Impact of the Internet on Contract Law and the Principles of Offer and Acceptance (*Century 21 Canada v Rogers Communications*)


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Issue in Rogers case

- Can “accessing a publically available website result in the formation of a contract?”
- In issue was enforcement of a “browse wrap” or “web wrap” agreement by Century 21 against Zoocasa.
- C-21 using terms to prevent Zoocasa from scraping its site to use data in competitive site.
  - Century 21 Canada Limited Partnership (“CENTURY 21”) provides this website (the “Website”) to you (“You”) subject to your acceptance of the following terms and conditions of use (these “Terms of Use”). By accessing or using the Website You agree to be bound by these Terms of Use without limitation or qualification. If You do not agree to be bound by these Terms of Use, You must not access or use the Website.
Issues canvassed

- Do web site terms constitute an “offer”?
- Can offers be accepted by using a website?
- Can offers be accepted by automated agents?
- Does including a unilateral right to amend TOS make it unenforceable?
- Is providing use of a web site consideration to support an online agreement?
- Is there a policy reason for not enforcing TOS that restrict access to information on web sites?
What is an offer?

Sookman, *Computer, Internet and Electronic Commerce Law, loose leaf* (Carswell: Toronto, Ont., 1989) at 10.3 states:

“One of the issues relevant to determining where and when an electronic contract has been concluded is to establish what constitutes an “offer” in an electronic commerce transaction. An “offer” is an intimation, by words or conduct of the willingness to enter into a legally binding contract, and which in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance or return promise on the part of the person to whom it is addressed. An offer is effected when it is communicated to the offeree and a wide variety of communications means may be used to make an offer including communications by mail, telegram, telex, fax and telephone. There are also no apparent reasons why offers may not be made electronically such as by electronic mail, or to an information processing device set up to receive contract offers.”
Do web site terms constitute an “offer”? 

- The “law of contract requires that the offer and its terms be brought to the attention of the user, be available for review and be in some manner accepted by the user. Such an analysis turns on the prominence the site gives to the proposed Terms of Use and the notice that the user has respecting what they are agreeing to once they have accepted the offer.”

- “Browse wrap agreements have the advantage of being readily available for perusal by the user. Their enforcement requires a clear opportunity for the user to read them which, given the nature of computer and the Internet, is likely to be a better opportunity than that available to the user of a product with a standard form contract presented at the time of purchase. A properly enforceable browse wrap agreement will give the user the opportunity to read it before deeming the consumer’s use of the website as acceptance of the Terms of Use. In the case at bar, notice is not an issue given the defendant has acknowledged it was aware of the Terms of Use and what conduct was deemed to be acceptance.”
Can offers be accepted by using a website?

- “A browse wrap agreement does not require that the purchaser indicate their agreement by clicking on an “I Agree” button. All that is required is that they use the product after being made aware of the product’s Terms of Use.”

- “Taking the service with sufficient notice of the Terms of Use and knowledge that the taking of the service is deemed agreement constitutes acceptance sufficient to form a contract. The act of browsing past the initial page of the website or searching the site is conduct indicating agreement with the Terms of Use if those terms are provided with sufficient notice, are available for review prior to acceptance, and clearly state that proceeding further is acceptance of the terms.”
Can offers be accepted by automated agents?

“A machine or a computer and the software that runs it has at some point been constructed and programmed by an individual. As noted by Sookman at 10.5:

... an electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. Ordinarily, the employer of a tool is responsible for the results obtained by the use of the tool since the tool has no independent volition of its own. When computers are involved, the requisite intention flows from the programming and use of the computer.

I agree with this statement. Liability is not avoided by automating the actions in question.”
Does including a unilateral right to amend TOS make it unenforceable?

¬ “CENTURY 21 may, at any time, without notice or liability, revise these Terms of Use by updating this posting. You should periodically revisit this posting to review any revisions to these Terms of use. If any revision is not acceptable to You, You must cease accessing and using the Website. If You continue to access or use the Website after any revisions are posted You will be deemed to have accepted those revisions.”

