Session 1: Controlling Information: Property and Contracts

We will start by reading four cases which address tools available to a firm to control valuable information. The first, *International News Service v. Associated Press*, is a U.S. property law and unfair competition law classic arising in the context of World War I. The second case, *Levitt v. Yelp!*, looks at unfair competition law questions in a modern context. We then switch to contracts and contract formation. *ProCD v. Zeidenberg* looks at the use of contracts to control information flows while *Nguyen v. Barnes & Noble Inc.* looks at contract formation on the Internet.

International News Service v. Associated Press

248 U.S. 215 (1918)

Mr. Justice PITNEY delivered the opinion of the Court: The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the District Court, is a co-operative organization, incorporated under the Membership Corporations Law of the state of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. *** Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to $3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through the publication of their several newspapers. Under complainant's by-laws each member agrees upon assuming membership that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership, that no other use of it shall be permitted, and that no member shall furnish or permit any one in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the state of New Jersey, whose business is the gathering and selling of news to its customers and clients, consisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has widespread news-gathering agencies; the cost of its operations amounts, it is said, to more than $2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts. ***

The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: (1) Whether there is any property in news; (2) Whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and (3) whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade. ***

We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. *** The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other.

Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. And, although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. *** The question here is not so much the rights of either party as against the public but their rights as between themselves. And, although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. ***

Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 250, related to the distribution of quotations of prices on dealings upon a board of trade, which were collected by plaintiff and communicated on confidential terms to numerous persons under a contract not to make them public. This court held that, apart from certain special objections that were overruled, plaintiff's collection of quotations was entitled to the protection of the law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be restrained from getting at the knowledge by inducing a breach of trust. * * *

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business. ***

As to securing "tips" from a competing news agency the District Court (240 Fed. 991, 995), while not sanctioning the practice, found that both parties had adopted it in accordance with common business usage, in the belief that their conduct was technically lawful, and hence did not find in it any sufficient ground for attributing unclean hands to complainant. The Circuit Court of Appeals found that the tip habit, though discouraged by complainant, was "incurably journalistic," and that there was "no difficulty in discriminating between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information."

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and verification; whatever may appear at the final hearing, the proofs as they now stand recognize such a distinction; both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business. ***

In the case before us, in the present state of the pleadings and proofs, we need go no further than to hold, as we do, that the admitted pursuit by complainant of the practice of taking news items published by defendant's subscribers as tips to be investigated, and, if verified, the result of the investigation to be sold—the practice having been followed by defendant also, and by news agencies generally—is not shown to be such as to constitute an unconscientious or inequitable attitude towards its adversary so as to fix upon complainant the taint of unclean hands, and debar it on this ground from the relief to which it is otherwise entitled. ***

Mr. Justice HOLMES, dissenting: *** When it comes from one of the great news collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in Western cities it naturally will be supposed to have obtained its information from the defendant. The falsehood is a little more subtle, the injury, a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The does seems to me strong enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.

Mr. Justice BRANDEIS, dissenting: *** That competition is not unfair in a legal sense, merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer; but the law sanctions, indeed encourages, the pursuit. ***

The means by which the International News Service obtains news gathered by the Associated Press is also clearly unobjectionable. It is taken from papers bought in the open market or from bulletins publicly posted. ******* The manner of use is likewise unobjectionable. No reference is made by word or by act to the Associated Press, either in transmitting the news to subscribers or by them in publishing it in their papers. Neither the International News Service nor its subscribers is gaining or seeking to gain in its business a benefit from the reputation of the Associated Press. They are merely using its product without making compensation. That they have a legal right to do, because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which otherwise precludes such use. The argument is not advanced by characterizing such taking and use a misappropriation.

It is also suggested that the fact that defendant does not refer to the Associated Press as the source of the news may furnish a basis for the relief. But the defendant and its subscribers, unlike members of the Associated Press, were under no contractual obligation to disclose the source of the news; and there is no rule of law requiring acknowledgment to be made where uncopyrighted matter is reproduced. ***

Nor is the use made by the International News Service of the information taken from papers or bulletins of Associated Press members legally objectionable by reason of the purpose for which it was employed. The acts here complained of were not done for the purpose of injuring the business of the Associated Press. Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International News Service promptly with all available news. ***

Fifth. The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts and to use news so obtained gainfully in competition with the original collector. The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.

