by **Martin Samson**

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## Recent Addition

**Designer Skin LLC v. S & L Vitamins, Inc., et al.**
Unauthorized internet reseller of plaintiff's products is not guilty of trademark infringement, and does not cause actionable initial interest confusion, by using plaintiff's trademarks in meta tags of website at which plaintiff's and its competitors' products are sold, and in...
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# Specht v. Netscape Communications Corp.

**2001 WL 755396, 150 F. Supp. 2d 585 (S.D.N.Y., July 5, 2001), aff'd. -- F.3d -- (2d Cir., Oct. 1, 2002)**

**Related Topic(s):**
Click-Wrap Agreement
Contract
Shrink-Wrap Licenses

**Full Text of Court Decision:**
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Court holds that act of downloading software does not indicate assent to be bound by terms of license agreement, where a link to such terms appears on, but below that portion of the web page that appears on the user's screen when such downloading is accomplished. As a result, the Court holds that under California law, plaintiffs are not bound by the terms of such license agreement, or the arbitration clause contained therein, despite language in the license agreement which provides that by installing or using the software, the user consents to be bound by the terms of the license agreement.

Netscape offers for free to members of the public a version of its Smart Download software. One of the places a user can obtain such software is from a page on the Netscape website. By clicking the "download" icon found on that page, the user will obtain the software. The portion of this web page that appears on the user's screen when he is presented with the download icon does not contain any reference to a software license agreement. If the user scrolls to the bottom of the page, however, he will see the following text:

> Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software.

This text contains a link which takes the user to a separate web page titled "License & Support Agreements." This page, in turn, contains the following text

> 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 products 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.

This page also contains a link to the full text of the Smart Download software license. This license agreement provides that by using or installing the Smart Download software, the user agrees to be bound by the terms of this license agreement. The software license provides, in part:

> BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMART DOWNLOAD SOFTWARE (THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT ("LICENSEE")IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

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Importantly, a user can download the Smart Download software without ever clicking an "I Agree" icon, indicating his assent to be bound by the terms of the software license.
Plaintiffs were individuals who downloaded the Smart Download software. Claiming the software improperly "transmits to Defendants private information about the user's file transfer activity on the Internet" plaintiffs brought this suit. Defendant Netscape moved to compel arbitration as dictated by the Software License.

Netscape argued that under the circumstances present in this case, the user's act of downloading the Smart Download software, or using and installing it on their PCs, indicated their assent to be bound by the terms of the software license, and hence created a binding contract in accordance with its terms. The Court disagreed, and held that plaintiffs were not bound by the term of the License Agreement. The Court described this form of contracting as a "browse wrap."

Applying California law, the Court held that "in order for a contract to become binding, both parties must assent to be bound." Under the circumstances of this case, the Court held that plaintiffs had not indicated their assent to be bound by the terms of the license agreement. In reaching this result, the Court pointed to the fact that a user could complete his download of the software in question without ever becoming aware that the use of the software may be subject to the terms of a software license, or that the act of downloading would be considered by Netscape as an assent to be bound by such terms.

Said the court:

> Netscape's Smart Download, in contrast, allows a user to 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 argues that that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is 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. Netscape's failure to require users of Smart Download to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed. Furthermore, unlike the user of Netscape Navigator or other click-wrap or shrink-wrap licensees, the individual obtaining Smart Download is not made aware that he is entering into a contract. Smart Download is available from Netscape's web site free of charge. Before downloading the software, the user need not view any license agreement terms or even any reference to a license agreement, and need not do anything to manifest assent to such a license agreement other than actually taking possession of the product. From the user's vantage point, Smart Download could be analogized to a free neighborhood newspaper, readily obtained from a sidewalk box or supermarket counter without any exchange with a seller or vendor. It is there for the taking.

The court distinguished those cases which upheld the enforceability of click-wrap and shrink-wrap agreements on the grounds that in those settings, the user must "perform an affirmative action unambiguously expressing assent before they may use the software," such as clicking on "I agree" icon.

The full text of the court's decision can be found on a web site maintained by the United States District Court for the Southern District of New York and CourtWeb.

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