

Memorandum

To: The University of British Columbia community

From: Office of the University Counsel

Re: General Information on Click-Through Agreements

Disclaimer: The information in this memorandum is intended to provide general guidance with respect to click-through agreements. It is not a substitute for proper legal advice.

Information Sheet on Click-Through Agreements

Click-through agreements are becoming increasingly more common. When a user assents to a valid click-through agreement it has force of law equal to a traditionally signed contract. Therefore it is very important that click-through agreements conform to basic principles of contract law. The authority for the validity of click-through agreements is provided by the case law and by the *Electronic Transactions Act* [S.B.C. 2001], which states in Part 3, section 15(1):

Unless the parties agree otherwise, an offer or the acceptance of an offer or any other matter that is material to the formation or operation of a contract, may be expressed [...] by an activity in electronic form, including touching or clicking an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

Click-through agreements need not be overly complicated, or couched in legalese, but there are a few common pitfalls to avoid. By following these steps, many potential problems can be avoided:

- 1.** Before your web site asks the user to accept your terms/condition, your web site should present the user with those terms/conditions either

 - a) directly; or
 - b) by presenting a clearly labelled hyperlink to the terms/conditions.

It is preferable to have the terms and conditions present on the screen directly so that there is a greater chance that users will actually read them.
- 2.** The user should be asked to signify his/her acceptance of the terms/conditions by clicking on a well-marked button labelled "I agree to the foregoing terms/conditions" or words to that effect. The user should not be able to click to signify his/her acceptance of the terms/conditions without viewing the applicable terms and conditions. To this end, the button should be placed at the end of the terms/conditions. Where a scrollable dialog box is used to present the terms/conditions, the user

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should be forced to scroll to the end of the terms/conditions before being allowed to click on the button.

- 3.** Users must not be permitted to gain access or rights to any of the services, property, or information governed by the terms/conditions prior to clicking on the relevant button to signify his/her agreement with those terms/conditions.
- 4.** Users should always have the option of reading and reviewing terms and conditions at their own pace. To this end, users should be able to:

 - a) navigate between terms in the agreement, both forward and backward (usually by scrolling if all the terms and conditions are contained on one page);
 - b) request a printable copy of the terms and conditions; and
 - c) review the terms and conditions at any time prior to acceptance or rejection.
- 5.** The content and format of the terms/conditions are very important. They should:

 - a) comply with existing laws;
 - b) be presented in clear language in an easily legible font and type size;
 - c) not contain any contradictions with other information available on the web site, CD-ROM, or promotional material.
- 6.** The terms/conditions should be concise. The more concise the agreement, the more likely users are to read it. Terms should not be overly restrictive or extravagant. For example, one should not ask users to waive their rights throughout the universe if simply waiving their rights on earth is sufficient to serve your purposes.
- 7.** The terms/conditions should include a forum selection clause. This reduces potential exposure to expensive foreign lawsuits or judgments. A forum selection clause could read as simply as "This agreement shall be governed by the laws of British Columbia and the laws of Canada applicable therein"

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without regard to principles of conflicts of law. Any disputes shall be determined exclusively in the courts of British Columbia."

- 8.** The button to be clicked by the user should clearly indicate acceptance or rejection by the user. Certain words convey this choice better than others. Words that clearly indicate acceptance include:

- I agree;
- I consent;
- I accept; or
- I assent.

Words that clearly indicate rejection include:

- I disagree;
- I don't accept;
- I decline.

Words to avoid because they are unclear or ambiguous include:

- Process my order;
- Continue;
- Next page;
- Submit;
- Enter; or
- Download.

- 9.** It is very important that the user knows that he or she has accepted or declined the terms/conditions. A good method of acceptance explicitly mentioned in the *Electronic Transactions Act* is by clicking on an easily located button or icon, preferably immediately following the terms and conditions.

- 10.** Unclear methods of acceptance include: simply continuing to use the site, submitting a query, or downloading software (all of which have been rejected by Courts in the USA).

- 11.** If the user does not accept the terms/conditions, the user will **not** be bound by them. Therefore the user should not be able to access any of the material governed by the terms/conditions.

- 12.** Where personal information is collected, users should be made aware of the University's privacy policy. In addition to

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making the privacy policy available to users by clearly labelled hyperlink, reference to the policy can be made in the terms/conditions.

13. Users should be notified of the consequences of their acceptance or rejection. This should be done in the last term of the agreement, immediately preceding the user's choice between acceptance and rejection.

Example: "By clicking 'I agree' below, I acknowledge that I have read this agreement and agree to be bound by its terms and conditions."

14. Administrators must keep accurate records. Records must retain the content and format of the agreement process. If there are numerous versions of the terms/conditions, records must be capable of reflecting which version the user accepted. If records are not accurate, they will be of low evidentiary value in court. In order to meet administrative and legal standards of records retention, electronic records must be:

- Trustworthy: records must be demonstrably reliable and authentic;
- Complete: records must show all the relevant data including metadata (data about the data);
- Accessible: it is necessary to be able to locate records should they be required as evidence;
- Durable: the two year limitation period for actions in respect of a breach of contract begins to run from the date of the breach, not from the date the contract was first executed by the click-through mechanism. Therefore, it may be necessary to access records several years after they were made.

If these steps are followed, the resulting agreement should be valid and enforceable. There should be no doubt as to the intention of the user or the rights of the parties governed by the agreement.