PITFALLS IN WEBSITE TERMS AND CONDITIONS: SIMPLIFYING ONLINE CONTRACTS

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Introduction:

Website User Agreement (WUA) or Terms and Conditions (T&Cs) stipulates the rights and obligations of users and website owners (i.e., your company); protects the interests of the website owners; limits legal obligations of the owner; sets out dispute resolution mechanisms; provides for indemnities to the company, Intellectual Property (IP) rights, the acceptable use of the site, and a host of other important things.

As internet users, we may have at one point or the other come across WUAs. However only a handful of website users actually take their time to read, study and understand the T&Cs of a WUA. It is extremely important to painstakingly study and understand the T&Cs of a WUA before signing up for the use of a website.

According to Tim Sandle,[1]citing ProPrivacy.com, "…*only 1 percent of technology users in a social experiment actually read the terms and conditions*." However according to Sandle, not many admitted this fact, as the survey showed that about 70% of the people surveyed lied in the survey by claiming that they had read the T&Cs, and as high as 33% claiming that they had read it thoroughly.[2]

The reluctance to read the T&Cs is often due to the lengthy literature of the T&Cs of such user agreements which gives online users a bore. In some cases, users just scan through the T&Cs without really reading and then click on the acceptance tab. It is important to note however, that reading the T&Cs of a WUA would give the end user relevant information about the various aspects of use of the website such as purchase, sale, delivery, dispute resolution and so on.

A wide range of website users have reported experiences of serious problems arising from their ignorance of the T&Cs of a website before using it and therefore do not take any action or even contact the operators of the website about the problem. For instance, it was reported in an article with the title "'Click to Agree With What? No one reads terms of Service, Studies confirm" published on the Guardian.com on third March 2017 by David Berreby, it was reported that a wide variety of college students who signed up for a new social network, namedrop.com by tapping on

[1] Tim Sandle, "Report Finds only 1 Percent Reads 'Terms & Conditions'" Digital Journal, [January 29, 2020] https://www.digitaljournal.com/business/report-finds-only-1-percent-reads-terms-conditions/article/566127#:~:text=The%20group%20found%20that%20only,have%20%E2%80%9Cread%20it%20thoroughly.%E2%80%9D

[2] 1 ibid, para. 6

big green "Join" button to become members of NameDrop, had according to paragraph 2.3.1 of the terms of service agreed to give NameDrop their future first-born children. This however sounds ridiculous but is a serious issue and goes a long way to affirm that a large proportion of website users do not read the T&Cs and therefore, they are also not likely to undertake any action against the website operators/owners should any issues arise.

Before signing up for a user agreement, here are some important questions to answer.

1. What am I about to commit myself to?

2. What are my obligations? and,

3. What penalties apply if I fail to meet those obligations?

The T&Cs of any contract clearly state those things that will regulate the business relationship between the relevant parties and create legally binding obligations between them. Kym Butler of Butlers Business and Law stated in his book, "Profit Boosters for Business";[3] that 'If you are locking your contracts away then you are failing to properly monitor agreements that may have serious financial penalties attached if legal obligations are not met.

It is important to note that website user T&Cs provide the basis for any contractual arrangement with respect to the use of a website which is voluntarily entered into by two or more parties. If a user is not conversant with the T&Cs of a WUA, they are not in a position to determine whether or not those T&Cs favour them. This notwithstanding, failure to meet those T&Cs exposes the user to legally enforceable liabilities against their person and their personal assets. Unfortunately, only a handful read the T&Cs to which they contractually agree to adhere strictly to.

If you want to give yourself the best chance to succeed in any contractual arrangement you need to not only read the terms and conditions but to also ensure that they are written in your favour wherever possible. You want to be able to trade to your own advantage. Terms and Conditions are the foundations that determine the obligations, liabilities and potential benefits of any trade and not just the use of a website. If you are unsure or in doubt about the terms and conditions of a contractual arrangement with regards to a website you intend to sign up for, it would be best to consult a lawyer who specializes in the area in which you are working.

There is no doubt that some website T&Cs are lengthy indeed, justifying why many consumers/users skip over them when making online transactions. However, reading a supplier's terms is not just important for consumers to know where they stand; but much more important for small businesses seeking to be in profitable business.

