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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How 9th Circ. B&N Case May Impact Website Terms Of Use

Perry J. Viscounty

Ghaith Mahmood

Sarah E. Diamond

Law360, New York (September 29, 2014, 10:06 AM ET) -- The Ninth Circuit recently declined to enforce Barnes & Noble Inc.'s website terms of use against a plaintiff customer. The court held that plaintiff did not affirmatively assent to those terms because there was no evidence that he had actual notice of their applicability. The court found that notice of these terms of use was insufficient where Barnes & Noble made its terms available via a conspicuous hyperlink on every page of its website, without further prompting website users to take any affirmative action to demonstrate assent. This article examines the potential impact on Internet service providers.

Background

On Aug. 18, 2014, a Ninth Circuit U.S. Court of Appeals three-judge panel affirmed an earlier district court's denial of Barnes & Noble Inc.'s motion to compel arbitration and to stay court proceedings pursuant to an arbitration agreement contained in B&N's website's terms of use. That case arose from a putative class action brought by a plaintiff whose order for heavily discounted tablets on the B&N website was canceled.[1]

The case addresses the question of what constitutes actual and inquiry notice of an online service provider's terms of use, which is essentially an Internet contract. The district court had agreed with plaintiff customer that he did not "affirmatively assent" to the terms and conditions of use because he was not required to "click on the Terms of Use in order to make a purchase" and B&N "did not specifically direct consumers to these terms prior to making a purchase."[2]

In affirming the district court's holding that plaintiff was not bound by the B&N terms of use, the Ninth Circuit applied New York law and closely inspected the design of the B&N website. Noting no evidence that plaintiff customer had actual notice of the terms of use, the court analyzed the enforceability of these types of "browsewrap agreements," in which the website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen.[3]

The Ninth Circuit held 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."[4]

Click-Through vs. Browsewrap Agreements

The Ninth Circuit began its analysis by reiterating that, as with all contracts, enforcement of Internet contracts such as terms of use requires mutual manifestation of assent. How to determine the existence of assent in the context of an Internet contract is largely a function of the form in which the contract appears.

The court distinguished the two main types of Internet contracts: "click-through" agreements and "browsewrap" agreements.[5] In a "click-through" (or "clickwrap") agreement website users are required to affirmatively click on an "I agree" box (or similar) after being presented with a list of terms and conditions of use (typically when a website user registers for an account, or before they complete a transaction).[6] In a "browsewrap" agreement on the other hand, a website's terms and conditions of use are generally made available for viewing on the website via a hyperlink at the bottom of the screen, or at the bottom of the website user registration page.[7]

Courts have found that browsewrap agreements create more uncertainty regarding the presence or lack of website user assent. As the court noted, "[u]nlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly ... [a] party instead gives his assent simply by using the website."[8] Emphasizing the difficulty in establishing assent to a browsewrap agreement, the court cited a recent district court opinion which observed that the "defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists."[9]

B&N's terms of use was available via a "Terms of Use" hyperlink located in the bottom left-hand corner of every page on the B&N website, and appeared alongside other hyperlinks labeled "NOOK Store Terms," "Copyright" and "Privacy Policy."[10] These hyperlinks also appear underlined and set in green typeface in the lower left-hand corner of every page in the online checkout process.[11]

Evidence of Actual Notice of Browsewrap Agreements Supports Enforceability

Despite the inherent assent issues in enforcing browsewrap agreements, the Ninth Circuit stated that "courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement."[12] Thus, if an online service provider can make a definitive showing that the website user knew of the existence of the terms of use, the terms and conditions are enforceable. However, establishing actual notice of a browsewrap agreement can be difficult.

In this case involving B&N, the Ninth Circuit found no evidence that plaintiff website user had actual knowledge of the terms of use agreement.[13] In making its decision, the court cited the following cases as examples in which the website user had actual notice of the terms of a browsewrap agreement:

- The website user admitted he was fully aware of the terms of use (see Register.com Inc. v. Verio Inc., 356 F.3d 393, 401-404 (2d Cir. 2004)).

