

# **TEACHING *STARE DECISIS* USING BROWSE WRAP AGREEMENTS**

**By Robert D. Sprague, JD, MBA**

Assistant Professor of Business Administration  
Eastern New Mexico University  
College of Business

One of the first challenges in teaching any introductory law course is communicating the nature of common law and the role of *stare decisis* in its development. Understanding how common law develops through the doctrine of *stare decisis* is critical for students, but particularly difficult when first being introduced to the law. Fortunately, there are a variety of legal doctrines currently under development, particularly in the high tech environment, that offer superb living examples of *stare decisis*.

This paper discusses the use of the development of the law relating to “browse wrap” agreements as an embodiment of how common law develops, and the role of *stare decisis* in that development. The notion of browse wrap agreements represents a novel legal issue in its early stage of development, addressed by only a few courts. In addition, using a high tech example is highly relevant to students, many of whom have probably encountered a browse wrap agreement.

## **A BRIEF REVIEW OF THE DOCTRINE OF *STARE DECISIS***

The doctrine of *stare decisis* is the policy of courts to abide by, or adhere to, previously decided cases. In general, once a court has decided a matter, it will decide subsequent cases containing substantially similar facts consistent with its earlier decisions.<sup>1</sup> Previous cases become binding precedent for future cases. When a matter comes before a court, therefore, it looks to past cases to determine present issues.<sup>2</sup>

An integral element of *stare decisis* is also which courts have binding authority over other courts. Where a court’s decisions are binding on inferior courts, previously decided cases from the superior court become binding precedent for future matters in inferior courts. Concomitant with the notion of the consistency provided by the doctrine of *stare decisis*, if a court cannot find binding precedent for a particular issue, it will look to previous cases from non-binding courts in an effort to find guidance so that, again, consistent law can be developed for emerging issues.

In a common law system, where the body of law develops case-by-case, the doctrine of *stare decisis* is critical for the development of a consistent and reliable body of law. But the actual process is not so simple. Trial courts are not bound by other trial court decisions, and therefore can rule differently on the same issue. In addition, each state has its own body of common law, developed independently of the other states.

## **AN OVERVIEW OF BROWSE WRAP AGREEMENTS**

A “browse wrap” agreement is particular to Web sites, which are accessible through the Internet. Visitors to a Web site “browse” through the site, using their mouse to click on links which take them to different parts of the Web site. A browse wrap agreement is a license

agreement that is part of a Web site and a visitor assents to the agreement by visiting the Web site.<sup>3</sup> To date, there have only been two cases which have dealt with the browse wrap issue<sup>4</sup>, and each case dealt with some technical variations regarding how the browse wrap agreement existed on the Web site.

In *Pollstar v. Gigmania Ltd.*<sup>5</sup>, Pollstar maintained a Web site containing time-sensitive information. By accessing Pollstar's Web site, visitors (users) could download<sup>6</sup> and use the information pursuant to conditions of a license agreement. Pollstar alleged that any user of its Web site is immediately confronted with a notice that use of the Web site is subject to a license agreement.<sup>7</sup> However, visitors to the Web site did not see the terms of the license agreement unless they selected (clicked on) a link which would then display the terms.

*Specht v. Netscape Communications Corp.*<sup>8</sup> involved computer software that users could download to their computers from the defendant's Web site. The Web page on which the users could initiate the download contained a link which stated: "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software."<sup>9</sup> If users clicked on (activated) this link, they were taken to a Web page containing the terms of the license agreement. However, users were not required to activate the link before they could initiate and complete the download of the software.<sup>10</sup>

The common element in both these cases is that one party is providing intellectual property (e.g., information or computer software) subject to a license agreement the terms of which the recipient will not see unless they (the recipient) take an affirmative action (activating a Web page link) to view the terms. The ultimate legal issue is whether users have manifested assent to a license agreement by using or obtaining services or information subject to the license agreement, without taking affirmative steps to view the terms of the license agreement.

In *Pollstar*, the court declined, in considering the defendant's motion to dismiss, to declare the invalidity and unenforceability of the browse wrap agreement at that time.<sup>11</sup> In contrast, the court in *Specht* found there was no assent on the part of the plaintiffs to the terms of the browse wrap agreement.<sup>12</sup>

## USING CLICKWRAP AGREEMENTS TO TEACH *STARE DECISIS*

The browse wrap agreement issue is an ideal candidate for teaching the doctrine of *stare decisis* because:

1. It is a novel issue just now reaching the courts;
2. It has only been directly dealt with by two courts in different jurisdictions; and
3. Each court has reached a different conclusion regarding enforceability.

The browse wrap agreement issue provides an opportunity to detail how the common law system, when confronted with a novel legal issue, develops a legal doctrine through the decisions of various courts. In particular, it can be used to illustrate how different courts can reach equally binding, but different conclusions – at least until a superior court addresses the issue.

