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How to Enforce Terms of Service for Online Social Media Promotions and Contests

BY TRAVIS CRABTREE

General Mills incurred blowback on social media earlier this year when it was suggested the company sought releases for all claims whatsoever from anyone who visited the company Facebook page. The truth, as always, was not as drastic or draconian as initially reported, but it did raise some concerns about how to enforce terms of service through social media.

According to the *New York Times*,[1] General Mills notified customers that if they downloaded a coupon, joined a forum or entered a sweepstakes, the customer would waive his or her right to sue in court and would have to go through an online ''informal negotiation'' or arbitration. The article reported that General Mills provided an update to its Facebook page that included: ''Please note we also have new legal terms which require all disputes related to the purchase or use of any General Mills product or service to be resolved through binding arbitration.''[2]

[1] Stephanie Strom, *When 'Liking' a Brand Online Voids the Right to Sue*, N.Y. Times, Apr. 16, 2014, *available at* http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html

[2] *Id.*

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Apparently, General Mills made the change to its terms soon after a judge refused to dismiss a case brought by a group of consumers in California.[3] Some ''legal scholars'' then suggested this was the first case of an attempt to ''force arbitration'' on all consumers.

Once the story broke, General Mills immediately tried to backtrack. The next day, *The New York Times* reported the company released an update clarifying that the release ''did not apply to people who visit its Facebook pages and Twitter accounts.''[4] The policy, according to the company, applied only to the online communities it hosts on its own websites. The company also clarified:

> No one is precluded from suing us merely by purchasing our products at the store or liking one of our brand Facebook pages. For example, should an individual subscribe to one of our publications or download coupons, these terms would apply. But even then, the policy would not and does not preclude a consumer from pursuing a claim. It merely determines a forum for pursuing a claim. And arbitration is a straightforward and efficient way to resolve such disputes.[5]

Despite this ''clarification,'' if a consumer received a coupon in exchange for liking a brand on Facebook, the consumer would have to agree to the new terms.[6] Although legal opinions varied regarding the enforceability of these terms, consumer watchdogs were concerned General Mills was trying to escape all liability for mislabeling claims or damages related to product recalls just because a customer liked a Facebook page or purchased a product at the local grocery store.

So, What Should Companies Do?

Companies can enforce protective provisions against consumers. In two recent decisions, the U.S. Supreme Court enforced such provisions in the ''brick and mortar'' world. In June 2013, in *American Express v. Italian Colors Restaurant*,[7] the Court enforced an arbitration clause between AmEx and the merchandisers. Two

[3] *Id.*

[4] Stephanie Strom, *General Mills Amends New Legal Policies*, N.Y. Times, Apr. 17, 2014, *available at* http://www.nytimes.com/2014/04/18/business/general-mills-amends-new-legal-policies.html

[5] *Id.*

[6] *Id.*

[7] 133 S. Ct. 2304, 2308-09 (2013).

years before that in *AT&T Mobility v. Concepcion*,[8] the court upheld a class action waiver.

On the Internet, and through social media, however, there is still, and always will be, the issue of consent. Although a little more complicated, courts still look to the basics of contract formation to determine whether someone has agreed to terms online. That is why courts often prefer what is referred to as ''click-wrap'' agreements to ''browse-wrap'' agreements. A browse-wrap agreement discloses terms on a Web page that offers a product or service to an Internet user, and the user then assents to the provision merely by visiting the website to purchase the product or enroll in the service.[9] Some companies try to enforce website terms of service merely by having a hyperlink at the bottom of a Web page, but never requiring a site visitor to even acknowledge its existence. Provisions disclosed solely through browse-wrap agreements are typically not enforced unless the party seeking to enforce the terms can show the website user had actual knowledge or constructive knowledge of the terms *and* consented to them, which is a difficult barrier to overcome.[10] Meanwhile, a click-wrap agreement ''presents the potential licensee . . . with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon.''[11]

Logic then dictates that to enforce terms and conditions for social media users, a company would be better off using a click-wrap agreement. But, just how is that done on social media? The recent decision in *Starke v. Gilt Groupe, Inc.*[12] provides a good example of how to enforce terms online. The plaintiff was forced to acknowledge he was bound by the terms and services, available through a nearby hyperlink, when he signed up for a membership on the Gilt flash sale site. As a result, the court enforced the mandatory arbitration and class action waiver.

There have not been many cases applying terms and conditions to contest rules or online promotions other than a few examples of what not to do. For example, in *Duick v. Toyota Motor Sales*,[13] Toyota tried to enforce an arbitration provision on someone who was referred by a friend for a ''prank'' promotion. Essentially, the court said that even if the plaintiff consented, it was not clear what the user was agreeing to since the user could only agree to the fake site that was part of the prank. There was no ''meeting of the minds'' as a matter of law.

