Online Contracts: We May Modify These Terms at Any Time, Right?

Description

Every time you visit a website to read the news, use a social media account, or buy a pair of shoes, you are binding yourself to online contractual terms. Courts routinely uphold those terms when a website user is required to click an â€œI agreeâ€• button signifying assent to those terms, and often uphold them, even in the absence of a click, when the terms are â€œreasonably communicatedâ€• to the user by use of a hyperlink labeled â€œTerms of Use.â€• It is highly unlikely that most readers of this publication have ever read a set of online terms from beginning to end.

If you did read these terms, you often would find that some businesses that operate online attempt to reserve the right to change their online terms at any time, without giving any notice to the user of the site. For example, Yahoo! warns its users in the first paragraph of its Terms of Service that the terms â€œmay be updated by us from time to time without notice to you.â€• Other sites and services warn that their terms have changed or are about to change, but simply direct users to the new terms without marking or explaining changes.

Over the past 15 years, users of websites and online services have challenged the enforceability of online terms of use, creating a robust body of judge-made law regarding such terms. The existing case law on online modifications, however, is scant. The few existing opinions rely appropriately on off-line contract modification rules to determine whether the authors of the original contract terms succeeded in effectively modifying those terms. Unfortunately, the decisions to date do not yet provide us with predictability as to the enforceability of online contract modifications.

Traditional contract doctrine clearly forbids the unilateral modification of contracts and treats a proposed modification as an offer that is not binding until accepted. Although state contract law may vary, there generally are three requirements in traditional contract law for modifying contracts. First, the offeree must have proper notice of the proposed modification. It is axiomatic that no offer can be accepted unless the offeree knows that the offer has been made. In addition, the offeree must manifest assent to the proposed modification in some manner, either explicitly or implicitly. Last, in order for a modification to be enforceable, it must be supported by consideration, or, in the case of contracts governed by Article 2 of the Uniform Commercial Code, it must be entered into in good faith. See U.C.C. Â§ 2-209 cmt. 2.

The notice inquiry tends to depend on the facts of a particular case. Cases involving the credit card and telecommunications industries provide helpful insight as to how courts evaluate modifications of standard form paper terms. For example, in one case where a bank attempted to modify credit card terms by adding an arbitration procedure where one was not already part of the contract terms, the court found that the offeree did not receive proper notice of the modification because the proposed change was printed on an insert with the monthly bill and nothing otherwise called the change to anyoneâ€™s attention. Badie v. Bank of America, 67 Cal. App. 4th 779 (Cal. Ct. App. 1998). Other companies have found out the hard way that simply providing a complete set of the proposed revised terms, without any indication as to which terms had been changed, was not sufficient notice. DIRECTV, Inc. v. Mattingly, 829 A.2d 626 (Md. 2003). On the other hand, a company that prominently announced modified terms with its monthly bill, and provided an Internet address and telephone number where the customer could access the revised terms, was found to have successfully put the customer on notice of the changed terms. Ozormoor v. T-Mobile USA, Inc., 2008 U.S. Dist. LEXIS 58725 (E.D. Mich. June 19, 2008).

The appearance and placement of the notice also is important. One company was unable to enforce a notice of a contract modification that was printed on its invoice where it was the fifth item on the second page of the

invoice, in ordinary type. Manasher v. NECC Telecom, No. 06-10749,2007 U.S. Dist. LEXIS 68795 (E.D. Mich. Sept. 18, 2007). On the other hand, in Briceno v. Sprint Spectrum, L.P., 911 So. 2d 176 (Fla. Dist. Ct. App. 2005), Sprintâ€™s notice was enforceable where it printed â€œImportant Notice Regarding Your PCS Service From Sprintâ€• in bold letters immediately below the amount due on the invoice. The notice also prominently discussed the changes in the contract terms and provided both a telephone number and a website where the revised terms could be found.

Courts also have looked at whether the modification has been accepted by the offeree. For example, in Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000), the purchaser of a Gateway computer did not see Gatewayâ€™s standard terms (and was not provided notice about the terms) until the computer was shipped to the purchaser and she opened the box. Gatewayâ€™s standard terms contained a number of provisions, including an arbitration clause. When Gateway moved to dismiss a class action lawsuit in light of the Federal Arbitration Act, the court refused to enforce the arbitration clause. The court found that the plaintiff offered to purchase the computer and Gateway accepted. Gatewayâ€™s standard terms then became either an expression of acceptance or a confirmation of the offer under section 2-207 of the U.C.C. However, the court found that the rest of the provisions in Gatewayâ€™s standard terms, including the arbitration clause, were not part of the original purchase agreement and were not enforceable.

