Attachment #9 - Browse Wrap Information

Are Browse Wrap (Terms of Use) Agreements Binding?

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Posted in: Internet Law, Privacy Law- No Comments

What is a Browse Wrap Agreement?

It is increasingly common for websites to include "Terms of Use" agreements. These agreements set out the terms and conditions to which the user must agree in exchange for using the site. A question that sometimes arises in the law is: how does one demonstrate that a user assented to the *Terms of Use* agreement?

With so-called "click-wrap" agreements, agreements that require the user to click an "I Agree" button or agree in some other direct way, the answer is simple enough: agreement is given directly by the user. But many other agreements are of the kind known as "browse-wrap" agreements, where there is no direct way of signalling assent, and any acceptance of the agreement, if it comes, must be contingent on the mere act of browsing the site. This essay will attempt to set out the relevant case law on the validity of browse-wrap agreements, and the likelihood that a *Terms of Use* agreement will be considered binding without the benefit of an "I Agree" button.

Contract Law Principles

The legal theory behind the enforceability of a *Terms of Use* agreement is that a contract can be formed if one of the parties posts a notice of terms and the other implicitly accepts the terms. Such contracts are common in everyday life. For example, it could be said that a driver agrees that a parking lot will not be responsible for lost or stolen items by parking in a lot that has a notice prominently displayed where a driver can see the notice before choosing to park in the lot.

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The key to enforceability is bringing the notice to the driver's attention before the driver chooses to park. In *Thornton* v. *Shoe Lane Parking Ltd*., [1971] 2 Q.B.163 (C.A.), the English Court of Appeal held that merely using a parking garage did not constitute acceptance of the terms of use unless there was evidence that the user knew, or should have known, that the use was "subject to it [the conditions]."

This case established the basic principle that there must be an offer and acceptance of the terms. The offer must be made known, and the act of using the product or facility must be in response to the offer, making it a form of acceptance.

Canadian Law

The leading Canadian case on browse-wrap agreements is *Kanitz* v. *Rogers Cable Inc.*, (2002), 58 O.R. (3d) 299 (Ont. Sup. Ct.). The plaintiffs signed an agreement with Rogers Cable, which stated that Rogers could amend the agreement at any time, and that any amendments would be posted on Rogers' website.

Rogers amended the agreement to say that all disputes should be settled through arbitration, and tried to use this to forestall a lawsuit by the plaintiffs. The plaintiffs brought the proceeding under the Ontario *Class Proceedings Act*, claiming that they had not been given reasonable notice of the change.

The court held that, by the terms of the agreement, posting it on the website was, in fact, reasonable notice. In the decision, Nordheimer J wrote:

> The effect of the terms of the amending provision in the user agreement, in my view, is to place an obligation on the customer… to check the web site from time to time to determine if such amendments have been made.

By continuing to use the website after the amendments were posted, they were "deemed to have accepted the amendments." Thus an online agreement was ruled to be binding on the plaintiffs even though they had not pressed any button to agree with it, nor even checked to see that it was there.

The court did not deal with the issue of whether such an agreement would be binding if it were not tied to another, signed agreement. The online amendment in *Kanitz* was an amendment to an agreement which the plaintiffs had physically signed, and part of the agreement they signed was the provision that the Rogers.com could amend it online.

Therefore there was, in fact, a direct act of agreement to the terms of the amendment; it just came before the amendment was posted. So while this case marked an important step in the recognition of browse-wrap agreements, its application may be limited by the fact that the agreement in question was tied to a previously-existing, physically signed agreement.

American Law

U.S. Courts have dealt with the issue of browse-wrap agreements with no accompanying signed agreement, and they have ruled that these agreements can be binding to the extent that there is some kind of action, of using the website, that constitutes an act of acceptance.

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In *Register.com, Inc.* v. *Verio, Inc.*, 356 F.3d 393; 2004 U.S. App. LEXIS 1074; 69 U.S.P. Q.2D (BNA) 1545 a New York court dealt with a violation of a browse-wrap agreement. The defendant, Verio, argued that while it was aware of the *Terms of Use* on the plaintiff's site, the terms did not form a binding contract because there was no "I accept" button to click.

The court, however, upheld the plaintiff's trespass to chattels claim, holding that the act of using the website to perform a WHOIS search was the same as an acceptance; the fact that the offer/acceptance takes place on the internet does not change the:

> standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.

Moreover, the court explicitly rejected the reasoning in the Ticketmaster case: "Under the circumstances of Ticketmaster, we see no reason why the enforceability of the offeror's terms should depend on whether the taker states (or clicks), 'I agree.'"

The principle has been established in the U.S., then, that use of a site can constitute acceptance of its terms. Apart from Verio, the other U.S. case of importance in this area is *Specht* v. *Netscape Communications Corp* 206 F.3d 17 (S.D.N.Y. 2001); aff'd 306 F.3d 17 (2nd Cir. 2002), the same New York Court as in Register.com heard the case of a "plug-in" program that included a licence agreement as part of the process of downloading.

While acknowledging that in some cases the receipt of an agreement can be enough to create acceptance if the recipient then continues to use the product, the court concluded that the licence agreement was obscurely placed (the plaintiff would have had to scroll down to find it), and the absence of any warning that the user would be downloading subject to the site's *Terms of Use*, there was no reasonable expectation that the user should have expected a contract to be formed. Sotomayor, Circuit Judge, wrote that:

> where consumers are urged to download free software at the immediate click of a button, a reference to the existence of licence terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.

Conclusion

Both Canadian law, as expressed in Kafritz, and American law, as expressed in the two decisions mentioned above, adhere to the same basic principles regarding browse-wrap agreements. These are, essentially, as follows: for a browse-wrap agreement to create a binding contract, there must be a reasonable expectation that the user of the site would see it (either because he or she has been told to look for it, or because it is clearly displayed so that someone will see it before using the site), and there must be some kind of physical action, like downloading, accessing a site, that is sufficient to constitute an act of acceptance.

A website owner with a browse-wrap agreement on his or her site would be well-advised either to add an "I accept" button (making it a direct, or "click-wrap," agreement), or to add a provision to the *Terms of Use* saying that by using the site, the reader is assenting to these terms. Either of these can be used to demonstrate acceptance. Without some way of demonstrating acceptance, there is no agreement; but as long as there is some action that demonstrates acceptance, it creates a binding agreement, no matter how slight the action may be. The website owner should also make sure that

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any *Terms of Use* or disclaimer displayed in such a way that someone who clicks on the site will be likely to read it before actually using the site: either put the message at the top of the site, or a shorter message advising the reader to scroll down to read the *Terms of Use* or disclaimer.

Without evidence that the agreement was easy to read and easy to find, a court will assume that a user could not reasonably have been expected to know about it and the agreement will not be enforced.

Server

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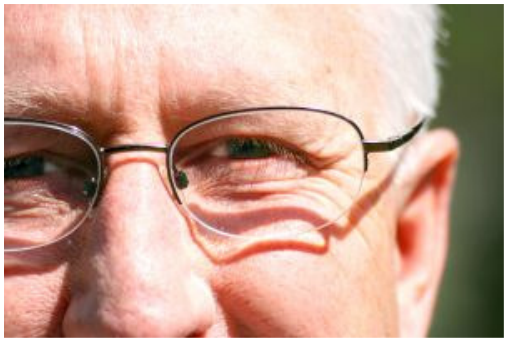

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Zvulony & Company, P.C.
28 Finch Ave West
Suite 208
Toronto, ON
Canada, M2N 2G7

Telephone and Fax:
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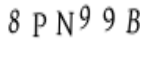
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