Why Small Businesses Should Read Terms and Conditions

The same "do I have to?" attitude to reading terms and conditions can sometimes be heard among small business owners. T&Cs are very important when it comes to small business contracts and

[3] Profit Boosters for Business By; Kym Butler of Butlers Business and Law;

there are many benefits to be derived from reading them and understanding their implications. Here are just a few:

- To avoid unplanned fees or charges – Certain T&Cs may contain applicable fees and charges which you may be unaware of, unless and until you read the T&Cs. if anyone accepts the T&Cs without read through them, they could end up paying the unplanned fees or charges.

- Ignorance is no excuse – It is important to note that a User might not be able to hide under the cloak of ignorance to disclaim liabilities from terms which were expressly stated in the contract at the point of signature or acceptance. A user may be unable to challenge a clause which is clearly written into a contract because they did not read it or "didn't know it was there."

- Make sure you get paid on time – Reading the T&Cs of a WUA goes a long way to ensure that the user is able to enforce their rights under the Agreement, including payment terms, as well as know what steps to take in the event of default.

Small business owners or users who have concerns about the T&Cs of a WUA are encouraged to seek expert legal advice.

Liabilities in Web user Agreements:

The most troubling clauses in WUAs involve liability, or lack of liability thereof. For instance, there are a series of T&Cs that attempts to limit a website Owner's aggregate liability to $100 per dispute; to prohibit all class-action suits and jury trials; and to allow a website operator/proprietor to determine legal jurisdiction. This gets rooted down to the company stating in their user agreement that they are not liable for various things and that if you think they are, it could be settled outside the court rooms. Therefore, as a website user it is very necessary to acquaint yourself with the T&Cs of the use of such website.

Eric Goldman, co-director of the High Tech Law Institute at the Santa Clara University Law School stated that he has drafted hundreds of online terms of service agreements.[4] He further stated that he "…like most sane people…." doesn't read everything he agrees to. It is however important to note that the major objective of website agreements is for companies to shield themselves from legal action. They are unwilling to accept the default law which has been established by the government, so instead they claim additional safeguards to serve as an immunity against lawsuits. It should be noted that it would be impossible for companies to negotiate individualized contracts with every single individual that browses their websites. consequently, they create blanket T&Cs for the use of their websites. Thus, it is important for website users to carefully study these

[4] Eric Goldman, co-director of the High Tech Law Institute at the Santa Clara University Law School

agreements in order to understand what liabilities the companies are shielding themselves from and what liabilities are being pushed to them.

Eric Goldman applauded Pinterest (an image sharing and social media service online platform) for its effort to offer a simplified translation of its WUA to the extent that its translations assist its web users understand what they are agreeing to which is extremely important.

Courts have been very clear that ticking an "I agree" box is enough to make the T&Cs binding on the user. Even in a situation of just scrolling through a site can in some cases mean an agreement to be bound by the website's user policies. As a result therefore, before clicking on the agree tab, it is important to be sure of whether you want to agree to the T&Cs which for instance forbid class action law suits; dictate that all disputes be settled by individual arbitration and literally impose exclusive right on the company to choose the forum for arbitration. The sad truth is that people never think of the legal consequences until they meet a pit fall.

In the light of same, we make reference to the American case of ***Feldman v Google Inc*** *Inc.*,513 F.Supp.2d 229 (E.D.Pa. 2007)..[5] This was a case which involved Lawrence E. Feldman & Associates with respect to Feldman's purchase of advertising from Google's "AdWords" Program.

Feldman argued that he was the victim of "click fraud", which is a situation when entities or persons, without any interest in the services being advertised, click repeatedly on ads. The implication of this is that the cost of advertising is increased.

Feldman alleged that it was a requirement by Google for him to pay for all clicks on his ads, including those which were fraudulent. The issue for determination in this case was: whether the forum selection clause in their agreement - i.e., the clause that covered where any dispute resolution would take place, would be enforceable.

The clause read as follows:

> "**The Agreement must be construed as if both parties jointly wrote it, governed by California law except for its conflicts of laws principles and adjudicated in Santa Clara County, California."**

Feldman alleged that the Agreement "was neither signed nor seen and negotiated by Feldman & Associates or anyone at his firm".

Feldman was required to enter into an AdWords contract before placing any ads or incurring any charges. At the top of the page displaying the AdWords contract, a notice in bold print appeared

[5] ***Feldman v Google Inc***. 513 F. Supp. 2d 229 (E.D Pa. 2007)

and stated, "Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below."

