

# Are websites adequately communicating terms & conditions link in a browse-wrap agreement?

Indranath Gupta [1]

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## Abstract

The recent Canadian Supreme Court decision in *Century 21* said that a browse wrap agreement is enforceable once the presence of the link providing the terms and conditions (hereinafter t&c) is adequately communicated to the user of the website. In a browse wrap unlike the act of clicking in a click wrap, an agreement becomes enforceable once the user moves beyond the homepage of a website. The act of moving beyond is deemed as the acceptance of the existing t&c. Browse wrap's enforceability thus depends on the way a website chooses to communicate the t&c link to the user. In comparison to the European courts, the American courts have mostly dealt with matters related to enforceability of browse-wrap agreement and have issued number of guidelines on adequate communication of the t&c link. Based on the guidelines issued by the American and Canadian courts, this article looks at the trend in communication practices of websites registered in Europe. In this context, the communication methods undertaken by websites are assessed from data collected in the course of an empirical survey. While concluding, this article shows that the websites in the sample do not adequately communicate the presence of the t&c link, and thereby pointing to a trend that may affect enforceability of browse-wrap agreements in European websites.

Keywords: Browse-wrap, adequate communication, empirical survey

## 1. Introduction

Browse-wrap and click-wrap are two prominent methods of communicating the t&c in web-based agreements, and clauses in such agreements depends on the nature of services offered by the websites (George C & Scerri J, 2007; Mann J R & Siebeneicher T, 2008). There is a difference in how websites communicate the t&c in browse-wrap and click-wrap agreements. In a click-wrap agreement the t&c is in a text box and is communicated by displaying on the computer screen of the user. The user is given the option to accept the t&c by clicking on an 'I accept' button typically placed at the bottom of the text box. Unlike click-wrap, in a browse-wrap or a web-wrap agreement (Chao Y S, 2001; Femminella J, 2003), the t&c is not in a text box and there is no option for the user to show acceptance by clicking on a button. On the contrary, the t&c is retrievable by clicking on a link at the bottom of a website's homepage and the act of moving away from the homepage to other pages of that website constitutes acceptance (Rembarran I & Hunt R, 2007). In this situation, the user may not be aware of the existence of t&c link (Chao Y S, 2001; Krammer D & Monahan J, 1999-00; Das M K, 2002; Deveci A H, 2007). Therefore, adequate communication of the link holds the key to the enforceability of browse-wrap agreements, while there may be additional problems in enforcing specific terms in these agreements (Hetcher S, 2007-08a; Hetcher S, 2007-08b; Trakman E L, 2009). Over the years, there have been questions about enforcing such agreements owing to inadequate communication (*Ticketmaster Corp v. Tickets.com*, 2000; Das MK, 2002; Streeter D, 2002; Kunz LC, 2003). These questions relate to the presentation and visibility of t&c links, and include issues like position of the link, font size, font colour and background colour of the homepage (Chao Y S, 2001; Block D, 2001-02, Sandeen K S, 2002-03). In comparison to the European courts, the American and Canadian courts have

decided on matters relating to browse-wrap agreements and have issued guidelines about adequately communicating the t&c link to the users of the website (*Specht v. Netscape Communications* 2001; *Century 21 Canada Limited Partnership v. Rogers Communication Inc* (2011 BCSC 1196) 2011; *Pollstar v. Gigmania* 2000). These guidelines voice for a better presentation and greater visibility of the t&c links. Although the cases decided so far show the practices of websites registered in the US and Canada, there is no existing indications on practices of European websites.

This article looks at the practices of websites registered in Europe based on the guidelines issued by the American and Canadian courts. Analysis of data sample collected in the course of an empirical survey show how far websites adequately communicate the presence of the t&c link to the users. While concluding, the article points to a trend in European websites to communicate such link inadequately.

## **2. T&c communication essential in a browse-wrap**

Websites communicate their t&c in the internet following web-based agreements and they are categorised under click-wrap and browse-wrap ( *Specht*, 2001; Casamiquela J R, 2002). These types of agreements, which are drawn by the websites, predominantly decide the contractual obligations of the user. In a click-wrap, the agreement containing the t&c provides explicit option for the user to click on 'I accept' button to show acceptance of the t&c., whereas in a browse-wrap agreement, a website does not provide the user with an explicit option to click and view the t&c in the agreement. Instead, the link for t&c is typically present at the bottom of the homepage of a particular website (For example, YouTube, Amazon and eBay; *Specht* 2001). According to the browse-wrap agreement, a user is bound by the t&c once he starts using the service by moving away from the homepage (For example in YouTube.com and eBay.co.uk). The need for communicating the t&c to the user needs further analysis due to the structure followed in browse wrap agreements.

