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2 Privacy Rulings Highlight Browsewrap Agreement Risks

By **Jason Stiehl, Christiana State and Brandon Ge**
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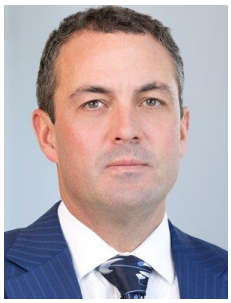

Jason Stiehl

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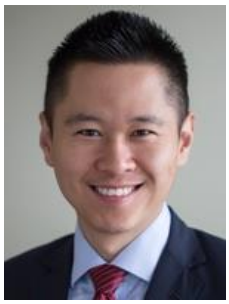

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In February, two federal courts — one in California and one in Massachusetts — under two different scenarios, opined on the enforceability of browsewrap and hybridwrap agreements.

The decisions provide important warnings for companies relying on such agreements to obtain legally required consent for activities such as telemarketing or to otherwise impose terms and conditions on website users.

Courts are increasingly unlikely to find browsewrap agreements enforceable, and these two recent court rulings reinforce the importance of having an appropriate web user interface for displaying website terms and conditions or other terms of use for online products or services, and putting users on actual notice of such terms.

The validity and enforceability of such terms depend on whether a contract was actually formed between the user and the website's owner. Without a valid contract that outlines the terms and conditions of website use, including a user's agreement to a forum selection clause or certain limitation of liability, enforceability of such terms becomes an obstacle.

Many cases turn on the enforceability of such agreements, and companies should evaluate their use of browsewrap agreements — e.g., terms of use available through a hyperlink at the bottom of a webpage — and hybridwrap agreements to determine whether changes are appropriate to improve enforceability and mitigate legal risk.

Background

Numerous companies rely on agreements, such as terms of use, that they form online with website users to meet legal requirements — e.g., to obtain consent — define rules for use of the website, and otherwise help limit the company's liability.

Courts generally categorize such agreements into two major groups. Clickwrap agreements require users to take an affirmative step, such as checking a box that says "I Agree," to agree to the proposed terms.

In contrast to browsewrap agreements, courts regularly uphold clickwrap agreements. Browsewrap agreements typically refer to those that are available as a hyperlink at the bottom of a webpage and require no affirmative action from the user indicating their assent.

Instead, browsewrap agreements attempt to bind users solely because they appear on the visited webpage. Courts often find these agreements unenforceable unless the website owner can show the user had actual or constructive notice of the terms and conditions.

According to the U.S. Court of Appeals for the Ninth Circuit's 2022 decision in Berman v. Freedom Financial Network, absent actual notice, a website owner can show constructive notice by demonstrating that:

1. The website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and

2. The consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms.[1]

The Berman court created a two-part test for determining whether terms of use presented on a website constitute "reasonably conspicuous notice."

First, the notice must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent internet user would have seen it.

For example, in Berman, the challenged language did not meet this standard as it was in tiny gray font and surrounded by significantly larger text and other visual elements.

Second, if the terms are presented via hyperlink rather than on the webpage itself, the fact that a hyperlink is present must be readily apparent.

Simply underlining words or phrase will generally be insufficient to alert a reasonably prudent user to the presence of a clickable hyperlink. Use of a contrasting font color or all capital letters is more likely to draw attention to the hyperlink.

Some courts have also defined a third category of agreements, hybridwrap, falling between browsewrap and clickwrap agreements.

Hybridwrap agreements incorporate elements of both browsewrap and clickwrap agreements, providing greater notice of the terms and the website owner's intent to bind the user to such terms while stopping short of requiring affirmative assent.

Gaker v. Citizens Disability

In Heather Gaker v. Citizens Disability LLC, Gaker alleged in the U.S. District Court for the District of Massachusetts in 2020 that Citizens violated the Telephone Consumer Protection Act by placing telemarketing calls to her cell phone without her prior consent despite registering her number on the National Do Not Call Registry.[2]

Citizens, a Massachusetts for-profit corporation that assists persons with disabilities in claiming Social Security benefits, argued that Gaker provided consent to receive telemarketing calls when she provided her personal information through a sweepstakes website that offered a chance to win $50,000.

At the bottom of the sweepstakes website was a box to confirm entry in addition to the following terms:

> By clicking confirm your entry I consent to be contacted by any of our Marketing Partners, which may include artificial or pre-recorded calls and or text messages, delivered via automated technology to the phone number(s) that I have provided above including wireless number(s) that I have provided including wireless number(s) if applicable regarding financial, home, travel, health, and insurance products and services. Reply "STOP" to unsubscribe from SMS service. Reply "Help" for help. Standard Message & data rates may apply. I understand these calls may be generated using an autodialer and may contain pre-recorded messages and that consenting is not required to participate in the offers promoted. I declare that I am a U.S. resident over the age of 18 and agree to this site's terms.

The words "marketing partners" contained a hyperlink to a page containing a list of companies that included Citizens. A marketing vendor provided Citizens the information submitted through the sweepstakes website, after which Citizens placed seven calls to Gaker's phone regarding the company's disability services.

The TCPA prohibits telephone solicitations to a number registered on the National Do Not Call Registry unless the solicitor has obtained prior express invitation or permission.

