

Enforceable On-Line Terms of Service

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If your company uses a browsewrap license agreement on your website, it may not be legally binding on site visitors. That's the message from a recent case, [In re Zappos.com Inc., Customer Data Security Breach Litigation](#), 2012 WL 4466660 (D. Nev. Sept. 27, 2012), decided in the US District Court in Nevada.

Zappos, an online retailer, used a "browsewrap agreement" on its website, wherein visitors were informed of the licensing agreement, but not required to affirmatively agree to it before entering the site or proceeding. A browsewrap agreement is one which purports to hold site visitors bound to its terms merely by using, i.e. browsing the site. Users are not required to agree to the agreement by clicking an "I Accept" button or any other means.

The Zappos Terms of Use stated, among other things, the following:

We reserve the right to change this Site and these terms and conditions at any time. ACCESSING, BROWSING OR OTHERWISE USING THE SITE INDICATES YOUR AGREEMENT TO ALL THE TERMS AND CONDITIONS IN THIS AGREEMENT, SO PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PROCEEDING.

When the Zappos site suffered a data security breach, lawsuits ensued. Zappos wanted such suits removed from court to arbitration because its online "Terms Of Use" required arbitration.

The District Court in Nevada held that the Zappos Terms of Use were not binding. The Court first distinguished a browsewrap agreement from a clickwrap agreement which "requires users to expressly manifest assent to the terms by, for example, clicking an 'I accept' button."

Since there was no evidence that the plaintiffs had actual knowledge of the browsewrap agreement, its validity, according to prior decisions, depended on whether the site provided reasonable notice of its terms.

In the case of Zappos, a hyperlink to the Terms of Use was posted on every webpage but users had to scroll down to the middle or bottom of the page to see it. In addition, the hyperlinks were no different in size, font or color than other links. Also, users were not required to view the Terms of Use "when creating an account, logging in to an existing account, or making a purchase."

Based on the foregoing, the court held that users did not have reasonable notice of the Term of Use and were not bound by it.

The *Zappos* decision does leave open the possibility that a browsewrap agreement could be enforceable if reasonable notice is provided. Factors that could sway a court in this regard are hyperlinks that appear at the top of every webpage which are highlighted by their size, font, and/or color, as well as directing users to the agreement when they create an account, log in, and/or when making purchases.

Still, the safest way to proceed is to include a clickwrap agreement which requires users to affirmatively assent to Terms of Use or other online agreements.

Additionally, the Court in the *Zappos* decision noted that “the Terms of Use gives Zappos the right to change the Terms of Use, including the Arbitration Clause, at any time without notice to the consumer.” The court found this one-sided ability to change the terms at any time rendered the contract illusory and unenforceable with respect to arbitration.

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