This Web Data Collection Considerations document concerns the Terms of Service Agreements (”TOS”) that are included on many websites. There are two different types of TOS utilized across websites: “Browse-Wrap” and “Click-Wrap”. The differences in these types of TOS and associated considerations are explained below.

**Browse-Wrap**

When a website has Browse-wrap TOS, the TOS will have language stating that by using or accessing the website, users are bound by the TOS. Browse-wrap TOS are often made available to users through a link on certain webpages, usually somewhere near the footer. Other than the link to the TOS, there is often no other conspicuous notice provided to users.

An example of language indicating that TOS are Browse-Wrap is:

“Regardless of what type of User you are, these Terms create a legal agreement directly between you and COMPANY and explain the rules governing use of the Service and Websites. By accessing or using the Service and Websites, you acknowledge and agree that you have read, understand, and agree to be bound by these Terms and our Privacy Policy. If you do not agree to these Terms, please do not access or use the Service and Websites.”

Most notably, browse-wrap TOS do not require users to affirmatively accept the TOS, nor do they usually contain an affirmation that the user has viewed the TOS.

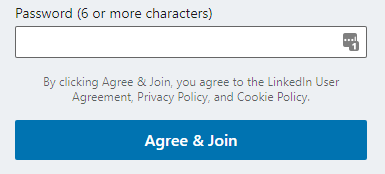
Enforceability. While the analysis is fact-specific, courts have generally found that the lack of constructive notice and user acceptance renders browse-wrap TOS unenforceable. Users should be aware that conspicuously placed browse-wrap TOS may provide users with adequate notice and be construed as enforceable. Moreover, constructive notice of TOS may occur outside the ordinary access of the website and bind the users (e.g., TOS provided via email have been found to be enforceable).

Material Non-Public Information.

* Public information - Information on websites that employ browse-wrap TOS and no technical access barriers may be construed by courts as constituting publicly available information.
* Breach of Contract: An argument can be made that no breach of contract occurred if there was no constructive notice or acceptance of browse-wrap TOS.

**Click-Wrap**

A click-wrap agreement requires the user to check a box, click a button, or take some other type of affirmative action indicating the user has paid attention to the TOS and assents to the terms. In the example below, the user must create an account and password to access a website. In that process, the user is given a prominent notice that by clicking “Agree and Join,” the user is agreeing to multiple agreements forming the TOS for the website:



“You agree that by clicking “Join Now”, “Join WEBSITE”, “Sign Up” or similar, registering, accessing or using our services (described below), **you are agreeing to enter into a legally binding contract** with WEBSITE (even if you are using our Services on behalf of a company). If you do not agree to this contract (“Contract” or “User Agreement”), do **not** click “Join Now” (or similar) and do not access or otherwise use any of our Services. If you wish to terminate this contract, at any time you can do so by closing your account and no longer accessing or using our Services.”

Click-wrap TOS may be presented to users in a variety of different ways (e.g., just-in-time notification with a link, a pop-up window that requires users to scroll to the bottom), but the feature that distinguishes click-wrap TOS from browse-wrap TOS is that users are required to take some kind of affirmative action to accept the TOS (e.g., through mouse click(s), scrolling through pop-up windows, completing a security CAPTCHA or entering username/ password).

Enforceability. While the analysis is fact-specific, courts have generally found that a website that requires users to take affirmative action(s) to access the website is sufficient to evidence constructive notice and contractual acceptance. Therefore, courts have generally found that click-wrap TOS are enforceable.

Material Non-Public Information

* Public Information – There is a lack of clear guidance about whether content located “behind” click-wrap TOS is considered public or non-public.
* Breach of Contract - Given that users affirmatively accept click-wrap TOS, it may be more difficult to make the case that no breach occurred if information was obtained in contradiction of a website’s click-wrap TOS.

**TOS Language**

In addition, it is important to note the language that is utilized to define the TOS as it can range from relatively permissive to relatively restrictive terms:

An example of **relatively permissive webscraping** **language from TOS is:**

“To ensure that everyone has equitable access to WEBSITE content, please use efficient scripting, downloading only what you need and please moderate requests to minimize server load. The WEBSITE-HOST reserves the right to limit request rates to preserve fair access for all users.”

An example of **relatively restrictive webscraping** **language from TOS is:**

**“You agree that you will *not*:** Develop, support or use software, devices, scripts, robots, or any other means or processes (including crawlers, browser plugins and add-ons, or any other technology) to scrape the Services or otherwise copy profiles and other data from the Services;”