

BROWSEWRAP V. CLICKWRAP

HOW ENFORCEABLE ARE YOUR TERMS OF SERVICE?

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Nothing beats that feeling of victory even when it is a mobile game like Candy Crush. But not much thought is given to the terms of use to which players must agree to play. On April 18, 2024, a federal court found that participants in the “Candy Crush All Stars 2023 Tournament,” which allowed Candy Crush players to compete for \$250,000 in prizes and a trip to London, agreed to King.com Limited’s (the makers of Candy Crush) terms of use. To play Candy Crush, players affirmatively demonstrated their acceptance of the terms by clicking an “accept” button in a popup dialog box on their app. In this class action suit, *Sorina Montoya v. King.com Limited*, the court found that King.com Limited’s terms of use presented via clickwrap effectively bound players to its terms of use.

Whether playing in an online tournament, booking a hotel stay, reserving time to play golf, or renting a boat for an afternoon, people are going online or using a mobile application for virtually every transaction. And the businesses offering these

products or services are frequently turning to terms of service agreements and other electronic contracts within their platforms to bind these users to their terms.

But as technology advances, so should everyone’s understanding of these electronic contracts. Because even the most well-crafted, protective electronic contract will have little value, if any, if it is not enforceable. Therefore, it is crucial for lawyers to understand and advise their clients as to the best ways to ensure these electronic contracts are enforceable if challenged.

This article will introduce the two most common methods for presenting Terms of Service and other electronic contracts: *browsewrap* and *clickwrap*. Next, it will discuss potential issues with their enforceability. Finally, this article will “wrap” things up with recommendations for the most effective ways to bind users to a business’s terms.

WHAT IS A BROWSEWRAP AGREEMENT?

A browsewrap agreement implies the

user’s consent to the website’s terms of service. By a user’s continuous use of the website, it is assumed that the user agrees to the terms of service. In browsewrap agreements, the terms of service are often found in the footer of a website via a hyperlink. For example, a user would scroll to the bottom of a website, find the words “Terms of Service,” and click on the hyperlink to find the terms.

WHAT IS A CLICKWRAP AGREEMENT?

A clickwrap agreement obtains the user’s explicit consent to a website’s terms of service. By requiring users to make an affirmative action, the user demonstrates awareness and acceptance of the terms of service. In clickwrap agreements, the user must make an active choice such as clicking a box that states, “I agree.” For example, Candy Crush presented players with an in-app dialog box informing players that they must confirm that they agree to Candy Crush’s terms of use by clicking a green “accept” button to continue playing.

KEY SIMILARITIES AND DIFFERENCES

Both the browsewrap and clickwrap methods are frequently employed to obtain consent to an electronic contract and terms of service. Their key differences stem from how they are presented to the user, how consent is acquired, and how the data is recorded. These differences are critical, as they affect the enforceability of electronic contracts.

Presentation. Browsewrap agreements have their terms and conditions hyperlinked at the footer or sidebar of a website. To access the terms of service, the user must locate the hyperlink. Clickwrap agreements, however, serve as a gateway that a user must pass by affirmatively making an action indicating their acceptance. Unlike browsewrap agreements, users do not have to find the terms of service, as they are prominently placed in front of the user.

Consent. In browsewrap agreements, users' consent is implied by their continued use of the website without any explicit acceptance of the terms and conditions. On the other hand, clickwrap agreements require users to make an affirmative choice and actively acknowledge their consent to the terms and conditions by a specific action like clicking a box. The browsewrap method of consent is passive, while the clickwrap method is active.

Records. Since the browsewrap method of consent does not require an explicit action, keeping a record of user consent is more challenging. At best, businesses can use website analytics or behavioral data to demonstrate consent. The clickwrap method, however, allows businesses to record user consent through timestamps and unique identifiers to show a user's acceptance of the terms and conditions.

ARE BROWSEWRAP OR CLICKWRAP AGREEMENTS ENFORCEABLE?

The *Electronic Signatures in Global and National Commerce Act* (ESIGN) and the *Uniform Electronic Transactions Act* (UETA) have made electronic contracts and digital signatures legally valid. Despite ESIGN's and UETA's regulations, the traditional contract principles of offer, acceptance, awareness, and consideration still apply to both browsewrap and clickwrap agreements.

