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Are Your Website Terms of Use Enforceable?

What does it take to create a binding contract online? This question has vexed courts, consumers, and e-commerce companies since the dawn of the Internet.

Background

The easy answer is to require a visitor to click a box or take some other affirmative action to clearly and unambiguously confirm agreement to a clearly disclosed set of terms. Common methods include requiring the visitor to scroll through the terms to click “Accept” at the end, or at least to include a clear and conspicuous link to the terms where the visitor is clicking the “Accept” button.

For a variety of reasons, however, many companies offering goods or services online don’t want to create barriers to visit their sites, at least not at the outset. Instead, it is common practice to merely post a set of terms and provide a footer link to those terms on every page of the site (or at least on the home page) and do nothing more.

Recent case law has confirmed that merely posting a set of terms with a footer link (and nothing more) generally won’t create a binding contract. This was exactly the holding by the federal Ninth Circuit Court of Appeals in California in 2014 in *Nguyen v. Barnes & Noble, Inc.* It also is consistent with earlier cases where courts would look for either an affirmative acceptance of the terms, or at least clear and conspicuous disclosure of terms in a manner likely to put consumers on notice of their existence. An example of those earlier decisions is *Specht v. Netscape Commc'ns Corp.*, a 2002 ruling from the federal Second Circuit Court of Appeals in New York authored by Sonia Sotomayor who now sits on the United States Supreme Court.

Options

What options are left for a company that doesn't want (or need) to force visitors to affirmatively accept a set of terms as a condition of gaining access to a website?

A useful in-between approach is to link affirmative consent to some other action a consumer must take in order to make a purchase, open an account, or complete some other transaction. Such actions typically require a consumer to click a button labeled "Send," "Submit," "I accept," etc. Adding a few words can create a binding agreement. Example: **"By clicking 'send' to submit your order, you agree to our Terms of Use and Terms of Sale"** (with the underlined portions being active links to the full terms). Even better is to include a separate checkbox to accept the terms along with the "submit" or "send" button.

The virtue of the in-between approach is that it can create clear consent and a binding contract, at least with the people who actually engage in a transaction on the site. The weakness is that it leaves the enforceability of the site's terms in limbo vis-à-vis casual visitors who don't enter into a transaction. Many site operators may be satisfied with this result. Establishing binding terms with actual customers is generally more important than with casual visitors.

If the operator is still concerned about establishing binding terms on all visitors, the option remains to either force each visitor to affirmatively accept terms of use before accessing the site (as is sometimes done by companies offering regulated products or services such as alcohol, tobacco, or adult-themed entertainment), or at a minimum making extremely clear and conspicuous disclosure that accessing the site constitutes acceptance of the terms of use and providing a link to the terms at that point (more than just a footer). If an operator follows this approach, however, it then must consider how to force visitors through the disclosure page and not allow deep linking directly to pages inside the site which may or may not be practical for any given site.

Need for Clarity

A final caution is to be sufficiently clear and unambiguous to make sure that any effort to obtain affirmative consent is binding. One recent California federal district court decision, *Friedman v. Guthy-Renker*, addressed this issue in two scenarios. In the first scenario, the words "agree to terms" appeared next to a credit card authorization button. The Court found this disclosure was not sufficient because (a) there was no link to the actual terms and (b) the average user might not realize that he/she was agreeing to anything other than the terms of making a credit card purchase. In the second scenario, the court found that the user had agreed to the site's terms of use when clicking a checkbox next to the clear and unambiguous statement **"Agree to Terms and Conditions,"** where the underlined portion was a hyperlink to the terms.

In short, small details, such as size, location and wording of consent language can make a big difference. Companies conducting business online are well advised to consider these recent cases and look at their sites to see if they are creating binding contracts with their users.

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