

Don't Let Your Online "Terms of Use" Get Zapped! How To Ensure Your Web Site's Terms Are Enforceable

We are all familiar with a website's Terms of Use, often buried among a sea of hyperlinks in the footer of the site's homepage. While great care is often used in drafting such terms — which generally contain provisions relating to choice of law, venue selection, and other dispute resolution mechanisms, limitations of liability, license restrictions, disclaimer of warranties, and similar risk-mitigating provisions —, companies should be equally diligent in ensuring that the terms are agreed upon by site visitors in order for them to be given legal effect. The class-action lawsuit against online retailer Zappos provides an important cautionary tale and adumbrates mitigation strategies for companies to follow to ensure their Terms of Use are legally enforceable.

In mid-January 2012, a computer hacker attacked Zappos.com and attempted to download files containing customer information such as names, addresses, phone numbers and encrypted account passwords affecting over 20 million consumers. As a result of this security breach, a wave of class-action lawsuits were filed in federal district courts across the country seeking monetary damages.

Following consolidation of the cases in the United States District Court,

District of Nevada (*In re Zappos.com Inc., Customer Data Security Breach Litigation*) (Case No. 3:12-CV-00325-RCJ-VPC) (D. Nev. June 14, 2012), Zappos sought to stay the litigation in order to enforce an arbitration provision contained in its Terms of Use. Additionally, as is common with many online vendors, Zappos' Terms of Use also provided: "We reserve the right to change this Site and these terms and conditions at any time. BY ACCESSING, BROWSING OR OTHERWISE USING THE SITE INDICATES YOUR AGREEMENT TO ALL THE TERMS AND CONDITIONS IN THIS AGREEMENT, SO PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PROCEEDING."

The court found that Zappos' Terms of Use constitutes a "browse-wrap" agreement, which requires "reasonable notice of the terms of the contract" to be enforceable. With a browse-wrap agreement, a website owner seeks to bind website users to terms and conditions by posting the terms somewhere on the website, usually accessible through a hyperlink located at the bottom of a website's homepage. In such an agreement, users do not expressly assent to the terms, but are said to be bound by merely visiting the website where a link to the terms is somewhere

posted. In contrast, a “click-wrap” agreement requires users to take some affirmative action to expressly manifest their assent to the terms by, for example, clicking an “I agree” button.

In refusing to enforce the arbitration clause, the court found that Zappos’ Terms of Use were not adequately communicated:

- The Terms of Use hyperlink is inconspicuous, buried between the middle and bottom of each Zappos.com webpage among many other links, only visible if a user scrolls down.
- The link is the same size, font, and color as most other non-significant links.
- The website does not direct a user to the Terms of Use when creating an account, logging in to an existing account, or making a purchase.

Unfortunately for Zappos, a simple click-wrap agreement could have avoided this outcome. No matter how well drafted Zappos’ Terms of Use may have been — with its host of substantial benefits in the form of a disclaimer of warranties, waiver of consequential damages, reduced statute of limitations, restrictions on class-actions, and the like — its terms carried no legal effect, given that Zappos could not prove they were ever accepted by its users.

What Companies Can Do

To increase the likelihood that your online terms will be enforceable — whether styled as “Terms of Use,” “Terms of Service,” “End User License Agreement,” “User Agreement,” or otherwise —, the following precautions should be adopted:

- **Use A Click-Wrap Agreement Whenever Possible.** Unlike browse-wrap agreements, click-wrap agreements are generally enforceable as evidencing the requisite level of mutual assent necessary to form a binding agreement. Click-wrap agreements are therefore the preferred vehicle to form an online contract. Companies could readily integrate such contracts into common web user activities on their sites, such as upon sign-up, account registration, or purchase check-out, or another more suitable activity tailored to the nature of the company’s business and user interaction.
- **Browse-Wrap Agreements Should Be Avoided Whenever Possible. If a Browse-Wrap Agreement Is Used, Be Sure the Terms Are Conspicuously Located and Displayed.** Browse-wrap agreements enjoy less legal certainty, and should generally be avoided. If browse-wrap agreements are used, the hyperlink to the Terms of Use

should be conspicuously placed on the website such that a user of the website will have reasonable notice of its existence and be aware that use of the website is subject to those terms. Preferably, the Terms of Use should appear at the top of the website rather than at the bottom of the website so that visitors do not have to scroll down to see the link. Similarly, repeated exposure to the Terms of Use should be offered (that is, appearing exclusively in the footer of the site's homepage will generally be insufficient), with the hyperlink itself underlined and in a different font, style or color from the remaining text. The Terms of Use should also explicitly state what action on the user's part constitutes "acceptance" of the terms, whether it be the mere continued "use" of the site, completing an online purchase, or some other specified action.

- **Obtain Consent to Changed Terms.** Companies should secure a user's consent to any modification when the user has previously accepted the terms and conditions. Such consent may be demonstrated through another click-wrap agreement showing the modified terms. Alternatively, with a browse-wrap agreement, notice of the changes should, at minimum,

be conspicuously displayed on the webpage and include the date of last modification. If properly structured, prospective changes can be accomplished by continued use.

- **Avoid Unilateral Right to Change Agreement.** Most federal courts have held that if a party retains the unilateral, unrestricted right to terminate an agreement, it is illusory and unenforceable, especially where there is no obligation to receive consent from, or even notify, the other parties to the contract. Indeed, the court in Zappos refused to uphold the arbitration clause in Zappos' Terms of Use on this alternate basis as well. Instead, notice should be given and consent should be obtained whenever amending your website's Terms of Use. The exact notice and consent mechanism will vary depending on the nature of the services offered (including whether the service is provided for free), and the original terms.

Bottom Line: If you're looking to bind your online customers to an agreement, it's essential that you obtain their affirmative express consent in the form of a click-wrap agreement wherever possible. If a browse-wrap agreement is required, be sure that the terms and conditions are conspicuously placed on your

website to be deemed sufficiently brought to the users' attention. Failure to take either precaution will likely get your Terms of Use zapped.

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