

ISMA COMPARISON REPORT NOTES - NEW ZEALAND

Understanding the chart

Red: Where a term is coloured red, it means that we think that the social media platform would not be able to enforce that term against a New Zealand user of the service under New Zealand law.

Orange: Where a term is coloured orange, it means that the term may or may not be enforceable under New Zealand law. This uncertainty arises either because the outcome depends on the circumstances on each individual case or on the discretion of the courts or other entities, or because the law is yet to be tested in relation to social media platforms.

Green: Where a term is green, it means that there are no apparent issues with the enforceability of the term under New Zealand law.

Recitals and entry into agreement

Most users agree to terms and conditions without reading them or thinking that a legal dispute will actually arise. This will be irrelevant in establishing the contractual intent required to create a valid contract so long as the user intends that the terms will be legally enforceable if such a dispute did arise. The main issue in relation to the recitals arises where the scope of the agreement is unclear, as this may create issues in establishing contractual intent in areas that are not clearly governed by the terms.

Parties and acceptance

Valid acceptance of a contract can occur in several ways. There are no enforceability issues with acceptance of the contract being through clicking 'accept' on the terms or through continued use of the service, which constitutes acceptance through conduct.

The primary issue that arose was where the terms of service apply to visitors to a social media platform who have not come across the terms (i.e. they have not made an account). In this case, it may be held that a visitor cannot be bound by the terms despite their use of the site as they were unaware that use of the site constituted acceptance of the terms.

Amendments

The standard principle surrounding amendments to contracts is that it must be supported by valid consideration from each side. Under this principle, the amendment provisions in each of the terms would not be enforceable unless consideration had been provided by both parties, which in practice is not usually the case.

However, in 2003 the Court of Appeal held in *Antons Trawling Co Ltd v Smith* that consideration is not necessary for a variation where it is clear that the parties intended to be bound by variations to the agreement and no policy reasons apply to not enforce the agreement. It is unclear whether this would apply to agreements such as the terms of a social media platform, but if it did, then the amendment provisions would be enforceable even where no consideration is provided by either party.

Another issue is that where the unfair contract terms in the Fair Trading Act 1986 apply, the contract may be declared an unfair term which cannot be enforced against consumers. The Act outlines that terms which allow one party to unilaterally change the terms of the agreement, or change the characteristics of the goods or services provided may be unfair. The amendment provisions allow each of these to a large extent, which indicates they may be declared unfair if tested.

Termination

Termination clauses outline how a contract can be terminated. If the unfair contract terms in the Fair Trading Act 1986 apply, the contract may be declared an unfair term which cannot be enforced against consumers. Terms that may be considered unfair include those which permit one party but not the other to terminate the contract, or allow one party to unilaterally determine if the contract has been breached or to interpret its meaning, and such terms are included in the majority of the social media platforms' terms.

Minimum age

Where the terms state that a user must be at least 13 years old to use the service, there may be enforceability issues due to s 6 of the Minors' Contracts Act 1969. This provides that a contract entered into by a minor (a person under 18) will not be enforceable against the minor unless, as per s (6(2)), the social media platform can show that the contract was fair and reasonable. This will be determined on the particular circumstances, so a term which imposes few obligations on a 17 year old is more likely to be enforced than a term which imposes onerous obligations on a 13 year old.

Some of the terms avoid this issue by requiring that the user be able to enter a legally binding contract. This would mean that New Zealand users between 13 and 18 would not be able to use the services, cutting out a large proportion of the users of most social media platforms.

Registration and account security

No obvious issues arise where the social media platforms require or allow users to make an account on the service. Where the user provides personal information about themselves when registering for an account, the social media platforms will not be bound by the privacy principles outlined in the Privacy Act 1993 as they are not public agencies, but they may still be the subject of a complaint to the Privacy Commissioner if they breach these principles, for instance by collecting the information for an unlawful purpose.

Commitment when using the platform

The terms each prohibit certain types of conduct on the platforms, for instance posting harmful content or harassing behaviour. There do not appear to be any issues with proscribing conduct and content in this way, and the prohibitions largely align with restrictions found in New Zealand law, such as prohibitions of hate speech and defamatory statements.

