8-9-2021

A Rose is a Rose: Electronic Commerce Spawns Word Confusion

Mark E. Budnitz

A ROSE IS A ROSE: ELECTRONIC COMMERCE SPAWNS WORD CONFUSION[*]

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According to Shakespeare, "[a] rose by any other name would smell as sweet."[1] Congress has enacted many statutes to protect consumers; however, courts and agencies have struggled to determine whether those laws still apply when sellers offer the same basic service through new electronic methods using terminology different from that found in the statutes. So, for courts and agencies, the rose by another name does not smell as sweet. For example, does the law treat a prepaid card in a digital wallet—such as PayPal or Venmo—the same as a plastic prepaid card in a traditional leather wallet?[2]

Congress never contemplated these new ways of conducting business because laws protecting consumers were enacted decades ago. These new ways, however, are merely new methods of providing the types of services and contracting that Congress has regulated in current law. Consequently, it is not clear that electronic commerce (e-commerce) should be excluded from regulation. This Article briefly discusses a few instances that illustrate the confusion that consumer e-commerce has produced.

Many consumer protection laws require consumers to assent to the seller's contract terms.[3] These laws, however, do not specify what constitutes assent. Instead, determining assent is left to the court's application of common-law contract formation. However, courts have

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* Originally published on the Georgia State University Law Review Blog (Aug. 9, 2021).

** Bobby Lee Cook Professor of Law Emeritus, Georgia State University College of Law. Budnitz represented low income consumers for ten years after graduation from law school, was a branch chief at the Securities and Exchange Commission, and taught at Boston University and Emory law schools. He joined the Georgia State College of Law in 1988 where his courses included Consumer Protection, the Law of Electronic Commerce, and Payment Systems.

1. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, l. 43–44.
2. *See infra* notes 20–21 and accompanying text.
3. *E.g.*, 15 U.S.C. § 1693(c)(a) ("The terms and conditions of electronic fund transfers . . . shall be disclosed at the time the consumer contracts for an electronic fund transfer service . . . .").

struggled to develop rules that are fair to consumers in the context of agreements entered into in cyberspace.[4]

Before e-commerce, consumers indicated their assent to the seller's terms and conditions by signing paper contracts.[5] With the advent of e-commerce, businesses have created a variety of methods to obtain the consumer's assent. In applying the common law of contracts, courts found that the word "contract" was inadequate. So, courts adopted new terms to differentiate two significantly different formats for obtaining consumer assent—"click-wrap" and "browse-wrap" contracts. Generally, courts will uphold a business's assertion that a consumer assented to a click-wrap contract but reject the assertion that a consumer assented to a browse-wrap contract.[6]

A 2021 case, Kauders v. Uber Technologies, Inc., illustrates how courts determine if consumers have provided sufficient assent to a business website's terms and conditions to form a contract. In Kauders, the Massachusetts Supreme Judicial Court followed precedent and required that a website must provide users with reasonable notice of the terms and conditions of transacting business on the website and

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4. *See generally* Nancy S. Kim, *Digital Contracts*, 75 BUS. LAW. 1683 (2019–20).

5. The Uniform Commercial Code (U.C.C.) defines "signed" as "any symbol executed or adopted with present intention to adopt or accept a writing." O.C.G.A. § 11-1-201(b)(37). The U.C.C. distinguishes between a "contract," defined as "the total legal obligation" and an "agreement," defined as "the bargain of the parties in fact." O.C.G.A. §§ 11-1-201(b)(3)–(b)(12). Federal law applies to e-commerce contracts. The Electronic Signatures in Global and National Commerce Act (E-Sign) defines an "electronic signature," in part as "an electronic symbol or process . . . associated with a contract . . . ." 15 U.S.C. § 7006(5). E-Sign uses the term "electronic record" to mean "a contract or other record created . . . by electronic means." 15 U.S.C § (4).

6. The American Law Institute defines "clickwrap" as the following: "In electronic and web-based transactions, assent is often manifested by clicking an 'I Agree' button. That procedure is the digital equivalent of a signature at the bottom of a printed form." Restatement of the Law Consumer Contracts § 2 (Am. L. Inst., Tentative Draft, 2019). "Browsewrap" is where "[t]he website includes a link to another page with the standard terms, and consumers, by proceeding with the purchase or simply by continuing to use the website, are deemed to have adopted the standard terms as part of the contract." *Id.* at 46. See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016) (describing clickwrap and browsewrap agreements). A third type of contract, "sign-in-wrap" agreements incorporate elements of both clickwrap and browsewrap. Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 399 (E.D.N.Y. 2015); Selden v. Airbnb, No. 16-CV-00933 CRC, 2016 WL 6476934, at *4 (D.D.C. Nov. 1, 2016). Yet another type is called "scrollwrap". *Id.* In the past, consumers contracted online by using their desktop computers and laptops. Today they are as likely to download an application (app) and enter into a contract from the app. *E.g.*, Kauders v. Uber Techs., Inc., 159 N.E.3d 1033, 1039 (Mass. 2021). Instead of using a mouse to click on a button labelled "I Agree", "I Accept", or comparable words, consumers now often assent by touching, tapping and talking. *See* Mark E. Budnitz, *Touching, Tapping, and Talking: The Formation of Contracts in Cyberspace*, 43 NOVA L. REV. 235, 256–57 (2019).

