enforceability of Browse-Wrap agreements that the TOU be made conspicuous if any enforcement will be sought against an individual consumer.

Legal writers suggest use of a different font, size, and color for the TOU link, locating the link so as to ensure it will be visible to the user, and placing the link on every page of the Site so as to prevent any deep-linking issues.

Though the emerging trend appears to show that Browse-Wrap agreements will be enforceable against individual users, until the courts provide further guidance as to what constitutes sufficient notice of the terms of Browse-Wrap Agreements, there are no clear criteria as to how to adequately provide a consumer with notice of the TOU of a site or program distributed through e-commerce. Consequently, until the law further evolves, the e-commerce company proceeds at their own risk when relying on Browse-Wrap agreements for enforceability of their TOU against their consumers.

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<sup>12</sup> Organ and Corcoran, *Supra* at 694-5.

<sup>13</sup> *Id.* At 695.