

Dubravka Klasiček*, LL.D.

Associate Professor,

Faculty of Law, University J.J. Strossmayer in Osijek,

Republic of Croatia

ПРЕГЛЕДНИ НАУЧНИ РАД

10.5937/zrpfno-34212

UDK: 339:004.658.2

004.421

Раd примљен: 30.09.2021.

Раd прихваћен: 23.10.2021.

DECLARATIONS OF WILL IN THE DIGITAL ENVIRONMENT AND WRAP CONTRACTS**

Abstract: *Declarations of will made in a digital environment are undeniably different from the ones done in a “physical” world and some persons might not be aware of their significance. Many people join various Internet Service Provider’s (ISP) sites daily. To do that, they usually have to agree to terms of service (ToS) that govern those sites. These declarations of will are sometimes direct: by clicking ‘I agree’, a person knows that he/she has agreed to ToS, whether he/she has read them or not. What is more important, a person is aware (or should be aware) that he/she has entered into some sort of an agreement with an ISP – a clickwrap agreement. However, on some Web pages, a person is consenting to the ISP’s ToS simply by staying on and browsing the page, which constitutes a browsewrap agreement. These declarations are not direct and a person is often unaware that he/she has entered into an agreement with ISP. Furthermore, ToS often change and an ISP will sometimes not inform users about it. In those instances, users will not be aware of the changes to ToS and that, by continuing to use the ISP’s services, they are agreeing to them. These are some examples of will being declared in a digital environment, without the person declaring it being aware of what he/she has done. It seems that, for some reason, people take what happens online less seriously than what happens in a “physical” world. This paper will try to show that this is a serious mistake in a digital environment.*

Keywords: *declaration of will, terms of service (ToS), Internet Service Provider (ISP), online agreements, clickwrap / browsewrap agreements.*

* dklasiccek@gmail.com

** This paper is a product of research that has been fully supported by the Faculty of Law, Josip Juraj Strossmayer University of Osijek, under the project IP-PRAVOS-7 „Civil law and civil procedural law in the 21st century - current situation and future tendencies“.

*** This paper was presented at the International scientific conference “Law and Digitalization“, held at the Faculty of Law, University of Niš, in 2021.

1. Introduction

It is probably inconceivable to most people to be a party to a contract without even being aware of its existence and the fact that their behavior means assent to it. Most people think that, in order to enter into a contract, they need to directly declare their will, sign the contract or certify it. However, there are certain contracts, known as adhesion contracts, where it is sometimes not clear to the party who agreed to them, i.e. that he/she has become a party to a contract. These contracts are concluded on a daily basis; they are so common today that many people do not even register that they have become their participants. This applies to offline, but particularly, to online adhesion contracts.

Online adhesion contracts are contracts that regulate the relationship between users and Internet Service Providers (ISPs). Today, it is almost impossible to access and use a Web site, for whatever purpose, if a person does not agree to the terms of use of that site. These terms are contained in online adhesion contracts and users have to agree to them, if they want to use the Web site. At the same time, because of various factors, most users are not aware that these terms exist, that they are placed in a contract, and that some of their behavior constitutes assent to the contract, thus becoming its party.

This paper will discuss typical types of online contracts and the ways in which parties declare their will in order to conclude them. It will also present (mostly) U.S. case law, which was used for a simple reason: probably the largest number of lawsuits, concerning online contracts, have been filed before U.S. courts in the last 15 to 20 years. The paper also mentions one decision from the Court of Justice of the European Union (CJEU) but U.S. case law on online contracts is more comprehensive and it dealt with all types of online contracts that are discussed in this paper. Besides, the goal of this paper is to present problems associated with declarations of will in regards to online contracts, in general. It does not aim to deal with any particular legal system or jurisdiction. That being said, as the decision from the CJEU will show, most courts, no matter which legal system they belong to, would reach similar decisions like U.S. courts, if presented with similar facts.

The first part of the paper will talk about various ways of declaring one's will in civil law, while concluding traditional contracts. The second part provides a brief overview of adhesion contracts, and the similarities and differences between those concluded offline and online. The third part of the paper deals with typical types of online contracts, the ways in which ISPs inform users of their existence and effects, and the ways in which users agree to the terms of use contained in those contracts. The fourth part deals with possible ways in

which online contracts could be improved, in terms of alerting users of their existence and users assenting to them.

2. Various ways of declaring one's will in civil law

When concluding traditional contracts, both parties have to declare their intentions to conclude a contract. One party has to declare his/her will as an offer to conclude a contract and the other has to accept it (Smits, 2017:41-42). An offer can be made to a specific person, but it can also be made to a larger number of people (Klarić, Vedriš, 2014-402). Sometimes the offer will be accepted as is, and a contract will be concluded, because only an acceptance that fully corresponds to the offer in terms of content represents its acceptance (Klarić, Vedriš, 2014-403). However, it is not uncommon for the other party to reject the offer and place a counter-offer with modified terms (Česić 2, 2021-18).

Regardless of how the contract was concluded (with or without negotiations), the will of the contracting parties must be clearly and seriously expressed (Gavella, 2019:240-214). There must exist a serious intention to enter into a particular contract; the parties have to agree to it and all of the persons involved need to be fully aware that they became parties to a particular contract.

When talking about various ways of declaring a will in civil law, we primarily have in mind direct declarations of will, where it is completely clear to everyone what the true will of the one making the declaration is. The simplest and certainly the most reliable way to express one's will is orally or in writing (Klarić, Vedriš, 2014:127-128). If one declares one's will in those ways, there is usually no doubt as to what the person wanted to declare and how she did it, provided that there are no defects of a declaration of will, in which case the contract resulting from such a statement will generally be either void or voidable (Gavella, 2019:308). Even when the will is declared by signs (nodding a head or hand gestures), normally there should be no problems as to what one is declaring, since declaration of will by signs is also a direct way of declaring one's will (Česić 2, 2021-12).

