

CLICK – WRAP QUANDARY

Do you remember the last time you attempted to download software from the Internet? How about the last time you attempted to access a restricted or “members only” website? In either case, you will probably recall being greeted with a pop-up window containing some very legal sounding language; *e.g.*, “this Agreement (the “Agreement”) is executed between you and Corporation X (the “Company”) regarding the use of Company’s software and/or services, as the case may be” After reviewing the language for less than a second, you probably selected “I Accept” to continue downloading or browsing.

The agreement that you so willing (or unwillingly) entered into is commonly referred to as a “click-wrap” agreement. The term reflects the requirement of the user to “click” on a button before getting the goods, a gesture that signifies the user’s acceptance of the terms set forth in the agreement. A close cousin to the click-wrap agreement is the “browse-wrap” agreement, which typically involves the presentation of a link to a legal document setting forth certain terms and conditions of use, but does not require the user to manually click a button or perform any other overt act signifying acceptance of such terms and conditions.

The enforceability of both click-wrap and browse-wrap agreements is an issue that has seen some action in the courts, but one for which there is not yet any final resolution. So far, click-wrap agreements have generally been held to be enforceable. By contrast, several courts have held that browse-wrap agreements are unenforceable for failure to provide the essential ingredient for a binding contract - consent. Regardless of the outcome, both types of agreements have been and will continue to be subject to challenge on a number of legal grounds.

In order to avoid potential chaos in the courts, website owners or operators are encouraged to adhere to the following guidelines:

1. Use a click-wrap agreement format. If possible, avoid browse-wrap agreements.
2. Present the user with the click-wrap agreement before the user is allowed access to the website, not afterwards.
3. Require the user to review the contents of the click-wrap agreement prior to acceptance and provide a highly visible and easily understood mechanism for the user to signify his or her acceptance of the applicable terms and conditions. For example, placing an “I Accept” button at the end of the agreement will require the user to scroll through its contents prior to acceptance. Allowing the user to click “I Accept” and bypass the content of the agreement increases the chances of a court finding the agreement unenforceable for lack of consent.
4. Record and maintain the time and date of the user’s acceptance.
5. Include a highly visible link to the agreement on each subsequent webpage.
6. Avoid the inclusion of “unconscionable” terms or clauses in click-wrap agreements. For example, a provision that purports to immunize the website owner from liability for knowingly providing a defective product while holding the user liable for the slightest misuse of the product will probably be deemed unfair, and thus unenforceable.

Adherence to these recommendations will better ensure a meeting of the minds between the contracting parties, reduce litigation, and increase the chances of enforcing the agreement against the user.

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DON'T GET LOST IN THE E-COMMERCE WORLD

In today's world, the Internet provides access to all types of information. Literally millions of documents, products, data and other information can be accessed with the touch of a finger. Whether writing a report on Eric the Red, looking for Britney Spears concert tour dates or pricing beanbag chairs, the "info" is just a click away. More importantly, people are purchasing products on line. Consumers are going to search engines, gathering information and purchasing products. More than half of the population between 16 and 34 are Internet users. Seventeen percent of people ages 50 or greater are Internet users.

The impact of the Internet was discussed in an article about scubatoys.com by G. Patrick Pauling in IQ Magazine. According to the article, owner Larry Dague learned what the Internet could do for a small retail dive shop. He opened a shop in 1997 and in 1998 his sales reached \$162,000. He then put Scuba Toys on line, and between 2001 and 2002 sales reached \$1.66 million. Now the Internet accounts for more than seventy percent of Scuba Toys' business.

Consumers have become accustomed to finding the "world of options" in terms of brands of goods and services on the Internet and transacting business. Their demand for goods/services can and will be satisfied by looking online. That being the case, sellers need to be sure that information about their goods/services is readily identifiable on-line. The products must "stick-out" in the overwhelming shopping world on the "net." A seller's supply of products must come in contact with the demand in order for a sale to be made. Obviously, Scuba Toys was readily identifiable on-line which caused its sales to skyrocket.

A good or service is most readily identified by its mark. A trademark or service mark acts to identify and distinguish the owner's goods or services from those manufactured or sold by others and to indicate the source of the goods. A mark is affixed to the good or service and sold or transported in commerce. Customers come to know the good or service by the particular mark and ask for it by the name. For example, a customer doesn't just ask for a soda but instead for a "coke and a smile." Additionally, when a consumer sees the word Heinz on the red bottle, he or she knows the source of the ketchup and makes the purchase. The mark serves a valuable function in terms of the sale. This simple process has worked when walking the aisles of the local grocery store.

This same principle applies to shopping on line. However, over the Internet the universe of products and services is not limited by the four walls of the store. Consumers will be looking for and will have access to numerous goods and services on-line. Thus, sellers must position themselves so their products are easily found. Customers must be able to quickly identify and distinguish a seller's goods from others in the "on-line shopping world." That is principally done by a website, domain name, site linking, etc. It is important for a seller to pick a name for a new good or service that functions to distinguish as to the source in commerce. Additionally, it is important for the business to own the domain name that corresponds with the trademark, service mark or company trade name which is already in use in commerce. Regardless of the suffix (e.g., .com, .org, .net, .biz, .edu), sellers should purchase and use that domain name. In this way, customers can quickly identify the products and services and particularly the source of them in order to satisfy the demand and transact business. For example, when a consumer is interested in purchasing a ticket to tour the Louisiana swamp land, it is important that Alligator Annie have a website highlighting that service. If the consumer cannot find Annie's site, he or she will move on and find some other seller of similar services.

So, it is important to take time and recognize the serious marketplace on-line. A lot of sales transactions are taking place "over the wires." Sellers should not get lost in the e-commerce world. Instead, sellers should embrace this e-marketplace. Trademarks, services marks, domain names and web sites should all be integrated so as to provide distinction in the marketplace and effectively bring the consumer in contact with the goods and services offered for sale.



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