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## That's a Wrap: The Ninth Circuit's Failure to Clarify the Enforceability of Browsewrap and Clickwrap Agreements in Internet Commerce

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THAT’S A WRAP: THE NINTH CIRCUIT’S FAILURE TO CLARIFY THE ENFORCEABILITY OF  
BROWSEWRAP AND CLICKWRAP AGREEMENTS IN INTERNET COMMERCE

By  
Ben Colburn\*

I. INTRODUCTION

In *Nguyen v. Barnes & Noble Inc.*, the Ninth Circuit held that a conspicuous, non-mandatory hyperlink at the bottom of every page of a website is insufficient to provide the user with actual notice of a website’s arbitration agreement.<sup>1</sup> Instead, the user must demonstrate some affirmative assent in order to be bound to the linked agreement.<sup>2</sup> The Ninth Circuit reasoned that “[b]ecause no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of the website’s terms and conditions.”<sup>3</sup> In the present case, there was no evidence that Nguyen had actual notice of Barnes & Noble’s Terms of Use, nor was he required to affirmatively acknowledge the Terms of Use before completing his online purchase; thus, Nguyen did not enter into Barnes & Noble’s agreement to arbitrate.<sup>4</sup> In its discussion, the Ninth Circuit deals extensively with two ways that internet contracts are formed: “clickwrap agreements”<sup>5</sup> and “browsewrap agreements.”<sup>6</sup> Although Barnes & Noble’s Terms of Use fall into the latter category<sup>7</sup> and did not bind Nguyen to an agreement to arbitrate, the Ninth Circuit went further by vaguely recognizing certain circumstances where a browsewrap agreement is enforceable.<sup>8</sup> Ultimately, even though the Ninth Circuit likely reached the correct conclusion, it failed to seize an opportunity to clarify the enforceability of contracts formed through Internet commerce.

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<sup>1</sup> *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1179 (9<sup>th</sup> Cir. 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill, 2011).

<sup>4</sup> 763 F.3d at 1176.

<sup>5</sup> *See id.* (“clickwrap” agreements require website users to click on an “I agree” box after being presented with a list of terms and conditions and use before they are able to access the website).

<sup>6</sup> *See id.* (“browsewrap” agreements exist where a website’s terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen).

<sup>7</sup> 763 F.3d at 1177.

<sup>8</sup> *See id.* at 1176 (“[C]ourts have consistently enforced browsewrap agreements where the user had actual notice of the agreement.”).

## II. BACKGROUND

Barnes & Noble is a national bookseller that owns and operates hundreds of bookstores as well as the website, [www.barnesandnoble.com](http://www.barnesandnoble.com).<sup>9</sup> In August 2011, Barnes & Noble liquidated its inventory of discontinued Hewlett-Packard Touchpads by advertising a “fire sale” of Touchpads at heavily discounted prices.<sup>10</sup> Quickly after the sale was announced, Kevin Khoa Nguyen (“Nguyen”) purchased two units on Barnes & Noble’s website on August 21, 2011, and received a confirmation email.<sup>11</sup> The next day, Nguyen received another email stating that his order has been cancelled as a result of the unexpectedly high demand of Touchpads.<sup>12</sup>

Nguyen claimed that, as a result of “Barnes & Noble’s representations, as well as the delay in informing him it would not honor the sale,” he was “unable to obtain an HP Tablet during the liquidation period,” and was “forced to rely on substitute tablet technology, which he subsequently purchased . . . [at] considerable expense.”<sup>13</sup> On behalf of himself and a putative class of consumers whose Touchpad orders had been cancelled (“plaintiffs”), Nguyen filed this lawsuit in the California Superior Court in April 2012.<sup>14</sup> The plaintiffs alleged that Barnes & Noble had engaged in deceptive business practices and false advertising in violation of both California and New York law.<sup>15</sup> Barnes & Noble removed the action to federal court and moved to compel arbitration under the Federal Arbitration Act (“FAA”),<sup>16</sup> arguing that Nguyen was bound by the arbitration agreement<sup>17</sup> in the website’s Terms of Use which were available via a hyperlink located in the bottom left-hand corner of every page on the Barnes & Noble website.<sup>18</sup>

Nguyen neither clicked on the Terms of Use hyperlink nor read the Terms of Use.<sup>19</sup> If he had clicked on the hyperlink, he would have been taken to a page containing the full text of Barnes & Noble’s Terms of Use, which states: “By visiting any area in the Barnes & Noble.com Site, creating an account, [or] making a purchase via the Barnes & Noble.com Site . . . a User is deemed to have accepted the Terms of Use.”<sup>20</sup>

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<sup>9</sup> 763 F.3d at 1173.

