



Top 10 Recommendations for Creating Enforceable Online Agreements

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Because the law interpreting the enforceability of online agreements continues to evolve, companies that want to create binding agreements with their online customers still face significant challenges. While the enforceability of an online agreement ultimately depends on the particular circumstances of that transaction, companies seeking to improve the likelihood that their current online agreements will be upheld should consider the following ten recommendations:

#10—Do a Risk/Benefit Analysis on Each Remedy

For consumer agreements, do a risk/benefit analysis on each remedy limitation. If arbitration is desired, make sure it is:

- Equitable;
- Does not impose undue costs on the consumer (as an absolute amount or relative to the size of the transaction); and
- Does not effectively deprive the consumer of a remedy for disputes.

Possible accommodations are:

- Using consumer rules;
- Having the company pay costs on a sliding scale; and
- Selecting a neutral forum for arbitration.

#9—Select Rational Jurisdiction

- Select a choice-of-law jurisdiction that has a rational connection to the transaction.
- Balance the use of exclusive jurisdiction and venue clauses against the risk that a court will find them unconscionable where consumers or low-valued transactions are concerned.

#8—Avoid Unilateral Modification Terms

Do not insert terms that allow the company to change the contract unilaterally.

#7—Record Evidence of User Acceptance

- Record evidence of user acceptance and the formation of each online agreement using a consistent, auditable process.
- By procedure – evidence that the only way to access product or service is to scroll through terms and click “I accept” – user must have accepted.
- Where practical, keep records of time, date, and source of acceptance.
- User registration or electronic signatures.

#6—Require Acceptance Before Delivery or Payment

- Require acceptance before payment or delivery.
- If payment and delivery occur before acceptance, then you need to ensure that the customer receives:
 - Notice before payment or delivery that contractual terms will be provided later;
 - A reasonable opportunity to review those terms after they are provided;
 - For time sensitive transactions, *e.g.* ticket sales, provide consumer with opportunity to review terms outside of the time-sensitive window; and
 - A right to return the product or terminate the service without incurring costs or for a refund if the customer does not agree to the terms.

#5—Make Rejection Clear and Simple

- Provide a clear, simple method for customers to reject the contract.
- Allow users to exit the process at any time.
- Do not require the customer to take additional steps or expend effort/money to reject the product or service once the contract has been rejected.

#4—Make Assent Unambiguous

- Secure an affirmative, unambiguous manifestation of assent to the agreement from the customer.
- The more the customer has to do, the better.

Examples include:

- Mouse click “I accept” or “I agree” button;
- Type “I agree” and submit (speed-bump for users, but more deliberate);
- “I accept” checkbox next to each provision – especially unusual or onerous provision; and
- Offer alternative “I don’t agree” option with an explanation that the user cannot use or access the product or service.

#3—Condition Use on Acceptance

- Expressly state the user’s access to or use of the product or service is subject to these terms.
- Expressly state that you will not provide the product or service except pursuant to these terms.

#2—Provide Notice of All Terms

- Draw attention to the online agreement.
- Make sure the customer sees it, e.g. no “below the fold,” small print, or hidden text.
- Place the “Accept” option at the end of all terms.
 - Require the user to scroll through all terms before making the acceptance action.
 - Consider requiring the user to check an “I accept” box for each provision, especially for an unusual or onerous provision.
 - No link to terms or scroll boxes.
- Advise user to print and keep a copy of the agreement.

#1 Tip for Creating an Enforceable Contract

Draft in plain English.

OTHER CONSIDERATIONS

Anticipate Possible Challenges

- Anticipate possible challenges based on public policy grounds.
- Some states (e.g., California) will invalidate on public policy grounds if a contract precludes class actions, so avoid expressly barring class action suits or prohibiting consolidation of claims.

Browse-wrap Agreements

- Use browse-wrap if the terms merely provide an affirmative license under your intellectual property rights with restrictions no greater than those provided under intellectual property law, for example by limiting copying or redistribution of content on the website, or limiting use of your trademarks. This is often the case with website terms of use that provide content but not products or services.
- Do not attempt passive imposition of material contractual conditions going beyond the exercise of your intellectual property rights, such as choice of law, choice of forum or arbitration clauses.
- If the contract requires those terms, follow the click-wrap recommendations above.

Remember that Contracts with Minors are Unenforceable

Assess risk that the person contracting is underage and determine which practice is most appropriate:

- Include browse-wrap agreement limiting use of the site/service/product to adults;
- Require affirmative agreement, e.g. clicking box, that the user is an adult;
- Require user to type in their year of birth;
- If the user is under-age, re-route and deny service;
- Require a credit-card number, even if no charge is needed; and
- Require a credit-card number, bill the card a nominal amount, and credit the money back to the user to ensure a valid card.

Use Secure Encryption for Sensitive Information

Implement appropriate protections such as secure encryption for any communication or transmission that:

- May involve personal, private or confidential information;
- Gives rise to fraud risks (such as credit card numbers or social security numbers); and
- Requires verification of the integrity of the received communication.

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