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Implementing and Enforcing Online Terms of Use

Operators of social media platforms and other Web sites must manage a large number of risks resulting from their interactions with users. In an effort to maintain a degree of predictability and mitigate some of those risks, Web site operators routinely present users with terms of use or terms of service (Website Terms) that purport to govern access to and use of the relevant Web site and include provisions designed to protect the Web site operators, such as disclaimers, limitations of liability and favorable dispute resolution provisions. But are such Website Terms enforceable against users and do they actually provide the protection that Web site operators seek? The answer may well depend on how the Website Terms are implemented.

Clickwrap versus Browsewrap

Website Terms typically come in two flavors: (1) “clickwrap” terms, where users are required to accept by taking some affirmative action such as checking a box or clicking an “I accept” button before using the Web site, and (2) “browsewrap” terms that are provided to users through a link (often, but not always, at the bottom of the page) and purport to bind users even without any affirmative manifestation of acceptance. In determining whether Website Terms are enforceable against users, courts

focus on whether users had notice of the terms and actually agreed to be bound by them. Not surprisingly, therefore, courts tend to look more favorably on clickwrap implementations as compared to browsewrap terms.

For example, in *Fteja v. Facebook, Inc.* [841 F. Supp. 2d 829 (S.D.N.Y. 2012)], the plaintiff claimed that Facebook disabled his Facebook account without justification and for discriminatory reasons, causing emotional distress and harming his reputation. Facebook moved to transfer the case to federal court in Northern California based on the forum selection clause in the Facebook terms of use, but the plaintiff claimed that he had never agreed to the terms of use. The court concluded that the plaintiff was bound by the Facebook terms, however, because he had checked a box indicating his acceptance when he registered for Facebook.

In contrast, Barnes & Noble had less luck enforcing its terms of use in *Nguyen v. Barnes & Noble, Inc.* [No. 12-56628 (9th Cir. August 18, 2014)]. In *Nguyen*, the plaintiff ordered a tablet from Barnes & Noble at a discounted price but Barnes & Noble canceled his order. The plaintiff sued and Barnes & Noble moved to compel arbitration based on an arbitration clause included in its Web site’s browsewrap terms of use. The court held that Barnes & Noble’s terms could not bind the plaintiff, despite being presented through a “conspicuous” link during the checkout process, because Barnes & Noble did not prompt

users to affirmatively assent to the terms.

Evidentiary Issues

In general, then, clickwrap Website Terms are more likely to be enforceable than are browsewrap implementations. But even if a Web site operator implements its Website Terms through a clickwrap, how can the operator prove that an individual user actually accepted the terms in a particular case? That issue arose in *Moretti v. Hertz Corporation* [No. C 13-02972 JSW (N.D. Cal. Apr. 11, 2014)]. In *Moretti*, the plaintiff had booked a car rental on the Hotwire Web site and alleged that he was overcharged. The defendants invoked a forum selection clause, which was included in the terms of use connected to Hotwire’s ordering page via a hyperlink, to move litigation to Delaware. The plaintiff denied that he had ever agreed to the forum selection clause. Fortunately for the defendants, they were able to produce two declarations from employees at Hotwire affirmatively stating that the forum selection clause existed in the terms of use at the time the plaintiff booked his rental car and that the plaintiff could not have booked the rental without checking an “acceptance box” indicating his assent to the hyperlinked terms of use. Therefore, the court concluded, the plaintiff had notice of and consented to the terms of use containing the forum selection clause.

Modifications

One of the most difficult issues relating to Website Terms involves modifications and updates. Website Terms typically include a provision granting the Web site owner the right to modify the terms unilaterally. This makes sense in practical terms; a Web site owner cannot be expected to continue

to operate under the same terms indefinitely and it would not be feasible to negotiate every update with individual users. At the same time, however, Website Terms are contracts and, under black letter contract law, contract modifications require acceptance by both parties. A Web site operator ideally should require users to affirmatively accept each updated version of Website Terms, for example, by presenting the updated terms and requiring a click acceptance when the user first logs in after the change. But where obtaining such affirmative acceptance is not feasible, a Web site operator may nonetheless be able to enforce changed terms against users if it gives users sufficient notice of the change and informs them that continued use of the website constitutes acceptance.