The terms and conditions then appeared. The preamble (shown at the top of the Agreement), stated in clear terms that by agreeing to the terms listed in the Agreement, a binding agreement with Google would be formed.

Below the webpage was a box conspicuously positioned without having to scroll down and the words, "Yes, I agree to the above terms and conditions." It is pertinent to note that Feldman had to have clicked on this box in order to proceed to the next step as he had activated his account, placed ads, and incurred charges. In view of same, it was obvious that he had clicked on this box.

The Court in its ruling cited **Baer v. Chase 2006** as follows:

“Contracts are 'express' when the parties state their terms and 'implied' when the parties do not state their terms. The distinction is based not on the contracts' legal effect but on the way the parties manifest their mutual assent. [...] To determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement.”

In this case, the Court concluded that Feldman had reasonable notice of the terms, and clearly showed assent to the agreement. The Judge stated:

“The user here [Feldman] had to take affirmative action and click the "Yes, I agree to the above terms and conditions" button in order to proceed to the next step. Clicking "Continue" without clicking the "Yes" button would have returned the user to the same webpage. If the user did not agree to all of the terms, he could not have activated his account, placed ads, or incurred charges”

In view of the foregoing, the Court upheld the clickwrap agreement.

Some website users have found themselves in a situation where they are trapped in a longer contract than they expected due to the fact that they signed to the terms of a website contract without reading them and some have also lost money as in the case cited above.

Joanne Lezemore[6] has strongly advised as follows: "The advice is simple: always read the terms and conditions of any contract before you sign it. It is really important you understand everything before you sign on the dotted line, as you could find yourself landed with extra fees or charges. While all consumer contracts are subject to the unfair terms in consumer contract regulations, this doesn't mean you can challenge a clause just because you didn't know it was there, or you think it's unfair – because it's clearly written, you're bound by it." (Terms and conditions: not reading the small print can mean big problems; by: Rebecca Smithers, The Gaurdian.com)[7] She further stated that online shoppers are always tempted to tick the box to confirm that they have read the T&Cs when in fact they have not done so. She also added that web users should ensure they know and understand what they are agreeing to in the T&Cs of a WUA. She gave an instance of how people are usually surprised to find out that they are obliged to pay returns on unwanted items bought online as the fees can be very expensive and it is usually stated in the T&Cs of a WUA.
By failing to check the T&Cs before signing up, a lot of website users put themselves in oblivion with respect to their rights and obligations until something goes wrong. For instance, most social media websites like Instagram, Facebook, Twitter, etc., have their T&Cs which every user must accept before signing up.

It is important to read carefully the T&Cs of any social media platform you wish to sign up for as some of their polices involve relinquishing your intellectual property rights to the website. The implication of this is that such social media websites can transfer or use your creative content upon successful registration and posting of creative contents. In other words, in the event the social media website user posts any creative work on that site, and the owners of the website decide to share the user's creative content, the later cannot maintain any legal action against them and even though he/she does, such action cannot be successful because the website user had earlier agreed to the T&Cs of that website. This is a call to action on individuals who randomly agree to T&Cs on social media websites, especially the creative writers, to have a thorough check on the terms of every website before signing up.

Remedies to Users upon grant of right to use copyright

It is also important for users of social media websites to know that even though they have agreed to the T&Cs of a particular social media website which most times invariably gives the website owners the right to reuse the user's creative work, it does not take away the user's copyright in his creative works, especially to third parties.

The Website User only grants the social media website owners upon clicking the "I agree" button a non-exclusive and unlimited license to use his creative contents. This however does not make social media contents free as the license is exclusive to the social media website and the User (s).

It is therefore important to examine the terms of service of Twitter, Facebook and Tik Tok.

[6] Lead Solicitor at J L Lezemore Solicitors and founder of Consumer Genie, a consumer advice service platform
[7] Terms and conditions: not reading the small print can mean big problems; by: Rebecca Smithers, The Gaurdian.com

Twitter terms of service states as follows:

"You retain your rights to any content you submit, post or display on or through the services. By submitting, posting or displaying content on or through the services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to ***use****,* ***copy****,* ***reproduce****,* ***process, adapt, modify, publish, transmit, display and distribute*** *such content in any and all media or distribution methods (now known or later developed). This license authorizes us to make your content available to the rest of the world and to let others do the same."*

Facebook

According to Facebook's terms:

"You own the intellectual property rights (things like copyright or trademarks) in any such content that you create and share on Facebook Company Products you use. Nothing in these terms takes away the rights you have to your own content.

