
Clickwrap agreements are legal and enforceable

“Clickwrap” is a simple method for indicating agreement to a set of terms by clicking on “I Agree” or a similar process. When properly implemented and maintained, clickwrap can be a highly effective legal agreement methodology, particularly for online transactions and applications.

A clickwrap agreement, like other types of electronic signatures, holds the same legal effect as a wet signature under the laws of Canada, the US, EU, and certain other countries for the vast majority of use cases. Strong support for the enforceability of clickwrap agreements in Canada is found in the Personal Information Protection and Electronic Documents Acts, 2004 (PIPEDA) at the federal level, and by the provincial Uniform Electronic Commerce Act (UECA) valid in all provinces except Quebec which adopted its own law.

While many international jurisdictions similarly support the enforceability of clickwrap agreements for a range of use cases, their laws are somewhat more likely to establish preferences for certain kinds of electronic signatures for specific use cases.

Ensuring the enforceability of clickwrap agreements

Beyond any question of the equivalency of an electronic signature to a wet ink signature, an agreement generated via clickwrap must also comply with basic legal principles of contract formation. Among other considerations, a “meeting of the minds” must be seen – i.e., that the parties intended to be bound by the terms being enforced. This can be particularly important for the “take-it-or-leave-it” agreements commonly used in online contracting, where a customer is asked to agree to terms that are non-negotiable.

Being clear in intent and execution

Courts may apply particularly heavy scrutiny to clickwrap agreement processes, focusing on, for example, whether the colors, font sizes, use of capitalization, and other formatting encourage or dissuade action, or whether the labeling of a button (e.g., “continue” or “next” versus

“I Agree”) suggests to the reasonable internet user something other than giving consent.

Organizations should consider an extensive range of such factors to help ensure their clickwrap processes produce consistently enforceable agreements.

Effective retention of records is also a key consideration. Even where an otherwise effective clickwrap process is used, the value of such a process may be moot unless sufficient evidence of each agreement is generated and maintained for use in any resulting legal proceeding. Organizations should have ready and secure access to a complete, verifiable “audit trail” documenting the specific details and terms of each and every clickwrap agreement.

Choosing a type of electronic signature

When determining whether to implement clickwrap versus other types of eSignature methodologies, organizations should consider the complexity of the use case and agreement terms. For example, an agreement requiring multiple signers, representing a large financial value, involving a high possibility of fraud, requiring routing, or triggering certain legal or regulatory requirements would warrant an eSignature methodology with more advanced workflow capabilities. However, many types of day-to-day agreements can benefit from the simplicity of clickwrap. While organizations are well-advised to seek legal counsel to evaluate their contracting processes – especially when their business spans a range of jurisdictions – clickwrap remains an efficient and effective option worthy of serious consideration.

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