

Signals, Assent and Internet Contracting

Juliet Moringiello
Professor, Widener University School of Law

1. In my presentation, I will focus on the question of assent in the Internet contracting process. Specifically, I will focus on two categories of contract terms delivered electronically.
 1. Click-wrap agreements: In a click-wrap transaction, the buyer of goods or services must click an “I agree” icon before completing his purchase. The terms themselves can be presented in a scroll-box above or adjacent to the “I agree” icon or can be accessed by clicking a hyperlink near the icon.
 2. Browse-wrap agreements: A browse-wrap agreement does not ask for any outward manifestation of assent to its terms. Instead, these terms, which can be accessed from a web site hyperlink often labeled “Terms of Use,” often provide that using (or “browsing”) the web site constitutes assent to the terms.
2. Both of these types of electronically delivered terms are covered by the Uniform Electronic Transactions Act (“UETA”) and the Electronic Signatures in Global and National Commerce Act (“E-SIGN”). These statutes provide simply that a contract cannot be denied enforceability *solely* because it is in electronic form. It is important to remember that these statutes otherwise preserve the substantive law of contracts, therefore, in order for a contract to be enforced the offeree must have assented to its terms.
3. Courts have had the opportunity to opine on the enforceability of click-wrap and browse-wrap terms in a number of cases, including:
 1. Click-wrap:
 1. *DeJohn v. .TV Corporation*, 245 F. Supp. 2d 913 (N. D. Ill. 2003);
 2. *I.Lan Systems, Inc. v. Netscout Service Level Corp.*, 183 F.Supp. 2d 328 (D. Mass. 2002);
 3. *Koch v. America Online*, 139 F. Supp. 2d 690 (D. Md. 2000);
 4. *Caspi v. The Microsoft Network*, 732 A.2d 528 (N.J. Super. 1999).

1. Browse-Wrap:
 1. *Register.com v. Verio*, 356 F.3d 393 (2nd Cir. 2004);
 2. *.Specht v. Netscape*, 306 F.3d 17 (2nd Cir. 2002).

4. Standard-Form Terms in the Paper World and their Internet World Counterparts:
 1. Courts commonly apply the objective theory of contract in deciding whether or not to enforce written standard-form terms. Under this objective theory, the actual state of mind of the contracting parties is irrelevant and the court will find an agreement if a reasonable person would be led to believe that an agreement exists.
 1. Paper-World Example I: When a party signs a contract, she is deemed to have assented to its terms. The signature requirement serves a number of functions, including a cautionary function. The signature requirement is said to signal to the offeree that the form is important and should be read.
 2. Internet World Problems I:
 - (1) Does the requirement of a click send the same message as the signature requirement? When the average Internet user sees a click to agree requirement, is that Internet user more likely to read the offered terms?
 - (2) Does it matter that the contract terms might not be displayed next to the “I agree” icon? Try to find the Terms and Conditions of travel on the US Airways web site, www.usairways.com.
 3. Paper-World Example II: Courts have fashioned a reasonable communicativeness test to deal with standard-form terms that do not require the offeree’s signature. Examples include travel tickets and ski-lift tickets. The reasonable communicative test has two parts that appear to impose a duty on the offeror to explain that the terms it is offering are contract terms. This test recognizes that standard forms that do not require a signature send a different signal to offerees than forms that require the offeree’s signature.
 - (1) The first part of the test directs the court to consider the physical characteristics of the form (such as type size and font);
 - (2) The second part of the test directs the court to consider more subjective factors such as the amount of time that the offeree had to read the terms and the offeree’s incentive to become familiar

with the terms.

4. Internet World Problem II: When is notice of browse-wrap terms conspicuous? Should an Internet vendor be required to explain terms by use of hyperlinks? Is flipping through 5 pages of printed text the same as scrolling through 15 screens of text on a computer screen?
 5. Internet World Problem III: Should the requirement of a click to agree absolve Internet vendors from complying with the reasonable communicativeness test?
2. Individuals might perceive paper and electronic forms differently and courts need to take that fact, if true, into account in deciding whether or not an offeree has assented to terms presented electronically. Computer scientists and marketing experts have studied the differences in individual perceptions of paper and electronic communications, but such studies are largely absent from the legal literature and thus ignored by the courts. (One exception is Robert A. Hillman, *On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, Cornell Law School Legal Studies Research Paper Series, *available at*, <http://ssrn.com/abstract=686817>)
5. Machine-Delivered Terms in the Pre-Internet Era: In the 1950s and 60s, insurance companies sold airline trip insurance policies from vending machines at airports. Several of these companies were sued on these policies and courts were forced to address the issue of assent between man and machine. These cases provide some important lessons for today's courts. See:
 1. *Steven v. Fidelity and Casualty Co. of N.Y.*, 377 P.2d 284 (Cal. 1962);
 2. *Lachs v. Fidelity & Casualty Co. of N.Y.*, 118 N.E. 2d 555 (N.Y. 1954).
6. Further Reading:
 1. Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, __ RUTGERS L. REV. __ (forthcoming 2005);
 2. Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter and Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Agreements*, 59 BUS. LAW. 279, 279-280 (2003)
 3. Robert A. Hillman and Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429 (2002);
 4. Christina L. Kunz, Maureen F. Del Duca, Heather Thayer and Jennifer Debrow,

Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent, 57 BUS. LAW. 401, 401 (2001);

1. Mark E. Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?* 16 GA. ST. L. REV. 741 (2000)