



Formation and Enforcement of Online Contracts

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How frequently do you make purchases or conduct other business online? If you are like the majority of people in the 21st Century, the answer is “all the time.”

Businesses expect to rely on the electronic contracts that consumers enter into through online transactions, including arbitration agreements and other terms of use. But, businesses are not always successful in doing so. This article outlines practices and procedures for businesses to help ensure the enforceability of online contracts.

There are several types of online agreements. Clickwrap agreements are agreements where users click “I agree” to accept the terms. Scrollwrap agreements are those where users must scroll to the end of the document prior to being able to click on “I agree” to accept the terms. Clickwrap and scrollwrap agreements are routinely enforced by courts, as long as they are presented to the consumer in a format where it is clear that by clicking “I agree,” it means agreement to the subject contract. Browsewrap agreements are agreements where users agree to the terms simply by using the website. There is no box for consumers to check to indicate consent. Instead, consent is implied based on the circumstances. Browsewrap agreements are closely scrutinized by courts and not routinely enforced.

The case of *Meyer v. Uber Technologies*, 868 F.3d 66 (2d Cir. 2017), demonstrates the elements of an enforceable clickwrap agreement. In that matter, the court enforced Uber’s Terms of Service, explaining that notice of the Terms of Service were reasonably conspicuous to consumers, and manifestation of assent was unambiguous. The court explained that while the

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reasonableness of notice is a fact-intensive inquiry, a court nevertheless may determine that inquiry notice has been established as a matter of law in certain circumstances. The Court described the presentation of an enforceable clickwrap agreement:

The Payment Screen is uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account or to connect the user's pre-existing PayPal account or Google Wallet to the Uber account, and the warning that "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration. The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service. Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined.

Meyer, 868 F.3d at 69-71. The court was describing with approval the following image of the screen:

Id. This successful enforcement of a clickwrap agreement contrasts to the unsuccessful enforcement of browsewrap agreements many cases.

In *In re Zappos.com v. Customer Data Sec. Breach Litigation*, 893 F. Supp. 2d 1058, 1095 (D. Nev. 2012), the court declined to enforce browsewrap Terms of Use on Zappos' website. The court found that it was insufficient that the Terms of Use were accessible via a link on every page of the website because they were only accessible if the user scrolled down to the middle or bottom of the website pages. Further, the links were displayed in the "same size, font, and color as most other non-significant links." *In re Zappos.com*, 893 F. Supp. 2d at 164. Additionally, the website did not direct users to the Terms of Use during times that users were specifically interacting with the website by entering their individual information, e.g., when creating an account, logging in to an existing account, or making a purchase. *Id.* The court concluded that "[n]o reasonable user would have reason to click on the Terms of Use, even those users who have alleged that they clicked and relied on statements found in adjacent links, such as the site's Privacy Policy." *Id.* The appellate court stated that the links were not conspicuous. Indeed, whether Terms of Use and similar agreements are enforceable often turns on whether they were "conspicuous" to give rise to implied consent.

Certain best practices emerge to light in the context of the above cases and other similar cases:

- Use clickwrap agreements, instead of relying on general browsewrap agreements;
- Terms of Use should be in close proximity to an "I agree" box to click.
- Consider using language in the clickbox that also indicates assent to the Terms of Use, e.g. use "I agree," as compared with "Create Account." While "Create Account" may be effective to indicate consent to Terms of Use depending on the conspicuousness of the link, proximity to the clickbox and other relevant factors, clear assent language increases the likelihood of enforcement.
- Links to Terms of Use should be conspicuous, e.g., in different color font, preferably the more common blue link, underlined; an uncluttered presentation of the link, without distractions by numerous other similarly-styled links on the same webpage; and a readable, noticeable font size to draw the attention

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of users.

- Terms of Use available on every webpage.

These factors should be considered when designing a website that seeks to create enforceable contracts with consumers and others who may interact with the site.

Please contact Elizabeth Shirley and others on Burr & Forman's Cybersecurity & Data Privacy team for consultation and recommendations with these issues, as well as all of your cybersecurity, data privacy, and other related areas.