

# Your Web Site's "Terms of Use": Are They Enforceable?

SHAWN J. ORGAN AND MATTHEW C. CORCORAN

*The authors suggest that the key to making browse-wrap agreements enforceable is sufficient notice of the proposed agreement to the user. Although pure click-wrap agreements may be too cumbersome or otherwise undesirable, hybrids between the browse-wrap agreement and click-wrap agreements provide a stronger alternative to pure browse-wrap agreements.*

The proliferation of the Internet has created many new business opportunities. But, the nearly universal access, the anonymity of both the identity and location of users, and the potential application of a multitude of laws expose businesses to uncertain risks. To mitigate these risks and provide some level of predictability, many companies require users to agree to web site Terms of Use. It is common for the Terms of Use to contain provisions such as a choice of law provision, a choice of forum provision, a binding arbitration provision, and, in some instances, even a class action waiver provision. The threshold issue when seeking to enforce these provisions is whether the user agreed to the Terms of Use, thus forming a contract with the web site owner.

There are essentially two ways a web site owner attempts to obtain

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Shawn J. Organ and Matthew C. Corcoran, a partner and associate, respectively, in the Columbus, Ohio, office of the international law firm of Jones Day, are trial lawyers who focus their practice in the areas of complex litigation, such as class action defense work. They can be reached at [sjorgan@jonesday.com](mailto:sjorgan@jonesday.com) and [mccorcoran@jonesday.com](mailto:mccorcoran@jonesday.com), respectively.

assent to the Terms of Use: the "Click Wrap Agreement" and the "Browse Wrap Agreement."<sup>1</sup> In a Click Wrap Agreement, the terms of a contract are displayed to a user who is required to click on a button indicating the user's assent. In contrast, a Browse-Wrap Agreement is typically found at the bottom of a web site's homepage and a user's assent to the Terms of Use is manifested by some action, usually the "use" of the web site.<sup>2</sup> While courts have had no problems applying general contract principals to enforce Click Wrap Agreements,<sup>3</sup> few courts have addressed whether Browse Wrap Agreements are enforceable.

## **MAKING BROWSE-WRAP AGREEMENTS ENFORCEABLE**

Generally, if four requirements are met, a Browse Wrap Agreement should be enforceable. The requirements are:

1. Adequate notice of the existence of the proposed terms;
2. Meaningful opportunity to review the terms;
3. Adequate notice that taking a specified action manifests assent to the terms; and
4. Action specified in such notice is taken by the user.<sup>4</sup>

Each of these requirements is briefly discussed below.

### **Adequate Notice of the Proposed Terms**

To provide adequate notice, a hyperlink to the Terms of Use should be prominently displayed and clearly indicate that the Terms of Use affect a user's rights. Some courts have found that when a user is required to scroll down to find or link to the Terms of Use, they are not sufficiently displayed to provide adequate notice.<sup>5</sup> However, because companies typically place the link to the Terms of Use at the bottom of the homepage, it is arguable that placement there is sufficient to provide the user notice.<sup>6</sup> Moreover, the hyperlinking to the Terms of Use should be clearly conveyed to a reasonable user: the text should be underlined, and other text should not be the same color as hyperlinks.<sup>7</sup> The hyperlink itself should

indicate in clear language that the Terms of Use constitute a proposed agreement.<sup>8</sup>

Two decisions in *Ticketmaster Corp. v. Tickets.com, Inc.* illustrate these principles.<sup>9</sup> Both Ticketmaster and Tickets.com sell events tickets through their web sites. For those events for which Tickets.com did not sell tickets, it provided links to Ticketmaster.com bypassing Ticketmaster.com's home page (this is known as "deep-linking").<sup>10</sup> Ticketmaster sought a preliminary injunction arguing that this practice violated its web site Terms of Use.<sup>11</sup> In its first decision, the Court dismissed Ticketmaster's breach of contract claim because "the terms and conditions are set forth so that the customer needs to scroll down the home page to find and read them [and customers] are likely to proceed to the event page of interest rather than reading the 'small print.'"<sup>12</sup> Three years later, Ticketmaster had redone its webpage placing in a "prominent place on the home page the warning that proceeding further binds the user to the conditions of use."<sup>13</sup> Ticketmaster's notice read "Use of this site is subject to express *terms of use*, which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms."<sup>14</sup> Interestingly, the notice is currently at the bottom of Ticketmaster's web site.<sup>15</sup>

Deep-linking presents additional concerns about adequate notice of the Terms of Use. Deep linking allows users to bypass the home page. Thus, if the Terms of Use are only posted on the homepage and the user deep links circumventing the homepage, the user arguably would not receive adequate notice of the Terms of Use. One solution is to include a link to the Terms of Use on every page.