More recently, in Knutson v. Sirius XM Radio, 771 F.3d 559 (9th Cir. 2014), the terms regarding an automobileâ€™s trial subscription to a satellite radio service were sent to the owner a month after the purchase of the automobile in an envelope marked â€œWelcome Kit.â€• The Ninth Circuit refused to enforce the additional terms because there was no mutual assent to the terms. The Ninth Circuit found no evidence that the purchaser of the automobile knew that he had purchased anything from Sirius or was entering into a relationship with Sirius, let alone had agreed to the terms (which contained an arbitration clause). Therefore, continued use of the service by the purchaser did not manifest assent to the terms.

How have these traditional contract ruled been applied online? The courts that have addressed online modifications generally have respected these traditional contract principles and have held that attempted modifications are unenforceable when the person to whom the modification is offered has no reason to know of the proposed changes to the agreement. As a result, online contract modifications tend to fall for failure to satisfy the notice requirement.

In evaluating notice, the courts that have addressed online contract modification have paid close attention to the differences between electronic and face-to-face or paper communications. This is a refreshing development, given that this is not always the case in opinions addressing online contract formation in the first instance. The opinion in Campbell v. General Dynamics, 407 F.3d 546 (1st Cir. 2005), a dispute involving an attempted modification of an employment handbook, provides an example of judicial awareness that electronic messages can get lost in the electronic shuffle. In Campbell, an employer attempted to modify an employment handbook by sending a mass company-wide e-mail message containing hyperlinks to the proposed changes to its employees. One of the proposed modifications was a binding arbitration clause. In holding that the modification was not effective, the court focused on the expectations of the employee receiving the modification offer. Given that the mass e-mail message did nothing to communicate its importance and that employment changes at General Dynamics were usually communicated in person by means of a signed writing, the court held that the attempted modification was not binding.

The communicative value of online interaction similarly influenced the Ninth Circuit in holding that the attempted modification in Douglas v. U.S. District Court, 495 F.3d 1062 (9th Cir. 2007), was ineffective. The dispute in that case arose when a phone service provider changed its online terms to add new service charges, a new arbitration clause, and a class action waiver. It did so without notifying its customers of the changes and simply posted the changes to its website. The plaintiff in Douglas had agreed to automatic billing and therefore had little reason to visit the website on a regular basis.

After becoming aware of the additional charges four years later, the plaintiff sued the service provider in federal court, and the service provider moved to compel arbitration based on the modified arbitration clause. After the district court found the arbitration clause enforceable, the Ninth Circuit reversed, finding that the subscriber had

not been given notice of the changes. The Ninth Circuit also felt strongly that parties 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. This fact, plus the fact that the plaintiff would not have known where to find the changes to the terms of use even if he had visited the website, led the court to hold that the modifications were unenforceable.

The court in Rodman v. Safeway, Inc., 2015 U.S. Dist. LEXIS 17523 (N.D. Cal. 2015), similarly refused to impose a duty on website users to continually check for changes to online terms. Rodman was another case in which the author of online terms of use posted changes to those terms on its website but made no attempt to notify its customers of the changes. The defendant attempted to justify its actions by highlighting a clause in its original terms of use that reserved the right to amend the terms at any time and imposed a duty on the customer to keep up with changes to the terms. Like the court in Douglas, the court in Rodman stressed that it is unreasonable to expect a customer to check a website regularly for changes to online terms. Moreover, the court, applying traditional contract doctrine, noted that a customer could not assent to future changes of which there was no reason to know would come.

When the modification is presented in a click-wrap format, courts seem more likely to find both notice and assent. TradeComet, LLC v. Google, Inc., 693 F. Supp. 2d 370 (S.D.N.Y. 2010), affâ€™d, 435 Fed. Appâ€™x 31 (2d Cir. 2011) provides an example. In order to become a member of the Google AdWords program, TradeComet was required to assent to click-wrap terms. A year later, Google modified those terms by amending the forum selection clause, and AdWords members were required to click their assent to the modification. Although Google had reserved the right to modify the terms and had provided in its terms that use of the services after the modification would constitute acceptance, TradeComet was in fact required to click through to the modified agreement and signify assent to it. As a result, the court found both that the terms were reasonably communicated to and accepted by TradeComet. The opinion did not address the length of the terms or the ease (or lack of ease) of finding the modification. As a result, the opinion reads more like the many formation opinions that find assent whenever there is a click requirement, regardless of the length and presentation of the terms.

One issue left open by the Douglas court is whether the parties can enforce language in the original terms and conditions that one party can unilaterally change the terms and conditions at any time. Courts have differed in their treatment of such language.

