

Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent

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Introduction

Although case law surrounding click-through agreements is still very sparse, it has evolved sufficiently to discern trends and policies in the small number of cases decided so far. These trends and policies can assist transactional lawyers in advising clients on setting up and using electronic form contracts. They also can assist litigators in continuing to argue and settle disputes on click-through agreements.

This project is a product of the Working Group on Electronic Contracting Practices, within the Electronic Commerce Subcommittee of the Cyberspace Law Committee of the Business Law Section of the American Bar Association (ABA).² During 2000-2001, the Working Group studied the process of mutual assent in a narrow set of electronic agreements—“click-through agreements” (also known as “click-wrap agreements”). In these agreements, one party sets up a proposed electronic form agreement to which another party may assent by clicking an icon or a button or by typing in a set of specified words. Click-through agreements are distinct from “click-free agreements” (also known as “browse-wrap agreements”), in which the User does not manifest unambiguous assent to the posted terms.³

The Working Group assembled a set of fifteen Strategies for avoiding disputes on the validity of the mutual assent process, as well as a bibliography of existing United States and Canadian case law and commentary on click-through agreements. It presented the Strategies and the accompanying bibliography at the ABA Annual Meeting in Chicago on August 5, 2001.⁴ That document, slightly modified based on feedback from that presentation, appears at the end of this Article.

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³ Click-free agreements are commonly used for web site terms of use and contract-based privacy terms, where the User’s action of using the web site is said to constitute the User’s assent to the terms. The User does not click a box or icon saying “I agree,” “I consent,” or the like. Click-free agreements are the subject of an ongoing project by the Working Group, but they are not the focus of this Article.

⁴ *ABA Online Contracting Experts Distill Option for Writing Valid Click-Through Deals*, 6 ELECTRONIC COMMERCE L. RPT. (BNA) 827 (Aug. 8, 2001), reprinted at 70 U.S.L.W. 2112 (2001).

The Strategies are designed to assist practitioners in developing, evaluating, and using click-through agreements, in order to give a margin of safety for the validity of assent in these kinds of online or otherwise electronic contracts. Although this project originally was envisioned as a set of “best practices,” the Working Group decided against that approach because it might have resulted in the Strategies being used to define the line between valid and invalid assent. They do not. Instead, they seek to define how proposed electronic form agreements can reliably lead to mutual assent.

The scope of the Strategies is limited. They do not define the only means by which to accomplish mutual assent. They do not address defenses to contract formation such as unconscionability, fraud, mistake, and lack of consideration. And they do not address specific requirements for notice, format, and disclosure that are applicable to particular types of agreements.

The fifteen Strategies are divided into six groups: opportunity to review terms, display of terms, rejection of terms and its consequences, assent to terms, opportunity to correct errors, and keeping records to prove assent. Each Strategy appears in indented text below, preceding the explanatory text for that Strategy.

OPPORTUNITY TO REVIEW TERMS

This cluster of Strategies encompasses the need for the User to view the terms before assent and to assent before gaining access to the items governed by the agreement. In addition, the terms should be easy to view and should continue to be available for viewing during the assent process.

- 1. Viewing of Terms before Assent: The User should not have the option of manifesting assent without having been presented with the terms of the proposed agreement, which should either appear automatically or appear when the User clicks on an icon or hyperlink that is clearly labeled and easily found. Place the means of assent at the end of the agreement terms, requiring the User at least to navigate past the terms before assenting.**

Three recent cases, an attorney general settlement, and some FTC guidelines demonstrate that a click-through agreement may be vulnerable to attack when the User is not required to at least view the terms of the proposed agreement before assenting to them. In *Ticketmaster Corp. v. Tickets.com, Inc.*,⁵ the User was not bound by the terms restricting the use of the Web site because, among other things, the User could find the terms only by scrolling past the instructions, past the directory of Ticketmaster event pages and their own hyperlinks, and finally to the bottom of the homepage where the User could read the terms if desired. Moreover, the User instead could link to other pages without viewing those terms.⁶

⁵ No. CV. 99-7654, 2000 WL 525390 (C.D. Cal. Mar. 27, 2000).

⁶ *Id.* at *3.

In *Williams v. America Online, Inc.*,⁷ the court refused to grant AOL's motion to dismiss because, among other items, the User did not assent to the terms and conditions, including the contested forum selection clause.⁸ The User could not even view the agreement terms without twice overriding the "I agree" button by twice clicking the "Read now" button.⁹ Thus, AOL built in a powerful incentive for the User to assent without reading the terms.

The preceding two cases are consistent with two of the FTC's Dot Com Disclosure guidelines:

- To make a disclosure clear and conspicuous, advertisers should: . . .
- § Use text or visual cues to encourage consumers to scroll down a Web page when it is necessary to view a disclosure. . . .
- § Display disclosures prior to purchase, but recognize that placement limited only to the order page may not always work.¹⁰

As to the first point above, the FTC advises that references to subsequent related text be explicit about where or how to find that text, as well as how important its content is. A mere scroll bar or a general reference ahead is not sufficient, and several inches of blank space or unrelated material can be downright misleading.¹¹ As to the second point above, the FTC advises that Users should be presented with the disclosures before clicking an "order now" button or to a link that says, "add to shopping cart" or before otherwise incurring a financial obligation.¹²

In *Specht v. Netscape Communications Corp.*¹³ the court quoted *Pollstar v. Gigamania, Ltd.*,¹⁴ in which

the court, although denying defendant's motion to dismiss, expressed concern about the enforceability of the browse-wrap license "[where] many visitors to the site may not be aware of the license agreement [because] [n]otice of the license agreement is provided by small gray text on a gray background. . . . [However,] [t]he court

⁷ No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

⁸ *Id.* at *2-*3.

⁹ *Id.* at *3.

