

## Online Contracting — Getting It Right

Uber hasn't done it. Amazon hasn't done it. Barnes & Noble hasn't done it. These big companies haven't been able to figure out how to get a court to enforce their online terms of service. But there is no reason that your company cannot get it right.

It's not rocket science. You just have to take traditional contract principles and apply them online. Yet, businesses (and courts) are still struggling with how to do this properly. Given that the consequences of not being able to enforce a contract can be disastrous for a business, you would think more effort and attention would be spent on applying these principles to websites. However, many businesses are still falling short.

What we tell clients is that, in general, courts use a four-part test to determine if a party has validly agreed to the terms of a contract (whether the contract is on paper or online): (1) is the user provided with adequate notice of the existence of the terms; (2) does the user have a meaningful opportunity to review the terms; (3) is the user provided with adequate notice that taking a specified action manifests assent to those terms; and (4) does the user take the specified action? However, as technology develops, courts are becoming more sophisticated, and are looking at not only the language of the terms, but also at the presentation of the terms and the flow of the screens in the online agreement process.

Recent cases involving Uber (there are many), Amazon.com and Barnes & Noble illustrate the problems that companies are having in enforcing their online terms.

- An Uber user filed a class action lawsuit alleging that Uber was improperly charging cancellation fees. Uber asked the court to refer the suit to arbitration, pursuant to a provision in the terms and conditions to which the user purportedly agreed when he created his Uber account. The user objected, saying that he did not have reasonable notice of Uber's terms of service. The court agreed, because a virtual keyboard on the user's smart phone screen blocked Uber's notice that "BY CREATING AN UBER ACCOUNT, YOU AGREE TO THE TERMS OF SERVICE & PRIVACY POLICY," with links to the terms of service and privacy policy.
- Amazon's order page said that "by placing your order, you agree to Amazon's privacy notice and conditions of use." But Amazon's page did not require the user to "click" or otherwise affirmatively agree to the terms of use (which contained an arbitration clause). The court refused to order arbitration pursuant to the terms of use, because Amazon could not prove that the user was on notice of the terms.
- Barnes & Noble made its terms of use available via a hyperlink on every page of its website, but did not otherwise provide notice to users to take affirmative action to demonstrate their consent to the terms. Once again, a court refused to enforce the terms because the court felt that the existence of the terms was not conspicuous enough.

Certainty is important in business transactions. It is not difficult to set up online Terms and Conditions that are enforceable if you pay attention to the rules and to the details. But not getting it right can cost a business many times more than the cost of getting it right. Just ask Uber, Amazon and Barnes & Noble.

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