

Web Design Accessibility Can Aid Enforcement Of Terms

By **Joshua Blank, Benjamin Danieli and Thomas Magnani** (July 19, 2022)

Enforceability of terms and conditions, privacy policies and other online agreements available on web, app and media assets is an increasingly hot legal topic, and one that continues to spur litigation despite, or perhaps due to, the fact that direction from courts and the legislature is not specific or actionable.

This, combined with the fact that no agency or other body has promulgated a set of concrete principles directly addressing enforceability of terms and conditions, leaves businesses without certainty as to whether their terms and conditions are enforceable, until litigated.

As a result, it's time to look elsewhere for practical and tangible suggestions around how clients can build content with enforceable terms.

In short, without website standards, uniform criteria or federal legislation regulating the enforceability of terms and conditions, and with little truly actionable legal direction from courts or other administrative bodies, how can a business make sure its online terms are enforceable?

One option: Try making the website accessible.

Gaps in Current Legal Framework

The jurisprudence around enforcement of terms and conditions begins with a focus on the various types of online agreements.

It is now widely accepted that clickwrap agreements are generally more enforceable than browse-wrap agreements, as the U.S. Court of Appeals for the Second Circuit stated in 2017 in *Meyer v. Uber Technologies Inc.*^[1]

Yet not all online terms and conditions fit squarely into those two categories, as in, for example the 2015 *Berkson v. Gogo LLC* decision in the U.S. District Court for the Eastern District of New York.^[2]

Indeed, most courts analyze online contracts under a spectrum framework, with various types of agreements falling between the clickwrap and browse-wrap extremes, as explained in the Supreme Court of Maine's 2022 *Sarchi v. Uber Technologies Inc.* decision.^[3]

This led the courts to note, as did the Second Circuit in *Meyer*, that, "[t]he reasonableness of notice [and] enforceability of a web-based agreement is a fact-intensive inquiry."^[4]

Courts across the country have developed an enforceability test to evaluate terms and conditions. That test centers on two factors: (1) reasonably conspicuous notice; and (2) a user's manifestation of assent.

Expanding on those points, courts, like California's Fourth District Court of Appeal in 2021's *Sellers v. JustAnswer LLC* decision, have highlighted the following as key elements:



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- The size of the text;
- The color of the text as compared to the background it appears against;
- The location of the text and, specifically, its proximity to any box or button the user must click to continue use of the website; d) the obviousness of any associated hyperlink; and
- Whether other elements on the screen clutter or otherwise obscure the textual notice.[5]

This enforceability test has led to a multitude of decisions across the country in which courts examine a broad range of font, color, contrast, notice and design elements to determine whether T&Cs are enforceable, as in the 2021 Peiran Zheng v. Live Auctioneers LLC decision in the U.S. District Court for the Southern District of New York;^[6] or unenforceable, as in the recent 2022 Berman v. Freedom Financial Network LLC decision in the U.S Court of Appeals for the Ninth Circuit.^[7]

While those opinions are generally instructive, courts and the legislature have not yet answered logical follow-on questions regarding implementation of the enforceability test.^[8] Obvious questions remain unanswered: How large should the font be? What contrast ratios — the text color vs. the background color — are readable? What makes text, boxes and prompts obvious and usable?

Fortunately, private organizations like the World Wide Web, tech giants like Google Inc. and government organizations like 18F have provided applicable direction in their standards for creating websites that are accessible for people with disabilities. World Wide Web Consortium is a group focused on designing and developing web standards,^[9] while 18F is a technology and design consultancy for the U.S. government operating under the General Services Administration.^[10]

These technical accessibility standards have become increasingly important in compliance efforts under Title III of the Americans with Disabilities Act, which prohibits a public accommodation from discriminating against individuals based on a disability.^[11]

The U.S. Department of Justice, tasked with enforcement of Titles II and III of the Americans with Disabilities Act, passed guidance on March 18 indicating that, even though it has not issued specific regulations or detailed standards, its "longstanding interpretation of the general nondiscrimination and effective communication provisions applies to web accessibility"^[12]

The guidance seems to indicate that the DOJ's enforcement powers apply to websites regardless of the circuit court split regarding public accommodations' websites,^[13] and even cites to settlement agreements reached with various private businesses.^[14]

Perhaps most importantly however, the DOJ expressly cites a few of the accessibility standards listed above and explains that such standards can provide helpful guidance for ensuring the accessibility of websites.^[15]

Given that those standards along with other commercially available guidelines pertaining to accessibility, seem to address many of the factors courts examine when analyzing enforceability, it becomes clear that accessibility standards may provide guidance not just

for businesses seeking to comply with the ADA, but also for businesses seeking to ensure that their online terms and conditions are enforceable.

