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Contract Corner

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Clickwrap, Browsewrap and Mixed Media Contracts: A Few Words Can Go a Long Way

Courts generally have categorized online agreements into "clickwrap" agreements and "browsewrap" agreements. Clickwrap agreements, which require a user to check a box or click an icon to signify agreement with the terms, are usually enforceable under US law, even when the terms appear in a separate hyperlinked Web page but where language accompanying the box or icon indicates that checking the box or clicking the icon indicates assent to such terms. On the other hand, browsewrap agreements, which presents the terms passively to users in a hyperlink somewhere on a Web page, often at the very bottom of the page in small font, are often unenforceable because it usually cannot be proved the user knew the terms existed or even was aware of the hyperlink.

A New Jersey court recently faced a type of online agreement that did not fit nicely into either category. When a contract, sent electronically but signed in hard copy, contains a hyperlink to a separate terms and conditions page, are those separate terms incorporated into the agreement? In *Holdbrook Pediatric Dental, LLC, v. Pro Computer Service, LLC,* No. 14-6115 (D.N.J., July 21,2015), the New Jersey federal district court said no. A requirement to arbitrate disputes buried in the online terms and conditions page was not incorporated into a contract where the contract merely stated "Download Terms and Conditions" near the signature line.

Again, the signed contract did not itself contain an arbitration clause. Rather, on the last page of the contract, directly above the signature line, the following appeared in small text: "Download Terms and Conditions ", which, if viewed in HTML, would instead appear as "Download Terms and Conditions". Exhibit 1 shows the signed contract.

Holdbrook's office manager, Nancy McStay, received the contract in electronic form where the hyperlink was clickable, but then printed and signed a hard copy. PCS argued that because McStay signed the contract, one could assume that she read and agreed to the entire agreement, including the hyperlinked terms and conditions. Holdbrook disagreed.

Holdbrook's argument was that the contract did not incorporate the terms and conditions for several reasons. First, the online terms and conditions contained a separate signature block, suggesting that it required additional acceptance, and Holdbrook never signed onto those terms. Second, Holdbrook claimed that McStay had no idea that additional terms were being incorporated, given the garbled coding of the hyperlink in the printed copy and the fact that the contract contained no clause specifically pointing to the separate terms and conditions.

Applying New Jersey contract law, the court held that "a separate document may be incorporated through a hyperlink, but the traditional standard nonetheless applies: the party to be bound must have had reasonable notice of and manifested assent to the additional terms."

After describing clickwrap and browsewrap agreements, the New Jersey court examined two key cases in this area: *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012), and *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904 (N.D. Cal. 2011).

Exhibit 1

Case 1:14-cv-06115-NLH-JS Document 17-2 Filed 11/17/15 Page 7 of 7 PageID: 175

PCS

3 Year Managed Support Plan

001189
Version: 1

PCS
304 Harper Drive Suite 130
Moorestown, NJ 08057
856-596-4446
http://www.helpmepcs.com

Download Terms And Conditions

Signature Nancy O. McStay

Date 4-1-14

In *Fteja*, a New York court found that a user had sufficient notice of Facebook's terms of service even though the terms were only visible to the user during sign-up via hyperlink (like a browsewrap). A notice above the "Sign Up" button stated that "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service" (like a clickwrap). Similarly, in *Swift*, a California court found that a hyperlink to the terms of services that appeared right below an "Accept" button—along with a statement that clicking "Accept" meant the user accepted the terms—was sufficient to prove the user agreed to those terms.

The New Jersey court explained that the fact that this case involved "mixed media" did not matter. The contract was "much like the 'clickwrap' agreements in *Fjeta* [sic] and *Swift*, where the 'Terms and Conditions' were contained in a hyperlink immediately next to a mechanism for accepting the agreement. In place of an 'I Accept' icon to be clicked, a Holdbrook representative was required to sign the agreement on paper."

However, the New Jersey court found one crucial component to be missing. In *Fteja, Swift* and other clickwrap cases, a statement draws "the user's attention to the hyperlink" that is "sufficient to provide reasonable notice that assent to the contract included assent to the additional terms." The New Jersey court noted that there was no such statement in this case, or instructions to sign the contract only if Holdbrook also consented to the additional terms. The hyperlink, standing alone, was insufficient to show that Holdbrook had "reasonable knowledge" that the terms and conditions were part of the contract. "Further complicating matters" was the fact that the contract was sent in electronic form but could not be accepted in electronic form. It had to be printed and signed. This made it even less clear that the hyperlink contained additional terms.

The New Jersey court noted that discovery might show that Holdbrook actually reviewed the contract electronically, noticed the hyperlink and agreed to its terms. In fact, after conducting some limited discovery, PCS has filed a new motion to compel arbitration, which, as of the date of this writing, is currently pending before the court.

As did the courts in *Fteja, Swift,* and other clickwrap cases, the New Jersey court took careful note of the language that surrounded the hyperlink to the terms and conditions to determine whether Holdbrook reasonably understood those additional terms were included in the contract. It seems that, for the court, PCS's "Download Terms and Conditions" was just a little too similar to a "browsewrap" agreement to be found enforceable without further inquiry into whether Holdbrook in fact was aware of and agreed to the terms.

PCS likely could have avoided the issue entirely by simply including the following language in the signed agreement: "By signing the agreement, you also accept the Terms and Conditions on the PCS Web site," proving that when it comes to any kind of mixed media agreement, a few words can go a long way.

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