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Hot Topics in Internet, Cloud & Privacy Law 2015

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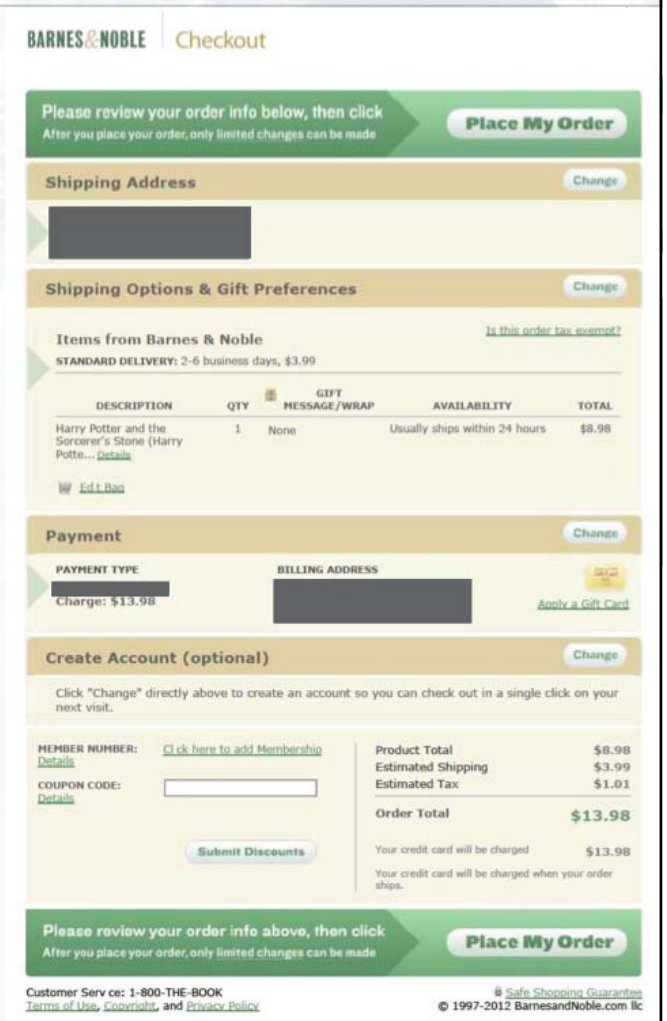
Online Contracts

Nguyen v. Barnes & Noble (9th Cir. 2014)

- "clickwrap" = website users are required to click on an "I agree" box after being presented with a list of terms and conditions of use
- "browsewrap" = website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen



Online Contracts

Browsewrap or Clickwrap?

- "Amazon's 2012 Conditions of Use agreement is a hybrid between a clickwrap and a browsewrap agreement." Nicosia v. Amazon, 2015 U.S. Dist. LEXIS 13560 (E.D.N.Y. Feb. 4, 2015)
- "The circumstances at issue in this case do not fit neatly into any of these categories [shrinkwrap, clickwrap and browsewrap]. Instead LegalShield's presentation of its terms shares some characteristics with all three." Savetsky v. Pre-paid Legal Services, 2015 U.S. Dist. LEXIS 17591 (N.D. Cal. Feb 12, 2015)

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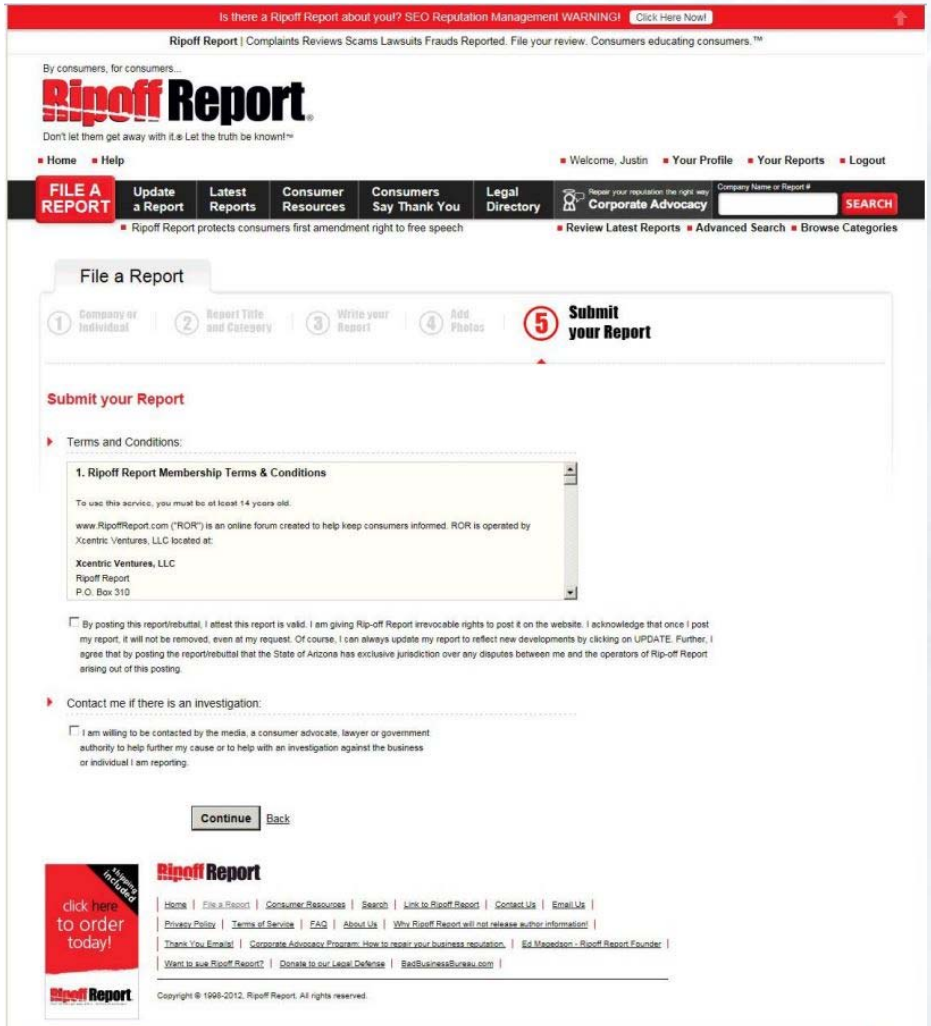