Of course, the will can also be declared in indirect ways, i.e. by conduct or, as designated in Croatian law, by conclusive actions (Klarić, Vedriš, 2014:129-130; Smits, 2017: 57-58). In these cases, the will of the person must be interpreted from one's behavior. There is a typical example in inheritance law, where it is quite clear that, when a testator disposes of the property included in a testament while still alive, the testator is, in fact, revoking a testament or a part of it, by conduct.¹

¹ Art. 66 of Inheritance Act, *National Gazette of the Republic of Croatia*, 48/03, 163/03, 35/05, 127/13, 33/15, 14/19. Given that this is an indirect way of declaring one's will, where others

However, whether a person has declared his/her will directly or indirectly, there is no ambiguity on her part (or at least there should not be) of what was done, and undoubtedly, it is clear to that person what the consequences of the declaration of will are going to be, regardless of whether the same can be said about the other party.

In the digital environment, people are declaring their will all the time. However, because of distinctiveness of online environment, those declarations often differ from the ones made offline. The will online can be declared in different situations, but this paper will deal exclusively with the ones made in order to access various ISPs' services. It will deal with users' assent to online contracts that dictate their relationship with ISPs and ISPs' notice of the existence of the contract and the consequences of users' behavior. When it comes to assent to online contracts, it will be shown *infra* that a will can be declared in different, peculiar ways, when compared to the offline world. However, one of the biggest differences between declarations of will made offline and online is probably that persons declaring their will online often have no knowledge that they have done so and, correspondingly, are not aware of the consequences of their declarations.

3. Adhesion contracts – offline and online

The terms of use governing users' relationship with an ISP are arranged in the form of adhesion contracts, whose clauses are set on a "take-it-or-leave-it" principle (Kamantauskas, 2015:61). These terms are determined and published by an ISP, while it is up to users to either accept or reject them and, thereby, lose access to ISP's services.

It has to be emphasized that most contracts today (both offline and online) are made as standard-form contracts or adhesion contracts (Preston, McCann, 2012:133-134; Smits, 2017:13). An adhesion contract is a standardized contract, the content of which is determined in advance by one contracting party, which decides on the conditions under which the contract will be concluded and offers the conclusion of the contract to a larger number of persons (Petrić, 2002:59). As already said, adhesion contracts are widely used today, and have been for some time (Smits, 2017:10, 13). Although, they might have a bad reputation, they are not innately bad for consumers (Condon, 2003:437). There are a lot of advantages to these types of contracts: lower costs (all transactions of the same type are processed in the same way); bargaining about future contracts takes time and

can only speculate that a person wants the usual consequences of his/her behavior, the person making the declaration must be given an opportunity to waive those consequences and protect herself from misunderstanding of his/her behavior; in Croatian civil law, it can be made by making statements called *reservatio* and *protestatio* (Klarić, Vedriš, 2014:130).

money, so concluding adhesion contracts saves both; most standard terms have been tested in courts so that parties (at least theoretically) save on litigation expenses as well; also, adhesion contracts are more suited for mass consumer transactions (Kunz, Ottaviani, Ziff, Moringiello 2003:289; Kim, 2011:1328). It would be unthinkable for every consumer who wants to use certain company's services to be able to negotiate with the company and to have to sign the contract in the end.

However, there is an obvious downside to all adhesion contracts; the party that puts together these contracts chooses which terms they will consist of, and the other party has no choice in the matter. Therefore, the party accepting terms put in adhesion contracts is at a disadvantage, compared to those composing the contract.² It is reasonable to conclude that sometimes those accepting the contract do not want to do so (at least when it comes to certain provisions), but have no choice if they want to gain desired goods or services. Another issue with most adhesion contracts is that assent is not given in a direct manner, as is usually the case with traditional contracts; rather, it is presumed or constructed (Kim, 2011:1330). Therefore, the party assenting to the terms of adhesion contract is sometimes not aware that his/her behavior led her to enter into a binding contract.

Online contracts, concluded between users and ISPs, exist for a reason and are very important for both parties. They are made in the form of adhesion contracts because there is probably no other way to compose them (Kim, 2010:1). They govern the relationship between these two parties and they consist of a variety of terms. Among other, these terms include: software licensing; terms of use for utilizing a Web site; terms of sale; forum selection; arbitration clauses; copyright rules; security, privacy and return policies; choice of law, etc. (Brehm, Lee, 2015:4; Kamantauskas, 2015:62).

While there are a lot of similarities between paper adhesion contracts and the ones made online, there are also significant differences. One of the differences is the size of offline and online adhesion contracts. With paper contracts, companies that draft them will be very careful not to make them too long because

² The ones composing adhesion contracts have to be careful not to overstep while deciding what terms they will put in them because, if they do, it might lead to unconscionability, violation of consumer protection laws, unfair trade practices, etc. (Kunz, 2003:290). For example, Article 296 (para. 1) of the Croatian Obligations Act (*National Gazette of the Republic of Croatia*, 35/05, 41/08, 125/11, 78/15, 29/18) states that the provisions of general terms and conditions of the contract which, contrary to the principle of good faith and fairness, cause obvious inequality in the rights and obligations of the parties, to the detriment of the party that is agreeing to those terms and conditions, or jeopardize the achievement of the purpose of the contract, are null and void.

every consumer will be reluctant to agree to a contract that comes on many pages (Preston, McCann, 2012:135). The bigger the document, the more cautious the consumer will be because she will suspect that some of those numerous provisions might be overly burdensome. With online contracts, the size of the contract does not come across because they are not printed out; so, users will not have a real comprehension of their actual size (Kim, 2011:1349, 1351).

Also, in paper contracts, there is often a human intermediary, whose knowledge of the contract might be limited, might have no bargaining power, and may exert pressure over the other party, but who can still be helpful answering some questions about the terms of the contract, products and services (Kunz, 2003:290). In online contracts, there is usually no such person and users are left to tend for themselves. That might be one of the reasons why online users are often unaware of the existence of these contracts, while accessing ISPs' websites. Even if users are aware of them, they usually feel powerless to negotiate them in any way and perceive them as overly broad and restrictive (Founds, 1999:100).

4. Declarations of will in online contracts: How do ISPs give notice and users their assent?

4.1. Types of online (wrap) contracts

There are several types of online adhesion contracts (further on, they will be referred to as "wrap contracts"³), and their names derive from the ways users declare their will to assent to them. Authors generally mention three typical types of wrap contracts: Shrinkwraps, Clickwraps and Browsewraps.⁴

Shrinkwraps are included in the package with the purchased product, usually software, which the user finds out about and assents to after opening a plastic wrapping or a shrink wrap (hence the name) (Kim, 2007:799). Of all the contracts that will be discussed in this paper, this is the only one that comes in a printed form. The user declares his/her will that he/she is assenting to a Shrinkwrap by tearing open a package. This declaration is not as explicit as in Clickwraps but is much more direct than it is in Browsewraps (Condon, 2003:435).

