

EXPEDIA, INC. WINS ONE AND LOSES ONE: UNDERSTANDING “TERMS OF USE” PROVISIONS IN ONLINE TRAVEL RESERVATIONS

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Online travel websites such as Expedia, Inc. require users to agree to certain terms and conditions before purchasing accommodations. The contracts formed as the result of users agreeing to these “terms of use” can be critical in resolving lawsuits that arise after the accommodations are booked. Two cases against Expedia, Inc. illustrate how the “terms of use” can work either for or against an online travel business.

KEYWORDS: *contract, terms of use, breach of contract, plain meaning*

Clicking “I agree” has become ubiquitous in the world of e-commerce. To purchase the goods or services offered by an online merchant, customers must consent to the terms and conditions of their sale. Should problems arise subsequent to the purchase, those terms and conditions establish the framework for their resolution. As is to be expected, merchants tend to use terms and conditions (often referred to as “terms of use”) that work to their advantage. Indeed, typically that is the case. However, when the “terms of use” utilized by an online

merchant are inconsistent with its business practices, that advantage is lost and can prove to be costly.

In a duo of cases both involving Expedia, Inc. as a defendant, courts examined the nature and application of “terms of use” provisions in online travel reservations. Expedia, Inc. prevailed in the case brought against it by Stephanie Hofer (*Hofer et al v. Old Navy, Expedia, Inc. and Turtle Beach Towers*, 2007) because its “terms of use” worked to its advantage. (As will be discussed in more detail later, this case is particularly important because it represents a case of first impression on the question posed.) However, Expedia, Inc. ended up settling a major class action lawsuit brought against it in the state of Washington (*In Re Expedia Hotel Taxes and Fees Litigation*, 2009) because its “terms of use” claimed one thing while its business practices revealed something quite different. The cases are similar in that both involve the application and interpretation of the travel company’s “terms of use” provisions; they are distinct from one another in that they examine quite different dimensions of the online booking transaction. *Hofer* examines the question of who is bound by the “terms of use” when one member of a travel party makes the reservations for the group and therefore is the only person to click “I agree.” *In Re Expedia Hotel Taxes and Fees Litigation* (2009) focuses on the interpretation of “terms of use” provisions that appear to conflict with what are essentially advertising claims about their charges for service fees and taxes. Taken together, the two cases illustrate how courts apply online “terms of use” provisions to resolve litigation involving these online contracts.

“Terms of Use” and Contract Law

The phrase “terms of use” is commonly employed when referring to the terms and conditions users agree to in utilizing websites to make online purchases. Nevertheless, as a technical matter of law, the phrase “terms of use” is simply a label used to refer to a type of contract. Furthermore, depending on how a particular website is set up, the “terms of use” may be defined as either a “click wrap” or “browse wrap” agreement.

Contracts entered into by consumers on the internet are defined by the courts to be either "click wrap" or "browse wrap" agreements. A "click wrap" agreement is entered into when the consumer clicks an "I agree" icon in conjunction with a detailed list of all of the terms and conditions. A "browse wrap" contract is entered into when the consumer has the ability to view all of the terms and conditions, in advance, through a hyperlink called "Terms and Conditions" or "Terms of Use," but is not required to provide any affirmative indication of knowledge or agreement of those terms (Wilson, 2007, p. 363).

While most of the terms of "click wrap" agreements are routinely enforced by courts today, the enforceability of browse wrap agreements continues to evolve in court decisions. (A detailed discussion on the enforceability of browse wrap agreements is beyond the scope of this article.) Online booking companies are interested in adding the additional terms and conditions to their contracts for the additional benefits that they provide, assuming that they are enforceable by a court. Typical additional terms and conditions include provisions that: place a limit on damages that may be awarded, require that any lawsuits be filed in a state specified in advance using the law of that state, require that any lawsuits be filed within a specified period of time, require binding or nonbinding arbitration, prohibit class action lawsuits, and otherwise increase the likelihood of success for the online booking company.

Treiber & Straub v. United Parcel Service, Inc. (2007) provides one example of how courts interpret and apply “terms of use” provisions. In this case, the U.S. Court of Appeals for the Seventh Circuit upheld a provision that waived liability claims against UPS. The waiver

provision was part of an online contract that required the user to click: “I accept” (*Treiber & Straub v. United Parcel Service, Inc.*, 2007). In this case, Treiber was bound by the terms of the contract because he agreed to its terms by clicking “I accept” even though he did not actually read the terms of the contract. As explained by the court in its decision: “This is basic contract law: one cannot accept a contract and then renege based on one's own failure to read it” (*Treiber & Straub v. United Parcel Service, Inc.*, 2007).