In addition, both cases exemplify how a court deals with cases of first impression. Since there is no controlling authority on the issue, both the *Pollstar* and *Specht* courts had to search for analogous situations in order to find guidance as to what would be the best approach to deal with this new issue. Both courts examined the evolution of computer-related license agreements, from shrink wrap licenses<sup>13</sup> to click wrap licenses<sup>14</sup>, to this latest incarnation – the browse wrap license. Interestingly, both the *Pollstar* and *Specht* courts closely examined the case of *ProCD*,

*Inc. v. Zeidenberg*<sup>15</sup> for guidance, and each court used it as part of its basis for ruling that a browse wrap agreement may be enforceable (*Pollstar*<sup>16</sup>) or is not enforceable (*Specht*<sup>17</sup>).

This paper illustrates how the browse wrap issue can be used to walk students through the process of how cases are brought into court, how different jurisdictions can reach decisions independent of each other, and how binding authority is established through the doctrine of *stare decisis*. Provided below are steps, with accompanying presentation slides, that have been used in a Business Law I class to illustrate these issues.<sup>18</sup>


### Step 1: Explain the basic facts and issues.

**Facts:** Internet users often download software from various Web sites. This software is provided subject to a License Agreement. Some software providers only make the License Agreement available through a link (which users must select) that is located in a pop-up box that displays during the download process (and the link sometimes is not visible unless the user scrolls through the text presented in the pop-up box). In some instances, users are not required to even view the License Agreement in order to proceed with the software download; however, the License agreement itself generally states that by downloading and using the software, the user agrees to be bound by the terms of the License Agreement. This has been referred to as a “browse wrap” agreement.<sup>19</sup>

**General Rule:** Before a party is bound by the terms of an agreement, that party must be aware of those terms.

**Issue:** Is this a sufficient means of making the user aware of the License Agreement, and making the user bound by the terms of the License Agreement?

### Step 2: Assume the first browse wrap case is brought in local state trial court.



Is a Browse Wrap Agreement Binding?

Case brought on this issue in New Mexico state trial court.


Court will initially look for “controlling authority.”

- Has the New Mexico Supreme Court ruled on the same issue?
  - If so, the NM state trial court must follow that ruling.

NM State Trial Court 1

 ?

If there is no controlling authority the court will look to see if this issue has been addressed by courts in other states and jurisdictions.




Is a Browse Wrap Agreement Binding?

Case brought on this issue in New Mexico state trial court.

If there is no “controlling authority” then the NM state trial court will look for rulings on the same issue from other courts for “guidance.”

NM State Trial Court 1 ?

If no other courts have directly dealt with this issue, the court may then look to see how other courts dealt with closely related issues, such as shrink wrap or click wrap license agreements – to see if any of the reasoning applied in those cases can be applied in the present case.



Is a Browse Wrap Agreement Binding?

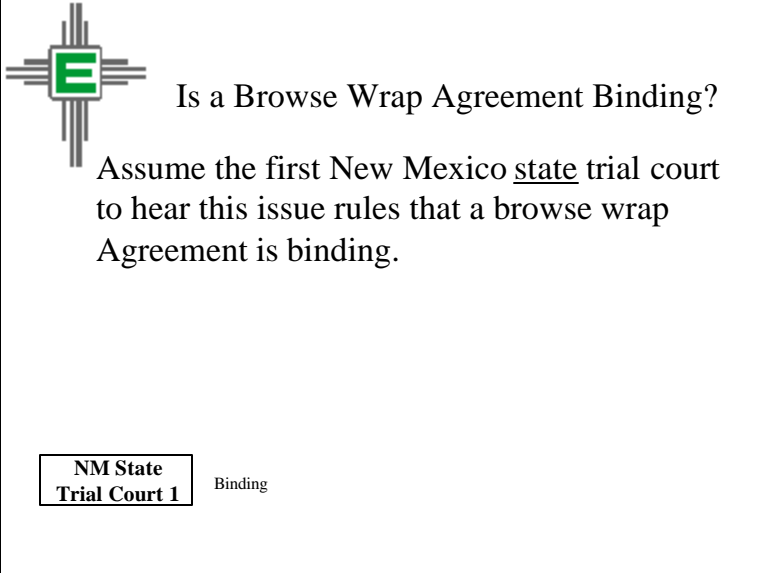
Case brought on this issue in New Mexico state trial court.


If no other court has ruled on this issue, then it is a case of “first impression.”

- NM state trial court may look to see how other courts have dealt with similar issues.
- e.g., “shrink wrap” and “click wrap” cases.

NM State Trial Court 1 ?