¬ The defendants “rely on the principle that one party cannot arbitrarily and unilaterally end an agreement or change the terms of an agreement.

¬ Century 21 confirms that there have been no changes to the Terms of Use that were posted on their Website on October 5, 2008. The Terms of Use are also not capable of retroactive change. Given there have been no changes since the Terms of Use were first posted, the plaintiffs rely on the Terms of Use posted on October 5, 2008. As a result of the foregoing, I do not need to further consider the issues that arise from unilateral changes without further notice.”
Is providing use of a web site consideration to support an online agreement?

- “The defendants also argue that in offering access to their Website, Century 21 is not giving any promise of benefit and undertakes no burden and as a result there is no consideration. I do not find this in fact to be the case.

- Clearly the databases created by developers of websites have value. Information has value. The evidence in this case is that Zoocasa has spent over $6 million on its Website. Century 21 has expended over $6,345,849.59 from 2006 to December 31, 2009. Zoocasa’s actions in accessing the Century 21 Website and copying photographs, property descriptions and other information affirms that there is value. Presumably if the information was without value Zoocasa would not seek it or use it. In my opinion there is consideration for the contract as Zoocasa obtained the benefit of the information displayed on the Website.”
Is there a policy reason for not enforcing TOS that restrict access to information on web sites?

- “The evolution of the Internet as an “open” medium with its ability to hyperlink, being key to its success, does not mean it must function free of traditional contract law. It is simply the manner of contracting that has changed, not the law of contract. The acceptance of click wrap and browse wrap agreements acknowledges the right of parties to control access to, and the use of, their websites.

- Just because a party chooses to do business on the Internet should not mean they relinquish their rights to control access to their business assets and information. The defendants’ submission would deny that right to the plaintiff Century 21. In turn, that would decrease their motivation to create and operate their Website.”
Is there a policy reason for not enforcing TOS that restrict access to information on web sites?

¬ “In my opinion, a publically available website does not necessarily give a right of access free of any contractual terms. Depending on the circumstances, a contract may be formed.

¬ It is important for commercial efficacy that contract terms can be agreed upon as easily in the electronic world as in the world of paper. In my opinion, the defendants’ suggestion that the Internet would be crippled by enforcing Terms of Use is incorrect. To render Terms of Use unenforceable would impair the utility and health of the Internet as creator’s products would not be capable of contractual protection. If offerors could not place information on the Internet without some measure of control, its utility would be diminished.”
Other Examples..................
Are shrink-wrap agreements enforceable?

“In Florida and the federal circuits, shrinkwrap agreements are valid and enforceable contracts…”

“The outside retail packaging of TracFone's Phones contain conspicuous language restricting the use of the Phones for TracFone Prepaid Wireless service and prohibits the consumer from tampering or altering the software or hardware in the phone. The language provides in part “[b]y purchasing or opening this package, you are agreeing to these terms and the terms and conditions of service in the enclosed user guide.” Accordingly, an enforceable contract exists between the parties as to Defendants' use of the Phones and Defendants have breached the parties' contract by, inter alia, purchasing TracFone Prepaid Phones with the specific intent to reflash or unlock the phones and ship the phones outside of the United States.”
“After reviewing the case law pertaining to so-called “shrinkwrap” agreements, we are satisfied that the Pro-CD line of cases is better reasoned and more consistent with contemporary consumer transactions...