Having established that customers of online businesses are bound by the contractual nature of a website’s “terms of use” provisions, the following will examine the two cases against Expedia, Inc. to see how specific “terms of use” provisions either protect or work against an online business. The first case considered is *Hofer et al v. Old Navy, Expedia, Inc. and Turtle Beach Towers* (2007).

Hofer -- A Case Alleging Serious Personal Injuries

At the time it was decided, *Hofer* represented what is known in the legal profession as a case of first impression (Goodwin, 2007). A case of first impression, simply put, is a case that asks a question that has never before been addressed by a court. Consequently, there are no direct precedents (prior cases) to turn to resolve the dispute. In this case, the question of first impression centered on the electronically “signed” disclaimer of liability contained in the website’s “terms of use” provisions.

Hofer et al v. Old Navy, Expedia, Inc. and Turtle Beach Towers (2007) presents an interesting constellation of defendants. Hofer and her husband brought this lawsuit against the retailer, Old Navy; the online travel reservation site, Expedia, Inc.; and the Jamaican resort, Turtle Beach Towers. The case centers on who is responsible for injuries sustained by Hofer

from a fall at the Turtle Beach Towers while she and a friend were vacationing there. The trip was booked by the friend on Expedia, Inc.'s website. At the time of the fall, Hofer was wearing a pair of flip-flops purchased from Old Navy. The part of the case against Old Navy boils down to the claim that the flip-flops were defective and the defect caused her to fall and suffer the injuries. This part of the case has no bearing on the case against Expedia, Inc. and, consequently, will not be discussed further here.

In contrast, the parts of the case against Turtle Beach Towers and Expedia, Inc. are more closely intertwined. Stephanie Hofer and her travel companion, Carrie LaRoche, traveled to Jamaica for a stay at the Turtle Beach Towers resort located in Ocho Rios, Jamaica flying out of Boston's Logan Airport. Hofer sustained the injuries from the fall on the first day of their arrival at the Turtle Beach Towers resort. As evidenced by the allegations in the Complaint, Hofer claims to have suffered extensive and long term injuries as a result of the incident. Stephanie fell down the steps that led from the resort's lobby. The steps did not have any guardrails. Each side of the lobby stairs had a turtle pond which, among other things, contained protruding coral and slate. When Stephanie fell, her left leg hit the coral and/or slate and was "gouged open to the bone" (*Hofer et al v. Old Navy, Expedia, Inc., and Turtle Beach Towers*, Complaint, Paragraph 13, 2005). After being treated initially at a Jamaican hospital, she was "air lifted to Massachusetts General Hospital where she remained a patient for fifteen (15) days" (*Hofer et al v. Old Navy, Expedia, Inc., and Turtle Beach Towers*, Complaint, Paragraph 14, 2005). The court documents detail the alleged nature and long term consequences of her injuries:

- Three surgeries.
- Twenty-seven medications on a daily basis as well as continuing treatment with numerous health care providers including surgeons, infectious disease associates, a neurologist, a psychologist, and pain management specialists.
- Irreparable nerve damage, permanent scars and reduced leg function (10% use).
- Reconstructive and plastic surgery to injured leg.

- Unable to return to work after accident.
- Unable to enjoy normal activities such as exercising, walking the dog or going to the movies.
- Advised to not become pregnant.
- Diagnosed with multiple mental illnesses including Post Traumatic Stress Disorder, anxiety, severe depression, insomnia, and restless leg syndrome.
- Significant weight gain (seventy-five pounds in one year) (*Hofer et al v. Old Navy, Expedia, Inc. and Turtle Beach Towers*, Complaint, Paragraphs 16-25, 2005).

While the allegations place this lawsuit in what is euphemistically referred to as a “slip and fall” case, the injuries averred are severe. Consequently, it is not surprising that Hofer chose to file suit in the U.S. where all the possible defendants (Old Navy, Expedia, Inc. and Turtle Beach Towers) are subject to the jurisdiction of the courts. It is certainly true that Hofer could pursue a case against Turtle Beach Towers by going to Jamaica, retaining counsel there, and filing suit; however, the costs and logistics associated with that make this lawsuit a more viable option.