### **2.1 Without communication user may not be aware of t&c**

In browse-wrap, a user is not explicitly notified about the t&c unlike the click-wrap where he specifically accepts the t&c by clicking 'I accept' (Rembarran I & Hunt R, 2007). The user in a browse-wrap is allowed to move beyond the homepage of a particular website without being pointed to the t&c. It is not that the user needs to be reminded of the terms every time he moves to different pages from the homepage. Constant notification may not be a pleasant experience for the user browsing the website and this process of constant notification may increase the browsing time. However, there should be an initial communication about the existing t&c otherwise, a user may not be aware of the agreement or the t&c contained therein (Zynola T, 2004; Pistorius T, 2004). A website should therefore, focus on the methods of communication to facilitate user awareness about browse-wrap agreements.

### **2.2 Issue of adequacy present in communication**

Other than the requirement of communicating t&c, there is an issue of adequacy in relation to such communication made by the websites (Das M K, 2002). It is understandable that websites of all kinds may not be able to reach consensus about a set standard of adequacy. However, it is essential to set up certain basic guidelines about the ways a website should communicate the t&c to the users irrespective of the type of the website. Otherwise, there would no uniformity prior to considering the enforceability of a browse-wrap agreement. Based on guidelines, the ways of communication will decide as to whether the message about t&c is adequately conveyed to the user of the website. Therefore, not only there is the requirement of communicating the t&c, there is the additional burden on the websites to communicate such terms in an adequate way (Robertson M, 2003).

### **2.3 Adequate communication increases transparency of website practices**

There may be an additional issue of transparency, while dealing with adequate communication practices. With the possibility that a user may not be aware and have doubts over the existence of t&c, adequate communication of such terms increases the transparency surrounding the browse-wrap agreements. In the

absence of transparency, it would be difficult for the websites to claim user acceptance with regard to the agreement in question. Further, in absence of acceptance it would be difficult to enforce browse-wrap agreement (Maggs E G, 2002; Trakman E L, 2009). Websites in their own interest should be transparent in communicating the existing t&c to increase the chances of enforcing browse-wrap agreements. While the aforementioned issues exceedingly bring forth adequate communication of t&c in a browse-wrap, over the years courts have developed certain guidelines about the means to communicate t&c adequately. In this regard, mostly American decisions, and one recent Canadian decision came up with such guidelines.

### **3. Notice of t&c is mandatory: Canadian Supreme Court in *Century 21* case**

The Supreme Court of British Columbia in *Century 21 Canada Limited Partnership v. Rogers Communication Inc* (2011 BCSC 1196) decided on the enforceability of a browse-wrap agreement. *Century 21*, the plaintiff in this case used browse-wrap agreement to communicate the t&c. The defendant extracted information out of the plaintiff's website and used it for the real estate business. Based on the claim that the defendant had breached the t&c pertaining to the plaintiff's website, the Canadian Supreme Court decided the matter in favour of the plaintiff. In the course of the judgement, the court said that there was sufficient notice about the t&c and the defendant was aware of such conditions. In fact, the defendant did not dispute on the existence and adequate communication of the t&c. The defendants continued extracting information even after the solicitors representing the plaintiffs had sent a letter notifying the breach of t&c.

#### **3.1 Awareness of t&c essential for browse-wrap enforceability**

Before deciding on the enforceability, the court made sure that the defendant was aware of the t&c. Although the responsibility of communication rests on the website, in this case the letter in the hands of the defendant was self evident of his knowledge about the terms in the agreement. It was of course relatively easy for the court to decide this matter, since the defendant did not dispute the presence of t&c. There was similar situation in a previous Canadian decision of *Kanitz v. Rogers Cable Inc* (2002). In this case, the agreement that was physically signed by the parties had a clause about future online amendments. Later the defendants, Rogers Cable, amended the terms through a browse-wrap agreement and the court held that the t&c contained in such agreement was adequately communicated to the plaintiff. The important aspect is the requirement of adequate communication by making sure that the user of a website is aware of the browse-wrap agreement. This is because the user's conduct of moving away is considered as an implied acceptance of the existing t&c in a browse-wrap agreement (*Pollstar*, 2000).