However, to provide our services we need you to give us some legal permissions (known as 'license') to use this content.

Specifically, when you share, post, or upload content that is covered by intellectual property rights on or in connection with our products, you grant us a non- exclusive, transferable, sub-licensable, royalty-free, and worldwide license to ***host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works*** *of your content. This license will end when your content is deleted from our systems."*

Tik Tok

Tik Tok's conditions of use states that:

"You or the owner of your User Content still own the copyright in User Content sent to us, but by submitting User Content via the services, you hereby grant us an unconditional, irrevocable, non-exclusive, royalty- free, fully transferable, perpetual worldwide licence ***to use, modify, adapt, reproduce, make derivative works of, publish and/ or transmit, and/ or distribute and to authorize other users of the Services and other third parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit*** *your User Content in any platform and on any platform, either now known or hereinafter invented.*

You further grant us a royalty-free licence to ***use your user name, image, voice, and likeness to identify you*** *as the source of any of your User Content.*

For the avoidance of doubt, the rights granted in the preceding paragraphs of this section include but are not limited to, the right to reproduce sound recordings (and make mechanical reproductions of the musical works embodied in such sound recordings), and publicly perform and communicate to the public sound recordings (and the musical works embodied therein), all on a royalty - free basis. This means that you are granting us the right to use your User Content without

the obligation to pay royalties to any third party, including, but not limited to, a sound recording copyright owner (e.g., a record label), a musical work copyright owner (e.g. a music publisher), a performing rights obligation, a sound recording PRO (e.g., Sound Exchange), any union or guilds, and engineers, producers or other royalty, participants involved in the creation of User Content."

From the User service terms of Twitter, Facebook and Tik Tok, it is obvious that there are implications of signing up with them. In other words, the User always has some kind of rights to forfeit upon signing up with them so much so that in the event the owners of the website eventually use the creative content in the manner stated in the User Service conditions, they cannot be held liable for any breach whatsoever. Therefore, any User who fails, neglects, and or refuses to read the user service conditions on the social media website, it would be at the User's own peril. The User cannot say that he/she was not aware of what they signed up for, as ignorance of the law is not an excuse.

In an article titled "Do you Accept the terms and Conditions…or Do They need to Change" By Jayar Harrar, last updated on 18th August 2018, Published in Lawyer Monthly[8]it was stated as follows "*More than a small handful of Gmail's 1.4 billion users went into panic mode last month, when the papers headlined that the widely accredited email server allows external companies to 'read' their users' private emails. It was reported that users that connect third party apps to their Gmail accounts, gave permission for their emails to be read, however, when linking to external services, the conditions state that by accepting you grant permission for Gmail to 'read, send, delete and manage your email'.*[9]

The big question is, Did Google do something wrong? I think a fair answer should be No. This is in view of the fact that Google had informed its users beforehand about the issue. However, its users put themselves in oblivion by not reading the T&Cs.

This is the situation a lot of internet users have put themselves in. Many times, users miss or avoid reading T&Cs carefully which may prompt them to have a careful rethink about signing up for a website.

During the latter part of the year 2019, a survey from Deloitte referred to in an article titled "What you need to know before clicking " I agree" on that Terms of service agreement or privacy policy" By Jessica Guynn published on 28th January 2020 in USA TODAY.COM [10]revealed that 90% of consumers/website users accept legal T&Cs without reading them. In their questionnaire in which 2000 consumers in the United States were interviewed, it was shown that people would rather

[8] "Do you Accept the terms and Conditions…or Do They need to Change" By Jayar Harrar, last updated on 18th August 2018, Published in Lawyer Monthly

[9] "Do you Accept the terms and Conditions…or Do They need to Change" By Jayar Harrar, last updated on 18th August 2018, Published in Lawyer Monthly

[10] "What you need to know before clicking " I agree" on that Terms of service agreement or privacy policy" By Jessica Guynn published on 28th January 2020 in USA TODAY.COM

accept the possible future consequences by clicking on the 'I agree' box, to get access to the online service they are seeking. This attitude is very common amongst younger adults between the ages of 18-24, where 97% of them avoid reading the lengthy, cumbersome and somewhat technical lists of T&Cs.

