Internet and the Law: Enforceability of browse-wrap terms and conditions

Most prudent website operators include terms and conditions on their website to make it clear on what basis information, products or services available through the website are being provided. A recent United States case involving Zappos.com, a large online shoe retailer based in the United States is a good reminder that just because a business operates online, does not mean the usual rules for contract formation and the enforceability of contracts do not apply. In particular, businesses operating online need to ensure the way their terms and conditions are on their websites are sufficiently brought to users' attention, or there is a risk the terms and conditions will be unenforceable.

Types of website terms and conditions
Terms and conditions can be set out in a variety of ways on a website but generally they take one of the following two forms:

- Clickwrap which is where the website user is required to take some form of positive action to express assent to the terms and conditions, usually by completing a checkbox alongside a statement that the user has read and accepts the terms and conditions;
- Browse-wrap which is where the terms and conditions are simply posted on the website, typically accessible via a hyperlink appearing on various pages on the website or at the foot of the website pages, with no requirement that a website user take any affirmative action to indicate assent to the terms and conditions.

Browse-wrap cases in the United States
Both clickwrap and browse-wrap agreements have been the subject of several Court cases in the United States. Generally clickwrap agreements have been held to be enforceable where it has been sufficiently demonstrated that a customer has seen and accepted the relevant terms and conditions before
proceeding with a transaction. With browse-wrap agreements, the same principle has been applied - generally, the US Courts have looked at whether a website user has actual or constructive notice of the terms and conditions prior to using the website or completing the relevant transaction.

In the United States a browse-wrap agreement has been upheld where users on a website purchasing products were repeatedly informed that all sales were subject to the Terms and Conditions of Sale in addition to a conspicuous hyperlink to those terms and conditions of sale over a series of pages. It was held that the repeated exposure put a reasonable user on notice of the terms and conditions. On the other hand browse-wrap terms have not been upheld where there was insufficient notice, such as where the hyperlink to the terms and conditions was found only when a user scrolled down the page to the next screen.

Based on the decisions of the courts in the United States to date, whether or not a browse-wrap agreement is enforceable is to be assessed on a case-by-case basis, and there are no "bright-line" rules as to whether a given set of terms and conditions agreement is sufficiently conspicuous.

Zappos.com case
The Zappos.com case arose after hackers successfully breached Zappos.com security and accessed personal information of Zappos.com customers collected at the time the customers had completed purchases on the website. The affected customers brought a class action claim for damages resulting from the security breach under State and Federal Statutes and at common law. Zappos.com argued that the customers could not bring a class action suit because the Zappos.com website Terms of Use provided that customers must attend arbitration with Zappos.com and prohibited class action suits. However, the US District Court of Nevada found that the Zappos.com's website Terms of Use, including the arbitration and anti-class action lawsuit clauses, were unenforceable. The Terms of Use constituted a browse-wrap agreement. The Court noted that the enforceability of browse-wrap terms turned on whether the user had actual or constructive knowledge of the terms. This would turn on whether the website provides sufficient notice of the terms. In the Zappos.com case, the website Zappos.com had a hyperlink to its Terms of Use on every page of its website, between the middle and bottom of the page, visible if a user scrolls down. The Court noted that if the Zappos.com homepage was printed, the link would appear on page 3 of 4 pages. There were no distinguishing features of the link - it was the same size font and colour as
most non-significant links and users were not directed to the Terms of Use when opening an account, logging in or making a purchase.

The Court found that it could not conclude that the website users ever viewed, let alone manifested assent to the Terms of Use. They were inconspicuous, buried among many other links and the website never directed a user to the Terms of Use. No reasonable person would have reason to click on the Terms of Use. The Court held that the basic requirements for a contract, including "acceptance" and a "meeting of the minds" are not altered just because the terms and conditions appear online. Without a manifestation by the website user, of an intention to be bound by the terms and conditions, no valid contract exists.

**Lessons for New Zealand website operators**

The New Zealand Courts have not yet considered the enforceability of a browse-wrap agreement (or clickwrap agreements). But, the Zappos.com decision provides a useful guide for operators of websites on the basic approach regarding enforceability of website terms and conditions. In particular, just because a contract is being formed online it does not negate the need to comply with fundamental contract law principles.

The Zappos.com decision illustrates the importance of ensuring that terms and conditions for a website to appear conspicuously and the need for assent. A correctly constructed clickwrap arrangement will almost always provide a greater basis than a browse-wrap arrangement on which to argue the terms and conditions have been agreed to by a website user. Businesses operating a transactional based website online would therefore be wise to err on the side of caution and use a clickwrap agreement rather than rely on a browswrap agreement.

Of course, clickwrap agreements will not always be practical. For example it would not always be appropriate for a brochure website to expect the user to click 'I agree' before being allowed to access the website material. In these situations, the terms and conditions should be conspicuously placed on the website such that a user of the website will have reasonable notice of the terms and conditions and be aware that use of the website is subject to those terms.

**Key contact:**

Karen Ngan (http://www.simpsongrierson.com/karen-ngan)
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AUTHOR

Karen Ngan
Partner - Corporate & Commercial
DDI: +64 9 977 5080
Mobile: +64 21 648 977
Email: karen.ngan@simpsongrierson.com