#### **3.2 *Century 21* did not comment on guideline for adequate communication**

This decision is incomplete to the extent that the Supreme Court in Canada did not comment on adequate communication of the t&c. There was no such opportunity to explore about adequate measures in the context of the letter provided by plaintiff's solicitors. Intimation of the existing t&c by way of letter is an effective way, although the option of knowing the terms through a letter may not be available in all browse-wrap cases. In fact, it is not a feasible option for the websites to provide a letter to every user browsing a particular website. Therefore, alternative measures and ways are to be explored for adequately communicating the t&c link. The aforementioned analysis recognises a greater need to develop a basic guideline for all the websites engaging in browse-wrap agreements. Guidelines about adequate communication in relation to t&c is further analysed in the background of the American decisions.

### **4. American guidelines in browse-wrap: adequate communication required for t&c**

The term 'browse-wrap' was formally introduced in the American decision of *Pollstar v. Gigmania Ltd*, (2000). Other than assigning the name, the case delivered certain guidelines about the desired practices of websites

in relation to adequate communication of t&c. In this case, it was alleged that the defendant *Gigmania*, in violation of the t&c, downloaded and scraped information off the claimant's website. *Pollstar* provided the t&c in a browse-wrap agreement. The court said that certain practices on the part of the plaintiff did not facilitate towards adequate communication of t&c. They were in relation to the colour of the fonts representing the link to the t&c and such representation was not made in a suitable background. The colour of the fonts was grey, not underlined and they were placed on a grey background. Even the link for the t&c was placed among other links at the bottom of the homepage of the plaintiff's website. Moreover, many of the links present in the cluster were not active and on clicking, they did not connect to different web pages. In the opinion of the court, the aforementioned circumstances would create confusion in the minds of the user, and he may not be aware of the existence of t&c (*Cvent, Inc. v. Eventbrite*, 2010). In spite of the unsatisfactory methods of communication, the fate of the case was not decided on adequate communication. The court held the matter in favour of *Pollstar* citing instances where users seldom get the chance to see the t&c in relation to a particular service.

Although the decision did point to the position of the link at the bottom of the homepage, the relevance of such position was taken up in *Ticketmaster Corp v. Tickets.Com* (2000). Ticketmaster's browse-wrap agreement had a provision, which constituted deep-linking as an infringement under the t&c. Deep-linking is a practice in the internet, which facilitates the process of bypassing the homepage of a particular website (Sangal T, 2010). The court in this matter said that the link for the agreement containing the t&c, was only visible to the user if he had scrolled down to the bottom of the homepage. Under these circumstances, the user is not adequately communicated about the presence of t&c. The position of the link was again questioned in the case of *Specht v. Netscape Communication Corp* (2001). Netscape, the defendant in this case, wanted to enforce an arbitration clause in defence of an alleged claim related to breach of privacy. Such a clause was present in the t&c link of a browse-wrap agreement. In the course of the judgement, the court said that the link at the bottom of the homepage could not be considered as adequate to bind the user in an enforceable agreement. A similar observation was made in the much later case of *Hines v. Overstock.com* (2009). The defendant charged a fee based on a clause in the browse-wrap agreement, and the link for such clause was placed at the bottom of the homepage. Based on the position of the link, the court said that there was no adequate communication.

If the aforementioned decisions questioned certain policy measures as an obstacle to adequate communication, there have been instances when websites successfully claimed communication, which was adequate to facilitate enforceability of browse-wrap agreements (*Register.com v. Verio, Inc.*, 2000). In *Southwest Airlines Co. v. Boardfirst LLC* (2007), the defendant in advance issued boarding passes to the passengers from Southwest's website. The boarding passes were useful to the passengers, since Southwest did not designate seat numbers. Once Southwest came to know about this activity, they immediately notified the defendant and referred to the t&c in the browse-wrap agreement. The defendant, however, ignored such notification and continued with their previous act. In this matter, the court held that the notification given by Southwest was adequate communication in relation to the t&c. This point of view has been previously followed in the case of *Dewayne Hubbert v. Dell Corp* (2006), wherein notification followed by blue coloured link of t&c constituted adequate communication. Both these cases show resemblance to the Canadian decisions in the sense that prior notification of the t&c was present (*Century21*, 2011; *Kanitz*, 2002).

