

The Pitfalls of Using Browsewrap Agreements for E-Transactions

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Introduction

As the commercial world continues moving business processes and transactions to mobile devices and the web, the legal world continues working—and often struggling—to adapt traditional contract principles to an ever-evolving electronic paradigm. The recent ruling of the United States District Court for the Northern District of California, in *Rushing v. Viacom*, where the court grappled with the enforceability of an arbitration clause of a website user agreement, should serve as a warning for companies considering entering into online agreements with their customers. The *Rushing v. Viacom* decision illustrates that a party seeking to create an enforceable electronic contract with its customers must provide clear and explicit notice of the contract's terms and conditions, and a mechanism for confirming its customers' acceptance of such terms and conditions, or face the risk that a court will not enforce the electronic contract.

Background Regarding Internet Adhesion Contracts

In order to facilitate the fast and efficient use of their websites, businesses frequently attempt to bind website users to terms and conditions by using various types of standardized form contracts that are offered on a "take it or leave it" basis. The terms and conditions contained in these agreements may govern, among other things, the use of a website, or purchases made from a website. Courts have coined several terms, each named after the "shrinkwrap" software license agreements common in the 1990s, to describe the various means of presenting and obtaining a customer's agreement to online terms and conditions:

- **Browsewrap Agreements.** In a browsewrap agreement, a website simply contains a notice (which, all too frequently, is not prominently displayed) that a user agrees to be bound by certain terms and conditions by the user's mere continuing use of the website, such as by purchasing goods offered for sale on the site. Though, by definition, a browsewrap agreement only requires a user's passive acceptance of the website's terms, such as by ordering goods on the site, the user must have actual or "reasonable notice" of the terms of the browsewrap agreement and agree to the terms in order to be bound by them.
- **Clickwrap Agreements.** Clickwrap agreements generally require the user to take some affirmative step to accept the terms and conditions at issue. Clickwrap agreements take many forms, but typically require that the user indicate consent to the terms and conditions by clicking a button or checkbox confirming acceptance of the terms before proceeding to use the website or undertake whatever other action implicates the terms and conditions, such as placing an order from an e-commerce site. A properly constructed clickwrap agreement will likely provide actual or reasonable and constructive notice of its terms and conditions.
- **Scrollwrap Agreements.** Scrollwrap agreements are similar to clickwrap agreements, but require the user to scroll through the website's terms and conditions before proceeding, thereby eliminating—at least theoretically—any future argument that the user did not have actual or reasonable notice of the terms and conditions.
- **Sign-in Agreements.** These contracts do not require the user to click on a

box accepting the website's terms and conditions. Rather, a sign-in agreement merely notifies its users of the existence and applicability of the website's terms of use when the user is signing onto the website, and may require the user to acknowledge that by proceeding to log onto the website, he or she is bound by those terms of use. A sign-in agreement is essentially another form of clickwrap agreement.

As the recent decision in *Rushing v. Viacom* made clear, online contract proponents have had far more difficulty enforcing the more passive, browsewrap agreement where the user has to search for the terms. In contrast, online agreements, such as clickwrap and scrollwrap agreements, that require the user to click "I agree" or take some similar action to indicate their assent to online terms and conditions that are conspicuously presented or made available to download for review, are generally deemed to be enforceable because they require an affirmative step to be taken by the customer. They include agreements where the terms are available in a conspicuous hyperlink placed adjacent to the acceptance button or clickbox.

Factual Background of *Rushing v. Viacom*

On August 7, 2017, Amanda Rushing, on behalf of her child and all others similarly situated (collectively, the "Plaintiffs"), filed a class action complaint against multiple defendants, including Viacom Inc. and Viacom International Inc. (collectively, "Viacom"). The plaintiffs alleged that Viacom had violated the federal Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501-6506, by capturing personally identifying and behavioral information from the children who used its online gaming app, *Llama Spit Spit*, in order to sell such information to third parties for the purposes of creating targeted advertising to children.

Viacom moved to stay or dismiss the lawsuit and compel arbitration of the Plaintiffs' claims pursuant to Viacom's End User License Agreement ("EULA"). Viacom argued that the Plaintiffs, as users of the online game, *Llama Spit Spit*, had agreed to be bound by the arbitration clause contained within the EULA when the Plaintiffs downloaded the app.

Viacom explained that users of *Llama Spit Spit* were notified in multiple ways that the EULA had governed their use of the app and that the EULA contained an arbitration clause. First, the description of the app in the relevant "app store" on users' mobile devices, located just below the "Install" button, stated that the use of the app is subject to the EULA, and provided a link to the EULA below that statement. Additionally, the app description explicitly stated that the EULA contained an arbitration clause. Though users had to click "read more" in order to see this portion of the app description, Viacom argued that the Plaintiffs' quoting of the app description in their complaint demonstrated that they must have clicked the applicable "read more" buttons.

Viacom also argued that notice of the EULA and arbitration provision were provided in the games themselves. According to Viacom, several of the games in question contained a pop-up notification that the user had agreed to Viacom's updated EULA by using the app. The pop-up contained a "click here" box that linked to such updates, and also required the user to click a button in the pop-up box before continuing to use the game.