The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations. A large majority of the newspapers and perhaps half the newspaper readers of the United States are dependent for their news of general interest upon agencies other than the Associated Press. The channel through which about 400 of these papers received, as the plaintiff alleges, "a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public" was suddenly closed. The closing to the International News Service of these channels for foreign news (if they were closed) was due not to unwillingness on its part to pay the cost of collecting the news, but to the prohibitions imposed by foreign governments upon its securing news from their respective countries and from using cable or telegraph lines running therefrom. For aught that appears, this prohibition may have been wholly undeserved; and at all events the 400 papers and their readers may be assumed to have been innocent. For aught that appears, the International News Service may have sought then to secure temporarily by arrangement with the Associated Press the latter's foreign news service. For aught that appears, all of the 400 subscribers of the International News Service would gladly have then become members of the Associated Press, if they could have secured election thereto. It is possible, also, that a large part of the readers of these papers were so situated that they could not secure prompt access to papers served by the Associated Press. The prohibition of the foreign governments might as well have been extended to the channels through which news was supplied to the more than a thousand other daily papers in the United States not served by the Associated Press; and a large part of their readers may also be so located that they cannot procure prompt access to papers served by the Associated Press.

A Legislature, urged to enact a law by which one news agency or newspaper may prevent appropriation of the fruits of its labors by another, would consider such facts and possibilities and others which appropriate inquiry might disclose. Legislators might conclude that it was impossible to put an end to the obvious injustice involved in such appropriation of news, without opening the door to other evils, greater than that sought to be remedied. Such appears to have been the opinion of our Senate which reported unfavorably a bill to give news a few hours' protection; and which ratified, on February 15, 1911, the convention adopted at the Fourth International American Conference; and such was evidently the view also of the signatories to the International Copyright Union of November 13, 1908, as both these conventions expressly exclude news from copyright protection. ***

Or legislators dealing with the subject might conclude, that the right to news values should be protected to the extent of permitting recovery of damages for any unauthorized use, but that protection by injunction should be denied, just as courts of equity ordinarily refuse (perhaps in the interest of free speech) to restrain actionable libels, and for other reasons decline to protect by injunction mere political rights; and as Congress has prohibited courts from enjoining the illegal assessment or collection of federal taxes. If a Legislature concluded to recognize property in published news to the extent of permitting recovery at law, it might, with a view to making the remedy more certain and adequate, provide a fixed measure of damages, as in the case of copyright infringement.

Or again, a Legislature might conclude that it was unwise to recognize even so limited a property right in published news as that above indicated; but that a news agency should, on some conditions, be given full protection of its business; and to that end a remedy by injunction as well as one for damages should be granted, where news collected by it is gainfully used without permission. If a Legislature concluded (as at least one court has held, New York and Chicago Grain and Stock Exchange v. Board of Trade, 19 N.E. 855) that under certain circumstances news-gathering is a business affected with a public interest; it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for insuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

Levitt v. Yelp! Inc.

765 F.3d 1123 (9th Cir. 2014)

BERZON, Circuit Judge: Today, individuals can share their opinions with the entire world courtesy of a few taps on the keyboard. The appellee in this case, Yelp! Inc. ("Yelp"), provides an online forum on which its users express opinions as to services ranging from dog walkers to taco trucks.

The appellees, Boris Levitt, Cats and Dogs Animal Hospital, Inc. ("Cats and Dogs"), John Mercurio, and Dr. Tracy Chan, are small business owners (collectively, "the business owners") who allege that Yelp extorted or attempted to extort advertising payments from them by manipulating user reviews and penning negative reviews of their businesses. The business owners filed a class-action lawsuit against Yelp for violations of California's Unfair Competition Law ("UCL"), California Business & Professions Code § 17200 *et seq.,* civil extortion, and attempted civil extortion.

The district court dismissed the lawsuit for failure to state a claim. ***

I.