Hofer – Who Agreed to What?

Turning specifically to Hofer’s claims against Expedia, Inc., the lawsuit argues that Expedia, Inc. is responsible for Hofer’s injuries under a number of different theories. Only one will be examined here. That is, Hofer alleges that she is not bound by the disclaimer of liability language in Expedia’s *Website Terms, Conditions and Notices* because she never “agreed” to them.

The facts relevant to this portion of the case are fairly straightforward. As noted earlier, Hofer traveled to Jamaica with a friend, Carrie LaRoche. LaRoche booked and paid for the travel arrangements for herself and Hofer using Expedia, Inc.’s website, and forwarded the travel itinerary to Hofer via e-mail. She did this with Hofer’s knowledge and permission. Hofer was not physically present when LaRoche booked the trip. The travel itinerary generated by the

website did not contain any disclaimer of liability language. After booking the trip, Hofer reimbursed LaRoche for Hofer's share of the trip's costs.

In its analysis of the case, the court concluded that the facts relevant to the disclaimer of liability were uncontroverted. While LaRoche didn't recall seeing or reading the disclaimer, Expedia, Inc.'s website is set up in such a way that a customer cannot finalize and purchase reservations without clicking and agreeing to the site's "terms of use." As noted by the court, the site's "terms of use" included language disclaiming Expedia, Inc.'s liability:

"Expedia, Inc., ... [is] not liable for the acts, errors, omissions, representations, warranties, breaches, or negligence of any such suppliers or from any personal [injuries] ... resulting therefrom" (*Hofer et al v. The Gap, Inc., Expedia, Inc., and Turtle Beach Towers*, 2007).

Having established that LaRoche "agreed" to the disclaimer of liability, the next question in front of the court was whether LaRoche's agreement (i.e. electronic signing by clicking) bound Hofer. In concluding that Hofer was bound by the disclaimer, the court noted a number of factors. First, Hofer authorized LaRoche to make the reservations for the two of them. Second, one person in a group booking for everyone is a common practice. While the court didn't make note of it, it is easy to imagine the practical obstacles to using online travel sites if each member of a group were required to make individual reservations so each could personally click "I agree." For example, it is easy to imagine problems when air travel is involved. Getting everyone on the same flights would be cumbersome at best. Finally, the court noted that despite the fact that LaRoche didn't recall seeing or reading the disclaimer of liability, it met the legal requirement that disclaimers must be "conspicuous" (*Hofer et al v. The Gap, Inc., Expedia, Inc., and Turtle Beach Towers*, 2007). It reached this conclusion by noting, as it did elsewhere, that LaRoche could not have purchased the travel services without clicking through the disclaimer. The law requires that disclaimers be conspicuous; it does not require proof they were read.

In conclusion, the court dismissed the portion of the case against Expedia, Inc. The portions of the case against Old Navy and Turtle Beach Towers, however, were allowed to go forward. Nevertheless, in the end, Hofer lost the case against all the defendants. After court ordered mediation, the parties failed to reach a settlement. The subsequent trial resulted in the jury concluding that Old Navy was not legally responsible for Hofer's injuries (*Hofer et al v. The Gap, Inc., Expedia, Inc., and Turtle Beach Towers*, Judgment, 2008). Turtle Beach Towers did not respond to the lawsuit (*Hofer et al v. The Gap, Inc., Expedia, Inc., and Turtle Beach Towers*, Defendant The Gap, Inc.'s Trial Brief, 2008). However, because the resort is not located in the United States, no further action was taken against it as part of this litigation.

Expedia, Inc. Website– Post *Hofer* Change to “Terms of Use”?

The law serves not only to resolve problems once they arise, but to avoid them as well. In a case such as this, even though it succeeded in enforcing its liability disclaimer against Hofer's claims, companies in Expedia, Inc.'s situation often undertake a review of relevant policies and protocols to determine whether any revisions are advisable. To determine whether that occurred in this case, the website's “terms of use” provisions in effect at the time Hofer's trip was booked were compared to those in place after the fact.

