



Internet Licensing

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Court Holds that Arbitration Clause in “Hybridwrap” Terms Is Unenforceable

A federal district court in Illinois recently held in *Anand v. Heath*, No. 19-CV-00016, June 28, 2019, that a digital marketing company could not force a user to arbitrate because a “Continue” button on its website did not provide clear notice that clicking the button constituted assent to the hyperlinked terms and conditions that contained the arbitration provision.

As previous court decisions have indicated, website operators who wish to enforce their online terms against users will have a higher likelihood of success if they do two things. First, the website should display the terms to users in a conspicuous fashion. Second, and applicable here, the website should affirmatively and unambiguously require users to assent to the terms. *Anand* demonstrates that online agreements risk unenforceability when the terms are presented in a manner that does not make clear to users that they are agreeing to be bound.

Background of the Complaint

The website www.retailproductzone.com offers users free gift cards in exchange for their responses to surveys and for their consent to be contacted

for marketing purposes. Reward Zone USA LLC, a subsidiary of Fluent Inc., maintains the website. In June 2017, plaintiff Narantuya Anand registered on www.retailproductzone.com and completed a survey to receive a free gift card. According to Anand, she then received several unwanted telemarketing voicemails and text messages.

Anand filed a putative class action against Fluent and Reward Zone alleging violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227. The defendants moved to compel Anand to arbitrate her claims based on the terms and conditions present on www.retailproductzone.com, which included a mandatory-arbitration clause. Anand argued that she never agreed to the arbitration clause contained in the website’s terms and conditions.

Specific Configuration of Terms of Use

When Anand navigated through the www.retailproductzone.com website in 2017, the words “I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy” were displayed above a “Continue” button. The defendants contended that, when Anand registered on the website, submitted her contact information, and advanced through the website after clicking “Continue,” she expressly assented to the arbitration clause contained in the terms and conditions. Anand

denied that she had agreed to be bound by the arbitration clause.

In determining whether the arbitration provision was enforceable against Anand, the court analyzed the configuration of the terms-of-use agreement on Reward Zone’s website.

The court noted that online agreements often fall into one of two categories, using terminology that has become ubiquitous if not always very illuminating: “clickwrap” and “browsewrap” agreements. So-called clickwrap agreements require users to click on an “I agree” box or otherwise expressly manifest assent to be bound after being presented with the terms and conditions. In contrast, browsewrap agreements do not require the user to expressly accept the terms and are generally provided through a link on the website, often in small type at the bottom of the screen. In theory, users are assumed to have accepted a browsewrap agreement simply by using the website. The *Anand* court noted, however, that courts are generally reluctant to enforce browsewrap agreements.

The court then goes on to note that many online agreements do not fall neatly into either the clickwrap or browsewrap category. Rather than abandoning the arguably misleading clickwrap/browsewrap dichotomy altogether, however, the court describes yet a third category of online contract, using the term “hybridwrap” to describe an online agreement that combines characteristics of a clickwrap and browsewrap. This mode of analysis, which a number of courts have employed since at least the Southern District of New York’s opinion in *Fteja v. Facebook*, holds that hybridwrap agreements “typically prompt the user to manifest assent”

after presenting a hyperlink to the terms and conditions, rather than displaying the terms themselves.

First, the court examined how Reward Zone presented its terms to users. The court noted that the terms themselves were presented through a hyperlink and that the user's ability "to continue through the site was not conditioned on express assent" to the terms. Significantly, the "Continue" button did not explicitly establish a connection to the "I understand and agree ..." language preceding the link to the terms and conditions. The court outlined the deficiencies of Reward Zone's configuration as follows:

The hybridwrap agreement here is unenforceable because nothing expressly linked the "I understand and agree ..." language to the "Continue" button. There was no "notice informing the user that, by clicking the button, the user [wa]s agreeing to" the terms and conditions. Anand was not, for example, presented with an "I agree" box after being presented with a list of terms and conditions for use," nor was she otherwise "require[d] ... to manifest assent to the terms and conditions expressly."

Second, the court rejected the defendant's argument that Anand had assented by affirmatively clicking "Continue" to proceed through the website. The court pointed back to its finding that the website did not explain that clicking "Continue" would "constitute assent to the terms

and conditions or that continuation was conditioned on such assent."

Third, the court also examined the placement of the "I understand and agree ..." text above the "Continue" button. Here, there was "no connection between the statement 'I understand and agree ...' and the 'Continue' button apart from the placement of the text above the button." The court reasoned that the "mere proximity of a terms and conditions hyperlink to a button that the user must click to proceed does not equate to an affirmative manifestation of assent to the terms and conditions." The opinion acknowledged that courts typically give effect to hybridwrap terms where "the button required to perform the action manifesting assent ... is located directly next to a hyperlink to the terms and a notice informing the user that by clicking the button, the user is agreeing to those terms." No such configuration was present on Reward Zone's website.

Finally, the court distinguished the cases cited by the defendants—where other courts enforced the terms of use of online agreements—because "those agreements included language expressly linking an action by the user to the manifestation of assent." For example, in *Fteja v. Facebook*, the court held that the plaintiff "was informed of the consequences of his assenting click" where the website read: "[b]y clicking Sign Up, you are indicating

that you have read and agree to the Terms of Service." In *Meyer v. Uber Technologies, Inc.*, No. 16-2750 (2d Cir. 2017) the website's text clearly explained that "[b]y creating an Uber account, you agree ..." Ultimately, the court did not find any "language that linked the notice regarding mandatory arbitration or the terms and conditions to the 'Continue' button" on Reward Zone's website. Accordingly, the court denied Fluent and RewardZone's motion to compel arbitration.

Anand serves as yet another reminder that correctly implementing online agreements is critical to ensuring that such agreements will actually be enforceable against users. Regardless of the various flavors of "wrap" terminology one uses, the keys to making online agreements enforceable are providing conspicuous notice of the terms to users and obtaining users' express assent to be bound by those terms.

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