

Advisories

Amending Terms of Service – Are Website Postings Enforceable?

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In our wired world of texting, email and the Internet, businesses continually communicate with potential and existing customers online. The majority of websites, regardless of content and functionality, post a link to an online agreement, typically referred to as the website "Terms of Use," "Legal Terms," "Acceptable Use Policy," (or something similar). This agreement usually provides that, "We may amend this Agreement at any time by posting the amended terms on this Site."

Can a business amend an existing contract with a customer (whether entered into online or by other means) by merely posting the agreement at its website? A recent decision of the Ninth Circuit, *Douglas v. US District Court ex rel Talk America, Inc.*,¹ considered whether a telecommunications service provider (Talk America, which acquired AOL's long-distance business) could unilaterally modify an existing service contract by merely posting the new agreement on its website. Unfortunately, the opinion does not indicate how the customer entered into the original agreement (by phone, for example) or whether he agreed that its terms could be amended by posting the revised agreement online (let's assume he didn't). What is clear is that Talk America made significant changes to the agreement, including additional service charges and a mandatory arbitration clause, and then posted the revised contract at its website without further notification to Douglas.

Four years passed and Douglas had not visited the Talk America website and was unaware of the new terms of service. The court noted that even if Douglas had visited the Talk America website, he had no reason to look at the revised contract posted there. The court held "[p]arties 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." The court concludes that the revised terms of service are not enforceable; holding that posting the new terms at the service provider's website was not sufficient notice.

The decision has significant ramifications for the enforceability of material changes to agreements where online posting of the revised terms is not likely to come to the attention of the customer. What steps can be taken to provide proper notice of changes to an online agreement? While not a comprehensive list, consider the following measures:

1. Ensuring that the initial agreement includes a "change in terms" notice, specifying that the agreement may be revised at any time by posting the amended terms to the website. The customer may reject the amendments by refusing or terminating the services (without penalty);
2. Allowing a reasonable period, such as 30 days, after the amended terms have been posted prior to the effective date;
3. Describing the nature of the changes to the Agreement at the website and posting a redlined version of the new agreement to clearly indicate the revisions; and
4. Taking reasonable measures to notify customers by email if changes are significant (particularly an arbitration clause) and adverse to the customer.

Footnotes

¹ Douglas v. U.S. District Court for the Central District of California, 2007 WL 2069542 (9th Cir. (Cal.) available at http://pub.bna.com/eclr/0675424_071807.pdf.

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