That permission must be evidenced by a "signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed."[3]

Further, the TCPA defines "prior express written consent" as

> an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.[4]

The agreement must contain a clear and conspicuous disclosure informing the person signing it that the person is authorizing the telemarketing calls and that signing the agreement is required as a condition of purchasing any property, goods or services.[5]

According to guidance from the Federal Communications Commission, when a question arises about whether a consumer has given consent, the telemarketer bears the burden to demonstrate that "a clear and conspicuous disclosure was provided and unambiguous consent was obtained."[6]

Thus, the central question before the District of Massachusetts was whether the sweepstakes website adequately disclosed the terms such that Gaker gave unambiguous consent to be bound by the terms.

Relying on precedent on online terms and conditions, the court sided with Gaker and ordered Citizens to pay $500 per violation for a total of $3,500.

The court concluded that Citizens had not met its burden to establish that a clear and conspicuous disclosure was provided and unambiguous consent was obtained. Salient factors in the court's decision included the following:

- The terms were presented in a font smaller than other language on the page.
- The terms were also displayed in blue font against a blue background, with only slight variation in color between the two. No other language on the sweepstakes website was presented as inconspicuously, and all promotional language was presented in clearly contrasting colors.
- The terms appeared below the "confirm your entry" box such that a user could click the button without ever reaching the terms at the bottom of the page.
- The sweepstakes website included images of gold coins and dollar signs in addition to other headlines and advertisements in large and legibly colored font, distracting visitors from the terms at the bottom of the page.

Citizens argued that appearance of the language "By clicking confirm your entry I consent to be contacted by any of our Marketing Partners" on the sweepstakes website, without requiring the visitor to click a hyperlink, should have sufficed to constitute clear and conspicuous disclosure.

The court determined on Feb. 6 that this was insufficient due to the totality of the page, given the factors above, indicating an intent to distract a reasonable user from the terms. For these reasons, the court also determined that the terms did not meet the Ninth Circuit's Berman test.

In addition, Gaker was not required to indicate that she had read the terms before submitting her information, e.g., by checking a box. Therefore, the terms did not meet the court's definition of a clickwrap agreement, which would carry some presumption of validity. Instead, the court characterized the terms as a browsewrap or hybridwrap agreement, which does not carry a presumption of validity.

Byars v. Goodyear

At the heart of Arisha Byars v. The Goodyear Tire and Rubber Co. in the U.S. District Court for the Central District of California were allegations that Goodyear engaged in wiretapping activities in violation of the California Invasion of Privacy Act.[7]

Of relevance to this article, however, is the decision's discussion of browsewrap agreements in evaluating whether Byars consented to Goodyear's forum selection clause.

Goodyear's terms of use contain a forum selection clause stating that visitors to Goodyear's website consent to litigating claims arising from use of the website in Ohio. Goodyear argued that Byars was on notice of its terms of use because Goodyear's website displays a pop-up banner to all visitors that contains three hyperlinks: one to Goodyear's privacy policy, one to view cookie settings and one to accept the cookies.

Goodyear also argued that there is a hyperlink to its terms of use at the bottom of every webpage. Byars argued that she was on neither actual nor constructive notice of the terms of use and therefore did not consent to the forum selection clause.

After examining Ninth Circuit precedent on clickwrap and browsewrap agreements, the court sided with

Byars. According to the court, Goodyear's terms of use plainly fell into the browsewrap agreement category as Goodyear's website does not ask visitors to accept the terms of use, such as through the inclusion of an "I Agree" box.

In addition, the court found the location of a terms of use hyperlink at the bottom of every page, where the website user might not look, consistent with the Ninth Circuit's description of browsewrap agreements.

Because the court categorized Goodyear's terms of use as a browsewrap agreement, it was only enforceable if Byars had actual or constructive knowledge of the terms of use.

Goodyear failed to persuade the court that Byars had any reason to scroll to the bottom of the webpage or otherwise viewed the terms of use, and Byars affirmatively alleged that she did not see the terms of use.

For these reasons, the court determined on Feb. 3 that Byars did not consent to the terms of use and its forum selection clause.

Takeaways

Gaker and Byars underscore the reluctance of courts to enforce browsewrap and hybridwrap agreements that use illegible text and place the challenged language at the bottom of the webpage.

In the case of Gaker, this includes where the agreement is used to obtain TCPA-required consent to place telemarketing calls. In the case of regimes like the TCPA, which provides for a private right of action and potentially very significant damages — $500 per call and possible treble damages — using a browsewrap agreement may be very costly.

Fortunately for the defendant in Gaker, the defendant only placed seven telemarketing calls to the plaintiff, so the court awarded a total of $3,500 in damages, but for many other organizations heavily reliant on telemarketing to reach potential clients, the outcome could have been very different.

Enforceability of terms of use is an issue that regularly comes up, and Gaker and Byars highlight the importance of presenting terms of use in a clear and conspicuous manner.

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[1] Berman v. Freedom Financial Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022).

[2] Gaker v. Citizens Disability, LLC, No. 20-CV-11031-AK, 2023 U.S. Dist. LEXIS 19182 (D. Mass. 2023).

[3] 47 C.F.R. § 64.1200(c)(2)(ii).

[4] Id. § 64.1200(f)(9).

[5] Id.

[6] In the Matter of Rules & Regs. Implementing the TCPA of 1991, 27 FCC Rcd. 1830 ¶¶ 26, 32, 33 (2012).

[7] Byars v. The Goodyear Tire and Rubber Co., et al., No. 5:22-cv-01358-SSS-KKx, 2023 U.S. Dist. LEXIS 22337 (C.D. Cal. 2023).