

The COVID-19 pandemic has created uncertain times for many businesses, with particular hardship being felt by ones that rely on in-person transactions. Even before the pandemic, many businesses had developed an e-commerce presence. For others, COVID-19 has acted as a catalyst for e-commerce integration of their product and service offerings.

One major component of conducting business through a website is a terms of use agreement. Also referred to as “terms of service” or “terms of use”, these agreements are generally found on the bottom of webpages (called “browsewrap” agreements), or are presented to a user for acceptance, upon the purchase of a product (called “clickwrap” agreements). These agreements function as a contract between the site owner and users of the site. The importance of these agreements to businesses cannot be understated, with some of their benefits including:

- Minimizing risk and liability;
- Protecting copyrighted and proprietary material; and
- Ensuring greater control over an e-commerce presence.

In the rush to adopt an online platform for selling goods and services, some businesses might be left wondering whether their terms of use agreements, if they have them, are sufficient, or if additional clauses could be added. Another question that can arise is whether a clickwrap or browsewrap format is the more appropriate way to present the agreement to the user. The information below highlights some commonly used clauses of terms of service agreements, their significance to the agreement as a whole, and how to navigate the clickwrap-browsewrap distinction.

COMMONLY USED CLAUSES

Some commonly used clauses can be found below. This is not meant to be an exhaustive list, but merely an attempt to flag some clauses that can be found in agreements of this type. Each business should consider whether some or all of these clauses might be applicable to their activities:

- Ownership of content;
- Choice of forum/jurisdiction;
- Accounts, login & security;
- Use of the website/purchases made by children;
- Disclaimers of warranties;
- Prohibited uses of the website; and
- *Force majeure*.

OWNERSHIP OF CONTENT

An ownership clause allows a business to alert the user about what content on the website is owned by the business. Often, these clauses will begin by stating that the user understands and agrees that the website and all of its contents (software, code, displays, graphics, videos, design, etc.) are owned

by the company or other applicable parties. If relevant, these clauses will also indicate to the user that the content(s) of the website are protected by copyright law, pursuant to applicable Canadian laws and international conventions. While clauses like these might be considered ‘boilerplate’ to some, the importance of these clauses makes them worth mentioning – if a third party is using your material without your permission, these clauses can provide the basis for any cease and desist demand. Ownership of content is also important, where a site encourages the submission of user generated content. Who ought to own that content, and what can (or can’t) the other parties do with it?

CHOICE OF FORUM/JURISDICTION

Many terms of use agreements will spell out what the user must do, if they wish to seek a legal remedy against the website provider. A business might have online customers located around the world; rather than being subject to lawsuits in many different foreign courts, businesses will often stipulate that lawsuits must be brought in a particular jurisdiction (usually where the business is located), using the law from the business’s same jurisdiction. Some agreements go further, and provide that a person who wishes to sue the business must instead submit to binding arbitration, rather than the courts. These clauses are not universally enforceable, but they do provide protection to a business that might otherwise find itself sued in a court halfway around the world.

ACCOUNTS, LOGIN & SECURITY

We now live in a world where login information can grant somebody access to a website user’s name, contact info, personal address and even banking information. It is not uncommon for an e-commerce platform to require a user to set up an account on the website. Account, login and security clauses will often relate to the safety and security of both personal information and login credentials. On the part of the business, these clauses might indicate that their website conforms to accepted industry standards for security. For users, the clause can require that they keep their login credentials confidential.

USE OF THE WEBSITE BY CHILDREN

Depending on the subject matter or industry of a business, sometimes it is appropriate to include a clause to indicate that the website is not intended for, and should not be accessed by, children. Alternatively, this clause could require the approval of a parent or guardian before a child uses the website. In either case, it is a clause that could be considered if the site’s subject matter warrants it.

DISCLAIMER OF WARRANTIES

A disclaimer of warranties clause will, as the clause suggests, disclaim any warranties in relation to the user’s access and use of the website. Commonly, these clauses will notify the user that the site and its materials are provided “as is”. Absent this clause, some warranties can be implied on/from your website, including implied condition of merchantability or implied condition of fitness for a particular purpose.

PROHIBITED USES

Depending on the nature of your business and what your website will require, it is important to consider prohibited uses. For starters, this might begin with a section informing the user that they must comply with all applicable laws and rules while using the site. While not an exhaustive list, these clauses can include the prohibition of harassing, threatening or criminal content, distribution of advertisement or spam, or transmission of viruses.

FORCE MAJEURE CLAUSES

Considering the impact that COVID-19 has had on the ability to both procure products/materials and ship goods, businesses might be wondering if there are any clauses that can protect them from liability in such unpredictable or extreme times. A force majeure clause can be included to protect from liability for failure or delay of performance resulting from extraordinary or extreme events. For more information about these clauses, click here: <https://www.pitblado.com/force-majeure-frustration-cancellation-material-adverse-change>

CLICKWRAP AND BROWSEWRAP - HOW SHOULD I CONVEY MY TERMS OF USE?

Before discussing how to convey your agreement, it is important to note that each agreement needs to be crafted to the specific industry and subject matter that applies to your business. While 'boilerplate' language is suitable in some sections, many other sections require language tailored to that specific business and its related industry/subject matter. While there is plenty of free information available, be warned that much of this information may be developed for different jurisdictions, or businesses that have considerations that don't apply to your activities.

As a general rule, clickwrap is considered stronger for enforcement when compared to browsewrap. However, not all businesses require clickwrap, and many businesses find that browsewrap is legally sufficient for their needs.

CLICKWRAP

While the name might not indicate it, you are probably familiar with this form of agreement. Clickwrap agreements are actually presented to the user, without the need for them to search for the agreement. A clickwrap agreement generally requires the user to take a positive action to accept its terms. The test is not whether the user actually read the agreement, but instead whether the user had a chance to read the agreement and did something (i.e., check a box) to indicate their acceptance of the terms.

The enforceability of a contract stemming from a clickwrap agreement has been affirmed by the courts. For one such example, see *Rudder v. Microsoft Corp.*, 1999 CarswellOnt 3195 (Ont. S.C.J.). You will most

commonly see these agreements in the context of an online purchase, or perhaps a registration of an account for a particular website.

BROWSEWRAP

Unlike clickwrap, browsewrap does not require a positive action from the user to accept the terms of the agreement. Instead, a browsewrap agreement simply ensures that links to the agreement are available on the website for the user to view. You can find browsewrap agreements on the bottom of most websites. These links will generally be titled as “legal”, “terms”, “user agreement” or other similar variants of these names.

The enforceability of a contract stemming from a browsewrap agreement has also been affirmed by the courts. For one such example, see *Magill v. Expedia Inc.*, 2014 ONSC 2073 (CanLII). These agreements typically arise in the context of general website terms of use agreements and privacy policies.

BOTTOM LINE:

Like many things, the answer to the question of what to include in your terms of use agreement, or whether to adopt a clickwrap or browsewrap method of acceptance, is that **it depends**. These questions are highly context specific to a business and its industry or subject matter. Whether you have an existing agreement you want reviewed, or are just beginning to consider e-commerce integration for your business, we would be happy to help you.

This article was prepared by:



ANDREW J. D. BUCK
PARTNER
204.956.3569
buck@pitblado.com



TREVOR YAKIMCHUK
SUMMER STUDENT
204.956.0561 ext. 286
yakimchuk@pitblado.com

Relationships. Respect. Results.

This article represents general information and is not legal advice. Please contact us if you would like legal advice that is tailored to your particular circumstances. We would be happy to help.