

Have a Website? You May Need to Reconsider How Users are Informed of Changes to the Terms of Service

By Michael J. Turgeon and Theodore M. Gelderman

October 26, 2022

Following a recent decision, *Int'l Markets Live, Inc. v. Thayer*, 2022 WL 4290310 (D. Nev. Sept. 16, 2022), website hosts should reconsider how they inform users about changes to terms of service for their websites.

Courts have long held that terms of service agreements of a website are a contract between the website host and the website users. Like any other contract, in order to be enforceable, there must be a manifestation of mutual assent between the parties. Historically, websites have used a variety of strategies to show mutual assent to ensure that their terms of service are enforceable. Many sites require users to affirmatively click a box verifying that they have read and understand the terms of service (known as “clickwrap” agreements). Other sites require users to review the terms of service when they register an account with the website (known as “sign-in-wrap” agreements). Still other sites simply post their terms of service at the bottom of their webpages and users implicitly agree to these terms by their use of the website (known as “browser-wrap” agreements).

A website’s terms of service, regardless of the type, have many provisions designed to protect the website host, including a provision that permits the host to make unilateral changes to the terms. Unilateral changes to online contracts are generally permitted. However, courts have looked to whether a user has received “reasonable notice” of these changes and had the opportunity to review them. See § 304 of the Uniform Computer Information Transactions Act (good faith changes to contract are valid if the changing party “reasonably notifies the other party of the change”). To provide reasonable notice of changes to the terms of service to their users, websites have employed many of the same techniques used to show mutual assent—clickwrap, browser-wrap, sign-in-wrap agreements, or variations of these, as well as email notices, pop-up windows, or a statement in the terms of service that the continued use of the website following any changes to the terms of service constitutes user assent, regardless of whether the user actually reviews or assents thereto.

However, following the court’s decision in *Int'l Markets Live*, website hosts should reconsider their strategy as to how they will provide reasonable notice to their users. In *Int'l Markets Live*, a website host provided information about cryptocurrency markets through a subscription service to its users. The website used clickwrap and browser-wrap agreements to inform its subscribers about the website’s terms of service. Later, the website host made several unilateral amendments to its terms of service, as was permitted by the original agreement. However, the website did not require its users to click a box verifying they had reviewed and understood the new changes, nor did the website email its users about the amendment. Instead, the website only posted the amendments on its website terms of service page which was accessible from the user dashboard home page. The court held this was insufficient to provide reasonable notice to the website’s users and, therefore, the amendment to the terms of service was unenforceable. The court explained, “[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,” and dismissed the suit in favor of the website users.

The holding in *Int'l Markets Live* reflects a recent trend requiring greater evidence showing that a user actually assented to a change in the terms of service in order for the agreement to be enforceable. See, e.g., *Sifuentes v. Dropbox, Inc.*, 2022 WL 2673080 (N.D. Cal. June 29, 2022) (holding an email notification was insufficient to bind a user to updated terms when there was no evidence the user actually had received and read the email); *Alkutkar v. Bumble, Inc.*, 2022 WL 4112360 (N.D. Cal. Sept. 8, 2022) (requiring a mandatory clickwrap agreement to enforce amendments); *Optimum Constr., Inc. v. Harbor Bus. Compliance Corp.*, 2022 WL 4608170 (D. Md. Sept. 30, 2022) (explaining it would be unreasonable to expect a user to

scroll through the terms of service on a website and compare the terms with a previous version in order to determine whether any amendments had been made); *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 857 (9th Cir. 2022) (“merely clicking on a button on a webpage” may be insufficient to show assent).

In light of this trend, website hosts should reconsider how they inform their users about and implement new provisions in their terms of service agreements.

In general, it is clear that browser-wrap provisions do little to ensure amendments to terms of service are enforceable, as it is difficult to show actual notice or assent. Clickwrap agreements to new amendments provide a higher level of protection, but hosts should ensure that cookies track whether users have actually verified that they have reviewed updates to the modified agreement and assented to their terms. Direct emails informing users of any changes can provide additional protections, but may be insufficient alone and may require showing that a user actually received and opened the email. Ultimately, a multi-tiered approach to provide notice to users will ensure the greatest protection for a website host and that any amendments to the website’s terms of service are enforceable.

If you have any questions regarding the topics discussed in this article, please contact **Michael J. Turgeon** at mturgeon@vedderprice.com, **Theodore M. Gelderman** at tgelderman@vedderprice.com or any Vedder Price attorney with whom you have worked.

vedderprice.com