Click-wrap Agreements

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- **Contrato de adesão:** os termos são estabelecidos unilateralmente – "take-it-or-leave-it" basis;
- É celebrado em amiente inteiramente online; não é utilizado apenas para distribuir programas de computador, pois é utilizado em geral no comércio eletrônico;
- Semelhanças entre click-wrap e shrink-wrap

Click-wrap: conceito

Criar uma nova conta

É gratuito e sempre será.

Nome | Sobrenome

Celular ou email

Nova senha

Data de nascimento

Dia | Mês | Ano | Por que preciso informar minha data de nascimento?

○ Feminino ○ Masculino

Ao clicar em Criar conta, você concorda com nossos Termos e que leu nossa Política de Dados, incluindo nosso Uso de Cookies. Você pode receber notificações por SMS do Facebook e pode cancelar o recebimento a qualquer momento.

Criar conta

Click-wrap (examples)

- Click-Wrap Agreements são contratos formados inteiramente em ambiente telemático, como a Internet e que estabelece direitos e obrigações entre as partes.

- É uma variação do shrink-wrap.

Click-wrap: conceito

- 1) "Type and Click": uma das partes (o aderente) deve digitar "Eu aceito" ou outra expressão equivalente em uma caixa de diálogo e, então, clicar em "enviar"ou em outra tecla semelhante como sinal de anuência às cláusulas contratuais.

- Se assim não fizer – o contrato não se conclui

Click-wrap: digitar e clicar

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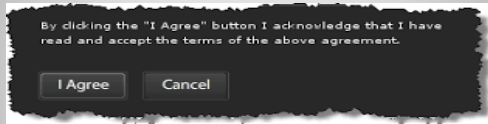- I`ve read and consented to the terms of the contract

Click-wrap: digitar e clicar

2) "*Icon Clicking*": uma das partes simplesmente clica no ícone "eu aceito" / "eu concordo" / ou expressões semelhantes que indicam anuência aos termos do contrato.

O contrato não é concluído se não houver superado essa etapa.

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: clicar no ícone

- Problema:

- Há real convergência entre as declarações de vontade?

I AGREE

- Essa conduta é suficiente para demonstrar anuência às cláusulas contratuais?

| I Agree | I Have No Idea What This Says |

Click-wrap: clicar no ícone

- 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)

Boilerplate
Margaret Jane Radin

Ex. Contratos de adesão, *Shrink-wrap Licenses, Click-wrap Agreements, Rolling Contracts* ($ now, terms latter)

Click-wrap: consentimento e formação do contrato

- • Boilerplate language nos contratos: porque não são lidos?

Não são compreensíveis, então seria uma perda de tempo ("it isn't worth our time")

Não faz diferença porque esses contratos são celebrados apenas se concordar integralmente ("take-it-orleave-it-basis")

Não se sabe da existência desse contrato;

Confiança;

Click-wrap: consentimento e formação do contrato

- O comprador/usuário tem acesso imediato às cláusulas contratuais

- O contrato deve ser concluído somente se o comprador/usuário concordar com elas

- Ao digitar seu consentimento e enviar ("digitar e enviar") ou

- Ao clicar no ícone que expressa a anuência ("consentimento pré-formulado").

Click-wrap: consentimento e formação do contrato

- 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: consentimento e formação do contrato

- **Click-wrap agreements são usados para:**

- (1) estabelecer as obrigações contratualmente assumidas entre as partes;

- (2) pontuar as regras do contrato, por exemplo, sobre responsabilidade civil, garantia, condições para o direito de arrependimento, eleição do foro e compromisso arbitral;

Click-wrap: objetivos

Vantagens:

- Pode ser usado para muitos tipos de aplicativos;
- São essenciais para o bom andamento do comércio eletrônico (sociedade de massa);
- Rapidez (celeridade nas transações eletrônicas);
- Facilidade (diminuição de formalidades desnecessárias);

Vantagens e desvantagens do Click-wrap

Desvantagens:

- Alto nível de impessoalidade;

- Aumenta o uso de cláusulas abusivas sem serem percebidas pela outra parte (ex. Termos Surpresas);
- Deliberadamente, ofuscam-se as cláusulas com o uso de linguagem incompreensível;
- Problemas com a validade e eficácia dos contratos de adesão;

Vantagens e desvantagens do Click-wrap

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 Jurisprudencia

Groff versus America Online Inc.
- USA (Maio 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 Jurisprudencia

Caspi versus Microsoft Network, L.L.C.
- Superior Court of New Jersey (Julho 1999) Steven J. Caspi (fez download do 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 Jurisprudencia

- ***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 Jurisprudencia

- **Williams versus America Online, Inc.**
- Mass. Supreme Court (Fev., 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.' […]

Click-wrap Jurisprudencia

- **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."

Click-wrap Jurisprudencia

- **Para ter efeitos vinculantes entre as partes:**
- 1) dar efetiva oportunidade de acesso às cláusulas contratuais;
- 2) provocar uma manifestação expressa da outra parte contratante sobre sua anuência;
- 3) a parte não consegue concluir a transação sem antes clicar no icone ou digitar a expressão de anuência ao contrato.

Working Group on Electronic Contracting Practices – Electronic Commerce Subcommittee of the Cyberspace Law Committee – Business Law Section of the American Bar Association

Conclusão