

Formation of Electronic Contracts

September 8, 2014

Ray Ferrell

EVP General Counsel and Corporate Secretary – Dex Media



dex media



About Dex Media

Dex Media (NASDAQ: DXM) provides local, social and mobile marketing solutions to businesses in communities across the U.S. under the Dex One and SuperMedia brands. The company's widely used consumer services include the DexKnows.com[®] and Superpages.com[®] online and mobile search portals and applications and local print directories. For more information, visit www.DexMedia.com.



I. My Experience with Electronic Agreements

A. At Firms

B. At Companies

C. Take Aways from Experience



dex media



II. What Makes a Traditional Contract Enforceable?

A. Elements - mutual assent, consideration, capacity and legality

B. Mutual Assent – Offer and Acceptance



dex media



III. What is an Electronic Agreement

An electronic agreement is a contract entered into using an electronic medium as the platform for the agreement.



IV. Types of Electronic Agreements

A. Shrinkwraps (not e-agreements, but...)- In interpreting contracts formed electronically, most courts begin their analysis with what have been called the Shrinkwrap cases. These cases lay the groundwork for e-contract interpretation. Shrinkwrap agreements are a form of “money now, terms later” bargain in which the consumer purchases a product, which includes terms and conditions governing the use of that product within a sealed package. Only after purchasing the product and then opening the box and/or uploading the software is the consumer given the opportunity to either agree to the terms and conditions, thus creating a binding contract, or to disagree and then return the product. This form of contracting served as a model for the development of electronic agreements.



dex media



IV. Types of Electronic Agreements

B. Clickwraps -In a clickwrap agreement, customers are presented with an online display of the terms and conditions of a contract along with a button (usually stating “I Agree” or something similar) or another type of link that requires them to manifest their assent to the terms and conditions by clicking the button or accessing the link before they can make use of the product or proceed with further transactions and use of the site. Typically, the terms of the agreement are presented up-front and in the same vicinity as the button or link manifesting consent. The basic purpose of clickwrap are to provide a new means of contracting entirely over the Internet, where the terms and conditions (as well as consent to them) are accessed electronically.



IV. Types of Electronic Agreements

C. Browsewraps - In contrast to both Shrinkwrap and clickwrap agreements, browsewrap agreements are distinct, both in their placement on Web pages, and the lack of a requirement of an express manifestation of assent. Unlike Shrinkwrap and clickwrap agreements, the user is usually not required to read and/or expressly consent to the terms of the agreement before purchasing the product or service or using the Web site. Instead, the terms and conditions of the contract are presented to the user as a link or button that a user may or may not choose to read. In a browsewrap agreement, a user is presumed to have agreed to the terms and conditions simply by proceeding further into the Web site. The enforceability of browsewrap agreements appears to hinge directly on notice and whether the user intends to be bound by his conduct.



V. *Challenges When Contracting Electronically*

A. Assent

- i. Presumed – no express manifestation of assent
- ii. Actual – an express manifestation of assent

B. Limitations on Capacity

- i. Confirming legal capacity – age, authorized representative
- ii. Technological Limitations – scrolling terms, size of mobile screens

C. Issues of Authentication

- i. Confirming identify
- ii. Maintaining record of transaction

D. Bargaining Power



VI. *Advantages of Contracting Electronically*

A. Economic Efficiencies

- i. Increased scope
- ii. Lower prices
- iii. Comparison “shopping”

B. Records

- i. Able to maintain record of transaction
- ii. Increased transparency of terms



VII. *What The Cases and Terms of Service Say?*

A. Key Cases

i. ProCD v. Zeidenberg, 86 F. 3d 1447 (7th Cir. 1996) (shrinkwraps) -ProCD spent millions of dollars creating a national directory of phone listings that it sold to consumers. However, the consumer version of the software was limited to non-commercial use by a license enclosed in the box. The outside of the box contained a small print reference to the license agreement inside. Zeidenberg purchased copies of ProCD's software program and republished ProCD's directories on the Internet at a price lower than the one offered by ProCD to its commercial customers. ProCD sought injunctive relief and damages, claiming that the republication was a violation of the license agreement. Zeidenberg argued that he did not have notice of the terms of the license agreement before agreeing to purchase the software (as it was inside the box), and therefore, could not possibly have agreed to be bound by them. The court disagreed, and held that ProCD, as the "master of the offer," defined acceptance as taking the software, trying it out and reading the license. Zeidenberg was held to the terms of the license inside the box. ProCD and the cases that followed it stand for the principle that "terms inside of a box of software bind consumers who use the software after having an opportunity to read the terms and to reject them by returning the product." By not returning the product, consumers are conclusively presumed to manifest their intent to be bound.



VII. *What The Cases and Terms of Service Say?*

ii. **Hotmail Corp. v. Van\$ Money Pie, Inc. – 47 U.S.P.Q. 2d 1020 (BNA) (N.D. Cal. April 16, 1998)** (clickwraps) - click through agreement implicitly held valid in preliminary injunction granted based on likely violation of click-through subscription agreement with Internet service provider, as well as causes of action; no details on format or assent method.

iii. **Caspi v. Microsoft Network, L.L.C. (Sup. Ct. N.J. July 2, 1999) (clickwraps)** – click-through agreement expressly held valid where network subscribers could click either box saying “I Agree” or “I Don’t Agree” at any time while scrolling the adjacent terms of the membership agreement, which included forum selection clause at issue; registration occurred and charges were incurred after subscriber clicked I Agree”; court drew analogy to plaintiff’s pre-contractual opportunity to read the fine print terms in Carnival Cruise Lines and refused to treat electronic and paper presentations of terms differently.



VII. *What The Cases and Terms of Service Say?*

iv. Specht v. Netscape Communications Corp., 306 F. 3d 17 (2d Cir. 2002) (browsewraps) – Second Circuit refused to enforce an arbitration clause contained in a license agreement that was not readily apparent to user downloading software. In Specht the court established that in the context of browsewraps, users must be notified of all the provisions of the agreement and a reasonably prudent consumer would not assent to contractual terms that are so inconspicuous that they could completely overlook them.

v. Feldman v. Google, Inc., 2007 WL 966011 (E.D. Pa. March 29, 2007) (clickwraps)– When an online user has been given reasonable notice of the agreement’s term and it is clear that once the user clicks on the acceptance “button”, the user agrees to be bound by those terms notwithstanding that the agreement does not include a specific price term, but describes with adequate definiteness, a practicable process by which price is determined, then the online clickwrap agreement becomes binding on the online user.



C. Comparison of Terms of Service

- i. What Type of Electronic Agreements Are Terms of Service?
- ii. General or Prescriptive Terms
 - a. Google
 - b. Bing
 - c. Yahoo
 - d. AOL
- iii. How is Intellectual Property Treated?
- iv. How is Privacy Treated?



VIII. *What Do You Say?*

A. How Are the Challenges with E-Agreements Illuminated in the Cases and Terms of Service?

B. How Are the Advantages Illuminated?

C. What is the Future of E-Agreements?



Formation of Electronic Contracts

September 8, 2014

Ray Ferrell

EVP General Counsel and Corporate Secretary – Dex Media



dex media

