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Creating an Enforceable Online Contract: Best Practices

Posted by Linda Norbut on Tue, Jul 23, 2019

“I AGREE.” Anyone who engages in online commerce has likely had to click on that button countless times. The question is whether contracts made under these and similar circumstances are enforceable. The typical lawyer’s answer would likely be “it depends,” but those drafting online agreements, such as privacy policies, terms and conditions (T&C), and end-user license agreements (EULA), can take certain measures to make certain such agreements are ultimately enforceable.

When the enforceability of a contract is placed in question, the threshold determination is often whether mutual assent exists among the parties. In this determination, courts have favored finding a binding agreement where the party has engaged in affirmative conduct acknowledging the terms of the contract. However, it is not merely clicking on the proverbial “I Agree” button that creates the legal contract, but rather the party must have had had reasonable notice and opportunity to review the terms of the agreement. In other words, a party should not even have the option of manifesting assent (e.g., by clicking an “I agree” button) without having been first presented with the terms of the proposed agreement, which could either appear automatically or when the party clicks on a hyperlink or icon that is clearly labeled and easily found.

Some technology may also prevent parties from assenting to the agreement until they have navigated past all the terms—if such a method is available, this would increase the chances of reliable mutual assent. To maximize the likelihood of enforceability, companies should ideally require counterparties to scroll through to the bottom of the terms and then type in their name in a signature box prior to clicking the “I Agree” button, or otherwise expressly and actively manifest their assent to the terms of the agreement.

Importantly, the format and content of the terms could drastically affect the enforceability of an online contract. For that reason, companies should provide clear and conspicuous notice of all terms. The use of all capital letters (All-Caps), for instance, is a time-honored tradition that extends into the digital age. Courts have agreed with the argument that using All-Caps on important provisions made them conspicuous. The important part, however, is to make the terms clear. Word processing and HTML allow the use of bold, italic, color, and highlighted font on just about any platform. Using text blocks and summary statements of the terms may make the terms more conspicuous and help parties understand what they are agreeing to. Courts have also found that agreements should appear on an uncluttered screen in order to dodge the chance that a term might be overlooked or that a party will argue it was “hidden print.”

There is one other scenario that should be given special attention: namely, where a company has provided standard terms and conditions of a sale or purchase online for review by suppliers and customers, and has incorporated those online terms by reference in the individual written contracts. This practice raises a number of questions about enforceability, especially when those online terms are subsequently modified or changed unilaterally, with little or no notice to the counterparty. These online terms and conditions often need to be updated, and the question remains as to whether the counterparty can be bound by unilateral updates. While there is little case law on the matter, the answer seems to be that such updates will be enforced as long as the party to be bound was made aware of the existence of or possibility of updates, even if actual notice was not provided.

Even though it seems that the transformation of society from handshakes and paper to electronics has caused much confusion in the process of contract formation, enforceability of agreements ultimately continues to boil down to the basics: notice and manifest assent. And with the ability to make terms even more conspicuous and more understandable through the use of technology, companies should be able to readily and reliably create enforceable contracts by keeping those basics in mind.

These principles are described in more detail in the latest update to [Internet Law: The Complete Guide](#).

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