

Online contracts—Take notice!

By Alan S. Wernick

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Editor's Note: The Cyberspace Law Committee has been examining issues surrounding online contracting for many years. At the ABA Annual Meeting in 2007, members Eran Kahana, Christina Kunz, Juliet Moringiello, John Ottaviani, and Kathleen Porter, presented on this issue to assembled members. Copies of their program materials can be found at <http://www.abanet.org/buslaw/mo/premium-cl/programs/ann07/11.pdf> (Business Section Membership required).

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Every time you visit an Internet site you most likely are agreeing to be bound by the terms and conditions associated with that website, including subsequent revisions. Or are you?

Most sophisticated websites include a “terms and conditions” page accessible by hyperlink from the home page and from nearly all of the other pages of the website. This is particularly true if the website offers goods and/or services. However, there are many other websites that include (or should include) terms and conditions as an integral part of the site: health care providers, education, newspapers, libraries and other public institutions, professional organizations, trade associations, and government entities, to name a few.

Indeed, some state statutes require that some terms and conditions be posted on the website.

The California Online Privacy Protection Act of 2003, for example, requires commercial websites and online services that collect personal information from California residents to have a privacy policy conspicuously on the site. The statute also sets forth certain

requirements for the privacy policy. Let's assume that a website follows best practices with its terms and conditions page and sets forth a reasonably sophisticated online agreement. When can unilateral changes to these online contracts be binding? This question was recently addressed by two different courts, resulting in two different outcomes turning on one critical fact — notice.

In *Douglas vs. Talk America, Inc.*, the U. S. Court of Appeals for the Ninth Circuit reviewed an online contract that Talk America, a telecommunications provider, unilaterally changed in several material ways by adding four provisions to the services contract: (1) additional service charges; (2) a class-action waiver; (3) an arbitration clause; and (4) a choice-of-law provision pointing to New York law.

After the plaintiff, a customer for four years, discovered the additional services charges, a class-action lawsuit was filed disputing the charges, among other things. Talk America moved to compel arbitration and the trial court agreed.

However, the Ninth Circuit disagreed. Underscoring the fact that online contracts are still contracts and must adhere to the requirements of contracts, the court stated: "Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so ... This is because a revised contract is merely an offer and does not bind the parties until it is accepted ... And generally 'an offeree cannot actually assent to an offer unless he knows of its existence.'"

The court observed that even if the plaintiff's continued use of the defendant's service could be considered assent, such assent can only be inferred after the plaintiff received proper notice of the proposed changes, and the plaintiff claimed that no such notice was given.

In contrast—and highlighting the factual nature of the analysis — the U.S. District Court for the Middle District of Alabama found enforceable contract terms posted on another plaintiff’s website and clearly referenced in the terms and conditions of the website.

In *Conference America Inc. v. Conexant Systems, Inc.*, the defendant was previously a “high volume, preferred customer” of the plaintiff’s services who, because of the high volume, enjoyed discounted call rates subject to a signed written price protection agreement. The plaintiff sent a termination letter to the defendant terminating the price protection agreement, and stated that the plaintiff’s services terms and conditions were available at [the plaintiff’s website], and that the terms and conditions had been revised subsequent to the earlier price protection agreement. These terms included a deactivation fee (not mentioned in the written price protection agreement) among other charges in the event of termination.

The defendant continued to use the plaintiff’s services for several weeks after the effective date of termination in the plaintiff’s termination letter.

Through e-discovery, an internal e-mail revealed that the defendant was aware of the revised terms posted on the plaintiff’s website. Furthermore, the correspondence indicated that the plaintiff referred to the website pricing repeatedly as a condition of its performing services after termination. The court held that the defendant was bound to the terms and conditions posted on the plaintiff’s website and entered a judgment in favor of plaintiff for nearly \$200,000, plus reasonable expenses and attorneys’ fees.

In each of these cases, the website had an online contract in which unilateral changes were made to the terms and conditions of that online contract. However, in one case the revised online contract was enforceable and, in the other, it was not, with notice being the critical factor.

Many enforceable statutory obligations are invoked each time you visit a website (for example, copyright laws that govern what you can and cannot do with the content of the site, or the Uniform Electronic Transactions Act, variations of which have been adopted by many jurisdictions). The bottom line is that you need to consider many factors (in addition to notice) not only in the creation of the online contract, but in the unilateral revisions to that agreement, in order to create a binding and enforceable agreement.

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