Click-wrap Agreements

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- Adhesion contract (**terms are established unilaterally**) – *"take-it-or-leave-it" basis*;

- On the contrary to shrink-wrap, the click-wrap is concluded **entirely online;** and it is used not only by the **software industry,** but by ecommerce in general;

- It has been originated by the similar idea of shrink-wrap, which is the usage of adhesion contracts and sometimes are hidden in hyperlinks (where **the terms are attached)** under which they purport to make their product available.
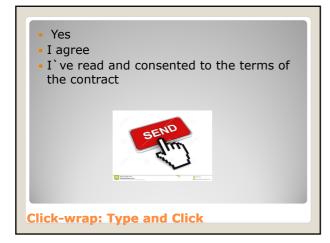
Click-wrap: concept

Click-wrap Agreement (example)

- **Click-Wrap Agreements** are contracts formed entirely in "an online environment such as the Internet, **which sets forth the rights and obligations between parties**". (Buono and Friedman, 2000)

- "Click-wrap is a variation of shrink-wrap. There are two main ways to enter into a click-wrap agreement. A party may **'Type and Click'** where the consumer must type 'I accept' or something synonymous in an on-screen box, and then click a 'send' button of some sort to signal acceptance of the contractual terms. […] The second way to enter into a click-wrap agreement is through **'Icon Clicking.'** Here, an online user clicks 'I accept' to website terms and conditions of use online." (GROSSMANN, et alli, 2001)
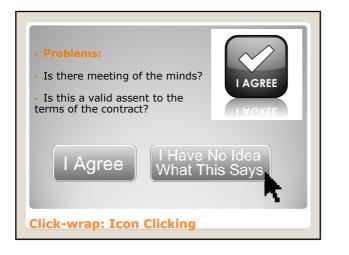
Click-wrap: concept

- 1) **Type and Click:** a party must type "I accept" or other specified words in an on-screen box and then click a "send" or similar button to signal acceptance of contractual terms.

- Without such action, **the user cannot conclude the electronic transaction** *(i. e.,* download the desired software, or purchase the desired product or service).

Click-wrap: Type and Click

- Yes
- I agree
- I`ve read and consented to the terms of the contract

Click-wrap: Type and Click

2) **Icon Clicking:** a party simply clicks an "I accept," "I agree," or similar icon to signal acceptance of the terms in the click-wrap agreement. Access is denied unless the button is clicked.

By clicking the "I Agree" button I acknowledge that I have read and accept the terms of the above agreement.

I Agree   Cancel

Click-wrap: Icon Clicking

• **Problems:**

• Is there meeting of the minds?

• Is this a valid assent to the terms of the contract?

I AGREE

I Agree   I Have No Idea What This Says

Click-wrap: Icon Clicking

• Margaret Jane Radin (2013), *"Boilerplate: the fine print, vanishing rights, and the rule of law"*.

• *World A* (*A*greement)

         X

• *World B* (*B*oilerplate language)

     Ex. Standardized Adhesion Contracts
          Offsite Terms, Shrink-wrap Licenses,
          Click-wrap Agreements,
          Rolling Contracts ($ now, terms latter)

Boilerplate

Margaret Jane Radin

Click-wrap: consent and contract formation

- *Boilerplate language in contracts:* why don't we read them?

- *We wouldn't understand the terms if we did read them ("it isn't worth our time")*

- *It wouldn't make any difference ("take-it-or-leave-it-basis")*

- *We ignore them;*

- *We trust the company;*

- *We think we are bound to them no matter what;*

Click-wrap: consent and contract formation

- The buyer/users has immediately access to the contractual terms;

- The contract shall be concluded only if the buyer/user agree to the contractual terms;

- By typing his/her acceptance and clicking the "send", he/she expressly manifest his/her assent;

- By clicking the icon with the acceptance expression, he/she expressly manifest his/her assent to a **previous formulated consent (by the other party**).

Click-wrap: consent and contract formation

One can find click-wrap agreements both on the Internet and in software. These agreements are so named because **the software purchaser or the purchaser of goods or services on the Internet must click an icon to signify agreement before obtaining the desired product or service**. In the classic click-wrap scenario, the buyer cannot complete a purchase without at least clicking **an "I agree" icon**. In some cases, as when someone installs software on a computer, the license terms are presented so that the user must view (but not necessarily read) them before clicking "I agree." On many web sites, *however, the contract terms can only be found behind a hyperlink presented near the "I agree" button and the buyer need not even view them before clicking the "I agree" button*. (Juliet Moringielo)

Click-wrap: consent and contract formation

- **Click-wrap agreements are used to**:

(1) establish the contractual obligations concerning electronic transactions;

(2) set forth the rules of contract, i.e., the liability, warranty, conditions for the right to withdrawal the contract, forum selection clause, arbitration clause; and

(3) establish the terms for the sale of goods and services online.

