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EXPERT ANALYSIS

For Online Contracts, 9th Circuit Requires Conspicuous Notice Plus 'Something More'

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Online retail has been a burgeoning segment of American commerce since the mid-1990s. But as is often the case, the growth of the technology outpaces the law. Electronic commerce, or e-commerce, raises the same host of contractual issues businesses and courts faced when innovations such as telegrams, telex and facsimile transmissions accelerated the pace and methods of completing commercial transactions. For the most part, the courts, legislatures and businesses have accommodated e-commerce in stride, adopting practices for securing communications, verifying transactions, submitting valid electronic signatures, transferring payments and demonstrating assent by the click of a mouse. Indeed, this is a golden time for convenient Internet shopping and e-commerce.

Websites themselves raise unique issues as well. They expose valuable business information to competitors such as product line, availability, pricing, shipping and handling. And, website owners often want to impose terms and conditions that govern not only transactions placed online, but the use of the website itself, such as prohibiting site-scraping or the use of bots.

One commonly deployed method to bind users to a site's terms of use has been to include a hyperlink at the bottom of the webpage to legal terms and conditions, and provide in the terms that the conduct of using the site demonstrates a user's assent. However, according to a recent decision of the 9th U.S. Circuit Court of Appeals, that common "browsewrap" practice may no longer be enough to bind users to website terms. In *Nguyen v. Barnes & Noble Inc.*,[1] the appeals court held that, in the absence of actual notice, a conspicuous hyperlink to a website's terms of use is insufficient to put a site user on constructive notice that binds the user to a contract.

In this commentary, we review generally the case law of "clickwrap" and "browsewrap" agreements and offer suggestions, in light of *Nguyen*, on how to better ensure enforceability of terms of use.

ENFORCEABILITY OF ONLINE AGREEMENTS

The Internet has changed the way society and business do many things, but bedrock contract principles remain the same. One such principle is the requirement that "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract."[2]

Online contracts typically fall into two categories: clickwrap or browsewrap. Clickwrap agreements — or, more accurately, "click-through" agreements[3] — are contracts where a user affirmatively acts to accept the terms of an agreement prior to using an online store, website or mobile app, such as by clicking on a button or checkbox labeled "I Agree." Click-through agreements usually meet the requirement of mutual assent for parties to enter a contract and are generally accepted by courts.[4]

In contrast, browsewrap agreements do not require any affirmative action by a website user to indicate that he or she agrees to certain terms, other than the user's initial or continued use of the website. Generally, courts disfavor browsewrap agreements because of the lack of affirmative

assent, and their enforceability typically depends on whether a reasonably prudent website user would have actual or constructive knowledge of a website's terms of use.[5]

NGUYEN REQUIRES NOTICE PLUS SOMETHING MORE

In August the 9th Circuit handed down the latest decision from a federal appeals court concerning the enforceability of online contracts. In *Nguyen* the court decided that browsewrap terms of use are insufficient to give rise to constructive notice.

The issue arose after Kevin K. Nguyen sued an online bookseller on behalf of himself and a proposed class of consumers whose online orders for tablet computers had been canceled by the defendant retailer. The complaint alleged the bookseller engaged in deceptive business practices and false advertising.

The defendant sought to invoke an arbitration clause that was included in its website's terms of use, which were hyperlinked in the bottom, left-hand corner of every webpage and near the button a user had to click to proceed in the checkout process. According to the plaintiff, he never clicked on the hyperlink, had no actual knowledge of the terms and never agreed to them. Accordingly, the enforceability of the arbitration provision turned on whether Nguyen had constructive notice of the terms. In other words, it depended on whether a reasonable consumer would have notice of the terms.

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The 9th Circuit ruled that providing a hyperlink to terms of use is insufficient to adequately provide notice, even if that hyperlink is placed in a conspicuous location on the webpage.[6] The court did not provide specific guidance on what type of website design would bind users to a browsewrap agreement, but it did cite to three federal trial court cases where, in addition to a conspicuous hyperlink, the websites included "something more to capture the user's attention and secure her assent."