Small Justice v. Xcentric Ventures, 2015 WL 1431071 (D. Mass. March 27, 2015)

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Online Contracts

Recommendations

- (1) Use mandatory checkbox before users can continue
- (2) STOP CALLING THEM -“WRAP” CONTRACTS!
  - Instead: “Clickthrough” & “Not a contract”

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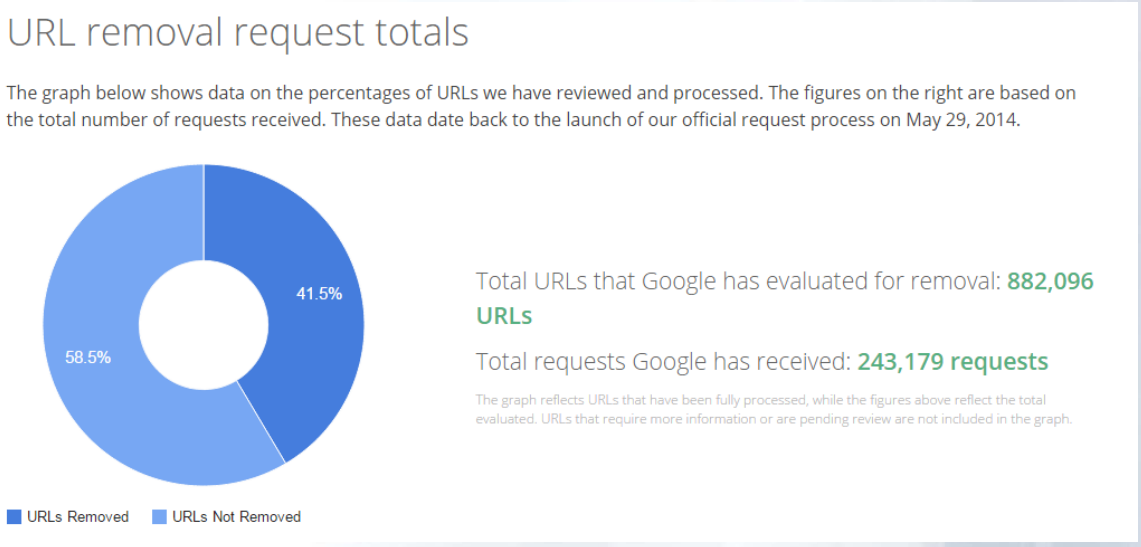
Right To Be Forgotten

- Google will remove “irrelevant, outdated, or otherwise objectionable” links unless sufficient public interest
- Open Questions
  - Must removal be in indexes worldwide or just EU indexes?
  - Can Google notify de-indexed sites?



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Right To Be Forgotten

Can RTBF work under US law?

- First Amendment
  - Zhang v. Baidu.com, (S.D.N.Y. 2014): "there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation"
  - Google, Inc. v. Hood (S.D. Miss. March 27, 2015): "Google's publishing of lawful content and editorial judgment as to its search results is constitutionally protected"
- Section 230
  - O'Kroley v. Fastcase (M.D. Tenn. 2014)
  - But IP workarounds
- Statutory
  - Martin v. Hearst Corp. (2d Cir. Jan. 28, 2015): "The statute creates legal fictions, but it does not and cannot undo historical facts or convert once true facts into falsehoods"
- Business & Professions Code Sec. 22581 (CA Online Eraser Law)

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Consumer Reviews

- CA Civil Code 1670.8: no "provision waiving the consumer's right to make any statement regarding" seller or its offerings
- In re AmeriFreight (FTC settlement): didn't disclose consumer discounts for leaving reviews
- In re SquareTrade, NAD #5824 (March 31, 2015): say "highly rated," not "Rated #1"

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