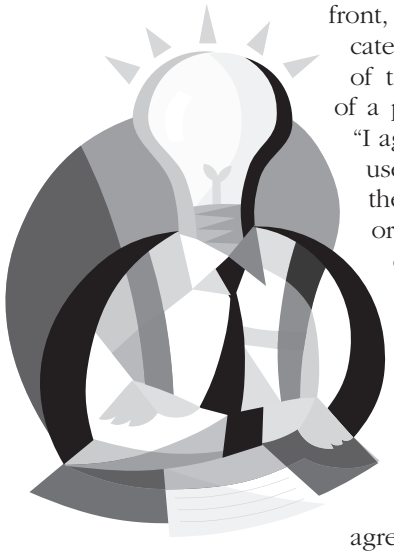
HEATHER H. BRUSER

Form Contracts in an Online World: The Enforceability of Click-wrap and Browse-wrap Agreements

As computers and the Internet continue to play a more prevalent role in commerce, electronic form contracting has become more common. Most people have encountered some type of electronic form contract involving the purchase of software or other goods and services over the Internet. Notwithstanding their widespread use, electronic form contracts continue to be controversial because of the generally accepted fact that most people who purchase goods or services over the Internet do not actually read electronic form contracts.[1] Furthermore, such form contacts do not provide the offeree the opportunity to bargain with the offeror in an effort to change any of the terms of the agreement; therefore, there is an increased risk that the agreement might contain onerous terms.[2] Despite these drawbacks, form contracting provides an efficient means of handling repeated transactions and has been recognized as a useful part of a functioning economy,[3] and courts continue to grapple with the issue of clearly identifying the circumstances under which electronic form contracts are enforceable.

Electronic form contracts generally take one of two forms that have been coined "click-wrap" and "browse-wrap" agreements. The typical click-wrap agreement found on many Web sites provides the user with the terms and conditions of the agreement up front, then requires the user to indicate his or her assent to the terms of the online agreement by means of a physical act, such as clicking an "I agree" button, before allowing the user to gain access to materials on the site, or to complete a purchase, or to download or install software on the user's hard drive.[4]



The other form that electronic form contracts take is the browse-wrap agreement, which is typically made a part of the Web site but does not require any physical act by the user indicating acceptance of the terms and conditions of the agreement before viewing or using the Web site or downloading or accessing material from the site.[5] Generally, a Web site using a browse-wrap form agreement requires the user to browse the Web site—often by clicking on a hyperlink that will take the user to another Web page on the Web site—to find the terms and conditions governing the use of the Web site. Such an agreement then states that by using or browsing the Web site the user is assenting to such terms and conditions.[6]

In determining whether these electronic form agreements are enforceable contracts, courts focus on the basic contract principle of mutual assent by the parties to the terms of the agreement. Most courts that have addressed click-wrap agreements have upheld such agreements based on a finding that the user assented to the terms of the agreement as long as there is conspicuous notice of the terms of the agreement and there is sufficient evidence that the user performed the physical act of clicking the "I agree" button or proceeded in a manner that would have been impossible had he or she not clicked the "I agree" button.[7] However, many courts deciding click-wrap cases have not focused on the way the terms of the agreement were presented, as long as there is sufficient evidence of assent through a physical act of assent to such terms.[8] When courts have refused to enforce the terms of click-wrap agreements, they have either generally relied on a lack of evidence of whether the user had clicked the "I agree" button or found that the terms were void because of other traditional contract principles, such as unconscionability.[9]

In contrast, courts that have addressed the enforceability of browse-wrap agreements have generally focused on whether the user had sufficient notice of the terms of the agreement.[10] Although the courts in some of these cases have commented on the location of the terms of the agreement on the Web site and the conspicuousness of the hyperlink, to date the courts have not established clear criteria for what constitutes sufficient notice to an offeree of the terms and conditions of a browse-wrap agreement to make such an agreement enforceable.[11]

