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Harris v. Blockbuster: Can a Website Truly Rely on its Terms of Use?

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It is now standard that virtually every website's terms of use provides that the site "can unilaterally revise these terms with notice to users". A dramatic new ruling from a recent Texas case, however, teaches that websites need to be attentive to the exact language by which they may change their Terms of Use. Otherwise, the entire Terms of Use may be unenforceable. In the case of *Harris v. Blockbuster Inc.*, the court specifically held that a site cannot unconditionally reserve the right to unilaterally amend their Terms of Use at any time.

The case arose from the serious privacy concerns raised by Facebook's Beacon program, and Facebook's collaboration with Blockbuster. It also indicates the growing sensitivity to privacy issues from courts, which in this case may have motivated the court to override the contractual protection afforded by Terms of Use.

The underlying dispute: Is there such a thing as "privacy" on Facebook?

Since its inception in 2004, perhaps the most common complaints from both users and non-users of Facebook concern the site's limitations on its users' ability to control their own privacy settings. Slowly but surely, Facebook has responded to the demands of its users by providing certain customizable privacy options, such as the option of only allowing certain members to view one's photos and other personal information, or the option to broadcast only certain information over Facebook's "news feeds." However, while Facebook has taken some positive steps toward protecting the privacy of its users, in other cases, it seems to have taken a few steps in the wrong direction.

What is "Beacon"?

In November of 2008, Facebook partnered with Blockbuster Online, along with 44 other companies, to launch "Beacon," a marketing tool that broadcasts details of purchases made by Facebook users from participating vendors to a user's Facebook friends and networks. For example, if I rent Hitchcock's *Psycho* from Blockbuster, a notification will be published on my Facebook account alerting my friends, as well as those in my networks (which, if my own childrens' usage is typical, often comprise entire cities of users), of my recent rental.

The concept seems innocent enough on its face, except for one small problem which Harris raises in her complaint: the service may well constitute a gross violation of the Video Privacy Protection Act of 1988 (the "VPAA"). The VPAA, a privacy protection law, enacted after Supreme Court nominee Robert Bork's personal video rental records were leaked to the press, prohibits the disclosure of personally identifiable rental information absent the express written consent of the consumer.

The public response to Beacon

The public outcry caused by the launching of Beacon began some time before Cathryn Harris brought her claim against Blockbuster, alleging violations of the VPAA. From the moment Facebook launched the campaign, individual users as well as public interest groups such as MoveOn.org, which amassed an anti-Beacon Facebook group of over 50,000 users within just a few days, began to express their concern for its invasiveness.

When first implemented, the main criticism of Beacon was that it was an opt-out, rather than an opt-in system, meaning that a user's purchasing data would automatically be published on Facebook, without the users knowledge (unless the user checks Facebook periodically) or consent. Not only were users concerned about the publication of some of their more personal purchases, but in addition, because the program was launched during the holiday season, many attempts by Facebook users to purchase surprise gifts for their loved ones were foiled, given that a description of each gift purchased was automatically published to Facebook for all to see.

Facebook has, to some extent, responded to complaints regarding the former opt-out system by converting Beacon into an opt-in system, whereby users must agree to the publication of their purchases from each participating vendor prior to the posting of such information.

Unilateral Modification: What was wrong with Blockbuster's User Terms and Conditions?

While it is useful to understand the background from which the underlying dispute in Harris arose, the issue of whether Blockbuster's participation in the Beacon campaign constitutes a violation of the VPAA (which could result in a large fine), was not decided by the district court. Rather, the court was faced with assessing the enforceability of the binding arbitration provision in Blockbuster Online's Terms of Use (the "TOU").

Under the TOU, Blockbuster reserved the right to unilaterally modify the TOU, "without notice…effective immediately upon posting." This unilateral modification provision also required its users to periodically check for changes to the TOU, and asserted that a user's continued use of Blockbuster's indicates their assent to any such changes.

When Harris brought her claim against Blockbuster, the defendant quickly pointed to the "binding arbitration" provision of the TOU in an attempt to get the dispute out of court. In response, Harris argued, and the court agreed, that the arbitration provision was "illusory," and therefore unenforceable, because Blockbuster had purported to reserve the right to unilaterally change the rules of the contract at any time it pleased.

The court began by noting that, "[i]n Texas, a contract must be supported by consideration, and if it is not, it is illusory and cannot be enforced." This basic requirement of contract formation (which is required not only in Texas, but in all states) must be present not only upon the initial formation of a contract, but also upon any amendment or modification to a contract. Furthermore, consideration for an amendment typically must constitute new consideration, separate and apart from the initial exchange at the time the contract was formed. For this reason, Blockbuster's unilateral modification clause, which permitted them to change the terms of the contract at any time, without consideration, was deemed unenforceable. Consequentially, the court found the binding arbitration clause to be illusory, given that it left Harris with no legal recourse in the face of any alterations made by Blockbuster to the TOU.

In reaching its holding, the court turned to the 2008 case of *Morrison v. Amway Corp.* In *Morrison*, the 5th Circuit found a similar arbitration provision to be illusory, because there was no language suggesting that Amway's unilateral modifications would be inapplicable to disputes arising prior their publication. However, the court in *Harris* made clear that the holding in *Morrison* applies as precedent even in cases where no retroactive modification has been attempted.

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Summary and Recommendations for Compliance: ***What should sites do differently?***

Harris provides some important guidance as to how companies employing click-through terms of use might be able to retain the flexibility of unilateral modification rights while preserving the enforceability of their contracts. We suggest the following steps:

- ***Qualify any unilateral modification provision.*** The court held that blanket assertions that a site retains the right to unilaterally modify its Terms of Use simply by posting notice on their website will generally be deemed unenforceable. However, the court suggested that a provision which provided for the change to go into effect after a 10-day grace period would be deemed enforceable. Therefore:
    - Allow for a grace period before a modification becomes effective.
    - Limit the applicability of any unilateral modification provision to disputes arising out of events occurring *after* any modification becomes effective.
- ***Provide adequate notice.*** While the court in *Harris* does not reach the issue of what constitutes adequate notice of a modification, other federal case law suggests that simply posting a change on your website might not suffice. For example, in the 9th Circuit case of *Douglas v. US District Court ex rel Talk America*, the court noted that "[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 as such, mandating that a user constantly check for changes to an online contract is simply unfeasible. While we cannot guarantee that any one method of notification will be deemed sufficient in court, we suggest taking one or more of the following steps:
    - Make a "track changes" version of your user agreement available on your website upon any modification. This method of notice could lessen the burden users face in keeping up to date on changes to user terms and conditions.
    - Provide notice of modifications to users via e-mail in addition to publishing notice of modification on your website. (Note: This solution is potentially problematic as such mass e-mails might be flagged by SPAM filters. Therefore, it may be appropriate to include the words "NOT SPAM" in the subject of any such notifications.)
    - In order to avoid the SPAM filter issue discussed above, require that users subscribe to an RSS feed to which notifications of modifications will be posted. (Note: www.tosback.org is one example of an established online service used by major corporations, such as Amazon and AT&T, which automatically tracks changes to online user terms and conditions and posts them to RSS feeds.)

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