A. Yelp's Service

Yelp provides an online directory that allows registered users to post reviews and rank businesses on a scale of one to five stars. Based on these user rankings, Yelp then assigns businesses an overall "star" rating. Businesses cannot opt out of being listed on Yelp.

Not all user reviews submitted appear on a business's Yelp page or remain there after initially appearing. Reviews can be removed by the reviewer, removed by Yelp for violating Yelp's "Review Guidelines" or "Terms of Service," or removed by an automated filtering software maintained by Yelp. According to Yelp's website, its filtering system operates as follows:

> Th[e] system decides how established a particular reviewer is and whether a review will be shown based on the reviewer's involvement on Yelp. While this may seem unfair . . . this system is designed to protect both consumers and businesses alike from fake reviews (i.e., a malicious review from a competitor or a planted review from an employee). The process is entirely automated to avoid human bias, and it affects both positive and negative reviews. It's important to note that these reviews

> are not deleted (they are always shown on the reviewer's public profile) and may reappear on your business page in the future.

Yelp also offers businesses advertising opportunities on its website for $300 to $1200 per month. Purchasing advertising allows a business to: appear in advertisements displayed above Yelp search results and on related business pages; prevent competitors' advertisements from appearing on its Yelp page listing; enhance its page listing with photos; and promote a favorite review to the top of its page.

B. The Allegations Against Yelp

The business owners maintain that Yelp created negative reviews of their businesses and manipulated review and ratings content to induce them to purchase advertising through Yelp. They urge that Yelp has thereby violated the UCL through acts of extortion and, when not successful in inducing payments to Yelp, attempted extortion. They also allege separate causes of action for civil extortion and attempted civil extortion.

The business owners seek to represent two subclasses of businesses: those that declined to advertise with Yelp ("nonsponsors"), and those that have, at some point, purchased advertising ("sponsors"). They support their claims by alleging that "approximately 200 Yelp employees or individuals acting on behalf of Yelp have written reviews of businesses on Yelp" and that Yelp's Chief Executive Officer admitted to a New York Times reporter that Yelp has paid users to write reviews, although it does not do so directly anymore.

The Third Amended Complaint contains the following plaintiff-specific allegations: *** Dr. Tracy Chan, a dentist, stated that she received calls from a Yelp sales representative "offer[ing] her lots of benefits, such as the opportunity to keep Chan's business ratings high by hiding or burying bad reviews," if she advertised with Yelp. According to Chan, the sales representative stated that "although many Yelp reviews were manipulated by a computer system, Yelp employees also had the ability to remove reviews from a business's Yelp page."

Chan initially declined to purchase advertising from Yelp. Two or three days after doing so, "Yelp removed nine 5-star reviews" from her page, causing her overall rating to drop from five to three stars. Chan called Yelp to ask about the decline in her overall rating, and was told that "Yelp 'tweaks' the ratings every so often and that [Yelp] could help her if she signed up for advertising services with Yelp." Chan alleged that "Yelp removed positive reviews . . . as a threat to cause Chan to fear that if she did not purchase advertising . . . her business's overall star rating would stay low."

"[O]ut of fear of further manipulations," Chan signed an advertising contract with Yelp. According to Chan, just days after signing the contract, her "overall rating increased to 4 stars and various five star reviews were reinstated by Yelp." She believes the rating increase was the result of her agreeing to advertise with Yelp.

Several months later, a Yelp sales agent asked Chan whether she was interested in increasing her advertising purchase with Yelp. When Chan declined, she "noticed that her reviews were again declining." That same month, Chan cancelled her existing advertising contract with Yelp. Chan alleged that after she cancelled, "Yelp removed positive reviews . . . and replaced them with negative reviews . . . to cause Chan to fear that if she did not pay Yelp for advertising, Yelp would continue to remove positive reviews from her [page]."