**Step 3: Assume the first state court to hear this issue rules that a browse wrap agreement is binding.**

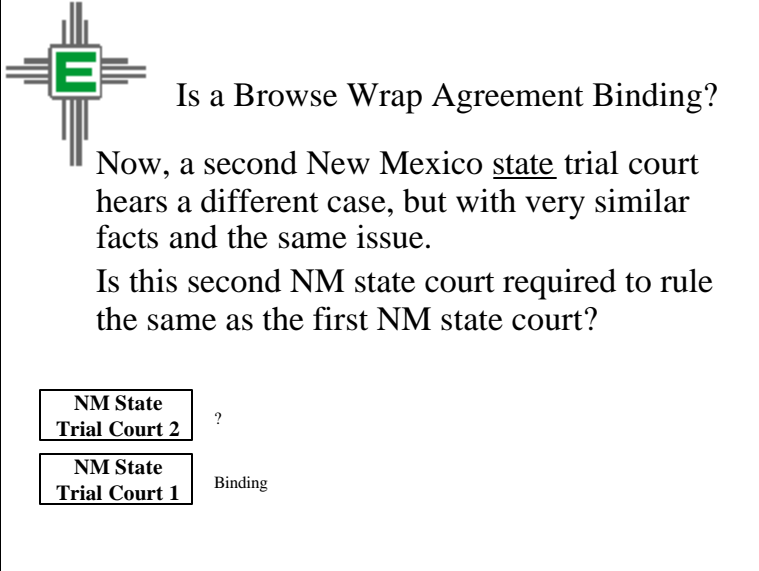



 Is a Browse Wrap Agreement Binding?

Assume the first New Mexico state trial court to hear this issue rules that a browse wrap Agreement is binding.

**NM State Trial Court 1** Binding

**Step 4: Assume a second browse wrap case is brought in the same state, but in a different state trial court.**



 Is a Browse Wrap Agreement Binding?

Now, a second New Mexico state trial court hears a different case, but with very similar facts and the same issue.


Is this second NM state court required to rule the same as the first NM state court?

**NM State Trial Court 2** ?

**NM State Trial Court 1** Binding

The second state trial court will go through the same process of searching for binding authority. Failing to find any, the court will also look for other browse wrap cases for guidance – including the first state trial court decision (if it is brought to the court’s attention). But the second state trial court is not bound by the decision of the first state trial court.

**Step 5: Assume the second state trial court rules that a browse wrap agreement is not binding.**



Is a Browse Wrap Agreement Binding?


The second New Mexico state trial court is not required to rule the same as another trial court. The judge may interpret the law and the facts differently than another trial judge.

- Assume the second NM state trial court rules that a browse wrap agreement is not binding.

NM State Trial Court 2	Not Binding
NM State Trial Court 1	Binding

This illustrates that trial courts, not only within the same state, but also next door to each other, can rule differently on the same basic set of facts.

**Step 6: Assume a third case is brought on substantially the same issues, this time in federal district court (in the same state as the first two cases).**




Is a Browse Wrap Agreement Binding?

A third case, with very similar facts and the same issue is now brought in the Federal District (trial) court located in New Mexico. Is the federal court required to rule the same as the first, or the second, NM state court?

NM State Trial Court 2	Not Binding	NM Fed. Dist. Court 1	?
NM State Trial Court 1	Binding		

This illustrates that the federal district court, hearing a common law contract matter, sits as just another state court (in the jurisdiction) and goes through the same process of looking for binding authority.




### Is a Browse Wrap Agreement Binding?

Initially, the federal district court will look to see if there is “controlling authority” in New Mexico on this issue (because the federal court is applying NM state law).

- Has the NM Supreme Court ruled on the same issue?
  - If so, the federal district court must follow that ruling.

NM State Trial Court 2	Not Binding	NM Fed. Dist. Court 1	?
NM State Trial Court 1	Binding		

**Step7: Assume the federal district court rules that a browse wrap agreement is binding.**




### Is a Browse Wrap Agreement Binding?

At this point, there is no controlling authority in New Mexico regarding this issue. Therefore, the federal court is not bound by any NM state court decisions.

- Assume the federal district court rules the browse wrap is binding.

NM State Trial Court 2	Not Binding	NM Fed. Dist. Court 1	Binding
NM State Trial Court 1	Binding		

**Step 8: Assume the first state trial court decision is appealed to and upheld by the state Court of Appeals.**




### Is a Browse Wrap Agreement Binding?

Next, the first NM state court decision is appealed to the NM state Court of Appeals.

- Assume the NM state Court of Appeals upholds the first state trial court decision.
- Must the second NM state trial court change its ruling?

NM State Ct. of Appeals	Binding	
NM State Trial Court 2	Not Binding	NM Fed. Dist. Court 1
NM State Trial Court 1	Binding	Binding

It can now be pointed out that the state Court of Appeals ruling is only binding on the case which was appealed (as well as any future cases under that particular Court of Appeals district).



