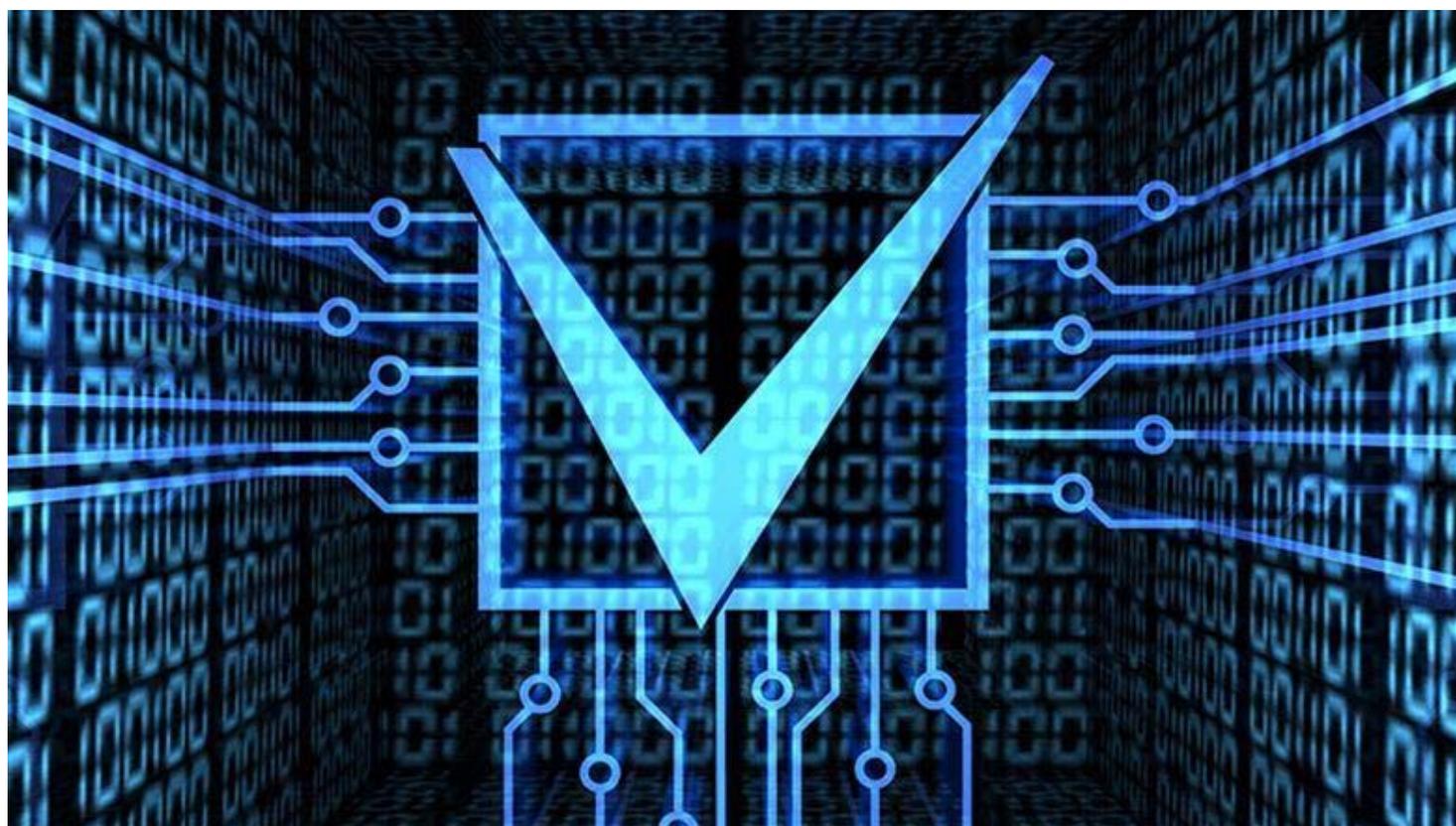




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Are Your Website Terms Enforceable?