## Meaningful Opportunity to Review the Terms

Notice of the Terms of Use should be presented before any contract is formed and the user should be given ample time to review the terms and conditions.<sup>16</sup> Because of the nature of web site transactions, a user typically has a meaningful opportunity to review the Terms of Use. "[I]n an electronic setting, ... [t]ime pressures are obviated when an Internet user can shop in the privacy of the user's own home, with the benefit of time, thought, and the opportunity to comparison shop, compare standard terms, and even return to a proposed transaction later. Moreover, an on-line shop-

per need not wait for the conclusion of the transaction to see the contractual terms when they are accessible by way of a link on the home page. As a result, in some respects, the Internet can be a more hospitable environment for contracting from a buyer's standpoint."<sup>17</sup> And while hyper-linking is acceptable, discovering all of the terms of the agreement should not require excessive multiple linking.<sup>18</sup>

### **The User Is Provided with Adequate Notice That Taking a Specified Action Manifests Assent to the Terms**

A web site owner can specify the particular kind of express or implied assent required from the user in order to form a contract. Typically, Terms of Use obtain a user's consent when they "use" the web site.<sup>19</sup> Assent to Terms of Use can also be conditioned on the completion of a sale.<sup>20</sup> Ultimately, the web site owner, as the master of the offer, can choose any action to constitute acceptance. The Terms of Use, however, must make it clear that the action chosen constitutes acceptance.<sup>21</sup>

### **The User Takes the Action Specified in Such Notice**

The problem with this requirement is proving the user took the specified action. Some record should be created to prove the user took the specified action to avoid disputes over whether the user, in fact, took the specified action. A company may choose to preserve various forms of evidence including "(i) the actual 'click-stream data' tracking the user's path through the Web site...(which may raise privacy issues about recording the user's identifying information); (ii) programming records establishing that the user could not have gained access to the Web site, data, or software governed by the agreement without first having engaged in the conduct that manifested assent to the agreement; [or] (iii) the content and appearance of the Web site, to show that a user 'scraped' and used the site's information, in violation of the agreement terms."<sup>22</sup>

### **Modification of Browse-Wrap Agreements**

Modifications to Terms of Use require additional notice to users. The Ninth Circuit held that an amendment to a contract was not effective when

the revised contract was posted online, but the user was not given meaningful notice of the amendment.<sup>23</sup> The court explained that once the contract had been formed, even if the plaintiff “visited the website, he would have no reason to look at the contract posted there. 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.”<sup>24</sup> While the court did not explain what adequate notice would be, it clearly required something more than posting a revised contract on the web site. Possible forms of notice may include e-mailing users, or prominently displaying the last modified date with the link to the Terms of Use.

### **Are Browse-Wrap Agreements Enforceable Against Consumers?**

When courts first began addressing the enforceability of Browse-Wrap Agreements, courts generally found them enforceable against commercial parties but not against consumers.<sup>25</sup> While the decisions were not based upon the user’s status (rather lack of adequate notice),<sup>26</sup> they led some commentators to argue that Browse-Wrap Agreement should not be enforced against consumers.<sup>27</sup> Recently, however, courts have enforced Browse-Wrap Agreements against consumers.<sup>28</sup>