The "something more" presented in those cases included:

- A direct admonition to the user to "review terms."
- A warning that "[b]y clicking and making a request to activate, you agree to the terms and conditions."
- A requirement that users select a checkbox confirming they had reviewed and agreed to the website's terms of use.[7]

The 9th Circuit also relied on two 2nd Circuit cases involving browsewrap agreements: *Specht v. Netscape Communications Corp.* and *Register.com v. Verio Inc.*[8]

In *Specht*, decided in 2002, Netscape attempted to enforce an arbitration clause in class-action lawsuits brought by consumers alleging that the company's SmartDownload application illegally transmitted their personal data. The Web page from which users downloaded the software referenced the SmartDownload license terms, which contained the arbitration clause, but the reference was buried at the bottom of the page.

Then-U.S. Circuit Judge Sonia M. Sotomayor, writing for the three-judge panel, found the browsewrap agreement was unenforceable because "a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms." She also observed that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."[9]

Two years later, the 2nd Circuit again confronted the enforceability of browsewrap agreements in *Verio*. There, plaintiff Register.com offered domain registration services, and defendant Verio offered Web design and development services. Register.com made domain name registration information available to the public on its website. Register.com included a "legend" on its Web pages prohibiting commercial use of the registration information, but the legend appeared only after the display of the registration information.

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To aid its sales efforts, Verio was "scraping" Register.com's Web pages for the contact information of newly registered domains and soliciting the registrants by email, phone and direct mail. Register.com demanded Verio stop contacting its customers, but Verio refused. Register.com filed a lawsuit for an injunction and prevailed.

On appeal, the 2nd Circuit found the browsewrap terms enforceable because Verio admitted to having actual notice of the terms and Verio continued to scrape Register.com's Web pages on a daily basis despite the prohibition.[10]

The *Specht* and *Nguyen* opinions could reflect a general trend in the federal appellate courts against the enforcement of browsewrap terms on consumers. The 2nd Circuit's decision in *Specht* focused on the conspicuousness of a hyperlink to terms of use. Twelve years later, the 9th Circuit makes clear that the proximity and conspicuousness of the hyperlink "alone is not enough to give rise to constructive notice," and more is needed.

The 2nd Circuit recently addressed browsewrap again in *Schnabel v. Trilegiant Corp.*, a 2012 decision about whether an arbitration provision contained in a post-enrollment email put the consumer class-action plaintiffs on inquiry notice.[11] While the enforceability of the arbitration provision was not an issue on appeal, the court in dicta stated that "[p]rovisions disclosed solely through browsewrap agreements are typically enforced if 'the website user must have had actual or constructive knowledge of the site's terms and conditions, *and* have manifested assent to them.'"[12]

The *Verio* case, where the 2nd Circuit found license terms enforceable without affirmative assent, does not counsel a different result. The corporate defendant, presumably a sophisticated contracting party, admitted to being on actual notice of the terms of use and yet continued to violate those terms on a daily basis.

The 9th Circuit decision in Nguyen *continues a general trend in the federal judiciary toward increased scrutiny concerning online contracting and finding constructive notice for consumers.*

DISTRICT COURTS DISFAVOR BROWSEWRAP TERMS

Four federal trial court cases are described below. Each case was decided prior to the *Nguyen* decision, but the cases support the 9th Circuit's reasoning and ultimate outcome.

In 2009 the U.S. District Court for the Eastern District of New York rejected a defendant's arbitration clause because of lack of constructive notice. The class-action case, *Hines v. Overstock.com*, involved fees for returned goods at Overstock.com.[13] The plaintiff alleged breach of contract, fraud and other violations of New York law.

The defendant attempted to enforce an arbitration clause that was included in its terms and conditions, which were only available via a hyperlink at the bottom of the site. The court held that the plaintiff lacked notice of the arbitration clause because Overstock.com neither displayed a hyperlink to its contractual terms in a prominent location nor prompted users to review those terms. In his opinion, Senior U.S. District Judge Sterling Johnson Jr. quipped, "Very little is required to form a contract nowadays — but this alone does not suffice."[14]

In September 2012 the U.S. District Court for the District of Nevada came to a similar conclusion in *In re Zappos.com Inc. Customer Data Security Breach Litigation*.[15] There, plaintiffs sued for damages as a result of a security breach on the Zappos website. Zappos attempted to enforce an arbitration provision in its terms of use. Each Zappos page contained a hyperlink to the site's terms of use between the middle and the bottom of the page, but the hyperlink was only visible when the user scrolled down.

