Website Contracts: "I Didn't Agree to Those Terms, Did I?"

ABA Cyberspace Law Committee Forum

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What is a “click-through agreement”?

- One party sets up electronic form agreement on web site or CD-ROM, etc.
- Other party assents by clicking icon or button with word(s) on it or assenting words proximate to it, or typing in pre-selected word(s).
- Bright moment of unambiguous assent by language

What is a “browse-wrap agreement”?

- Resembles click-through agreement because both involve electronic form agreement on web site or CD-ROM, etc.
- No express assent: no box or button to click
- Instead, user’s conduct shows implied assent to the agreement terms.

ABA project

- ABA Working Group on Electronic Contracting Practices, in the Cyberspace Law Committee, of the Business Law Section, of the American Bar Ass’n
- Working since 2000 on contract formation and modification issues in electronic form agreements

Our Articles

- “Click-through Agreements: Strategies for Avoiding Disputes on the Validity of Assent,” 57 Business Lawyer 401 (Nov. 2001).
- “Browse-wrap Agreements: Validity of Implied Assent in Electronic Form Agreements,” 59 Business Lawyer 279 (Nov. 2003).
- New article on modification of electronic agreements: now in production

The Bottom Line in Click-through and Browse-wrap Agreements

- No assent to electronic form agreement *unless*
  - User gets adequate notice that the proposed terms exist, and
  - User gets meaningful opportunity to review the terms, and
  - User gets adequate notice that taking specified (optional) action manifests assent to the terms, and
  - User takes that action.

Step 1: User gets adequate notice that the proposed terms exist.

- Physical presentation
  - Judged by standard of reasonably prudent offeree
  - Size, type, and color of font (*Hubbert v. Dell*)
  - Placement of notice
  - Degree of attention paid to terms incorporated by reference

Step 1 (continued)
Adequate notice

- Might need to be "immediately visible" (*Specht*)
  - *But see Register.com v. Verio*
    - A repeat visitor to a web site might be bound by terms even if they are not immediately visible
  - Disapproved by *Specht* court

Step 1 (continued): Notice of existence of terms

- Content of the notice
  - Notice of binding agreement, not just request or suggestion to read
  - If terms on back of paper agreement, front gives notice of terms and their importance to user

Step 1 (continued): Notice of existence of terms

- Timing of notice
  - Before assent, User should be presented with notice of the terms' existence
  - Presentation can be
    - Automatically (e.g., inevitable screen, or notice at top of home page) or
    - By hyperlink that's clearly labeled and easily found or
    - By a screen that the User MUST go past

Step 2: User gets meaningful opportunity to review the terms.

- As in paper transactions, User need not actually read the terms, nor does User have to be able to negotiate the terms
- Circumstances of presentation of terms
  - Able to read terms at own pace, without time pressure
  - Able to navigate forward and backward
  - Not just one-time opportunity to review

Step 2 (continued): Opportunity to review terms

- Circumstances of presentation of terms
  - Must still follow “paper” rules re font size, conspicuousness, etc., if any
  - FTC Dot Com Disclosures: clear syntax, no technical jargon
  - Hyperlink *can* provide access to terms
    - Set off from other text by size, color, and type of font
    - Obvious location (“above the fold”)
    - Clear wording
    - Not more than two layers of links

Dangers of Pop-up Boxes

- Click-through or browse-wrap terms in pop-up box are invalid
  - If pop-up blocking software keeps box from appearing
    - Then no notice of existence of terms (Step 1)
    - And no opportunity to review terms (Step 2)
- FTC Dot-Com Disclosure guidelines disapprove of pop-up box that disappears after one viewing
    - No chance for comparison shopping at a later time
    - No chance to review contract terms

Step 2 (continued): Opportunity to review terms

- Timing of presentation of terms
  - Before contract formation
    - User shouldn’t be able to assent without viewing terms
    - Place assent at end of proposed agreement terms
  - Before access to governed item (website, software, information, property, services, etc.)

Step 2 (continued): Opportunity to review terms

- Timing of presentation of terms
  - Otherwise courts hold terms to be optional and non-binding
  - Exception: terms in the box and other terms presented after contract formation
    - Cases are split about whether recipient assents to terms
    - Might be valid based on modification, waiver, promissory estoppel, or recipient’s commercial expectations

Step 3: User gets adequate notice that specified action is assent.

- User must take action of assent with reason to know that taking that action will constitute assent to the proposed terms of agreement.
- So notice must precede specified action of assent.

Step 3 (continued): Notice of action of assent

- Express assent: Can be by clicking box or icon with language of assent, by typing specified words, etc.
    - Especially if at end of terms (scrolling)
    - Especially where choice between yes and no, with clearly labeled buttons
  - User must give specific assent to particular term, if required by law
- Implied assent: Can be by going to next page, submitting query, downloading software, possibly just using the web site, etc.

Step 3 (continued): Notice of action of assent

- Examples of notice of express assent:
  - “By clicking “Yes” below you acknowledge that you have read, understand, and agree to bound by the terms above.”
  - “If you click ‘I Agree’ without reading the membership agreement, you are still agreeing to be bound by [the agreement].” (Rudder)
  - “If you reject the proposed terms above, you will be denied access to the [web site, software, product, services] that we are offering you.”

Step 3 (continued): Notice of action of assent

- Examples of implied assent (if specified in notice):
  - User downloads software
  - User submits query to search engine
  - User gains access to web site
- We think it must be an action that the User wouldn’t have to take and wouldn’t take automatically.
  - See paper-world precedent.