obtain from users a clear manifestation of assent to the terms and conditions.[7] After an exhaustive and detailed examination of the design features of the website's interface, the Kauders court concluded that there was no reasonable notice or clear manifestation of assent; therefore, no contract was formed.[8]

This approach is problematic because it is fact intensive. Each company's website design is unique.[9] Furthermore, a company's website design may change often. Consequently, a court could find that a website design initially met the legal requirements for obtaining the consumer's assent, but the website could later be found to be insufficient if the design is changed in a material way.

Although consumers are undoubtedly divided on these complicated e-commerce issues, they likely all share a disgust of robocalls. A recent Supreme Court case, Facebook, Inc. v. Duguid, asked the Court to determine when a robocall is not covered by the Telephone Consumer Protection Act.[10] The Act is Congress's attempt to respond to consumer anger over robocalls. It prohibits automatically dialed calls unless the consumer gives the caller prior consent.[11] Facebook, the defendant in the case, contended that the Act only applies to automatic telephone dialing systems that generate and automatically dial random or sequential phone numbers. Facebook further argued that the Act does not cover calls generated from a stored list. Conversely, the consumer asserted that the Act's consent requirement makes sense only if the caller is using the stored numbers of consumers who have consented to receive autodialed calls. The unanimous Court rejected the consumer's position by applying "conventional rules of grammar" and reading the statutory definition of "automatic telephone dialing system" narrowly.[12]

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7. *Kauders*, 159 N.E.3d at 1039.

8. *Id.* at 1052–54. The court analyzed the website's use of different fonts and contrasting colors to influence eye movements. *Id.* at 1053. The website required users to click on a button labeled "Done" but without clicking on the link to the terms and conditions. *Id.*

9. *See, e.g.*, Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 32 (2d Cir. 2002) (finding that after a detailed examination of the company's website, the website was "not sufficient to place consumers on inquiry or constructive notice of [the license] terms.").

10. Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1168 (2021).

11. 47 U.S.C. § 227(b)(1)(A).

12. *Facebook, Inc.*, 141 S. Ct. at 1169–71. United States Senator Markey and United States

Another issue is that in the past, some consumers visited their bank to deposit their checks. But now, an increasing number of consumers deposit their checks by taking a photograph of their checks on their cell phones and sending the digital images to their bank. The financial services industry calls this deposit method Remote Deposit Capture (RDC). Because laws governing checks existed before RDC was invented, it is unclear what law applies. The Uniform Commercial Code (U.C.C.) covers issues such as who is liable if a check is forged or altered.[13] Arguably, the U.C.C. applies up until the consumer takes a photo of the check, and then the Electronic Funds Transfer Act (EFTA) generally applies to the electronic transfer of funds.[14] But the EFTA provides that it does not cover transactions "originated by check."[15] And so, it is not clear what law applies once the check is converted into a digital image. Nor is it clear what law applies if the deposit goes awry and questions of a consumer's liability arise.

Even the meaning of the word "bank" is in doubt. In 2020, the Comptroller of the Currency issued a rule providing that nonbanks that associate with chartered banks are exempt from state usury laws limiting the interest they can charge.[16] Consumer advocates called this maneuver "rent a bank" and contended that these nonbanks should not benefit from an exemption afforded to real banks.[17] However, Congress voted to repeal the rule in 2021, and with President Biden's signature, the rule was revoked.[18]

Representative Eshoo promptly announced they would introduce legislation to broaden the scope of the Act. *See* Press Release, Ed Markey, Sen. Markey and Rep. Eshoo Blast Supreme Court Decision on Robocalls as "Disastrous" (Apr. 1, 2021), https://markey.senate.gov/press-releases/senator-markey-and-rep-eshoo-blast-supreme-court-on-robocalls-as-disastrous [https://perma.cc/8NNU=VJZN].

13. O.C.G.A. § 11-3-403; O.C.G.A. § 11-3-407.

14. 15 U.S.C. § 1693(a)(7).

15. *Id.*

16. National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742, 68,742 (Oct. 30, 2020) (under certain conditions, a national bank or federal savings association is the "true lender" when it is in the context of a partnership with a third party if the bank is named as the lender in the loan agreement).

17. Center For Responsible Lending, et al., Comment Letter to the Office of the Comptroller of the Currency, at 6 (Sept. 3, 2020), www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/OCC-True-Lender-Comments.pdf [https://perma.cc/Y9TK-9QLY] (claiming that under the rule "as long as a bank's name is in the fine print—nothing more," the OCC can grant a bank charter to a nonbank).