Chan's overall rating fluctuated over the next year and a half. She attributed dips in her rating to specific interactions with Yelp. For example, Chan stated that Yelp "removed several positive reviews," prompting her to "post a negative review about Yelp's conduct" on her Yelp page. "Within two to three days," she alleged, Yelp removed more positive reviews, causing her overall rating to "[fall] to 3 stars." Over a year later, Chan alleged that her overall rating fell again, this time from four stars to three and a half stars, when "Yelp removed six positive reviews" from her page after she "posted a negative review about Yelp to her own website." Chan asserted that the removal of positive reviews was done "to induce [her] to pay for advertising and/or to discourage her from posting negative information about Yelp." ***

II.

The business owners maintain that Yelp attempted to extort and did extort advertising payments from them by wrongfully threatening them with economic loss. We hold that the business owners have failed to state a claim under California law on which relief can be granted. Accordingly, we do not address Yelp's defense of immunity under the CDA.

A. California's Unfair Competition Law

California's Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. "[I]t establishes three varieties of unfair competition acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999) (internal quotation marks omitted).

In prohibiting "any unlawful" business practice, the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Id.* (internal quotation marks omitted). The business owners premise their "unlawful" UCL claim on Yelp's allegedly extortionate conduct.

Specifically, they allege that the following conduct amounts to extortion: (1) Yelp manipulating user-generated reviews to induce them to buy advertising; and (2) Yelp creating its own negative reviews of their businesses to induce them to buy advertising. They do not assert any claims based on failure to remove negative third-party reviews of their businesses.

We conclude, first, that Yelp's manipulation of user reviews, assuming it occurred, was not wrongful use of economic fear, and, second, that the business owners pled insufficient facts to make out a plausible claim that Yelp authored negative reviews of their businesses. Accordingly, we agree with the district court that these allegations do not support a claim for extortion.

B. Unlawful (Extortionate) Business Practices

We first consider whether the business owners have stated a claim of extortionate, and therefore unlawful, business practices under California's UCL.

1

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). Threats of economic harm made to "obtain[] . . . property from another," *id.,* are not generally considered "wrongful," *id.,* where the alleged extortioner has a legitimate claim to the property obtained through such threats. Therefore, unless a person has a preexisting right to be free of the threatened economic harm, threatening economic harm to induce a person to pay for a legitimate service is not extortion.

Like the Hobbs Act, California law states that "[e]xtortion is the obtaining of property from another, with his consent . . . induced by a *wrongful* use of force or fear." Cal. Penal Code § 518 (emphasis added). California law also provides that "[f]ear, such as will constitute extortion, may be induced by a threat . . . [t]o do an *unlawful* injury to the person or property of the individual threatened," *id.* § 519(1) (emphasis added), "thus excluding fear induced by threat to do a lawful injury," *People v. Beggs*, 178 Cal. 79, 83 (1918). Accordingly, the elements of extortion under federal and California law are substantially the same. The plaintiffs here point to no pertinent distinctions between the federal and California statutes.

In sum, to state a claim of economic extortion under both federal and California law, a litigant must demonstrate either that he had a pre-existing right to be free from the threatened harm, or that the defendant had no right to seek payment for the service offered. Any less stringent standard would transform a wide variety of legally acceptable business dealings into extortion.

2

Given these stringent requirements, the business owners in this case failed sufficiently to allege that Yelp *wrongfully* threatened economic loss by manipulating user reviews.

To start, we note that there is no allegation that Yelp directly threatened economic harm if the business owners refused to purchase advertising packages from Yelp. While the lack of such express threats does not alone dispose of the extortion claims, it does make the business owners' case considerably more difficult. Absent explicit threats of economic harm, the business owners must allege sufficient facts to support the inference that Yelp "inten[ded] . . . to induce payment through the use of threats or the exploitation of [economic] fears," *United States v. Greger*, 716 F.2d 1275, 1278 (9th Cir. 1983).

We begin with Chan, who alleges that Yelp extorted her by removing positive reviews from her Yelp page. Chan asserts that she was deprived of the benefit of the positive reviews Yelp users posted to Yelp's website, and that, had she received the benefits of the positive reviews, they would have counteracted the negative reviews other users posted.