- The website user continued its breach after being notified of the terms in a cease-and-desist letter (see Sw. Airlines Co. v. BoardFirst LLC, No. 06-CV-0891-B, (N.D. Tex. Sept. 12, 2007)).

- The website user continued breaching the contract after receiving a letter quoting the browsewrap contract terms (see Ticketmaster Corp. v. Tickets.com Inc., No. CV-997654, (C.D. Cal. Mar. 7, 2003)).

Without Evidence of Actual Notice, Courts Look for Inquiry Notice to Evaluate Enforceability

In denying to enforce B&N's terms of use, the court held that where "there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract."[14] The Ninth Circuit maintained that the conspicuousness and placement of the terms of use hyperlink, the other notices given to website users, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice (also referred to by the court as constructive notice) of a browsewrap agreement.[15] However, the court remained silent regarding what level of conspicuousness would, in fact, establish such inquiry notice.

The Ninth Circuit did expand on what does not establish sufficient constructive notice. With regard to B&N's terms of use, the Ninth Circuit held that a "conspicuous hyperlink on every page of the website even where the hyperlink is in close proximity to relevant buttons users must click on" is not alone sufficient to establish constructive notice.[16] Moreover, the court rejected B&N's attempts to establish that plaintiff's familiarity with other websites governed by similar browsewrap terms (including plaintiff's own personal website) gives rise to an inference of constructive notice of the B&N terms of use. The court dismissed this argument, finding that plaintiff's experience with the browsewrap agreements found on other major websites "has no bearing on whether he had constructive notice" of B&N's terms of use.[17]

Given the lack of a definitive standard online service, providers should strongly consider including affirmative "I Agree" click boxes to demonstrate their website user's assent to the website's terms of use.

Other Circuits and Districts Weigh in

Given the dearth of relevant case law governing enforcement of terms of use, courts often cite to decisions from other circuits and states in making their rulings. Below are a few recent decisions where courts have considered the validity of browsewrap agreements in differing scenarios.

No express assent required:

- In this case involving B&N, the Ninth Circuit identified PDC Labs. Inc. v. Hach Co,[18] an unpublished district court order cited by neither party, as the "most analogous case the court was able to locate." In that case the court upheld the terms of use, which were "hyperlinked on three separate pages of the online ... order process in underlined, blue, contrasting text" and the "conspicuousness was reinforced by the language of the final checkout screen, which read, 'STEP 4 of 4: Review terms, add any comments, and submit order,' and was followed by a hyperlink to the Terms."[19]

- In Register.com Inc. v. Verio Inc., 356 F.3d 393 (2d. Cir. 2004), the Second Circuit upheld Register.com's browsewrap terms of use, holding that contractual relationships could be formed whether or not website users are required to express assent prior to using a product or service. However, as the district court in the case involving B&N emphasized, in Register.com Inc. v. Verio, Verio was a daily repeat user that was shown a link to Register.com's terms of use with each transaction.

Browsewrap agreement rejected where hyperlink was not conspicuously placed:

- Specht v. Netscape Communications Corp.[20] is cited as the "leading authority on the enforceability of browsewrap terms under New York law."[21] In Specht, the Second Circuit declined to enforce an arbitration provision in a website's licensing terms where the hyperlink to the terms was located at the bottom of the page, hidden below the "Download" button that website users had to click to initiate the software download.

- In Hines v. Overstock.com Inc.,[22] an action involving an arbitration clause contained in a browsewrap agreement accessible via hyperlink, the court found that plaintiff lacked notice of the terms and conditions because "the website did not prompt her to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions." The court concluded that "[v]ery little is required to form a contract nowadays-but this alone does not suffice."[23]

- The court in In re Zappos.com Inc., Customer Data Security Breach Litigation[24] declined to enforce an arbitration provision in Zappos.com's browsewrap terms where the terms were linked from a "highly inconspicuous hyperlink buried among a sea of links."[25]

Implications for Online Service Providers: Website Design Matters

Unfortunately, no definitive design guidelines yet exist to ensure that every U.S. court will find a browsewrap agreement enforceable.[26] Instead the Ninth Circuit held that multiple factors contribute to whether a reasonably prudent website user would have inquiry notice of a browsewrap agreement; such as the conspicuousness and placement of the hyperlink, other notices transmitted to website users and the website's general design.

