

'Browse-wrap' licensing in Australia: prospects after the Netscape case

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In the recent US decision of *Specht v Netscape Communications Corp* 2001 WL 755396, the Federal District Court of New York (applying Californian law) held that the terms of a "browse-wrap" licence agreement were not enforceable as the act of downloading the software did not indicate the user accepted the terms of the agreement. For an online contract to be enforceable, the website must ensure that the user accepts the terms before the software can be downloaded.

Several users commenced proceedings against Netscape, alleging that the SmartDownload software transmitted private information about their file transfer activity to Netscape. Netscape brought a motion to stay the proceedings and compel arbitration in accordance with the terms of its End User Licence Agreement, available on its website.

Issues

The key issue in the case was whether the plaintiffs were bound by the Licence Agreement and thus by the arbitration clause. The Court considered whether:

- the SmartDownload website gave the users sufficient notice of the existence and terms of the License Agreement; and
- the act of downloading the software could be taken to indicate that the users accepted the terms of the License Agreement.

Was the agreement binding?

The SmartDownload website had a button marked 'Download' which, when a user clicked on it, downloaded the SmartDownload

software onto his or her hard drive free of charge. The Licence Agreement for the software was not set out on the page containing the download function. The reference and link to the Licence Agreement could only be seen if the user scrolled down to the next page, past the 'Download' button. This page included a small text box containing a brief and "ambiguous" reference to the Licence Agreement. The text box requested, but did not require, the user to click on the hyperlink and read and agree to the full terms and conditions of the Agreement before downloading and using the software.

The Court applied general contractual principles to determine whether users were made aware of the terms of the Licence Agreement and whether the act of downloading indicated their acceptance of those terms. The Court considered consent to be an essential element in the formation of a contract and the circumstances did not indicate that such consent had been provided. In particular, the Court considered that:

- the mere act of downloading the software did not indicate that the user consented to the terms of the agreement, as the primary purpose of downloading is to obtain a product, not to consent to an agreement;
- a user of the SmartDownload website may not be aware when downloading the software that he or she is entering into a contract, as:
 - the software is free;
 - they may not have viewed any license agreement terms or even any reference to a license agreement; and

- they were not required to take any positive action or do any thing to indicate their consent before downloading the software
- the request for users to read and agree to the terms and conditions read as an invitation rather than a condition of use and did not provide adequate notice either that a contract was being created or that the terms of the License Agreement would bind the user.

For the reasons set out above, the Court held that the plaintiffs did not consent to the License Agreement, were not subject to the arbitration clause and could not be compelled to arbitrate their claims against the defendants.

On-line agreements

In reaching its decision, the Court distinguished this "browse-wrap" agreement from "shrink-wrap" and "click-wrap" agreements previously found to be enforceable.

Shrink-wrap agreements are often used in packaged software and computer systems. The agreements are contained within the package and the packaging contains a statement that the use of the software or computer is subject to the terms of the agreement. In most instances, the licence is contained in the software and will pop up when the software is installed or run. By using the software and not returning it within a reasonable time, the user is taken to have consented to the terms of that agreement. These agreements have been upheld as binding.

Click-wrap agreements are generally found on software and on the

internet. In most instances, the user is presented a message on their screen, indicating the existence of the terms, a link to the terms and requiring the user to indicate their consent to the terms by clicking on an icon. The product cannot be obtained or the software downloaded unless the user clicks the icon, indicating their acceptance of the terms.

The Court characterised Netscape's agreement as a browse-wrap agreement. With these agreements, the internet site often simply refers to the existence of a licence agreement. Users are not required to view the

agreement or indicate their acceptance of the terms before downloading the software or obtaining the product.

Impact on Australian businesses

In Australia, as in the United States, electronic transactions are governed by the general law of contract. It is likely that Australian courts will look to the United States for guidance when considering similar issues.

Businesses need to ensure that their on-line contracts satisfy the elements necessary to form a contract. As a

general rule, the user should be immediately made aware of the full text of the license agreement and should be unable to proceed in downloading or using the software unless, and until, he or she assents to the terms and conditions. It should be obvious to the user that he or she is entering a contract with the you.

Finally, you should review the operation of your websites – if a user is unlikely to realise they are bound by the agreement, the terms may not be binding.

Update

Submission of the Legislative Watch Subcommittee of The New South Wales Society for Computers & the Law on the Cybercrime Bill 2001 (Cth)

The Senate Select Committee on Legal and Constitutional Affairs has adopted some aspects of the submission made to them by the New South Wales Society for Computers and the Law on the Cybercrime Bill currently before parliament.

The Cybercrime Bill, and its equivalent State legislation will form an extremely important part of the regulatory environment in the new economy. One of the key aspects of the Bill is the replacement of existing criminal offences by offences of causing unauthorised access to, or unauthorised modification of, data

held in a computer, or any unauthorised impairment of the reliability, security or operation of any data held on any device used to store data by electronic means.

These provisions will have a critical application to such organisations as IT services companies conducting security audits or "white knight" hacks of their customers' systems and could arguably apply to such things as the application of virus checking software to email in transit.

The submission was put together by the Legislative Subcommittee of the Society.

The subcommittee's submission is available from:

<http://www.nswscl.org.au/home/cybercrime.html>

The Senate's report is available from:

http://www.aph.gov.au/senate/committee/legcon_ctte/cybercrimebill01/cybercrime_bill01.pdf