<sup>10</sup> *Id.* at 1173.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 763 F.3d at 1174.

<sup>15</sup> *Id.*

<sup>16</sup> 9 U.S.C. § 3.

<sup>17</sup> BARNES & NOBLE TERMS OF USE, [http://www.barnesandnoble.com/include/terms\\_of\\_use.asp](http://www.barnesandnoble.com/include/terms_of_use.asp) (last visited Oct. 10, 2014).

<sup>18</sup> 763 F.3d at 1174.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Nguyen argued that he could not be bound to the arbitration provision because he did not have notice of the Terms of Use, and that he did not assent to the website's Terms of Use.<sup>21</sup> Barnes & Noble argued that the placement of the Terms of Use hyperlink on its website put Nguyen on constructive notice of the arbitration agreement. They contended that this notice, combined with Nguyen's subsequent use of the website, was enough to bind him to the Terms of Use.<sup>22</sup> The District Court disagreed with Barnes & Noble, finding that Nguyen had insufficient notice of Barnes & Noble's Term of Use; thus, Nguyen did not enter into an agreement to with Barnes & Noble to arbitrate his claims.<sup>23</sup> Barnes & Noble appealed.

### III. THE NINTH CIRCUIT'S ANALYSIS

The Ninth Circuit began its discussion by stating that “[the Court] review[s] the denial of a motion to compel arbitration de novo.”<sup>24</sup> The Court further stated that the underlying factual findings are reviewed for clear error<sup>25</sup> while “[t]he interpretation and meaning of contract provisions” are reviewed de novo.<sup>26</sup>

After explaining the standard of review, the Ninth Circuit reiterated the applicable provision of the FAA in the case. FAA § 3 requires federal district courts to stay judicial proceedings and compel arbitration of claims covered by a written and enforceable arbitration agreement.<sup>27</sup> The FAA limits the district court's role to determining whether a valid arbitration agreement exists, and whether the agreement encompasses the disputes at issue.<sup>28</sup> In this case, the parties did not dispute that Barnes & Noble's arbitration agreement, if enforceable, included Nguyen's claims.<sup>29</sup> Therefore, the only issue before the Court was whether a valid arbitration agreement existed.<sup>30</sup>

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<sup>21</sup> 763 F.3d at 1174.

<sup>22</sup> *Id.* at 1175.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting *Cox v. Ocean View Hotel Corp.*, 533 F.2d 1114, 1119 (9<sup>th</sup> Cir. 2000)).

<sup>25</sup> *Balen v Holland m. Line. Inc.*, 583 F.2d 647, 652 (9<sup>th</sup> Cir. 2009).

<sup>26</sup> 763 F.3d at 1175 (quoting *Milenbach v. Comm'r*, 318 F.3d 924, 930 (9<sup>th</sup> Cir. 2003)).

<sup>27</sup> 9 U.S.C. § 3 [hereinafter § 3].

<sup>28</sup> *See Chiron Corp. v. Ortho Diagnostic Sys. Inc.*, 207 F.3d 1126, 1130 (9<sup>th</sup> Cir. 2000).

<sup>29</sup> 763 F.3d at 1175.

