

# Are Your Website “Terms of Use” Enforceable?

09.03.14 01.07.26

On August 18, 2014, the Ninth Circuit Court of Appeals issued an opinion that may impact the way website users are bound by Terms of Use. In *Nguyen v. Barnes & Noble, Inc.*, Plaintiff had purchased two items during a “fire sale” on the Barnes & Noble website, received an order confirmation and then received another e-mail the following day notifying him that the order had been cancelled. Plaintiff proceeded to file a putative class action lawsuit against Barnes & Noble, alleging deceptive business practices and false advertising. In response, Barnes & Noble moved to compel arbitration pursuant to the Barnes & Noble website Terms of Use. Plaintiff argued that he never clicked on the link to the Terms, and he had no notice of the Terms or the arbitration provision. The district court ruled in favor of the Plaintiff, finding that, even though the site contained a hyperlink to its Terms of Use on every page, including through completion of the purchase process, the Plaintiff did not have actual notice of the Terms, nor did the existence of the hyperlinks provide him with constructive notice (*i.e.* implied notice) of the Terms, and Plaintiff was therefore not bound by the arbitration provision.

The significance of this ruling for website operators depends on whether your site uses the “browserwrap” or the “clickwrap” approach to the Terms of Use agreement. The browserwrap agreement is where the site’s Terms can be found in a hyperlink, usually at the bottom of the page. Alternatively, some sites use the clickwrap agreement, which requires users to click a box indicating that the user has read and agreed to the Terms, thereby affirmatively assenting to the Terms. Barnes & Noble used the browserwrap agreement, and the Court found this to be insufficient, stating “we 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.” Although the Court only considered whether the Plaintiff was bound by the arbitration provision, the implication is that the Court would rule that the Plaintiff was not bound by any provision of the Terms.

Under the Court’s reasoning in *Nguyen*, absent evidence of a user’s actual notice of a site’s Terms of Use, a user may not be considered to have had constructive notice, and is therefore not bound by them, where a hyperlink to the Terms is buried on the bottom of the page, or even within close proximity to where the user must click. Website owners should consider making any appropriate changes to ensure that their Site’s users have actual or constructive notice of those Terms.

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