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GIVE YOUR ONLINE WEBSITE AGREEMENTS REAL TEETH

By: Frank A. Natoli, Esq.

The number one concern I have observed with our clients' online terms and agreements is NOT with the substantive drafting of the provisions, but with the way these contracts (and yes, they are binding contracts) are implemented on the website. That said, I thought for my first entry, I would offer a quick guide on how to properly implement online terms and agreements for maximum enforceability.

1) Users need a meaningful opportunity to review your terms and proper notice that some form of action will bind them:

Make sure you give notice to users that there is a binding agreement in place that governs their use of the site. This is covered, of course, if you use a "click-through" agreement because they have to actually agree to terms in order to access the site. Also, Users need to be able to actually review your terms. For example, don't have the terms on a timer that will then disappear and avoid using "pop-up" boxes for contract terms - the FTC doesn't like this. And while the use of "browse-wrap" terms may be enforceable (where assent (agreement) is given by simply visiting the site and taking some action on the site, like turning a page), they are not as strong as the "click-through" alternative.

2) Users must actually take that action:

The action can be anything, really, like turning a web page, or entering data, or clicking on an icon. But whatever it is, they need to perform that action in order to be bound.

3) Make this notice of terms "immediately available" when visitors come:

This is important; display NOTICE of your binding agreement on your home page and above the fold (on top) if applicable. Assent to your terms (for all intensive purposes) must occur prior to the User's action. Otherwise, you run the risk that the terms become unenforceable.

4) Make clear that it is a "binding agreement" and not just a suggestion or request to read terms - It must appear in your notice:

For example, "By using this Website in anyway (or by clicking through to another page, or submitting a query, etc.), the User is bound to our Terms of Use."

You are permitted to use a hyper-link to your terms in your notice, but note that you should set it off from other text by size, color and type of font. Also, you cannot have more than two (2) layers of links, the wording has to be clear and, again, place the notice above the fold.

5) You need to make sure that the User can:

1. Read the terms (at their own pace)
2. Be able to navigate back and forth, and
3. Be able to revisit the terms (not just a one-time viewing never to be seen again kinda deal!)

6) Users do not have to actually read the terms to be bound nor do they need to be able to negotiate them:

Remember, most people will never read them and they do NOT have to (even though it is in their interest to do so).

7) The presentation must be "conspicuous" (size, font, etc.):

This is intended to protect your interest by making sure Users cannot say that they did not see important terms. Do not try to hide things with font size!

Proof issues - avoid "click-stream data" because it can create privacy issues and make sure you keep old versions of your websites:

Be prepared to prove that your User was informed and that notice was given and the explicit action was taken, thus assent to your terms is established. The best way is to keep a record of those Users who "click through" as an action of assent, as opposed to monitoring all click-streams.

9) Notice must precede specified action of assent:

You always want to place your notice of terms up front (I can't say that enough!).

10) Lastly, Terms of Use that are "subject to change without notice" are not always enforceable:

The better way is to e-mail blast an advanced notice of any changes to your terms or Privacy Policy and allow members to "opt-out" if they do not agree to those changes. They rarely will, and you can make it proactive, meaning they have to take action or they consent by their omission. That is, require action on their part to opt out within a reasonable time frame.

These measures were offered up as a "best practice" quick-guide for enforceability. There is, of course, a lot more that concerns the enforceability of any contract. But taking even a few small steps can transform your online docs from toothless into a mouth full of fangs!

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