

"CLICK THROUGH" OR "CLICK WRAP" AGREEMENTS READ BEFORE YOU "ACCEPT"

by MAJ Cliff Barr

We have all come across a decision at some point to "Accept" or "Cancel" a download of software. Perhaps you were offered a decision to "Continue" or "Go back" when entering a website. Actually, when you "Accept" or "Continue," you are doing so by accepting the terms and conditions established by the software or website developer, a so-called "click through" or "click wrap" agreement.



The terms and conditions of these "click through" agreements vary in length and complexity and may or may not be clearly displayed. Often the length or visibility of the agreement does not matter because most people never read "click through" agreements before accepting them. This is because whatever software we are downloading or website we are visiting when we encounter a "click through" agreement is something we really need or want, so cancelling the download or not proceeding to the website at that point is really not an option.

While acceptance of the terms and conditions may be necessary, it is important to be aware of what you have agreed to. Here are several common clauses that are included in many "click through" agreements and what they mean to you:

- 1) **Confidentiality.** This clause is often included in "beta testing" agreements (agreements to try a software or website such as a new computer game before it is released to the general public). In this clause you are acknowledging that the software and content you are gaining access to is considered confidential (private) and that you will protect the privacy of the software and content under your control. If any portion of the software or content is released without authorization, you could be held liable for any resulting damages (which may be substantial).
- 2) **Governing Law.** This clause sets out which law and courts will control any dispute that may arise over your use of the software or website. If you later have a claim against the software or website developer, you have agreed to use the courts listed in this clause, even if the courts are in another country.
- 3) **Limitation of Liability.** Often this clause limits the software or website developer's liability for all damages that may arise to around \$100 dollars. This is a very important clause to consider because if you incur some damages from your use of the software or website, you may only be able to recover up to \$100 dollars. Let's say, for example, that you visit a retail or auction website, accept the "click through" agreement, and use your credit card information to make a purchase. Later the website is hacked (broken into) and your credit card information is stolen and used to make multiple purchases. In this situation the website can argue that its maximum liability to you is \$100 dollars, even if the website was hacked due to inadequate security.
- 4) **Acceptance of third party software.** This is a clause that allows the software or website developer to use and download other software onto your computer. If you see this clause, you should think about what type of software might be downloaded and why. Some companies will download mal-ware (malicious software) onto your computer that is not visible to you, but uses your computer to track your internet usage and send reports back to the company. Sometimes this type of mal-ware can affect other systems on your computer, causing crashes, lockups, and slow response times, not to mention the serious invasion of your privacy that occurs once it starts sending reports on your internet activity.

Again, not all "click through" agreements contain the above clauses, but next time you run across one, take a few minutes to scan it. If you really know what the terms and conditions state, you will be aware of any potential dangers associated with using the software or website. After all, it never hurts to have knowledge of what you are agreeing to.

Editor's Note: MAJ Barr is a JAG Reservist from Texas who spent two weeks providing legal assistance at the KLSC this fall as part of our Overseas Deployment Training (ODT) program.