We therefore decline to adopt the minority view, as urged by plaintiffs, that a contract is fully formed when a buyer orders a product and the seller accepts payment and either ships or promises to ship. Instead, formation occurs when the consumer accepts the full terms after receiving a reasonable opportunity to refuse them. Yet in adopting the so-called “layered contracting” theory of formation, we reiterate that the burden falls squarely on the seller to show that the buyer has accepted the seller's terms after delivery. Thus, the crucial question in this case is whether defendants reasonably invited acceptance by making clear in the terms and conditions agreement that (1) by accepting defendants' product the consumer was accepting the terms and conditions contained within and (2) the consumer could reject the terms and conditions by returning the product.”
Defrontes v Dell Inc. 984 A.2d 1061 (Sup.Ct.RH.Isld.2009)

“In reviewing the language of the terms and conditions agreement it cannot be said that it was reasonably apparent to the plaintiffs that they could reject the terms simply by returning the goods. We believe that too many inferential steps were required of the plaintiffs and too many of the relevant provisions were left ambiguous. We are not persuaded that a reasonably prudent offeree would understand that by keeping the Dell computer he or she was agreeing to be bound by the terms and conditions agreement and retained, for a specified time, the power to reject the terms by returning the product.”
Major v McCallister (Miss.CT.App. Dec 23, 2009)

- Are browse-wrap agreements enforceable?
  - “The legal effect of online agreements may be ‘an emerging area of the law,’ but courts still ‘apply traditional principles of contract law and focus on whether the plaintiff had reasonable notice of and manifested assent to the online agreement.’”

- “ServiceMagic’s site was a browsewrap -- i.e., one where users need not ‘click’ to accept the website terms. Instead, browsewraps indicate in some fashion that use of the site constitutes acceptance of its terms of service... uphold browsewraps if the user “has actual or constructive knowledge of a site's terms and conditions prior to using the site.”

- ServiceMagic did put ‘immediately visible notice of the existence of license terms’ -- i.e., ‘By submitting you agree to the Terms of Use’ and a blue hyperlink -- right next to the button that Appellant pushed. A second link to those terms was visible on the same page without scrolling, and similar links were on every other website page....

- For these reasons, Appellant’s contention that the website terms were so inconspicuous that a reasonably prudent internet user could not know or learn of their existence, or assent to them without a ‘click,’ is unconvincing.”
“the Court finds that the Terms were conspicuous enough... It is undisputed that the Terms were hyperlinked on three separate pages of the online Plate order process in underlined, blue, contrasting text... Further evidence of the Terms' conspicuousness is the fact that they were brought to attention by being specifically referenced in the final order step which read: “STEP 4 of 4: Review terms, add any comments, and submit order,” and was followed by a hyperlink to the Terms... Though PDC does not state whether or not they read the Terms, it is inconsequential to the Terms' conspicuousness or PDC's accent thereto. See Druvan v. Jagger, 508 F.Supp.2d 228, 237 (S.D.N.Y. 2007) (where the court found that the plaintiff was bound to online terms regardless of whether she actually read them).”

“In ruling upon the validity of a browsewrap agreement, courts consider primarily ‘whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site.’”

“In the instant case, it is clear that Plaintiff had no actual notice of the Terms and Conditions of Use. Defendant has also failed to show that Plaintiff had constructive notice. The Hawkins Affidavit...[or] refute Plaintiff's sworn statement that she was never advised of the Terms and Conditions and could not even see the link to them without scrolling down to the bottom of the screen—an action that was not required to effectuate her purchase. Notably, unlike in other cases where courts have upheld browsewrap agreements, the notice that “Entering this Site will constitute your acceptance of these Terms and Conditions,” was only available within the Terms and Conditions... Hines therefore lacked notice of the Terms and Conditions because the website did not prompt her to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions.”
Are click-wrap agreements enforceable?

“The agreements at issue here are “clickwrap arrangements” in which users of Google's AdWords program are required to agree to the proffered terms in order to use the program.”

“The Second Circuit “regularly enforce[s]” forum selection clauses as long as ‘the existence of the clause was reasonably communicated to the parties.’”

“District courts in this Circuit have found that clickwrap agreements that require a user to accept the agreement before proceeding are “reasonably communicated” to the user for purposes of this analysis.”