The court found the terms of use unenforceable because they were "inconspicuous, buried in the middle to bottom of every Zappos webpage among many other links, and the website never directs a user to the Terms of Use." The court, citing to *Hines* and *Specht* for support, concluded that "no reasonable user would reason to click on the terms of use."[16]

In January 2012 the U.S. District Court for the Southern District of New York considered the enforceability of a forum-selection clause in Facebook's terms and conditions for user accounts in *Fteja v. Facebook Inc.*[17] The plaintiff claimed that he had never read the site's terms of service, which were available via a hyperlink during the registration process, next to a "Sign Up" button.

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Next to the button, the following sentence appeared: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service."

The court described the Facebook registration process as an amalgam of both click-through and browsewrap designs. Like typical browsewrap, the terms were only visible via a hyperlink, but like click-through agreements, the user was required to take an affirmative step: click the button, to assent.

U.S. District Judge Richard J. Holwell found Facebook's terms enforceable, analogizing the facts to cruise ship tickets where the terms and conditions are printed on the back of the ticket. "[C]licking the hyperlinked phrase is the 21st-century equivalent of turning over the cruise ticket," he said. "In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant."[18]

A June decision by the U.S. District Court for the Northern District of California demonstrates the contrast between the effectiveness of click-through agreements and the perils associated with browsewrap terms. In *Tompkins v. 23andMe Inc.*, the class-action plaintiffs alleged 23andMe, which provides genetic testing to consumers, engaged in false advertising.[19] The company sold its genetic testing kits online and delivered results for customers via its website.

The defendant moved to compel arbitration pursuant to a provision in its terms of service. A hyperlink (simply called "LEGAL") to the terms of service on the 23andMe website was located at the bottom of the page during the purchasing process and required no acknowledgement of the terms by customers. Not surprisingly, the court found that the notice was insufficient to enforce the arbitration provision based on the checkout process alone.

As the 9th Circuit makes clear in Nguyen*, "the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers."*

To receive the testing results, however, 23andMe customers had to sign up for an account, and the during registration process, users had to click "I ACCEPT" near a hyperlink to 23andMe's terms of service, which contained the arbitration provision. The court found this click-through agreement enforceable and granted 23andMe's motion to compel arbitration.

RECOMMENDATIONS AFTER *NGUYEN*

The 9th Circuit decision in *Nguyen* continues a general trend in the federal judiciary toward increased scrutiny concerning online contracting and finding constructive notice for consumers. The decision, of course, is not binding on courts outside the 9th Circuit, but judges in other districts will likely find the decision to be persuasive authority, especially when combined with the dicta in the recent 2nd Circuit decision in *Schnabel*.

As the 9th Circuit makes clear in *Nguyen*, "the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers."[20] Each case is fact-specific and presents unique issues, but a few general observations about the risks associated with common types of online terms and conditions are possible:

- Least risk: Click-through agreements that display the terms of use to the user and require affirmative action by the user to indicate she has read and agreed to the terms.[21]
- Less risk: Click-through agreements that employ a hyperlink to the terms of use and require affirmative action by the user to indicate she has read and agreed to the terms.[22]
- More risk: Terms of use displayed on each page in a conspicuous fashion with no affirmative action by the user to indicate that she has read and agreed to the terms.[23]
- Most risk: Terms of use displayed on each page via a hyperlink in an inconspicuous fashion with no affirmative action by the user to indicate that she has read and agreed to the terms.[24]

CONCLUSION

The Internet has not changed contract law, and courts are increasingly scrutinizing online contract formation for adequate notice and user assent. The 9th Circuit's decision in *Nguyen* further demonstrates the danger of using browsewrap terms to create an enforceable agreement

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with website users. As the case law suggests, browsewrap terms generally should be avoided, and click-through agreements pose less risk to website owners and operators.

