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

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taaGtnLGeLaLLe oieNnoGLetGanoisetnoLNeae NLoiseaiotnoaiNeLoEoise ntiNtnoaiNe Nonnnoise tYoGe LYLnaioe NositnLNe ntiNLoise tELinNe tiGe GLaiNntnoise tNNLineEenLeYoeaeteaNLeeiGLLGenoNeoNetesaYGLienoLeaeaiLioLineinLiLneNaoisetiGe LaLL

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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.

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]

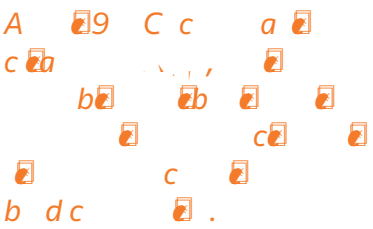
In *Specht*, decided in 2002, Netscape attempted to enforce an arbitration clause in class-action lawsuits brought by consumers alleging that the company's SmartDownload application illegally transmitted their personal data. The Web page from which users downloaded the software referenced the SmartDownload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

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]



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.

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

[24] *See, e.g., S ... c*, 306 ... 3 ... 32 ([illegible]).