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The Moment it Clicks: A Deeper Look at the Case Law of Clickwrap and Browserwrap Agreements

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Previously, we posted an article on the Top 5 Ways to Help Ensure Your Business has Click-Wrap Agreements that Work. Given the importance of clickwrap and browserwrap when it comes to limiting an online business' liability, we've decided to expand on the topic by delving deeper into the factors that determine whether a business' online terms are enforceable.

What are Clickwrap and Browserwrap?

Like traditional shrink wrap agreements, clickwrap and browserwrap agreements contain terms of use that must be agreed to before using an online service or purchasing a good via the Internet. A clickwrap agreement is presented when a window filled with terms pops up in front of the user and the user must take an affirmative action, such as clicking "I accept", before continuing on to the next webpage.

A browserwrap agreement is present when there is a notice and a link to a separate webpage that hosts the full terms and use of the website is premised on the acceptance of those terms. For example, a website might read, "By continuing onto this page you accept the terms of use which can be found in full form at www.xyz.com/terms." Unlike clickwrap, browserwrap does not require an express manifestation of assent and the user may never see the text of the terms unless he or she seeks them out.

Best Practices for Enforceable Clickwrap and Browserwrap Agreements

In order for a contract to be enforceable, the terms of the agreement must be sufficiently brought to a consumer's attention and the consumer must agree to them. Clickwrap generally fulfills both requirements because it displays the full text of the terms and requires an affirmative action to proceed to the website. Since browserwrap does not include either of those things, it makes it more difficult to determine whether users were on notice of the terms and accepted them.

To ensure that your browserwrap agreement will be enforceable, here are a few dos and don'ts:

- DO clearly state that there are terms that should be read by all users and that they will be enforced.
- DON'T merely have a page stating that "entering this site will constitute your acceptance of these Terms and Conditions" without otherwise notifying users that this page exists and that their use is premised on agreeing to those terms.
- DO make use of contrasting formatting to make notice of the terms more visible, such as underlined, bolded, or different colored text.
- DON'T hide the notice of the terms or otherwise let them blend in with the rest of a webpage.
- DO give consumers a choice to reject the agreement and inform them of their right to return any downloaded software if they do not agree to the terms.

Even when there are deficiencies in the notice of the terms to users, the courts have found that it is reasonable that "frequent and expert users" of a site should be familiar with the terms of service and will assume notice of the terms. However, this should not be relied on, and website owners wishing to enforce their terms should give notice to users as clearly as possible.

Give Clear Notice of Changes in the Terms

While parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side, assent based on continued use can only be inferred after proper notice of the proposed changes as been given. Douglas v. United States District Court for the Central District of California, 495 F.3d 1062 (9th Cir. 2007), cert. denied sub nom Talk Am., Inc. v. Douglas, 128 S. Ct. 1472 (2008). Therefore, website owners should always give users clear notification whenever the terms of use have been changed.

However, the courts may place less scrutiny on sophisticated businesses and respect their freedom to contract. In Margae, Inc. v. Clear Link Technologies, LLC, the plaintiff accepted a clickwrap partnership agreement that included a clause stating that the defendant could "modify the agreement at any time by notifying [the plaintiff] or by posting a new agreement". No. 2:07-CV-00916-TC, 2008 WL 2465450, at *2 (D. Utah 2008). Some time later, the defendant modified the agreement and posted the new terms on its website. The court found that the new terms were enforceable because they were modified according to the terms of the original partnership agreement. Id.

A somewhat more complicated consideration is presented by Harris v. Blockbuster Inc., 622 F Supp 2d 396 (N.D. Tex. 2009). In this case, Blockbuster had customers agree to a set of terms and conditions before they were able to use Blockbuster.com. The terms contained a modification clause which stated: "Blockbuster may at any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, with or without notice. Such modifications will be effective immediately upon posting." Harris, 622 F Supp 2d at 398-99. Blockbuster later modified the agreement to contain an arbitration provision that it sought to enforce against Harris at trial. The court held that the arbitration provision was unenforceable because the contract was illusory. The contract lacked consideration because the modification terms were conditioned only on posting, were at Blockbuster's sole discretion, and there was no express limitation on which terms could be altered. Without consideration, there was no contract to enforce.