### Is a Browse Wrap Agreement Binding?

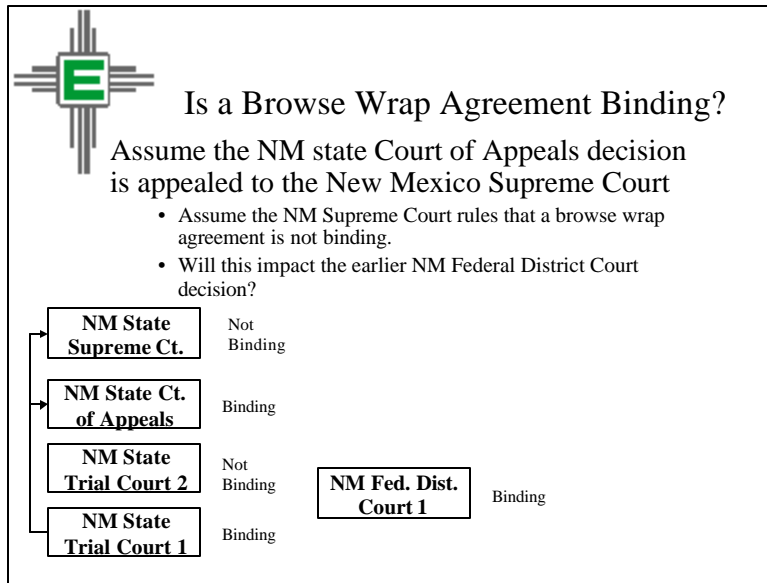
The NM state Court of Appeals upholds the first state trial court decision.

- Must the second NM state trial court change its ruling?
- No, the Court of Appeals decision only applies to the case being appealed (and future cases in its district).

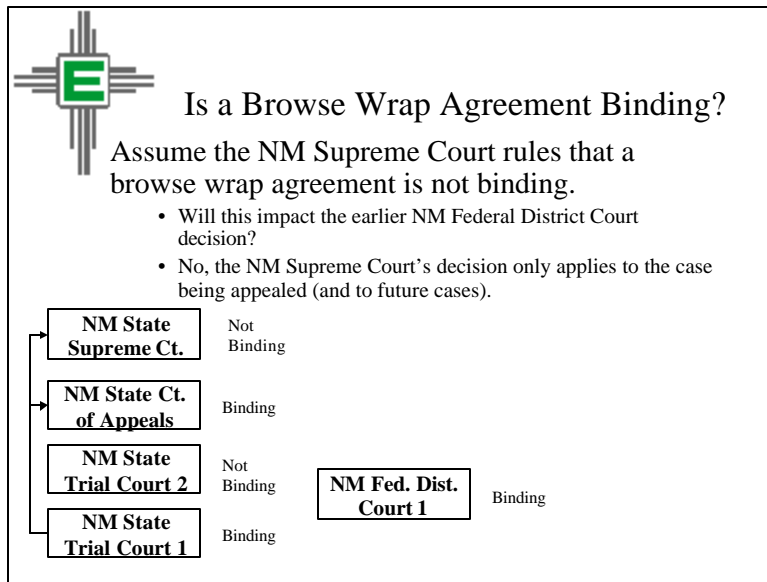
NM State Ct. of Appeals	Binding	
NM State Trial Court 2	Not Binding	NM Fed. Dist. Court 1
NM State Trial Court 1	Binding	Binding



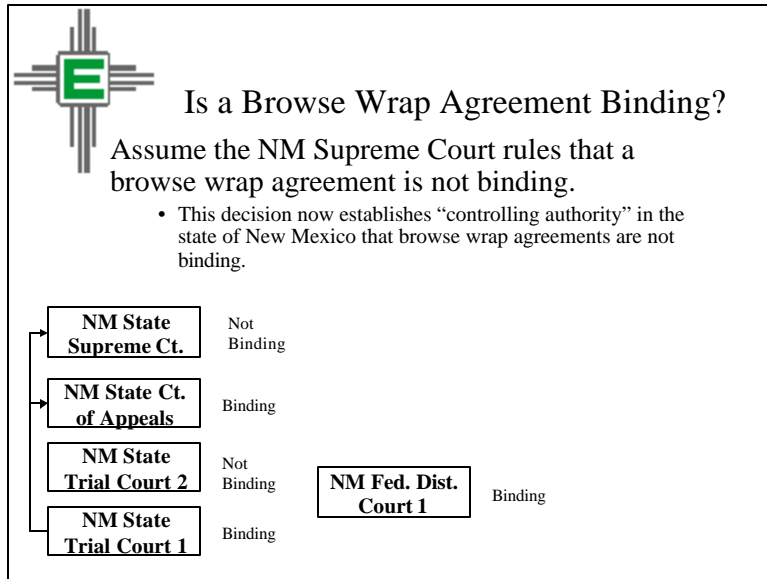
**Step 9: Assume the state Court of Appeals decision is appealed to and reversed by the state Supreme Court.**