Step 4: User takes action of assent.

- Advise client on proof issues
  - need to retain old versions of web site
  - perhaps also “clickstream data” (avoid if possible, because of privacy issues)
- Acceptance by silence or inaction not usually valid, except when the parties have a pattern of having done so or when User takes benefit knowing that payment is expected.
  - 2nd Restatement of Contracts § 69
  - Common law cases

Modifications of e-Agreements: Common Scenarios

- Change in privacy policy, to sell company and its data or otherwise broaden acceptable uses of customer data
- Modify online service agreement, to increase price, add arbitration clause, or change other material terms
- Change in employment handbook

Lessons re e-modifications

- Same steps as in forming electronic contracts
- Reservation of right to unilaterally modify might or might not be advisable
  - “Terms subject to change without notice” might not be enforceable
- Advance notice with chance to opt out is safer course
- Keep record of date/means of posting notice of change, and which services/goods it affects
- Possibly higher standard for employee policies?

Browsewrap Matrix

Name	Main Facts	Browsewrap Characteristics	Human-Centric Desicion?
Pollstar v. Gigmania	1. Gigmania copied Pollstar's concert and ticket information. 2. Pollstar sued for breach of contract 3. Gigmania filed MTD arguing no contract was formed because of lack of mutual assent.	1. Browsewrap was not on Pollstar's home page, but on a different page linked to it. 2. It appeared in small font on a gray background. 3. Notice was not underlined to indicate a hyperlink.	Yes. Bots are not dependent on page location, font color or the lack of hyperlink.
Register.com v. Verio	1. Verio used bots on a daily basis to scrape Register.com's customer database. Verio would then solicit Register.com customers. 2. Register.com's browsewrap prohibited this type of activity; browsewrap was triggered by submitting a WHOIS query. 3. Court issued a preliminary injunction against Verio. Verio countered that even if browsewrap was enforceable it did not manifest assent to its terms.	Terms were presented either on the query screen or on the page results.	Yes. Even though the court properly found in favor of Register.com, it relied on awareness of the browsewrap. In other words, had Verio argued it was unaware of the terms, the case may have turned differently. However, in either case, the decision is human-centric.
Ticketmaster Corp v. Tickets.com, Inc.	Tickets.com deep-linked into competitor's Ticketmaster's website in violation of the latter's browsewrap. Tickets.com argued it was not aware of the terms of use. In Ticketmaster III, Tickets.com argued it was entitled to summary judgment because there was no evidence it assented to the browsewrap.	Ticketmaster I & II: Terms of use "buried". Ticketmaster III: Ticketmaster modifies its website and makes the terms of use more visible.	Yes. Bots are not dependent on location of the terms of use.
Cairo Inc., v. Crossmedia	Cairo used a bot to scrape information from its competitor's, Crossmedia, website. Crossmedia	Virtually every page on Crossmedia's website	Yes. This case is a close one, however. The

Services, Inc.	sent a letter to Cairo's president demanding it cease and desist and threatening litigation because its conduct constituted, among other things, a breach of the Terms of Use. Cairo continued to scrape even after the letter was sent. Cairo argued that just before it received the letter from Crossmedia, it was not aware of the terms of use. It further argued that it was not bound to the terms and conditions because it had not assented to them.	contained a hyperlink to its full terms of use.	reason being that the court found that even though no Cairo employee accessed Crossmedia's website, it had imputed knowledge and therefore imputed assent was properly found through its use of bots. The issue remains that the location of the terms of use was still apparently relevant. This analysis should have been unnecessary because of the use of bots.

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- Uniform Electronic Transactions Act
    - http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.htm (last visited June 25, 2007)
    - http://www.ncsl.org/programs/lis/CIP/ueta-statutes.htm (jurisdictions where UETA adopted, last visited June 25, 2007)
- Restatement (Second) of Contracts
- Federal Arbitration Act, 9 U.S.C. §§1 et seq.
- 16 C.F.R. 435 (Mail Order Rule)
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John E. Ottaviani has represented clients for over 20 years on a variety of intellectual property and business matters, including the protection of trademarks, copyrights and trade secrets, the acquisition and sale of technology companies, the Internet, electronic commerce, the use and exploitation of technology, and investments in technology companies. He also advises emerging technology and other privately held businesses on organizational, operational and financing matters. John frequently is asked to review and negotiate computer software licenses and technology services contracts on behalf of users, and has represented some of the region's largest governmental, financial services and health care institutions on these matters. He also advises, prepares and negotiates contracts for software, hardware, electronic commerce, and other technology vendors. In recognition of his accomplishments, he is the only private attorney to have been listed twice in the Providence Business News's list of "Who's Who in Technology in

Rhode Island" (October 2000; November 2001). John also was named in the September 2003 issue of "Rhode Island Monthly Magazine" as among the 3 "top lawyers" in Rhode Island in intellectual property matters. John is the past President of the Board of Directors of Adoption Rhode Island, a non-profit organization dedicated to recruiting permanent families for abused and neglected children in state care, and is President of the Bowdoin College Alumni Club of Rhode Island. John also serves on the Advisory Board of Directors of the Tech Collective (formerly the Rhode Island Technology Council), is Co-Chair of the Intellectual Property Subcommittee of the ABA's Cyberspace Law Committee and is an adjunct faculty member in the Legal Studies Department at Bryant College. He is an avid baseball fan and is awaiting the day when the Boston Red Sox win the World Series again.