The two predominant cases in this area—*Specht v. Netscape Communications Corp.* and *Register.com Inc. v. Verio Inc.*[12]—were both decided by the Second Circuit, but they appear to conflict with regard to whether an unambiguous act of assent is a necessary requirement for the formation of an online contract.[13] In *Specht*, the court set forth a general rule that in order for browse-wrap agreements to be enforceable there must be conspicuous notice of the existence of

the terms of the agreement and there must be a clear manifestation of the user's assent to the terms.[14] The court rejected Netscape's arguments that downloading the software constituted assent to the license terms, finding that "a consumer's clicking the download button does not communicate assent to contractual terms offered if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms."[15] However, in *Register.com*, the court seems to have dispensed with the requirement that there be a clear manifestation of assent and imputed assent to the defendant, which was a business competitor of Register.com that repeatedly visited Register.com's Web site for nefarious purposes and was automatically provided with terms of the agreement each time it accessed the site. Other cases that have enforced browse-wrap agreements have similar fact patterns and it appears that courts are more likely to enforce such agreements against businesses than against individual consumers.[16]

Although the *Specht* court based its holding on the fact that there was no manifestation of assent to the terms of the browse-wrap agreement, the court also noted that there was no constructive notice of the terms of the agreement because the user had to scroll down the page to the next screen before coming to the invitation to review the full terms available by hyperlink and such notice of the terms of the agreement were not reasonably conspicuous to the average user.[17] Courts have also indicated that the font, color, and location of the hyperlink to the terms of the browse-wrap agreement may be factors in the sufficiency of notice of the terms of the agreement, suggesting that there are some criteria that would make notice of the terms reasonable and conspicuous enough for the browse-wrap agreement to be enforced.[18] However, no court has provided clear guidance as to what constitutes reasonably conspicuous notice.

Therefore, in most cases, click-wrap agreements are likely to be enforceable as long as the terms are conspicuous and there is evidence of manifestation of assent. But there is still a great deal of uncertainty about what circumstances would make browse-wrap agreements enforceable. Hence, it is not clear what type of notice of the terms of the agreement a court would deem sufficient or whether an actual manifestation of assent of such terms is required. Until courts provide further guidance, businesses and consumers alike should be cautious when conducting business online and relying on browse-wrap agreements for their contracts. **TFL**

Heather H. Bruser is a member of the Intellectual Property and Technology Licensing Practice Group and the Real Estate and Lending Practice Group in the Lexington, Ky., office of Wyatt, Tarrant and Combs LLP. She can be reached at (859) 288-7601 or hbruser@wyattfirm.com.

Endnotes

[1]Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 Berkeley Tech. L. J. 577 (2007).

[2]*Id.* at 578.

[3]*Id.* at 579.

[4]*Id.*

[5]*Id.*

[6]*See Cohn v. Truebeginnings, LLC et al.*, No. B190423 (Cal. Ct. App. July 31, 2007), pub.bna.com/eclr/b190423.pdf.

[7]Davis, *supra* note 1, at 583.

[8]Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 Rutgers L. Rev. 1307, 1320 (Summer 2005),

[9]Davis, *supra* note 1, at 582.

[10]Moringiello, *supra* note 8, at 1320.

[11]*Id.* at 1319.

[12]*Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 592–593 (S.D.N.Y. 2001), *aff'd* 306 F.3d 17 (2d Cir. 2002); *Register.com Inc. v. Verio Inc.*, 356 F.3d 393 (2d Cir. 2004).

[13]Moringiello, *supra* note 8, at 1326.

[14]*Id.* at 1327.

[15]*Id.*

[16]*See Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 200); *Ticketmaster L.L.C. v. RMG Technologies Inc.* 507 F. Supp. 2d 1096 (C.D. Cal. 2007); *Southwest Airlines Co. v. BoardFirst L.L.C.*, Civ. Action No. 3:06-CV-0891-B (N.D. Texas Sept. 12, 2007), www.internetlibrary.com/pdf/Southwest-Airlines-Boardfirst-ND-Tex.pdf.

[17]Moringiello, *supra* note 8, at 1327.

[18]*See*, for example, *Pollstar*, *supra* note 16; *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005).