¹⁰ FEDERAL TRADE COMMISSION, DOT COM DISCLOSERS, *available at* www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html. Note that these FTC guidelines specify how to make certain disclosures (not necessarily contract terms) clear and conspicuous (but not necessarily resulting User's assent to the terms), so they are not directly on the same topic as these Strategies. However, many of these FTC guidelines provide clues for how to craft a click-through agreement with the margin of safety desired under these Strategies, so this Article will refer to the FTC Dot Com Disclosure guidelines as pertinent [hereinafter DOT COM DISCLOSURES].

¹¹ *Id.*

¹² *Id.*

¹³ 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

¹⁴ No. CIV-F-00-5671 REC, 2000 WL 33266437 (E.D. Cal. Oct. 17, 2000).

hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time.”¹⁵

The New York attorney general recently settled a deceptive business practice claim against CompUSA for the company’s failure to clearly and conspicuously disclose a material condition.¹⁶ Although this dispute did not focus on the validity of assent, its underlying policy is consistent with the preceding cases and thus pertinent to this Strategy on viewing the term before assent (Strategy 1). On its Web site, CompUSA offered buyers a \$400 rebate on a hardware purchase, but that rebate was conditioned on the buyer signing up for three years of Internet service. If the buyer terminated the Internet service provider (ISP) subscription early, there was a penalty of \$250 to \$450—potentially more than the rebate was worth. However, the condition and the penalty were posted on screens that were accessible only by the buyer following three and four layers of links past the homepage of the Web site. From the homepage, the buyer followed one hyperlink to another hyperlink for “more information,” to another hyperlink to “click for details,” where the buyer finally found out about the ISP subscription. The buyer had to follow one more hyperlink to learn that the ISP subscription had to be for three years and that its early termination was accompanied by a cancellation penalty. The New York Attorney General obtained a settlement of \$50,000 plus costs, as well as CompUSA’s agreement to disclose conditions clearly and conspicuously. In the future, CompUSA can disclose lengthy terms in a hyperlinked screen, but only if a clear statement of “the existence and nature of any extra fees or conditions . . . appear adjacent to the price.”¹⁷

The FTC’s Dot Com Disclosure guidelines discuss the use of hyperlinks. They advise that closely related disclosures should appear immediately next to the related claim, rather in a hyperlink. A hyperlink, however, might be a better choice if the material is lengthy or needs repetition (perhaps because of multiple triggers). If so, the language of the hyperlink label should be clear and conspicuous and should convey the importance and general topic of its contents. The hyperlink’s function should be obvious, and its placement should be proximate and noticeable. Finally, the style of hyperlinks should be consistent throughout the Web site, and getting to the disclosure on the click-through page should be easy and effective. The FTC even advises that the Web site visitor data be monitored to see whether the hyperlinks are working, so that they can be modified if they are not.¹⁸

On the other hand, three (or possibly four) cases indicate that some click-through agreements not complying with Strategy 1 might still be upheld as valid. In *Groff v. American Online, Inc.*,¹⁹ the contested term was held valid where the User could have subscribed to defendant’s Internet service by either (i) pressing the “I Agree” button next to the “Read Me” button, without viewing or reading the proposed terms, or (ii) scrolling through the proposed

¹⁵ *Specht*, 150 F. Supp. 2d at 594 (quoting *Pollstar*, 2000 WL 33266437, at *6).

¹⁶ *CompUSA Agrees to Discontinue Practice of Placing Disclosures Behind Several Links*, 6 ELECTRONIC COM. & L. RPT. (BNA) 562 (May 30, 2001).

¹⁷ *Id.*

¹⁸ See DOT COM DISCLOSURES, *supra* note 9.

¹⁹ No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998).

terms and then pressing the “I Agree” button next to the “I Disagree” button at the conclusion of the agreement. The first option was inconsistent with requiring the User to view the terms before assenting to them, but the court still upheld the terms, saying that a party manifesting assent to an instrument “cannot later complain that he did not read the instrument or understand its contents.”²⁰

In *Caspi v. Microsoft Network, L.L.C.*,²¹ the screen was laid out in two columns, so that the buttons for “I Agree” and “I Don’t Agree” remained in one column while the User scrolled through the proposed terms in the adjacent column. Thus, even though the User could assent without scrolling to the bottom of the agreement, the *Caspi* court still upheld the User’s assent as valid.²² The same format appears to have been used with the same result in *Rudder v. Microsoft Network Corp.*,²³ but the case is less clear in its statement of the facts.

Similarly, in *Scott v. Bell Atlantic Corp.*,²⁴ the court disregarded the User’s arguments that “it was possible to use defendant’s service without having read the terms and conditions of service . . . since the complaint does not allege that any of the plaintiffs did so”²⁵ The court also refused to find any defects in the location or conspicuousness of the terms and conditions within the installation package, because “it has been held that such does not impair the enforcement of the agreement.”²⁶

Although these cases are mixed in their results, at least five of the eight support the proposition of this Strategy, i.e., that the User should be required to view or scroll through all of the terms of the proposed agreement before being permitted to manifest assent. Indeed, the very existence of the cases to the contrary (setting a lesser standard) demonstrates why the best course of conduct for avoiding disputes about the validity of assent is to mandate that the User view all terms before being able to manifest assent.

2. Assent before Access to Governed Item: The User should not be able to gain access to or rights in the website, software, information, property, or services governed by the proposed agreement without first assenting to the terms of the agreement.

²⁰ *Id.* at *5.

²¹ 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

²² *Id.* at 533.

²³ No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarswellOnt. 3195, at 5 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999).

²⁴ 726 N.Y.S.2d 60 (App. Div. 2001).

²⁵ *Id.* at 64.