“Google bears the burden of demonstrating that it reasonably communicated the forum selection provision to TradeComet...Google offers testimony and screenshots showing the status of TradeComet's AdWords accounts to support its contention that TradeComet accepted the August 2006 Agreement and that it had to click through the text of that agreement to do so...” (emphasis added)

See also, Universal grading Services v eBay, Inc. 2009 WL 2029796 (E.D.N.Y. June 10, 2009)
Scherillo v. Dun & Bradstreet, Inc. 684 F.Supp.2d 313 (E.D.N.Y.2010.)

- “Directly below this text box there is more text that reads: “I have read and AGREE to the terms and conditions shown above.” Immediately adjacent to this text is a much smaller, empty box (“the terms and conditions check box”). Also at the bottom of the page is another box containing the phrase “Complete Registration” (“the Complete Registration box”). Clicking on this box completes the user’s registration. McDonald testified that if a user clicks on the Complete Registration box without checking the terms and conditions check box, the user is unable to complete registration and is returned to the registration page.

- “plaintiff's primary contention is that he did not actually consent to the clause, and he sought to show that it was possible for him to unknowingly and involuntarily “check” the terms and conditions check box.”
“the Court finds plaintiff's testimony that he did not realize he had checked the box accepting the terms and conditions not to be credible... to accept plaintiff's theory, the Court would have to find that plaintiff hit two keys accidentally—the space bar and the return key—and that he was then involuntarily and unexpectedly sent to the next screen where he nonetheless proceeded to enter his credit card information and complete the purchase of the report. This alleged chain of events is simply not credible. The Court finds that plaintiff knowingly and voluntarily “checked” the terms and conditions box and assented to the clause.”

See also, Appliance Zone, LLC v Nextag, Inc. 2009 WL 5200572 (S.D. Inc. 2009)
“The fact that plaintiff had to “scroll” through a text box to get to the provision containing the forum selection clause does not affect the Court's analysis. Instead, this Court concludes that forum selection clauses are “reasonably communicated” to a webpage user even where a user simply has to scroll down a page to read the clause...

A person who checks the box agreeing to the terms and conditions of a purchase on an internet site without scrolling down to read all of the terms and conditions is in the same position as a person who turns to the last page of a paper contract and signs it without reading the terms-namely, the clause is still valid. In sum, the Court concludes that the forum selection clause was reasonably communicated to the plaintiff.”
“Mr. Odeh asserts that because he clicked “register” only once, the forum selection clause does not bind him. He argues that, by contrast, the defendants in Field agreed to the forum selection clause every time they accessed the plaintiff's online database over the course of four years. But a party need not assent to an agreement multiple times in order for a contract to be enforceable... In Field, the fact that the defendants agreed to the website's terms of use each time they accessed the plaintiff's online database reinforced the court's conclusion that the defendants had consented to personal jurisdiction, but it was not dispositive.”
“Prior to continuing and completing Match's subscription and payment process, each subscriber to Match.com, including Brodsky and other putative class plaintiffs, must check a box on the website affirming “I agree to the Match.com terms of use,” which statement is hyperlinked to a complete copy of the 11-page User Agreement. The first paragraph of the User Agreement states: “If you object to anything in this Agreement or the Match.com Privacy Policy, do not use the Website or the Service.”

“it is clear that the forum selection clause in Match's User Agreement is reasonably communicated and mandatory, and that it covers the claims involved here-i.e., it is presumptively enforceable.”
“It is perfectly reasonable and legitimate for Match-in operating a website and service accessible to users anywhere in the country-to have decided that any disputes about its website and services should be litigated in Texas, the State in which it is headquartered and where all of its employees reside. Indeed, as a website and service provider, Match would appear to have no practical alternative than to include a forum selection and choice of law clause in its User Agreement, since otherwise Match could potentially be subject to suit in any of the fifty states arising from its website or service. Accordingly, because Match's forum selection clause meets the standard for presumptive enforceability under well-settled law and plaintiffs have failed to make the strong showing required to overcome that presumption, we shall give effect to the forum selection clause.”

