

Joint Committee on the Uniform Commercial Code and Emerging Technologies

Addendum to March 28, 2022 Committee Meeting Draft

Definition of “Conspicuous” and Official Comment

Section 1-201(b)...

(10) “Conspicuous”, with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. [Whether a term is “conspicuous” or not is a decision for the court.] ~~Conspicuous terms include the following:~~

~~(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and~~

~~(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.~~

Official Comment

~~10. “Conspicuous.” Derived from former Section 1-201(10). This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person against which the term is to operate. [Whether a term is conspicuous is an issue for the court.] ~~Subparagraphs (A) and (B) set out several methods for making a term conspicuous. Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved). Although these paragraphs indicate some of the methods for making a term attention calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test. Whether the appearance and presentation of a particular term satisfy this standard is determined by reference to the totality of the circumstances and requires a case-by-case analysis.~~~~

Historically, contract terms were presented in writing, making the use of standards that relate to the size and appearance of type relevant to the determination of conspicuousness. Today terms in a record are frequently communicated electronically. New technologies have created opportunities for terms to be displayed or presented in novel ways, such as by the use of pop-up windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual elements such as vibrations, to name a few.

The definition has been revised by deleting the statutory examples relating to the appearance of type and instead indicating in the comments a broader universe of factors that are applicable to both written and electronic presentations. This approach is intended to be both more protective of consumers and more useful to drafters by providing more clarity and flexibility in the methods that may be used to call attention to a term.

The attributes of a reasonable person against which a term is to operate can vary depending upon the nature of the transaction and the market in which the transaction occurs. For example, assume that a merchant of goods wishes to enter into a transaction for the sale or lease of goods which does not include an implied warranty of merchantability or fitness for particular purpose. Depending on the particular transaction, the person against which the term excluding implied warranties is to operate may be a large business buyer or lessee, a small business, or a consumer. Similarly, the determination of whether a term is conspicuous may, depending on the context, yield a different conclusion when the term is used in a standard form agreement than when terms of the agreement are the subject of negotiation or discussion.

Terms presented in an online record raise issues that differ in some respects from the issues associated with presenting the same terms in a writing. For example, how a term appears depends to some extent on the equipment and settings of the person presented with the term.

The test of whether a term is conspicuous remains constant notwithstanding the different contexts referenced above. A term is conspicuous if its appearance and presentation are such that it ought to be noticed by a reasonable person against which the term is to operate. If the term is in a standard form intended for use in many agreements, the determination of whether the term is conspicuous may be made with reference to typical likely parties to the agreements, taking into account all aspects of the transaction, the range of likely equipment and settings used by such parties, and the education, sophistication, disabilities, and other attributes of such parties. If the term is not in a standard form, the determination of whether it is conspicuous should be made with reference to a reasonable person in the position of the actual person against which it is to operate.

Factors relevant to whether a term is conspicuous include, but are not limited to, the following:

(i) The use of headings and text that contrast with the surrounding text. For example, a term is likely to be conspicuous if it is introduced by a heading in uppercase letters equal to or greater in size than the surrounding text. Similarly, a term is likely to be conspicuous if set out in language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language. However, even with those characteristics, for a term to be conspicuous the overall statutory test must always be met. For example, even if in bold, uppercase letters, a term might not be conspicuous if placed among other terms also in bold, uppercase letters so there is no contrast with the surrounding text or if the application of other factors cause the term not to be provided such that a reasonable person against which it is to operate ought to have noticed it.

(ii) The placement of the term in the record. A term appearing at, or hyperlinked from, text at the beginning of a record, or near the place where the person against which the term is to operate must signify assent, is more likely to be conspicuous than a term in the middle of a lengthy record absent the use of a method reasonably designed to draw the person's attention to the term in middle of the record (for example, by providing separate reasonable notice of the

term before presenting the record containing the term to the person for assent or forcing the person to stop on a screen highlighting the term during the presentation of the record for assent).

(iii) If terms are available only through the use of a hyperlink, in addition to the placement of the hyperlink as described above, factors to be considered include whether there is language drawing attention to the hyperlink and describing its function, and the size and color of the text used for the hyperlink and any related language.

(iv) The language of the heading, if any. A misleading heading – such as the heading “Warranty” for a paragraph that contains a disclaimer of warranties – might cause a reasonable person to fail to notice the language that would disclaim warranties, so that the term would not be conspicuous.

(v) The effort needed to access the term. The process and flow of the display and presentation is also relevant. For example, a term accessible only by triggering multiple hyperlinks is less likely to be conspicuous than a term accessible from a single hyperlink.

(vi) Whether the person against which the term is to operate must separately assent to or acknowledge the term. Obtaining separate assent or acknowledgment of a term is generally sufficient to make the term conspicuous.

As noted above, the evolution of technology has led to an evolution in the ways in which terms in an electronic record are displayed or presented. A term displayed or presented in a novel way utilizing emerging technologies is, of course, conspicuous if the effect of the display or presentation is that a reasonable person against which the term is to operate ought to have noticed it.

This definition deals only with requirements of that a term be conspicuous (or noted conspicuously) that are stated in particular provisions of [the Uniform Commercial Code]. Other protective doctrines designed to assure that assent is meaningful that are part of general contract law may also apply. See Section 1-103(b).