But Chan had no pre-existing right to have positive reviews appear on Yelp's website. She alleges no contractual right pursuant to which Yelp must publish positive reviews, nor does any law require Yelp to publish them. By withholding the benefit of these positive reviews, Yelp is withholding a benefit that Yelp makes possible and maintains. It has no obligation to do so, however. Chan does not, and could not successfully, maintain that removal of positive user-generated reviews, by itself, violates anything other than Yelp's own purported practice. "[W]hat [Yelp] may do in a certain event [Yelp] may threaten to do." *Rothman v. Vedder Park Management*, 912 F.2d 315, 318 (9th Cir. 1990). Moreover, Chan does not allege that the advertising Yelp sold her was a valueless sham, or that she was already entitled to the advertising privileges Yelp induced her to buy. We thus "deal with a very narrow subset of the potential universe of extortion cases: one involving solely the accusation of the wrongful use of economic fear where two private parties have engaged in a mutually beneficial exchange of property." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 525-26 (3d Cir. 1998).

As Chan alleges no independent barrier to the ratings manipulation of which she complains, and as there is no allegation that Yelp's advertising services are, objectively, worthless, any implicit threat by Yelp to remove positive reviews absent payment for advertising was not wrongful within the meaning of the extortion statutes.

This conclusion is not entirely the end of the matter, as Chan alleges that the ratings manipulation negatively affected her "business's reputation." But Chan does not connect her claim of reputational harm to a specific allegation of wrongful conduct. We note, too, that unlike the other business owners, Chan at one time had a contractual relationship with Yelp. It may be that by manipulating Chan's ratings to induce her to increase her advertising dollars, Yelp "breached [its] duties under the contract []." *Rennell v. Rowe,* 635 F.3d 1008, 1014 (7th Cir. 2011). "But those claims should be pursued through state-law theories of contract . . .—not [extortion]." *Id.*

Chan's pleadings thus fail to allege that deflation of her business's overall rating resulting from removing positive reviews constitutes "wrongful" conduct, and she therefore fails to state a claim of economic extortion. ***

The other brand of extortionate ratings manipulation the business owners allege is the re-posting of negative reviews and the placement of negative reviews at the top of the business owners' Yelp pages. Business owners Mercurio and Cats and Dogs bring these allegations. Here, too, however, Cats and Dogs and Mercurio have no claim that it is independently wrongful for Yelp to post and arrange actual user reviews on its website as it sees fit. The business owners may deem the posting or order of user reviews as a threat of economic harm, but it is not unlawful for Yelp to post and sequence the reviews. As Yelp has the right to charge for legitimate advertising services, the threat of economic harm that Yelp leveraged is, at most, hard bargaining. ***

For these reasons and the reasons explained in Part II.B of this opinion, we conclude that none of the business owners have stated a claim of "unlawful" conduct on the basis of extortion. We therefore affirm the dismissal of the separate claims of civil extortion and attempted civil extortion, as well.

D. The UCL "Unfair" Prong

"Each prong of the UCL is a separate and distinct theory of liability," and so "the 'unfair' practices prong offers [plaintiffs] an independent basis for relief." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). At least with respect to business-competitor cases, to state a claim under the UCL's "unfair" prong the alleged unfairness must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech*, 20 Cal.4th at 186-87.

The business owners acknowledge that the *Cel-Tech* standard applies here. Although this case is not a suit involving "unfairness to the *defendant's* competitors," *Lozano*, 504 F.3d at 735 (emphasis added), as Yelp does not compete with the business owners, the crux of the business owners' complaint is that Yelp's conduct unfairly injures their economic interests to the benefit of other businesses who choose to advertise with Yelp.

In business-competitor claims, "the word 'unfair' . . . means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal.4th at 187. Under this standard, the business owners have not stated a claim that Yelp violated the UCL's prohibition of unfair business practices.

The business owners do not allege that Yelp violated any "legislatively declared policy" other than the prohibitions on extortion discussed above. For the reasons discussed, they have not pled facts sufficient to support an inference of extortion.

As to violations of antitrust principles, the business owners allege generally that Yelp's conduct "harms competition by favoring businesses that submit to Yelp's manipulative conduct and purchase advertising to the detriment of competing businesses that decline to purchase advertising." This very general allegation does not satisfy *Cel-Tech*'s requirement that the effect of Yelp's conduct amounts to a violation of antitrust laws "or otherwise significantly threatens or harms competition." *Id.*

For these reasons, we conclude that the UCL claim fails under the "unfair" prong, as well.

