

Chicago Daily Law Bulletin®

Volume 161, No. 165

An Internet riddle — When are online terms of service enforceable?

I have chosen today to write about one of the most boring topics known to humankind, but first I will introduce the subject with a riddle: What intangible specter confronts us most every day, but has never been seen? Of course if you looked at the headline above you know the answer — online terms of service.

They are always there, but no one ever reads them. There is little that is so deadening to the human spirit or so abusive to the English language as the terms of use on a website or digital app.

But not always. Some websites try to liven things up by adding a touch of humor while continuing to be slightly menacing.

One marketing blog website reminded its users not to misappropriate its intellectual property with this blunt message: "Don't steal our stuff ... Our content is protected by all the freakin' laws you can think of ... We don't like it when people jack our content."

A British website offered free Wi-Fi, but only if the recipient agreed to "assign their firstborn child to us for the duration of eternity."

More often, the terms are not funny but invidious. People who would never even consider looking at the terms are quick to click "I agree." Social media sites have often been criticized for claiming ownership of user's intellectual property.

Some sites include self-protective measures that restrict their customers' legal rights, such as terms waiving the customer's right to participate in a class action. What choice do we really have but to "agree" as quickly as possible to get the annoying box off the screen and get on with our business?

A ubiquitous term in website agreements states that by continuing to use the site, the user agrees to be bound to any future

changes to the terms. How would you like to lose your firstborn that way?

This brings us to a second riddle: When are online terms of service legally enforceable? I'm sorry to say there is no straightforward one line answer to this Delphic question. But there are some principles that will help you to understand when online terms will be binding.

This is important both to users who fear they may have agreed to something they never considered and to lawyers trying to help a client make its reasonable online terms binding. A smoothly operating Internet economy, after all, needs an efficient mechanism for participants to enter contracts.

There are two types of online contracts — "clickwrap" (or "click-through") agreements and "browsewrap" agreements. A clickwrap agreement is one in which the website user is required to click on an "I agree" box after being presented with terms of use.

Browsewrap agreements are those in which a site's terms and conditions can be reviewed by clicking on a hyperlink. These are usually located at the very bottom of the webpage, a netherworld where website users rarely venture. (The "wrap" suffix is a vestige of an earlier day in computer technology when consumers en-

The key to an enforceable online contract, as with any contract, is that there must be some manifestation of each party's assent to the terms.

tered "shrinkwrap" agreements when they opened the packaging of a software product that contained printed terms inside the box).

The distinction between clickwrap and browsewrap is important because the legal standards for forming a binding contract differ for these two forms. The key to an enforceable online contract,

INSIDE IP LAW

WILLIAM T. McGRATH



William T. McGrath is a member of Davis, McGrath LLC, where he handles copyright, trademark and Internet-related litigation and counseling. He is also associate director of the Center for Intellectual Property Law at The John Marshall Law School. In 2013, he was honored with a Lisagor Award from the Chicago Headline Club. He can be contacted at wmcgrath@davismcgrath.com.

as with any contract, is that there must be some manifestation of each party's assent to the terms.

With a clickwrap agreement, the assent is apparent. The user has taken an affirmative act of clicking on the "I agree" button. It is similar to signing an agreement on paper. The fact that the person signing the document or clicking "I agree" has not read the document is usually insufficient to relieve a party of its obligations under the contract. It is enough that the user has a reasonable opportunity to read the terms.

With browsewrap terms, there is no such clear manifestation of the user's assent. Rather a typical browsewrap agreement will state that merely by using the website's services or apps, the user is agreeing to be bound

by the site's terms of service. Courts are reluctant to find mutual assent to the terms of a browsewrap agreement. As the court explained in *Nguyen v. Barnes & Noble* (9th Cir. 2014), enforceability of a browsewrap agreement will depend on whether the user has either actual or constructive notice of the terms and conditions at the web-

site.

Courts have consistently enforced browsewrap agreements where the user had actual notice of the terms. But actual awareness of the terms is usually hard to prove. In the absence of such actual notice, the validity of a browsewrap agreement will depend on whether the website in some way puts a reasonably prudent user on "inquiry notice" of the terms.

If a site contains a sign in bold red letters that says "Hey user — click on the link right here to see what this means to you or you might regret it!" the user is probably on inquiry notice. See, e.g., *Starkey v. G Adventures* (2nd Cir. 2015) (a statement in an e-mail that customers "must read and agree to the following terms" followed by a hyperlink to the terms reasonably communicated a forum selection clause).

It behooves the user to take a look or risk being bound, just as the user would be by clicking on an "I agree" box. In contrast, a faint hyperlink in microfont that is buried somewhere on the site, or an agreement that can be found only after a multistep process of clicking through non-obvious links, will not be sufficient to put a user on inquiry notice.

But even an obvious link alone might be insufficient to put a user on notice. The *Nguyen* case held that even a visually conspicuous link to the terms of use is not enough to give rise to constructive notice if the website provides no notice to users, or does not prompt them to take any affirmative action to demonstrate assent. "The onus is on website owners to put users on notice of terms to which they wish to bind consumers," said the court.

Which leads us to our final riddle: Why is a browsewrap agreement that conspicuously provides notice and a reasonable opportunity to review the terms of service like a cyanoacrylate? (Because, like Super Glue, it's binding).