²⁶ *Id.* In support of the latter ruling, the court cited *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148, (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453. Of course, those rulings represent only one side of split rulings on this subject. *Contra Klocek v. Gateway, Inc.*, No. CIV. A. 99-24 99-KHV, 2000 WL 1372886 (D. Kan. Sept. 6, 2000).

The terms of the proposed agreement should be presented before and assented to before the User gets the “product” governed by the agreement. The *Caspi* court upheld the contested clause in a membership agreement and noted that “[r]egistration [could] proceed only after the potential subscriber . . . had the opportunity to view and . . . assented to the membership agreement, including [the contested] clause. No charges [were] incurred until after the membership agreement review [was] completed and a subscriber . . . clicked on ‘I Agree’ ”²⁷

In *Ticketmaster*, the terms and conditions were not binding.²⁸ The technology of the web site allowed “deep-linking,” thereby allowing people to bypass the homepage that contained terms and conditions. The court observed that “[m]any web sites make you click on ‘agree’ to the terms and conditions before going on, but Ticketmaster does not.”²⁹ The terms and conditions in that case provided that anyone going beyond the home page agrees to those terms and conditions, which could be found only by the customer optionally scrolling down the home page, past the instructions and past the hyperlinks to the event page, to the terms and conditions at the bottom of the scrolling process. Therefore, the User could easily gain access before and without reading the terms and conditions that tried to create assent by the User’s act of accessing the rest of the Web site.³⁰ One of the lessons from *Ticketmaster* is that the Web site programming should prevent the User from deep-linking to interior electronic pages that contain the “product” governed by the proposed agreement without first agreeing to terms that govern access to that product.

In *Specht*, the court held that the downloaded software was not protected by the accompanying license, because the User could download the software by clicking a download button without manifesting assent to the license terms.³¹ Although a screen after the downloading process contained the following language: “Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software,” this language was held to be a mere invitation, not a condition to downloading and using the software.³² Thus, the User was not required to assent to the license before downloading that software, so the license was not binding on the User.³³ In support, the *Specht* court also mentioned the *Pollstar* court’s concern that, in that case, “the user is not required to click on an icon expressing assent to the license, or even view its terms, before proceeding to use the information on the site.”³⁴

²⁷ 732 A.2d at 530.

²⁸ *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH, 2000 WL 525390, *3 (C.D. Cal. Mar. 27, 2000) (ruling on motion to dismiss).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001).

³² *Id.* at 595-96.

³³ *Id.* at 596.

³⁴ *Id.* at 594.

In *Williams v. American Online, Inc.*,³⁵ where the User's computer system was damaged by the software installation process before the User clicked "I agree" or had the opportunity to view the terms of the agreement, the court held that the agreement did not apply to the harm to the User that occurred before the moment of assent.³⁶

3. Ease of Viewing Terms: The program operating the click-through agreement should give the User sufficient opportunity to review the proposed agreement terms before proceeding. The User should be able to read the terms at his or her own pace; if the terms occupy more than one computer screen, the User should be able to navigate forwards and backwards within the terms by scrolling or changing pages.

In three cases, the court held that the User had assented to the contested term, based in part on the proposed terms being easily viewable by the user. In *Caspi*, the Users argued that the contested clause did not become part of the contract because they did not receive adequate notice of the clause.³⁷ However, the court rejected that argument, in part, by noting that the Users "were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement."³⁸ Likewise, in *Rudder*, what may well have been the same agreement in the same or a similar format was noted by the court to be "readily viewable by using the scrolling function on the portion of the computer screen where the Membership Agreement was presented."³⁹ The court was unconcerned that the agreement occupied more than one screen, analogizing it to a multi-page written agreement.⁴⁰

In *In re RealNetworks, Inc.*,⁴¹ the court rejected the User's argument that the license agreement was presented in a procedurally unconscionable manner.⁴² Among other points, the court found that the pop-up window containing the proposed agreement terms did not make the agreement difficult to read, nor did it "disappear after a certain time period, so the User [could] scroll through it and examine it to his heart's content."⁴³

In *Rudder*, the court reasoned that the User could view the agreement in an easy enough fashion because the User could view the entire agreement by scrolling down the screen.⁴⁴ The agreement did not have to appear in a single screen.⁴⁵

³⁵ No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

³⁶ *Id.* at *3.

³⁷ *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999).

³⁸ *Id.*

³⁹ *Rudder*, No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarswellOnt 3195, at 5 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999).

⁴⁰ *Id.* at 6.

⁴¹ No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000).

⁴² *Id.* at *6.

⁴³ *Id.*

⁴⁴ *Rudder*, No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarswellOnt 3195, at 5 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999).

4. Continued Ability to View Terms: Once the User views the terms, the User should be able to review the terms throughout the assent process.

Although there are as yet no cases on this point, the Working Group thought it important that the User be able to reread the proposed terms at a later point in the transaction. Some members of the Working Group had seen terms that disappeared after one viewing or after the expiration of a time limit. Terms that disappear after the User scrolls past them do not qualify for ease of access, nor can they be viewed by a User who wants to reread the proposed terms before deciding whether to assent to them.

The FTC's Dot Com Disclosure guidelines advise that disclosures may need to be repeated on lengthy Web sites; suggest displaying visual disclosures long enough for Users to notice, read and understand the disclosures; and note the importance of allowing the User to preserve the disclosures by downloading or printing, in order to do comparison shopping.⁴⁶ "As with brief video superscripts in television ads, fleeting disclosures on Web sites are not likely to be effective."⁴⁷ In addition, the guidelines warn as follows:

[C]onsumers may miss information presented in a pop-up window or on an interstitial page if the window or page disappears and they are unable or unaware of how access it. Others may inadvertently minimize a pop-up screen by clicking on the main page and may not know how to make the pop-up screen reappear.⁴⁸

This Strategy is closely related to Strategy 14 on user's copy and Strategy 15 on accuracy and accessibility of terms after the assent process.

