

The Danger of "Browse Wrap" Agreements in the Commonwealth

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In today's economy more and more goods and services are sold through the Internet. Your business may increasingly rely on e-commerce rather than face-to-face transactions. Having a low-cost method to resolve disputes with these remote, faceless customers is a business necessity. How do you make sure the other party agrees to your warranties, disclaimers and even dispute resolution procedures? One popular method, the browse wrap agreement, may not be a good choice for companies wanting to transact business with residents of Massachusetts.

Browse wrap agreements have become ubiquitous on e-commerce service websites. Visit any services website and you will see the small link on the bottom of the page that points you to the website's terms and conditions. Moving the terms of the agreement away from the point of sale is a very popular marketing technique. The fewer things customers have to do to purchase your products and services, the more likely they are to complete the purchase. If the customers have to stop to evaluate terms, they are more likely to abandon the transaction. How far away can you move the terms and conditions from the point of sale and still have them be binding on the transaction?

Decades ago, the software industry pioneered the first bold step in moving the terms away from the point of sale. Software involves the sale of a license to use intangible property rather than a tangible good or service. The license agreement is typically long and verbose. The software vendors began putting the software license inside the product packaging. Consumers objected to this practice, stating that they could not possibly have agreed to the terms because they were unable to read them when the software was purchased. Courts largely agreed with this position and allowed consumers a period of time after the purchase of software to consent to the terms or return the software for a refund of the purchase price. Despite this pro-consumer ruling, few consumers would avail themselves of this remedy. Most would continue to use the software. The "shrink wrap" license agreements proved to be effective for both marketing and risk prevention purposes.

When the software distribution model moved from physical media to Internet downloads, the industry reacted with the "click wrap" agreement. In a click wrap transaction, the purchaser of the software would be required to review a window or screen showing the terms and conditions of purchase, and then take some type of affirmative action, such as a click, to state whether they agreed to those terms and conditions. Many e-commerce companies selling goods followed this model. Most courts have upheld click wrap agreements, and they have become a fixture in e-commerce product sales.

The click wrap agreement wasn't an ideal solution for e-commerce service providers. These companies required longer-term relationships with customers. Service website transactions were not discrete, but continuous and spread over time. As the law progressed, the service website agreement also needed to progress. The need to constantly update terms led to the birth of the browse wrap agreement. With the browse wrap, the customers bound themselves to terms and conditions by performing some action other than clicking "I Accept." Most often the terms would be located on a separate web page with just a hyperlink pointing to the terms and conditions. Users would purportedly bind themselves to the terms just by using the website services. Would the terms of these browse wrap agreements be binding on the parties? If they are binding, could companies that sell goods use a similar type of agreement to avoid losing customers during the "click to assent" stage of a browse wrap agreement?

The answers to these questions will continue to evolve as lawsuits progress through the courts of each state. However, the Massachusetts Appeals Court's recent decision in *Ajemian v. Yahoo* makes pure browse wrap agreements inadvisable. In *Ajemian*, the estate and siblings of John Ajemian filed suit in Massachusetts probate court to compel Yahoo to turn over certain emails from the deceased Ajemian's email account. Yahoo asked the court to dismiss the suit because, inter alia, Yahoo's terms of service included clauses that (1) removed any right of survivorship to the account, (2) did not allow any third parties to bring actions for benefits they may receive from Ajemian's account, and (3) required all disputes to be resolved in California courts. The forum selection clause was in the Terms of Service on Yahoo's website at the time Ajemian opened the account, and the limitation on survivorship and third-party beneficiary clauses were added to the Terms of Service four years later. The appeals court denied Yahoo's request because it found that Yahoo failed to show that the terms were adequately communicated to Ajemian or accepted by Ajemian.

When reaching its decision, the Appeals Court was careful to reaffirm that it does recognize forum selection clauses in click wrap agreements. More specifically, the Appeals Court searched for two distinct characteristics to decide whether the agreement was accepted. First, was the agreement shown to Ajemian. Second, did Ajemian take an affirmative action such as clicking "I Accept."

Because of *Ajemian*, a company considering moving from a click wrap agreement model to a browse wrap agreement model should reconsider its decision. If you already have a viable means

to conduct your transactions, you would not want to move to a model that is less likely to result in an enforceable agreement. If you already have a browse wrap model and you are able to transition to a click wrap model, you may find it advisable to make the switch. If you have a service-based e-commerce business that doesn't lend itself to discrete transactions, you may still want to implement certain aspects of a click wrap model on certain of your transactions. For instance, you may want to have all account sign-ups subject to a click wrap rather than a browse wrap agreement. If you have content that requires disclaimers or specific types of agreements, you may want to prominently display the disclaimers in conjunction with the material and even require a click wrap screen prior to allowing access to the content. The key will always be to prove that you provided notice and that the other party agreed to the terms.

Fletcher Tilton can review your e-commerce websites and provide recommendations on how to include and integrate click wrap terms and conditions.

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