Among the basic contract principles, acceptance of an electronic contract remains the most vulnerable to legal challenge. Whether an electronic contract will be enforced is largely dependent on how the terms are presented and what action a user is required to perform to show assent.

Since the browsewrap method does not require users to read the terms and conditions or take any action indicating

their agreement, browsewrap agreements are more challenging to enforce. For example, in *Vitacost.com, Inc. v. James McCants*, a Florida court found a browsewrap agreement unenforceable since the terms and conditions were at the bottom of the page where users would not see it without scrolling all the way down. And in *Brett Long v. Provide Commerce, Inc.*, a California court declined to enforce a browsewrap terms of use agreement that appeared in the checkout because it was not conspicuous enough as its text color blended too much with the background. As these cases demonstrate, it is difficult to prove awareness of a browsewrap agreement when users are not clearly presented with the website's terms and conditions.

On the other hand, the clickwrap method forces users to take a specific action such as clicking a checkbox. With an emphasis on users' clear awareness in clickwrap agreements, there is more evidence of users' acceptance and awareness. For example, in *Caspi v. Microsoft LLC*, a New Jersey court ruled in favor of the enforceability of Microsoft's clickwrap agreement where users had to navigate through each page of Microsoft's agreement and click "I agree" before proceeding to each page. Similarly, in *Davis v. HSBC Bank Nevada, NA*, a federal court ruled that a credit card applicant could have read that there was an annual fee had the applicant read the terms and conditions in the scrolling box menu before clicking "I agree." Accordingly, to determine a browsewrap agreement's enforceability, courts may scrutinize its placement, visibility, and compliance with regulations. In sum, a clickwrap agreement is more likely to be enforced compared to a browsewrap agreement.

WHAT IS THE BEST OPTION?

Although browsewrap agreements have questionable enforceability, the browsewrap method remains relevant under certain circumstances. For example, browsewrap agreements can be an option for strictly informational websites where users are simply reading or watching content. Also, non-transactional websites without account creation or payments are lower risk and could arguably benefit from the browsewrap method. Browsewrap agreements offer a less disruptive and more convenient user experience, but risk not being enforceable.

Despite browsewrap's more favorable user experience, more businesses are converting to clickwrap agreements. As discussed supra, clickwrap agreements are the most reliable method that can protect a business's interests in a legal proceeding. With the clickwrap method, defense attor-

neys can provide clearer evidence that the user read and actively chose to agree to the terms and conditions.

It should be noted that whether an entity uses a clickwrap over a browsewrap agreement may depend on various industry-specific, consumer-protection, or data privacy laws, such as:

Health Insurance Portability and Accountability Act – HIPAA is a federal law that establishes national standards to protect patients' health information. Given the sensitive data protected by HIPAA, patients must give explicit consent. Thus, clickwrap consent is required.

General Data Protection Regulation – The European Union's GDPR is the most stringent privacy and security law in the world. Since the GDPR mandates explicit opt-in consent, only the clickwrap agreement method is possible.

Children's Online Privacy Protection Act – COPPA requires parents or legal guardians to give verifiable consent. Therefore, clickwrap agreements are the best option.

California Consumer Privacy Act – The CCPA is a privacy law that applies to most businesses that process personal data from California residents. A clickwrap agreement is the optimal method.

Given the nature of these laws, it is a better practice for entities subject to them to employ clickwrap agreements. Nonetheless, clickwrap agreements provide the best overall option for most entities given their better enforceability, clear consent, and legal compliance.

IT'S A WRAP!

As electronic contracts become increasingly ubiquitous, lawyers must understand this evolving digital landscape to ensure that their client's terms are enforceable. As seen with the browsewrap and clickwrap method, *how* an electronic contract is presented is just as important as *what* is presented. Since browsewrap agreements rely on implied consent, while clickwrap agreements involve explicit consent, clickwrap agreements have proven more enforceable. Therefore, in most scenarios, clickwrap agreements are the better option.



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