Viacom also relied on an additional provision of notice of the EULA in the bottom left of the home screen for apps like *Llama Spit Spit*, where there was a "prominent link" to Viacom's "PRIVACY POLICY." Viacom asserted that parents concerned with data privacy who clicked on the "PRIVACY POLICY" link would see not only a link to Viacom's "PRIVACY POLICY," but also prominent links to the EULA and information about its arbitration clause.

The Plaintiffs opposed Viacom's motion to compel arbitration, arguing that the EULA was an unenforceable browsewrap agreement. The Plaintiffs asserted that browsewrap agreements "risk binding users to terms and conditions that they might never see" and must, therefore, be "carefully scrutinized." The Plaintiffs argued they were not bound by the EULA and its arbitration requirement because Viacom had failed to provide a conspicuous hyperlink or explicitly direct its users to such a link. They alleged that this violated controlling Ninth Circuit law that requires browsewrap agreements to provide a conspicuous hyperlink to the relevant terms and conditions and an additional conspicuous notice that continuing to use the website binds the user to those terms.

Additionally, the Plaintiffs submitted a declaration with their opposition brief that provided a step-by-step analysis of the process of downloading and playing the *Llama Spit Spit* app, including hyperlinks to videos of each step of the process. The Plaintiffs confirmed that “read more” must be clicked in order to see any mention of the EULA in the game’s app description, and further stated that even after clicking “read more,” the link provided to the EULA was defective and non-functioning and, therefore, the user could not access the EULA or its arbitration provision. The declaration also confirmed that the app could be launched and played without clicking any hyperlinks or acknowledgements beforehand.

The Court’s Decision

The court ruled that the arbitration clause in the EULA was unenforceable. The court explained that “a user cannot accept an offer through silence and inaction where she could not reasonably have known that an offer was ever made to her,” and the Plaintiffs could not have agreed to the arbitration provision without having either actual or at least reasonable or constructive notice of the EULA and its arbitration provision.

The court noted that Viacom, as the party seeking to compel arbitration, had the burden of proving that the Plaintiffs had agreed to arbitrate by a preponderance of the evidence. The court concluded Viacom failed to meet its burden because it could not prove the Plaintiffs had received the requisite notice of the arbitration agreement contained in the EULA.

The court first found that Viacom had failed to prove the Plaintiffs had actual notice of the EULA. While *Llama Spit Spit*’s app description in the app store explicitly referenced the EULA and its arbitration clause, Viacom did not prove that it had provided the requisite notice of the app description to users of the website, such as the Plaintiffs. The relevant portion of the app description only became visible if the user had clicked a hyperlink titled “read more”—an action that users were not required to take in order to download the app. The court rejected Viacom’s argument that the Plaintiffs’ quoting of the relevant portion of the app description in their complaint proved they had clicked “read more” (and, therefore, had actual notice of the app description). It was more likely that one of the Plaintiffs’ lawyers had decided to click “read more” long after the Plaintiffs had downloaded the game.

The court also held that Viacom had failed to provide constructive notice of the arbitration clause to the Plaintiffs. The court noted that Viacom did not dispute that the EULA, including its arbitration provision, was a browsewrap agreement, and that in the absence of the Plaintiffs receiving actual notice of the EULA and its arbitration clause, the enforceability of the agreement “turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.” The court held the arbitration clause was unenforceable because Viacom could not satisfy this requirement.

The court found that the app description did not provide the user with sufficient notice of the arbitration agreement. The page of the app description that Viacom had relied on, which referenced the EULA and the arbitration clause, was not visible to users of the website unless they had clicked “read more.” Just as problematic for Viacom was the fact that users could have downloaded or played the game without having clicked “read more.” Accordingly, the court followed the decisions of other courts and determined that browsewrap agreements, such as Viacom’s, are not enforceable where users are not likely to see the terms of the agreement.

The court also relied on Viacom’s inability to point to any kind of textual notice on “every page” of the app notifying users that continuing past the page and/or using the app constituted acceptance of the EULA. Though the court recognized that the app contained a link to Viacom’s “privacy policy” on its home screen that the user would have encountered each time he or she launched the game, “that is a far cry from an explicit textual notice that continued use will act as a manifestation of the user’s intent to be bound by the EULA.”

Conclusion

As a result of the *Rushing v. Viacom* decision and other similar court holdings, companies considering using online contracts in business-to-business transactions should not rely on a browsewrap agreement to impose terms and conditions on the users of their websites and mobile apps. A company seeking to bind a user of its website to terms and conditions that can only be found by searching for, finding, and then clicking an inconspicuously placed button acknowledging agreement to such terms (such as the “read more” button in *Rushing v. Viacom*)

faces the real risk that a court will find the user lacked the requisite constructive notice of the website's terms and conditions and refuse to enforce those terms in any subsequent litigation. Companies looking to establish enforceable electronic terms and conditions would be better off using a clickwrap or scrollwrap agreement

that presents users with a clear and explicit requirement to affirmatively confirm their agreement to the terms before proceeding. Absent that, businesses seeking to bind customers and other end users to important terms and conditions risk sinking in the same boat as Viacom.

About the Authors:

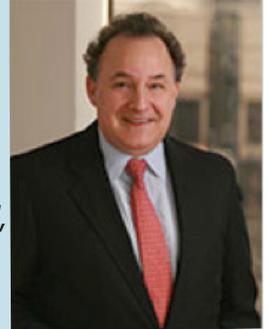


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