Web Site Contracts

Ruling Throws Web Site Terms and Conditions in Doubt

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The vast majority of companies doing business on the Internet have a terms and conditions link somewhere on the Web site. A new legal decision calls into question whether these important contract terms are enforceable.

This recent Federal District Court decision addressing what appears to be a question of first impression for the Internet is significant for anyone using the Internet. The decision, Specht *v. Netscape*, questions the fundamental idea of mutual assent in a contract formation.

In particular, the *Specht* case questions the legitimacy of the "terms and conditions" found on most Web sites.

Web site terms and conditions have generally been thought to create a binding contract between the owner of the Web site and anyone viewing or downloading materials from the site. Typical Web site terms and conditions often reflect important business considerations such as requiring mandatory binding arbitration in a specific local jurisdiction when a dispute arises.

With the law of Internet jurisdiction still in its infancy, many businesses have made conscientious efforts to limit their exposure to lawsuits in inconvenient or foreign jurisdictions by crafting carefully worded terms and conditions (this is actually what happened in the *Specht* case).

To put the *Specht* decision in context, it is important to understand the legal landscape of Internet and software licenses. Generally speaking, almost everyone who has used the Internet or owned a computer has been exposed to at least one of three specific kinds of licensing mechanisms.

> *The most common form of computer-related licensing is referred to as a "shrink-wrap license." A shrink-wrap license is the kind of license that comes prepackaged (wrapped in cellophane) for computer software.*

If one takes the time to read one of these license agreements it says that use of the software will create an assent to the terms and conditions contained in the license agreement. Typically for these shrink-wrap licenses to be enforceable, the consumer must have the option of returning the software for a full refund if they find the terms and conditions of the shrink-wrap license unacceptable.

In fact, under the Uniform Commercial Information Transaction Act (UCITA), which has been adopted in two states so far, shrink-wrap licenses are only enforceable if the end user has an opportunity to return any software or

product for a full refund if they find terms and conditions of the shrink-wrap license unacceptable.

> *Another common licensing scheme is referred to as the "click-wrap license." The click-wrap agreement is a screen or a page that presents a Web site's legal terms and conditions to a user and requires the user to click "I agree" or similar wording before gaining access to the site or before completing a transaction.*
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> *A third type of software license is referred to as a "browse-wrap" agreement. A browse-wrap agreement is usually accessible through a link at the bottom of a home page site (the review of which is not a condition to obtaining information on the site or completing a transaction). The Specht court found that the terms and conditions in that case were most like a browse-wrap agreement.*

The law of enforcing shrink-wrap licenses has become well established. Click-wrap agreements are also generally thought to be enforceable, although one District Court located in Kansas has noted that both Kansas and Missouri courts may not enforce click-wrap agreements.

The question of whether a browse-wrap agreement is enforceable, however, is now clearly in question.

THE SPECHT CASE

The Specht decision resulted from a recent class action lawsuit by several plaintiffs, including Christopher Specht. These plaintiffs got together and sued Netscape Communications Corp. and America Online Inc., et al., claiming that the defendants' software transmitted private information about the plaintiffs' file transfer activity over the Internet.

The plaintiffs alleged that the tracking of their private download information amounted to an unlawful electronic surveillance activity in violation of two federal statutes. The two anti-surveillance statutes in question are the Electronic Communications Privacy Act and the Computer Fraud Abuse Act.

In an interesting procedural twist (that appears to ripple through every Web site on the Internet today), Netscape moved to compel an arbitration proceeding.

Netscape argued that the software license for the software in question contained a clause requiring binding arbitration.

The plaintiffs argued that they were not bound by the license agreement because they never agreed to it. District Court ruled in favor of the plaintiffs, holding that there was no "meeting of the minds" to make an enforceable contract of the license agreement offered independently of the free software because the license was not expressly accepted by the user of that software.

This District Court ruling is the first significantly reported case holding that links to terms and conditions on Internet Web sites do not necessarily create a binding contract for the use of that site.

In the context of the Internet, a terms and conditions link that is not viewed may not create the requisite assent in order to create a binding contract, at least according to the Specht court.

Interestingly, a recent bulletin published by the Federal Trade Commission on advertising guidelines on the Internet supports a similar kind of reasoning.

The FTC specifically recommends that businesses monitor the "click-through" rate of hyperlinked advertising disclaimers. The FTC reasons this empirical information can be used by companies to help avoid false advertising.

When one opens the Sunday paper to read a typical CompuVest advertisement, the appropriate disclaimers are typically clearly in place. With hyperlinking technology on the Internet, these disclaimers may get overlooked, thus creating a need for advertisers to monitor how often these links are viewed.

Following this same line of thought, the District Court in Specht found that Netscape’s license agreement hyperlink was merely an invitation to enter into a license, not a requirement for downloading the software in question. Thus no binding contract was formed.

In a similar way, if a typical Web surfer enters onto an Internet company's Web site and is not required to explicitly accept the Web site's terms and conditions, those terms and conditions may not be enforceable against that Web surfer.

The good news is that individuals may not be subject to non-negotiated contract terms over the Internet in some case. The bad news is that most Internet businesses may need to revise their Web site configurations or risk, for example, being sued in a nonlocal (expensive) jurisdiction.

The Specht Court also found that the language accompanying the hyperlink in question was merely an invitation to review the license agreement and that visitors were not required to affirmatively indicate their assent to the license agreement.

The hyperlink read, "Please review and agree to the terms of the Netscape Smart Download Software License Agreement before downloading and using the software."

Ideas to consider might include:

Moving links to terms and conditions to the top of one's web site page;

Providing language that indicates the terms and conditions MUST be reviewed and accepted before use of the Web site would be allowed.

Though this basic reordering of Web site layout may seem simple, it could have significant legal and aesthetic impacts. Such reordering may make the Web site terms and conditions more analogous to an enforceable shrink-wrap license and less like a browse-wrap license because the Web surfer is given a reasonable notice that use creates assent to the terms and conditions.