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# When Terms of Use Are Not Enough – Lessons from Long v. Provide Commerce, Inc.

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The California Court of Appeals recently determined that the hyperlink to a website terms of use was not binding on users. In *Long v. Provide Commerce, Inc.,* the court upheld the Ninth Circuit's ruling that a hyperlink to a "Terms of Use" page on the ProFlowers website was not enough to put consumers on notice that they had consented to be bound by arbitration. This case confirms the rule that, to be enforceable, "browsewrap" agreements must provide actual or constructive notice that continued use of the website will constitute an agreement to be bound to the terms of use.

In *Long*, the defendant, Provide Commerce, Inc., which operates the ProFlowers website, was attempting to compel a consumer to arbitrate his consumer fraud claims based on a hyperlink to the full text of the website's "Terms of Use" page, which included an agreement to arbitrate disputes. The ProFlowers website allowed users to browse its product offerings, make product selections and complete purchase transactions without taking any affirmative action to assent to the Terms of Use. The only notice presented to the user was a "Terms of Use" hyperlink (in a light green font with a dark green background) on the bottom of each webpage.

The *Long* court focused on the distinction between "browsewrap" agreements and "clickwrap" agreements, both common forms of Internet contracts. Browsewrap agreements, unlike clickwrap agreements, do not require users to affirmatively click a button to confirm their assent to the agreement's terms; instead, a user's assent is inferred from his or her use of the website. Therefore, the determination of whether a binding browsewrap agreement has been formed depends on whether the user had actual or constructive knowledge of the website's terms and conditions.

To reach its decision, the *Long* court relied heavily on the Ninth Circuit's opinion in *Nguyen v. Barnes & Noble Inc.* (9th Cir. 2014) 763 F.3d 1171, 1175, in which the Ninth Circuit court concluded that the act of placing an order did not constitute an unambiguous manifestation of assent to be bound by the browsewrap agreement.

"[W]here a website makes its terms of use available via a conspicuous hyperlink on each 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 [of the terms of the contract]."

The *Nguyen* court went on to hold that “proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice,” there must also be explicit textual notice warning users to “‘Review terms’” or admonishing users that by clicking a button to complete the transaction “‘you agree to the terms and conditions in the [agreement].’”

Therefore, the *Long* court found that “the problem with merely displaying a hyperlink in a prominent or conspicuous place is that, without notifying consumers that the linked page contains binding contractual terms, the phrase “terms of use” may have no meaning or a different meaning to a large segment of the Internet-using public.”

If your company does business with California consumers, a hyperlink to your website terms of use alone is not enough to create a binding agreement with users. If your website relies on this type of browsewrap agreement you should consider modifying your process to require consumers to expressly agree to be bound by your website’s terms of use.

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