
Can Website Terms and Conditions Create a Binding Online Contract without a Click-and-Accept?

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Almost every commercial website contains a link to terms and conditions of use or other legal requirements purporting to govern a user's visit to the site. Initially, U.S. courts had varying views about the enforceability of terms and conditions that were simply hyperlinked to a website, but not formally "accepted" by the user. In *Specht v. Netscape Communications*, which we discussed in our [August 20, 2001 Internet Alert](#), a federal district court held, and an appellate court affirmed, that persons who had downloaded Netscape's software were not bound by the arbitration clause in the license agreement on Netscape's website because the users had not affirmatively assented to the terms of that license agreement. Recently, however, at least one court has indicated that it may be more generous to online terms and conditions, and may be willing to find that user assent may be indicated by affirmative actions other than clicking an "I Accept" box, at least in certain circumstances.

When the United States Court of Appeals for the Second Circuit in October 2002 [affirmed the *Specht* case](#) mentioned above, that court highlighted several issues relating to the presentation of Netscape's license agreement on its website.

First, the court noted that the Internet site from which users were invited to download the free software did not contain a plainly visible notice of the

license terms. Instead, users would have to scroll down the screen, below the download button, and then select a hyperlink to view the license. The court explained that, unlike a paper document, the contractual nature of website terms of use is not obvious to all users. The court found that a submerged link, below the fold, was not sufficient to put the consumer on constructive or inquiry notice of the terms of use, and stated that "a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendant [Netscape's] invitation to download the free software."

Second, the *Specht* court rejected Netscape's argument that the act of downloading the software by the user was an agreement to be bound by the license agreement. The court found that such an act did not meet the requirement of an "unambiguous manifestation of assent" when there was no reasonable notice of the terms of the agreement. In reaching this conclusion, the Second Circuit relied upon California's common law of contracts-which was applicable in the case-and explained 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."

More recently, however, a California district court reviewing whether a website's terms of use were enforceable left open the issue of whether mere notice of the terms of use posted on a website may be sufficient to create a binding agreement when the user proceeds to use the website after having such notice.

In *Ticketmaster Corp. v. Tickets.com*, the plaintiff, Ticketmaster, sued Tickets.com over Tickets.com's deep linking to event-specific pages within Ticketmaster's website. We discussed the deep linking aspects of this case in our [September 11, 2003 Internet Alert](#) and the "trespass to chattels" arguments made by Ticketmaster in our [August 26, 2003 Internet Alert](#). In this case, the District Court in March 2003 also denied Tickets.com's motion

for summary judgment on the issue of whether a contract was formed by Tickets.com use of information from Ticketmaster's website when that website contained a notice on its homepage that users were subject to certain terms and conditions which would have prohibited Tickets.com's activity. Users were not required to click-and-accept to show their assent to those terms. However, the court found that there was a triable issue of fact as to whether Tickets.com had knowledge (or constructive knowledge) of the conditions accepted by going into the website's interior webpages, and whether a contract was thereby formed that Tickets.com then breached. Notably, the *Ticketmaster* court explained that it "would prefer a rule that required unmistakable assent . . . by requiring clicking on an icon which says "I agree" or the equivalent." It reasoned, however, that there are many instances in which the law has found enforceable contracts despite a lack of clarity regarding whether assent was given, including the backs of cruise and airline tickets, shrinkwrap terms on cassettes or CDs, and even parking tickets. It noted that such principles have been applied in similar cases involving online contracts. Accordingly, the court held that the question of whether the requisite assent was actually given in the case was an issue of fact to be decided at trial.

The *Ticketmaster* court specifically distinguished the *Specht* case based on the *Specht* court's finding that the terms of use were not plainly visible or actually known to the users, and based on the circumstances of the *Specht* case, "that of consumers invited to download free software from an internet site that did not contain a plainly visible notice of license terms." Notably, the dispute in *Ticketmaster* involved two companies that operated online businesses, while the dispute in *Specht* involved consumers. Accordingly, the *Ticketmaster* court's conclusion may be based, in part, on the fact that both parties were sophisticated users who could be presumed to understand the complexities of online agreements. Moreover, the website operator in *Ticketmaster* actually sent a letter to Tickets.com quoting the terms of use.

Accordingly, there was no dispute that the user was actually on notice of those conditions. Finally, shortly after the preliminary injunction hearing in the *Ticketmaster* case, the website at issue was modified in order to place a flashing warning at the top of the website's home page, explaining that further use of the website bound the user to the conditions. Unlike the warning in *Specht*, which could be found only if users scrolled down the screen, the modified warning in *Ticketmaster* "could not be missed," according to the court.

Despite the factual differences in the two cases, the *Specht* and *Ticketmaster* decisions each suggest that website operators should enhance the prominence and specificity of references to their terms and conditions of use in order to improve their enforceability. Moreover, while the *Ticketmaster* order denying summary judgment suggests that online agreements may be enforceable against certain users (such as other online businesses) even in the absence of an unmistakable indication of assent (such as clicking an "I agree" button) if the user had actual notice as a factual matter, it is becoming increasingly clear that courts will look for such indications of assent in their consideration of whether the agreements are enforceable.