

Click-Throughs – The Limits of Enforceability

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Software as a Service (SaaS), Platform as a Service (PaaS) and Infrastructure as a Service (IaaS) providers among other online vendors generally use “click through” agreements (also sometimes called “clickwrap” agreements) to establish a contractual relationship with their users. A “click through” is designed so that the terms and conditions of the relationship are presented (in one format or another) on the vendor’s website and acceptance by the user is signaled through the click of a button, often labeled with “I accept.”

The holding in *Sgouros v. TransUnion Corp.*, which was handed down on March 25, 2016, by the U.S. Court of Appeals for the Seventh Circuit, provides guidance to online vendors in ensuring their click through terms and conditions amount to an enforceable contract. Before proceeding to the facts of the case, it is important to note that click throughs are becoming increasingly common year over year and are routinely upheld by courts. However, in *Sgouros*, the court invalidated the terms of a click through because it ruled that it did not amount to an enforceable contract. In *Sgouros*, the court held that TransUnion’s click through agreement, specifically the requirement that the parties submit to arbitration proceedings in the event of a dispute, was unenforceable because TransUnion did not provide reasonable notice to the customer that, by clicking a button to purchase a credit score report, the customer would be agreeing to arbitration.

Under the facts of the case, the arbitration clause was placed at the back-end of a ten page agreement and was not displayed for the customer to view. Only the first lines of the agreement were visible from a box on the website. There was no mention of the agreement on the webpage nor was there any notice to the customer that they would be bound by such terms upon the purchase of the credit report. The court ruled that in order for the terms to be enforceable, there has to be some evidence that the customer had notice of the terms and expressly agreed to them by purchasing the product or service. In the case of a click through, the concepts of notice and evidence of consent are especially important as it amounts to a unilateral agreement under which there is no customer signature to otherwise indicate agreement and consent to be bound.

Overall, when using a click through, it is important to clearly signal to the customer that, by clicking accept, they are agreeing to be bound by certain terms and conditions of purchase and/or use. While providing access to the customer so that they may review the terms and conditions is a must, it is also helpful to include some prompt to indicate that the customer *must* review these terms before clicking and accepting such terms.

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