Incorporate Fully or by Reference Any Other Terms or Privacy Policies

To bind a consumer to additional terms, a business need not show that the consumer actually knew of or read those terms. The provider merely needs to show that the consumer accepted an agreement which incorporated outside terms by reference. Feldman v. United Parcel Serv., Inc., 06 CIV. 2490(MHD), 2008 WL 800989 (S.D.N.Y. 2008) citing Sam L. Majors Jewelers v. ABX, Inc., 117 F3d 922 (5th Cir. 1997).

To determine whether additional terms are incorporated by reference, the courts apply a two part "reasonably communicated" test, which has been adopted in several jurisdictions:

> (1) whether the physical characteristics of the agreement itself "reasonably communicate[d] to the [consumer] the existence therein of important terms and conditions" that affected the consumer's legal rights, and
> (2) whether "the circumstances surrounding the [consumer]'s purchase and subsequent retention" of the contract permitted the consumer "to become meaningfully informed of the contractual terms at stake."

Ward v. Cross Sound Ferry, 273 F3d 520, 523 (2d Cir. 2001).

Below are some general tips on how to properly incorporate additional terms by reference:

- Make sure that the consumer has an opportunity to read the incorporated document before "accepting" and that the terms are available in the same medium, such as both in hard copy and stapled together, linked to on a webpage, or orally given over the phone.
- The mere mention of a website in another document, without any indication that the website contains binding contract terms, does not make those website terms part of the contract.
- If you are selling something over the phone and explain the terms of service, but tell a consumer that there are additional terms which are located on a website before he or she accepts, the consumer's agreement to proceed will incorporate the additional terms on the website by reference. Greer v. 1-800-Flowers.com, Inc., No. H-07-2543, 2007 U.S. Dist. LEXIS 73961 (S.D. Tex. 2007).
- If you intend to incorporate another document by reference, make sure the original document doesn't says that it is the "complete agreement" and that the incorporation is explicit. Contradicting terms between documents often lead to disputes and litigation.
- If a device that presents a contract has a link to an incorporated document, but no Internet service, the court may find there was no notice because the terms could not be read.

Avoid Hidden and Overly Oppressive Terms

To escape the terms of a contract, a consumer may attempt to prove that the contract was unconscionable and therefore unenforceable. In order to prevail on a claim of unconscionability, one must prove that the contract was both procedurally and substantively unconscionable. Substantive unconscionability is when the terms are extremely one-sided in that they unduly restrict the remedies of the weaker party or unduly expand the remedies of the stronger party.

More relevant to clickwrap and browserwrap agreements is procedural unconscionability, which is when the aggrieved party lacks meaningful choice and focuses on presentation of terms. Procedural unconscionabilty is based on two factors: oppression and surprise.

Oppression exists where there is such inequality of bargaining power that the weaker party is deprived of a "meaningful opportunity to negotiate the terms of the contract." Mazur v. eBay Inc., 257 FRD 563 (N.D. Cal. 2009). There are several factors that can mitigate oppression, including the existence of other options for similar price, the inclusion of a return policy if the consumer doesn't agree with terms, and avoiding non-negotiable standard forms.

Surprise exists when the terms are hidden in the printed form. Surprise may be found where there is no visible separation of paragraphs or sections or if all the terms are single-spaced, in the same size font, and/or all in the same color.

Conclusion

While there are many considerations when it comes to determining the enforceability of clickwrap and browserwrap agreements, the main concern for any online business should be making sure that their customers are without a doubt on notice of all applicable terms and conditions. By making notice a top concern, you will avoid many of the pitfalls that can come with clickwrap and browserwrap agreements.