Cooley

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In April 2015, the United States District Court for the Eastern District of New York defined a new category of online agreement, the "sign-in-wrap" agreement, which it distinguished from clickwrap agreements. The court then formulated a new test to assess the validity of the sign-in-wrap agreement and, applying the test to the Gogo agreement, concluded it was invalid and unenforceable. While this is a federal district court decision and is not binding on state courts or other federal courts, the decision was drafted with the intent to provide guidance regarding the validity of such agreements. As a consequence, it is likely that the decisions of other courts may be influenced by the court's decision in *Berkson v. Gogo LLC and Gogo Inc*. [1]

Facts

Defendants Gogo LLC and Gogo Inc. (collectively, "**Gogo**") provide airline passengers with Wi-Fi access. During the period at issue, Gogo's website advertised the cost of a monthly subscription and the cost of a single day pass. For potential customers who were interested in purchasing a monthly subscription, the only representation on Gogo's website regarding the price was the monthly charge of $34.95.

Plaintiff Berkson and another named plaintiff filed a class action in which they asserted that the graphics and text on Gogo's website led Internet consumers to believe they were only buying a one-month subscription when they signed up for in-flight Wi-Fi through Gogo. Gogo responded that the plaintiffs consented to the terms of use agreement ("**Terms**") posted on the website, which not only clearly provided for automatic renewal, but also included mandatory arbitration and waiver of venue protection.

At the time plaintiff Berkson purchased the Wi-Fi service, there were two sign-in buttons on the Gogo webpage. The "SIGN IN" button in the upper right hand corner did not include language above or near it that required the consumer to agree to the Terms. Towards the bottom of the page, there was a second "SIGN IN" button that included the following language above it: "By clicking 'Sign in' I agree to the *terms of use* and *privacy policy*." The "terms of use" and "privacy policy," appeared in lowercase and in a font size that was considerably smaller than the "SIGN IN" button, and appeared to be hyperlinked (i.e. displayed to the user if she clicked on the underlined phrases). Clicking on the "SIGN IN" button did not display either the "terms of use" or the "privacy policy." A potential user who wanted to sign up for use of Gogo's Wi-Fi would first activate the "create account" page to create a username and password. This "create account" page told the user: "By clicking 'NEXT' I agree to the *terms of use* and *privacy policy*." Once again, the Terms and privacy policy were only displayed if the user clicked on the hyperlinks. Clicking on the "NEXT" button did not present the Terms or the privacy policy in a pop-up window; instead, it took the user to the next screen, which presumably asked for the user's credit card information. If a user clicked on the "terms of use" hyperlink and scrolled down to the seventh page, she would find a provision that required that all actions by either party be filed in the federal or state courts located in Chicago, Illinois. Although no arbitration provision was included in the Terms at the time Berkson signed up, it was added prior to the time other plaintiffs signed up for the Gogo Wi-Fi service.

Electronic adhesion contracts

Before assessing the validity and enforceability of the Terms, the court defined four general types of online consumer contracts and summarized the court decisions that involved such agreements as follows:

1. **Browsewrap agreements**. Browsewraps are agreements that provide that the user gives assent to the terms merely by using the site. The court noted that courts generally have enforced browsewrap agreements only against "knowledgeable accessors, such as corporations, not against individuals."[2]
2. **Clickwrap agreements**. Clickwrap agreements require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of the agreement before he or she is allowed to proceed with further use of the website. Citing an article by Mark Lemley in the Minnesota Law Review, the court concluded that almost "[e]very [lower] court to consider the issue has found 'clickwrap' licenses … enforceable."[3]
3. **Scrollwrap agreements**. Scrollwrap agreements require a user to physically scroll through an internet

agreement and click on a separate "I agree" button in order to agree to the terms and conditions of the host website. Courts have found scrollwraps to be enforceable, although many have confused them with clickwraps.

4. **Sign-in-wrap agreements.** The court then defined a new category of agreement, the sign-in-wrap, which it noted was most frequently considered to be an enforceable clickwrap agreement by the district courts (the court noted that no federal court of appeal has yet ruled on the enforceability of a sign-in-wrap contract). Like a clickwrap agreement, the sign-in-wrap includes text which states that acceptance of the "terms of use" is required in order to continue. Unlike a clickwrap agreement, however, the sign-in-wrap does not require the user to click on a box showing acceptance of the "terms of use," but instead includes a statement like the statement on the Gogo website that, "By clicking 'NEXT' I agree to the *terms of use* and *privacy policy*." In other words, the sign-in-wrap agreement couples assent to the website terms of use with signing up for use of the site's services. The court then stated its opinion that sign-in-wrap agreements are "[a] questionable form of internet contracting," because they do not require the user to click on a box showing acceptance of the terms of use in order to continue, but only notify the user of the existence and applicability of the terms as the user is proceeding through the website's sign-in process.[4]

Test for assessing validity and enforceability of electronic adhesion contracts

The court then set forth the following four factors to consider when analyzing sign-in-wraps specifically, and electronic contracts of adhesion generally:

1. Is there substantial evidence from the website that the user was aware that she was binding herself to more than an offer of services or goods in exchange for money? A no answer to this question will tend to support a finding that the contract is not enforceable..
2. Did the design and content of the website, including the homepage, make the terms of use (i.e., the contract details) readily and obviously available to the user? A no answer to this question will also tend to support a finding that the contract is not enforceable.
3. Was the importance of the details of the contract (such as terms dealing with venue and arbitration) obscured or minimized by the physical manifestation of assent expected of a consumer seeking to purchase a product or subscribe to a service? A yes answer to this question will support a finding that the contract is not enforceable.
4. Did the merchant clearly draw the consumer's attention to material terms that would alter what a reasonable consumer would understand to be her default rights when initiating an online consumer transaction from the consumer's state of residence, including the right not to have a payment source charged without notice (i.e. automatic payment renewal); the right to bring a civil action in the courts of her state under the laws of that state (i.e., the venue and choice of law provisions); and the right to participate in a class or collective action? A no answer to this question also supports a finding that the contract is not enforceable.

Applying the four factor test to Gogo's motion to transfer venue and compel arbitration premised on the Terms, the court concluded that Gogo had not demonstrated that plaintiff Berkson knew that he was binding himself to more than a one-time offer of service in exchange for money at the time he purchased the Gogo Wi-Fi service. First, there was no substantial evidence from the website that Berkson knew that he was binding himself to more than a one-time offer of service other than clicking a button to purchase the service. Second, the design and content of the Gogo website, including the homepage, did not make the Terms readily and obviously available to Berkson. Neither the text above the "NEXT" button when signing up, nor the text next to the "SIGN IN" button on the lower-left side of the page, were sufficient to give adequate notice because (1) the hyperlink to the Terms was not in large font, in caps, or in bold and (2) with regard to the sign-in process, the Terms were not accessible next to the other "SIGN IN" button in the upper-right side of the page. Third, the importance of the Terms was obscured by the physical manifestation of assent, in this case the clicking of the "SIGN IN" button, expected of a consumer seeking to purchase in-flight Wi-Fi service. After Berkson clicked "SIGN IN," the Terms did not appear in a screen or pop-up window on the same screen and Berkson was also not required to scroll through the contract. The site also failed the fourth prong of the test, since Gogo failed to clearly draw Berkson's attention to material terms that purported to alter Berkson's default rights.

Recommendations

Although the *Berkson* decision is not binding on state or other federal courts, it is a lengthy decision that was

intended to be cited as precedent by courts that are asked to determine the validity of online contracts in the future. As a result, we recommend that companies review the manner in which they obtain user consent to their online agreements and consider making the following changes to enhance the likelihood that such agreements will be upheld.

1. **Obtain consent from users by using a clickwrap and/or scrollwrap agreement.** When requesting consent to your terms of use or other online agreements from a user, you should either use (1) a clickwrap, which requires the user to affirmatively check a box that says "I Agree to the Terms of Use", or (2) a scrollwrap, which requires the user to scroll through the agreement before clicking on a separate "I agree" button to assent to the agreement. Note that the *Berkson* court suggests that use of a scrollwrap agreement is preferable to use of a clickwrap.
2. **If you are using a browsewrap or a sign-in-wrap agreement, consider upgrading these agreements to clickwrap or scrollwrap agreements.** Make sure that the button or box that the user must click through clearly and unequivocally acknowledges the user's agreement to be bound by the terms of use or other online agreement. Avoid the use of language like the language used by Gogo, which used a "NEXT" clickthrough button rather than an "I AGREE" button.
3. **Disclose material unexpected terms in a conspicuous manner on the website.** Consider including a separate disclosure of any terms which a court may consider to be a material unexpected term, such as terms providing for the automatic renewal of monthly charges, forced venue or compelled arbitration. For example, you may want to include a pop-up box that appears when a user scrolls over the link to the online agreement which warns users that the online agreement includes an arbitration clause and encourages them to read the agreement before proceeding. As another example, if your terms provide for automatic renewal of monthly charges, you may want to include an excerpt of the auto-renewal provision explicitly above the "I AGREE" button and bold any auto-renewal subscription cancellation requirements.
4. **Disclose material unexpected terms in a conspicuous manner within the online agreement.** Consider highlighting any material unexpected terms to the user at the beginning of the agreement.
5. **Provide the user with an opportunity to download or print the online agreements.** By providing users with the ability to print and/or save a copy of their online agreement, you will avoid user claims that they did not have any real opportunity to access or examine the details of these agreements.
6. **Refer to the online agreement by name and use capital letters to make the reference more prominent.** Refer to the "Terms of Use Agreement" or the "Terms of Service Agreement," rather than the "terms of use" or "terms of service." Similarly, refer to the "Privacy Policy," rather than the "privacy terms" or "privacy policy."

NOTES

1. *Berkson v. Gogo LLC and Gogo Inc.*, No. 14-CV-1199 (E.D.N.Y. April 9, 2015).
2. Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459, 472 (2006).
3. *Id.* at 459.
4. *Berkson, supra* note 1 at 30.

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