In a parallel “brick and mortar” transaction, the Seventh Circuit enforced “Terms of Use” on display in the store against a consumer.<sup>29</sup> At issue was whether the Official Rules for McDonald’s “Who Wants to be a Millionaire” game were enforceable when the rules were posted near the food counter, on the back of in-store tray liners and the near the drive-thru window. In addition, the French fry cartons had language directing customers to the see the Official Rules.<sup>30</sup> The plaintiff obtained a game piece when she purchased an order of French fries at the drive-thru window. She claimed that she was the grand prize winner, a claim that McDonald’s disputed. McDonald’s sought to compel arbitration based upon a provision in the Official Rules.<sup>31</sup> The plaintiff, however, claimed she never agreed to the official rules.<sup>32</sup> After noting that “a contest normally has rules regarding eligibility to win the promised prize,” the court held “[t]he Official Rules were identified to [plaintiff] as part of the contest, and that identification was sufficient in this case to apprise her of the contents of

the rules."<sup>33</sup>

Thus, the enforceability of a Browse-Wrap Agreement against consumers likely turns on whether they received adequate notice. It is possible that courts will require greater notice in consumer transactions than in commercial transactions. Given, however, that most, if not all, commercial web sites have Terms of Use, typically found at the bottom of the homepage, is it now axiomatic that web sites normally have Terms of Use located at the bottom of the homepage?

### **Even if Browse-Wrap Agreements Are Not Enforceable Against Users, They May Be Binding on the Web Site Owner**

Recent investigations by state attorneys general create the possibility that Terms of Use are unilaterally enforceable against a web site owner. JuicyCampus.com is a gossip web site on which students can post anonymous comments. Currently, the gossip site has sections for approximately 60 Universities.<sup>34</sup> On March 19, 2008, New Jersey Attorney General Anne Milgram announced that the state was investigating JuicyCampus for allegedly violating New Jersey's Consumer Fraud Act for failing to comply with its posted Terms of Use.<sup>35</sup> Three days later, Connecticut Attorney General Richard Blumenthal announced he had launched a similar probe.<sup>36</sup> And in California, State Assemblyman Alberto Torrico called upon California Attorney General Jerry Brown to launch a similar investigation of JuicyCampus.com and other gossip web sites.<sup>37</sup> To date, however, Attorney General Brown has not announced such an investigation. If any of these investigations determine there is a violation of state law when a web site owner fails to comply with its Terms of Use, it may set the precedent that a web site owner is bound by the Terms of Use regardless if an agreement is formed with the web site's users.

## **CONCLUSION**

The key to making Browse-Wrap Agreements enforceable is sufficient notice of the proposed agreement to the user. While pure Click-Wrap Agreements may be too cumbersome or otherwise undesirable, hybrids between Browse-Wrap Agreements and Click-Wrap Agreements provide

a stronger alternative to pure Browse-Wrap Agreements. For example, in *Cohn v. TrueBeginnings, LLC*, a California Court of appeals enforced the Terms of Use when the user was required to click “CONTINUE” on a page that stated, “I am 18-years-old and I have read and agree to the TRUE Terms of Use and Code of Ethics.”<sup>38</sup> Similarly, in *DeJohn v. The .TVCorporation Int’l*, the federal district court enforced an online agreement when DeJohn was required to click on a box indicating agreement to the terms of the contract when the actual text was provided through a hyperlink above the box.<sup>39</sup> Thus, in order to obtain the greater certainty provided by Click-Wrap Agreements, a web site owner need only display a hyperlink to the Terms of Use when requesting a user agree to the terms. In the end, what matters is whether the user received sufficient notice that the web site proposed an agreement through its Terms of Use.

## NOTES

<sup>1</sup> Ian Rambarran & Robert Hun, *Are Browse-Wrap Agreements All They are Wrapped Up to Be?*, 9 Tul. J. Tech. & Intell. Prop. 173, 174 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459, 459 n.2 (2006) (collecting cases).

<sup>4</sup> Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 Bus. Law. 279, 281 (2003); see also *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 120-22 (Ill. App. 2005).

<sup>5</sup> See, e.g., *Sprecht v. Netscape Commc’ns*, 306 F.3d 17, 31-32 (2d Cir. 2002), stating “[T]he fact that, given the position of the scroll bar on their computer screens, plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms.”; accord *Cario, Inc. v. Crossmedia Servs., Inc.*, 2005 WL 756610, at \*5 (N.D. Cal. Apr. 1, 2005) (finding display at the bottom of web site requiring a user to scroll down not relevant when actual or imputed knowledge of the Terms of Use was shown); *Motise v. Am. Online, Inc.*, 346 F. Supp. 2d 563, 564-65 (S.D.N.Y. 2004) (holding that “[t]he Second Circuit seems to require that the license terms appear on the screen, in view of the user, for the user to be on notice of them.”).