In finding for Expedia, Inc., the court in *Hofer* noted that to purchase travel services from Expedia, Inc.'s website, customers must agree to the following disclaimer of liability:

THE CARRIERS, HOTELS AND OTHER SUPPLIERS PROVIDING TRAVEL OR OTHER SERVICES FOR EXPEDIA, INC. ARE INDEPENDENT CONTRACTORS AND NOT AGENTS OR EMPLOYEES OF EXPEDIA, INC. OR ITS AFFILIATES. EXPEDIA, INC. AND ITS AFFILIATES ARE NOT LIABLE FOR THE ACTS, ERRORS, OMISSIONS, REPRESENTATIONS, WARRANTIES, BREACHES OR NEGLIGENCE OF ANY SUCH SUPPLIERS OR FROM ANY PERSONAL INJURIEIS [sic], DEATH, PROPERTY DAMAGE,

OR OTHER DAMAGES OR EXPENSES RESULTING THEREFROM. (*Hofer et al v. Old Navy, Expedia, Inc. and Turtle Beach Towers, 2007*).

A post-*Hofer* comparison was undertaken by reviewing Expedia, Inc.'s website in December of 2010. As of that date, to make a reservation for a hotel room using the website, customers reach a screen that requires them to “click” the box shown below saying they have both read and agree to the “Terms of Use” and “Privacy Policy.” It is possible to check the box and “Continue” without opening or reading either document.

Sign in or select an option

Continue as a guest

I have read and agree to the [Terms of Use](#) and the [Privacy Policy](#).

[Continue](#)

(Terms of Use and Privacy Policy, Expedia, Inc.)

Customers who do choose to click on the “Terms of Use” are taken to a thirteen page document containing very precise and detailed terms and conditions clearly designed to protect Expedia, Inc. in relation to a wide range of issues. For example, many of the terms restrict and/or prohibit certain third party commercial uses of the site without permission from Expedia, Inc. Several provisions deal with customers acknowledging they understand that user comments concerning specific hotels may not be accurate and that Expedia, Inc. has no responsibility for their accuracy. There are forum selection provisions, indemnification terms, limitation of damages, and limitation of time provisions to commence suit. The language of the “terms of use” relevant to the *Hofer* case is as follows.

THE CARRIERS, HOTELS AND OTHER SUPPLIERS PROVIDING TRAVEL OR OTHER SERVICES ON THIS WEBSITE ARE INDEPENDENT CONTRACTORS AND NOT AGENTS OR EMPLOYEES OF THE EXPEDIA COMPANIES OR THE EXPEDIA AFFILIATES. THE EXPEDIA COMPANIES AND THE EXPEDIA AFFILIATES ARE NOT LIABLE FOR THE ACTS, ERRORS, OMISSIONS, REPRESENTATIONS, WARRANTIES, BREACHES OR NEGLIGENCE OF ANY SUCH SUPPLIERS OR FOR ANY PERSONAL INJURIES, DEATH, PROPERTY DAMAGE, OR OTHER DAMAGES OR EXPENSES RESULTING THEREFROM (Terms and Conditions, Expedia, Inc., 2010).

Comparing the language of the terms and conditions in the Expedia, Inc. website as quoted in the Hofer case with the language of the terms and conditions as of December 13, 2010 reveals no significant legal difference as it relates to Expedia, Inc.'s claim of being an independent contractor. There is no real reason to change this provision as Expedia, Inc. prevailed on the argument in the *Hofer* case that it was an independent contractor and therefore was not liable for the injuries caused by any of its suppliers.

Expedia Fees & Taxes – When Is a Room's Tax a Service Fee?

Another case against Expedia, Inc. that examines “terms of use” in an online transaction, involves a very different aspect of the transaction between the user purchasing travel accommodations and the travel site. Characterized as the largest consumer class action settlement in the state of Washington, Expedia, Inc. was ordered to pay in excess of \$184,000,000 for violating its “terms of use” when assessing service and tax recovery fees to customers purchasing hotel reservations (Bronstad, 2009). According to the complaint filed in *In Re Expedia Hotel Taxes and Fees Litigation* (2007), Expedia, Inc. violated its own “terms of use” by the manner in which it imposed and collected service and tax recovery fees. Specifically, the complaint alleges that the “terms of use” in place at the time (early 2003) “warranted to consumers that its bundled ‘Service/Fees/Tax Recovery Charge’ consists of (i) ‘a

recovery of all applicable transaction taxes’ that it pays to hotel vendors plus (ii) ‘the costs incurred by Expedia Travel in servicing your reservation’” (*In Re Expedia Hotel Taxes and Fees Litigation*, Complaint, Paragraph 15, 2007). The Tax Recovery Charge is described as “a recovery of all applicable transaction taxes (*e.g.*, sales and use, occupancy, room tax, excise tax, value added tax, etc.) that Expedia Travel pays to the vendors (*e.g.*, hotels, car suppliers, etc.) in connection with your travel arrangements” (*In Re Expedia Hotel Taxes and Fees Litigation*, Complaint, Paragraph 4, 2007). In other words, according to the allegations in the lawsuit, the “terms of use” specified that the only fees Expedia, Inc. added to the cost of a hotel reservation were those direct out-of-pocket costs it incurred in booking the accommodations.

