

RECENT DEVELOPMENTS IN THE ENFORCEABILITY OF CLICKWRAP AND WEBWRAP AGREEMENTS

By David M. Lilienfeld

Introduction. Companies doing business on the Internet typically employ either a “clickwrap” or “webwrap” agreement to govern the use of its website. A clickwrap agreement requires website users to click on an “I Agree” box indicating the user has read, understood and consented to the terms of the agreement. The terms of a webwrap agreement, though, require the user to follow a link, usually found at the bottom of the website’s homepage. With webwrap agreements, users can use the website without any affirmative act of assent to the terms of the agreement.

Recent Clickwrap Cases. As Internet commerce began to grow, much was written about the enforceability of clickwrap agreements. Soon enough, though, courts confirmed that if a clickwrap agreement satisfied the traditional principles of contract formation it was enforceable. (See, for example, *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260 (6th Cir. 1996) (an early analysis finding clickwrap agreements enforceable). Recent cases further solidify the enforceability of click wrap agreements even when the terms of the agreement are not conspicuous.

DeJohn v. The .TV Corporation, Register.com et al., 245 F.Supp. 2d 913 (C.D. Ill. 2003) involved a clickwrap agreement which DeJohn arrived at by following a link on Register.com. *Id.* at 915. Upon arriving at the agreement, DeJohn clicked on an “I Agree” box indicating that he had read, understood, and agreed to the terms. *Id.*

A dispute arose and in litigation DeJohn argued that Register.com’s clickwrap agreement was not enforceable because, among other things, the text of that agreement was only visible after following the link. *Id.* The court rejected this argument, finding that DeJohn was indeed able to review the terms by clicking on the link. *Id.* The court also opined that DeJohn’s claim that he had not read those terms was irrelevant because, absent fraud, “failure to read a contract is not a get out of jail free card.” *Id.* at 919.

In *Forrest v. Verizon Comm., Inc.*, 805 A.2d 1007, 1014 (D.C. 2002), the court held a forum selection clause in a clickwrap agreement valid. Forrest argued that he was not provided with adequate notice of the forum selection provision because the scroll box on the defendant’s website contained only a small portion of the text, which did not include the forum selection provision. *Id.* at 1010.

In rejecting Forrest’s argument, the court relied on the traditional notion of contract law that “one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not.” *Id.* at 1010. Modernizing this principle, the court stated “the use of a ‘scroll box’ in the electronic version that displays only part of the Agreement at any one time [is not] inimical to the provision of adequate notice.” *Id.* at 1011. The court held that while the text of the forum selection clause was below the scroll window, had Forrest read the Agreement he would “have inevitably discovered the forum selection clause.” *Id.* The court also suggested that Forrest could have printed the terms of the agreement, which would have made the text easier to review. *Id.* at 1010.

Finally, *I.Lan Systems, Inc. v. Netscout Service Level Corp.*, 183 F.Supp. 2d 328 (D.Mass. 2002), dealt with the issue of whether the buyer of software was subject to the terms of a clickwrap license agreement which did not appear on the website until after the purchase was made. *Id.* at 330-331. I.Lan Systems had paid for the software and was required either to accept or reject a license agreement within the software before proceeding further. *Id.* I.Lan Systems clicked on the “I Agree” box. *Id.* I.Lan Systems argued that the terms were not known to it at the time of the purchase and therefore were not part of the bargained-for exchange. *Id.* The court rejected this argument and held that I.Lan Systems explicitly

accepted the clickwrap license agreement when it clicked on "I Agree." *Id.* at 338. (See also, *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 587, 741 N.Y.S.2d 91 (N.Y.A.D. 2 Dept. 2002) (the user clicking on the "I agree" icon before proceeding with the download of the software was sufficient evidence of assent)).

These cases show that courts are inclined to continue to find clickwrap agreements enforceable based upon traditional principles of contract formation.

Recent Webwrap Cases. The enforceability of webwrap agreements, though, is much less clear.

In *Register.com, Inc. v. Verio, Inc.*, 126 F.Supp. 2d 238 (S.D.N.Y. 2000), the court did enforce a term within a webwrap agreement. Register.com alleged Verio's practice of accessing customer information on Register.com and compiling that information for mass marketing purposes was prohibited by Register.com's webwrap agreement. *Id.*

The concluding paragraph of Register.com's agreement stated "submitting this query is your agreement to abide by these terms." *Id.* Register.com argued that by submitting the query, Verio assented to the terms of the webwrap agreement. *Id.* The court agreed with Register.com, noting that the "terms [were] clearly posted on the Web site." *Id.* The court concluded, that "there can be no question that by proceeding to submit a query, Verio manifested its assent to be bound by Register.com's terms of use, and a contract was formed." *Id.*

In *Pollstar v. Gigmania, Ltd.*, 170 F.Supp. 2d 974 (E.D. Cal. 2000) the court suggested that webwrap agreements are enforceable. *Id.* at 981. The court reasoned that according to U.C.C. Section 2-204, parties may form an enforceable contract in any manner sufficient to show agreement and that other cases in the circuit court held that users can be bound by terms they did not see. *Id.* at 982. The defendant's motion to dismiss was based on its argument that webwrap agreements are prima facie unenforceable. The court rejected this argument and remanded for further proceedings. *Id.*

In *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002), Netscape was unable to enforce its arbitration provision in its webwrap agreement. The court held that the agreement was unenforceable because it could only be viewed by scrolling down the homepage of the website and because there was no affirmative consent necessary to download the product. *Id.*

In *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 WL 1887522 (C.D. Cal. 2000), *aff'd*, 2 Fed. Appx. 741, 2001 WL 51509 (9th Cir. 2001), however, the court refused to enforce a webwrap agreement. *Id.* at *8-9. The webwrap agreement consisted of a general statement that use of the site bound users to its terms and conditions. *Id.* at *6-8. The court said that this system lacked sufficient proof of agreement to be enforceable. *Id.* at *11.

Conclusion. The enforceability of clickwrap and webwrap agreements is an evolving matter. Practitioners should closely monitor developments in this area and periodically review their clients' practices. This review should entail an evaluation of the technical means which assent is demonstrated by the user and recorded for evidentiary purposes.

David M. Lilenfeld practices technology and intellectual property law and litigation at Stokes Lazarus & Carmichael LLP in Atlanta. He received his B.A. from Hunter College in 1993 and his J.D. from The Ohio State University College of Law in 1996 where he was a member of The Ohio State Law Journal. Mr. Lilenfeld may be reached at (404) 352-1465 or at dml@slclaw.com.