<sup>30</sup> *Id.*

Regarding which law governed the conflict, the parties agreed that the validity of the arbitration agreement was governed by New York law as was specified in Terms of Use's<sup>31</sup> choice of law provision.<sup>32</sup> Whether the choice of law provision applied, however, depended on whether the parties agreed to be bound by Barnes & Noble's Terms of Use in the first place.<sup>33</sup> Ultimately, the Ninth Circuit stated that they did not need to engage in this circular inquiry because both California and New York law dictated the same outcome.<sup>34</sup> Thus, in evaluating the validity of the Barnes & Noble's arbitration agreement, the Court applied New York law.<sup>35</sup>

A. *Contracts Formed on the Internet are Primarily the Result of One of Two Methods: Clickwrap and Browsewrap.*

The Ninth Circuit next illustrated the two primary “flavors” of contract formation on the Internet: clickwrap and browsewrap.<sup>36</sup> The former involves websites where users are required to click on an “I agree” box after being presented with a list of terms and conditions of use.<sup>37</sup> The latter type of agreement includes websites where the terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen.<sup>38</sup> As explained in *Hines v. Overstock.com*, the difference between the two is that “[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.”<sup>39</sup> In other words, “by visiting the website—something that the user has already done—the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink.”<sup>40</sup> Considering this, it is possible that the user can continue to use the website without visiting the page hosting the browsewrap agreement or even knowing that such a website exists.<sup>41</sup>

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<sup>31</sup> In *Doctor's Associates v. Casarotto*, the Supreme Court held that courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions. 517 U.S. 681, 687 (1996). This precedent raises the question: If Nguyen had insufficient notice of the terms of use, why was he bound by the choice of law provision? If Nguyen was bound by the choice of law provision, then he should have been bound by all of Barnes & Noble's terms and conditions.

<sup>32</sup> 763 F.3d at 1175.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1175-76.

<sup>37</sup> 763 F.3d at 1176.

<sup>38</sup> *Id.*

<sup>39</sup> 668 F. Supp. 2d 362, 366-367 (E.D.N.Y. 2009).

<sup>40</sup> *Fieja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D. N.Y. 2012).

<sup>41</sup> *Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 U.S. Dist. LEXIS 147047 (N.D. Cal. Oct. 9, 2013).

B. *The Validity of a Browsewrap Arbitration Agreement Hinges on Whether a User has Knowledge of the Website's Terms and Conditions.*

With the fundamental principle that “[m]utual manifestation of assent . . . is the touchstone of a contract”<sup>42</sup> in mind, the Court proceeded with its analysis by recognizing the central issue facing the legitimacy of browsewrap agreements: a user can use the service without being aware of the terms and conditions. Because of this, the Ninth Circuit adopted the test from *Van Tassell v. United Mktg. Grp.*<sup>43</sup> specifically, the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of the website’s terms and conditions.<sup>44</sup> Moreover, the Ninth Circuit noted that “[c]ourts may be willing to overlook the utter absence of assent only when there are reasons to believe that the [website user] is aware of the [website owner’s] terms.”<sup>45</sup>

Applying the *Van Tassell* test, the Ninth Circuit quickly concluded that Nguyen did not have actual knowledge of the Terms of Use nor was he required to affirmatively acknowledge the Terms of Use before completing his online purchase.<sup>46</sup> Thus, because there was no evidence that Nguyen had actual knowledge of the agreement, the validity of Barnes & Noble’s browsewrap agreement turned on whether the website puts a reasonably prudent user on “inquiry notice” of the terms of the contract.<sup>47</sup> To determine whether a user has inquiry notice of a browsewrap agreement, a court examines the design and content of the website and the agreements webpage.<sup>48</sup> For instance, when the link to a website’s terms and conditions is buried at the bottom of the page or tucked away in a corner where the user is unlikely to see it, courts have refused to enforce the browsewrap agreement.<sup>49</sup>

Conversely, where the website contains an explicit textual notice that continued use will act as a manifestation of the user’s intent to be bound, courts have been more amendable to

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<sup>42</sup> 763 F.3d at 1175.

<sup>43</sup> 795 F. Supp. 2d 770, 790 (N.D. Ill, 2011).

<sup>44</sup> *Id.*

<sup>45</sup> 763 F.3d at 1176 (quoting Mark Lemley, Terms of Use, 91 Minn. L. Rev. 459, 477 (2006)).

<sup>46</sup> 763 F.3d at 1176.

<sup>47</sup> *Id.* at 1177.

<sup>48</sup> Google, 2013 U.S. Dist. LEXIS 147047.