Under the business model utilized by Expedia, Inc., it profited from the sale of hotel rooms in two ways. First, as is customary in the travel services industry, Expedia, Inc. books rooms for customers at a wholesale rate which is the rate it pays to particular hotels. Expedia, Inc. sells those same rooms to customers at a mark-up. The difference between the lower wholesale rate and marked up retail rate is profit. This is standard industry practice and not at issue in this case. What is at issue is the second way in which Expedia, Inc. profited from the sale of hotel rooms.

When travel agencies book room reservations, they charge customers for the agreed on room rate plus applicable taxes such as occupancy taxes. The tax is computed on the lower wholesale rate actually paid to the hotel, not the higher retail rate paid to the travel agency. In this case, Expedia, Inc. is accused of violating its own “terms of use” by computing the tax collected from its customers on the higher retail rate, remitting the tax based on the lower wholesale rate, and keeping the difference as profit (*In Re Expedia Hotel Taxes and Fees Litigation*, Complaint, Paragraphs 2- 4, 2007). Essentially, Expedia, Inc. collected monies under

the service fees/taxes category that were not direct costs because they exceeded amounts paid out by Expedia, Inc. in servicing the accommodations.

Expedia, Inc. Found to be in Breach of Contract

Judge Benton's ruling in the case focused on the interpretation of what qualifies as a "service fee" in light of the language of Expedia, Inc.'s "terms of use" provisions. To put it simply, did Expedia, Inc. compute its service fees in a manner that was consistent with its own "terms of use?" Judge Benton concluded it did not. In reaching that conclusion, she noted that by its own "terms of use," Expedia, Inc. defined a "service fee" as a fee that "goes to covering costs" (*In Re Expedia Hotel Taxes and Fees Litigation*, Consolidated Civil Action, Master File No. 05-2-02060-1 SEA, 2009). As the court went on to explain, when that definition is applied to making a travel reservations it includes only the actual expenses associated with the service and not any additional profits. Consequently, when Expedia, Inc. collected profits in addition to recovering the cost associated with booking the travel reservations, it breached the "terms of use" as posted to its website.

It is important to note that Judge Benton's ruling is only that Expedia, Inc. breached its contract with its customers by violating its stated "terms of use" provisions. The ruling in this case does not state that service fees are illegal. As a general proposition, it is perfectly legal to assess service fees. Furthermore, this case does not rule that the formula for calculating the service fee (tax on retail room rate less tax on wholesale room rate) is per se illegal. However, the ruling makes it clear that if a service fee is to be assessed, it must be done in a manner that is consistent with the "terms of use" in effect at the time of the reservation.

In Re Expedia Hotel Taxes and Fees Litigation – Settlement

The final settlement approved by the court awarded \$123.4 million to qualified customers who purchased travel reservations from Expedia, Inc. during the period from January 10, 2001 through June 11, 2008. In addition, the judge authorized the payment of up to \$10,000,000 in fees and expenses to the lawyers who brought the suit (*In Re Expedia Hotel Taxes and Fees Litigation*, Settlement, Master File No. 05-2-02060-1 SEA, 2009).

Expedia, Inc. Website – Post *In Re Expedia Hotel Taxes and Fees Litigation* Change to “Terms of Use”?

“Companies change their sites from time to time for a variety of reasons, including court decisions, marketing strategies, responses to competitors, changes in website design, changes in statutes or regulations and the desires of the executives involved” (Wilson, 2011). Given that Expedia, Inc. lost this lawsuit because its “terms of use” provisions were inconsistent with the manner in which it computed and assessed “service fees,” it clearly represents a situation in which the language of the “terms of use” required review. Essentially, Expedia, Inc. had three choices: 1. modify the “terms of use” to be consistent with the manner in which the service fee was assessed and collected; 2. eliminate any reference to the service fee and collect only direct costs consistent with the provisions of the existing “terms of use”; or 3. modify both the “terms of use” and service fee collections in a manner that are consistent with one another.