III.

The business owners' Third Amended Complaint fails to state a claim under California's unfair competition laws, and fails to sufficiently allege extortion or attempted extortion.

We emphasize that we are not holding that *no* cause of action exists that would cover conduct such as that alleged, if adequately pled. But for all the reasons noted, extortion is an exceedingly narrow concept as applied to fundamentally economic behavior. The business owners have not alleged a legal theory or plausible facts to support the theories they do argue.

The judgment of the district court is, accordingly, AFFIRMED.

ProCD, Inc. v. Zeidenberg

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

EASTERBROOK, Circuit Judge: Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. Parties and numerous amici curiae have briefed many other issues, but these are the only two that matter—and we disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). ProCD sells a version of the database, called SelectPhone™, on CD-ROM discs. (CD-ROM means "compact disc—read only memory." The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer "end user license," but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone™ cost more than $10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and SIC codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately $150 for the set of five discs) while selling information to the trade for a higher price. It has adopted some intermediate strategies too: access to the SelectPhone™ database is available via the America Online service for the price America Online charges to its clients (approximately $3 per hour), but this service has been tailored to be useful only to the general public.

If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially over $150. The ensuing reduction in sales would harm consumers who value the information at, say, $200. They get consumer surplus of $50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves—for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price—ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone™ in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone™ database. The corporation makes the database available on the Internet to anyone willing to pay its price—which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone™ packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they might have been different, and a purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase.

II

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods. In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good—but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. * * *

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with BytePusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. § 402.201 corresponds to UCC § 2-201, and other citations are easy to derive.) One of the court's reasons—that by proposing as part of the draft Article 2B a new UCC § 2-2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law—depends on a faulty inference. To propose a change in a law's text is not necessarily to propose a change in the law's effect. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction—although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268-70 (5th Cir. 1988); Arizona Retail Systems, Inc. v. Software Link, Inc., 831 F.Supp. 759 (D. Ariz. 1993). As their titles suggest, these are not consumer transactions. *Step-Saver* is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails. Our case has only one form; UCC § 2-207 is irrelevant. *Vault* holds that Louisiana's special shrinkwrap-license statute is preempted by federal law, a question to which we return. And *Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

What then does the current version of the UCC have to say? We think that the place to start is § 2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra $10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

*** In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone™ must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for $100 rather than $150—although any of these changes would be welcomed by the customer, if all other things were held constant—so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of "the product" than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off. ***

REVERSED AND REMANDED.

Nguyen v. Barnes & Noble Inc.

763 F.3d 1171 (9th Cir. 2014)

NOONAN, Circuit Judge: Barnes & Noble, Inc. ("Barnes & Noble") appeals the district court's denial of its motion to compel arbitration against Kevin Khoa Nguyen ("Nguyen") pursuant to the arbitration agreement contained in its website's Terms of Use. In order to resolve the issue of arbitrability, we must address whether Nguyen, by merely using Barnes & Noble's website, agreed to be bound by the Terms of Use, even though Nguyen was never prompted to assent to the Terms of Use and never in fact read them. We agree with the district court that Barnes & Noble did not provide reasonable notice of its Terms of Use, and that Nguyen therefore did not unambiguously manifest assent to the arbitration provision contained therein.

We also agree with the district court that Nguyen is not equitably estopped from avoiding arbitration because he relied on the Terms of Use's choice of law provision.

We therefore affirm the district court's denial of Barnes & Noble's motion to compel arbitration and to stay court proceedings.

I. Background

A.