“Even if the court were to assume without deciding that the TOU was a contract of adhesion, striking the forum selection clause could wreak havoc on the entire social-networking internet industry. If this court were to determine that the forum selection clause contained in Facebook's TOU was unenforceable, the company could face litigation in every state in this country and in nations around the globe which would have potential adverse consequences for the users of Facebook's social-networking site and for other internet companies.”
“The Qwest Subscriber Agreement and the Arbitration Clause do not appear on the same scroll down box or page as the “I Accept” and the “I Do Not Accept” buttons...the Subscriber Agreement is referenced by the Legal Agreements page but it is not expressly incorporated into the Clickwrap Agreement”.

“As presented, the Clickwrap Agreement does not clearly incorporate the Subscriber Agreement by reference and to reach the arbitration clause requires the user to leave the installation program, log onto the Internet (if possible), navigate to the proper page, and read the Subscriber Agreement, then return to the installation program's scroll down window to read the remaining ten pages of the High-Speed Internet Modem Installation Legal Agreement before choosing whether to agree to the terms... This creates an ambiguity regarding recourse in the event of a dispute. These circumstances demonstrate a genuine issue of fact.”
Roling v. E*Trade Securities, LLC, 756 F. Supp. 2d 1179 (N.D. Cal. 2010)

Is a term in an online brokerage agreement that permits E*TRADE to modify its fee structure at any time by posting a modified structure on its Web site and requires customers to check E*Trade's website for modifications enforceable?

“In sum, E*Trade is unable to cite to any case, whether under New York law or California law, that undercuts plaintiffs' allegation that a contractual provision that allows a party to unilaterally change the terms of the contract without notice is unenforceable.”
“In addition, by virtue of the posting online of the Modified eBanking Agreement, Patco effectively agreed to monitor its commercial accounts daily. While Patco protests that it did not actually ever see the Modified eBanking Agreement and thus was never properly notified of its existence or bound by it... the Bank reserved the right, in the Original eBanking Agreement, to modify the terms and conditions of that agreement at any time effective upon publication...There is no dispute that Patco reviewed and agreed to the terms of the Original eBanking Agreement....The online publication of the Modified eBanking Agreement hence was binding upon Patco. See, e.g., Harold H. Huggins Realty, Inc. v. FNC, Inc., 575 F.Supp. 2d 696, 708 (D.Md. 2008) (unilateral modification of Internet-based service contract held effective when prior agreements permitted modification at any time and stated that modifications would be effective after they were posted for 30 days).”
Enforcement of TOS referenced in hyperlink to clickwrap.

HomeAway.com implemented a "click-through" process on each of its websites. Under this procedure, before an advertiser could list or renew a property listing, she was required to affirmatively click a box reflecting agreement to the terms and conditions posted on the website. These terms and conditions were available to the advertiser via a hyperlink located directly below the "I Agree" check box.

"Importantly, nowhere in Knopff's testimony does she affirmatively testify that she did not click the "I Agree" box when listing or renewing listings. While she averred that she did not recall any terms and conditions being posted on any of the websites, she never testified that she did not click the "I Agree" box. This testimony is not sufficient to defeat a motion for summary judgment when undisputed evidence establishes that she necessarily would have clicked this box in order to place or renew the listings."
Some listings were contracted for before the clickwrap process was in place. This “browsewrap” was not enforced.

"Although the terms and conditions were posted on the website at this time, because visitors were not required to assent to them, they would constitute a "browsewrap agreement."...Most courts analyzing the enforceability of the terms and conditions of browsewrap contracts focus on whether the user had actual or constructive knowledge of the terms and conditions such that their use of the website can constitute assent to the terms.

