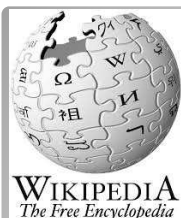


## Browse-wrap (terms and conditions)

Associated Professor Cintia Rosa Pereira de Lima

- usually displayed on a website's homepage or are accessible through a link;
- there is almost none interaction between the website and the internet user;
- terms and conditions found when browsing the web – **web-wrap agreements, online click-through contracts, user agreement, etc...**

### Browse-wrap: concept



### Browse-wrap (examples)

- **Browse-Wrap** are the terms and conditions imposed unilaterally by the website owner to those who access her/his webpage;

conditions of use

terms of use

legal notices

terms and conditions of use



**Browse-wrap: concept**

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- "This Article uses the term 'browse-wrap' to mean terms and conditions, posted on a **Web site** or **accessible on the screen to the user of a CD-ROM**, that do not require the user to expressly manifest assent, such as by clicking 'yes' or 'I agree.' These terms can cover a particular transaction (license, sale, services, etc.) or merely the use of a Web site or a CD-ROM. They typically claim that the user assents to the terms by taking a specified action, such as using the Web site or installing the software. Often, the terms and conditions begin with such phrases as 'use of the site constitutes acceptance of the terms' or 'downloading or using the software manifests your assent to these license terms.'"; (MORINGIELLO, Juliet M. et alli)

**Browse-wrap: concept**

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- **Shrink-wrap**



- **Click-wrap**

- **Browse-wrap**

**Browse-wrap X Shrink-wrap X Click-wrap**

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- **Leading case:** October 17th, 2000;
- **US District Court for the Eastern District of California**
- "Gigmania contends that the **breach of contract** claim fails as a matter of law because Pollstar cannot allege the required contract element of **mutual consent**. Viewing the web site, **the court agrees with the defendant that many visitors to the site may not be aware of the license agreement**. *Notice of the license agreement is [\*981] provided by small gray text on a gray background.* [...]"

### Pollstar vs. Gigmania

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- [...] Moreover, unlike the shrink-wrap license held enforceable in ProCD v. Zeidenberg, 86 F. 3d 1447 (7th Cir. 1996), the license agreement at issue is a browse wrap license. A shrink-wrap license appears on the screen when the CD or diskette is inserted and does not let the consumer proceed without indicating acceptance. **By contrast, a browse wrap license is part of the web site and the user assents to the contract when the user visits the web site**".

### Pollstar vs. Gigmania

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- The subsequent use of this term has been **imprecise and has conveyed different meanings**, including an agreement that covers a user's browsing of a Web site or an agreement for a transaction in which the user can browse the terms but does not have to assent by express means.



### Pollstar vs. Gigmania

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- "License Agreement: Any person using information from this web site hereby agrees to the following terms: 1. All documents and information may only be used for informational purposes. 2. All documents and information may only be used for non-commercial purposes. 3. Any copy of these documents or information or portions thereof must include the copyright notice and this License Agreement".

### Pollstar vs. Gigmania

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- 1) **Browse-wrap with notice:**
- Right to be informed clearly about the existence of the terms and conditions;
- Website visitors should be informed by which conduct would be implied his/her consent;
- By continuing browsing the webpage, after being well informed, he/she has agreed to the terms and conditions;

### Browse-wrap: With Notice

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- opportunity, notice, and demonstration.



### Browse-wrap: With Notice

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- 2) **Browse-wrap without notice:**
- Website owner do not call the attention to the terms and conditions;
- Usually the terms are in small prints at the bottom of the webpage in a very clear color which makes very hard to really get to know them;

### Browse-wrap: Without Notice

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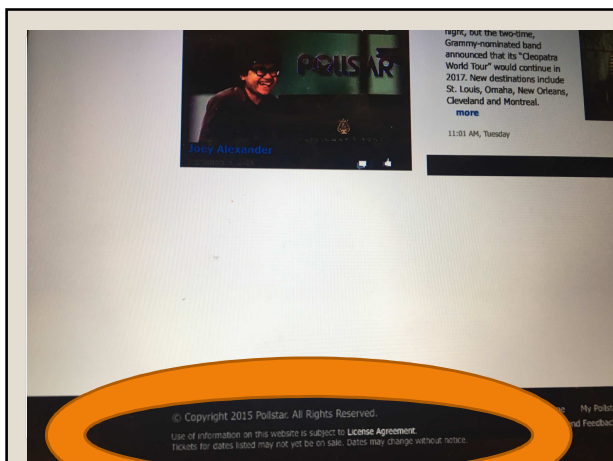
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• **Problems:**

- Is there meeting of the minds?
- Is this a valid implied assent to the terms of the website?



