UNILATERAL MODIFICATION · ILLUSORY PROMISE · MUTUALITY OF OBLIGATION · BROWSEWRAP · CLICKWRAP · CONSTRUCTIVE NOTICE · DEFINITENESS · UNCONSCIONABILITY

The Moving Target

Unilateral modification, illusory promises, and assent to a continuously changing consumer interface

Tap "I accept" and you are bound, the provider says. Concede it. The question that survives is: accepted what? A consumer agreement the provider may rewrite at any time, and rewrites continuously, fails on three contract grounds and one consumer-protection ground even granting valid assent at formation. Conceding acceptance does not rescue the bargain. It isolates the defects acceptance cannot reach.

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"I accept." *Accepted what?*

Concede formation entirely, the click, or continued use under browsewrap, carried full legal effect. The interface still will not hold still: the skip control moves, the reporting path is renamed twice, the help page says 30 seconds while the app serves 90.

Conceding assent is strategic. It closes the escape, "you agreed, including to the reserved right to amend", and forces the real question: **can that clause do the work the provider needs it to?**

Sources Gilly, The Moving Target, secs. I, III.

The controls that move most are the ones the user needs most: skip, report, cancel.

2×

more likely to sign up for a dubious service under mild manipulative design.

~4×

more likely under aggressive design, and price became immaterial to the choice.

11K

shopping sites crawled: manipulative patterns are widespread, not outliers.

The most effective designs were **hidden information, trick questions, and obstruction.** Continuous revision is an exercise of design power, and the friction is selected for its effect on the user.

Sources Luguri & Strahilevitz, 13 J. Legal Analysis 43 (2021); Mathur et al., 3 Proc. ACM Hum.-Comput. Interaction (CSCW) (2019); Gilly, sec. II.A.

The documentation inconsistency is not the defect. It is proof of the conditions the defects arise from.

The help page is not the contract; the terms of service are. But a drafter that says "30 seconds" and serves 90 has shown, by its own hand, there is no determinate term, evidence going to notice, definiteness, and unconscionability at once.

ALMOST NO ONE READS

1–2

of every 1,000 software shoppers opened the license agreement at all, across 48,000 tracked visitors, and most read only a fraction.

If the experienced bargain is the interface, revising the interface revises the only terms the consumer ever engages.

Sources Bakos, Marotta-Wurgler & Trossen, 43 J. Legal Stud. 1 (2014); Obar & Oeldorf-Hirsch, 23 Info. Commc'n & Soc'y 128 (2020); Gilly, secs. II.B–C.

GRANTING ASSENT, THE BARGAIN STILL FAILS

Four Independent Failures

Three in contract, one in consumer protection, none of which assent can cure

01 Illusory promise **02** No notice **03** Indefiniteness **04** Unconscionability

A provider that reserved the power to unpromise has undertaken no fixed obligation.

Harris v. Blockbuster

Terms modifiable at any time, effective on posting, held illusory and the arbitration clause unenforceable: a promise subject to unilateral modification "binds the promisor to nothing."

In re Zappos.com

Reserved right to change terms at any time rendered the promise illusory, **independent of** the separate no-assent holding. Two defects, each sufficient.

> *The clause the provider relies on to legitimize the moving target is the clause that dissolves the bargain.*

Sources Harris v. Blockbuster, Inc., 622 F. Supp. 2d 396 (N.D. Tex. 2009); In re Zappos.com, Inc., 893 F. Supp. 2d 1058 (D. Nev. 2012); Gilly, sec. IV.

A standing warning that the deal may change is not notice that the deal has changed.

Douglas v. Talk America. A provider posted revised terms and later enforced terms that did not exist at contracting. Not bound: a customer "is not expected to monitor" a website for unannounced changes.

The moving target delivers changes without notice as its ordinary operation, the change simply appears. **Only notice that the deal has changed can bind, and the interface gives none.**

Sources Douglas v. U.S. Dist. Court ex rel. Talk Am., Inc., 495 F.3d 1062, 1066 (9th Cir. 2007); Gilly, sec. V.

THE DRAFTER CONTRADICTS ITSELF

30s the help page's stated cap

90s what the app actually serves

A bargain the drafter cannot describe consistently is a bargain there was no definite thing to assent to.

Definiteness and notice reinforce one another: one cannot have notice of terms that do not hold still long enough to be identified. A clause authorizing perpetual change **guarantees** indefiniteness.

Sources Gilly, The Moving Target, sec. VI, Definiteness and the Knowable Bargain.

The cost of relearning a moving target is a cognitive cost, and cognitive costs are not distributed evenly.

Both dimensions offend. Procedurally adhesive and unpinnable; substantively one-sided, the whole power to change on one side, the duty to absorb unseen changes on the other. *Comb v. PayPal* found materially similar online terms unconscionable.

THE BURDEN FALLS UNEQUALLY

Relearning draws on attention, working memory, executive function. For a user whose disability impairs exactly those, **the relearning consumes a resource the disability has already depleted.** A graduated burden, heaviest on those least able to bear it.

Sources Comb v. PayPal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002); Luguri & Strahilevitz, 13 J. Legal Analysis 43 (2021); Gilly, secs. VII.A–B.

Every case in the enforcement line asks the one question this article has already conceded.

From *Meyer* (enforced, conspicuous notice) to *Specht, Nguyen, Sgouros, Berkson* (refused, inadequate notice), the whole line turns on **formation**, notice and assent at the moment the contract was made.

Grant it. A user perfectly on notice at formation is still not on notice of an unannounced revision (*Douglas*), still faces an illusory promise (*Harris, Zappos*), still faces indefiniteness. **The line answers whether a contract formed; the defects arise after.**

Sources Meyer v. Uber, 868 F.3d 66 (2d Cir. 2017); Specht, 306 F.3d 17; Nguyen, 763 F.3d 1171; Sgouros, 817 F.3d 1029; Berkson v. Gogo LLC, 97 F. Supp. 3d 359 (E.D.N.Y. 2015); Gilly, sec. VIII.

Tell the user when the deal has changed. Get agreement when the change is material.

01 · MUTUALITY

A reserved right to amend cannot bind if it leaves the provider free to modify any obligation at will, some core must be fixed.

02 · NOTICE

A modification does not bind a user with no notice of that particular change. A standing warning is not notice.

03 · FRESH ASSENT

A material change needs conspicuous notice and fresh assent, not silent posting and imputed acquiescence.

Sources Gilly, The Moving Target, sec. IX, A Modest Rule.

A user can accept, be bound by what was accepted, and still be unable to say what that was, because the provider reserved the right to change it and then exercised that right continuously, silently, and unequally. A promise it may revoke at will is illusory. A change the user never saw does not bind. A product that will not hold still is not a definite agreement.

"Accepted what?" has no answer the provider can give,
because a moving target is not a contract a user can be held to.

Sources Gilly, The Moving Target, sec. X, Conclusion.

Table of Authorities · Cases

All authorities as cited in Gilly, T. (2026), The Moving Target, Working draft, June 2026 (v0.1). Reproduced verbatim from the article's footnotes.

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