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Click, wrap and scroll: Securing assent to online agreements

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With increasing frequency, companies are asking their customers, employees and independent contractors to agree to terms of service and other contracts over the internet. Because the parties do not sign the agreement by hand, questions sometimes arise over whether the customer, employee or independent contractor actually assented to the contract. The answer often turns on how the agreement was presented and whether the user had a fair opportunity to review and agree to the terms. Three of the most common types of online agreements are "click wrap," "sign-in wrap," and "scroll wrap" agreements. All three can create enforceable contracts, but there are certain rules of the road and things that companies can do to increase the likelihood that a court will enforce the agreement.

Click-Wrap Agreements

A click-wrap agreement requires the user to affir- matively click a button (or check a box) dedicated to accepting the terms and conditions. Courts generally find such agreements enforceable. For example, in *Yiru v. WorldVentures Holdings LLC*, CV-02155 (N.D. Tex. Sept. 11, 2018), the court found that the company's click-wrap agreement provided the plaintiff reasonable notice of the terms and conditions, such that the plaintiff's act of clicking an "I agree" button effectuated assent. The court noted that the plaintiff could not proceed with her enrollment without clicking the box. A plaintiff was similarly bound by Groupon's terms *Davis v. USA Nutra Labs*, 303 F. Supp. 3d 1183, 1190 (D.N.M. 2018), where she affirmatively clicked a box acknowledging acceptance of those terms both when she created her account and when she completed her purchase. Under such circumstances, the court was unconvinced by plaintiff's contention that she did not "'recall specifically consenting to any particular terms'" because any reasonably prudent user would have known of the existence of the terms, given Groupon's con- spicuous hyperlink.

Courts have also enforced clickwrap agreements when the full text of the agreement was not presented next to the button or check box. In *Tompkins v. 23andMe, Inc.*, CV-05682 (N.D. Cal. June 25, 2014), for example, the court found that the plaintiffs had adequate notice of the terms of service where "during the account creation and registration processes, each named Plaintiff clicked a box or button that appeared near a hyperlink to the TOS to indicate acceptance of the TOS."

If the user is required to click a hyperlink to view the agreement, the company should ensure that the hyperlink is conspicuous and directly links to the terms — for example, in blue, underlined font and not overshadowed by other, more eye-catching icons.

Sign-In Wrap Agreement

A sign-in wrap agreement does not require the user to separately agree to the contract. Rather, the webpage states that, by signing-in, creating an account, or completing a purchase, the user agrees to the contract, which

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is generally hyperlinked. Courts have held that signin wrap agreements are enforceable so long as a reasonably prudent user would be on notice of the terms. In *Graf v. Match.com*, CV-03911 (C.D. Cal. July 10, 2015) for example, the court held that a plaintiff assented to an arbitration clause where evidence showed that all website users "were required to affirmatively agree to the Terms of Use when they clicked on a 'Continue' or other similar button on the registration page where it was explained that by clicking on that button, the user was affirming that they would be bound by the Terms of Use, which were always hyperlinked and available for review."

Likewise, in *DeVries v. Experian Info. Sols., Inc.*, CV-02953 (N.D. Cal. Feb. 24, 2017), the court held that the customer assented to Experian's terms and conditions, which were hyperlinked directly next to a "submit secure order" button. The text prominently notified the customer that clicking the "submit secure order" button meant that the customer also consented to the terms and conditions.

In other cases, where the terms and conditions hyperlink was far removed from the "order" button, courts have found that the customer did not necessarily assent to the terms and conditions.

Sign-in wrap agreements sometime resemble "browse-wrap" agreements, in which a notice on a website conditions use of the site upon compliance with certain terms or conditions. Courts regularly enforce browsewrap agreements.

Scroll-Wrap Agreement

A scroll-wrap agreement requires the user to scroll through the terms before the user can indicate his or her assent by clicking "I agree." Courts have found scrollwrap agreements enforceable but have provided helpful guidance to companies wishing to implement them. Specifically, in *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1032 (7th Cir. 2016), the 7th U.S. Circuit Court of Appeals held that an enforceable scroll-wrap agreement should (1) adequately display the terms, (2) instruct a user to scroll downward, and (3) indicate that the terms are binding. The court could not presume that the user had assented to the scroll-wrap agreement because the terms were not adequately displayed and did not indicate that the agreement was binding on the user.

Finally, one court recently cautioned against using email as the exclusive means of notifying a customer of the company's terms and conditions. In *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019), the purchase webpage notified the customer that he would later receive a "Service Contract" by email. The company then sent the customer an email that included a hyperlink to the contract. The court held that the customer had not assented to the contract.

In conclusion, there are numerous ways that companies can secure assent to online agreements, but also some pitfalls to be avoided.

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