

# Client Alert

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## **Ninth Circuit Refuses to Enforce Browsewrap Terms**

A recent decision by the Ninth Circuit reinforces the importance of obtaining affirmative user consent to the Terms of Use on a website in order for the website owner to enforce such terms against a consumer. In *Nguyen v. Barnes & Noble Inc.*, 2014 WL 4056549 (Aug. 18, 2014), the Ninth Circuit held that Barnes & Noble's website Terms of Use ("Terms") were not enforceable against a consumer because the website failed to provide sufficient notice of the Terms, despite having placed a conspicuous hyperlink to such Terms throughout the website.

In *Nguyen*, the plaintiff purchased two heavily discounted Hewlett-Packard Touchpads from the Barnes & Noble website. The following day, the plaintiff received an email from Barnes & Noble explaining that the plaintiff's order had been canceled because of the unusually high demand.

In response, the plaintiff filed a putative class action with other consumers whose Touchpad orders had also been canceled by Barnes & Noble. The plaintiff alleged that because he was unable to purchase the Touchpad devices at the discounted rate advertised, Barnes & Noble had engaged in deceptive business practices and false advertising. Barnes & Noble sought to remove the action from federal court to arbitration, based upon a binding arbitration provision contained in the Terms.

The plaintiff contended that he was not bound by the Terms because he neither assented to nor had constructive notice of such Terms. Barnes & Noble, on the other hand, argued that the placement of hyperlinks to the Terms put the plaintiff on constructive notice and that the plaintiff's continued use of the website was sufficient to bind the plaintiff.

The Ninth Circuit sided with the plaintiff. Unlike "clickwrap" agreements, where users must affirmatively manifest assent (e.g., by clicking on an "I agree" button), the Terms were presented as a "browsewrap" agreement, where users are deemed to have read and accepted the website terms by using the website. In this case, however, the court found that the plaintiff did not have sufficient constructive notice of the Terms, despite the numerous hyperlinks to the Terms that appeared throughout the website.

According to the Ninth Circuit, hyperlinks to terms and conditions placed at the bottom of webpages are not likely to be noticed compared to text expressly stating that use of the website would act as a user's manifestation to be bound to such terms. Without providing further notice or prompting the plaintiff to take some type of affirmative action to show intent, the Ninth Circuit found that the hyperlinks alone did not provide sufficient notice of the Terms to render the Terms binding on the plaintiff.

This decision reaffirms that courts have yet to clearly define the parameters for creating enforceable browsewrap agreements. While the *Nguyen* decision highlights the importance of obtaining affirmative user consent, it does not specify what measures a website operator must take when designing a browsewrap agreement. Businesses and website operators should be aware of the legal implications stemming from the placement and design of hyperlinks to Terms and seek experienced legal counsel to ensure that the Terms are properly designed to bind users..

**Contacts**

**Cecilia Y. Oh**  
ceciliaoh@hunton.com

**William F. Wilson**  
WWilson@hunton.com

**Andrew G. Geyer**  
ageyer@hunton.com

**Jeffrey L. Harvey**  
jharvey@hunton.com

**Randall S. Parks**  
rparks@hunton.com

**P. Watson Seaman**  
wseaman@hunton.com

**Aaron P. Simpson**  
asimpson@hunton.com

**Lisa J. Sotto**  
lsotto@hunton.com

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