<sup>6</sup> *James v. McDonald's Corp.*, 417 F.3d 672, 677 (7th Cir. 2005).

<sup>7</sup> In *Pollstar v. Gigmania Ltd.*, the court found that a reasonable user would not know that the agreement was linked to the home page when it was not clearly indicated:

Since the text is not underlined, a common Internet practice to show an active link, many users presumably are not aware that the license agreement is linked to the homepage. In addition, the homepage also has small blue text which when clicked on, does not link to another page. This may confuse visitors who may then think that all colored small text, regardless of color, do not link the homepage to a different web page.

170 F. Supp. 2d 974, 981 (E.D. Cal. 2000); *but see Hubbert v. Dell Corp.*, 835 N.E. 2d 113, 121 (Ill. App. 2005) ("Although there is no conspicuousness requirement, the hyperlink's contrasting blue type makes it conspicuous.")

<sup>8</sup> "Couched in the mild request, 'Please review,' this language reads as a mere invitation, not as a condition. The language does not indicate that a user must agree to the license terms before downloading and using the software." *Sprecht v. Netscape Commc'ns*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001).

<sup>9</sup> *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 WL 21406289, at \*1 (C.D. Cal. Mar. 7, 2003).

<sup>10</sup> *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 U.S.P.Q.2d 1344, 1345 (C.D. Cal. 2000).

<sup>11</sup> *Id.* at 1346.

<sup>12</sup> *Id.*

<sup>13</sup> *Ticketmaster Corp.*, 2003 WL 21406289, at \*2; *see also Browse-Wrap Agreements*, *supra* n.4 at 305 (noting the notice was at the top of the webpage).

<sup>14</sup> *Browse-Wrap Agreements*, *supra* n.4 at 305.

<sup>15</sup> <http://www.ticketmaster.com/> (last visited Apr. 21, 2008).

<sup>16</sup> *Browse-Wrap Agreements*, *supra* n.4 at 305.

<sup>17</sup> *Id.* at 290.

<sup>18</sup> *Id.* at 305; *CompUSA Agrees to Discontinue Practice of Placing Disclosures Behind Several Links*, 6 Electronic Comm. & L. Rep. (BNA) 562 (2001) (demonstrating that excessive linking may be viewed as a deceptive business practice).

<sup>19</sup> *Are Browse-Wrap Agreements All They are Wrapped Up to Be?*, *supra* n.1 at 174; *see also Ticketmaster Corp.*, 2003 WL 21406289, at \*2 (consent obtained when user proceeded past the homepage); *Deaton v. Overstock.com*,

*Inc.*, 2007 WL 4569874, at \*1 (S.D. Ill. Dec. 27, 2007) (same).

<sup>20</sup> See, e.g., *Hubbert v. Dell Corp.*, 835 N.E.2d at 120-22.

<sup>21</sup> Cf. *Defontes v. Dell Computers Corp.*, 2004 WL 253560, at \*7 (Sup. Ct. R.I. Jan. 29, 2004) (finding terms of use not binding when the plaintiffs “were not given sufficient notice of the method to reject those terms”)

<sup>22</sup> *Browse-Wrap Agreements*, *supra* n.4 at 308-09; see also *Cohn v. TrueBeginnings, LLC*, Case No. B190423 at 5 (Cal. App.- 2d Jul. 31, 2007) (“Respondents presented substantial evidence that appellant had to click on the ‘continue’ button in order to register for his trial membership on the Web site, and that doing so constituted an agreement to the ‘Terms of Use’ on the website.”).

<sup>23</sup> *Douglas v. United States District Court for the Central District of California*, 495 F.3d 1062 (9th Cir. 2007).

<sup>24</sup> *Id.* at 1066.