In this case, the record reflects only that when initially posted, the terms and conditions were available via a hyperlink posted on the home page of the websites. However, the record does not contain any information as to the size of the font of the hyperlink or the language used to alert the website users to the terms and conditions. As Knopff averred that she has never read the terms and conditions, this would suggest that she did not have actual knowledge of these terms and conditions at this time. Therefore, the Court cannot conclude that the terms and conditions were binding on Knopff by virtue of the browsewrap agreement in place at the time the listings were initially posted on A1 Vacations."

- Enforcement of TOS referenced in hyperlink to “modified” clickwrap
- The first time that a user such as Plaintiff decided to start playing a Zynga game through a social media platform such as Facebook, he or she was presented with a screen request stating: "Allow Access? Allowing YoVille access will let it pull your profile information, photos, your friends' info, and other content that it requires to work." Underneath, there is a large "Allow" button, a smaller "cancel" link, and smaller grey font stating “... By using YoVille, you also agree to the YoVille [blue hyperlink] Terms of Service.”

- “Plaintiff's argument that she was not provided with sufficient notice of the contractual terms she was assenting to because of Zynga's modified clickwrap presentation, and therefore is not bound by any arbitration provision, fails in light of recent caselaw holding that clickwrap presentations providing a user with access to the terms of service and requiring a user to affirmatively accept the terms, even if the terms are not presented on the same page as the acceptance button, are sufficient.”
Fteja v. Facebook, Inc., 2012 WL 183896 (S.D.N.Y. 2012)

- Enforcement of TOS referenced in hyperlink to hybrid browserwrap, clickwrap.
  - “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." The phrase "Terms of Service" is underlined, an indication that the phrase is a hyperlink, a phrase that is "usually highlighted or underlined" and "sends users who click on it directly to a new location—usually an internet address or a program of some sort."

- "Thus Facebook's Terms of Use are somewhat like a browserwrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else—click "Sign Up"—to assent to the hyperlinked terms. Yet, unlike some clickwrap agreements, the user can click to assent whether or not the user has been presented with the terms."

- “the Court concludes that Fteja assented to the Terms of Use and therefore to the forum selection clause therein. If that is so, Fteja agreed to litigate all disputes regarding his Facebook account "exclusively in a state or federal court located in Santa Clara County,"

- Enforcement of TOS referenced in hyperlink to clickwrap during software installation.

- “Several cases have concluded that where, during a software installation, the user is presented with the text of an agreement in a scroll box and required the click a button expressing assent to those terms before installation continues, a contract is formed. Rarer are cases in which, rather than presenting the terms of the agreement in a scroll box, the installation software directs the user to the terms of the agreement through a link to a different location... Nevertheless, the reasoning in "scroll box" cases applies with equal force where, rather than scrolling through an agreement's terms in a text box, the user can review the license terms by following the tendered link.”

“There are two facts that are unique to this scenario. First, Mr. Grosvenor could not review Qwest's terms of service simply by clicking on the link www.qwest.com/legal; doing so would have only taken him to a page where he would have to continue to search for a link to the applicable contractual terms. The Court cannot say that, as a matter of law, requiring a user to navigate through two links in order to review the terms of an offer prevents any contractual formation, each additional step required of the user tips against a finding that the terms were sufficiently conspicuous. Second, and perhaps more importantly, the fact that a user must navigate to a web page in order to ascertain terms of an offer is particularly difficult where the software being installed is the means by which the internet can be accessed. In the absence of some other means of accessing the internet, Qwest's program did not allow Mr. Grosvenor to go to www.qwest.com/legal or review the applicable documents.... Under these circumstances, where there is no assurance that a user could view the operative terms prior to agreeing to them. Thus, despite the representations made as to the effect of pressing the "I Accept" button, the Court has some doubt that doing so created an enforceable contract.” (emphasis added)

Note: installation process plus a welcome letter were sufficient to obtain assent to an arbitration clause.
One beacon Insurance Company v Crowley Marine Services, Inc. 648 F.3d 258 (5th.Cir.2011)