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By: *A.J. Zottola*

Your website's legal terms and conditions can't protect your association if they can't be enforced. Here are the elements that courts look for in assessing enforceability.

When an association makes sales, or otherwise engages in commerce, through a website, it's important that the site include appropriate legal terms and conditions that can be made enforceable against the user. Properly executed terms and conditions create a contract between the website

owner and the user, governing issues such as licensed use, intellectual property ownership, warranty disclaimer, and limitation on liability.

To form a binding agreement, website legal terms—like traditional contracts—generally must show an offer and acceptance between the contracting parties. In the case of an association website, the organization "offers" to provide the content on its site to a member or other user consistent with the published terms. The user shows acceptance by taking some action, which indicates his or her agreement to the terms and conditions.

A number of court rulings have made clear that the implementation of legal terms and conditions is sometimes inadequate. These courts have determined that the website owner had no contract with the user, and therefore the terms were unenforceable—often because the site did not include proper notice of legal terms and did not supply a sufficient process to confirm the user's agreement.

Contracting Methods

The contracting process is often accomplished online by providing a user with conspicuous notice, an opportunity to review the governing legal terms before accepting them, and a way to show acceptance of the terms—for example, by clicking a checkbox or an "I Agree" button. This type of direct agreement, sometimes called a "click-wrap" agreement, is the most widely accepted by the courts for ensuring contract enforceability.



Courts have held that merely providing a link to browse legal terms and conditions is not sufficient to form a contract because there is no clear offer and acceptance.

However, some associations and other website owners attempt less formal approaches to get users to agree to their site's terms and conditions, not requiring them to click to agree. This approach can be valid if the website owner can show that it gave clear notice of the terms and that the user took a specific action that constituted acceptance. For example, an association may give notice to users that its terms will apply to them and state that downloading a document or clicking on a link constitutes acceptance.

Under this method, which resembles the traditional "shrink-wrap" contract that was commonly used with retail software years ago, the user accepts the terms by undertaking a pre-announced action, such as using the website. This less formal method is more difficult to defend than the click-wrap agreement, and it is best suited to general-audience websites that don't typically require a fee for access.

A failure to provide notice or make clear that taking certain actions constitutes acceptance can open the door to arguments that the site has an unenforceable "browse-wrap" agreement. Courts have held that merely providing a link to browse legal terms and conditions is not sufficient to form a contract because there is no clear offer and acceptance. Courts are unwilling to infer acceptance without plain evidence that the user knew of the terms and understood that an act constituting acceptance would create a binding contract. For example, courts have held that no contract existed when the website owner merely provided a link to the terms in a web-page footer and required the user to scroll to the bottom of a page to find the link.

Keys to Enforcement

When deciding on how you will establish a contract with website users, weigh carefully the legal certainty of the "click-wrap" agreement against the efficiency of a less formal process. Generally speaking, don't rely on the "browse-wrap" option—although providing a link to the legal terms is always recommended as a way to give easy access to them (this can sometimes suffice as a "legal notice" for websites with limited functionality or content).

Other factors that a court may consider when determining whether online legal terms are enforceable include:

Timing. If the time allowed for the user to review the terms and conditions is deemed too short (the page "times out" too quickly), a court may find that the terms are not binding because insufficient notice was given, and the user did not have a reasonable opportunity to review them.

Availability and visibility. The legal terms should be readily available and conspicuous. Don't make it difficult to find them by requiring the user to go through multiple steps to get there. In one case, a court found the terms and conditions unenforceable (insufficient notice) because the only way a user could access them was by first scrolling to the bottom of the homepage and clicking a "Customer Service" link, and then scrolling to the bottom of the next page to find the legal terms.

Clarity. Be clear about what constitutes an acceptance of legal terms. Vague references to binding legal terms and conditions—such as labeling a link "Legal"—may not provide sufficient notice.

Website terms and conditions, when properly executed, provide an association significant legal protections. Careful consideration of the manner by which legal terms and conditions are implemented and made enforceable is as important as the terms themselves.

Author's note: Julien D. Bowers at Venable LLP assisted with the preparation of this article.

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