<sup>49</sup> See e.g., *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (Second Circuit Judge Sotomayor, writing for the panel, held that “a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.”); see also *In re Zappos.com Inc. Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012) (“The Terms of Use is inconspicuous, buried in the middle to bottom of every Zappos.com webpage among many other links, and the website never directs a user to the Terms of Use”); see also *Van Tassell*, 795 F. Supp. 2d at 792-793 (refusing to enforce arbitration clause in browsewrap agreement that was only noticeable after a “multi-step process” of clicking through non-obvious links).

enforcing browsewrap agreements.<sup>50</sup> In sum, the Ninth Circuit concluded that “the conspicuousness and placement of the ‘Terms of Use’ hyperlink, other notices given to users of the terms of use, and the website’s general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement.”<sup>51</sup>

The Court rejected Barnes & Noble’s argument that the placement of the Terms of Use hyperlink in the bottom left-hand corner of every page on the website, and its close proximity to the buttons a user must click on to complete an online purchase, is enough to place a reasonably prudent user on constructive notice.<sup>52</sup> The Ninth Circuit noted that the location of the hyperlink on Barnes & Noble’s website distinguished it from *Specht*, the leading authority on the enforceability of browsewrap terms under New York law,<sup>53</sup> stating that “the proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice....”<sup>54</sup> Rather than clarify what would constitute constructive notice, the Court pointed to a lack of controlling authority, and held that,

[I]n keeping with the courts’ traditional reluctance to enforce browsewrap agreements against individual consumers, 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. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers. Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.<sup>55</sup>

In the alternative, Barnes & Noble next argued that Nguyen’s familiarity with other websites governed by similar browsewrap terms, including his personal website, gave rise to an

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<sup>50</sup> See *Cairo, Inc. v. Crossmedia Servs.*, No. 04-04825, 2005 U.S. Dist. LEXIS 8450, at \*2 (N.D. Cal. Apr. 1, 2005) (enforcing forum selection clause in website’s terms of use where every page on the website had textual notice that read: “By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site”).

<sup>51</sup> 763 F.3d at 1177.

<sup>52</sup> *Id.*

<sup>53</sup> In *Specht*, the Second Circuit stated that California state law governed the formation of the contract. 306 F.3d at 27. Therefore, the Ninth Circuit’s statement in *Nguyen* calling *Specht* the leading authority on the enforceability of browsewrap terms under New York law is misleading because *Specht* is not binding New York law since the Second Circuit applied California state law.

<sup>54</sup> 763 F.3d at 1177.

<sup>55</sup> *Id.* at 1178 (emphasis added). Ultimately, what the Ninth Circuit held—without explicitly stating—is that courts will only enforce browsewrap agreements when they possess the characteristics of clickwrap agreements. Specifically, the user must take some affirmative action to demonstrate assent.

inference of constructive notice.<sup>56</sup> The Ninth Circuit rejected this argument, stating that experience with browsewrap agreements found on other websites has no bearing on whether he had constructive notice of Barnes & Noble's browsewrap terms.<sup>57</sup>

Finally, the Ninth Circuit rejected Barnes & Noble's argument that the district court erroneously rejected its argument that Nguyen<sup>58</sup> should be equitably estopped from avoiding arbitration because he ratified the Terms of Use<sup>59</sup> by relying on its choice of law provision in his complaint and asserting class claims under New York Law.<sup>60</sup> In support of its holding, the Ninth Circuit gave two reasons. First, the doctrine of direct benefits estoppel did not apply to the facts at hand because federal courts have recognized that the obligation to arbitrate under the FAA does not attach only to one who has personally signed the arbitration agreement.<sup>61</sup> Instead, a non-signatory to an arbitration agreement may be compelled to arbitrate where the non-signatory "knowingly exploits" the benefits of the agreement and received benefits flowing directly from the agreement.<sup>62</sup> In this case, the Court held, Nguyen was not the type of non-signatory contemplated by the rule because equitable estoppel typically applies to third parties who benefit from an agreement made between two primary parties.<sup>63</sup>

Second, the Ninth Circuit rejected Barnes & Noble's argument because there was no case law holding that reliance on a contract's choice of law provision in itself constitutes a "direct benefit."<sup>64</sup> In its analysis, the Ninth Circuit noted that the most similar case was *HD Brous & Co., Inc. v. Mrzyglcocki*.<sup>65</sup> In *HD Brous*, a District Court compelled arbitration against a non-signatory petitioner in part because the non-signatory had sought to limit the respondent's choice of substantive law by relying on the agreement's choice of law provision.<sup>66</sup> That case, the Ninth

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<sup>56</sup> 763 F.3d at 1178.