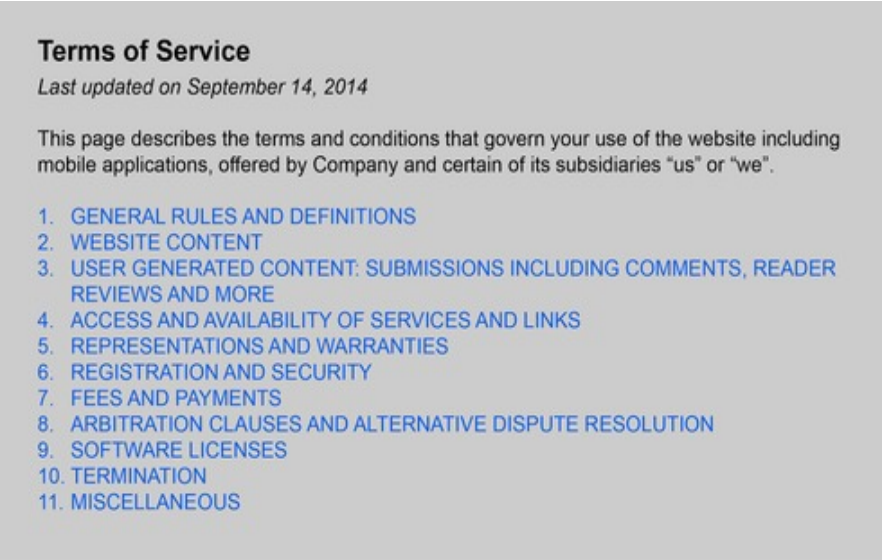
Despite this statement pointing to the criteria courts examine to assess inquiry notice, the takeaway from the Ninth Circuit's holding suggests that current best practices are for terms of use acknowledgements to appear as click-through agreements in some form, such that actual notice can be more easily demonstrated. Online service providers should carefully note the following points in the Ninth Circuit's holding:

- "Proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice." The Ninth Circuit acknowledged that the hyperlink on B&N's website was "conspicuous" and "on every page of the website," and was therefore much more conscious than the hyperlink at issue in Sprecht.[27] Nevertheless, the court still refused to uphold the terms of use, and concluded that the location of the hyperlink alone is not sufficient to establish assent.

- "[C]ourts have consistently enforced browsewrap agreements where the user had actual notice of the agreement." When litigating the enforceability of a terms of use, parties seek to enforce such terms are better positioned if they can point to specific evidence that the website user was aware of the existence of the terms of use. This evidence can come in many forms, but the essential point is that the party has notice of the terms before the event giving rise to litigation.

- "Courts have also been more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement." The Ninth Circuit essentially stated that browsewrap agreement enforcement is easier if it is actually a click-through agreement. Terms of use are therefore more likely to be enforced "where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website"[28] as required by a click-through agreement.

- Arbitration clauses and class action waivers should be especially prominent. As the district court stated, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[29] Arbitration clauses and class action waivers are often the most important provisions in a terms of use, and certainly are among the most frequently litigated clauses. An online service provider seeking to enforce these provisions is better positioned if it can point to more than one obscure (or even prominent) hyperlink to show that a website user had notice of these provisions. Therefore, a prudent online service provider should disclose its arbitration clause and class action waiver provisions through multiple layers of website user communications — including through email notices, during user registration, during the online purchase process, as well as include a table of contents with hyperlinks to each section of the Terms of Use, including the arbitration provision. See Fig. 1.



Terms of Service

Last updated on September 14, 2014

This page describes the terms and conditions that govern your use of the website including mobile applications, offered by Company and certain of its subsidiaries "us" or "we".