NOTES

[1] 763 F.3d 1171 (9th Cir. Aug. 18, 2014).

[2] *Id.* at 1175, quoting *Specht v. Netscape Commc'ns Corp.,* 306 F.3d 17, 29 (2d Cir. 2002).

[3] Both "clickwrap" and "browsewrap" are misnomers. The etymological origins of the terms can be traced to "shrinkwrap" licenses where a consumer accepted the terms of software license simply by opening the shrinkwrap packaging. Today, consumers are more likely to confront such agreements while using a website.

[4] *See* Mark A. Lemley, *Terms of Use,* 91 Minn. L. Rev. 459 (2006), *available at* http://www.minnesotalawreview.org/wp-content/uploads/2011/11/Lemley_Final.pdf ("Every court to consider the issue has found 'clickwrap' licenses, in which an online user clicks 'I agree' to standard form terms, enforceable.").

[5] *Nguyen*, 763 F.3d at 1176, 1178 n. 2 (quoting *Be In Inc. v. Google Inc.*, No. 12-CV-03373, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013) and *Van Tassell v. United Mktg. Group LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011)).

[6] *Id.* at 1178-79 ("[W]e therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on — without more — is insufficient to give rise to constructive notice.").

[7] *PDC Labs. Inc. v. Hach Co.*, No. 09-1110, 2009 WL 2605270 (C.D. Ill. Aug. 25, 2009); *5381 Partners LLC v. Sharesale.com Inc.*, No. 12-CV-4263, 2013 WL 5328324 (E.D.N.Y. Sept. 23, 2013); *Zaltz v. JDATE*, 952 F. Supp. 2d 439 (E.D.N.Y. 2013). The latter case appears to be a click-through agreement.

[8] *Specht*, 306 F.3d 17; *Register.com v. Verio Inc.*, 356 F.3d 393 (2d Cir. 2004).

[9] *Specht*, 306 F.3d at 32, 35.

[10] *Register.com*, 356 F.3d at 403 ("It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.").

[11] *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012).

[12] *Id.* at 129-30 n. 18 (quoting *Cvent Inc. v. Eventbrite Inc.,* 739 F. Supp. 2d 927, 937-38 (E.D. Va. 2010) (emphasis added).

[13] 668 F. Supp. 2d 362 (E.D.N.Y. 2009).

[14] *Id.* at 367.

[15] 893 F. Supp. 2d 1058 (D. Nev. 2012).

[16] *Id.* at 1064.

[17] 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

[18] *Id.* at 839.

[19] Nos. 5:13-CV-05682, 5:14-CV-00294, 5:14-CV-00429, 5:14-CV-01167, 5:14-CV-01191, 5:14-CV-01258, 5:14-CV-01348 and 5:14-CV-01455, 2014 WL 2903752 (N.D. Cal. June 25, 2014).

[20] *Nguyen*, 763 F.3d at 1179.

[21] *See, e.g., Specht*, 306 F.3d at 22-23 (finding a "signal difference" between hyperlinked terms of use and software where users "were automatically shown a scrollable text of that program's license agreement and were not permitted to complete the installation until they had clicked on a 'Yes' button to indicate that they accepted all the license terms").

[22] *See, e.g., Fteja*, 841 F. Supp. 2d at 839-40 (finding the plaintiff "was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough.").

[23] *See, e.g., Verio*, 356 F.3d at 402 ("Verio visited Register's computers daily to access WHOIS data and each day saw the terms of Register's offer; Verio admitted that, in entering Register's computers to get the data, it was fully aware of the terms on which Register offered the access.").

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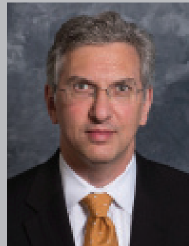
[24] *See, e.g., Specht*, 306 F.3d at 32 ("Internet users may have, as defendants put it, 'as much time as they need[ ]' to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there.").



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