DISPLAY OF TERMS

This pair of Strategies is aimed at making sure that the format and content of the terms and the assent process comply with laws on those topics and that the terms of the formal agreement do not conflict with other contents of the Web site or compact disc environment that might also be part of the agreement.

5. Format and Content: The format and content of the terms must comply with applicable laws as to notice, disclosure language, conspicuousness, and other format requirements. The terms should be clear and readable, in legible font. If the law requires specific assent to a particular type of term, the format of the assent process should comply with that requirement.

⁴⁵ *Id.* at 6.

⁴⁶ *See* DOT COM DISCLOSURES, *supra* note 9.

⁴⁷ *Id.*

⁴⁸ *Id.*

Electronic agreements must, of course, comply with the usual requirements governing notice and disclosure language, conspicuousness, layout, and consumer protection. These requirements appear in various statutes and regulations like the Uniform Commercial Code, banking and financial regulations,⁴⁹ securities regulations,⁵⁰ and FTC rules.⁵¹ If a law requires a specific kind of assent, then the click-through assent has to comply with that requirement.

In *RealNetworks*, the initial issue was whether the electronic agreement containing the contested arbitration clause was in a “writing,” as required by the Federal Arbitration Act⁵² and the Washington state arbitration act.⁵³ After considerable examination of the meaning of “writing,” the court ruled that indeed the Acts had been complied with because this particular electronic agreement was a writing that could be printed and stored.⁵⁴ The court also mentioned the then-pending federal E-SIGN Act,⁵⁵ which has since ensured that an electronic “record” meets the requirement of a “writing.”⁵⁶

The *RealNetworks* court rejected the Users’ claim that the agreement was procedurally unconscionable, finding, among other items, that the font size of the license agreement to be no smaller than the rest of the words in the computer’s own display.⁵⁷

In *Rudder*, the court upheld the click-through agreement because, among other items, “there are no physical differences which make a particular term of the agreement more difficult to read than any other term[,] . . . no fine print The terms are set out in plain language, absent words that are commonly referred to as ‘legalese.’”⁵⁸

⁴⁹ Interim Rule; request for comments, 66 Fed. Reg. 17,322 (Mar. 30, 2001) (codified at 12 C.F.R. pt. 13) (amending Regulation M, Consumer Leasing); Interim Rule; request for comments, 66 Fed. Reg. 17,329 (Mar. 30, 2001) (codified at 12 C.F.R. pt. 226) (amending Regulation Z, Truth in Lending); Interim Rule; request for comments; 66 Fed. Reg. 17,779-86 (Apr. 4, 2001); Regulation E (Electronic Fund Transfers), 66 Fed. Reg. 17,786-95 (Apr. 4, 2001) (codified at 12 C.F.R. pt. 202) (amending Regulation B, Equal Credit Opportunity); Interim Rule; request for comments, 66 Fed. Reg. 17,795-804 (Apr. 4, 2001) (codified at 12 C.F.R. pt. 230) (amending Regulation DD, Truth in Savings). Board of Governors of the Federal Reserve System Docket Nos. R-1040, R-1041, R-1042, R-1043 and R-1044, issued March 29, 2001. The mandatory compliance date was lifted and the comment period extended by Order of the Board of Governors of the Federal Reserve System issued August 2, 2001 and by the Office of the Comptroller of the Currency, OC Bulletin 2001-45 (Oct. 1, 2001).

⁵⁰ OFFICE OF INVESTOR EDUCATION AND ASSISTANCE, SEC, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS ch. 7 (1998), available at www.sec.gov/pdf/handbook.pdf.

⁵¹ DOT COM DISCLOSURES, *supra* note 9.

⁵² 9 U.S.C. §§ 1-14 (1994).

⁵³ WASH. REV. CODE ANN. § 7.04.010-.220 (West 1992 & Supp. 2001).

⁵⁴ *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341, *4 (N.D. Ill. May 8, 2000).

⁵⁵ Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, tit. I, §§ 101, 114 Stat. 464 (2000) (to be codified at 15 U.S.C. §§ 7001-7003 [hereinafter E-SIGN]).

⁵⁶ *Id.*

⁵⁷ *RealNetworks, Inc.*, 2000 WL 631341, at *6.

⁵⁸ *Rudder*, No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarswellOnt. 3195, at 6 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999).

The FTC Dot Com Disclosure guidelines urge the use of “clear language and syntax so that consumers understand the disclosures”⁵⁹ and advise that legalese or technical jargon be avoided.⁶⁰ “Incorporating extraneous material into the disclosure . . . may diminish the message that must conveyed to consumers.”⁶¹

6. Consistency with Information Elsewhere: Information provided to the User elsewhere should not contradict the agreement terms or render the agreement ambiguous.

To avoid disputes like the one in *Scott*⁶² the rest of the Web site should not contradict the terms in the proposed click-through agreement. In *Scott*, a digital subscriber line (DSL) provider placed wildly enthusiastic ads and testimonials about its DSL services elsewhere on its Web site. The proposed online agreement, however, disclaimed the DSL service being error-free or uninterrupted, the DSL provider having control over third-party networks or Web sites, the usual service warranties, and the reliability of high-risk activities on the DSL line. The court held that these disclaimers were more than enough to put the advertisements in perspective for the User, that the Web site was not false and deceptive under the Consumer Protection Act, and that a person who read the whole of the Web site would get the idea that some people are wildly pleased with this service, but the service provider is not guaranteeing that the User will be.⁶³ Thus, *Scott* stands for the proposition that contradictory or inconsistent information will not necessarily invalidate agreements terms, but they may result in litigation.

ACCEPTANCE OR REJECTION OF TERMS

These five Strategies spell out the need for a choice between the User’s assent to and rejection of the terms, as well as the clarity of the words and method of assent and rejection. In addition, the User’s choice should dictate whether the User indeed gains access to the items governed by the agreement, and the User should be told, in advance, of the consequences of that choice.

