
Court Holds Browse Wrap Agreement Unenforceable

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U.S. courts have held in a number of recent cases that so-called "click wrap" agreements, in which a user must click on an on-screen button bearing the words "I accept" or similar language, create enforceable and binding contractual obligations (see our [March 22, 2000 Internet Alert](#)). Recently, however, another type of online contract has appeared on the e-commerce scene. "Browse wrap agreements" for a web site can be read by clicking on a hypertext link. However, unlike click wrap agreements (and their predecessors, shrinkwrap agreements), browse wrap agreements do not require the user to click a button, type a text string, or take any other affirmative action to demonstrate his or her assent to the terms of the agreement prior to downloading software or using the service offered through that web site.

The enforceability of these browse wrap agreements is now in doubt. In [Specht v. Netscape Communications, Inc.](#), No. 00 Civ. 4871, 2001 WL 755396 (S.D.N.Y. July 5, 2001), a federal judge ruled that users downloading Netscape's SmartDownload software were not bound by the arbitration clause in Netscape's license agreement because the users had not affirmatively assented to its terms.

The SmartDownload program allows users to download files and monitor their interim progress, while also engaging in other functions. Any user visiting Netscape's web site can download the program for free by clicking on a designated box. The SmartDownload license agreement is referenced by a message that reads "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software." This message was only visible, however, if the user scrolled down the page to the next screen, and the user was required to follow another link before actually viewing the license agreement. At no point did SmartDownload affirmatively require the user to assent to the agreement.

In this case, the plaintiffs sued Netscape and its parent, AOL, in federal district court in New York, claiming that SmartDownload provided private information to the defendants in violation of federal privacy regulations. Netscape attempted to force the plaintiffs into arbitration proceedings, citing the arbitration provision of the license agreement. The court declined to enforce the arbitration provision, citing the lack of mutual assent to the contractual terms. The federal district judge noted that, while mutual assent may be manifested by either words or gestures, some affirmative action must occur before a contract is binding on both parties. The court was unwilling to accept

Netscape's argument that the mere act of downloading SmartDownload was unambiguous assent to the agreement. The judge stated that an affirmative act, such as clicking an "I accept" button, must occur before the license agreement could bind both parties. The judge also observed that the primary purpose of downloading in this case was to obtain a product, and not to assent to terms of a license agreement.

The court was also concerned by the lack of notice to the user about the existence of the license agreement. Users downloading the software may not have been aware that they were entering into a contract, nor that such a contract even existed. The only indication to the user that SmartDownload was subject to a license agreement was one small box of text referencing the license agreement, which appeared on the screen following the download screen. The court rejected the idea that a user could be bound by a contract without having seen the text referencing the license agreement, much less the actual agreement itself.

The SmartDownload license agreement was also problematic because the language in the box of text did not state that the user *must* agree to the terms of the agreement. Rather, the text stated "Please review and agree to the terms of the...agreement." The court found this language to be a "mere invitation," rather than a requirement for use of the software. While the actual SmartDownload license agreement contained more specific language, the court found that the absence of a requirement to read the agreement prevented it from finding that there was a contract created between the user and Netscape.

The court's discussion of the Netscape browse wrap agreement is similar to the *dicta* contained in the Ticketmaster v. Tickets.com case (discussed in our [June 26, 2000 Internet Alert](#)), in which the court questioned the enforceability of Ticketmaster's online terms of use, absent a user's affirmative demonstration of assent to those terms.

This case makes it clear that in order to bind a user to an online agreement, the vendor must ensure that the user is aware of the requirement that an agreement be entered into, and the user must affirmatively manifest his or her assent to that agreement by taking a demonstrable step, such as clicking or typing. Unless these minimum requirements are met, courts are unlikely to enforce the terms of online agreements.