For example, the plaintiff in *Rodriguez v. Instagram* [CGC-13-532875 (San Francisco Sup. Ct. Feb. 28, 2014)], objected to certain changes in Instagram's terms of use. Instagram had unilaterally modified its terms in December 2012 and announced the changes to its users a month in advance of their implementation. The new terms stated that continued use of the Web site amounted to consent to the modifications and that users who did not accept the modifications must stop using Instagram. The court found that, by continuing to use Instagram, Rodriguez agreed to the new terms, and that she could simply have stopped using Instagram if she did not want to be subject to them. The court pointed out that Rodriguez could not possibly have had a reasonable expectation of perpetual use of Instagram's service under the original terms, which included an express modification right for Instagram.

It should be noted, though, that courts in some cases have looked less favorably on Web site

operators' attempts to modify Website Terms unilaterally, particularly where users are not given adequate notice or the changes are applied retroactively. For example, the Ninth Circuit held in *Douglas v. Talk America* [495 F.3d 1062 (9th Cir. 2007)] that an individual's assent to changed Website Terms could not be inferred where the individual had not actually received notice of the changes. In *Douglas*, the defendant Talk America provided long distance services to the plaintiff Douglas. When a dispute arose, Talk America attempted to enforce an arbitration provision contained in updated terms that it had posted to its Web site. But Talk America had never given Douglas notice of the updated terms and Douglas was not required to visit the Talk America Web site in order to continue using the Talk America services. The court noted, "[p]arties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side."

Even more problematic for Web site operators, the court in *Harris v. Blockbuster, Inc.* [622 F. Supp. 2d 396 (N.D. Tex. 2009)] held that an arbitration clause in Blockbuster's online terms was illusory and unenforceable because Blockbuster reserved the right to unilaterally modify the terms and apply the modified terms to earlier disputes. Interestingly, Blockbuster had not *actually* modified its terms of use and attempted to apply the modified terms retroactively; rather, the court held that the mere reservation of the right to unilaterally amend the terms rendered the contract illusory. The court in *In re Zappos.com, Inc.* [893 F. Supp. 2d 1058 (D. Nev. 2012)] came to a similar conclusion regarding the unilateral modification provision in Zappos'

online terms of use (the *Zappos* court also did not look favorably upon Zappos' browsewrap implementation of its terms).

Takeaways

In light of the issues noted above, the following are some steps that Web site operators may take to increase the likelihood that Website Terms will be enforceable against site users:

- When possible, Website Terms should be implemented using clickwraps that give clear notice and require affirmative assent, rather than through browsewraps. If a browsewrap is used because a clickwrap is not feasible, for example, when a Web site does not require users to register and does not otherwise include functionality to interact with users, Web site operators should present the terms as conspicuously as possible (and should recognize that their Website Terms may prove more difficult to enforce).
- If a clickwrap is used, Web site operators should be prepared to produce evidence that users actually must accept the Website Terms to access the Web site or make a purchase on the Web site, and be able to show the specific version of the Website Terms that were in place at the time that any given user indicated acceptance.
- A prominent notice should be included on the Web site regarding the Website Terms and the terms should be easily accessible to users (including for download and printing). Website Terms should be easy for users to understand and particularly important terms, such as disclaimers, limitations of liability, and dispute

resolution provisions, should be conspicuous. Also consider adding a prominent “last updated” notice to Website Terms.

- When modifying Website Terms, consider obtaining users’ express acceptance of the updated terms, if possible. If obtaining such express acceptance is not feasible, the users ideally should be provided with clear advance notice of any changes and a statement that continued use of the Web site following implementation of the

updated terms constitutes acceptance of those terms.

- Regardless of how terms are updated, Web site operators should not assume that they will be able to enforce updated terms retroactively. Indeed, Web site operators should consider making clear in their Website Terms that newly added provisions will not apply to disputes arising prior to the adoption of the new provisions.

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