Other than the explicit notice of t&c in the aforementioned cases, there may be instances when the link to the t&c may be immediately visible to the user without having to scroll down at the bottom of the homepage. The aspect of 'immediate visibility' of t&c was considered as adequate communication in the case of *Major v. McCallister* (2009). In this case, the defendant *Major* provided information to a website, while locating contractors to remodel her house. The website had the link to t&c on every page in addition to the homepage. Furthermore, *Major* was provided with the link to t&c as she entered her information and therefore, the link was immediately visible. The position of the link made *Major* aware of the t&c, and the existence of t&c was adequately communicated. The aforementioned decisions have provided some guidelines as to how t&c link can be adequately communicated in a browse-wrap agreement. These guidelines need further analysis for a better understanding of the requirement of adequate communication.

#### **4.1 The link at the bottom of homepage is not adequate**

Cases have been critical about the position of the t&c link, since this method of communication is not appropriate for increasing t&c link awareness among users. The link is not visible unless the user scrolls

down to the bottom. In some instances, however, the user may not need to scroll down depending on the hardware components used by him. It depends on the screen resolution of the monitor and the graphics ability of the user's computer. Although the scrolling down requirement to some extent depends on the computer of the user, most of the times, the user needs to scroll down for the t&c link. The position of the link at the bottom of the homepage has been repeatedly questioned in all of the aforementioned cases. This makes it a single most important issue that works against the requirement of adequate communication and enforceability of browse-wrap agreements.

## **4.2 Notification complements the link at the bottom**

Communication of t&c is adequate when some explicit notification complements the presence of the link (*Southwest Airlines* (2007); *Dewayne Hubbert* (2006); *McCallister* (2009) & *Century 21* (2011)). The cases approved adequate communication made either through a letter or when the t&c link is placed at a position immediately visible to the user. On a general note, this approval means that information about t&c has to be either explicit or the link must be presented in a manner, which is accessible without having to look for its existence (O'Rourke A M, 2002). Placing the link in the immediate visibility may be possible when the user is providing some information to the website. In the *McCallister* case, the plaintiff provided some information to the website for remodelling his house. However, it is a different proposition when the user of a website is not providing information. In this context, use of rich variety of typefaces, user interfaces and adequate presentation techniques may prove useful in adequately communicating the t&c (Gomulkiewicz W R & Williamson M, 1996). Merely the link will not be sufficient for the website to satisfy the requirement of presenting t&c adequately and in a transparent way (*DeFontes v. Dell Inc*, 2009; *Moringiello M J & Reynolds L W*, 2005; *Wilhelmi J Lydia*, 2002-03).

## **4.3 Increase in overall visibility of the t&c**

The aforementioned cases have been critical about font size, the colour of the fonts and the background in which they are represented. Further, the link for the t&c usually finds place in the cluster of all other links present at the bottom of homepage. All these aspects relate to the relative visibility of the t&c link in comparison to the links in the cluster. There are certain colour combinations like the grey coloured fonts in grey background that works against effective communication. The decision in this respect underlines the importance of choosing the right colour combination that automatically improves the visibility of the t&c link (*Pollstar*, 2000, *PDC Laboratories v. Hach Co*, 2009). Without the right colour combination, the effective notification of the link would be incomplete and result in failure of adequate communication. There is questionable communication when the link is placed at the bottom of the homepage with other links, especially when all links are of the same font colour and size (*Pollstar*, 2000). The court felt that when user awareness about the presence of t&c link at the bottom of the homepage is doubtful, it would be further difficult to identify such link among all other links. Keeping these guidelines in mind, a website placing the t&c link with other links must notify the user when he starts to access the website. In this context, a dynamic text box near the website's address bar may notify the user about the t&c link at the bottom (For example You tube is using this type of box to notify changes in privacy policy). This would ensure adequate communication and facilitate in enforcing browse-wrap agreements.