<sup>57</sup> *Id.* at 1179.

<sup>58</sup> The Supreme Court in *Casarotto* held that special notice requirements for arbitration agreements that are not applicable to contracts generally are illegal because such requirements directly conflict with § 2 of the FAA. 517 U.S. at 687. Ultimately, this argument has more traction in *Nguyen* than the Ninth Circuit acknowledged. Specifically, if plaintiffs were bound by the choice of law provision, why weren't they bound by the arbitration agreement? As the Supreme Court held, courts may not place arbitration agreements in a class apart from "any contract." *See Casarotto*, 517 U.S. at 688.

<sup>59</sup> 763 F.3d at 1179.

<sup>60</sup> *See supra* notes 31-36 discussing how federal courts sitting in diversity normally look to the law of the forum state—in *Nguyen*, California—when making choice of law determinations.

<sup>61</sup> *Thomson-CSF, S.A. v. Am. Arbitration Ass'n.*, 64 F.3d 773, 776 (2d Cir. 1995).

<sup>62</sup> *See MAG Portfolio Consultant, GMBH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 61 (2d Cir. 2001).

<sup>63</sup> *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267-268 (5<sup>th</sup> Cir. 2004) (estopping non-signatory wife of borrower from avoiding arbitration clause of loan agreement made between her husband and lender).

<sup>64</sup> 763 F.3d at 1180.

<sup>65</sup> No. 03 Civ. 8385 (CSH), 2004 U.S. Dist. LEXIS 3095 (S.D.N.Y Feb. 26, 2004).

<sup>66</sup> *Id.* at \*8.

Circuit stated, is distinguishable from the present case because the agreement there served as the foundational document for the business relationship between the parties and explicitly named the petitioner as the intended beneficiary.<sup>67</sup> Compared to the present case, the Court held, “[i]t can hardly be said here that the choice of law—chosen unilaterally by Barnes & Noble—was intended to benefit Nguyen. Any benefit derived by Nguyen under New York law—whether it be the possibility of statutory or treble damages on Nguyen’s nationwide class claims—is merely incidental.”<sup>68</sup>

In light of this, the Court ultimately concluded that the district court did not abuse its considerable discretion by rejecting Barnes & Noble’s estoppel argument; thus, Nguyen had insufficient notice of Barnes & Noble’s Terms of Use and did not enter into an agreement with Barnes & Noble to arbitrate his claims.<sup>69</sup>

#### IV. SIGNIFICANCE

Since *AT&T Mobility LLC v. Concepcion*,<sup>70</sup> courts have largely rejected substantive attacks on arbitration agreements that include class action waivers. In light of the Ninth Circuit’s recent decision in *Nguyen v. Barnes & Noble*, however, plaintiffs aggrieved by online merchants now have a new weapon in their arsenal: argue they never agreed to arbitrate in the first place. In its discussion, the Ninth Circuit makes clear that “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”<sup>71</sup> One such principle, the Ninth Circuit notes, is the requirement that “[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.”<sup>72</sup>

Essentially, the Ninth’s Circuit opinion in *Nguyen* attempts to harmonize these ancient contract principles with today’s Internet commerce. In doing so, the Ninth Circuit effectively marked the end of the browsewrap agreement. While stopping short of calling browsewrap agreements unenforceable all together, the Ninth Circuit all but accomplishes that end.<sup>73</sup> As a result, the Ninth Circuit requires the transformation of browsewrap agreements into clickwrap agreements.

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<sup>67</sup> 763 F.3d at 1180.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011) (holding that a California state contract law which deems class-action waivers in arbitration agreements unenforceable when certain criteria are met is preempted by the FAA because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress).

<sup>71</sup> *Register.com, Inc. v. Verio, Inc.* 356 F.3d 393, 403 (2d Cir. 2004).

<sup>72</sup> *Specht v. Netscape Commc’ns Corp.*, 206 F.3d 17, 29 (2d Cir. 2002) (holding that online contacts must be held to the same standards as other written documents and terms therein must also be conspicuous).

