



To Click or Not to Click, That is the Question: Enforceability of Terms of Use in an Online Economy

Whether you operate an informational health blog, an on-demand grocery delivery iOS application or a web-based e-commerce marketplace, the importance of a well-tailored and business-specific Terms of Use agreement is essential in protecting your online business and mitigating legal exposure. Commonly referred to as “Terms of Use,” “Terms of Service” or “Terms and Conditions” (for purposes of this article, collectively, “Terms of Use”), these agreements are the rules (or, in many cases, binding legal contracts) that an end-user agrees to when accessing or using the services of a web-based or smartphone application.

Terms of Use provide the legal foundation for the substantive terms, conditions and restrictions governing a company’s relationship with its end-users. Not all Terms of Use, however, are created (or drafted) equally, and businesses should carefully vary their specific Terms of Use to fit the unique circumstances under which end-users will engage with them and their sites and applications. These points of variance include the type of business the company engages in, the services or goods offered, the extent of interaction between users, and whether content is typically generated by site users.

There are two primary formats for Terms of Use. The first such format is the “browse-wrap” agreement, by which terms and conditions are merely posted on a website (generally in the footer) and are accessible via hyperlink. The second type of Terms of Use is the “click-wrap” agreement, which requires a user to manifest agreement with, or acceptance of, the website’s terms and conditions after being presented with them – typically in an automatic pop-up window. Recent iterations in a long line of one-sided, company-friendly contracts, both phrases come from the term “shrink wrap contract” and are reminiscent of the days when a floppy disk or CD-ROM was required to install software.

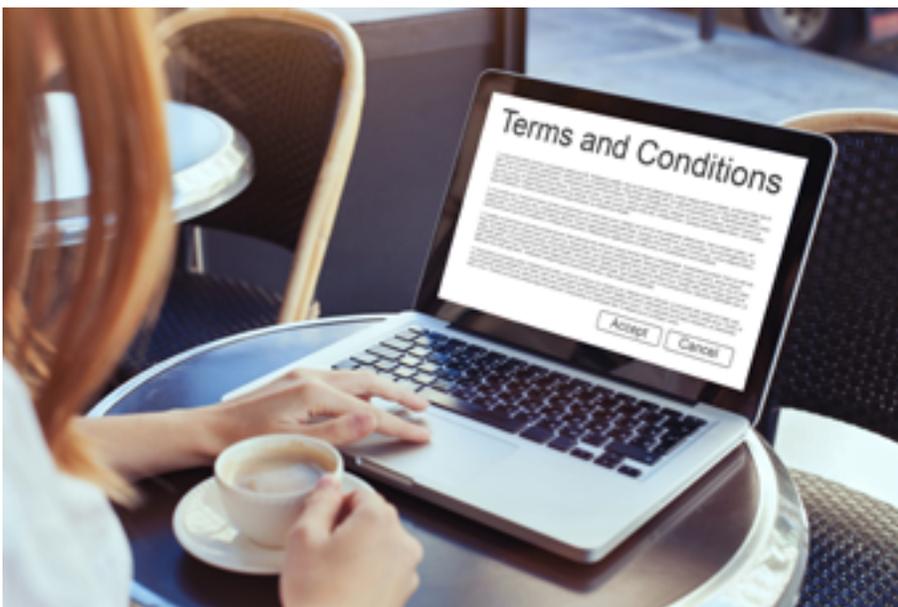
As a result of the heavy increase in online user activity, courts across the country are consistently faced with lawsuits involving online agreements. One such lawsuit involved claims against the national bookseller Barnes & Noble. In *Barnes & Noble*, a customer sued Barnes & Noble in federal court claiming that the online bookstore had engaged in deceptive business practices and false advertising relating to its advertisement of a fire sale of



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discontinued tablets. Rather than fighting the suit in the costly and public federal court venue, Barnes & Noble moved to compel arbitration alleging that the plaintiff was subject to the arbitration clause contained in the Company's Terms of Use. The district court denied Barnes & Noble's motion to compel, and the company appealed.

In affirming the district court's decision, the Ninth Circuit concluded that the plaintiff was not bound by the arbitration clause in the Terms of Use. The appeals court in *Barnes & Noble* found that the Terms of Use in dispute constituted a browse-wrap agreement, and stated that "the determination of the validity of [a] browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions". Given that the user was not required to take any affirmative action to agree to the terms, other than incidentally through the user's use of the website, the online business was unable to impute knowledge of the Terms of Use to the user. If there is no evidence of actual notice, "the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract." The Ninth Circuit explained that courts generally refuse to enforce browsewrap agreements "[w]here the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it." Consequently, even though there was a hyperlink to the Terms of Use on the bottom of each webpage of Barnes & Noble's website, the court still found that it was insufficient to give rise to constructive notice because the user was never prompted to take affirmative action to demonstrate assent to the Terms of Use.



An alternative and more favorable result for an online business was in *Whitt v. Prosper Funding LLC*, which involved a click-wrap agreement. In *Whitt*, the defendant, the owner of a website that accepted loan applications, filed a motion to dismiss the plaintiff's complaint and compel arbitration. The disputed website terms in *Whitt* required loan applicants to check a box adjacent to the following bolded text: "Clicking the box below constitutes your acceptance

of . . . the . . . agreement”. This acknowledgement was displayed near the bottom of the website, but immediately above a “Continue” button and the loan applicant could not complete the process without checking off the box and accepting the terms of the agreement. In enforcing the agreement, the court held that the plaintiff at least had constructive knowledge of the terms of the agreement and had assented to them.

Ultimately, when it comes to implementing a sound and enforceable Terms of Use agreement, businesses should play it safe. Some best practices a business should observe are:

- Prompting users’ affirmative agreement with the Terms of Use by checking a box (or responding to another similar clear and conspicuous call to action);
- Including a hyperlink to website or app Terms of Use that is both obvious and conspicuous in location on the platform, font size and color of lettering;
- Disabling users from proceeding with a transaction or website registration unless the user manifests assent to the Terms of Use; and
- Requiring that users have fully scrolled through Terms of Use before acceptance, thus bolstering the argument that such terms have been completely reviewed.

By simply implementing a few of the above recommendations, a business can substantially increase the likelihood that a court will ultimately enforce their Terms of Use agreement when it counts and add overall clarity to the rules of engagement with their end-users.

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