The underlying facts are not in dispute. Barnes & Noble is a national bookseller that owns and operates hundreds of bookstores as well as the website. In August 2011, Barnes & Noble, along with other retailers across the country, liquidated its inventory of discontinued Hewlett-Packard Touchpads ("Touchpads"), an unsuccessful competitor to Apple's iPad, by advertising a "fire sale" of Touchpads at a heavily discounted price. Acting quickly on the nationwide liquidation of Touchpads, Nguyen purchased two units on Barnes & Noble's website on August 21, 2011, and received an email confirming the transaction. The following day, Nguyen received another email informing him that his order had been cancelled due to unexpectedly high demand. Nguyen alleges that, as a result of "Barnes & Noble's representations, as well as the delay in informing him it would not honor the sale," he was "unable to obtain an HP Tablet during the liquidation period for the discounted price," and was "forced to rely on substitute tablet technology, which he subsequently purchased . . . [at] considerable expense."

B.

In April 2012, Nguyen filed this lawsuit in California Superior Court on behalf of himself and a putative class of consumers whose Touchpad orders had been cancelled, alleging that Barnes & Noble had engaged in deceptive business practices and false advertising in violation of both California and New York law. Barnes & Noble removed the action to federal court and moved to compel arbitration under the Federal Arbitration Act ("FAA"), arguing that Nguyen was bound by the arbitration agreement in the website's Terms of Use.

The website's Terms of Use are available via a "Terms of Use" hyperlink located in the bottom left-hand corner of every page on the Barnes & Noble website, which appears alongside other hyperlinks labeled "NOOK Store Terms," "Copyright," and "Privacy Policy." These hyperlinks also appear underlined and set in green typeface in the lower lefthand corner of every page in the online checkout process.

Nguyen neither clicked on the "Terms of Use" hyperlink nor actually read the Terms of Use. Had he clicked on the hyperlink, he would have been taken to a page containing the full text of Barnes & Noble's Terms of Use, which state, in relevant part: "By visiting any area in the Barnes & Noble.com Site, creating an account, [or] making a purchase via the Barnes & Noble.com Site . . . a User is deemed to have accepted the Terms of Use." Nguyen also would have come across an arbitration provision, which states:

> XVIII. DISPUTE RESOLUTION
>
> Any claim or controversy at law or equity that arises out of the Terms of Use, the Barnes & Noble.com Site or any Barnes & Noble.com Service (each a "Claim"), shall be resolved through binding arbitration conducted by telephone, online or based solely upon written submissions where no in-person appearance is required. In such cases, arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules (including without limitation the Supplementary Procedures for Consumer-Related Disputes, if applicable), and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. ***

Nguyen contends that he cannot be bound to the arbitration provision because he neither had notice of nor assented to the website's Terms of Use. Barnes & Noble, for its part, asserts that the placement of the "Terms of Use" hyperlink on its website put Nguyen on constructive notice of the arbitration agreement. Barnes & Noble contends that this notice, combined with Nguyen's subsequent use of the website, was enough to bind him to the Terms of Use. The district court disagreed, and Barnes & Noble now appeals. ***

III. Discussion

A.

*** Here, the parties agree that the validity of the arbitration agreement is governed by New York law, as specified by the Terms of Use's choice of law provision. But whether the choice of law provision applies depends on whether the parties agreed to be bound by Barnes & Noble's Terms of Use in the first place. As the district court acknowledged in its order, we need not engage in this circular inquiry because both California and New York law dictate the same outcome. Thus, in evaluating the validity of Barnes & Noble's arbitration agreement, we apply New York law, to the extent possible.

For the reasons that follow, we hold that Nguyen did not enter into Barnes & Noble's agreement to arbitrate.

B.

"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). One such principle is the requirement that "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (applying California law).

Contracts formed on the Internet come primarily in two flavors: "clickwrap" (or "click-through") agreements, in which website users are required to click on an "I agree" box after being presented with a list of terms and conditions of use; and "browsewrap" agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen. Barnes & Noble's Terms of Use fall in the latter category. ***

Were there any evidence in the record that Nguyen had actual notice of the Terms of Use or was required to affirmatively acknowledge the Terms of Use before completing his online purchase, the outcome of this case might be different. Indeed, courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement. Courts have also been more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website.

But where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract. Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage. Where the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement. On the other hand, where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements. In short, the conspicuousness and placement of the "Terms of Use" hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement.

