Intellectual Property

Click Here to Waive a Jury Trial: 'Nicosia v. Amazon'

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Startup entrepreneurs love "disruption"—a buzzword that has come to mean sweeping out old models of delivery or consumption and replacing them with technological alternatives—but their lawyers often do not. The law can be slow to change, and its application to any new technology is never totally predictable. Just ask Aereo, the company that sought to disrupt television viewing with its miniature antenna technology until the U.S. Supreme Court shut it down last year. But even where the law itself may not "disrupt," it does tend to adapt. Courts confronting novel issues of law often are inclined to look for analogies, molding older precedent to accommodate new situations.

This process has been particularly clear over the past several years, in the important area of contract formation. Every law student for well over a decade has read Judge Frank H. Easterbrook's seminal Seventh Circuit opinions *Hill v. Gateway 2000*[1] and *ProCD v. Zeidenberg*.[2] These cases addressed issues of contract law that arose as consumers embraced new ways of buying and selling software and computers (and later a host of other goods) in the 1990s. They are often called the "shrinkwrap" cases because they tackle the issue of whether a consumer can be found to have agreed to contract terms *after* a purchase is made: The new terms are inside the "shrinkwrap" and the consumer accepts them by removing it and using the product. The shrinkwrap cases highlighted new ways of thinking about contractual relationships, emphasizing that they can be more fluid than courts had traditionally found. That flexibility has been crucial to the growth of online commerce and the rise of direct-to-consumer retail.

These cases are not taught because they are easy or because they represent the simple application of black-letter law. They are taught because they demonstrate how contract law can adapt to new commercial realities. And understanding this process is often helpful for lawyers who are faced with new issues and must advise their clients on likely outcomes, or argue for an application of existing law that would be beneficial to their clients' business model. On the Internet, for example, commercial transactions are fundamentally electronic: The vendor may provide only a service or may have no control over the physical packaging of any goods that are eventually supplied. Such a vendor has nothing to "shrinkwrap," but

still needs an efficient way to contract with its customers. As expected, the rise of these online service providers has created its own line of cases. They are the progeny of the shrinkwrap cases and address what are appropriately named "clickwrap" and "browsewrap" agreements. Although these agreements have been in use for decades, they continue to raise difficult issues in litigation, as demonstrated by a recent opinion issued by District Judge Sandra L. Townes of the Eastern District of New York.

Contracts on the Internet

There are two general types of agreements commonly entered into on the Internet: clickwrap and browsewrap agreements.[3] In the typical "pure clickwrap" case, the user is confronted by the entire text of the agreement (typically called "terms of use," an "end user license agreement," or something similar) and cannot use the product or service until he or she affirmatively clicks on a button indicating acceptance of those terms.[4] Anyone who has ever installed a piece of software knows that these agreements are rarely read; the vast majority of people hurriedly scroll through screen after screen of legal jargon before clicking "I Agree." Nonetheless, these agreements are generally enforced in part because the user could (in theory) read through the agreement and, finding an unpalatable clause or two, click cancel to reject the product or service. Courts view the decision not to do so—or indeed the decision to ignore the text entirely—as tantamount to accepting the terms of the agreement.

In contrast, a browsewrap agreement, usually found in the context of a website, does not prompt or otherwise require the user to affirmatively agree to any terms before being able to use the offered product or service. Instead, the terms are merely "posted on the website typically as a hyperlink at the bottom of the screen."[5] Often, with a browsewrap agreement, "by visiting the website—*something the user has already done*—the user agrees" to the terms of use, whereas a clickwrap agreement "requires a user to take more affirmative action" to accept the contractual terms.[6] Determining the enforceability of browsewrap agreements is more complicated, because they do not directly present the contract terms to the user, and they do not require any affirmative assent to those terms prior to use of the product or service.

But as is often the case in the Internet context, this pure categorical distinction—clickwrap verses browsewrap—may not be enough to deal with every case. Some business models employ "hybrid" agreements that have characteristics of both clickwrap and browsewrap.[7] In such cases, courts must look beyond the categories and try to determine the practical realities of the parties' consent. Recognizing this, courts have held that the enforceability of an agreement—in all circumstances—depends on ordinary principles of contract law.[8] As the Second Circuit has stated: "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[9]

Thus, in many cases, the enforceability of a "hybrid" agreement will come down to whether the user was given adequate notice of the contractual terms. Generally, a contract will not be enforced unless the parties know the terms, or at least know that terms exist and have the ability to find out what they are. In the Internet context, this inquiry can be highly fact-intensive,[10] though not necessarily focused on any particular individual user. The objective theory of contract does not ask whether a particular user *actually* knew the contract terms,

but instead asks whether a *reasonable* user could or should have received notice of the terms, and assented to them in some objectively provable way.