- Enforcement of TOS on websites incorporated by reference in other contracts.
- "THIS RSO [Repair service Order] IS ISSUED IN ACCORDANCE WITH THE PURCHASE ORDER TERMS & CONDITIONS ON WWW.CROWLEY.COM / DOCUMENTS & FORMS, UNLESS OTHERWISE AGREED TO IN WRITING."
- "The terms and conditions referred to in the RSO were located on a subpage of Crowley's website. The terms and conditions could not be accessed by typing "www.crowley.com / documents & forms" into a web browser. The district court found that "www.crowley.com / documents & forms" was not intended to be a web address indicating the exact location of the page containing the terms and conditions, but merely provided directions to assist in locating the terms and conditions on Crowley's website."
- "Under general contract principles, where a contract expressly refers to and incorporates another instrument in specific terms which show a clear intent to incorporate that instrument into the contract, both instruments are to be construed together....We see no reason to deviate from these principles where, as here, the terms to be incorporated are contained on a party's website..."
- Although Crowley undoubtedly could have provided clearer directions to the location of the terms and conditions on the website, we agree with the district court that notice of the terms and conditions was reasonable under the particular facts of this case."
Problems with incorporating terms by reference.

Dispute over whether GoDaddy had right to “park” domain names on pages with advertising under a Parked Page Service Agreement that was incorporated by reference into GD's Universal Terms of Service.

“A careful customer reading the Universal Terms of Service would have no reason to suspect that the Domain Registration Agreement and the Parked Page Service Agreement always go together. The Universal Terms of Service informed customers that specific agreements would apply when specific services were purchased. It did not clearly and unequivocally inform customers which agreements applied to which services. It did not notify customers that certain unrequested "services" would be bundled with requested services. In particular, it did not communicate that the Parked Page Service Agreement applies to anyone registering a domain name.

As a matter of law, the Terms of Service did not clearly and unequivocally inform Plaintiffs that the Parked Page Service Agreement was among those agreements incorporated by reference when Plaintiffs purchased domain name registration from GoDaddy.”
Are TOS posted on a website binding?

Plaintiff ordered goods by email. The defendant’s website contains the "Terms of Sale" on its "About Us" page. The "Terms of Sale" has a hyperlink that directs the viewer to the terms of all sales, including disclosures, return policy and legal policy.

"Assuming, without deciding, that the conspicuous placement of such terms of sale on the website of an internet merchant would be sufficient even in cases where the transaction arose from an email solicitation, defendants' "terms of sale" were "submerged" too deeply to become a binding part of any sale agreement...

In closing, this Court reiterates that forum selection clauses are *prima facie* valid when a party can show that the clause was incorporated into the parties' contract. However, e-commerce merchants cannot blithely assume that the inclusion of sale terms, listed somewhere on a hyperlinked page on its website, will be deemed part of any contract of sale.”
Are TOS referenced in an email confirmation binding?

“Clearwire asserts that Ms. Brown assented to its TOS both (1) by using her modem after having received the confirmation email which noted the TOS on its website and then retaining the modem for six months, and (2) by clicking on its "I accept terms" web-button prior to accessing the internet on her modem...

The confirmation email did not contain a direct link to Clearwire's TOS, but rather a link to Clearwire's homepage. To find the TOS, Ms. Brown would have had to negotiate her way through two more hyperlinks. Further, the reference to the TOS did not appear until the third page of the email Ms. Brown received. Like the court in Specht, this court finds that the breadcrumbs left by Clearwire to lead Ms. Brown to its TOS did not constitute sufficient or reasonably conspicuous notice of the TOS. Accordingly, the court declines to hold that Ms. Brown manifested assent to the TOS based on her receipt of Clearwire's email and retention of the modem alone.”

