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9th Circ. Is Stuck In The '90s On Internet Terms Of Use

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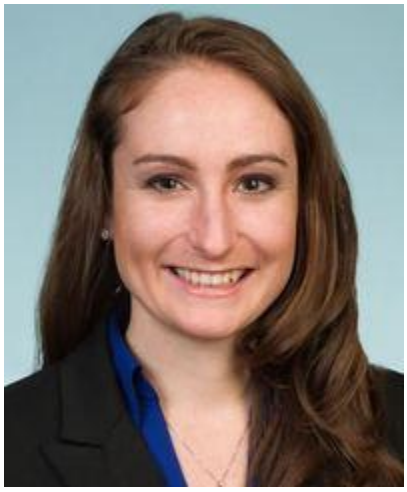
Katherine Gasztonyi

On Aug. 18, one of the country's most influential courts decided a case about the enforceability of a website's terms of use — a contract that governs people's use of a website — by relying on notions about the way people use the Internet that originated in court decisions from the 1990s.

Remember the Internet in the 1990s?

If you were one of the 20 or so million Americans that was lucky enough to get online during those years, you might remember turning on the modem, waiting several minutes to log in, and firing up Netscape Navigator. What you won't remember is Facebook, Google or Wikipedia — those services, now ubiquitous, came later. Plus, it's not like you spent enough time online to actually read a full Wikipedia article: In the 1990s, Americans with Internet access spent less than 30 minutes on the Web per month. Now, according to Nielsen, we spend 27 hours online each month and 34 hours per month using smartphone apps and the mobile Web — a whopping 61 hours total.

In the 1990s, courts felt that Americans weren't familiar with the practice of websites linking to terms of use. And, as a result, courts said that website owners couldn't enforce terms of use against their visitors without having given the visitors a reason to know that the terms existed in the first place.

In a series of opinions, courts found that people had no reason to know of the existence of terms where they didn't have to click to indicate their agreement to the terms, where viewing the link to the terms required scrolling down, or where the existence of the terms wasn't otherwise obvious.

That might have made sense in, say, 1996, but today, where we spend 8,200 percent more time each month online, does it still make sense to assume people don't know about the existence of terms of use? Probably not. Over time, industry and consumers have become more sophisticated; terms of use are now commonplace and consumers know where to go to read them.

But, the courts still seem to be stuck in the 1990s. This week, the Ninth Circuit decided a case against Barnes & Noble Inc. where an individual argued that he was not bound by Barnes & Nobles' website terms because he had no reason to know that they existed. (Interestingly, the individual

operated his own webpage, which, unsurprisingly, was governed by its own online terms.) The Ninth Circuit agreed with the individual that he had no reason to know that the Barnes & Noble website was governed by terms of use even though he had to "bring the link [to the terms] within his field of vision" to make a purchase on the website.

So if actually viewing a link labeled "Terms of Use" is not enough to know that they exist, then what is? In answering this, the court dove into the nitty-gritty of website content and design, discussing colors of links, backgrounds, scrolling and more. In the end, the court said that, if the user clicks on something that indicates the website is governed by terms, then the court will find that the user was aware that the website had terms. Otherwise, it's anybody's guess what will be sufficient.

This is problematic for many reasons. First, in this case the court is inserting itself into the business of website design. Even if the court were particularly tech-savvy, in the incredibly fast-paced world of technology today, any hard-wired solution designed for the present will be difficult to apply to the technology of the future. Prescriptive solutions, such as requiring specific placement of a link and a check box, have a tendency to inhibit commerce, innovation, and development, leaving everyone worse off.

Second, the case seems to ignore how much things have changed since the 1990s by continuing to assume that people are generally unaware that online activities are governed by terms unless the website says so explicitly. This is simply no longer the case. Now, people do not fail to read terms because they do not know they exist; rather, they do not read terms because they choose not to.

A fundamental legal rule provides that a person cannot get out of a contract that she knows exists simply because she hasn't read the contract. By continuing to operate on the incorrect assumption that online consumers aren't aware of terms of use — that we're still in 1996 —courts are running roughshod over this rule and hurting online commerce in the process.

—By Katherine Gasztonyi, Stephen Satterfield and Kurt Wimmer, Covington & Burling LLP

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