The question was answered in the negative at least under Texas law by the court in Harris v. Blockbuster, Inc., 622 F. Supp. 2d 396 (N.D. Tex. 2009). At one point in time, Facebook had an arrangement where customers who rented videos from Blockbuster would find their choices broadcast to that customerâ€™s Facebook friends. The plaintiff sued, claiming this practice violated the federal Video Privacy Protection Act. Blockbuster attempted to invoke an arbitration clause in its terms and conditions, which had been accepted by the customer. Blockbusterâ€™s terms and conditions also contained a clause where Blockbuster reserved the right to modify the terms and conditions at any time, with or without notice, effective immediately upon posting the modifications on its website. Given that Blockbuster could change the contract unilaterally at any time, the court found that the entire contract was â€œillusoryâ€• and refused to enforce the arbitration provision.

On the other hand, some courts have upheld such language using different theories. The contract in TradeComet contained a similar provision, but the court found that the actual notice of the modification to the user saved the contract. The contract in Liebowitz v. Dow Jones & Co., 847 F. Supp. 2d 599 (S.D.N.Y. 2012) contained language that Dow Jones could change the fees and charges in effect or add new fees and charges at any time by giving notice to the subscribers in advance. When Dow Jones decided to charge separately for two publications that previously had been bundled with one subscription fee, subscribers claimed that Dow Jones had breached its subscription agreement. The court refused to find the contract illusory, finding that New York courts would impose an obligation of reasonableness on Dow Jones in exercising its discretion, and that Dow Jones had acted reasonably.

In light of the uncertainty in the law, are there practices that are more likely to result in the enforceability of modifications to online contracts? Based on the traditional contract principles, and the few cases that have addressed online modifications to date, we offer the following suggestions (which are in no means intended to

be considered â€œsafe harborsâ€• or â€œbest practicesâ€• in any given situation):
â€¢If you are preparing initial terms and conditions, avoid using â€œwe can modify these terms at any timeâ€• language. You do not know in advance in which court the plaintiff will attempt to attack the language and whether that court will uphold the clause or strike the clause or the entire contract as illusory. Even if you successfully uphold the language in court, you have needlessly spent time and money in a dispute that could have been avoided.
â€¢If the initial terms and conditions provide a procedure for modifying the terms, at a minimum, one should follow those procedures.
â€¢Use language similar to â€œwe can modify these terms at any time, after providing notice to you.â€• This is more analogous to the traditional credit card cases. The problem then becomes how to provide notice. One option is to send an e-mail to all subscribers at the e-mail address provided with their registration. However, this does not work for websites with no registration mechanism. Here, a prominent notice on the website, coupled with a right to reject the terms (e.g., â€œIf you disagree with the terms, do not continue to use the service/websiteâ€•) may be successful. Alternatively, require a click-wrap type of mechanism where the users cannot continue to use the website unless they affirmatively click on a box or button assenting to the modified terms.
â€¢Provide a means for the subscriber to reject the modification by quitting the service or discontinuing use of the website without penalty.

Courts in online modification cases appear to require more robust notice for modifications than they do for formation. Traditionally, courts have classified online terms according to whether the user is required to click a box or button to indicate assent to the terms. Presentations that require a click are described as â€œclick-wrapâ€• presentations, and those that display terms solely by hyperlink are described as â€œbrowse-wrapâ€• because the terms often provide that browsing the site constitutes acceptance of the terms. Courts have routinely upheld click-wrap terms even when voluminous and even when presented in a way that discourages reading. Likewise, courts are more skeptical of browse-wrap, but uphold such presentations when it appears that the link that presents the terms was displayed in a format that communicates the contractual nature of the terms. That may be changing, however. The court in Berkson v. Gogo LLC, 97 F. Supp. 3d 359 (E.D. N.Y. 2015), after an exhaustive discussion of the electronic contracting cases and scholarship, drew a distinction between presentations that encouraged reading and those that did not. Rejecting the clear line between click-wrap and browse-wrap, the court refused to enforce terms when the design of the website did not force the user to view the terms before clicking acceptance to them. In modification cases, courts appear to be on the leading edge of this trend of urging online companies to present their modifications in a way that encourages customers to have a meaningful opportunity to know that changes have occurred.

Additional Resources

The Business Law Sectionâ€™s Cyberspace Law Committee has been working since 2000 on contract formation and modification issues in electronic form agreements. The committee and its members have produced numerous publications and presentations, including the following:

- Christina L. Kunz et al., Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent, 57 Bus. Law. 401 (Nov. 2001)
- Christina L. Kunz et al., Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, 59 Bus. Law. 279 (Nov. 2003)
- Internet Law for the Business Lawyer (2d ed.) (American Bar Association 2012)

The committeeâ€™s work in this area was noted in Berkson v. Go Go LLC, 97 F. Supp. 3d 359 (E.D.N.Y. 2015).

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