

I Agree

I Have No Idea
What This Says



The Clicks That Bind: Ways Users "Agree" to Online Terms of Service

By

Ed Bayley

ed@eff.org

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"I Agree." We have all, at some point while online, clicked on a button bearing these words. Whether it is registering for a new social media account or just trying to get to our bank statements, one almost cannot visit a website today without being asked to agree to a listed set of "Terms and Conditions." But by clicking on such boxes, or even in some cases just by using the website, we as online users may be binding ourselves to legally enforceable contracts with the online service provider (i.e. website, MMORPG, etc.).

As with any legal contract, both sides, including the user, must agree ("assent") to the terms and conditions offered with the online service in order to create a legally enforceable "agreement." In addition, a user can demonstrate agreement in a variety of ways, either by words *or by deeds*, depending on the circumstances. Online, however, the line between these two categories can blur. Some service providers seek your agreement by requiring you to click the aforementioned "I Agree" button after being shown the agreement (i.e. a "clickwrap" agreement), whereas other service providers, alternatively, try to characterize your simple use of their website as your "agreement" to a set of terms and conditions buried somewhere on the site (i.e. a "browsewrap" agreement). There are many variations on these themes, such as mandatory checkboxes ("check this box to indicate your agreement to our terms and conditions") or email notices ("by continuing to use our service, you agree to the recent modifications to our terms of service").

Yet not all of these techniques are good enough to create legally binding contracts. As a rule of thumb, courts have been more willing to recognize clickwraps as contracts, while expressing skepticism about browsewraps. But the answer can turn on a number of factors, discussed below.

Clickwrap: More Than Just a Button

Given the emphasis placed on a user's assent, courts favor finding a binding agreement where the user engages in affirmative conduct acknowledging the terms of a TOS. For instance, a genuine clickwrap agreement, in which a service provider places a TOS just adjacent to or below a click-button (or check-box), **has been held to be sufficient** to indicate the user agreed to the listed terms. In these cases, requiring the user to click "I Agree," after calling attention to the terms and affording the user an opportunity to review them, demonstrates the user agreed to the terms. However, courts generally do not require that you actually have read the terms, but just that you had reasonable notice and an opportunity to read them.

In other words, it's not merely clicking the "I Agree" button that creates the legal contract. The issue turns on reasonable *notice* and *opportunity to review*—whether the placement of the terms

and click-button afforded the user a reasonable opportunity to find and read the terms without much effort. In practice, the enforceability of each TOS implementation often falls on a sliding scale, depending on the degree of notice it provides the user. At one end, presentations that require the user, before clicking, to scroll to the bottom of a set of terms, or through an adjacent scroll box, guarantees the entirety of the TOS appears at least once, even if the user chooses to ignore it, and has been held to be enforceable. At the other end, by contrast, if a user must click on a hyperlink, or series of hyperlinks, to view the terms, the significance of clicking “I Agree” as showing assent diminishes, depending on the difficulty in actually finding the terms and whether a reasonable Internet User would have done so. Finally, in addition to the placement of terms, courts also consider the inclusion of conspicuous statements on websites that instruct users to read the TOS and inform them of the consequence of clicking “I Agree.”

A clearly presented clickwrap agreement represents the “best practice” mechanism for creating a contractual relationship between an online service and a user. Such a mechanism should:

1. conspicuously present the TOS to the user *prior* to any payment (or other commitment by the user) or installation of software (or other changes to a user’s machine or browser, like cookies, plug-ins, etc.);
2. allow the user to easily read and navigate *all* of the terms (i.e. be in a normal, readable typeface with no scroll box);
3. provide an opportunity to print, and/or save a copy of, the terms;
4. offer the user the option to decline as prominently and by the same method as the option to agree;
5. ensure the TOS is easy to locate online *after* the user agrees.

Browsewrap: “What Agreement?”

Whereas courts have been willing to give clickwraps their blessing, attempts to legally bind users with browsewrap agreements have been more controversial. Unlike clickwrap agreements, browsewraps do not require a user to engage in any affirmative conduct, like clicking on a box, in order to show that they agree to a set of terms. Instead, websites with browsewrap agreements often purport to bind their users by passive conduct, unrelated to the TOS itself, like continuing to use the website or proceeding past its homepage.

The use of browsewraps agreements is unfair to users, who generally are surprised by these “contracts” that were never brought to their attention. Accordingly, courts increasingly judge it to be unfair to hold website users accountable for terms and conditions of which a reasonable Internet user would not be aware just by using the site.

As with clickwraps, the key issues are often notice and opportunity to review the terms. Courts are especially skeptical where service providers do not place links to terms, or references to them, in conspicuous locations so as to notify the user that they even exist. Unlike other media, the draw of the Internet rests heavily on providing users instant access to incredible amounts of information. As a result, it is not surprising courts may find it unreasonable to expect users in this environment to scroll and scour

every inch of a webpage, searching for links labeled “Terms and Conditions” or “Privacy Policy.” Such behavior runs opposite to our instincts on the Web.

Nevertheless, some courts **have been willing** to make browsewraps enforceable under certain circumstances. The more a site calls the user’s attention to the terms while browsing, the more likely a court will be to find it enforceable. On the other hand, if a service provider places the notice out of sight, such that a user must scroll down in order to see but not in order to use the service, courts will likely find such an arrangement does not show meaningful assent on the part of the user.

It is EFF’s view that browsewraps are unfair to users, particularly since clickwraps are easily implemented and so widely used by leading online services and e-commerce sites. Because the law regarding browsewraps is still developing, it is difficult to predict how courts will respond to these kinds of tactics in the future. The key, as with clickwrap agreements, is whether the service provider constructed the website in such a way as to expect the average Internet user to have been aware of the terms.

Of course, even if a particular TOS is held to constitute a valid contract, this does not mean *every individual term* within it will be found legally enforceable. Even when validly agreed upon, courts occasionally hold some contract language unenforceable by itself for a variety of reasons—whether because is unjustifiably one-sided or because enforcing it would violate the law or public policy. In such cases, the court may either strike the offensive term or void the agreement all together.

Beyond the Clickwrap: Public Notice of Terms

Given the range of options in online services available today, it is now more important than ever that users are actually aware of the strings that come attached to each. At the same time, everyone knows that the majority of users do not and never will read the legalese that pops up on websites. So forthright presentation of terms to the user at sign-up is not enough.

Rather, a TOS should also be publicly available online, so that the press, user groups, and consumer watchdogs can examine the agreements and warn, and be warned, of terms that stray beyond the reasonable or industry norm. While most online service providers already post their TOS online, such public notice of should be part of the standard for creating enforceable user agreements online. In its 2009 Principles of the Law of Software Contracts, the **American Law Institute** recognized this rule for software licenses; a similar principle should apply to terms of service online, as well.

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