7. Choice between Assent and Rejection: The User should be given a clear choice between assenting to the terms or rejecting them. That choice should occur at the end of the process when the User’s assent is requested.

In considering whether a forum selection clause in an agreement for online services was a result of “overweening” bargaining power, and thus unenforceable under New Jersey law, the *Caspi* court specifically considered the ability of the User to walk away from the agreement. The court noted that if Users did not want to agree to the terms of the license, they could click “I

⁵⁹ DOT COM DISCLOSURES, *supra* note 9.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See Scott v. Bell Atl. Corp.*, 726 N.Y.S.2d 60 (App. Div. 2001).

⁶³ *Id.* at 64.

Don't Agree" at any point while scrolling through the agreement.⁶⁴ The fact that the plaintiffs proceeded with the transaction despite the opportunity to state their non-agreement to the transaction once they had been fully informed of the terms gave added weight to the Users' assent.

Similarly, in *Groff*, the User had (in one of the two setup options) the choice between agreeing or disagreeing to the proposed terms. The court upheld the User's assent.⁶⁵ Likewise, in *Rudder*, the User was given a choice between agreeing or disagreeing to the terms of the proposed agreement, and the User's assent was valid.⁶⁶

The lack of opportunity to reject the agreement terms was a factor in the *Specht* court's determination that the User had not assented to Netscape's license agreement. The User either could click "Download" directly or could choose to read the license and then click "Download." Neither resulted in valid assent by the User to the license agreement. The court contrasted the SmartDownload process at issue with another Netscape assent process in which the User must manifest his or her assent to the license agreement by clicking on an icon before obtaining the Netscape product.⁶⁷ In that process, the User had a choice between "Yes," "No," and "Back." The court intimated in dictum that such agreements are "valid and enforceable."⁶⁸

8. Clear Words of Assent or Rejection: The User's words of assent or rejection should be clear and unambiguous.

(a) Examples of clear words of assent include "Yes" (in response to a question about User's assent), "I agree," "I accept," "I consent," or "I assent." Do not use vague or ambiguous phrases such as "Process my order," "Continue," "Next page," "Submit," or "Enter."

(b) Examples of clear words of rejection include "No" (in response to question about User's assent), "I disagree," "I do not agree," "Not agreed," or "I decline."

In *Specht*, the court discussed at length the necessity for unambiguous language of assent to the terms of an agreement. It held that the Users in that case had not assented to the agreement terms posted elsewhere on the Web site by clicking on a button marked "Download." Netscape argued that the mere act of downloading indicated assent, but the court noted that the primary purpose of downloading was to obtain a product, not to agree to a contract. "In contrast," the court stated, "clicking on an icon stating 'I assent' has no meaning or purpose other than to indicate such assent."⁶⁹ The court contrasted another Netscape assent process in which the license agreement was accompanied by the following question: "Do you accept all the terms

⁶⁴ Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 531 (N.J. Super. Ct. App. Div. 1999).

⁶⁵ Groff v. America Online, Inc., No. PC 97-3-0331, 1998 WL 307001, at *6 (R.I. Super. May 27, 1998).

⁶⁶ *Rudder*, No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarswellOnt. 3195, at 6 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999).

⁶⁷ *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001).

⁶⁸ *Id.* at 594.

⁶⁹ *Id.* at 595.

of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close.”⁷⁰ That arrangement, the court suggested, resulted in valid assent.⁷¹

A member of the Working Group visited a Web site in which the User could electronically shop for a loan after entering personal and financial information, such as the User’s income, the value of the User’s house, and what kind of loan the User desired. After entering the personal and financial information, the User clicked on a button that says “Show Me the Lenders.” That phrase, and other language on the website, implied that the User would be presented with information about lenders who have products in which the User might be interested. Instead, though, the User’s name and identifying information was, at that moment, sent to an undisclosed number of lenders who then could arrange to have telemarketers contact the User.⁷² That action of sending personal information to the lenders may have violated several financial services laws because the User was not adequately notified of the action nor did the user consent to it.⁷³ This Web site should have used clearer words of assent, rather than “Show Me the Lenders.” Alternatively, it could have alerted the User, in advance of a particular action by the User, that such action would constitute assent.⁷⁴

9. Clear Method of Assent or Rejection: The User’s method of signifying assent or rejection should be clear and unambiguous. Examples include clicking a button or icon containing the words of assent or rejection, or typing in the specified words of assent or rejection.

In *Specht*, the court started off its opinion with the following grand language of contract law:

Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even willful inaction, as long as it is unequivocally referable to the promise, may create a contract.⁷⁵

The court then went on to reject defendant’s argument that downloading the software constituted plaintiff’s assent to the license terms.⁷⁶ It noted that

⁷⁰ *Id.* at 594.

⁷¹ *Id.* at 593-94.

⁷² Interview with Heather Thayer, Attorney, Fredrikson & Byron, in Minneapolis, Minn. (Aug. 17, 2001).

⁷³ Gramm-Leach-Bliley and the Fair Credit Reporting Act both require certain disclosures, and, in the case of the Fair Credit Reporting Act, an affirmative consent before certain financial information can be shared with third parties.

⁷⁴ *See infra*, Strategy 11.

⁷⁵ *Specht*, 150 F. Supp. 2d at 587.