**Browse-wrap: Without Notice**

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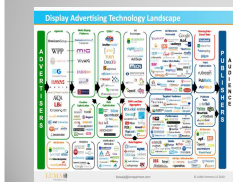
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**Terms and  
Conditions  
May Apply**



**Browse-wrap: is there a consent?**

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- Robert A. Hillman - survey to 92 students **in order to verify if they really read electronic adhesion contracts and the terms and conditions.**
- Results:
- only 4 students answered yes (4%);
- almost half of them, 40 students (44%) answered that they do not read these contracts;
- 16 students said that it depends on the terms and conditions (17%);
- 33 students, instead, said that it depends on the services providers (36%);
- 34 students read electronic adhesion contracts depending on the amount of the electronic transaction (37%).

**Browse-wrap: is there a consent?**

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- i) many **videogame players have agreed to sell their souls to a videogame company** because they did not realize there was such a clause within privacy policy;



**Browse-wrap: symptomatic examples**

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- ii) terms and conditions are too long, as a matter of fact, concerning a study carried at *Carnegie Melon University* **users would waste 781 billion of dollars of their labor productivity reading all privacy policies of each website accessed;**

- iii) and many others believe that “**privacy policy**” states rules to protect their privacy and personal data so these terms were stated only for the best interests of users.

**Browse-wrap: symptomatic examples**

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- **Browse-wrap are used to:**

- (1) state what the owner consents to as acceptable uses of the intellectual property contents on the website;
- (2) liability restrictions;
- (3) limitation of the use of information on the webpage;
- (4) use of personal data.

**Browse-wrap: background and purposes**

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**Advantages:**

- can be used easily by website owners;
- are important to ensure a more secure online environment ("but not always");
- faster (less time consuming);

**Advantages and Disadvantages of Browse-wrap**


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**Disadvantages:**

- they are found in small print hyperlinks at the bottom of home pages, and these hyperlinks generally link to another page that lays out the terms of use for the particular website;
- *deep-linking* practice vs right to be informed;

**Advantages and Disadvantages of Browse-wrap**


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**Register.com versus Verio, Inc.**

356 F. 3d 393 (2d Cir. 2004)

Companies – domain names and webpages hosting

"The District Court for the Southern District of New York, with little reasoning but **clearly bothered by Verio's behavior**, ruled in favor of Register.com's terms. The District Court opinion did not explain how the terms were presented, glossing over the fact that the terms were presented *with the results* of each WHOIS query, and held that because the terms were 'clearly posted' on Register.com's website, Verio manifested its assent to the terms every time it submitted a WHOIS query". (MORINGIELLO, Juliet M.; REYNOLDS, William)

**Browse-wrap Jurisprudence**


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• **Cairo, Inc. versus Crossmedia Services, Inc.**

2005 WL 756610 (N.D. Cal. Apr. 1, 2005)

"By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site. (Id.) 'Terms of Use' appears in an underlined and highlighted format which signals in a common Internet convention that users can view the terms by clicking on the hyperlink".

( Available at:  
<<http://www.Internetlibrary.com/pdf/Cario%20CrossMedia.pdf>)

**Browse-wrap Jurisprudence**

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• **Ticketmaster Corp. versus Tickets.com, Inc.**

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

"*Ticketmaster* stands for the notion that browse-wrap agreements are far from *per se* enforceable. Seemingly, Ticketmaster's agreement could not be valid unless it could prove that Tickets.Com had actual notice of the agreement. Therefore, the clear message of the *Ticketmaster* court is that websites with terms and conditions should be presented in the *click-wrap* format in order to force actual notice upon users of the website, and consequently avoid the risk of litigation resulting from lack of notice". (BLOCK, Drew)

**Browse-wrap Jurisprudence**

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• **Specht versus Netscape Communications Corp.**

306 F.3d 17 (2d Cir. 2002)

"Visitors wishing to obtain **SmartDownload** from Netscape's web site arrive at a page pertaining to the download of the *software*. On this page, there appears a **tinted box, or button, labeled "Download."** By clicking on the box, a visitor initiates the download. The sole reference on this page to the License Agreement appears in text ***that is visible only if a visitor scrolls down through the page to the next screen.*** If a visitor does so, he or she sees the following invitation to review the License Agreement: **Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software**".

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- **Specht versus Netscape Communications Corp.**

"Viewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement. **Notice of the license agreement is provided by small gray text on a gray background.** . . . No reported cases have ruled on the enforceability of a browse wrap license. . . . While the court agrees with [the defendant] that the user is not immediately confronted with the notice of the license agreement, this does not dispose of [the plaintiff's] breach of contract claim."

### Browse-wrap Jurisprudence

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- **A valid browse-wrap needs to fulfill the following requirements:**

- (i) The user is provided with adequate notice of the existence of the proposed terms.
- (ii) The user has a meaningful opportunity to review the terms.
- (iii) The user is provided with adequate notice that taking a specified action manifests assent to the terms.
- (iv) The user takes the action specified in the latter notice.

### Conclusion

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