3 This term is used by prof. Kim, among others, in some of her papers (e.g. Kim 2010, 2014, 2016).

4 It has to be noted that all wrap contracts do not fit within these three categories. There are hybrid wrap contracts that have features of more than one of the typical wrap contracts (e.g., click-browsewrap hybrids, scrollwraps, sign-in wraps, multiwraps: shrink-clickwrap hybrid or shrink-click-browsewrap hybrids) (Kim, 2016(b):25-29).

Clickwraps are contracts in which users' will must be declared in a direct way; there is an explicit manifestation of assent to the terms (Condon, 2003:435). Therefore, users often know, or at least should be aware of their assent. These contracts are concluded after the user clicks (hence the name) on the box next to the statement "I agree", "Agree", "OK" or something similar (Scranton, 2002:291). If the user does not click on the box, he/she cannot proceed to the website. Here, the assent is given in probably the most direct way possible in a digital environment.

Browsewraps are the third type of wrap contracts which will be the most difficult for the user to be aware of. These contracts exist behind a hyperlink, which is located somewhere on the ISP's website. In most cases, the website or the Browsewrap itself states that, by browsing the page (hence the name) or downloading from it, the user indicates assent to the terms (Kamantauskas, 2015:52). Here, assent is given merely by remaining on the site or downloading from it, which the user is usually not aware of. There is only an implied declaration of will to assent to that contract, nothing as explicit as clicking or even tearing a plastic wrapping. In Browsewraps, the user is able to achieve whatever he/she wanted on a website, without doing anything at all, and to assent to the terms of use, without even knowing they exist. Therefore, the user often has no knowledge that, merely by browsing the site, he/she became a party to a binding contract (Condon, 2003:435-436).

The following few pages will deal with how these wrap contracts came into being, the case law pertaining to them, and certain controversies surrounding them.

4.1.1. *Shrinkwraps*

In the 1990s, software industry sparked a debate by making End User License Agreements (EULAs)⁵ in the form of Shrinkwrap licenses (Garcia, 2013:34). A software would arrive in a plastic wrapping (also called shrinkwrap), usually with a sticker across the front or a user manual, containing the conditions for use. This was a shortened version of the licensing agreement, and its full version

5 A EULA is a legal agreement between a customer (end user) and the software developer (licensor). It ensure that developer retains full ownership rights and control over the software while a customer receives a license to merely use the software. This agreement only specifies how users can use the purchased software license. It does not cover other contractual terms for that ISP's use of Terms of Service (whether they are called ToS or given a similar name); see: <https://www.privacypolicies.com/blog/eula-vs-terms-conditions/>
ToS is a contract between an ISP and a user, which defines the rules by which a user must abide by in order to use an ISP's service; see: <https://odinlaw.com/the-differences-between-a-eula-tos-and-sla/>

was inside the plastic wrapping (Garcia, 2013:34). The user would agree to the terms by opening a plastic wrapping and would be able to examine the contract only after she has already opened the product, and thus consented to the terms (Condon, 2003:435).

It would be unimaginable for software developers to have to compose a written contract, which every purchaser would have to sign; in order to have a valid licensing agreement with a user, this is probably the only way they could think of (Kim, 2011:1336.). The biggest issue concerning Shrinkwraps, which generated the most controversy when it first appeared, was that users would first give assent to the terms (by opening the package) and only after that would they be able to read them (Garcia, 2013:35.). Sometimes, a user would have certain period of time to return the software and decline the agreement, but not always (Garcia, 2013:35; Kim, 2016(b):14).

In the U.S., Shrinkwraps were largely invalidated before 1996.⁶ However, in 1996, a landmark case *ProCD, Inc. v. Zeideberg*, changed all that. In *ProCD*, the court found that Shrinkwrap licenses were valid and enforceable contracts "... unless their terms are objectionable on the grounds applicable to contracts in general".⁷ The court did not find a problem with user assenting to terms before being able to read them because, in *ProCD*, the defendant had an opportunity to return the purchased software after he had read the terms of use and decided that he did not agree with them (Condon, 2003:439). In other words, in *ProCD*, the court decided that a Shrinkwrap is not unenforceable just because of the way a user declares his/her will to assent to it and learns about its content. From then on, Shrinkwraps became standard among software companies and other related industries, which soon started packaging licensing agreements in the form of Shrinkwraps, regardless of the fact that scholars and authors severely criticized them (Garcia, 2013:38 – 39).

4.1.2. Clickwraps

A Clickwrap would appear to a software user as a screen (or a few of them) and, in order to proceed, the user would have to click that he/she has read the terms listed on the screen and agreed to them (Garcia, 2013:35). Unlike Shrinkwraps, Clickwraps lacked physical form; they only existed online. Here, users' decla-

⁶ See: *Step-Saver Data Sys., Inc. v. Wyse Tech*, <https://cyber.harvard.edu/metaschool/fisher/contract/cases/step.htm>

⁷ *ProCD, Inc. v. Zeidenberg*, see: https://scholar.google.com/scholar_case?case=11811009805458694240

This case is usually linked to Shrinkwraps, but it has to do with Clickwraps as well, since this contract was a hybrid Shrinkwrap-Clickwrap: users were also required to click that they agree to the terms, or they could not use the software (Davis, 2007:580).

ration of will was direct and they would first have the chance to read all of the terms, unlike with Shrinkwraps.

Clickwraps also sparked a lot of controversy, but not for the same reasons as Shrinkwraps. The biggest issue with Clickwraps was that software developers did not give users notice of the existence of the terms; so, users were not aware what their clicking entailed (Garcia, 2013:39).⁸ To elaborate: in order to attract and keep users' interest, websites try to be extremely user-friendly; so, ISPs try not to bother users with legal information. For this reason, most users were not given the notice that they have entered into a binding legal contract by clicking (Garcia, 2013:39-40).