⁷⁶ *Id.* at 595.

downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking an icon stating 'I assent' has no meaning or purpose other than to indicate such assent. Netscape's failure to require Users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed."⁷⁷

The *Specht* court voiced disapproval of the ruling in *Register.com v. Verio, Inc.*,⁷⁸ in which the Web site's license terms were posted with the following sentence at the end: "By submitting this query [to the Web site's database], you agree to abide by these terms."⁷⁹ The judge in that case held that

in light of this sentence at the end of Register.com's terms of use, there can be no question that by proceeding to submit a . . . query, Verio manifested its assent to be bound by Register.com's terms of use, and a contract was formed and subsequently breached."⁸⁰

The judge in *Specht* noted that *Register.com* was decided under California law, but stated in dictum, "whether under California or New York law, the promisee's assent to be bound is a required condition, and I find no such assent on the [Register.com facts]."⁸¹

The *Specht* court also cited *Pollstar*, which voiced skepticism about the validity of an agreement that allegedly bound any User of the information on the Web site, without the User clicking a button expressing assent to the agreement.⁸²

In *Ticketmaster*, the agreement posted at the bottom of long scrollable home page, full of hyperlinks to elsewhere on the Web site, stated that anyone going beyond the home page agrees to the terms of the agreement. The court reasoned, "It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one using the web site."⁸³ The court granted the User's motion to dismiss the suit, but noted that it would reconsider its holding if it could be shown that the User had knowledge of the terms and impliedly agreed to them.⁸⁴

⁷⁷ *Id.*

⁷⁸ 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000), cited with disapproval in *Specht*, 150 F. Supp. 2d at 594 n. 13.

⁷⁹ *Id.*

⁸⁰ *Id.* quoted in *Specht*, 150 F. Supp. 2d at 594 n. 13.

⁸¹ *Specht*, 150 F. Supp. 2d at 594 n.13.

⁸² *Id.* at 594 (Citing *Pollstar v. Gigamania Ltd.*, No. CIV-F-00-5671, 2000 WL 33266437 (E.D. Cal. Oct. 17, 2000)).

⁸³ *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH, 2000 WL 525390, at *3 (C.D. Cal. Mar. 27, 2000).

⁸⁴ *Id.* at *3.

A member of the Working Group assigned her Commercial Law class to locate online click-through agreements and analyze them for validity of assent. Out of seventy students, six students inadvertently ordered goods, services, or software by pressing buttons that the students did not think were going to signify their assent. These students were very cautious about clicking buttons and were aware they could blunder into assent while just trying to print out a click-through agreement.⁸⁵ If nine percent of a class of cautious law students can inadvertently order items, the industry is not doing well in setting up clear methods of assent.

10. Consequences of Assent or Rejection: If the User rejects the proposed agreement terms, that action should have the consequence of preventing the User from getting whatever the click-through agreement is granting the User. The User should not be able to complete the transaction without agreeing to the terms. For example, if the click-through agreement would grant the User use of a website, software, or particular data, the consequence of the User's rejection of the proposed terms should be to bar the User from that use. Likewise, if the click-through agreement would give the User rights to goods or services, the consequence of the User's rejection of the proposed terms should be to eject the User out of the ordering process. On the other hand, if the User assents to the proposed agreement terms, the User should be granted access to whatever is promised in the agreement without having to assent to additional terms (aside from those that the User specifies in the ordering process).

If the User rejects the proposed click-through agreement, the consequence must be that he or she cannot gain access to whatever the agreement protects or applies to. *Specht*, *RealNetworks*, *Caspi*, and *Rudder* each touched on this requirement. In *Specht*, the court discussed at length case law relating to formation of a contract through shrinkwrap and clickwrap agreements and noted that a common thread in the cases finding such agreements binding is that the User is required to perform “an affirmative action unambiguously expressing assent before [the User] may use the software.”⁸⁶ The court noted that, in contrast, the User in *Specht* was merely invited to read terms of the license agreement, and there was no consequence of a failure to agree.⁸⁷ The court's decision that the proposed terms of the license agreement were not binding appears to have been based in large part on this lack of consequences.⁸⁸ It contrasted another Netscape assent process in which the User could not obtain the product without assenting to the agreement terms and in which the user was prevented from being able to download the product if the User chose to reject the agreement terms.⁸⁹

On the other hand, in *RealNetworks*, the court initially noted that before a User could install the software packages at issue, the User was required to accept the terms of the

⁸⁵ Interview with Christina L. Kunz, Professor, William Mitchell College of Law, in St. Paul, Minn. (Aug. 10, 2001).

⁸⁶ *Specht*, 150 F. Supp. 2d at 595.

⁸⁷ *Id.* at 595-96.

⁸⁸ *Id.*

⁸⁹ *Id.* at 593-94.

RealNetworks license agreement.⁹⁰ The court spent the rest of the analysis determining whether an arbitration clause contained in the license agreement was valid. Similarly, the court in *Caspi* noted that registration could “proceed only after the potential subscriber has had the opportunity to view and has assented to the membership agreement, including Microsoft Network’s (MSN’s) forum selection clause. No charges are incurred until after the membership agreement review is completed and a subscriber has clicked on ‘I Agree.’”⁹¹ And finally, in *Rudder*, the court noted that if the User chose the option of disagreeing with the proposed terms, that action terminated the agreement process.⁹²

In these cases a prevailing theme is that when Users, as part of the process of obtaining a product or service, are required to agree to the provider’s proposed terms before obtaining the use of the service or product, those terms will be binding. On the other hand, when Users are able to obtain the product without agreeing to the terms proposed by the provider, courts are unwilling to make those terms binding on the Users. Thus, the best strategy is to require Users to agree to the terms before being allowed access to the product or service.

11. Notice of Consequences of Assent or Rejection: Immediately preceding the place where the User signifies assent or rejection, a statement should draw the User’s attention to the consequences of assent and rejection. Examples of notice of assent consequences include: “By clicking ‘Yes’ below you acknowledge that you have read, understand, and agree to be bound by the terms above” or “These terms are a legal contract that will bind both of us as soon as you click the following assent button.” Examples of notice of rejection consequences include: “If you reject the proposed terms above, you will be denied access to the [web site, software, product, services] that we are offering to you.”