“the same day that Clearwire asserts that Ms. Brown clicked on the "I accept terms" button, a Clearwire technician visited her home, while she was not there, to check the modem connection. The parties have expressly stipulated that a material issue of fact exists with respect to whether or not Ms. Brown ever clicked Clearwire's "I accept terms" button.”
Liberty’s Syndicates at Lloyd’s v Walnut Advisory Corp 2011 WL 5825777 (D.NJ. Nov 16, 2011)

- Problems with incorporating terms by reference where there is an existing agreement.
- Parties had an implied by fact contracts (Binding Authority Contracts or BOCs). One party argued that other terms (Terms of Business Agreements or TOBAs) applied based on (1) emails containing hyperlinks and reference to the TOBAs, and (2) instructions located on their client website/extranet.

1. “In the present case, the hyperlinks and references in Miller's emails most closely resemble the terms and conditions in those browsewrap agreements that courts have declined to enforce. The Court finds that these notifications, like the terms and conditions listed on a submerged portion of a webpage in certain browsewrap agreements, were insufficient to provide adequate notice of the TOBAs.”
2. “When Walnut first accessed the client website/extranet, the implied contract between Walnut and Miller was already in effect... Because the relationship between Walnut and Miller was not limited to the bounds of Miller's client website/extranet, the forum selection clause referenced in the website terms did not provide fair notice...Thus, the notice provided by Miller's website/extranet was insufficient to notify Walnut of the effect of the website's contractual terms on Walnut and Miller's existing contractual relationship.”
Enforceability of right to unilaterally change services.

“On its face, the Subscriber Agreement expressly permits Dow Jones to discontinue or change services (defined to include BOL) or their availability at any time. Plaintiffs argue that such an interpretation of the contract renders it meaningless because it would eliminate the requirement of consideration or performance on the part of Dow Jones. Yet it is well-settled that "the courts will not adopt an interpretation that renders a contract illusory when it is clear that the parties intended to be bound thereby."

“In this case, there is no evidence that Dow Jones used the discontinuance provision to deprive plaintiffs of an unreasonably large part of WSJ Online's content, and there is no reason to interpret this provision as permitting such extreme behavior. Dow Jones acted reasonably, and therefore this provision of the Subscriber Agreement is not illusory. Dow Jones discontinued access to BOL content in accordance with the contract.”

- Use of TOS to obtain jurisdiction in a patent infringement case.
- “Finally, with the growth of the social networking industry, the Court hesitates to establish precedent that would potentially foster satellite litigation in every patent case involving a social networking market participant. Should this Court decide that a social networking market participant can limit the forum in which it can be sued for patent infringement via Terms of Service governing "access to and use of that social networking market participant's website and services”, foreseeably, other District Courts in similar cases will be called upon to decide, inter alia, whether other plaintiffs' employees ever agreed to online Terms of Service, whether those employees could bind their plaintiff employers to those Terms of Service, whether those Terms of Service contained a forum selection clause, whether any such forum selection clause was enforceable, and, as the Court is asked to decide here, whether that forum selection clause contemplated coverage of patent infringement claims. The Court refuses to set this precedent.”
Enforcement of Facebook “webwrap” TOS against minor suing over Facebook’s sponsored stories (a form of paid advertisement that appears on a facebook.com user’s profile page consisting of another friend’s name, profile picture, and an assertion that the person "likes" the advertiser”).

“As California law recognizes also, however, "the disability of infancy [is not] a `sword' rather than a `shield...The infancy defense may not be used inequitably to retain the benefits of a contract while reneging on the obligations attached to that benefit.”

“In the specific context of forum-selection clauses, courts, including California courts, have readily declined to permit minors to accept the benefits of a contract, then seek to void the contract in an attempt to escape the consequences of a clause that does not suit them.”

“Plaintiffs have used and continue to use facebook.com. The Court concludes that Plaintiffs cannot disaffirm the forum-selection clause in Facebook's TOS, although Plaintiffs were minors when they entered the agreement containing the clause.”
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