Regardless of the controversy surrounding them, Clickwraps were considered by courts to be valid until 1998. Since then, courts have (for the most part) taken a stand that, if a click can be proven, it does not matter whether the user has actually read or understood the terms, nor was it important whether the user was aware what the clicking entailed. If the box next to "I Agree" was clicked, assent was given (Davis, 2007:579). For example, while deciding in *Groff v. America Online, Inc.* (1998), the court stated something very important: "Here, the plaintiff effectively "signed" the agreement by clicking "I agree" not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc., and is bound to the terms of his agreement."⁹ Therefore, a click was equalized with a signature in a physical world. As already noted, from then on, courts have largely enforced most Clickwraps.¹⁰

In the EU, in *El Majdoub vs. CarsOnTheWeb.Deutschland GmbH*, the EU Court of Justice took a similar stand in 2015. The Court indicated that clicking "Yes" meant assent, which the users had to have been aware of, especially since they could not move forward without clicking.¹¹

To summarize, while deciding on enforceability of Clickwraps, the courts will want to establish if the user assented to the terms (Davis, 2007:583-587). The-

8 For example, in *Hoffman v. Supplements Togo Management, L.L.C.* (see: <https://law.justia.com/cases/new-jersey/appellate-division-unpublished/2011/a5022-09-opn.html>), the court took a stand that Clickwrap is enforceable as long as there was a button with some indication that clicking amounts to acceptance. A similar stand was taken in *Grosvenor v. Quest Communications Intern. Inc.* (Garcia, 2013:42-43).

9 *Groff v. America Online, Inc.*; see: <https://casetext.com/case/groff-v-america-online-inc>

10 In few instances when courts refused to enforce Clickwraps, there was no sufficient evidence that the click was made, or the terms of the contract were void based on traditional contract principles (Davis, 2007:582).

11 *El Majdoub vs. CarsOnTheWeb.Deutschland GmbH*, CJEU (2015); see: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0322&from=EN>

refore, if an ISP could prove that the user declared his/her will in a direct way, by clicking, courts will uphold the contract. Courts will not consider users' claims that they have not read or understood the contract, that it was too lengthy and ambiguous, or that they did not remember clicking or were not aware that clicking meant agreeing to anything (Davis, 2007:588.). However, as with paper contracts, courts will consider users' claims that certain terms were, for example, against public policy or the principle of conscientiousness and honesty (Davis, 2007:590; Condon, 2003:447-452).

4.1.3. *Browsewraps*

Browsewraps developed after Clickwraps and they refer to agreeing to terms of a website, merely by browsing or making a transaction which originated on the website (Garcia, 2013:35). They are mostly used by email, retail and social networking sites (Preston, McCann, 2012:135). The user declares his/her will to be bound by a Browsewrap, by visiting, viewing, using or just navigating the website. The issue here is that the user usually does not know that his/her behavior means assent, considering that some websites do not give notice to users or their notice is not visible or understandable to an average user. Even if the user is aware that his/her browsing means assent, it is sometimes hard to know what he/she assented to because the terms are often located in such a place that it makes them hard to find (Garcia, 2013:36).

An early mention of the term "browsewrap" occurred in 2000, in *Pollstar v. Gigmania, Ltd.*¹², but the landmark case concerning Browsewraps was *Specht v. Netscape Communications Corp.* In *Specht*, the court found a Browsewrap contract to be unenforceable. In this case, the contract in question was actually a hybrid Clickwrap-Browsewrap.¹³ The Browsewrap part of the contract could be visible only if the user scrolled all the way down, below the button that activated the program and below the download instructions; thus, users were actually encou-

12 In *Pollstar v. Gigmania, Ltd.*, the court actually upheld this contract, which was not conventional. Although it stated that the notice was "in small gray print on gray background" and not underlined, as is the custom on the Internet, the court also noted: "The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time. Taking into consideration the examples provided by the Seventh Circuit, showing that people sometimes enter into a contract by using a service without first seeing the terms, the browser wrap license agreement may be arguably valid and enforceable." See: https://scholar.google.com/scholar_case?case=1097855858429084707&q=170+F.Supp.2d+974&hl=en&as_sdt=2002

13 In order to download the software, users first had to click that they agree to the terms. However, the downloaded software contained a plug-in which was bundled with another software; but, for that particular software, there was no clicking to agree to its terms; its mere download meant that the user agrees to terms (Garcia, 2013:44).

raged to download the software before seeing the terms (Scranton, 2002:292). For that reason, the plaintiffs claimed that they had no adequate notice of the existence of those terms and, therefore, should not be bound by them. The court agreed, stating: “Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility. We hold that a reasonably prudent offeree in plaintiffs’ position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload’s license terms hidden below the “Download” button on the next screen.”¹⁴

This proved to be very important in deciding whether a Browsewrap should be enforceable in the future: the emphasis was put on a notice (or the lack of one) given by an ISP. On the basis of this case, we may reach the following conclusion: if an ISP gives adequate notice to users that their browsing or downloading constitutes assent to terms of use, even a contract made in the form of a Browsewrap can be enforceable. From then on, Browsewraps continued to be used and soon courts started to uphold more and more of these contracts (Scranton, 2002:294-295).¹⁵

4.2. Adequate notice and assent

When problems concerning wrap contracts arise and cases end up in front of the court, users’ claims depend on what type of wrap contract is in question. They might claim that they did not declare their will (in any way) in order to assent to ISPs’ terms. How could they assented to something if they were not even aware it existed (Kamantauskas, 2015:66)? They might also claim that ISPs did not give them any notice that some of their behavior constitutes assent to a wrap contract.

It is obvious from case law that courts agree that there has to be a reasonable notice of the existence of terms of use. ISPs need to announce to users, as directly as possible, what their actions mean. Reasonable notice might mean

14 *Specht v. Netscape Communications Corp.* https://cyber.harvard.edu/stjohns/Specht_v_Netscape.pdf p. 28

15 For example, in *Hubbert v. Dell Corp.*, the court stated: „The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract. Although there is no conspicuousness requirement, the hyperlink’s contrasting blue type makes it conspicuous. Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.” See: https://scholar.google.com/scholar_case?case=16411101656811779909&q=359+Ill.App.3d+976&hl=en&as_sdt=2002

actual notice about the existence of terms but also constructive notice, which implies that a “reasonably prudent offeree” would be aware of their presence (Kim, 2016(a):243). When U.S. courts considered notice given by ISPs, they took into account different elements: placement of the notice; the size and type of its font; words used; presentation, form and functionality; web design; colors; hyperlink labeling; and the user experience (Kunz *et al.*, 2003:292; Brehm, Lee 2015:6-7; Kim, 2016(a):252).