Immediately before the assent mechanism, the Users should be told that their assent below means that they are agreeing to the terms above. In *Rudder*, the Canadian court pointed out that the “I Agree” button was preceded by the following statement: “To become a MSN Premier member, you must select ‘I Agree’ to acknowledge your consent to the terms of the membership agreement. If you click ‘I Agree’ without reading the membership agreement, you are still agreeing to be bound by all of the terms of the membership agreement, without limitation.”⁹³ The court upheld the agreement, even in the face of the Users’ argument that they had not read much of the agreement, including the contested term.⁹⁴

The *Specht* court discussed the need for the User to be aware that a contract is being formed by a particular action. Because the User was not required to view or assent to any license agreement or even any notice of that agreement, the court reasoned that “[f]rom the user’s

⁹⁰ *In re* RealNetworks, Inc., No. 00C 1366, 2000 WL 631341, at *1. (N.D. Ill. May 8, 2000).

⁹¹ *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1999).

⁹² *Rudder v. Microsoft Corp.*, No. 97-CT-046534CP, [1999] 2 C.P.R. (4th) 474, 1999 CarswellOnt. 3195, at 6 (WL) (Ont. Super. Ct. Justice Oct. 8, 1999).

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 7.

vantage point, [the download of defendants' software] could be analogized to a free neighborhood newspaper, readily obtained from a sidewalk box or supermarket counter without any exchange with a seller or vender. It is there for the taking."⁹⁵ In contrast, the court described a valid assent process (not issue in this case) used by Netscape for another product. In that process, the User was confronted with the license agreement and the following statement of consequences: "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." If the User chose Yes, it could proceed with the software download. If the User chose No, the User was shut out of the rest of the download preparation process.⁹⁶

OPPORTUNITY TO CORRECT ERRORS

12. Correction Process: The assent process should provide a reasonable method to avoid, or to detect and correct, errors likely to be made by the User in the assent process. A summary of an online order preceding assent is one such means.

This strategy is based on Uniform Electronic Transactions Act (UETA) section 10(2), which applies to an automated transaction involving an individual. If the electronic agent did not provide the individual with an opportunity to prevent or correct the individual's error, the individual may avoid the effect of the electronic record resulting from the error, but only if the individual gives prompt notice of the error, takes reasonable steps to return any property received as a result, and has not used or received any benefit from the consideration received from the other person.⁹⁷ A common error correction mechanism involves the electronic agent showing the individual a summary of the order specifications chosen by the individual, before asking the individual for final assent.

In the Commercial Transactions class described under Strategy 9, three of the six people who inadvertently placed orders were not able to correct the error within three days by using the error correction process posted for that web site.

KEEPING RECORDS TO PROVE ASSENT

This trio of Strategies focuses on what kind of records should be kept of the content and format of the electronic agreement process, how to comply with the requirements that the User have a record of the agreement (or at least an opportunity to print or store the record), and how to comply with the requirements that an accurate record of the agreement remain accessible to some person for a period of time.

⁹⁵ Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001).

⁹⁶ *Id.* at 594.

⁹⁷ UNIF. ELEC. TRANSACTION ACT § 10(2) (1999), available at <http://www.law.upenn.edu/bll/ulc/ulc.htm> [hereinafter UETA].

13. Accurate Records: Maintain accurate records of the content and format of the electronic agreement process, documenting what steps the User had to take in order to gain access to particular items and what version of the agreement was in effect at the time. If necessary, for proof of performance, link the User's identity to his or her assent by maintaining accurate records of the User's identifying information, the User's electronic assent to the terms, and the version of the terms to which the User assented. Be sure to comply with applicable privacy laws.

Even if the Strategies are followed in the content and process of a click-through agreement, if it becomes necessary to enforce the agreement in litigation, a Web site owner will need to demonstrate at trial the content and process in place when a particular User accessed the site.

The dynamic nature of Web sites means that care must be taken to log or store multiple versions of the site as it changes over time. A Web site owner may need to enforce a click-through agreement months or years after the assent occurred and the Web site and associated agreement will likely have been through numerous iterations in that time. Keeping an accurate record of the content and format of the agreement, including the presentation on the screen as the user moved through the process may be done in a number of ways. When litigating this type of agreement, the Web site owner may want to show the fact-finder the exact process that the User encountered, including the steps in the process, the size of the scroll box where the agreement appeared, the size of the type, etc. Some companies store the versions of their Web sites with records of the dates when each version was active. Others may use third-party products that allow the Web site owner to keep a record of the exact activity of each User of the site, including the actual click of assent in the agreement process. The sophistication of the tools used will likely vary with the substantive nature of the contract and the importance of later enforcement of the terms.

14. Retention and Enforceability: To meet any legal requirement that a record of the agreement be provided, sent, or delivered, the sender must ensure that any electronic record is capable of retention by the recipient. In addition, for an electronic record to be enforceable against the recipient, the sender cannot inhibit the recipient's ability to print or store the electronic record.

If the law mandates that the User be given or sent a copy of the terms for future reference,⁹⁸ UETA section 8(a), as applied to a click-through agreement,⁹⁹ requires that the User

⁹⁸ For instance, some laws, such as financial services regulations, require that the consumer be given a copy of the agreement.

