

Santa Clara University

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

BARNES&NOBLE | Checkout

Please review your order info below, then click [Place My Order](#)
After you place your order, only limited changes can be made

Shipping Address [Change](#)

Shipping Options & Gift Preferences [Change](#)

Items from Barnes & Noble [Is this order tax exempt?](#)
STANDARD DELIVERY: 2-6 business days, \$3.99

DESCRIPTION	QTY	GIFT MESSAGE/WRAP	AVAILABILITY	TOTAL
Harry Potter and the Sorcerer's Stone (Harry Potte... Details	1	None	Usually ships within 24 hours	\$8.98

[Edit Bag](#)

Payment [Change](#)

PAYMENT TYPE: **BILLING ADDRESS:** [Apply a Gift Card](#)

Charge: \$13.98

Create Account (optional) [Change](#)

Click "Change" directly above to create an account so you can check out in a single click on your next visit.

MEMBER NUMBER: [Click here to add Membership Details](#)

COUPON CODE: [Submit Discounts](#)

Product Total	\$8.98
Estimated Shipping	\$3.99
Estimated Tax	\$1.01
Order Total	\$13.98

Your credit card will be charged **\$13.98**
Your credit card will be charged when your order ships.

Please review your order info above, then click [Place My Order](#)
After you place your order, only limited changes can be made

Customer Service: 1-800-THE-BOOK
[Terms of Use](#), [Copyright](#), and [Privacy Policy](#)

Safe Shopping Guarantee
© 1997-2012 BarnesandNoble.com llc

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)



Online Contracts

Recommendations

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

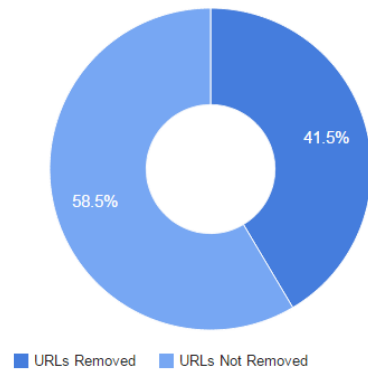


Right To Be Forgotten

- 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?

URL removal request totals

The graph below shows data on the percentages of URLs we have reviewed and processed. The figures on the right are based on the total number of requests received. These data date back to the launch of our official request process on May 29, 2014.



Total URLs that Google has evaluated for removal: **882,096 URLs**

Total requests Google has received: **243,179 requests**

The graph reflects URLs that have been fully processed, while the figures above reflect the total evaluated. URLs that require more information or are pending review are not included in the graph.



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)**



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”