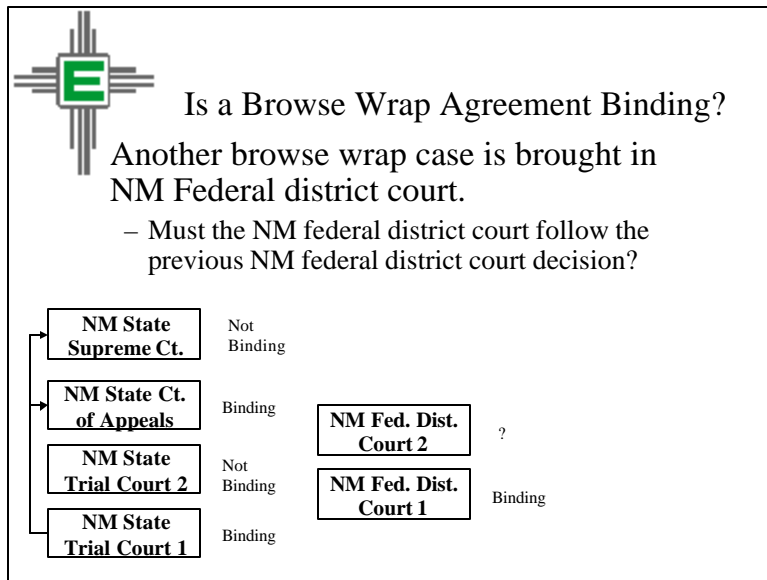
It can now be pointed out that the state Supreme Court decision does not affect the earlier federal district court decision.




Controlling authority has now been established within the state (and its jurisdiction).



**Step 10: Assume another browse wrap case is brought in federal district court (in the same state as the previous browse wrap cases).**



Just as before, trial courts are not bound by other trial court decisions (a federal district court is not bound by the decisions of another federal district court nor the decisions of the trial courts in the state of applied law).




### Is a Browse Wrap Agreement Binding?

Another browse wrap case is brought in NM Federal district court.

- Must the NM federal district court follow the previous NM federal district court decision?
- No, the second NM federal district court is not required to rule the same as another district (trial) court.

NM State Supreme Ct.	Not Binding		
NM State Ct. of Appeals	Binding	NM Fed. Dist. Court 2	?
NM State Trial Court 2	Not Binding	NM Fed. Dist. Court 1	Binding
NM State Trial Court 1	Binding		

However, if there is binding authority in the state of applied law . . .



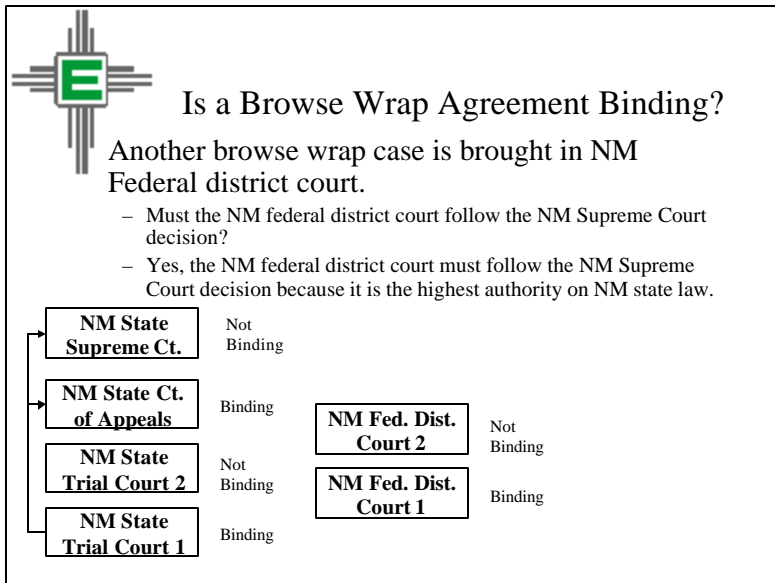
### Is a Browse Wrap Agreement Binding?

Another browse wrap case is brought in NM Federal district court.

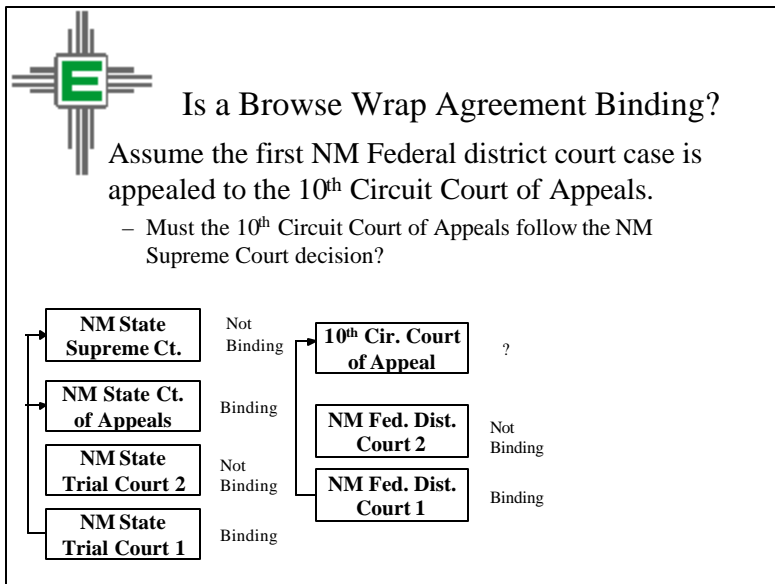
- Must the NM federal district court follow the NM Supreme Court decision?

