

Contract Corner: Standard Terms in the IoT Age

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A seismic shift is afoot in the intelligence, complexity, and interconnectedness of everyday products, and the flimsy foundation of customer assent to standard terms will continue to crack, if not collapse. We recently [noted](#) some relatively straightforward adjustments that manufacturers can make to their standard terms to address issues related to e-commerce portals. The Internet of Things (IoT), however, could render the old contracting process (not just old products) obsolete. We highlight some challenging IoT contractual considerations below.

Manufacturers and distributors sensibly disclaim warranties, limit liabilities, and curb disputes in their standard terms. But courts will flout such measures, particularly in a consumer setting, unless valid contracts were formed. Standard terms are more likely to prevail if they are conspicuous, clear, reasonable, accessible, and expressly accepted by customers, but sellers often fall short of these guidelines for the sake of a seamless customer experience. Without careful attention, IoT products will exacerbate the strain on an already flawed contracting framework.

With consumers purchasing products with the tap of a button or a simple voice instruction, and with IoT products automatically purchasing refills and replacements to maximize convenience, it seems increasingly unlikely that consumers actually read, understand, and accept end user terms. In addition, courts might question sellers' ability to rely on IoT products' apparent authority to bind consumers when making programmed purchases.

At the same time, more and more products include software and data elements, adding to the list of risks and opportunities to be addressed in standard terms. Prudent sellers deploy their terms (i) to obtain broad rights to user-related data; (ii) to restrict modifications and any critical, commercial, or other unauthorized use of the software, often including references to more comprehensive end user license terms; (iii) in light of the Federal Trade Commission's [warning](#) regarding end-of-life problems with IoT products, to limit obligations to provide ongoing updates or service and to maintain flexibility to discontinue or modify the products; and (iv) to disclaim responsibility for third-party software and products.

Given the uncertainty surrounding the IoT contracting process, sellers shouldn't wait for courts to realize that contracts are becoming more distant—the connection among consumers, contract terms, and the contract formation process is stretching. If, for example, a trash bin senses that supplies are

low and sends an update to a digital assistant, which then automatically orders replenishments, how do sellers get assent to, and provide updates regarding, product terms? What remedies would be available to the end customer if an IoT product were to make a mistake or misrepresent another product?

Although a silver bullet has yet to emerge, sellers can take steps to strengthen the success of their standard terms, including the following:

- **Make the terms readily available, and provide references early and often.** Consider including a link to the terms and a summary of the most controversial provisions (e.g., the dispute resolution process) in user manuals, websites, apps, warning labels, and other materials provided or made available to end users. Clearly indicate that by purchasing or using the product, the customer agrees and is subject to the terms. Consider requiring that distributors, including digital assistants, provide notice of and obtain customers' assent to the terms. Voice recognition and other technologies that enable swift purchases could also support contract formation.
- **Look for natural opportunities to obtain customer acceptance of the standard terms.** Any product, website, or app registration process or rebate procedure could incorporate the acceptance of end user terms.
- **Update the privacy policy to cover current and forthcoming data collection, usage, and sharing practices.** Emphasize that third-party products are subject to separate terms and policies.
- **Examine and limit perceived abuses of information asymmetry.** Manufacturers and their products can collect copious amounts of specific, and potentially sensitive, information about consumers, especially if data is widely shared among products. Even if users expressly accept the terms, courts will require a minimum level of procedural and substantive fairness. Courts and regulators will be wary of a transaction if the seller seemingly utilized its information and other bargaining advantages to exploit consumers. Similarly, a provision could be nullified if the seller, given its detailed customer data, knew or should have known in advance that the specific customer probably would have objected to the provision (though some courts might, instead, focus on the reasonable expectations of an average consumer).
- **Monitor, and consider coordinating with, other merchants.** Because products are more connected than ever, consider how the terms, policies, and practices of related parties, and the functionality and performance of their products, will affect your products and the end customer.

The IoT revolution, including its legal underpinnings, is still in its infancy. But manufacturers and distributors can take proactive steps to improve the enforceability of their standard terms while building a transparent, trailblazing reputation as this new landscape evolves.

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