⁹⁹ UETA applies only to transactions in which the parties have agreed to conduct transactions electronically. UETA § 5(b) (1999). That requirement is automatically satisfied in a click-through agreement, at least as to that

be capable of retaining an electronic record containing the information in the agreement, if the information is not provided in some other medium (such as being sent in paper to the User). To meet this requirement, the vendor or other party doing business with the User cannot inhibit the User's ability to print or store the electronic record¹⁰⁰ and must assure that the recipient receives and can retain the information, unless recipient's system is peculiar enough to preclude subsequent reference to the information.¹⁰¹ The User "must be able to get to the electronic record and read it, and must have the ability to get back to the information in some way at a later date."¹⁰²

Even if the law does not mandate that the User be given or sent a copy of the terms for future reference, subsection (c) of UETA section 8 will apply to a click-through agreement. As a comment explains, "Subsection (a) applies only where another law imposes the writing requirement . . . and imposes a broader responsibility on the sender to assure retention capability by the recipient."¹⁰³ "Unlike subsection (a), subsection (c) applies in all transactions¹⁰⁴ and simply provides for unenforceability against the recipient."¹⁰⁵ That is, it makes an electronic record unenforceable against the User if the sender inhibits the ability of the User to store or print the electronic record.¹⁰⁶ However, if the sender instead provides the information in the agreement by paper in the mail, it will be able to enforce the agreement against the User, in spite of inhibiting the User's ability to retain the electronic version. If the environment in which the click-through agreement is operating (such as a Web browser) does not provide a print or save option, the click-through program itself should present that option. Whether the User can actually do so depends on his or her equipment and software. The Working Group was uncertain about the application of these rules in newer technologies, such as Wireless Application Protocol (WAP) devices and WebTV.

In *RealNetworks*, the court rejected the Users' claim that the online arbitration agreement was not a "writing" because it was not printable or storable. In an impressive display of technological knowledge, the court found three ways in which to print the electronic agreement: (i) by right-clicking and copying, (ii) by highlighting and copying, and (iii) by the automatic download of the accepted agreement.¹⁰⁷ It noted that the "process of printing the License Agreement is no more difficult or esoteric than many other basic computer functions, and the melodrama and over exaggeration with which [the Users] describe[] the alleged impossibility of

transaction, because party A has placed a proposed form agreement online or on a CD and party B has assented to that electronic agreement.

¹⁰⁰ *Id.* § 8(a).

¹⁰¹ *Id.* § 8 cmt. 3.

¹⁰² *Id.*

¹⁰³ *Id.* § 8 cmt. 5.

¹⁰⁴ That is, all transactions within the scope of UETA, which means all transactions in which the parties have agreed to conduct transactions electronically.

¹⁰⁵ *Id.* § 8 cmt. 5.

¹⁰⁶ *Id.* § 8(c).

¹⁰⁷ *In re RealNetworks, Inc.*, No. 00C 1366, 2000 WL 631341, at *3 (N.D. Ill. May 8, 2000).

printing the License Agreement is disingenuous.”¹⁰⁸ In addition, the court noted that the installation process automatically downloaded copies of the two agreements into the User’s computer, marked by prominent and separate icons on the “Start” menu.¹⁰⁹

Under the FTC Dot Com Disclosure guidelines, if a seller “uses email to comply with Commission rule or guide notice requirements, the seller should ensure that consumers understand that they will receive such information by email and provide it in a form that consumers can retain.”¹¹⁰

15. Accuracy and Accessibility After the Assent Process: If applicable law requires retention of a record of information relating to the transaction, ensure that the electronic record accurately reflects the information and, if required, remains accessible to all persons entitled to access by rule of law for the period required by the rule of law in a form capable of accurate reproduction for later reference.

Although similar to Strategy 14 above, this Strategy addresses the accessibility of a electronic record over time, rather than a one-time opportunity to print and save an agreement. E-Sign section 101(d)(1)(B)¹¹¹ states that if a rule of law requires a record to be retained about information in a transaction, that requirement is met by retaining an electronic record (i) that accurately reflects the information in the contract or other record and (ii) that remains accessible to all persons legally entitled to access, for the required period of access, in a form capable of being accurately reproduced for later reference. Legal effect, validity, or enforceability may be denied if the requirement is not met.¹¹² Note that this requirement could be satisfied by the sender keeping an electronic record of the click-through agreement on its system, if the persons entitled to access could gain access to that electronic record for however long the law in question mandates. Or it might be satisfied by the persons entitled to access being given their own paper or electronic records of the agreement. Note that this E-Sign provision has applicability beyond the User, applying, for instance, to the Internal Revenue Service’s and other agencies’ requirements for record-keeping.

CONCLUSION

Despite the relatively small number of cases assessing the validity of assent in electronic agreements, there is an emerging body of analysis that has enabled this Working Group to identify potential pitfalls on the one hand and likely safe zones on the other. Because of the modest nature of this undertaking, the Working Group strongly urges two caveats as to use of these Strategies.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ DOT COM DISCLOSURES, *supra* note 9.

¹¹¹ E-SIGN, Pub. L. No. 106-229, tit. I, §§ 101, 114 Stat. 464 (2000), (to be codified at 15 U.S.C. §§ 7001-7031).

¹¹² “[M]ay be denied” seems to leave the legal consequence to the court’s discretion.

First, the Strategies do not purport to set a minimum standard or to identify any exclusive means to obtain valid assent. The purpose of these Strategies is to encourage electronic agreements to be set up so as to avoid disputes on the validity of the User's assent. Accordingly, they have been drafted with the goal of avoiding assent procedures that courts have invalidated, even though other courts may have upheld agreements based on similar facts.

Second, the Strategies should not be used to undermine the policy of media neutrality that is so critical to the emerging law of electronic commerce. Procedures recommended here are not meant to suggest in any way that the law should require any more of contracts in an electronic medium than of contracts in a paper medium. Rather, the Strategies merely recognize the unique factual circumstances that may be presented in electronic settings, which may or may not have a paper analog.

In setting out these Strategies for avoiding disputes on the validity of assent in click-through agreements, this Working Group seeks to assist practitioners in developing reliable agreements on which their clients can depend and in which Users will have confidence. Growth of a consensus about safe and fair practices in electronic contracting is critical to the growth of electronic commerce. These Strategies are an effort to provide a foundation on which to build that consensus.