

Caution with Hyperlinks and Info-Hovers: Court Denies DIRECTV'S Motion for Partial Summary Judgment

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Are hyperlinked and hovering disclosures enough to adequately inform consumers about the terms of your offer? Is requiring consumers to click on a button to accept all terms and conditions enough to obtain their informed consent to each of your terms and conditions? A recent federal court decision demonstrates that the answers to those questions are not always clear. The decision at issue is a September 23 order denying DIRECTV's motion for partial summary judgment in a case brought by the Federal Trade Commission.

For context, in early 2015 the FTC filed a lawsuit against DIRECTV for deceptively advertising programming packages. Among other alleged violations, the FTC claimed that DIRECTV violated the Restore Online Shopper's Confidence Act (ROSCA) by (i) charging consumers for access to premium channels through a negative option on its website while failing to clearly and conspicuously disclose all materials; and (ii) failing to obtain consumers' express informed consent before charging them for premium channels through its website.

DIRECTV filed a motion for summary judgment on the two ROSCA claims, arguing that it disclosed all material terms through hyperlinks and info-hovers throughout the subscription web flow. DIRECTV likewise contended that it disclosed its negative option throughout the subscription web flow and in its terms and conditions, to which consumers had to affirmatively agree before their financial information was submitted to DIRECTV. To support its arguments, DIRECTV pointed out that the FTC had presented no contrary evidence. For example, the FTC did not produce consumer surveys, research, studies, or tests supporting its ROSCA claims, or even disclose whether any such evidence exists. DIRECTV also argued that its negative option disclosures complied with a consent decree previously entered into with state attorneys general.

The FTC argued in response that although DIRECTV may have disclosed material terms through hyperlinks and info-hovers, consumers would only see those disclosures if they clicked on the links or moved their cursors above the info-hovers. The FTC further argued that info-hovers did not accompany every mention of premium-channel promotions, and that consumers could navigate through the website and checkout without ever seeing any of the disclosures. The FTC also argued that the hyperlinks leading to the disclosures used non-descriptive names like "Additional Offer Details" that did not adequately describe the referenced content. Even if consumers clicked on disclosures, the FTC noted, the material terms were buried in dense, confusing language. Finally, although consumers may have been required to click to accept the terms and conditions generally, there was no information presented on the checkout page or the referenced terms and conditions

about the negative option.

Last week, the federal judge overseeing the case denied DIRECTV's motion for summary judgment on the two ROSCA claims. In denying DIRECTV's motion, the court noted that "while the contents of the website did not appear to be disputed, the inferences drawn from those contents are vigorously disputed, and that dispute is the heart of this case." In drawing all reasonable inferences in the opposing party's (FTC's) favor, as required when deciding a motion for summary judgment, the court held that there was an issue of fact as to whether the non-descriptive names of hyperlinks used by DIRECTV to disclose its material terms rendered the disclosures less than clear and conspicuous. Likewise, the court determined that, viewing all facts favorably for the FTC, there was a reasonable inference "that consumers did not have sufficient information and thus could not have given informed consent when they clicked 'I Accept. Submit My Order.'"

Although the court's denial of DIRECTV's motion for partial summary judgment didn't determine that DIRECTV's disclosures were inadequate or that DIRECTV had violated ROSCA, the court's finding that a triable issue of fact existed on these issues should serve as a warning to advertisers. As [the FTC has advised](#), advertisers should incorporate key disclosures in the underlying claim, where possible, instead of using hyperlinks or info-hovers. When hyperlinks are used, the links should be obvious and labeled appropriately to convey the importance, nature, and relevance of the referenced information. Currently pending before the court is the FTC's motion for partial summary judgment on the same claims that were the subject of DIRECTV's motion. The FTC apparently believes that there can be no genuine issue of material fact over the alleged inadequacy of DIRECTV's disclosures. Regardless of whether the FTC succeeds on its motion, the other claims at issue are headed for trial. Unless the parties reach a settlement, the trial is currently set to begin on January 30, 2017.