Incorporating Accessibility Into Online Terms and Conditions to Make Them Enforceable

Several industry initiatives offer broad guidance that help drive the accessibility analysis. First, W3C, via its Web Accessibility Initiative,[16] created the Web Content Accessibility Guidelines 2.1 — widely regarded as the international standard for web accessibility[17] — which directs web designers and operators to follow four principles and create websites that are: (1) perceivable; (2) operable; (3) understandable; and (4) robust.

Each of those principles encourages website operators and designers to implement tools and practices that permit a broad range of users and visitors to access webpages, regardless of disabilities or other impairments.

More specifically, the W3C, 18F and Google resources highlight the following specific suggestions for making websites accessible:

Font Size and Formatting

Per the WCAG, consider the following font sizing and formatting directions:

- Line height, or line spacing, of at least 1.5 times the font size;
- Spacing following paragraphs to at least 2 times the font size;
- Letter spacing, or tracking, to at least 0.12 times the font size; and
- Word spacing to at least 0.16 times the font size.

Contrast Ratio

Higher contrast between text color and the background makes text easier to read, but W3C provides more detail and direction:

Color is not used as the only visual means of conveying information, indicating an action, prompting a response, or distinguishing a visual element. ... The visual presentation of text and images of text should have a contrast ratio of at least 4.5:1, except for the following:

- Large Text: Large-scale text and images of large-scale text have a contrast ratio of at least 3:1
- Incidental: Text or images of text that are part of an inactive user interface component, that are pure decoration, that are not visible to anyone, or that are part of a picture that contains significant other visual content, have no contrast requirement.
- Logotypes: Text that is part of a logo or brand name has no contrast requirement.

Design Organization/Sequencing

Appropriate layout of a site makes the information more accessible and navigable, according to 18F's "Headings" page under its Accessibility Guide.[18] Google's Material Design Accessibility Guidelines[19] furthers this thinking by focusing on the hierarchy of buttons, images and lines of text stating that,

Every added button, image, and line of text increases the complexity of a UI. You can simplify how your UI is understood by using:

- Clearly visible elements
- Sufficient contrast and size
- A clear hierarchy of importance
- Key information that is discernable at a glance

To convey an item's relative level of importance:

- Place important actions at the top or bottom of the screen (reachable with shortcuts)
- Place related items of a similar hierarchy next to each other.

Touchpoints

Accessibility goes beyond the text itself and expands to the ease with which a user can access the information through a click or tap. The area in which a user can click that is responsive to the embedded link makes the information behind that click more easily accessible to the website user. As the Google guidelines detail,

Touch targets are the parts of the screen that respond to user input. They extend beyond the visual bounds of an element. For example, an icon may appear to be 24 x 24 dp, but the padding surrounding it comprises the full 48 x 48 dp touch target. For most platforms, consider making touch targets at least 48 x 48 dp. A touch target of this size results in a physical size of about 9mm, regardless of screen size. The recommended target size for touchscreen elements is 7-10mm. It may be appropriate to use larger touch targets to accommodate a larger spectrum of users.

Device Type

Websites need to be accessible not only on computers, but also on a wide range of other devices. W3C accounts for that and notes that information must be presented in a "responsive web page," meaning that the site must reformat according to the type of device on which it is being viewed — e.g., phones, tablets, etc.

How Accessibility Standards Help Legal Precedent Gaps

Commercially available accessibility standards can help provide critical implementation details missing from the enforceability precedent.[20]

For example, while the precedent makes clear that online terms and conditions are unlikely

to be enforced if they are displayed in tiny gray font on a gray background, the accessibility standards take an additional step and provide that if the font was larger and on a background contrasting at a 4.5:1 ratio — as noted in the WCAG —the relevant text is likely accessible. By implementing those accessibility standards, a court applying the enforceability test could find that the terms and conditions, available or accessible under the same webpage, were reasonably conspicuous.

Similarly, relevant precedent indicates hyperlinked text presented in blue and underlined, generally supports enforceability. Accessibility guidelines again provide additional guidance, indicating that if the web design obscured relevant text or made buttons impossible to click on, the hyperlinked presentation may still be insufficient for the website to be considered accessible.

Courts analyzing the terms and conditions available on the same website might therefore find that no "manifestation of assent" existed when applying the enforceability test to a user visiting the site.