<sup>73</sup> *See* 763 F.3d at 1178 (“[I]n keeping with courts’ traditional reluctance to enforce browsewrap agreements . . .”).

Ultimately, the likely result of *Nguyen* is that website owners who wish to bind their users to their Terms of Use will use clickwrap agreements that require some affirmative action to demonstrate assent to their terms. Clicking an “I Accept” button seems to be enough for the Ninth Circuit to demonstrate assent on behalf of the consumer to bind themselves to the site’s terms of use because “even close proximity of the hyperlink [to accept the site’s terms of use] to relevant buttons . . . is insufficient to give rise to constructive notice [of an arbitration agreement].”<sup>74</sup> Based on the Ninth Circuit’s reasoning, prominently presenting the site’s terms of use prior to purchase and giving the consumer the explicit option to decline such terms will be helpful in binding the consumer to an arbitration agreement. Further, giving the consumer the option to download or print the terms of use may also be helpful in proving that the consumer had constructive notice of the site’s terms of use.

## V. CRITIQUE

The Ninth Circuit’s analysis of whether there was inquiry notice of Barnes & Noble’s arbitration agreement pulls the Court out of its normal role of adjudicator and pushes it into the realm of website design.<sup>75</sup> With the goal of bringing clarity to the enforceability of internet contracts with regard to notice, the Ninth Circuit further muddied the water and missed its opportunity to provide online merchants with a bright-line rule. Early in its discussion, the Ninth Circuit provides examples of types of browsewrap agreements that will not be enforced. For instance, “[w]here the link to a website’s term 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.”<sup>76</sup> Conversely, “where the website contains an explicit textual notice that continued use will act as a manifestation of the user’s intent to be bound,” the Ninth Circuit stated that “courts have been more amenable to enforcing browsewrap agreements.”<sup>77</sup> Finally, the Ninth Circuit notes, “[c]ourts have also been more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website.”<sup>78</sup>

Functionally, the Ninth Circuit held that browsewrap agreements will only be enforced when they resemble clickwrap agreements. The user must take some affirmative action to demonstrate assent to the site’s terms and conditions. Such logic raises the question: why did the Ninth Circuit not hold that browsewrap agreements do not provide users with the requisite notice

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<sup>74</sup> 763 F.3d at 1179.

<sup>75</sup> *Id.* at 1177 (“Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement’s webpage.”).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 451-52 (E.D.N.Y. 2013) (enforcing forum selection clause where prospective members had to check box confirming that they both read and agreed to the website’s Terms and Conditions of Service to obtain account).

of the website's terms and conditions? As the Ninth Circuit stated, "[t]he 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."<sup>79</sup> The Court went on the hold that when "a website . . . provides no notice to users nor prompts them to take any affirmative action to demonstrate assent . . . [it] is insufficient to give rise to constructive notice."<sup>80</sup> Based on this logic, a true browsewrap agreement is never enforceable because the user can continue to use the site without ever attaining notice of the site's terms and conditions.

The Ninth Circuit's examples of browsewrap agreements that are enforceable and browsewrap agreements that are unenforceable creates little more than a "gray area" for online merchants. Essentially, the question becomes: what is "explicit textual notice"?<sup>81</sup> Does this mean that in order for a browsewrap agreement to bind a user, the text must be in large, flashing typeface in the middle of each webpage? Or does a statement written in small font on the bottom of every page telling users that their continued use of the site will act as a manifestation of assent to the arbitration agreement provide sufficient notice? If the latter example is correct, what if the website user never scrolls to the bottom of the page to see the textual notice? The Ninth Circuit went only as far as to say that courts have refused to enforce browsewrap agreements where the *link* to the terms of use is "buried at the bottom of the page or tucked away in obscure corners where users are unlikely to see it . . ."<sup>82</sup> Thus, a user would arguably have sufficient notice of an arbitration agreement when the terms of use are explicitly stated on the bottom of every webpage even if the user fails to scroll down and see them.

The hypothetical above provides one of many possible situations that could have been avoided by a clearer and more definitive opinion in *Nguyen*. The Ninth Circuit was provided a golden opportunity to provide future courts clarity and workable precedent to determine sufficient notice regarding the enforceability of browsewrap terms and conditions, but failed to do so.