NM State Supreme Ct.	Not Binding		
NM State Ct. of Appeals	Binding	NM Fed. Dist. Court 2	?
NM State Trial Court 2	Not Binding	NM Fed. Dist. Court 1	Binding
NM State Trial Court 1	Binding		

The federal district court will be bound by a previous decision of the Supreme Court of the state of applied law . . .

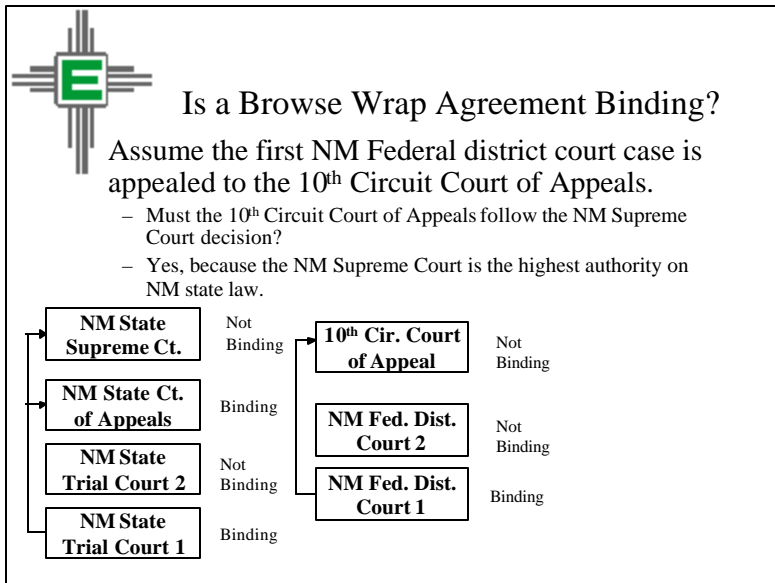


**Step 11: Assume the first district court decision is appealed to the appropriate federal Circuit Court of Appeals.**

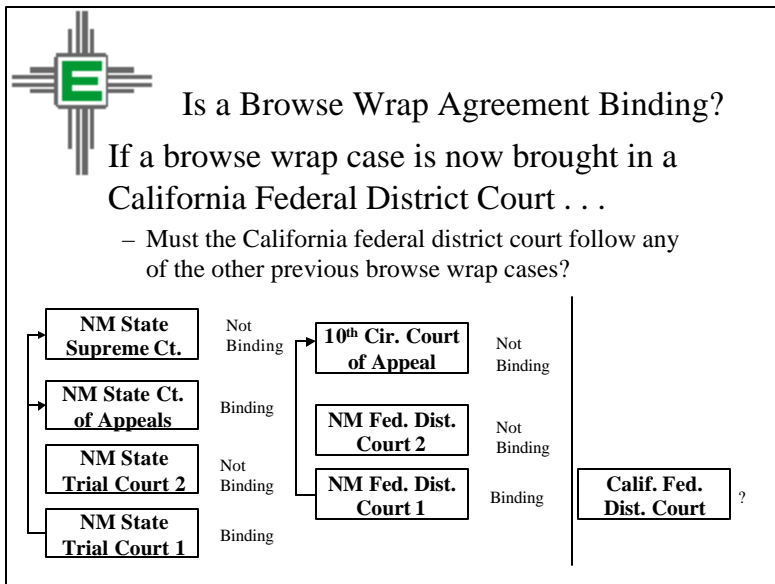


Must the federal Circuit Court of Appeals follow the previous decision of the state Supreme Court?

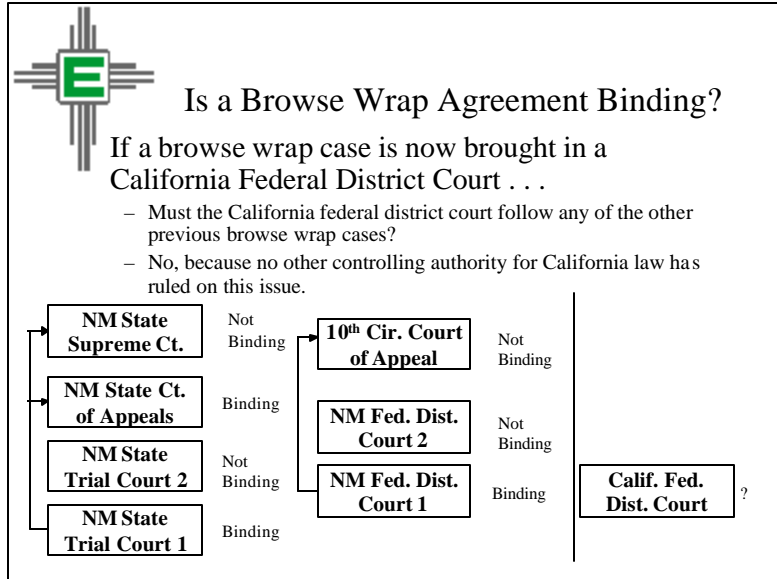
When applying state common law, the federal Circuit Court of Appeals is bound by the highest authority in the state – that state’s Supreme Court . . .