Application of accessible design to broader life situations is not new, and accessibility solutions have long informed the lives of many individuals.

Consider sidewalk cutouts on corners: While initially designed for individuals in wheelchairs, the dip benefits parents walking with strollers, cyclists, skateboarders, delivery people and more.

As a result, for an attorney looking to provide tangible, actionable and, by many indications, enforceable advice to clients, technical accessibility standards, in addition to existing precedent, could serve as a reasonably suitable proxy for formal enforceability guidelines.

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[1] Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017).

[2] Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 394–95 (E.D.N.Y. 2015).

[3] Sarchi v. Uber Techs., Inc., 268 A.3d 258, 268 (2022 ME 8).

[4] Meyer, 868 F.3d at 76.

[5] Sellers v. JustAnswer LLC, 73 Cal. App. 5th 444, 473 (2021), reh'g denied (Jan. 18, 2022), review denied (Apr. 13, 2022).

[6] B.D. v. Blizzard Ent., Inc., 292 Cal. Rptr. 3d 47, 65 (2022) (finding T&Cs enforceable based, in part, on the color contrast of the relevant terms against the background on which they appeared); Peiran Zheng v. Live Auctioneers LLC, No. 20-CV-9744 (JGK), 2021 WL 2043562, at *5 (S.D.N.Y. May 21, 2021) (holding T&Cs enforceable, in part, because of the

placement and sequence of the notices linking to the T&Cs on the webpage at issue).

[7] *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022) (finding that the website in question did not meet either element of the enforceability test after analyzing, among other things, font size and overall website design); *Sarchi v. Uber Techs., Inc.*, 268 A.3d 258, 270 (ME 2022) (finding, in part, that hyperlinked elements of the webpage were insufficient to constitute conspicuous notice given the lack of underlining and muted grey coloring).

[8] This is not to say that there have not been some efforts. Two pieces of legislation are currently pending in Congress that, if passed, could have potentially significant impacts on the enforceability landscape. The Terms-of-service Labeling, Design, and Readability Act, S.3501, 117th Cong. (2022), would set forth an affirmative obligation for most websites to publish terms of service and would designate the Federal Trade Commission as the enforcement authority. That could potentially give the agency broad powers in the enforceability space. The E-Sign Modernization Act of 2022, S.3715, 117th Cong. (2022), amends the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.) and repeals the requirement that consumers demonstrate their ability to access information electronically in order to consent to the use of electronic records. This repeal makes it easier for agreements to be electronically executed and relates directly to the "manifestation of assent" element of the enforceability test.

[9] More information on W3C is available at <https://www.w3.org/Consortium/>.

[10] More information on 18F is available at <https://18f.gsa.gov/about/>.

[11] Public accommodations generally refer to businesses including private entities that are open, or otherwise provide goods or services, to the public. 42 U.S.C.A. § 12181(7).

[12] The DOJ's March 18, 2022 press release titled "Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act," is available at <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>.

[13] American with Disabilities Act Applies to Websites Connected to Physical Places of Public Accommodation, 40 No. 9 Cal. Tort Rep. NL 3 (October 2019) "The federal circuit courts are split three ways on whether websites are places of public accommodation within the meaning of Title III."

[14] The full text of the DOJ's most recent guidance on accessibility, including citations to "Title III Sample Cases" is available at <https://beta.ada.gov/resources/web-guidance/>.

[15] The most prominent guidelines cited in the DOJ guidance are the Web Content Accessibility Guidelines and Section 508 Standards. These guidelines are not addressed in this article, as they are designed specifically for the federal government. The full text of the standards and guidelines is available at <https://www.access-board.gov/ict/>.

[16] More information on the Web Accessibility Initiative is available at <https://www.w3.org/WAI/about/>.

[17] The WCAG are available at <https://www.w3.org/TR/WCAG21/>.

[18] 18F's Accessibility Guide is available at <https://accessibility.18f.gov/>.

[19] Google's Material Design Accessibility Guidelines are available at <https://material.io/design/usability/accessibility.html>.

[20] It should be noted that not all accessibility standards are applicable to the enforceability test. Many of the provisions in the accessibility standards address concepts and tools that are not prominently featured in the enforceability precedent, such as screenreaders (tools to help visually impaired individuals navigate webpages), customization utilities (tools permitting users to increase or decrease font size or page layout) and alt. text (code that aids in creating a description of the visual elements on a webpage). Following those standards may still be important from an ADA compliance standpoint, even if they are not as relevant to the enforceability analysis.