These determinations often turn on the structure, design, and functionality of the website or service at issue. Terms "that a user would not encounter until he or she had scrolled down multiple screens" may *not* be enforceable.[11] Yet terms on an entirely separate page might be, so long as they are clearly referenced via a hyperlink.[12] But if that hyperlink is merely one of many, the terms may again not be enforceable.[13] And demonstrating just how complicated this inquiry can get, the Second Circuit has held that some websites that do not provide notice to first-time users and are thus unenforceable as to them, nevertheless may still provide notice to and be enforced on *repeat users*.[14]

As these cases make clear, there are few bright-line rules, and lawyers tasked with advising clients in this area must keep an eye on the law as it continues to develop in response to changing business models. A recent case in the Eastern District of New York addresses some of the complexity in analyzing these "hybrid" agreements, where the clickwrap-browsewrap distinction is ill suited for resolving the case.

'Nicosia'

In July 2014, Dean Nicosia commenced *Nicosia v. Amazon*, a putative class action against Amazon.com.[15] Nicosia alleged that Amazon was illegally selling weight loss supplements that contained sibutramine, a controlled substance that the FDA had publicly stated increased the risk of heart attack and stroke. Nicosia had purchased these supplements twice through his Amazon account, admitting that at the time of each sale, neither Nicosia nor Amazon knew the supplements contained sibutramine. Regardless, Nicosia claimed that Amazon had violated consumer protection laws and had breached various implied warranties.

Amazon moved to dismiss the complaint, arguing that Nicosia could only assert his claim in arbitration, not in court, and that he was limited to suing on his own behalf, not as part of a class. Amazon pointed to its "Conditions of Use," which (at the time of Nicosia's purchases in 2013) contained a mandatory arbitration clause and a class action waiver.

In support of its motion, Amazon submitted copies of (1) the final purchase screen that Nicosia saw before making his purchase and (2) its 2012 Conditions of Use, which the final purchase screen referenced via a hyperlink. Nicosia did not dispute that the Amazon website displayed the final purchase screen before his purchases, or that the Conditions of Use were in effect at those times. Instead, Nicosia argued that "the terms of [the] 2012 Conditions of Use [were] not enforceable against him because he did not manifest his intent to be bound by those terms."[16]

Amazon disagreed, arguing that Nicosia had entered into the contract when he placed his orders. To place those orders, Nicosia had to navigate through the final checkout screen, which had a bolded caption: "Review your order." Immediately under the caption, the on-screen text read: "By placing your order, you agree to Amazon's privacy notice and conditions of use." The words "conditions of use" were a blue hyperlink, which directed users to Amazon's Conditions of Use that were in effect at that time. Below the caption and the

disclaimer was an icon that said "Place your order," which Nicosia had to click on to make his purchase.

The court's analysis focused on whether the website's design was "sufficient to incorporate the Conditions of Use into the purchase agreement."[17] It began this analysis[18] by identifying the "two primary means of forming contracts on the Internet": clickwrap and browsewrap agreements. It found Amazon's 2012 Conditions of Use to be "a hybrid between a clickwrap and a browsewrap agreement." Although a user could only access the Conditions of Use by clicking on a hyperlink (a la browsewrap), that hyperlink was conspicuously presented to the user in a disclaimer that was located *before* the "Place your order" button and that informed the user that the purchase was subject to those conditions (a la clickwrap).

To determine whether this "hybrid" was enforceable, the court focused on whether Amazon's website put a user on notice of the terms of the Conditions of Use. It essentially applied the test for browsewrap agreements, which asks "whether a website user has actual or constructive notice of the terms and conditions prior to using the website or other product."[19] Ultimately, the court held that Nicosia was "at minimum, on inquiry notice of the current terms of the Conditions of Use when making his purchase."[20] It further held that Nicosia "assented, each time he made a purchase on Amazon.com, to be bound by" those terms.[21] It therefore granted Amazon's motion to dismiss the case in favor of single-party arbitration.