Ownership of IP Content

Each of the social media platforms allows users to upload content onto the platforms, and provide either that the user retains any rights they have in that content, or that the user owns that content. Rather than claiming ownership of this content, the social media platforms receive a licence to use the uploaded content liberally.

This will largely be enforceable, however, there is an anomaly where intellectual property (IP) content is uploaded by someone other than the owner of the relevant IP rights, and the term purports to grant ownership of that content to the user. Where this occurs, the term will not be enforceable because the owner of those IP rights is the only person entitled to grant ownership rights, so the social media platform is purporting to grant ownership rights where they are not entitled to do so.

Inclusion of a term requiring that users have rights to the content that they post will not necessarily prevent this unenforceability, as users may post content that infringes IP rights unknowingly. In this case, the social media platform will still be purporting to grant ownership in that content until the social media platform becomes aware that the content is infringing IP rights.

Deletion of IP content and remaining copies

When considering how content is dealt with after deletion of content or an account, copyright infringement poses the greatest risk for the social media platforms. Under the Copyright Act 1994, simply storing a copyright work without licence from the copyright owner to do so can constitute infringement by copying.

Further, where a social media platform is considered to be an internet service provider for the purposes of the Act (someone that offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, or hosts material on websites or other electronic retrieval systems that can be accessed by a user) it can be liable under s 92C for storing material that infringes copyright in a work if it knows or has reason to believe that material is infringing copyright.

Simply retaining content which is subject to trade mark or patent rights will not infringe those rights. However, issues may arise if a term purports to allow the social media platform to use that content in breach of the Trade Marks Act 2002 or the Patents Act 2013.

Privacy may be an issue where the content uploaded contains personal information about a user. In this case, storing this content in breach of the privacy principles could leave the social media platform open to a complaint to the Privacy Commissioner. Privacy principle 9 is the most relevant principle in this situation, as it states that an agency should not keep personal information for longer than necessary.

It is also possible that the term could be declared unfair and thus unenforceable against consumers under the Fair Trading Act 1980. A court may consider it too onerous to expect the platforms to delete every copy of a photo from the platform, especially where it has been shared between users, which may mean a term which makes some effort to remove the content within a reasonable time is not declared unfair. However, a term that allows the platform to keep the content indefinitely, or which does not purport to take any action in deleting users' content may be declared unfair as it is not fairly balanced with the users' rights.

Modification or use of content

Under New Zealand law, parties are largely free to contract however they choose, so an agreement providing a licence to use a party's content will usually be enforceable. Given that the nature of social media platforms is to share and distribute content between users, it is understandable why these licences are broadly written.

Where the content which the licence applies to is not subject to IP rights, or where it is but is uploaded by the owner of those IP rights, the term regarding use of that content will be enforceable.

Issues arise, however, where the content is subject to IP rights and is uploaded by someone other than the owner of those IP rights, as the user is purporting to grant a licence to use and modify that content when they are not entitled to do so.

System for claiming intellectual property rights violation

When dealing with reports that copyright has been infringed, each of the social media platforms follows the takedown process in the Digital Millennium Copyright Act 1998 (DMCA). This is a United States Act which provides that an internet service provider will not be liable for copyright infringement where it is a mere conduit of the infringing content. This closely aligns with New Zealand law regarding internet service providers' liability for copyright infringement, and the terms will be enforceable.

Some difficulties may arise in practice however, due to differences in what will constitute a copyright work in New Zealand and the United States. The difference is slight, but it may mean that in certain circumstances, a work which would be protected by copyright in New Zealand may not be protected in

the United States, and the work may not be removed due to a report made under the DMCA. If so, a social media platform could allow content which is permitted under the terms, but which contravenes New Zealand law.

The DMCA process cannot be used to claim violation of trade mark rights and so these must be dealt with under trade mark law.

Disclaimers

It is standard practice for large online platforms to include disclaimers in their terms of service to avoid any implied warranties regarding the service or its content. Each of the terms provides wide disclaimers, which is permissible in the United States where they are based. However, this is not permitted in all jurisdictions, which many of the platforms acknowledge with a statement that the disclaimer is “to the extent allowed under the applicable law”. New Zealand is one of these jurisdictions, as the Consumer Guarantees Act 1993 restricts the ability for companies to contract out of certain consumer protections. Where this Act is held to apply to the use of social media platforms, any term that attempts to contract out of certain protections, such as implied warranties as to quality, will not be enforceable.

