

Hyperlink Fails to Give Reasonable Notice of Terms of Use

A hyperlink to the terms of use on the bottom left-hand corner of every page in close proximity to the buttons a user must click to complete an online purchase is not sufficient for constructive notice to bind the user to the terms, including a requirement to arbitrate.

The case arose when the plaintiff attempted to purchase two Hewlett-Packard Touchpads at a “fire sale” as part of the liquidation of the discontinued Touchpads from www.barnesandnoble.com. Barnes & Noble initially confirmed the sale, but on the following day the plaintiff was informed that his purchase was cancelled due to “unexpectedly high demand” for the product. The plaintiff said he then was forced to buy a higher priced tablet.

The plaintiff sued Barnes & Noble for deceptive business practices and false advertising. Citing its Terms of Use, which required arbitration, Barnes & Noble sought to have the case dismissed and arbitration ordered. The district court refused to order arbitration because Barnes & Noble failed to give reasonable notice of the arbitration provision.

The appellate court said contracts on the Internet may be either via a “clickwrap” agreement requiring the user to click on an “I agree” box or via a “browsewrap” agreement which allows a user to view the terms via a hyperlink. “Where the link to a website’s terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement,” the court wrote.

The Barnes & Noble Terms of Use were available “via a ‘Terms of Use’ hyperlink located in the bottom left-hand corner of every page on the Barnes & Noble website, which appears alongside other hyperlinks labeled ‘NOOK Store Terms,’ ‘Copyright,’ and ‘Privacy Policy.’” Barnes & Noble argued that this created constructive notice to the users.

Not so, said the appellate court. “[W]here 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.” Moreover, there was no evidence that the plaintiff ever read the terms and conditions.

The appellate court also rejected Barnes & Noble’s argument that plaintiff’s “familiarity with other websites governed by similar browsewrap terms, including his personal website www.kevinkhoa.com, gives rise to an inference of constructive notice is also of no moment. Whether Nguyen has experience with the browsewrap agreements found on other websites such as Facebook, LinkedIn, MySpace, or Twitter, has no bearing on whether he had constructive notice of Barnes & Noble’s Terms of Use.”

Kevin Khoa Nguyen v Barnes & Noble Inc., Ninth Cir. No. 12-56628, issued August 18, 2014.