THOMPSON COBURN LLP

insights

TYPES NOT MAPPED YET May 14, 2020 | TTR not mapped yet | Mark Sableman

You may avoid coronavirus contacts, but you can't avoid online contracts

While people have moved their activities online to avoid coronavirus contacts, we can be pretty sure they aren't avoiding coronavirus-era *contracts*. A lot of online activity involves automatically created contracts, and recent court rulings have facilitated the creation of binding online agreements.

Legal terms of service underlie most online activities, and users of online services consent to those terms in various ways. Merely browsing a website may subject the user to the website's legal terms, although courts often won't take those so-called "browse-wrap" contracts too far, because of the lack of explicit user assent. For binding enforceable contracts that may include unexpected terms, courts have usually required some affirmative assent from the user—often, the user clicking to signify that he or she agreed to the terms of service (which, of course, the user hardly ever actually reads). These "click-through" or "clickwrap" deals have been the gold standard for assent to online contracts.

A click-through page often contains some portion of the terms of service and makes it easy for the user to scroll through the terms before clicking agreement. But must the actual terms be right out in front? What if they are on another page altogether, meaning that most users, in clicking assent, never saw any part of them? One recent court decision held that the absence of the terms on the sign-in page doesn't matter, so long as the user was on notice that some terms would apply, and had a means to see them in advance.

The case, *Babcock v. Neutron Holdings, Inc.*, involved a registration to use a Lime brand e-scooter. These registrations are often completed on the fly, on a user's smartphone, on the street next to an available e-scooter. Because of the small smartphone screens, and the user's likely desire to zip through the registration process, Lime kept its registration screens simple. The key screen, titled "User Agreement," simply told the user that by tapping "I Agree," he or she acknowledged reading the User Agreement and Privacy Note. Those terms were available only by link; none of their text was visible on that screen. (The court characterized this kind of arrangement as a "sign-in wrap" rather than a "click-through.") Most users, of course, clicked "I Agree" without using the link to preview the terms.

The plaintiff, who claimed that he sustained injuries when his rented Lime e-scooter "suddenly lost control," claimed that he had no reasonable notice of arbitration provisions in Lime's terms of service. The arbitration terms were emphasized in the actual Lime "User Agreement" but he never clicked through to them.

The court's conclusion that the terms were enforceable was driven by the "commonplace" nature of contracting for services on smartphone applications, and the visual clarity of Lime's "User Agreement" screen. The screen used clear design, with the title, fonts, colors and emphasis all making the message clear. There were colored boldface links to the User Agreement and Privacy Note, for example. Additionally, Lime gave up an entire screen in the registration sequence to this issue of assent to its terms. The court noted, consistent with modern best practices, that in the context of web-based contracts, clarity and conspicuousness depend not just on textual statements, but also on the "design and content of the relevant interface."

The court noted that even if the plaintiff never read the terms in issue, the "User Agreement" screen in the registration process warned a reasonably prudent user of the terms, by putting the user on what the law calls "inquiry notice"—notice that he or she should look further before blindly proceeding with the registration.
An online contract, in short, is a little bit like that dastardly coronavirus—it can affect you even if you never see it.

Mark Sableman is a partner in Thompson Coburn's Intellectual Property group.

THOMPSON COBURN LLP

authorsTest

mark

Mark Sableman