**Step 12: Assume a browse wrap case is brought in federal district court in another state (applying that other state’s common law).**

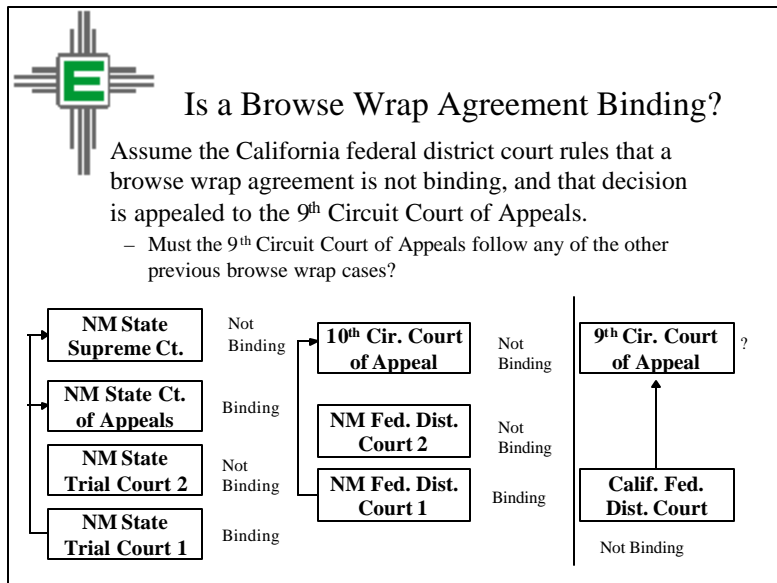


Are any of the previous browse wrap cases binding upon this federal district court?

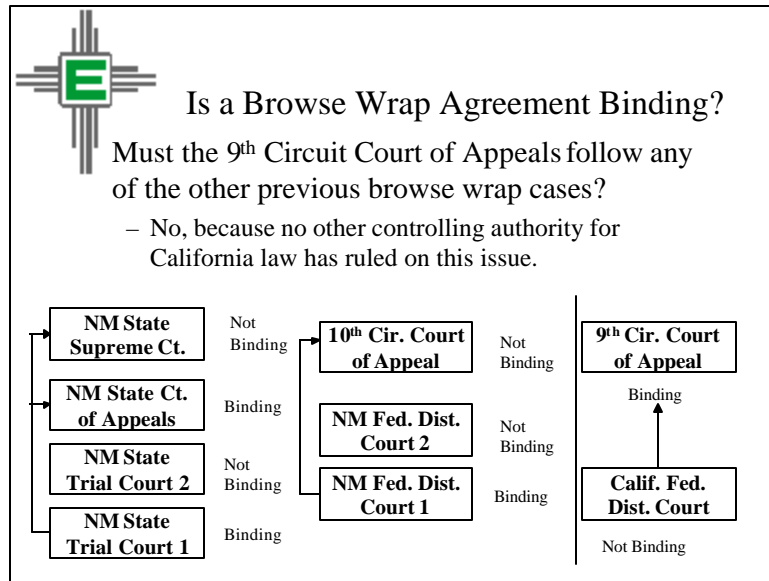


This is a case of first impression in that other state. There is no controlling authority for this federal district court. It may look to the previous browse wrap cases for guidance, but is not bound by them.

**Step 13: Assume the latest federal district court rules that browse wrap agreements are not binding and that decision is appealed to the appropriate, but different, federal Circuit Court of Appeals.**



Must this different federal Circuit Court of Appeals follow the previous federal Circuit Court of Appeals decision?



As with the federal district court, when applying state common law, the federal Circuit Court of Appeals is only bound by the ruling of the Supreme Court of the state of applicable law. Here, there is no binding authority in the applicable law state. However, as with the federal district court, the federal Circuit Court of Appeals may look to the previous cases for guidance.

### CONCLUSION

The first 11 steps in this illustration demonstrate how law is made within a state, as well as how, during this process, courts determine whether or not they are bound by the previous decisions of other courts. The final steps illustrate how common law develops independently within each state.

