

## ENFORCEABILITY OF WEBSITE TERMS OF USE

The majority of commercial websites, and even a number of personal weblogs, contain a link to terms and conditions for the use of those websites to govern any user's visit to it. Called "clickwrap" or "browsewrap" agreements, these terms and conditions are often not available for review until after you have visited the website and/or paid for a product online.

As the use of these provisions first proliferated, court decisions on their enforceability seemed to vary as much as the websites they intended to govern. But a number of recent cases have begun to help offer clarity on the enforceability of certain website terms and conditions.

In *Hubbard v. Dell Corporation*, an Illinois appeals court held that buyers who purchased computers through Dell's website were bound by an arbitration clause contained in the "Terms and Conditions of Sale," even though buyers were not required to click on an "I Agree" or "I Accept" button specifically accepting those terms. Although website terms and conditions had been upheld before, this was one of the first cases to hold that such terms were enforceable to a first time or infrequent visitor, so long as they are conspicuous.

Among other things, the sophistication of the buyers played into the court's decision. The court reasoned, "Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink."

Although some courts may not be willing to go as far as the Illinois court in *Dell*, most jurisdictions at least recognize the enforceability on website terms of use when there is an unmistakable indication of assent. In such situations the user has actual notice, gave an unambiguous manifestation of assent, and will thus be bound to the terms when they proceed to visit rest of the website.

It is important to note that once a user accepts a website's terms of use, he or she will typically be taken to an "interior" page on the website. Occasionally other websites or users can provide links leading directly to these interior pages (called "deep linking"), thus allowing visitors to arrive at an interior page and bypass any acceptance to terms of use.

The enforceability of a website's terms of use in instances where the user arrived at an interior page through deep linking was upheld in *Ticketmaster Corp. v. Tickets.com*, a 2003 case before a U.S. District Court in California. In that case Ticketmaster sued Tickets.com for deep linking to pages within Ticketmaster's website. The court upheld the enforceability of Ticketmaster's terms of use in part because Tickets.com had knowledge (or constructive knowledge) of the conditions by accessing interior webpages.

Notably, the court in *Ticketmaster* explained that it “would prefer a rule that required unmistakable assent . . . by requiring clicking on an icon which says ‘I agree’ or the equivalent.” However, it reasoned that the law has previously enforced contracts despite a lack of clarity regarding whether assent was given, including terms and conditions on the backs of sporting and airline tickets.

Ultimately, terms of use may be held enforceable against even first time or infrequent visitors to a website. Nevertheless, using an acceptance procedure for terms and conditions provides more certainty in enforcing it. Thus, this approach should be used whenever possible.

The Internet is a constantly evolving medium, but an increasingly important one to running a successful business. Each website and Internet-based commercial transaction is unique, so you are encouraged to consult with legal counsel before providing terms of use on your company’s website.

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