Click-wrap: background and purposes

Advantages:

- can be used in a wide array of applications;

- are essential to the functioning of electronic transactions (mass);

- faster (less time consuming);

- easier (few formalities requirements);

Advantages and Disadvantages of Click-wrap Contracts

Disadvantages:

- high level of abstraction;

- great potential for abuse from the use of these types of contacts (surprising terms);

- deliberately obfuscating and incomprehensible language;

- problem of adhesion contracts' enforceability;

Advantages and Disadvantages of Click-wrap Contracts

Rudder versus Microsoft Corp (Canada)
- Ontario Superior Court of Justice (1999)

"The entire agreement was readily viewable by using the **scrolling function** on the user's computer screen. There were no physical differences which made a particular term of the agreement more difficult to read than any other term. The structure of the sign-up procedure was such that the potential member was presented with the terms of membership twice during the process. **The potential member was required to signify acceptance each time by clicking the "I Agree" button**. A notice advised potential members that if they clicked the "I Agree" button without reading the agreement, they would nevertheless be bound by the agreement. The agreement provided that it was governed by the laws of the State of Washington and that the parties consented to the exclusive jurisdiction of the Washington courts over any disputes under the agreement."

Click-Wrap Agreement Jurisprudence

- ***Groff versus America Online Inc.***
- USA (May 1998)
- AOL (Virginia) – "flat fee"
- Lawrence Groff (Rhode Island)

- "The affidavit outlines the process each subscriber must follow. The affidavit asserts in paragraph 7 alter reading the Terms of Service (TOS) "… the user is unable to proceed onto the AOL system or become an AOL member without affirmatively choosing to accept the TOS. The user has the option of clicking 'I Agree' or 'I Disagree' after reading the TOS." (Exhibit 1 at page 79)".
- "Indeed as pointed out in defendant's affidavit and argued in his memorandum, one could not enroll unless they clicked the "I agree" button which was immediately next to the "read now' button (Exhibit 1, page 33) or, finally, the "I agree" button next to the "I disagree" button at the conclusion of the agreement (Exhibit 1, page 79)."

Click-Wrap Agreement Jurisprudence

- ***Caspi versus Microsoft Network, L.L.C.***
- Superior Court of New Jersey (July 1999)
- Steven J. Caspi (has downloaded MSN Microsoft)
- "In this case, the plaintiff was prompted to view multiple computer screens of information, including the membership agreement containing the forum selection clause before subscribing to Microsoft's online service. The potential members had the option to click on "I agree" or "I don't agree," depending on whether or not they agreed to the terms of the agreement. The court refused to hold the forum selection clause unenforceable on the grounds that if it did, the entire agreement would be invalidated, since all provisions were presented in the same manner. […] The New Jersey court explained that enforcement of the forum selection clause would not be contrary to public policy, but instead, would further traditional notions to the new technology". (GROSSMAN, et alli)

Click-Wrap Agreement Jurisprudence

- *Comb versus PayPal, Inc.*
- North District of California (2002)
- Contract: "*you have read and agree to the User Agreement and PayPal's privacy policy*"
- "Having considered the terms of the User Agreement generally and the arbitration clause in particular, as well as the totality of the circumstances, the Court concludes that the User Agreement and arbitration clause are substantively unconscionable under California law and that arbitration cannot be compelled herein. Good cause therefore appearing, IT IS HEREBY ORDERED that the motions to compel individual arbitration are DENIED."

Click-Wrap Agreement Jurisprudence

- *Williams versus America Online, Inc.*
- Mass. Supreme Court (Feb., 2001)
- "Cass, who has more than 20 years experience with mainframe and personal computers, owns and operates Cass, Inc., a provider of database and computer support services. In his affidavit, Cass describes in detail the AOL 5.0 installation process. He states that the alleged harm occurs before the user clicks 'I agree'. He describes a complicated process by which subscribers 'agree' to the TOS after configuration of the computer has been altered. AOL sets the default for reviewing the TOS to 'I Agree.' […]

Shrink-Wrap Agreement Jurisprudence

- *Williams versus America Online, Inc.*
- […] A customer who merely clicks 'I Agree' is instantly bound by the terms of a TOS she has never seen. The customer's only other option is to click off the default and select 'Read Now.' That option also fails to provide a customer with an opportunity to read the TOS. A customer who selects 'Read Now' is presented with another choice between the default 'OK, I Agree' and 'Read Now'. Thus, the actual language of the TOS agreement is not presented on the computer screen unless the customer specifically requests it by twice overriding the default."

Shrink-Wrap Agreement Jurisprudence

- Adhesion contract – in order to be enforceable:
- 1) the party must be aware of the contractual terms;
- 2) the party should be asked if he/she agree or not to the terms;
- 3) the party should not conclude the contract if he/she does not click the "I agree" signal;
- *Working Group on Electronic Contracting Practiced – Electronic Commerce Subcommittee of the Cyberspace Law Committee – Business Law Section of the American Bar Association*

Conclusion