The browse wrap issue is an ideal candidate for this illustration, not only because it is a new issue evolving out of the rapidly developing high tech field, but also because two courts, in two separate jurisdictions, have ruled differently on the issue, while both have heavily relied upon the same previous case for guidance.

## NOTES

---

<sup>1</sup> The term *stare decisis* is derived from the phrase *stare decisis et non quieta novere* – “let the decision stand and do not disturb things which have been settled.” Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 602, 602 n.2 (2001), citing John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1 n.2 (1983).

<sup>2</sup> Reliance upon binding precedents leads courts to begin every new case with an examination of the past. The resolutions that arise in turn form a foundation for future cases. The doctrine of *stare decisis* thus creates a seamless web connecting the past to the present and future.

*Id.*, at 602.

<sup>3</sup> See *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

<sup>4</sup> There is a third known (unreported) case which has dealt very peripherally with the browse wrap issue. In *Ticketmaster Corp., et al. v. Tickets.com, Inc.*, Case No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553; 54 U.S.P.Q.2d (BNA) 1344; Copy. L. Rep. (CCH) P28,059 (C.D. Cal. March 27, 2000), Ticketmaster filed a complaint against Tickets.com for, among other things, copyright infringement and breach of contract, based on Tickets.com hyperlinking to the Ticketmaster Web site. The court described a browse wrap agreement similar to the one described in *Pollstar*, *supra* n. 3, when noting that Ticketmaster’s

. . . home page further contains (if a customer scrolls to the bottom) “terms and conditions” which proscribe, among other things, copying for commercial use. However, the customer need not view the terms and conditions to proceed straight to the event page which interests him.

2000 U.S. Dist. LEXIS 4553, 2-3. In granting Tickets.com’s motion to dismiss the breach of contract claim (but with leave to amend), the court stated, “It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one using the web site.” *Id.* at 8.

This case again came before the same court in relation to Ticketmaster’s motion for preliminary injunction against Tickets.com. *Ticketmaster Corp. v. Tickets.com, Inc.*, Case No. CV99-7654-HLH (BQRx), 2000 U.S. Dist. LEXIS 12987; Copy. L. Rep. (CCH) P28,146 (C.D. Cal. August 10, 2000). The only reference to the possible browse wrap issue was the court’s refusal to grant a preliminary injunction on the basis that the “. . . contract theory lacks sufficient proof of agreement by defendant to be taken seriously as a ground for preliminary injunction.” *Id.* at 18. The denial of preliminary injunction was upheld without published opinion. *Ticketmaster Corp., et al. v. Tickets.com, Inc.*, 248 F.3d 1173 (9<sup>th</sup> Cir. 2001).

Because the browse wrap issue in *Ticketmaster* is only dealt with peripherally at such an early procedural stage, it is not “counted” as a browse wrap case in this paper. According to Tickets.com’s latest SEC filings, the case is still in the discovery phase, with trial tentatively set for January 3, 2003.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> In other words, copy information from the Web site to the visitor’s personal computer.

<sup>7</sup> *Supra* note 3 at 977.

<sup>8</sup> 150 F. Supp. 585 (SDNY 2001).

<sup>9</sup> *Id.* at 588.

<sup>10</sup> *Id.*

<sup>11</sup> *Supra* note 3 at 982.

<sup>12</sup> *Supra* note 8 at 596.

<sup>13</sup> Shrink wrap licenses initially related only to packaged computer software where the packaging itself provided a notice to the consumer that use of the enclosed software was subject to a license agreement (also enclosed in the package). Shrink wrap licenses have also evolved into agreements encoded into the software itself, so that users have to assent to the terms of the license agreement before they can operate the software. As a general matter, shrink wrap licenses have been found to be enforceable. *Specht*, *supra* note 8 at 592, citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451-52 (7<sup>th</sup> Cir. 1996). See also *Pollstar*, *supra* note 3 at 981.

<sup>14</sup> A click wrap license arises when a user attempts to download software from a Web site. Before the user may download the software, they must select a button (which usually states something to the effect of “I Agree”) which indicates assent to the terms of the controlling license agreement. See *e.g.*, *Specht*, *supra* note 8 at 593-94. See also James C. Hoyer, *Click – Do We Have a Deal?*, 6 SUFFOLK J. TRIAL & APP. ADV. 163, 164 (2001).

<sup>15</sup> 86 F.3d 1447 (7<sup>th</sup> Cir. 1996), upholding a shrink-wrap license agreement where each time the user started the computer software a message was displayed informing the user the software was subject to a license agreement and directing the user how to view the terms of the license agreement.



---

<sup>16</sup> *Supra* note 3 at 982.

<sup>17</sup> *Supra* note 8 at 594-95.

<sup>18</sup> The accompanying slides use New Mexico courts as the primary example courts, as the course is taught in New Mexico. A copy of the presentation slides is also provided so that they can be tailored to other jurisdictions.

<sup>19</sup> These facts are based on Specht, *supra* note 8.