4.2.1. ISPs’ notice

For example, the user can be given notice by a scroll box revealing (at least a portion of) the terms, or by an appropriately placed sentence that will be apparent to an average user (Kunz *et al.*, 2003:293). It has to be positioned somewhere where a reasonable person would be able to find it. So, if scrolling is required to get to the notice, a website should be designed so as to entice an average user to scroll all the way to the notice (Macdonald, 2011:297).¹⁶ Also, there is another important thing concerning ISPs’ notice: if the website can be reached through multiple pages, the notice should occur on all of those pages.¹⁷

If the terms are found behind a hyperlink (i.e. in Browsewraps), it should be underlined and marked by a different color (usually blue).¹⁸ The hyperlink leading to terms of use has to be immediately visible and should not require users to search for it. Especially, it should not require users to have to click on multiple hyperlinks to find multiple terms of the agreement (Kunz *et al.*, 2003:305).¹⁹ Also, there has to be a sentence or a phrase alerting users that terms are located behind a hyperlink, and that sentence or a phrase has to be located in such a place on a website that it can be easily seen by an average user (Kunz *et al.*,

16 For this reason, the court found that a Browsewrap was unenforceable in *Specht*: “... a reasonably prudent offeree in plaintiffs’ position would not have known or learned (...) of the reference to (...) license terms hidden below the “Download” button on the next screen.” See note 14.

17 This is called „deeplinking“, the process of linking to a website located beneath the home page (Tontodonato, 2000:201)

18 In *Long v. Provide Commerce, Inc.*, the hyperlink leading to terms of use was in “light green” on a “lime green” background of a website. The court found that: “...the Terms of Use hyperlinks—their placement, color, size and other qualities ... are simply too inconspicuous to meet that standard. Indeed, our review of the screenshots reveals how difficult it is to find the Terms of Use hyperlinks in the checkout flow even when one is looking for them.” See: <https://caselaw.findlaw.com/ca-court-of-appeal/1729412.html>

19 In *Sgouros v. TransUnion Corp.*, the court noted: “A website might be able to bind users to a service agreement by placing the agreement, or a scroll box containing the agreement, or a clearly labeled hyperlink to the agreement, next to an “I Accept” button that unambiguously pertains to that agreement.” See: <https://caselaw.findlaw.com/us-7th-circuit/1730191.html>

2003:293).²⁰ The phrases used should be simple and straightforward: “Use of this Web site is subject to our terms of use...” or “By going beyond this page, you are deemed to have agreed to our terms of use” (Kunz *et al.*, 2003:294.).

The language used also has to be taken into account. It should not be ambiguous and users should be aware that they are entering in a binding contract. However, in *AvePoint, Inc. v. Power Tools, Inc.*; the court held that, if an ISP could prove that a user had actual or constructive knowledge of the terms of use (“...knew, or should have reasonably known...”), the Browsewrap could be enforceable, regardless of an ISP not giving users notice of the term’s existence.²¹

All that has been said about notice given by ISPs leads to the conclusion that it should be as direct and as explicit as possible. This makes sense, given that ISPs are the only ones capable of alerting users of terms’ existence and of the ways users assent to them (Kim, 2011:1331). ISPs are the ones that decide how they will present (or not) terms to users, who are in no way capable of influencing that. ISPs decide what the contract will look like and what it will comprise; they can put emphasis on some terms and decide to hide others; they may require users to click once, many times or not at all; they can spread terms on different pages or locate them all in one place (Kim, 2011:1351). Because of that, ISPs should take care to do whatever is in their power to notify users of the terms and their meaning, but it seems that they are doing exactly the opposite; they try to hide the terms of the contract and diminish their importance. Certainly, putting a Browsewrap below an enticing offer urging users to click and buy items on sale is the same as hiding them or not putting them there at all (Cicirelli, 2016:1007).

After an ISP has given users adequate notice of the existence of the terms and an opportunity to read them, users have to be made aware that taking a certain action means they have assented to the terms (Kunz *et al.*, 2003:306). Therefore, ISPs have to inform users, in advance, that their conduct (opening a plastic wrapping, clicking on a box, or just browsing the website) will be considered a

20 In *Sgouros v. TransUnion Corp.*, the court found that the title “Service Agreement” on a scroll window did not indicate what terms it governed. Also, there was no way for the user to be alerted to the nature of a document that the hyperlink led to, since it was titled “Printable version” and not Terms of Use or Service agreement or some similar phrase (Kim, 2016(a):252). In this case, the court actually took a stand that an ISP “actively misleads the customer”: „But what cinches the case for Sgouros is the fact that TransUnion’s site actively misleads the customer. The block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It says nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement.“

21 *AvePoint, Inc. v. Power Tools, Inc.*; See: <https://cases.justia.com/federal/district-courts/virginia/vawdce/7:2013cv00035/88318/62/0.pdf?ts=1411607234>

valid assent. It is not important whether users have to take a direct action or whether assent is given by conduct; they have to be informed of how assent is given and what it means (Kunz *et al.*, 2003:307).

4.3.2. *User's assent*

1) In Clickwraps, users have to click a box next to the terms, indicating they have read and assented to the contract. Their declaration of intent to enter into a contract with an ISP is direct. In Shrinkwraps, opening the plastic wrapping constitutes assent to the contract inside, like in Clickwraps. Thus, users will not be able to claim that they had no knowledge of these contracts.

In Browsewraps, things might be a little different since there is often no notice of their existence or the notice is not adequate. A hyperlink leading to terms of use is sometimes "hidden" somewhere on a website and it might be difficult to find it, even if the user was notified that it existed and was looking for it. In those instances, users could successfully claim they were not aware of contracts existence, or that they could not find it. If that is the case, it would be impossible for ISPs to prove users' knowledge of the terms of a Browsewrap and their assent to it. If ISPs gave users adequate notice, they might be in a better position but, if they did not, users would have to admit they were aware of the contract's existence and have read the terms. But, since users are the ones arguing that a Browsewrap is unenforceable, they will never admit to it (Cicirelli, 2016:996). Therefore, if an ISP decided to use a Browsewrap, it has to be much more cautious, in terms of notifying users that they are assenting to a Browsewrap by conduct.