The cases decided in US and Canada suggests that the entire responsibility of adequately communicating the t&c rests on the websites. Users on their part are not expected to look for the t&c link on the homepage, but should be provided with the link in a way to reduce ambiguity surrounding the browse-wrap agreement's existence. There is room for transparency where the presentation of the t&c link is concerned. Following the guidelines coming out of the US and Canadian decisions, there is further analysis on websites that are registered in Europe. In this regard, data for analysis has been collected in the course of an empirical survey and this analysis points to the trend in communication practices of the European websites.

## **5. Empirical survey results: Adequate communication of t&c link absent in European websites**

Cases concerning browse-wrap agreements in the past ten years show that websites mostly do not communicate t&c adequately to the users. The objective of analysing data from an empirical survey is to

observe the trend in communication practices of websites at a given point of time. The websites used in this context are all European, meaning they have all registered their domains in Europe. Courts in Europe have given little guidance on what constitutes adequate communication of t&c link in browse-wrap agreements. In this context, the guidelines issued by the American and Canadian courts are followed to reflect upon practices of European websites.

## **5.1 Methodology in the empirical survey**

The sample used for analysis consists of a database (hereinafter Database 'A') of 50 websites (on file with the author). This sample has been obtained from a database (hereinafter Database 'B' <http://counter.lsdev.it/#main>) of five hundred websites. Database 'B' has been used to analyse websites' practices, while managing online intellectual properties, privacy, data ownership, etc. Websites in this database are further categorised under music on demand, web radio, video games, video on demand, video hosting service and multimedia. These websites are all European and were selected based on the ranking offered by Google AD Planner. There were two parameters prior to website selection from database 'B' to database 'A'. The primary criterion for website selection was the language of communication. In the present case, websites communicating in English were only considered. To get the sample size subsequently these selected websites were filtered based on a ranking system offered by Alexa <http://www.alexa.com>. The sample of 50 websites comprises of 11 Music on Demand, 8 Web radio, 9 Video game, 6 video on demand, 12 video hosting service and 4 multimedia websites.

In database 'A', website attributes for analysis were divided under three heads. The first heading consists of data revealing the position, expression and notification of the t&c link in the websites. Visibility aspect of the t&c link is the second heading and font size, colour, the chosen background are the attributes under this heading. In this regard, common human sensory perception of identifying most things has been adopted to assess these attributes. The final heading looks at the number of similar looking links present at the bottom of the homepage with the t&c link. This similarity is in relation to the size and colour of the fonts. The presence of three, five and seven or more links have been considered to assess the clarity of the t&c link among other similar looking links.

There are certain limitations in the methodology followed in the empirical survey. The first aspect is the size of the sample considered for the current analysis. A bigger sample would be required when considering websites in all European languages. For the purpose of this article, the current sample observes a trend in the practices of websites with regard to adequate communication of t&c. The second aspect relates to the language of communication of the websites. This analysis is only limited to websites communicating in English language and has left out websites following other European languages.

## **5.2 Results of empirical survey: guidelines not reflected in websites' practices**

Guidelines issued by the American and Canadian courts are followed in this section to analyse the results of the empirical survey. The analysis is based on the primary requirement of adequately communicating the t&c link. The t&c links are present in all of the sample websites and such links are positioned at the bottom of their respective homepages. Although the links are present, there is no uniformity observed in the representation of such links. The article began with t&c as a representation of the clauses in a browse-wrap agreement, but in practice representation may be made in various ways. In the sample, 'terms of service' is the most popular way of representing the link and 30% of the total number of websites follow this method of communication. Other popular ways are 'terms and conditions' (20%), 'conditions of use and sale' (4%) and 'terms of use' (26%). In addition to the popular ways, 20% of the total websites have adopted different methods, while communicating the t&c link. All these different methods have been grouped under 'others'.