18. Elyse Moyer, Obrea Poindexter & Sean Ruff, Biden Signs Law Overturning True Lender Rule, COOLEY (July 2, 2021), https://www.cooley.com/news/insight/2021/2021-07-02-biden-signs-law-

With this survey of the various complicated issues that can arise, we revisit the question originally posed: can the law treat the credentials of a prepaid card in a digital wallet the same as a plastic prepaid card in a leather wallet? The Consumer Financial Protection Bureau (CFPB) issued a rule requiring issuers of prepaid card accounts to make extensive disclosures.[19] However, PayPal challenged the inclusion of digital wallets in the rule, contending that the CFPB did not have the authority to include prepaid accounts that consumers access through digital wallets.[20] The CFPB argued that it had broad authority under the EFTA to protect consumers who make electronic transfers. The federal district court found in favor of PayPal. It appears that a wallet, by any other name, even a similar name such as "digital wallet," does not resonate with a court.

Increasingly, businesses are accepting payment for goods and services in the form of bitcoin.[21] Are bitcoin and other forms of virtual currency a type of money? Not according to the U.C.C., the Commodity Futures Trading Commission, and the Internal Revenue Service. The U.C.C. defines money as "a medium of exchange currently authorized or adopted by a domestic or foreign government."[22] Further, the Commodity Futures Trading Commission defines virtual currency, like bitcoin, as a commodity.[23] Lastly, the

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overturning-true-lender-rule [https://perma.cc/4ZPE-2VPB].

19. 12 C.F.R. § 1005.18.

20. PayPal, Inc. v. Consumer Fin. Prot. Bureau, No. 19-3700 RJL, 2020 WL 7773392, at *1 (D.D.C. Dec. 30, 2020), *appeal docketed*, No. 21-5057 (D.C. Cir. Mar. 10, 2021).

21. Paul Vigna & Caitlin Ostroff, *Bitcoin Trades Above $50,000 for First Time*, WALL ST. J., (Feb. 16, 2021, 7:11 PM), https://www.wsj.com/articles/bitcoin-trades-above-50-000-for-first-time-11613479752 [https://perma.cc/29VV-CBA9] (reporting that "Bank of New York Mellon Corp. said it would start treating bitcoin like any other financial asset. Mastercard Inc. said it would integrate bitcoin into its payments network this year."). *But see* Paul Vigna, *Why Bitcoin Hasn't Gained Traction as a Form of Payment*, WALL ST. J., (Feb. 9, 2021, 12:44 PM), https://www.wsj.com/articles/why-bitcoin-hasnt-gained-traction-as-a-form-of-payment-11612886974 [https://perma.cc/G5MW-MZTW] (reporting that "[t]he cost of using bitcoin, and its volatility, have made normal, day-to-day transactions impractical . . . The [average] transaction fee . . . is more than $11, and it varies widely, depending on network traffic.").

22. O.C.G.A. § 11-1-201(b)(24).

23. CFTC v. McDonnell, 287 F. Supp. 3d 213, 228 (E.D. N.Y. 2018) (upholding CFTC's regulation of virtual currencies as commodities). The court also noted that virtual currency is not legal tender. *Id.* Consequently, there is no requirement that virtual currency be accepted in payment for debts under 31 U.S.C. § 5103. *Id.* at 217.

Internal Revenue Service classifies virtual currency as property.[24] And to complicate matters even more, when virtual currency is traded, sometimes it is a security and sometimes it is not.[25]

Businesses have adopted modern developments in technology, which have been incorporated into the consumer cyber marketplace.[26] The words used to identify new services and ways to conduct transactions are different from the words used in older consumer protection statutes. This difference in terminology has created significant legal consequences because it is difficult to determine whether these laws apply to e-commerce. Indeed, the marketplace will continue to change, which will create a continuing gap between the need for consumer protection and the ability of the law to stay current.[27] Nevertheless, Congress and federal regulatory agencies should act promptly to make necessary adjustments and clarifications so that consumers can continue to be protected, and companies also know what laws apply to new business services.

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24. I.R.S. Notice 2014-21, 2014-16 I.R.B. 938 (Apr. 14, 2014).

25. Carol R. Goforth, *Using Cybersecurity Failures to Critique the SEC's Approach to Crypto Regulations*, 65 S.D. L. REV. 433, 436 (2020).

26. For a description of many recent and anticipated future developments in consumer e-commerce, see Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 Loy. Consumer L. Rev. 369, 418–37 (2020).

27. The pervasive use of mandatory arbitration clauses in online contracts precludes courts' ability to construe, apply, and develop the law case by case as new situations arise. Richard M. Alderman, *What's Really Wrong with Forced Consumer Arbitration?*, A.B.A. (Nov. 22, 2010), https://www.americanbar.org/groups/business_law/publications/blt/2010/11/03_alderman/ [https://perma.cc/W4BD-G4G6] ("Arbitration allows businesses to effectively opt-out of our civil justice system and replace it with a system of private justice.").