As shown earlier, assent can be given either actively: by doing something (by clicking), or passively: by failing to act after being notified (not leaving the website) (Kim, 2016(b):24). However, no matter how assent was given, for a wrap contract to be enforceable it is important for an ISP to be able to prove that the user has taken an action that constitutes assent. They have to be able to prove that the user has declared his/her will in a way necessary to agree to a wrap contract. ISPs can do that, for example, by preserving evidence of an actual "click-stream data", or proving that the user could not go any further on a website without first performing an action that constitutes assent (Kunz *et al.*, 2003:308-309). The case law pertaining to Clickwraps shows that, if an ISP was able to prove user's click and the user was given reasonable notice of the contract itself, these contracts will be enforceable (Condon, 2003:446). As expected, proving assent in Browsewraps is much more difficult (Kim, 2016(b):24-25).

Therein lies a problem with assent to wrap contracts: users might be alerted of the terms existence and how to assent to them but they will, more often than not, be unaware that they have entered into a binding contract (Condon,

2003:434). Even in Shrinkwraps and Clickwraps, users might not know that they have become a party to a wrap contract by taking a direct action. Then, imagine what happens to users assenting to Browsewraps; their behavior alone has led them to be parties to a contract but most will have no knowledge of that fact (Macdonald, 2011:289).

2) When it comes to user's assent, another issue needs to be discussed: should assent to terms of use mean that the user has given a "blanket assent" to all of the terms in the wrap contract? In many wrap contracts, there are provisions that have nothing to do with what the user wanted to achieve on the website (Kim, 2013:182). Some of those provisions give ISPs rights they have never had, while severely limiting users' rights. Does a user's assent mean that he/she has agreed to all of the provisions in a wrap contract, even the precarious ones? Some authors advocate that users should be compelled to assent multiple times to multiple problematic provisions.

Even if ISPs give users adequate notice about terms' existence, they do not inform them of the terms' content (Kim, 2013:183). It is up to users to read the terms and decide whether they will assent to them or not. However, users usually do not read wrap contracts; many users are completely unaware that they exist at all. Also, users presume that provisions found in the wrap contract are related to the transaction made between them and an ISP. However, that is not the case for all of the provisions because each of them serves a different purpose.

Some terms shield ISPs from different problems, e.g. from liability (provisions limiting warranty or stating that there is no warranty at all) or they put limitations on the use of the product (license instead of transferring ownership) (Kim, 2011:1337-1339). These terms are there to protect ISPs, and users probably expect them in a wrap contract. Some provisions in wrap contracts are there to limit or terminate users' rights (e.g. provisions on exclusive jurisdiction or an arbitration clause). These provisions, unlike the ones used to shield ISPs, might put users at a disadvantage, but they are also used by ISPs to minimize risks by cutting down costs and unpredictability. Users might not like them but they understand the rationale behind them. Both of these types of provisions are used for a defensive purpose and are typically found in most adhesion contracts (Kim, 2011:1339-1341).

However, with the development of wrap contracts, certain provisions that secure ISPs benefits unrelated to the subject of the transaction started to emerge (e.g. giving ISP the license to user content that is much broader than is necessary, giving ISPs intellectual property rights, etc.) (Kim, 2011:1342, 1354). These provisions were not normally found in adhesion contracts, and if they were, consumers would have to specifically assent to them, together with assenting to the rest of

the contract.²² In wrap contracts, if the user assents to the terms, his/her assent covers all of the provisions, including those that are to users' disadvantage. A name "blanket assent" is used for one assent to all of the terms, regardless of what they might refer to (Kim, 2007:803; Kim, 2010:3; Kim, 2011:1330, 1339; Kim, 2013:196; Kim, 2014:319).

As mentioned before, some authors propose that these overburdening provisions should not be accepted by one click alone, especially not by simply browsing the site. Rather, it would be more prudent for the user to have to click multiple times, in order to assent to multiple problematic provisions, giving ISPs benefits or rights it should not normally have (Kim, 2011:1353). Multiple clicking would serve another purpose: ISPs might give up putting too many of such provisions in wrap contracts because, if users have to click on each provision that is to their disadvantage, and there are too many of those, users might forgo that ISP's website altogether (Kim, 2014:319). This would certainly draw users' attention to those provisions and would make them reconsider giving assent, in the first place.²³

However, this might also create a counter effect. For example, under Directive E 2009/136/EC²⁴ it is required in all EU countries that websites have to obtain users' consent if they are to store information on or retrieve it from users' computer or some other device (e.g. smartphone). All of the ISPs' have to inform users that they are using cookies. They have to let users know what those cookies are being used for and acquire users' assent before placing cookies on their device.²⁵ The assent has to be given every time when a user accesses the website. Even if the user accesses the same site from the same device every day, assent has to be given over and over again. As a result, users are now so desensitized to clicking that most just automatically click that they agree, in a hurry to access the website, without giving ISP's notice a second glance and, in many cases, without even being aware what they have assented to. It is imaginable that the same might happen with wrap contracts, which would require users to click multiple times on multiple, overly burdensome, provisions.

22 For example, if a hotel wanted to charge additional fees for late check-outs, consumers would have to be informed about the rate and agree to the fee in advance (Kim, 2011:1342).

23 Multiple clicks assenting to multiple „problematic“ provisions might seem too annoying for a user, but that is exactly the point: users should not relinquish their rights too easily, with one click or by merely browsing, without even being aware what that click or a browse meant (Kim, 2011:1363).

24 Directive E 2009/136/EC; <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF>

25 Privacy Policies.com: Ultimate Guide to EU Cookie Laws; <https://www.privacypolicies.com/blog/eu-cookie-law/>

5. How to improve wrap contracts in terms of notice and user's assent?

After even a brief analysis of the problems and case law concerning wrap contracts' and declarations of will made in order for them to be concluded, it can be summarized that there are some things ISPs could do to improve wrap contracts.

First, it seems that the more a wrap contract looks like a Clickwrap, the fewer problems ISPs and users will have later on. ISPs will have less risk, if contract's enforceability is discussed in front of the court, and users will be better informed what action constitutes assent to terms of use (Cicirelli, 2016:995, 1013; Kamantauskas, 2015:51, 8). Also, there has to be a notice that clicking means assent to the terms found in a Clickwrap. Furthermore, a user should not be able to proceed to a website if he/she does not click the box manifesting assent to the terms, which have to be available in a visible screen. Many authors agree that clicking is the surest way of giving assent and later proving it. It is not overly burdensome to users and it leaves little or no room for doubt that users are aware that they have entered into a contract by clicking (Macdonald, 2011:305).