It was further reported the said article titled "**Do You Accept the Terms & Conditions… or Do They Need to Change?** By Jaya Harrar Published on 1st August 2018 in Lawyer Monthly[11], that, Dinna Yarovinsky, an artist had a brilliant way of confirming the above stated position. He printed the T&Cs of leading online service providers– from Instagram to Snap Chat -, on an A4 paper. The list was lengthy. Dinna shared the word length and the average time required to read the entire T&Cs thoroughly in a bid to have an insight about their various T&Cs took around 86 minutes (i.e. 1 hour, 26 minutes). In other words, it takes about 1 hour, 26 minutes for a web user to have an idea about what is truly being signed up for when he or she clicks 'I accept' on Instagram for instance.

T&Cs in a website are highly essential in order to avoid misunderstandings and disagreements, so that parties can be fully aware of what they are signing up for and what their obligations and rights are. It is of great essence that the contract itself states clearly the basic obligations, rights and consequences where things go wrong.

T&Cs are a great legal necessity. They stipulate the required data disclosures, website usage rules, limitations and the general relationship parameters which users must agree to, in order to use the app or website. A lot of times site users may assume that nothing unforeseen is likely to happen as a result of avoiding to read the T&Cs. However, it is extremely important for users to disabuse their minds from such thoughts.

A well-drafted T&Cs can provide a wide range of advantages for both businesses and web users; they stipulate expectations and rights, and protect website users from general misuse or abuse. They can also determine the liability and limitations, as well as state clearly the law which is applicable in the event of dispute resolution.

What Provisions of a T&Cs are unenforceable?

It is important to note that as in the case of paper contracts, some provisions in the T&Cs of a WUA may be unenforceable, even if in a situation where the website user has clicked the "I agree" button. Provisions which are against public policy, no matter how express the other party's consent may be, are illegal and will not be enforced by the Courts. Other provisions which may be considered unenforceable are "unfair trade practices" under various federal or local consumer

[11] **Do You Accept the Terms & Conditions… or Do They Need to Change?** By Jaya Harrar Published on 1st August 2018 in Lawyer Monthly

protection laws. Apart from being unenforceable, there are likely to be stiff sanctions which are consequent upon including illegal or unfair terms in a web user contract.

T&Cs which are favourable to the Website Operator in such a way as to "shock the conscience" will be highly unenforceable on the basis of "unconscionability". For instance, a provision in a web user contract which unfortunately is sometimes enforced, but a lot of times has been found to be unconscionable, is one which requires that relatively small claims against the website operator/ company be resolved in a location far from where the claimant/web user resides.

It is a big challenge to list the provisions which are unconscionable, in view of the fact that most of the time it revolves around the relevant facts of the case, the laws which apply in the jurisdiction in question, the court/arbitrator/jury's inclination or discretion, and the standard industrial perspective of a customer's reasonable expectations.

We would make reference to the case of ***Bragg V. Linden Research. Inc.***[12]a case was between Linden Research, Inc (Linden), the inventors of the game, Second Life, and Mr. Bragg, a Second Life player. Second Life is an online virtual world game wherein players can explore the world, interact with other players and build objects, Players can also purchase land with real life money.

In November 2003, Linden stated that it would recognize participants' full intellectual property protection for the digital content they invented in other words owned in Second Life, from "cars to homes to slot machines." Players were also able to buy "virtual land," make improvements on the land, exclude other players from entering or trespassing into the land, rent the land, or sell the land to other players for a profit.

Bragg bought several parcels of land in his Second Life, including a parcel of virtual land called "Taesot" for $300. In view of same, Linden sent Bragg an email advising him that Taesot had been improperly purchased through an "exploit" and as a result Linden took Taesot away. It also froze Bragg's account, thereby confiscating all of the virtual property and currency that he maintained on his account with Second Life.

Bragg filed an action in Court. **Linden argued that their agreement required arbitration to occur.**

It should be noted that before a person is permitted to participate in Second Life, he or she must accept the T&Cs of Service of Second Life by clicking a button indicating acceptance. Bragg admitted to the fact that he clicked the "accept" button before gaining access to Second Life. However, Bragg kicked against the enforcement of the Arbitration Clause in the Terms of Service on the basis that it was "both procedurally and substantively unconscionable".