A review of the relevant pleadings and post-lawsuit website “terms of use” reveal how Expedia, Inc. modified its business model to address the problem. According to the complaint filed in the lawsuit, in 2006, Expedia, Inc. changed its “terms of use” eliminating the language defining as service fee in a manner that restricted it to covering actual costs. At that point in time, the new language provided an ambiguous description of the fees: "Our service fees are retained by the Companies as compensation in servicing your travel reservation. Our service fees vary based on the amount and type of hotel reservation" (*In Re Expedia Hotel Taxes and Fees*

Litigation, Complaint, Master File No. 05-2-02060-1 SEA, 2009). A more recent (December 13, 2010) review of Expedia, Inc.'s website documents the detailed description of the manner in which Expedia Companies collect tax recovery charges and service fees.

PREPAID HOTEL RESERVATIONS

You acknowledge that the Expedia Companies pre-negotiate certain room rates with hotel suppliers to facilitate the booking of reservations on your behalf. The room rate displayed on the Website is a combination of the pre-negotiated room rate for rooms reserved on your behalf by the Expedia Companies. You authorize the Expedia Companies to book reservations for the total reservation price, which includes the room rate displayed on the Website, plus tax recovery charges, and service fees, where applicable, and taxes, where applicable. You agree that your credit card will be charged by the Expedia Companies for the total reservation price. Upon submitting your reservation request you authorize the Expedia Companies to facilitate hotel reservations on your behalf, including making payment arrangements with hotel suppliers. You acknowledge that, except as provided below with respect to tax obligations on Expedia's services in New York State and New York City, the Expedia Companies do not collect taxes for remittance to applicable taxing authorities. The tax recovery charges on prepaid hotel transactions are a recovery of the estimated taxes (e.g. sales and use, occupancy, room tax, excise tax, value added tax, etc) that the Expedia Companies pay to the hotel supplier for taxes due on the rental of the room. The hotel suppliers invoice the Expedia Companies for tax amounts. The hotel suppliers are responsible for remitting applicable taxes to the applicable taxing jurisdictions. None of the Expedia Companies act as co-vendors with the supplier with whom we book or reserve our customer's travel arrangements. Taxability and the appropriate tax rate vary greatly by location. The actual tax amounts paid by the Expedia Companies to the hotel suppliers may vary from the tax recovery charge amounts, depending upon the rates, taxability, etc. in effect at the time of the actual use of the hotel by our customers. We retain our service fees as compensation in servicing your travel reservation. Our service fees vary based on the amount and type of hotel reservation (Terms and Conditions, 2010).

While this "terms of use" language does not detail the formula Expedia Companies use to compute service fees, it does specify that service fees are collected in addition to the applicable taxes remitted to hotel suppliers. Expedia, Inc. remedied the problem with the "terms of use" by modifying its language so that the collection of a service fee in excess of any direct costs is permitted.

IMPLICATIONS

The cases discussed here highlight a number of important legal implications for “terms of use” provisions associated with online travel websites. In addition, they exemplify how courts interpret and enforce “terms of use” in online transactions.

First, customers who purchase travel accommodations pursuant to a website’s “terms of use” provisions are bound by those “terms of use” even though most people do not read them before agreeing to their provisions. Generally, this applies to online purchase of other products and services as well. Second, as illustrated in *Hofer*, when one member of a travel party books accommodations for everyone in a group, each member of that group is bound by the “terms of use” even though only one person clicked “I agree.” In each of these instances, it is easy to imagine the logistical impediments to operating an online travel business if the rules were otherwise.

Third, and most importantly, *In Re Expedia Hotel Taxes and Fees Litigation* illustrates the critical importance to all types of online enterprises of insuring that their business models are consistent with the stated provisions of their “terms of use.” Expedia, Inc. learned a harsh and expensive lesson. While the structure of its service fee was not illegal per se, it was illegal because it was not consistent with then company’s own “terms of use.” Expedia, Inc. could have avoided the headline “Record Consumer Law Judgment Against Expedia” (Bronstad, 2009) by taking the time to review its “terms of use” in relation to its implementation of the service fee. The lesson to other online enterprises is clear: the “terms of use” posted to a company’s website must be consistent with all aspects the company’s business model. Any changes to that business model must be evaluated to determine whether subsequent changes to the “terms of use” are in order.

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