Based on the Ninth Circuit's logic in *Nguyen*, a more workable precedent could have been the following. First, clickwrap agreements in which users are required to click on an "I agree" box after being presented with a list of terms and conditions of use are always enforceable because "[m]utual manifestation of assent . . . is the touchstone of contract."<sup>83</sup> Having clicked the "I agree" button, the user has affirmatively demonstrated assent to the terms and conditions

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<sup>79</sup> *Be In, Inc. v. Google, Inc.*, No. 12-CV-03372-LHK, 2013 U.S. Dist. LEXIS 147047.

<sup>80</sup> 763 F.3d at 1179.

<sup>81</sup> *Cairo, Inc. v. Crossmedia Servs.*, No. 04-04825, 2005 U.S. Dist. LEXIS 8450, at \*2 (N.D. Cal. Apr. 1, 2005) ("[W]here the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements.").

<sup>82</sup> 763 F.3d at 1177.

<sup>83</sup> *Id.* at 1175.

even if she has not read them.<sup>84</sup> The demonstration of assent to the agreement can take place when the user is creating an account for the website or when he or she is checking out after purchasing a product from the website; it would not be necessary for the user to click the “I agree” box every time he or she visits the website. Second, browsewrap agreements are enforceable when a hyperlink containing the terms of use or a statement informing the user that his or her continued use will act as a manifestation of assent to the terms is sufficient to bind a user to the agreement when the hyperlink or terms are visible *as soon as the user opens the webpage*. As the Ninth Circuit noted, finding a workable definition of what provides sufficient notice of a website’s terms of use is difficult “[g]iven the breadth of the range of technological savvy online purchasers . . .” who use the internet.<sup>85</sup> Making a website’s terms of use visible or available to the user as soon as he or she accesses a site, however, would reasonably put website users of all skill and ability on inquiry notice of a website’s terms of use.

Another point of uncertainty that arises from the Ninth Circuit’s opinion is to what extent *Nguyen* will be binding precedent on the Second and Ninth Circuits. The Ninth Circuit, in deciding this matter, applied New York state law that governs the formation of contracts even though, the Court noted, federal courts sitting in diversity normally look to the law of the forum state when making choice of law determinations.<sup>86</sup> Ultimately, the Ninth Circuit decided to apply New York law because “the parties agree that the validity of the arbitration agreement is governed by New York law . . . and both California and New York law dictate the same outcome.”<sup>87</sup> In its discussion, however, the Ninth Circuit relies heavily on *Specht*—a case in which the Second Circuit interpreted California state law. The result of this is that the Ninth Circuit in *Nguyen* applied California state law as seen through the lens of the Second Circuit.<sup>88</sup> Although the Ninth Circuit never addressed the issue, the question remains: to what extent will the decision in *Nguyen* be binding on California and New York law?

While the Ninth Circuit reached the correct decision in finding that a valid agreement to arbitrate can only exist when the party has constructive notice of the agreement, the Court stopped short of resolving the major issue: the enforceability of browsewrap agreements. Savvy internet merchants must read hereafter between the lines of the Ninth Circuit’s opinion if they wish to bind their users to arbitration using browsewrap agreements. Despite the ambiguity surrounding the enforceability of browsewrap agreements to arbitrate, merchants can arguably preserve the arbitral process by simply transitioning to the use of clickwrap agreements.

## VI. CONCLUSION

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<sup>84</sup> 763 F.3d at 1179 (“[F]ailure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract . . .”).

<sup>85</sup> 763 F.3d at 1179.

<sup>86</sup> *Id.* at 1175.

<sup>87</sup> *Id.*

<sup>88</sup> *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002).

The Ninth Circuit's holding in *Nguyen* typifies the unfavorable treatment received by browsewrap arbitration agreements. The Court's holding that browsewrap agreements are only enforced if they resemble clickwrap agreements likely signals the "death" of true browsewrap agreements. Moreover, while stopping short of taking the opportunity to explicitly hold that browsewrap agreements do not provide the requisite inquiry notice of an agreement to arbitrate, the Ninth Circuit's discussion on website content and design will further "muddy the water" on the enforceability of internet contracts while providing little precedential value to future courts deciding similar cases.