

## IP ADVISOR

AN INFORMATIONAL NEWSLETTER FROM GOODWIN PROCTER LLP'S INTELLECTUAL PROPERTY GROUP

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2007 ISSUE**CASE EMPHASIZES IMPORTANCE OF PROVIDING CLEAR NOTICE OF CHANGE OF ONLINE TERMS***By Jacqueline Klosek***Overview**

The U.S. Court of Appeals for the Ninth Circuit recently held that the proposed modification of an online terms of service agreement which was simply posted on the company's website, was not effective against a company's customer who had no notice that the terms had changed. *Douglas v. U.S. District Court for the Central District of California*, 9th Cir., No. CV-06-03809, 7/18/07. This recent case questions the common practice of many companies to merely post revised terms on their websites and emphasizes the importance of taking steps to provide existing customers with clear notice of material changes to online agreements.

**Facts of the Underlying Case**

The plaintiff had entered into an agreement with America Online Inc. ("AOL") for the provision of long distance telephone service. AOL subsequently sold its long distance telephone service to a third company called Talk America Inc. ("Talk America"). Upon purchasing this business, Talk America made several changes to the services agreement that was to be binding upon its customers. Among the significant changes, Talk America imposed additional charges on its customers, required its customers to waive their right to bring any class action against the company, required its customers to assent to an arbitration provision and to agree to a choice-of-law provision that would designate New York law as the governing law of the agreement.

Following the changes to the agreement, the plaintiff continued to use the services of Talk America for a period of four years without any objection. Upon become aware of the additional charges, however, the plaintiff filed a class action lawsuit, claiming various federal and state-law causes of action. Citing the arbitration clause in the revised services agreement, Talk America made a motion to compel arbitration. The lower court granted the motion, and the plaintiff appealed.

**Decision and Legal Reasoning**

Before the Ninth Circuit Court of Appeals, the plaintiff contended that Talk America had changed the service contract without notifying him. The lower court dispensed with this argument by observing that Talk America made the service contract available on its website which the plaintiff could have accessed and read should he had wished to understand the terms under which he was receiving the services. On appeal, the plaintiff contended that because the monthly charges were charged automatically to his credit card, he did not have occasion to visit the provider's website each month. The lower court did not address this argument of the plaintiff. The Ninth Circuit addressed it, and then dismissed it, contending that even if the plaintiff had visited Talk America's

website to pay his monthly bill, he would have had no reason – or obligation – to look at the service contract posted there. The court contended: “Parties 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 relied upon traditional principles of contract law, contending that a party to a contract cannot unilaterally change the terms of the deal without obtaining the party’s consent to doing so. The court rejected Talk America’s contention that the plaintiff had agreed to the service contract changes by continuing to use Talk America’s services, emphasizing the lack of notice. The court contended that even if continued use of service could be deemed to be assent to the contract changes, as has been held by some courts, such assent could only be inferred after the plaintiff received proper notice of the changes. Unfortunately, the court did not provide detail on what “proper notice” might be.

### **Lessons Learned**

The case really emphasizes the importance of providing users with sufficient notice of changes to services agreements. While the court did not detail the components of proper notice of changes, the court did distinguish two district court opinions that had been relied upon by the lower court. In one of the prior cases, the customer was advised by mail that she could see the new terms online or call the service provider to learn about them and in the other case, the customer received the modified contract in the mail. In addition, each of the distinguished cases involved new customers. This was a key fact in the court’s view, as new customers would be on notice that they were required to assent to contract terms as condition of using the service.

Given that the defendant in this case changed the terms of service contracts that had been put into place by the company from which it had purchased the business, the case also emphasizes the importance of conducting proper and thorough due diligence when purchasing an existing business. Prospective purchasers are advised to review the service agreements of the business that they are purchasing and consider whether the terms of those agreements are acceptable to the purchasing entity. Where the terms are unacceptable, the purchasing entity will need to develop a strategy for revising the terms in a manner that will be enforceable.

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