The second observation was in relation to the visibility of the t&c link. At the initial stage of browsing, the user is not notified about the existing link at the bottom of the homepage and no additional effort is present on the part of the websites to inform users. This observation did not extend to notifications in case of users giving away personal information to websites. Other than the aspect of notification, the visibility issue of the t&c link has been observed from three angles: size of the font, colour of the font and colour of the background where the t&c link is represented. In this context, 46% of the websites in the sample tend to adopt fonts of smaller size, while 38% and 16% of websites have adopted medium and big size fonts respectively. Further to

smaller size fonts, the colour combination adopted for the font and the background has been same for 26% of the websites in the sample. In all these cases, the colour has been grey. The other combinations have been black & grey (2%), black & white (8%), grey & white (10%), white & black (6%), white & grey (10%), white & blue (6%) and other combinations (32%). As to the issue of t&c being with other links, 58% of the total number of websites in the sample place 7 or more similar links at the bottom of their respective homepages. About 30% places 5 or more similar links, whereas 12% of the websites places 3 or more links. These links are similar to the t&c link in terms of font colour and size.

### **5.2.1 Link at the bottom of the homepage not adequate without notification**

The figures representing the sample websites show that all European websites place the t&c link at the bottom of their respective homepages and these links exist without any notification. In the past, the American and Canadian cases have decided against the enforceability of browse-wrap agreement because of inadequate t&c communication. Although there is no equivalent decision in Europe concerning a browse-wrap agreement's enforceability, in the background of the precedent set by the American and Canadian decisions, the present trend in the communication practice of European websites' is not adequate. The overall practice of placing the t&c link at the bottom of a homepage is rather interesting. Not only the link has been placed at the bottom of European websites, but consistently in all of the cases decided so far in America and Canada (Han S S, 2010). This means that the link position representing the t&c is a standard practice in the internet, although this is a standard adopted by the websites and not by courts. Without adequate communication, this practice is bound to face rejection in the eyes of law and in this context, Europe is unlikely to decide otherwise ( *Douglas v. Talk America Inc*, 2006; Wilson E, 2008-09).

The reason behind the position of the link may be connected to a couple of issues: commercial reality in online business and design of the websites. Based on the commercial reality argument, websites may insist on prioritising the links on their homepage. Websites would naturally want to promote the service links connected to business growth at the top. Business of a website depends on the amount of traffic generated and browse-wrap agreement acts in facilitating website browsing, and increases web traffic for websites (Conklin S R, 2007-08). It is understandable for websites to worry about revenue, since the whole process of browsing will slow down if users are asked to click on 'I accept' every time they visit a particular website. However, this argument is not free from the suspicion that websites, intentionally keep the t&c link somewhat hidden from the users for subsequent legal advantage ( *Pollstar* 2000). On the design front, the appearances of finished websites do not completely depend on the type of business (Gussis GG, 1998). It also depends on the type of hardware and software used by the user. For example, there is no uniformity in the use of operating systems and web browsers. This consideration does not exonerate the websites and going by the cases decided so far, the responsibility of adequately communicating the t&c rests only on the website (Lemley A M, 2006-07). Websites must come up with user interfaces and typefaces that are dynamic and adjusts to the platform of the user (Mann J Ronald & Siebeneicher, 2008; Hartzog W, 2010-11).

While there are problems with the link's position and adequate communication, lack of uniformity in the representation of such link may create additional ambiguity (Block D, 2001-02; Sandeen K S, 2002-03). This may be sorted out by notifying the presence of conditions at the bottom of a website's homepage (Davidson D, 2000; Femminella J, 2003; Streeter D, 2002; Kunz L C & others, 2003; Devenci A H 2007). A text box, which is placed near the address bar of a website, is a good option to notify the presence of t&c.

### **5.2.2. The t&c link not adequately visible**

The guidelines issued by the American and Canadian courts suggest that the visibility of the t&c link must be considerably improved. Small font size and poor presentation due to the combination of similar font and background colour does not facilitate in adequately communicating the presence of the t&c link. Data obtained from the sample in database 'A' shows that majority of the websites use small fonts to represent the t&c link. The background colour in combination with the font colour is not conducive enough to increase the visibility of the small fonts. Following the aforementioned decisions, the attributes of the t&c link in the data sample do not facilitate towards adequate communication of such link to the users. This issue of representing the link in small font size questions the intent of websites. It shows that not enough importance is given by the websites, while presenting the t&c link to the users. The t&c link occupies the minimum possible space on the homepage, and the small sized link is pushed down at the bottom. There is also a sense of negligence combined with poor design skills in choosing the same colour for the font and the

background. Moreover, the small sized t&c link is bundled together with other similar looking links. This again shows less importance and attention is given to make the link conspicuous for the user. The aforementioned analysis points to the lack of intent and transparency on the part of the websites to communicate t&c adequately. Link representing the t&c should have a different visual appeal when it is placed among other links (Davison D, 2000; Sandeen K S, 2002-03).