<sup>25</sup> *Compare Cario*, 2005 WL 756610, at \*4 6 (holding Terms of Use enforceable against a competitor scraping plaintiff’s web site for information and placing it on a competing web site), *Pollstar*, 170 F. Supp. 2d at 981-82 (refusing to dismiss claims based on unenforceability of a browse-agreement against a competitor who was scraping information from plaintiff’s web site when there was a factual dispute regarding notice), *Ticketmaster Corp.*, 2003 WL 21406289, at \*2 (enforcing browse-wrap agreement against a competitor scraping information from Ticketmaster’s web site for use on competitor’s web site) and *Am. Airlines, Inc. v. Farechase, Inc.*, Cause No. 067-194022-02 (Tex.- 67th Mar. 8, 2003) (entering preliminary injunction against Farechase from violating American Airlines’ Terms of Use), with *Sprecht v. Netscape Commc’ns*, 306 F.3d at 31-32 (finding browse-wrap agreement not enforceable against a consumer), *Motise*, 346 F. Supp. 2d at 564-65 (same) and *Defontes*, 2004 WL 253560, at \*6 (Sup. Ct. R.I. Jan. 29, 2004).

<sup>26</sup> *Sprecht v. Netscape Commc’ns*, 306 F.3d at 31-32; *Motise*, 346 F. Supp. 2d at 564-65; *Defontes*, 2004 WL 253560, at \*6.

<sup>27</sup> See, e.g., *Terms of Use*, *supra* n.3 at 472-77.

<sup>28</sup> *Hubbert*, 835 N.E. 2d at 120 22; *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. 4th 583, 588-89 (2003) (enforcing forcing forum clause against a “private attorney general” when “the forum selection clause would be enforceable had Net2Phone’s customers filed themselves.”). Certain language in Overstock.com suggests that a

Click-Wrap Agreement may have been at issue. *Overstock.com*, 2007 WL 4569874, at \*1. Overstock.com's motion to dismiss, however, makes it clear that a Browse-Wrap Agreement was involved: "When an individual accesses the website, he or she accepts Overstock's Terms and Conditions, which govern all of Overstock's customer purchases." *Overstock.com*, Case No. 3:07-cv-00643 (JPG), Docket No. 13, Motion to Dismiss, Transfer Venue or Stay at 5 (Nov. 11, 2007).

<sup>29</sup> *McDonald's Corp.*, 417 F.3d 672.

<sup>30</sup> *Id.* at 674-675.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 677

<sup>33</sup> *Id.* at 678.

<sup>34</sup> Kate Brenner, *Juicy Campus Update*, *The Daily Princetonian* (Mar. 25, 2008) available at <http://www.dailyprincetonian.com/2008/03/25/20512/>.

<sup>35</sup> Kelly Heyboer, *Gossip Website Says AG is Violating Free Speech Rights*, *The Star-Ledger* (Mar. 27, 2008) available at [http://www.nj.com/news/index.ssf/2008/03/gossip\\_website\\_says\\_ag\\_invest.html](http://www.nj.com/news/index.ssf/2008/03/gossip_website_says_ag_invest.html).

<sup>36</sup> *Id.*; see also Martha Neil, *Another State AG Probes JuicyCampus Gossip Website*, *ABAJournal Law News Now* (Mar. 25, 2008) available at [http://www.abajournal.com/news/another\\_state\\_ag\\_probes\\_juicycampus\\_gossip\\_website/](http://www.abajournal.com/news/another_state_ag_probes_juicycampus_gossip_website/).

<sup>37</sup> *Id.*; see also Chris Rizo, *AG Brown Asked to Investigate Campus Gossip Site*, *LegalNewsline.com* (Apr. 9, 2008) available at <http://www.legalnewsline.com/news/210631-ag-brown-asked-to-investigate-campus-gossip-site>.

<sup>38</sup> *Cohn v. TrueBeginnings, LLC* at 35.

<sup>39</sup> *DeJohn v. The .TVCorporation Int'l*, 245 F. Supp. 2d 913, 915 16, 919 (N.D. Ill. 2003); see also *Sutton v. Expedia Inc.*, Case No. 3:07-cv-005547 (GPM), Docket No. 30, Minute Entry (S.D. Ill. Apr. 21, 2008) (dismissing case for improper venue base on web site Terms of Use).