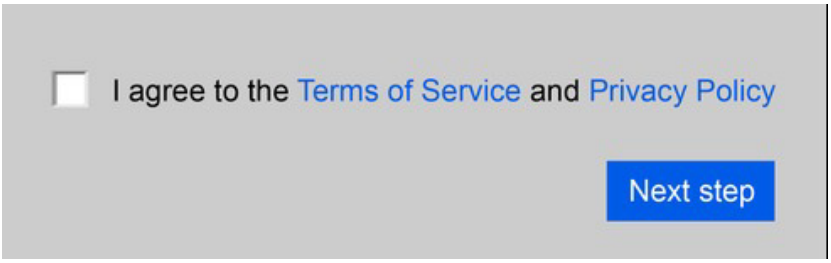
1. GENERAL RULES AND DEFINITIONS
2. WEBSITE CONTENT
3. USER GENERATED CONTENT: SUBMISSIONS INCLUDING COMMENTS, READER REVIEWS AND MORE
4. ACCESS AND AVAILABILITY OF SERVICES AND LINKS
5. REPRESENTATIONS AND WARRANTIES
6. REGISTRATION AND SECURITY
7. FEES AND PAYMENTS
8. ARBITRATION CLAUSES AND ALTERNATIVE DISPUTE RESOLUTION
9. SOFTWARE LICENSES
10. TERMINATION
11. MISCELLANEOUS

Different Forms of Designing Click-Through Agreements

The Ninth Circuit has declared that absent actual notice, the validity of a browsewrap agreement turns on whether the website puts a reasonably prudent website user on inquiry notice of the terms of the contract.[30] The court's language strongly suggests that between the two types of Internet contracts, the click-through agreement more definitively establishes actual and inquiry notice. While online service providers may be reluctant to use click-through agreements, which are sometimes viewed as cumbersome or difficult for users to navigate, there are some alternative forms of which may make them more appealing for wider use.

The Click-Through/Browsewrap Hybrid

Terms of use can be accessible from a hyperlink on every page of a website, but can also be bolstered by a functionality in which a site visitor must also click "I agree" when first registering for a site or making a purchase. See Fig. 2.



Website Homepage Announcement of Changes in Terms of Use /Privacy Policy

Online service providers making nonminor changes to their terms of use and privacy policies may consider posting highly visible language on their homepage announcing revisions. This further bolsters the "conspicuousness" argument to establish constructive notice.

The Pop Up/Splash Screen

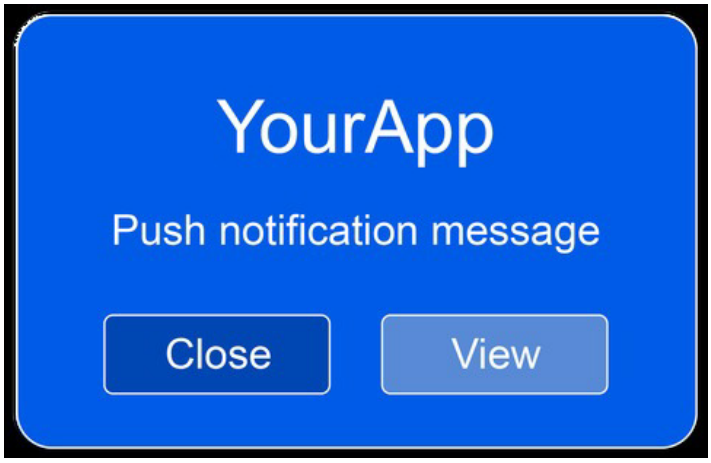
For greater evidence of assent following edits to terms of use/privacy policies, online service providers may consider also putting in place a functionality which directs website users to click an "I agree to the Terms of Use" box. This could take the form of a pop up/splash screen stating, for instance, that "Our Terms of Use have been updated, please click I AGREE so we know you agree with our revised terms."

Email Notifications for Terms of Use/Privacy Policy Updates

Online service providers can also direct website users to click "I agree" boxes which appear in update notification emails. This option is, of course, more suited for websites that maintain an email list of registered website users.