The court's holding rested on three highly specific, undisputed facts about Amazon's checkout process. *First*, the hyperlink to the Conditions was conspicuously placed on the checkout page. *Second*, the checkout page contained an express warning that the purchase was subject to the terms of the Conditions of Use. *Third*, when Nicosia signed up for his Amazon.com account—a requirement for purchasing anything through the website—he expressly agreed to be bound by the Conditions of Use. Together, these circumstances established that Nicosia had or should have had notice of the terms of the Conditions of Use and also assented to them by proceeding with the purchase. He was therefore bound by the Conditions of Use agreement, including its mandatory arbitration clause and the class action waiver.[22]

The More Things Change …

The outcome in *Nicosia* is not particularly surprising, especially given that it involved enforcement of an agreement to arbitrate. After all, if there is one thing we have learned from recent Supreme Court jurisprudence it is that agreements to arbitrate are rigorously enforced. But the careful analysis by the court in *Nicosia* of the Amazon checkout process—even on a motion to dismiss—offers an important reminder to practitioners in this field. This is an area in constant flux, where details matter and shortcuts don't necessarily work. For a contract to exist in these cases, the terms must be readily available, not buried in a sea of links; the users must be clearly informed of the contract; the method of acceptance must be clearly defined. A business that gets this wrong, even a little bit, may find itself with no contractual protection at all.

Endnotes:

1. 105 F.3d 1147 (7th Cir. 1997).

2. 86 F.3d 1447 (7th Cir. 1996).

3. See *Schnabel v. Trilegiant*, 697 F.3d 110, 129 n.18 (2d Cir. 2012) (explaining the difference between clickwrap and browsewrap agreements); *Edme v. Internet Brands*, 968 F. Supp. 2d 519, 525 (E.D.N.Y. 2013) (same).

4. See *Specht v. Netscape Comms.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002) (Sotomayor, J.) ("This kind of online software license agreement has come to be known as 'clickwrap' … because it 'presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.'"); *Register.com v. Verio*, 356 F.3d 393, 429 (2d Cir. 2004) ("Essentially, under a clickwrap arrangement, potential licensees are presented with the proposed license terms and forced to expressly and unambiguously manifest either assent or rejection prior to being given access to the product.").

5. *Hines v. Overstock.com*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009), aff'd, 380 Fed. App'x 22 (2d Cir. 2010); *Register.com*, 356 F.3d at 429-30 ("A browsewrap license is part of the website, e.g., license terms are posted on a site's home page or are accessible by a prominently displayed hyperlink, and the user assents to the contract when the user visits the website.") (internal quotation marks and alterations omitted).

6. *5381 Partners v. Shareasale.com*, No. 12-CV-4263 (JFB)(AKT), 2013 WL 5328324, at *6 (E.D.N.Y. Sept. 23, 2013) (emphasis added) (quoting *Fteja v. Facebook*, 841 F. Supp. 2d 829, 836 (S.D.N.Y. 2012)).

7. See, e.g., *5381 Partners*, 2013 WL 5328324, at 6.

8. *Hines*, 668 F. Supp. 2d at 366 ("It is a basic tenet of contract law that in order to be binding, a contract requires a 'meeting of the minds' and 'a manifestation of mutual assent.' The making of contracts over the Internet 'has not fundamentally changed the principles of contract.'") (citations omitted).

9. *Register.com*, 356 F.3d at 403.

10. See generally *Be In v. Google*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *7 (N.D. Cal. Oct. 9, 2013) ("Subsequent decisions hew closely to the logic of *Specht* but nonetheless reach disparate and fact-specific conclusions.").

11. *Schnabel v. Trilegiant*, 697 F.3d 110, 130 (2d Cir. 2012) (citation omitted).

12. See *Fteja v. Facebook*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012).

13. *Hussein v. Coinabul*, No. 14-5735, 2014 WL 7261240, at *3 (N.D. Ill. Dec. 19, 2014).

14. *Register.com*, 356 F.3d at 430-31 ("Although the first (or first few) query submissions are clearly insufficient to create a contract for the reasons discussed above, repeated exposure to the terms and conditions (via repeated submissions) would have put Verio on notice … .").

15. No. 14-cv-4513 (SLT)(MDG), 2015 WL 500180 (E.D.N.Y. Feb. 4, 2015).

16. Id. at *5.

17. Id. at *5.

18. The parties agreed that Washington state law governed the contractual analysis. Even so, the court relied heavily on Second Circuit authority, due to the paucity of relevant opinions applying Washington law and also because the few opinions that did exist relied on Second Circuit authority as well. See id. at *6 (identifying *Kwan v. Clearwire*, No. C09-1392 JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012) as "the only relevant case applying Washington law of which this Court is aware" and parenthetically acknowledging that *Kwan* relied on numerous authorities from the Second Circuit).

19. Id. at *6 (quoting *Kwan*, 2012 WL 32380, at *7, which applied the test set out in *Specht* (2d Cir.)).

20. Id. at *7.

21. Id.

22. Id. at *8.

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