Regardless of all that was said, if the terms are composed in a form of a Browsewrap, a hyperlink has to be discernible in lettering and color. It has to be located on a website so that an average user would have no problem finding it. Terms should not be composed in a way requiring users to click on multiple hyperlinks to view them. Also, if a Web site consists of more than one page or can be accessed through more than one page, terms of use should be visible on all of those pages (Brehm, Lee, 2015:7). Most importantly, an ISP has to inform users by using a visible, simple and straightforward phrase, stating that they are assenting to the terms of use by staying on a website or downloading from it.

If a contract is made in the form of a Shrinkwrap, the best way to ensure that there are no problems with its enforceability is usually to let users return purchased products, if they do not agree with the terms found in the contract. They might not be able to read it before assenting to it, but they should be given an opportunity to withdraw from it within a certain time frame.²⁶

However, the biggest problem with improving wrap contracts seems to be that even ISPs do not take them seriously and do not consider them important. It is understandable that there were issues when wrap contracts were a novelty. But, a lot of time has passed since then and the courts still encounter the same problems. Therefore, it seems that ISPs have done little to nothing in order to improve wrap contracts, in terms of their conclusion (Kamantauskas, 2015:78).

26 As stated in *ProCD, Inc. v. Zeidenberg*. See note 7.

6. Conclusion

This paper has tried to demonstrate different ways of declaring one's will in order to enter into typical types of wrap contracts. As shown, those declarations vary: from straightforward (clicking) through unconventional (tearing a plastic wrapping) to extremely ambiguous ones (just browsing the website). Each of the wrap contracts analyzed in this paper has its own set of issues but, according to the presented literature and case law, it seems that Clickwraps are the best way to go. They are almost risk free for ISPs and foolproof for users. They are convenient for users who will not have to look for them and who will have no doubt as to what they have assented to. They are useful for ISPs because, if there is trouble, they only need to prove that a user clicked that he/she agreed to the terms of the contract.

However, many ISPs still choose Browsewraps, thus ending in problems when they have to prove that users were notified about contracts' existence, that they were given an opportunity to read them, and that they knew what their behavior constituted. It is understandable that Browsewraps do not overwhelm users by burdening them with boring legalese, which makes them user-friendly and convenient. However, if a Browsewrap's enforceability is questioned in front of the court, problems will emerge, mostly for an ISP. User friendliness aside, it almost seems as though ISPs use Browsewraps for another reason: to hide the fact that there are terms of use somewhere on the website, regardless of the fact that these terms are crucial for user-ISP relationship.

Literature

- Davis, N. J. (2007). Presumed Assent: The Judicial Acceptance of Clickwrap, *Berkeley Technology Law Journal* 22, no. 1. 577-598
- Founds, G. L. (1999). Shrinkwrap and Clickwrap Agreements: 2B or Not 2B, *Federal Communications Law Journal* 52, no. 1. 99-124
- Garcia, M. (2013). Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum, *Campbell Law Review* 36, no. 1. pp. 31-74
- Gavella, N. (2017) *Privatno pravo*, Narodne novine, Zagreb
- Kamantauskas, P. (2015). Formation of Click-Wrap and Browse-Wrap Contracts, *Teises Apzvalga Law Review* 12, 51-88
- Kim, N. S. (2007). Clicking and Cringing, *Oregon Law Review* 86, no. 3. 797-864
- Kim, N. S. (2011), Contract's Adaptation and the Online Bargain, *University of Cincinnati Law Review*, 79, no. 4. 1327-1370

- Kim, N. S. (2013). The Duty to Draft Reasonably and Online Contracts. In: L.A. DiMatteo, Q.Zhou, S.Saintier, K.Rowley (ed.), *Commercial Contract Law*, Cambridge University Press (pp.181-200)
- Kim, N. S. (2014). The Wrap Contract Morass, *Southwestern Law Review*, 44 no. 2. 309-326
- Kim, N. S. (2016). Online Contracting, *Business Lawyer* 72, no. 1 (A). 243-253
- Kim, N. S. (2016). Wrap Contracting and the Online Environment: Causes and Cures. In: *Research Handbook on Electronic Commerce Law, Research Handbooks in Information Law*, John A. Rothchild (B) (pp. 11-34).
- Klarić, P., Vedriš, M. (2014). *Građansko pravo*, Narodne novine, Zagreb
- Kunz, C.L., Ottaviani J.E., Ziff E.D., Moringiello J.M. (2003). Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, *Business Lawyer (ABA)* 59, no. 1. 279-312
- Macdonald, E. (2011). When is a Contract Formed by the Browse-Wrap Process, *International Journal of Law and Information Technology* 19, no. 4. 285-305
- Matić, T. (2008). Formulary Contracts in the Electronic Form, *Zbornik Pravnog Fakulteta u Zagrebu* 58, no. 3. 779-804
- Petrić, S. (2002). O nepravičnim klauzulama općih uvjeta ugovora u pravo Europske unije, *Zbornik radova Pravnog fakulteta u Splitu*, 39, no. 1-2. 59-82
- Scranton, D. F. (2002). Clickwrap or Browsewrap: Enforceable Website Agreements, *Banking Law Journal* 119, no. 3. 290-299
- Smits J. M. (2017) *Contract law, A comparative introduction*, 2nd edition, Edward Elgar, Cheltenham, UK – Northampton, MA, USA
- Tontodonato, J. A. (2000). Deep-Linking: Sure You Can Exploit My Trademark, Weaken Its Strength, and Make Yourself Money While Doing It, *Thomas Jefferson Law Review* 22, no. 2. 201-218
- Cicirelli, L. (2016). Online Shopping: Buy One Lose Legal Rights for Free, *Seton Hall Law Review* 46, no. 3. 991-1020
- Condon Jr. W.J. (2003). Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements, *Regent University Law Review* 16, no. 2. 433-458
- Ćesić, Z. (2021). *Komentar Zakona o obveznim odnosima*, Posebni dio, Knjiga druga, Libertin naklada, Rijeka

Legislation

Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Retrieved 28 September 2021 from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF>