Push Notifications

Mobile devices can complicate the display of a website's terms of use given devices' small screen challenges and the limited options offered when downloading through third-party application stores. However, the mobile format can also create opportunities for websites seeking to give notice of the terms of use. For example a push notification which notifies website users of new messages or events (such as an updated terms of use) without requiring the website user to open the application, similar to the way a text message may make a sound and pop up on a screen. See Fig 3.



For further best practices, the Federal Trade Commission publishes detailed guidance regarding internet

disclosures and obtaining website user assent.[31]

Further Developments

The future of the enforceable browsewrap agreement remains far from certain. The Ninth Circuit stated that had there been evidence in the record that plaintiff had actual notice of the terms of use or was required to affirmatively acknowledge the terms of use before completing his online purchase, the outcome of the case "would have possibly changed."[32] However, the court did not offer any definite guidance as to how a browsewrap agreement can be enforced. Rather, the court's holding suggests that online service providers use click-through agreements instead to establish assent. The Ninth Circuit explicitly noted that despite the number of courts refusing to enforce browsewrap agreements the "few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable."[33]

As the Ninth Circuit's opinion demonstrates, for online service providers seeking to minimize the risk that the provisions in their terms of use will be declared unenforceable, the click-through agreement is a much safer bet.[34]

—By Perry J. Viscounty, Ghaith Mahmood and Sarah E. Diamond, Latham & Watkins LLP

Perry Viscounty is a partner and Sarah Diamond is an associate in Latham & Watkins' Orange County, California, office. Ghaith Mahmood is an associate in the firm's Los Angeles office.

End Notes:

[1] Nguyen v. Barnes & Noble Inc., No. 12–56628, (9th Cir. Aug. 18, 2014) ("Nguyen").

[2] Nguyen v. Barnes & Noble Inc., No. 8:12–cv–0812–JST, (C.D. Cal. Aug. 28, 2012) ("Nguyen District Court").

[3] Nguyen, at 2.

[4]. Id. at 15.

[5] Id. at 9 (citing Register.com Inc. v. Verio Inc., 356 F.3d 393, 403 (2d Cir. 2004)).

[6] Id.

[7] Id.

[8] Id. at 10 – 11.

[9] Id. at 10 (quoting Be In Inc. v. Google Inc., No. 12-CV-03373-LHK, (N.D. Cal. Oct. 9, 2013)).

[10] Id. at 5.

[11] Id. at 5.

[12] Id. at 11.

[13] Id.

[14] Id. at 10 – 11.

[15] Id. at 13.

[16] Id. at 14.

[17] Id. at 16.

[18] PDC Labs. Inc. v. Hach Co., No. 09-1110, (C.D. Ill. Aug. 25, 2009).

[19] Nguyen, at 14. (quoting PDC Labs., Inc. v. Hach Co., No. 09-1110, (C.D. Ill. Aug. 25, 2009)).

[20] Specht v. Netscape Communications Corp., 150 F. Supp.2d 585 (S.D.N.Y. 2001), aff'd, 306 F.3d 17 (2d. Cir. 2002).

[21] Nguyen, at 13.

[22] Hines v. Overstock.com Inc., 668 F. Supp. 2d 362 (E.D.N.Y. 2009).

[23] Id.

[24] In re Zappos.com Inc. Customer Data Sec. Breach Litig., 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012).

[25] Id.

[26] Nguyen, at 13.

[27] Id. at 13.

[28] Id. at 11.

[29] Nguyen District Court, at 5 (quoting AT&T Techs. Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986)) (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)).

[30] Nguyen, at 11-12.

[31] Federal Trade Commission, ".com Disclosures: How to Make Effective Disclosures in Digital Advertising," (Mar. 2013), http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf

[32] Nguyen, at 10-11.

[33] Register.com Inc. v. Verio Inc., 356 F.3d 393, 429 (2d Cir. 2004) (citing Specht v. Netscape Communications Corp., 150 F. Supp.2d 585, 594 (S.D.N.Y. 2001)).

[34] LATHAM & WATKINS DOES NOT AND CANNOT GUARANTEE THAT ANY AGREEMENT, INCLUDING ANY CLICK-THROUGH AGREEMENT WILL BE ENFORCEABLE.