

## insights

TYPES NOT MAPPED YET October 28, 2014 | TTR not mapped yet | Mark Sableman

# What are you giving up when you click a click-through contract?

Here are some of the things people consent to when they click on “I agree”:

- That all disputes will be heard and decided in the courts of King County, Washington,
- That they accept the app or service “as is” and without any warranties,
- That they give up all rights to their first-born child, and
- That they convey all rights to their immortal soul.

Surely this is a joke, you think. But the joke is on all of us who assent to terms of use without reading them. And the jesters who have highlighted this issue are various website and app providers and others who have indeed inserted into their fine-print terms of use so-called “Herod clauses” (rights to your first born) or devil’s bargains (rights to your immortal souls).

This summer a provider set up an experimental WiFi hotspot in London, and, in return for free wifi, asked customers to agree to terms and conditions that included a promise “to assign their first born child to us for the duration of eternity.” Predictably, [a number of people signed up](#).

This kind of thing has been [done before](#). And none of us can look down on those who click without reading, because we all do it. The initial consent to [Apple’s terms of service](#) would fill roughly 225 iPhone screens. One study estimated that reading all terms for all of the privacy policies you encounter in a year would take more than 200 hours. Clicking without reading is a basic fact of life in the digital world.

Which raises the question – how effective *are* those ubiquitous but rarely read terms of use?

The question is important, since website and mobile app terms of service frequently include many crucial provisions. The New York Times [reported](#), for example, that website terms of one-third the top 200 online stores either compel disputes to be decided in arbitration or ban class action claims. Other typical terms disclaim various warranties, and, even where lawsuits aren’t prohibited, include consent by the user to jurisdiction and venue in the company’s home county and state.

The law distinguishes between click-through terms to which the user specifically consented, and browse-wrap terms (which were seen as akin to old software “shrink-wrap” terms, in that they never got specific assent, but knowledgeable purchasers knew they were there).

### Is a browse-wrap an enforceable contract?

A recent case, [Nguyen v. Barnes & Noble](#), discussed website terms of use in the context of a browse-wrap agreement. The plaintiff, who sought to represent a class of purchasers, complained about the unavailability of a tablet he sought to purchase on Barnes & Noble’s website. B&N referred to its website terms of use, which, as with many websites, are accessible through links placed at the bottom of every page on the website. If enforceable, those terms would have required Nguyen’s case to go to arbitration, effectively killing his proposed class action.

The court began its analysis with the truism that traditional contract principles apply on the web, and contracts require mutual assent. But assent can occur without a traditional signed written contract. In the web context, the

validity of a browse-wrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions, the court held.

The issue thus became, was there "constructive assent"? Where the user has actual knowledge of the terms, and proceeds with the deal, constructive assent generally exists. And where a browse-wrap imitates a click-through agreement by requiring some acknowledgement of the terms, that, too, suffices as constructive consent, the court held.

But Nguyen denied knowing the terms, and B&N never required him to acknowledge them. So in this case (as with many websites), the court had to analyze constructive assent based on the design and content of the website and the prominence of the hyperlinks to the terms of use. Examining precedents, the court noted that constructive assent was usually not found when the hyperlinks were inconspicuous or hidden behind "a 'multi-step process' of clicking through non-obvious links." By contrast, browse-wrap terms were enforced where users were given some "explicit textual notice that continued use will act as a manifestation of the user's intent to be bound." So enforceability of a browse-wrap depends on all these circumstances, the court held: "The conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice of a browse-wrap agreement."

Why, you might ask, isn't it enough to display, on each website page, prominent Terms of Service hyperlinks, in typical contrasting colors and underlining? The court simply didn't accept that as sufficient, at least as to notice to consumers. It noted that other cases enforcing browse-wraps against consumers involved "something more," usually some reference to the terms before checkout. And in a footnote the court acknowledged that browse-wraps have been applied against business users even without that "something more."

The court's conclusion: "Where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice."

This area continues to evolve and *Nguyen* isn't likely to be the last word on browse-wraps. If, for example, specific evidence is submitted concerning a particular user's sophistication or experience with websites, or about general understandings, even among consumers, about website legal terms, browse-wraps may become more widely enforced.

### Click-through contracts: The preferred method

For now, though, if you want to make an enforceable contract through your website or mobile app, click-through agreements are the way to go. They are widely recognized as enforceable contracts, as the court in *Nguyen* acknowledged.

Click-through agreements, sometimes called "clickwrap" agreements, are viewed as similar to software "shrink wrap" agreements. Particularly after one leading case, *ProCD, Inc. v. Zeidenberg*, upheld business shrink wrap agreements in 1996, click-through agreements have generally been enforced. As one court noted, "If ProCD was correct to enforce a shrink wrap license agreement, where any assent is implicit, then it must also be correct to enforce a clickwrap license agreement, where the assent is explicit."

But if click-throughs are enforceable, doesn't that present a problem if you have signed one of these Herod Clauses or clicked away all rights to your immortal soul?

In those situations, you may need to rely on judicial unwillingness to enforce "unconscionable" contracts – or on the contracting party's goodwill. (The experimenter who used the Herod Clause has generously noted, "as this is an experiment, we will be returning the children to their parents.") And we may want to keep an eye on the [FTC's noble but probably quixotic attempt](#) to standardize and simplify mobile app terms, so that they can actually be read and understood.

Finally, if you clicked on one of those agreements in which you sold your immortal soul, I recommend that you find yourself a very good lawyer, as did Jabez Stone for [his memorable trial reported by Stephen Vincent Benet](#).

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