Zakon o nasljeđivanju (Inheritance Act), *Narodne novine Republike Hrvatske*, br. 48/03, 163/03, 35/05, 127/13, 33/15, 14/19

Zakon o obveznim odnosima (Obligations Act), *Narodne novine Republike Hrvatske*, br. 35/05, 41/08, 125/11, 78/15, 29/18

Web sources

Brehm, A. S., Lee, C. D. (2015). Click Here to Accept the Terms of Service, *Communications Lawyer* 31, no. 1. (str. 4-7) Retrieved 28 September 2021 from https://images-insite.sgp1.digitaloceanspaces.com/dunia_buku/koleksi-buku-lainnya/communications-lawyer-vol-31-no-1-pdfdrivecom-56661583873353.pdf

Kim, N. S. (2010). *Wrap Contracts and Privacy*, Association for the Advancement of Artificial Intelligence Press Technical Report SS-10-05. Retrieved 28 September 2021 from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580111&download=yes

Odin Law and Media (2018): *The differences between a EULA, TOS and SLA*, (1 August 2018). Retrieved 28 Sept. 2021 from <https://odinlaw.com/the-differences-between-a-eula-tos-and-sla/>

Private Policies.com (n,d): *EULA versus Terms and Conditions*. Retrieved 28 September 2021 from <https://www.privacypolicies.com/blog/eula-vs-terms-conditions/>

Private Policies.com (n,d): *Ultimate Guide to EU Cookie Laws*. Retrieved 28 September 2021 from <https://www.privacypolicies.com/blog/eu-cookie-law/>

Case law

AvePoint, Inc. v. Power Tools, Inc. (2013), U.S District Court for the Western District of Virginia, Retrieved 28 September 2021 from <https://cases.justia.com/federal/district-courts/virginia/vawdce/7:2013cv00035/88318/62/0.pdf?ts=1411607234>

El Majdoub vs. CarsOnTheWeb.Deutschland GmbH. (2015), CJEU, retrieved 28 Sept. 2021 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0322&from=EN>

Groff v. America Online, Inc. (1998), C.A. No. PC 97-0331, Superior Court of Rhode Island, SC, retrieved 28 Sept. 2021 from <https://casetext.com/case/groff-v-america-online-inc>

Hoffman v. Supplements Togo Management, L.L.C. (2011), Superior Court of New Jersey, Appellate Division, A-5022-09T3, retrieved 28 Sept. 2021 from <https://law.justia.com/cases/new-jersey/appellate-division-unpublished/2011/a5022-09-opn.html>

Hubbert v. Dell Corp. (2005), Appellate Court of Illinois, 5th District, retrieved 28 Sept. 2021 https://scholar.google.com/scholar_case?case=16411101656811779909&q=359+Ill.App.3d+976&hl=en&as_sdt=2002

Long v. Provide Commerce, Inc., Court of Appeal, Second District, California, B257910, 2016, Retrieved 28 Sept. 2021 from <https://caselaw.findlaw.com/ca-court-of-appeal/1729412.html>

Pollstar v. Gigmania, Ltd. (2000) U.S. District Court, E.D. California, retrieved 28 Sept. 2021 https://scholar.google.com/scholar_case?case=1097855858429084707&q=170+F.Supp.2d+974&hl=en&as_sdt=2002

ProCD, Inc. v. Zeidenberg (1996), U.S. Court of Appeal, 7th Circuit, Illinois, retrieved 28 Sept. 2021 from https://scholar.google.com/scholar_case?case=11811009805458694240

Sgouros v. TransUnion Corp. (2016), U.S. Court of Appeal, 7th Circuit, Illinois, retrieved 28 Sept. 2021 from <https://caselaw.findlaw.com/us-7th-circuit/1730191.html>

Specht v. Netscape Communications Corp. (2002), U.S. Court of Appeals, 2nd Circuit, New York, retrieved 28 Sept. 2021 from https://cyber.harvard.edu/stjohns/Specht_v_Netscape.pdf

Step-Saver Data Sys., Inc. v. Wyse Tech (1991), U.S. Court of Appeals, 3rd Circuit, Philadelphia, PA, Retrieved 28 Sept. 2021 from <https://cyber.harvard.edu/metaschool/fisher/contract/cases/step.htm>

Др. сц. Дубравка Класичек,

Ванредни професор,

Правни факултет, Универзитет Ј. Ј. Стросмайера у Осигеку,

Република Хрватска

МАНИФЕСТАЦИЈЕ ВОЉЕ У ДИГИТАЛНОМ ОКРУЖЕЊУ И ONLINE УГОВОРИ

Резиме

Манифестације воље дате у дигиталном окружењу, несумњиво се разликују од оних која се дају у „физичком“ свету, а поједине особе можда нису ни свесне њиховог значаја. Велики број особа свакодневно приступа разним Web страницама пружаоца интернетских услуга (Internet Service Providers). Да би то учинили, обично морају пристати на услове пословања пружаоца услуга (Terms of Service), који уређују споменуто Web страницу. Овакве манифестације воље понекад су директне: након што кликне на ‘Слажем се’, особа постаје свесна да је пристала на услове пословања, без обзира да ли их је прочитала или не. Оно што је још важније, особа је свесна (или би требала бити) да је закључила неку врсту уговора с пружаоцем интернетске услуге – тзв. clickwrap уговор. Међутим, на неким Web страницама, особа пристаје на услове пословања пружаоца интернетских услуга самим тим што остаје на страници и прегледава њен садржај – тзв. browsewrap уговори. Овакве манифестације воље нису директне и корисник често није свестан да је склопио уговор с пружаоцем услуге. Надаље, услови пословања се често мењају, а пружалац интернетске услуге понекад неће обавестити кориснике о томе. У тим случајевима корисници неће бити свесни промена услова те чињенице да настављањем коришћења пружаочевих услуга, пристају на те измјене. Ово су само неки од примера очитовања воље у дигиталном окружењу, код којих особа која је очитовање учинила, уопште није свесна онога што се догодило. Чини се да, из неког разлога, људи мање озбиљно схватају оно што се догађа на интернету од онога што се догађа у “физичком” свету. Овај ће рад покушати показати да је то озбиљна грешка коју корисници услуга могу направити у дигиталном окружењу.

Кључне речи: манифестација воље, услови пословања (ToS), пружалац интернетских услуга (ISP), online уговори, clickwrap и browsewrap уговори.