ARE YOUR WEBSITE TERMS ENFORCEABLE?

By Lawrence E. Westerlund

If your company conduct business through a website, you need to know the difference between "clickwrap" or "browsewrap" agreements. If you don't know the difference between these terms and you are using the wrong noticing procedure on your website, your agreement is probably unenforceable. What do you mean unenforceable? It means that when you finally have a dispute that winds up in court, the court will probably find that you do not have a contract with your customer and the terms of service associated with your webpage have no binding effect.

When you sell a product or service through your website, whether it is a book, electrical cabling, exercise video or a hotel room, you are entering into a contract with your online customer. All of the usual requirements for a valid contract that you learned in Business Law 101 must be present. There must be an offer, an acceptance, mutual agreement and consideration. The key to any contract is that the buyer and seller agree upon the terms of the sale. The courts call it "mutual assent." If there is no mutual assent there is no contract. If there is no contract then there is no arbitration provision, no lawsuit limited to your county and no attorney's fee provision, among other key provisions you have in your terms and conditions to protect your company.

So what does this have to do with "clickwrap" or "browsewrap?" Depending which way you present your terms on your website, it will likely determine if your terms of using the website are enforceable or not.

"Clickwrap" refers to terms that are disclosed when a user "clicks" on a dialogue box when an account is opened and/or when a purchase is made. For example, a dialogue box may appear that states: "By continuing, you agree to our Terms and Conditions and Privacy Notice." The terms may be part of the dialogue box or the user may be directed by hyperlink to the terms. Then your customer must click "Accept" or "Reject."

By contrast, "browserwrap" is used without a dialogue box. Instead, the website contains a hyperlink somewhere (usually) on the homepage or subsequent pages that states: "Terms of Use" or "Terms and Conditions." Generally, the terms link is at the bottom of the homepage or on the bottom of the website's interior pages.

Courts are much more willing to find that your customer has expressed "mutual consent" or in other words, accepted the terms of your website and effectuated the contract when they must affirmatively click on the dialogue box. This is true even if they never read the terms.

When companies use "browserwrap" as the basis of contract acceptance, courts are much more likely to find that there was no mutual assent. When you use "browserwrap" as the basis of your contract acceptance, the courts are required to determine if your hyperlink is conspicuous. This is a much harder test to pass. Finding your hyperlink was conspicuous requires the court to look at the color, the font size, the contrasting background, the placement of the link and so on to

determine whether the website put a reasonably prudent user on inquiry notice of the terms of the contract.

Given the above differences, we, at Coleman and Horowitt, highly recommend that your company adopt the “clickwrap” approach with your terms. Additionally, we recommend that your terms hyperlink be placed clearly and openly on every webpage. The terms hyperlink should be easy to see and not require scrolling down to find. You should also require an additional acceptance dialogue box prior to every purchase. Finally, you need to keep a record that is retrievable for every customer that agrees by clicking their acceptance to the terms of your website. These steps will go far in helping a court find there was an actual “mutual assent” when it comes to making a legal determination.

We, here at Coleman and Horowitt, assist businesses and their owners with avoiding disputes and helping to resolve them when they do happen. This includes those involved in business, banking, real property, construction and intellectual property matters. For additional information, call Larry Westerlund at lwesterlund@ch-law.com or (559) 248-4820/(800) 891-8362.

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