Adequate visibility is also an issue in case of users who have special needs on health ground. This issue has not come to the forefront in any of the cases decided so far. For those users there may be an additional need other than what has been expressed in the guidelines issued by the courts. To some extent, there are special computers available in public places and libraries to cater to their needs. However, all depends on how far these computers are accessible to the person concerned. [2] The aforementioned analysis reveals the inadequacies present in the communication of the t&c link. Communication trend shows that European websites have similar limitations as the US websites. Under these circumstances, there is no reason to believe that the grounds on which US browse-wrap cases were decided would be any different in Europe.

## 6. Conclusion

The problems associated with adequate communication of the t&c link largely rests on the websites. In spite of the current trend, appropriate initiative and intent on the part of the websites may largely reduce the problems. One has to remember that the law relating to browse-wrap will continue to evolve owing to the ever-changing nature of websites. Even with the possibility that the user interface may change in future, the basic requirement of adequate communication will remain the same. Although the problems notified relates to the communication process in browse-wrap agreements, these guidelines may be an example for websites in the internet to show better response in matters of communication with the users.

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[2] The author is indebted to reviewer 'B' of EJLT for highlighting this aspect

## References

Block D (2001-02) 'Caveat Surfer: Recent Developments in the Law Surrounding Browse-wrap agreements, and the future of consumer interaction with websites' *Loyola Consumer Law Review* 14

Casamiquela J R (2002) 'Contractual Assent and enforceability in cyberspace' *Berkeley Technology Law Journal* 17

Chao Y S (2001), 'Contract Law- Electronic Contract Formation- District Court for the Central District of California Holds the a web-warp site license does not equate to an enforceable contract- *Ticketmaster Corp. v. Tickets.com, Inc*' *Southern Methodist University Law Review* 54

Conklin S R (2007-08), 'Be careful what you click for: An analysis of online contracting' *20 Loyola Consumer Law Review* 325

Counterfeit and Piracy Research <http://www.counter2010.org/events/counter-conference/preliminary-programme/parallel-session-five/> accessed 10 March 2010

*Cvent, Inc. v. Eventbrite, Inc. et al* , 2010 U.S. Dist. Lexis 96354( E.D. Va. September 14, 2010)