If the Consumer Guarantees Act does not apply for any reason, for instance if the supply is not considered to have taken place in New Zealand, the term may still be unenforceable against consumers if declared to be an unfair contract term under the Fair Trading Act 1986. Under this Act, terms which may be considered unfair include those which allow one party to avoid or limit performance of the contract, such as the terms which specify that the service is offered only on an “as is” basis.

Limitation of liability

Where a term which limits liability is constructed clearly and contains no ambiguities, it will likely be enforceable. Where there is an ambiguity, the Court will assume that a party did not intend to limit liability to protect parties from an inequality of bargaining power. An ambiguous term may still be enforceable, but it will depend on the interpretation of its wording.

The term may be unenforceable against consumers if it is declared to be an unfair term under the Fair Trading Act 1986. The Act provides that a term may be unfair if it limits, or has the effect of limiting, one party’s vicarious liability for its agents, or one party’s right to sue another party, which each of the limitation of liability terms does.

The Fair Trading Act also provides that parties cannot limit liability for misrepresentation, so a term which purports to do so will not be enforceable under New Zealand law.

If the Consumer Guarantees Act 1993 is held to apply to the use of social media platforms, the terms cannot purport to contract out of or limit liability for negligence. If it does not apply however, the platform may contract out liability for negligence with an express and unambiguous statement.

Law, jurisdiction and arbitration notice

Jurisdiction clauses will be enforced in most circumstances; however, New Zealand courts have discretion to exercise its jurisdiction over a dispute where it is deemed necessary. It is possible that if the outcome in the other jurisdiction would be substantively unfair under New Zealand law, that the courts may exercise this discretion.

Under s 11 of the Arbitration Act 1996, an arbitration clause is only enforceable if the consumer enters into it in a separate written agreement with the other party, and after a dispute arises, agrees to be bound by it. Where the user of the social media platform is in trade, this section will not apply and the arbitration clause will be enforceable.

Time and money limitations on claims

Terms which limit the time in which a claim can be made or the amount that can be claimed for must be clearly drafted as any ambiguity in the term will be read against the party seeking to rely on it. Clearly drafted terms will be enforceable against businesses and, where the terms are fair, against consumers.

However, if the term is declared unfair under the Fair Trading Act 1986, it will be unenforceable against consumers. This is possible as the Act provides that terms which limit or have the effect of limiting one party's right to sue another party may be unfair.

A term that imposes a reasonable monetary limit is likely to be fair. Conversely, a term that limits claims to nominal amounts would likely be unfair. Several of the platforms' terms impose a limit of \$100, which may be unfair given the costs of bringing a claim. Similarly, reasonable time limits are likely to be declared fair, but terms which bar claims from being made at any point would very likely be declared unfair.

Provisions regarding advertisement

The main issue regarding advertisement is misrepresentation under the Fair Trading Act 1986. A social media platform may be liable for misrepresentation in an advertisement unless it was due to the act of another person, and the platform took reasonable precautions to avoid misrepresentation.

It may also be liable for misrepresentation if it has reason to suspect that publication of the advertisement constitutes misrepresentation, such as if an advertisement is reported as such by a user, and the platform takes no action to remove or review it.

Further, where an advertisement is passed off as something else, it could be considered misleading or deceptive conduct, and a term stating that advertisements may not always be identified as such will not remove liability as it is not possible to contract out of liability for misrepresentation.

Third party content or links

Each of the social media platforms' terms limit liability for content or links posted by third parties on their platforms. This will usually be enforceable, though if a term is declared unfair under the Fair Trading Act 1986, for instance because it limits one party's right to sue another, it could not be enforced against a consumer.

Brand guidelines

The guidelines on how a user may use the social media platforms' brands and logos will be enforceable as the owner of intellectual property rights has an exclusive right to licence those rights. Most of the logos and brands are registered trade marks in New Zealand, but where they are not, they will likely constitute a copyright work.

Entire agreement/severability

Severability clauses and entire agreement clauses will likely be enforceable, unless a court considers that it would be reasonable for a user to contemplate that some other document or statement to constitute part of the agreement.