Barnes & Noble argues that the placement of the "Terms of Use" hyperlink in the bottom left-hand corner of every page on the Barnes & Noble website, and its close proximity to the buttons a user must click on to complete an online purchase, is enough to place a reasonably prudent user on constructive notice. ***

But the proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice, and Barnes & Noble directs us to no case law that supports this proposition. *** In light of the lack of controlling authority on point, and in keeping with courts' traditional reluctance to enforce browsewrap agreements against individual consumers, we therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every 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. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers. Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound. ***

We hold that Nguyen had insufficient notice of Barnes & Noble's Terms of Use, and thus did not enter into an agreement with Barnes & Noble to arbitrate his claims.

AFFIRMED.

Clicks and More

In many cases, a firm spends substantial resources to create information and then wants to distribute that information. The ease with which information can be copied means that distributing the information creates the possibility of building a competitor to the firm that initially distributed the information. Firms typically want less competition, not more, so they have strong incentives to try to minimize the ability of other firms to redistribute that information, especially if that redistribution puts at risk their business model. This is a frequent issue for firms. To see this issue in three other settings, click on the links that follow (1) *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2nd Cir. 1997); (2) *Barclays Capital Inc. v. theflyonthewall.com, Inc.*, 650 F.3d 876 (2nd Cir. 2011); and (3) Yelp Terms of Service (update of November 27, 2012).

There are many other issues that arise in connection with the monetization of information. Start with what information economists call "versioning." Versioning occurs when a firm takes a product and figures out a way to turn it into multiple products targeted at different customer bases. Starting in 1946, the University of Michigan has surveyed consumers to understand their current views of the United States economy. (For background, see Surveys of Consumers.) Over time, the consumer sentiment survey has become valuable information and that has led to a two-tier structure for the release of updates to the survey. As *The Wall Street Journal* reported on June 12, 2013 (possibly paywalled story here), Thomson Reuters struck a deal to pay Michigan for early access to the to-be-announced consumer results with Thomson paying $1.1 million for the early look in 2013 and $1.2 million in 2014. Thomson in turn has created two early-look products based on the Michigan data. One product gives buying firms fast access at 9:54:58 a.m. Eastern time; the second gives other Thomson customers access two seconds later. Michigan posts the data on its website, available to the public for free, five minutes later at 10 a.m. These practices raise a number of questions. Consider the views, quoted in the WSJ story, of former White House ethics lawyer Richard Painter that entities like the University of Michigan and Thomson Reuters should "not be allowed to selectively disclose market-moving data to people who pay more money—that is not right."

Switch to government information. As students of the 1983 Dan Aykroyd and Eddie Murphy classic *Trading Places* will know, the United States government has its own valuable data sources and early access to that information can be valuable. The film is all about gaining early access to an orange juice forecast by the U.S. Department of Agriculture and those forecasts remain important to traders today. Stealing that information is undoubtedly a federal crime, but other firms have figured out other ways to get early information.

It isn't unusual for private firms distributing press-worthy information to distribute it to the press in advance subject to an embargo on the release of stories based on that information. Some government agencies, including the U.S. Department of Labor, have done the same thing, but given the sensitivity of the government information and the capacity of that information to move markets, the government has moved to tighter controls over its early access program. That includes separating out general news organizations from firms seeking press credentials to facilitate their ability to build early-release trading products. These products are based on speed—low latency by design—and for high-speed computerized algorithmic trading. (For information, see Deutsche Börse's AlphaFlash product and news stories (*NYT*, July 16, 2012 and *WSJ*, August 12, 2013.))

Consider one more situation that raises a different question: to what extent should a firm limit its own internal use of information? Bloomberg LP has emerged as leading provider of real-time data access with its ubiquitous and expensive data terminals. But Bloomberg has also become a substantial financial news organization. In early May, 2013, it was reported that Bloomberg news reporters had had access to information regarding Bloomberg customer use of their Bloomberg data terminals. JP Morgan quickly asked Bloomberg for a detailed investigation into what JP Morgan considered a breach of the conditions under which it used the data terminals. Bloomberg ultimately responded with two external investigations and promised new controls going forward.