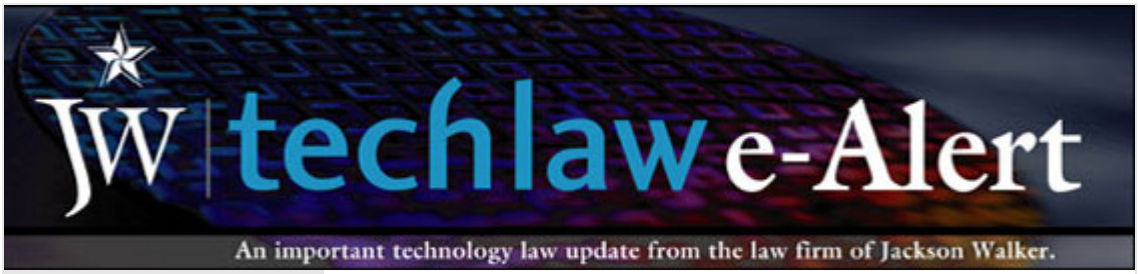

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Is It Time to Review Your Website Policies? *Harris v. Blockbuster Inc.* Terms of Use E-Contract Found Illusory and Unenforceable

By: Stephanie Chandler and **Shannon Zmud**

As many companies continue to enhance their online presence, the enforceability of a company's e-contracts becomes paramount. While traditional contract laws apply as a baseline rule, courts are frequently asked to consider the unique characteristics of e-contracts and law continues to evolve as a result of the courts' decisions. Additionally, many of our clients are adding more interaction to their websites, offering more and more online transaction options, or including community or social media aspects to their sites, which raises additional issues for site owners to address in their policies. Thus, if you have not had your website's Terms of Use or Privacy Policy reviewed recently (within the last 12 months), it may be time for an update.

The recent Memorandum Opinion in *Harris v. Blockbuster Inc.*, Cause No. 3:09-CV-00217-M, pending in the U.S. District Court for the Northern District of Texas, demonstrates the pitfalls online businesses may encounter when trying to enforce their Terms of Use/Terms and Conditions e-contracts. *Harris* arises out of alleged violations of the Video Privacy Act brought by Blockbuster customers whose movie rental choices were disseminated on their Facebook accounts through the now infamous "Beacon" program. Blockbuster attempted to invoke a provision in its Terms and Conditions that provided for all claims to be resolved through binding arbitration. Blockbuster customers succeeded in avoiding arbitration, forcing Blockbuster to resolve the dispute in federal court by challenging the Terms and Conditions agreement as illusory (in other words, it lacked sufficient consideration to form a binding contract).

Specifically, an illusory challenge was mounted against the clause titled "Changes to Terms and Conditions," which stated that Blockbuster could, at any time, modify the Terms and Conditions with or without notice, that such modifications were effective immediately upon posting on the site, and that continued use of the site after such modifications demonstrated the customers' acceptance. Like many online retailers and service providers, Blockbuster required all users to first click a box certifying that they had read and agreed to the Terms and Conditions before they were permitted to utilize the site. Provisions of this nature are very common in website browsewrap and clickwrap usage agreements and are consistent with policies that online powerhouses have utilized for years.

The *Harris* Court determined that the arbitration provision was illusory, because (1) "there is nothing in the Terms and Conditions that prevents Blockbuster from unilaterally changing any part of the contract other than providing that such changes will not take effect until posted on the website" and (2) "there is 'nothing to suggest that once published the amendment would be inapplicable to disputes arising, or arising out of events occurring, before such publication.'" The Court further noted that the latter concern

remained even when, as in *Harris*, there was no attempt by the online business to apply a contract modification to prior events.

There are two take-aways from the *Harris* decision. First, it is advisable for online businesses to include a "savings clause" in the modification of terms section in their Terms and Conditions to specifically limit the application of modifications to disputes that arise after the modification has been posted. Second, it may also be advisable for online businesses to consider a "notification of modification" clause in the modification of terms section that provides for a link on the user log-in screen for a set period of time.

If you have questions regarding this e-alert or would like to have your website's e-contracts reviewed, please contact **Stephanie Chandler** at 210.978.7704 or **schandler@jw.com** or **Shannon Zmud** at 214.953.5987 or **szmud@jw.com**.

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