- Das M K (2002) 'Forum-Selection Clauses in Consumer Clickwrap and Browsewrap agreements and the 'reasonably communicated' test' *Washington Law Review* 77
- Davidson D (2000) 'Comment- Click and Commit: What terms are Users Bound to When They Enter Websites?' *William Mitchell Law Review* 26
- DeFontes v. Dell Inc*, No. 2004-137, 2009 R.I. LEXIS 142 (R.I. Dec. 14, 2009)
- Deveci A H, 'Consent in online contracts: old wine in new bottles' (2007) *Computer & Telecommunications Law Review* 13(8)
- Dewayne Hubbert v. Dell Corp* 359 Ill. App. 3d 976, 835 N.E.2d 113 (Ill App 5 Dist., August 12, 2005) app. denied, 217 Ill. 2d 601, 844 N.E.2d 965 (Ill. 2006)
- Douglas v. Talk America Inc* . (9th Cir., July 18, 2007)
- Femminella J (2003) 'Online Terms and Conditions Agreements: Bound by the Web' *St. John's Journal of Legal Commentary* 17
- George C and Scerri J, 'Web 2.0 and User-Generated Content: legal challenges in the new frontier' [2007] [http://go.warwick.ac.uk/jilt/2007\\_2/george\\_scerri](http://go.warwick.ac.uk/jilt/2007_2/george_scerri) accessed October 20 2009
- Gomulkiewicz W R & Williamson M (1996) 'A Brief Defense of Mass Market Software Licensing Agreements' *Rutgers Computer & Technology Law Journal* 22
- Gussis G G (1998) 'Website Development Agreements: A guide to planning and drafting' *Washington University Law Quarterly* 76
- Han S S (2010), 'Predicting the enforceability of Browse-wrap agreements in Ohio' *36 Ohio Northern University Law Review* 31
- Hartzog W(2010-11), 'Website design as contract' *60 American University Law Review* 1635
- Hetcher S (2007-08)a, 'User-Generated Content and the Future of Copyright: Part One- Investiture of Ownership' *Vanderbilt Journal of Entertainment & Technology Law* 10
- Hetcher S (2007-08)b, 'User generated and the future of copyright: part two- agreements between users and mega-sites' *Santa Clara Computer & High Technology Law Journal* 24
- Hines v. Overstock.com, Inc* (No. 09 CV 991 (E.D.N.Y. Sept. 8, 2009)
- <http://www.amazon.co.uk/> (accessed 17th February, 2010)
- <http://counter.isdev.it/#main> (accessed 10th July, 2010)
- <http://www.ebay.co.uk/> (accessed 17th February, 2010)
- <http://www.Youtube.com/> (accessed 17th February, 2010)
- <http://www.Youtube.com/>(accessed 20th February , 2012)
- Krammer D & Monahan J (1999-00) 'Panel Discussion – To Bot or Not to Bot: The Implications of Spidering' *Hastings Communications & Entertainment Law Journal* 22
- Kunz L C & others (2003) 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' *The Business Lawyer* 59
- Lemley A M (2006-07), 'Terms of Use' *91 Minnesota Law Review* 459
- Maggs E G (2002), 'Regulating Electronic Commerce' *American Journal of Comparative Law (Supplement)* 50
- Major v. McCallister*, Missouri Court of Appeals, No CD29871 (Dec. 23, 2009)
- Mann J R & Siebeneicher T (2008), 'Just one click: The reality of internet retail contracting' *105 Columbia Law Review* 984
- Moringiello M J & Reynolds L W (2005), 'Survey of the Law of Cyberspace: Internet Contracting Cases 2004-2005' *61 Business Law* 433
- Moringiello M J(2005), 'Signals, Assent and Internet Contracting' *57 Rutgers Law Review* 1307

- O'Rourke A M (2002), 'Common law and statutory restriction on access: contract, trespass, and the Computer Fraud and Abuse Act' *University of Illinois Journal of Law, Technology, and Policy*
- PDC Laboratories v. Hach Co* No. 09-1110 (C.D. Ill., Aug. 25, 2009)
- Pistorius T(2004), 'Click-wrap and web-wrap agreements' 16 *South African Mercantile Law Journal* 568
- Pollstar v. Gigmania* 170 F.Supp. 2d 974 (E.D. Cal. 2000)
- Register.com v. Verio Inc* 126 F.Supp. 2d 238 (SNDY 2000)
- Robertson M (2003) 'Is assent still a pre-requisite for contract formation in today's E-economy?' 78 *Washington Law Review* 265
- Rambarran I & Hunt R (2007), 'Are Browse-wrap agreements All they are Wrapped up to be?' 9 *Tulane Journal of Technology & Intellectual Property* 173
- Sandeen K S (2002-03) 'The Sense and Nonsense of Website Terms of Use Agreements' *Hamline Law Review* 26
- Sangal T (2010) 'IP issues in linking, framing and keyword linked advertising' *Computer and Telecommunications Law Review* 64
- Southwest Airlines Co. v. Boardfirst LLC* (Civ. Act. No. 3:06-CV-0891-B (N.D. Texas, September 12, 2007)
- Specht v. Netscape Communications Corp* 150 F. Supp. 2d 585 (SDNY 2001)
- Streeter D (2002) 'Into Contract's Undiscovered Country: A defence of Browse-wrap Licenses' *San Diego Law Review* 39
- Ticketmaster Corp. v. Tickets.com, Inc* 2000 U.S. Dist. Lexis 4553 (C.D. Ca., March 27, 2000)
- Trakman E L (2009) 'The boundaries of contract law in cyberspace' *International Business Law Journal* 2
- Wilhelmi J L (2002-03), 'Ensuring enforceability : How online businesses can protect themselves from consumer litigation' 86 *Marquette Law Review* 181
- Wilson E (2008-09), '*Douglas v Talk America* : making the case for proper notice (comment)' 45 *Idaho Law Rev* 479
- Zynola T (2004), '*Ticketmaster Corp v. Tickets.com, Inc*: Preserving minimum requirements of contract in the internet' 19 *Berkeley Technology Law Journal* 495