

ALERT

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Federal District Court Finds On-Line Browse-Wrap Licenses Not Binding

On July 3, 2001, the Federal District Court for the Southern District of New York issued a ruling declaring on-line browse-wrap licenses invalid. *Specht, et al. v. Netscape Communications, et al.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001). In its ruling addressing Netscape's motion to compel arbitration of the underlying lawsuit, the Court applied California law and held that Internet users who downloaded Netscape's free SmartDownload software from its web site were not bound by the license agreement on that site.

Case Background

Plaintiffs in the underlying class action suit accused Netscape, an AOL subsidiary, of tracking Internet user activity through the use of Netscape's SmartDownload software program in violation of two federal privacy statutes, the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act. The SmartDownload software was available free of charge on Netscape's web site and could be downloaded simply by clicking one's mouse in a designated box. The software enabled users to download files from the Internet without losing their interim progress when they paused to engage in some other task.

The sole reference to the license agreement for the SmartDownload software appeared in text that was visible only if a visitor scrolled past the download icon on Netscape's web site, through the page to the next screen. The text read as follows:

Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading the software.

Visitors were not required to indicate affirmatively their assent to the license agreement, or even to view the license agreement, before proceeding with the download of the software. But if a visitor chose to click on the invitation, a hypertext link took the visitor to the web page entitled "License and Support Agreements." On this page, the following text was displayed:

The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For prod-

ucts available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below the above paragraph were hyperlinks to various Netscape license agreements which a user clicked on in order to retrieve the full text of such license. The SmartDownload license agreement contained a term requiring that virtually all disputes be submitted to arbitration in Santa Clara County, California.

The SmartDownload software allowed Netscape secretly to monitor downloads of .exe. and .zip files. Plaintiffs sued Netscape claiming that this violated their privacy rights, among others. Netscape then moved to compel arbitration of the dispute, referring to the binding arbitration clause in the license agreement.

In determining whether to grant or deny the arbitration motion, the Court was faced with the issue of whether the license agreement containing the arbitration clause bound the users.

The District Court Decision

Applying California law, the Court held that the license agreement did not create a binding contract

between the users of the SmartDownload software and Netscape. The Court found that unless the plaintiffs agreed to the license agreement, they could not be bound by the arbitration clause. Under California law, in order for a contract to become binding, both parties must mutually assent to it. The Court found that in the context of software licensing, there are different forms of license agreements that have been utilized in the sale of software. One such form is the “shrink-wrap” license, where software is commonly packaged in a container or wrapper that advises the purchaser that that use of the software is subject to terms of a license agreement contained inside the package. The license agreement generally explains that if the user does not want to be subject to the license agreement, he or she can return the product for a refund. Failure to return the product within a certain time frame constitutes assent to the license terms. The Court noted that “shrink-wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general.”

Similarly, the Court discussed another type of software license, the “click-wrap” license. Here, the user views a message on his or her computer screen, requiring that the user assent to the terms of the license agreement by clicking on an icon. The product can not be obtained or used unless and until the icon is clicked. The Court noted that these licenses have also been held by courts to be valid and enforceable.

Unlike the click-wrap and shrink-wrap licenses, a “browse-wrap” license, such as that used by Netscape, does not require any direct manifestation of assent. With this sort of license, a user simply clicks on a notice that the software is subject to a license, which sends the user to a separate web page containing the text of the license. However, the user is not required to click on an icon expressing assent to the license, or even to view the terms of the license, before using the software.

The Court determined that the SmartDownload license agreement most closely resembled a browse-wrap license in that the user could download and use the software “without taking any action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being formed.” Netscape argued that the mere act of downloading was enough to indicate assent. However, the Court disagreed, stating that “[t]he primary purpose of the download was to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating ‘I assent’ has no meaning or purpose other than to indicate such assent.” Thus, because Netscape failed to require users of the SmartDownload software to indicate assent to its license as a precondition to downloading the software, the Court found there was no formation of a binding contract. The Court noted that before downloading the software, the user need not view any of the license agreement terms or do anything to manifest assent to the terms other than taking

possession of the product. “The only hint that a contract is being formed is one small box of text referring to the license agreement - text that appears below the screen used for downloading and that a user need not even see before obtaining the product.” The Court stated that “the ‘Please Review’ language reads more as an invitation rather than a condition.” Thus, the Court denied Netscape’s motion to compel arbitration, stating that the license agreement was not a binding contract and as such, plaintiffs were not subject to the arbitration clause in the license agreement.

Implications

Specht v. Netscape sheds light on how on-line license agreements should be displayed to companies who are offering or selling products over the Internet. Such license agreements should appear on the web page automatically before the user has an opportunity to take action with respect to the product. Terms should be clear without the user having to take multiple steps or having to navigate through multiple hyperlinks to access the agreement. The agreement should provide the user with the ability to manifest his or her assent to the terms and conditions of the product by either clicking on an icon expressly agreeing to the provisions, or having the user type words such as “I agree to the terms and conditions above.” The user should not have the option of manifesting assent without having to view the terms. The words of assent should be clear and

unambiguous, such as “I assent,” “I agree,” as opposed to phrases such as “Continue” or “Process.” In addition, companies who maintain on-line licenses should be mindful of the applicable governing law of such license. Jurisdictions have different levels for addressing the validity of assent in contracts. The best solution is to provide clear, unambiguous avenues for manifestation of assent, such as those just described.

Claims alleging violations of licensing agreements, accordingly, need to be examined to ensure that there was a clear manifestation of consent when the alleged license agreement was formed. Absent such manifestation, under the reasoning in *Specht*, the claim is likely to be without merit.

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