[12] ***Bragg v. Linden Research Inc***. 487 F. Supp. 2d 593 (E.D Penn 2007)

In accordance with the Californian law, the procedural component with respect to unconscionable provisions can be satisfied where the under-listed is established:

1. Oppression through the existence of unequal bargaining positions; and

2. Surprise through hidden terms common in the context of adhesion contracts

The substantive component can also be established by disclosing a very high handed and/or one-sided results that "shock the conscience."

The Court stated that a contract is procedurally unconscionable if it is a contract of adhesion. A contract of adhesion can be referred to as a "standardized contract, which, imposed and drafted by the party of an upper hand and greater bargaining strength, relegates to the subscribing party only the opportunity to accept and adhere to the Terms and Conditions of the contract or reject it."

In the instant case, the T&Cs of Service of Second Life is a standardized contract which only gave the customer the opportunity to agree to the Terms or reject same.

The Court held as follows that:

"When the weaker party has presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present. [...] An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable.

But surely there's a problem here - we all know that standard form contracts are used all the time!

Here's the reason: If there are numerous providers of the same service, such as e-commerce websites, contracts of adhesion are not at issue, as a customer can always go to another vendor if they don't like your terms of service. In this case, there was *no alternative* to Second Life in the market.

So, to put it simply, if Mr. Bragg did not accept these terms, he could not play Second Life or any other similar game or service, which created an unconscionable take-it-or-leave-it situation. Linden also had superior bargaining strength over Mr. Bragg, and the contract was, therefore, a contract of adhesion."

In view of the foregoing the court ruled in favour of Mr. Bragg.

How Website Operators/Companies Can Avoid Disputes:

It should be noted that there should be a greater obligation on the operators of apps or websites with any unusual and unreasonable T&Cs such as charges for over usage or in app purchases to review such terms or at least clearly bring them to the user's attention in order to avoid disputes from unhappy customers.

Business and/or companies should make concrete efforts to ensure the users of their sites are given a reasonable opportunity to read the T&Cs by making them much more conspicuous and reader friendly.

In the American case of ***Specht v. Netscape***,[13] it was held that it is not just the tick the " I Agree" box that is important, it is also very important that the T&Cs of usage are conspicuous, and clear that the tick box or button relates to the T&Cs (rather than something else).

Specht v. Netscape was a case between some Plaintiffs (including Mr. Specht) and Netscape Communications Corporation (Netscape). The Plaintiffs had all installed a Netscape program called *SmartDownload*. *SmartDownload* was used to transmit personal information to Netscape when the Plaintiffs used it to browse the Internet.

It was the argument of the Plaintiffs that there was an invasion of their privacy, and they consequently filed an action against Netscape. Netscape on the other hand argued that the Plaintiffs had agreed to be bound by an arbitration clause in license T&Cs of use which they had (allegedly) accepted when they downloaded *SmartDownload*.

Therefore, the Court's duty was to determine whether the Plaintiffs had agreed to be bound by provisions of the software's license agreement.

On the page to download *SmartDownload*, a "Download" button was displayed with the text "Start Download". However, below the fold of the page, if the Plaintiffs had scrolled down, they would have seen a statement saying:

"Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software."

The license agreement contained a clause stating:

> *"By clicking the acceptance button or installing or using Netscape communicator, Netscape navigator, or Netscape smartdownload software (the "Product"), the individual or entity licensing the product ("licensee") is consenting to be bound by and is becoming a party to this agreement"*

[13] *306 F. 3d 17 (2d Circ. 2002)*

However, this statement was not displayed or indicated anywhere near the "download" button for *SmartDownload* or any other conspicuous position.

The Court in its ruling held as follows that:

"Although an onlooker observing the disputed transactions in this case would have seen each of the user plaintiffs click on the SmartDownload "Download" button [...] a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms. [...] California's common law is clear that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious."

Consequently, the Plaintiffs were not bound by the terms of the license agreement as the agreement was too inconspicuous and hidden. The "Download" button was not sufficiently linked to the terms of the agreement for the Plaintiffs to be legally bound by it.