A better discussion of the applicable issues comes from a case dealing with an off-line McDonald's scratch-off game. In *James v. McDonald's Corp.*,[14] the fast food chain ran a ''Who Wants To Be A Millionaire?'' scratch-off game. The plaintiff believed she had won $1 million. When she was told she had won only $5, she sued, claiming McDonald's knew the winning cards had been stolen and therefore the published odds were misstated. McDonald's tried to enforce an arbitration provision found in the official rules. The Seventh Circuit opined the plaintiff had the opportunity and ability to read the rules, including the arbitration provision, but chose not to. The rules were referenced on the french fry packaging and in the stores. In a pro-business ruling, the court also examined how a contest like this works in practice:

> To require McDonald's' cashiers to recite to each and every customer the 14 pages of the ''Official Rules'' and then have each customer sign an agreement to be bound by the rules would be unreasonable and unworkable. The Official Rules were identified to Ms. James as part of the contest and that identification is sufficient in this case to apprise her of the contents of the rule.

Although it worked in that case, it is not the best practice to rely upon such a favorable opinion for an online contest or promotion by simply hoping the court finds the consumers had ample opportunity to review the applicable rules.

Best Practices

Companies should consider the same factors when it comes to online promotions or contests. Assuming the official rules of the contest include protective measures such as limitations of liability, arbitration provisions or class action waivers, then the participants need to affirmatively express their consent to the official rules. This can be done numerous ways, and the more definitive the consent to the rules, the better.

If the company controls the site, as opposed to running it on a social media platform such as Twitter or Instagram, then it should be easy. Before someone can enter the contest or download a coupon, the customer must show that he or she agrees to the promotion or contest rules. The best practice is for there to be an empty box the customer has to check that can be checked only when she scrolls through all of the rules. This shows that not only has the consumer claimed to have read the rules but the consumer was forced to at least scroll to the bottom of them. Naturally, this interferes with the user experience, so a company may prefer to make the consumer check the box with a window already showing the rules. Next in line of enforceability, would be the ''check the box'' option with the rules hyperlinked. Finally, in the scale of best practices, still probably acceptable is a notice immediately next to the ''enter'' or ''download'' button containing text that states: ''By entering this promotion, you agree to the official rules'' with the official rules hyperlinked.[15]

Companies have to balance the desire to make sure the terms are enforced with the user experience. Obvi-

[8] 563 U.S. 321, 131 S. Ct. 1740, 1745 (2011). The issues of procedural and substantive conscionability need to be considered, which apply equally to on-line and off-line agreements. That discussion is beyond the scope of this article.

[9] *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 30-32 (2d Cir. 2002); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004) (using the term ''browsewrap'').

[10] *Cvent, Inc. v. Eventbrite, Inc.,* 739 F. Supp. 2d 927, 937–38 (E.D. Va. 2010).

[11] *Register.com*, 356 F.3d at 429 (internal quotation marks omitted).

[12] 2014 BL 124277 (S.D.N.Y. Apr. 24, 2014). A recent decision also upheld Facebook's membership agreement against a minor. *See C.M.D. v. Facebook*, 2014 BL 85230 (N.D. Cal. Mar. 26, 2014).

[13] 131 Cal. Rptr. 3d 514, 2011 BL 225925 (Cal. Ct. App. 2011).

[14] 417 F.3d 672 (7th Cir. 2005).

[15] Companies need to be careful when changing terms and trying to show that customers agree to the changes. *Compare Rodriguez v. Instagram LLC*, 2014 BL 62851 (S.F. Super. Ct. Feb. 28, 2014) *with In re Zappos.com Inc., Customer Data Se-*

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ously, the more a company can show the user had actual knowledge or constructive knowledge of the terms *and* consented to them, the better off the company is. Presumably, the company is already collecting something in exchange for the promotion, such as e-mails or phone numbers. Participants at least have to provide some type of contact information to receive the benefits of the promotion, so adding one step should not discourage many people.

Using another platform, such as Facebook, makes things more complicated. For example, if the participant enters a contest by liking the Facebook page, then somewhere near the like button, it should state: ''By Liking this page, you agree to the official rules of the contest,'' with the rules hyperlinked. The closer notice is to the Like button, the better off the company is to demonstrate actual knowledge of the rules and consent.

Contests on Twitter, Pinterest or Instagram, where the user has to merely upload, retweet or hashtag something makes it more difficult. The standards would be the same, but the mechanics would make it more difficult to show the contestant agreed to the terms. Obviously, if it is merely a coupon delivered via e-mail, then a company can require consent through the follow-up mechanism. If it is a contest, then the best practices recommendation is to use these platforms to send consumers to the company-controlled sites where the company can require an acknowledgment of acceptance. Otherwise, a company will have to demonstrate knowledge of the rules and consent—not an impossible task, but more difficult depending on the platform, especially in 140 characters. The primary goal in this scenario is to conspicuously disclose the rules or their availability when the company promotes the online contest. Then, the company will have to hope for a *McDonald's*-type decision holding the consumers could have and should have known about the rules because it is impossible to list them all on Facebook, Twitter, Pinterest or Instagram.

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curity Breach Litig., 893 F. Supp. 2d 1058 (D. Nev. Sept. 27, 2012).