It is very important to note that adopting a more simplified method like bullet points, Summarizing the main points of T&Cs can go a long way to ensure that users are in the know of the more important parts of the T&Cs and reduce the reading time.

In a summary by Electronic Frontier Foundation,[14]it states that to avoid disputes as much as possible, operators of Websites should:

1. Clearly present the T&Cs to the user before any payment (or other commitment by the user) or installation of software (or other changes to a user's machine or browser like cookies, plug-ins, etc. are made);
2. Give the user the opportunity to easily read and peruse all of the terms
3. Provide an opportunity for the User to print, and/or save a copy of the T&Cs;
4. Offer the user a clear platform for him/her to decline by the same medium as the option to agree; and
5. Ensure the T&Cs are easy to locate on the internet after the user agrees to them.[15]

It should be noted that the fifth point also extends to radio. Judith Spilsbury, the Head of Special Projects at Radiocentre, stated as follows that: "According to our research, 72% of radio listeners

[14] An international digital rights non-profit organization defending digital privacy, free speech and innovation platform based in San Francisco, California..

[15] Do you accept terms and conditions or do they need to change by Jaya Harra last updated 1st August 2018 published in Lawyer Monthly

say they would prefer to read financial terms and conditions in their own time on a website. This should be an urgent incentive for the industry to rethink."[16]

Judith further stated that; "People tend to listen to the radio at the same time as doing something else – whether that's cooking, cleaning or driving – so they will simply 'zone out' if Terms and Conditions become too complicated. In fact, we have evidence to prove it – less than 4% of people recall the figures from financial terms and conditions just after hearing an ad on the radio."[17]

Conclusion:

It is very important that Website operators make their T&Cs capable of being saved by the user in electronic or printed format. It would also not be out of place for the Website operator to ensure that the T&Cs are sent directly to the user by mail. With regards to electronic transactions generally, in the United States for instance, Section 8 (a) of the Uniform Electronic Transactions Act[18], ("UETA"), in nearly all 50 states prohibits a website proprietor/operator from limiting a user's ability to store or print the T&Cs where the parties have agreed to contract electronically and the law requires that the user be provided information in writing. This is a welcome development which one should expect in other jurisdictions.

As earlier stated, long T&Cs of contracts are usually not read by the web users. However, when there is a conspicuous sentence requiring the user to sign away his or her rights, the sledge hammer falls on the companies/ website operators. In recent times website users have been prompted to be far more concerned about how much of their information is being disclosed and if the companies are paying strict adherence to privacy rights. In the year 2012, Instagram had updated their privacy policy, stating that they possessed the right to sell the app's users photos to advertisers without any notification. The App faced serious public criticism and lost about 50% of its users then.

It is important, however, to draw the attention of readers to the unfortunate fact that website users usually don't have an equal bargaining power when it comes to the T&Cs of the use of apps or websites. Sam Moore, a Legal Technologist at Burness Paull LLP, opined as follows: "Consumers don't have an even bargaining position on app terms – you take them or you leave them. <u>As a minimum then, it must be clear what the consumer is agreeing to.</u> Some of this is about personal responsibility of course, but at the very least the important bits should be front and centre."[19]

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[16] Do you accept terms and conditions or do they need to change by Jaya Harra last updated 1st August 2018 published in Lawyer Monthly

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[18] Section 8 (a) Uniform Electronic Transactions Act (If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record)

[19] Do You Accept the Terms & Conditions… or Do They Need to Change? by Jaya Harra last updated 1st August 2018 published in Lawyer Monthly

He further states that "Perhaps it's time for industry standard formats, along the lines of food labeling, to give the user a graphical clue as to how secure their data is going to be. Who sets such standards? Well, that's potentially an even bigger problem. There is some precedent in the industry however – look at website security certificates, for example. A similar approach may work for apps, but it would require the 'gatekeepers' of app stores like Google and Apple to agree to a common approach first."[20]

From the above statement it is definitely not out of place to advice that a regulatory body be established to set the guidelines for draft of T&Cs between website operators and website users. This would go an extra mile to guarantee the equality of legal rights and obligations with regards to the use and operation of various websites on our internet space.

It is highly recommended that there should be a code of conduct for digital agreements. For instance, an initiated industry-wide code which all companies and businesses should embrace and adhere strictly to. This would in no small measure grow the trust between consumers/website users and companies/businesses.

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