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 19 CORPORATION and AMERICA ONLINE, INC.

20 **UNITED STATES DISTRICT COURT**  
 21 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 22 **SAN JOSE DIVISION**

23 NETSCAPE COMMUNICATIONS  
 24 CORPORATION, et al.,

25 Plaintiffs,

26 v.

27 FEDERAL INSURANCE COMPANY, et al.,

28 Defendants.

CASE NO. 5:06-CV-00198 JW (PVT)

Case Filed: December 12, 2005

Assigned to: Hon. James Ware

Courtroom: 8

**DECLARATION OF MARC PATTERSON  
 IN SUPPORT OF PLAINTIFFS' CROSS-  
 MOTION FOR PARTIAL SUMMARY  
 JUDGMENT**

Date: March 26, 2007

Time: 9:00 a.m.

Judge: Hon. James Ware

Place: 8, 4<sup>th</sup> Floor, San Jose

**DECLARATION OF MARC PATTERSON**

I, Marc Patterson, declare as follows:

1. I am the Vice President and General Manager of Mobile Data Services for BT Infonet. BT Infonet is a leading provider of managed network communication services for multinational entities. BT Infonet conducts operations and provides services in more than 170 different countries. Its primary activities include networked IT services, local, national, and international telecommunication services, and “higher-value” broadband and internet products and services. BT Infonet is also the owner and operator of a privately-owned, proprietary “backbone” known as The World Network.® Operating 24/7 and accessible from nearly all points on the planet, The World Network® functions as the platform for providing a wide variety of sophisticated technologies to clients, including email services, instant messaging services, content-delivery solutions, and third party access.

2. Suffice it to say, I understand the Internet, Internet-related activities, the concept of online activities and services, and the technologies, connections and interconnections which lend themselves to (seemingly) seamless communications between and among users. I have detailed, first-hand knowledge of these topics because I served as Infonet’s Director of Managed Access Services prior to Infonet’s acquisition by BT Group, plc in 2005. Immediately prior to my post as Director of Managed Access Services, I served as the head of Infonet’s Global Connect Access offering. In both capacities, I helped “build-out” Infonet’s World Network.® In addition to designing many of the underlying systems and connections that “hook” The World Network® to the public Internet, to private internets, to various intranets, and to end-users (and each of the other), I was, and continue to be, responsible for devising and implementing systems and solutions for enabling customers to deliver, among other things, email services, instant messaging services, third party advertising, and third party content. Understanding such services, their functionalities, and their interface with the Internet are absolutely critical to my current position with BT Infonet, inasmuch as mobile solutions – wireless and remote access capabilities – fundamentally depend on the existence, stability, operability, and connectivity to The World Network® and each of its constituent pieces.

1           3. Based upon my background and expertise, I have been asked by Plaintiffs  
2 Netscape and AOL to review and render opinions regarding various factual issues pertaining to  
3 Netscape's SmartDownload product, its functionality, and the group of lawsuits comprising the  
4 so-called "SmartDownload Lawsuits." Toward this end, I have reviewed data and information  
5 provided to me by Plaintiffs' counsel. Likewise, I have conducted my own research (and made  
6 my own inquiries) regarding issues and topics which I feel were necessary to inform my  
7 opinions. Accordingly, my opinions are as follows:

8           (a) As its name suggests, Netscape's SmartDownload product is a software  
9 tool (or utility) whose primary function is to facilitate the transfer of large files over the Internet  
10 by permitting a transfer to be resumed if interrupted. As designed, the product alleviates two of  
11 the most common (and frustrating) aspects of the download process: "frozen" downloads and  
12 downloads interrupted by a telephone calls where internet access is affected via a phone modem.  
13 The complaints comprising the SmartDownload lawsuits make these points plain.

14           (b) SmartDownload is a service unto itself. It does not provide Internet  
15 access to third parties, or anyone else for that matter. Indeed, a functional pre-requisite of the  
16 SmartDownload product's use and operability is the requirement that a user has already accessed  
17 the Internet. This initial connection to the Internet is typically facilitated through a users' ISP  
18 (Internet Service Provider), of which the choices are many, including AOL, Earthlink, MSN,  
19 Juno, NetZero, Covad, and Roadrunner to name just a few.<sup>1</sup> To be clear: SmartDownload is not  
20 an ISP; moreover, SmartDownload is completely indifferent to which ISP provides a user with  
21 connectivity (access) to the Internet. Yet, access must be obtained. For absent a user's  
22 connection to the Internet, SmartDownload cannot be placed into the environment necessary to  
23 its operation.

24           (c) As for the data transfer process SmartDownload facilitates (i.e.,  
25 "downloading"), the movement of a file from one computer to another – by or through use of the

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27 <sup>1</sup> For the United States, you can find an alphabetical arrangement of service providers and  
28 attendant services at <http://www.thelist.com/misc/usa/>. The list is quite extensive. Looking just  
at the Court's 408 area code, for example, there are more than 500 different Internet Service  
providers, ranging from A1 Excel Internet to Zzapp! Internet Services.

1 Internet – does not constitute the provision of Internet access to third parties or otherwise. To  
2 speak of “downloading” and Internet access in the same sentence is to mix apples and oranges.  
3 They are completely separate processes. As commonly understood, “downloading” is an activity  
4 unto itself.<sup>2</sup> SmartDownload merely makes the download process more convenient by allowing  
5 for interruptions. At no level does SmartDownload connote either Internet access or Internet  
6 connectivity. As noted above, third party Internet access is a service provided by an ISP, and  
7 represents the users’ “on-ramp” to the Internet. SmartDownload does not provide such  
8 functionality.

9 (d) From reviewing the complaints in the SmartDownload lawsuit, I have  
10 taken note of the claimants’ allegations that SmartDownload (secretly) eavesdropped,  
11 intercepted, and sent to Netscape and AOL “profiling” information regarding users’ downloads,  
12 web visits, and other online behavior. I have also reviewed SmartDownload’s technical  
13 specifications to determine possible functionalities regarding these allegations. Although I do  
14 not purport to render any views regarding the truth of claimants’ assertions, I can (and do) opine  
15 – *based upon SmartDownload’s operability* – that electronic eavesdropping, interception, and  
16 other purported wrongdoing could not have been facilitated via SmartDownload’s provision of  
17 third party Internet access. The reason for this conclusion is obvious: SmartDownload did not  
18 provide third party Internet access for any purpose – legitimate, illegitimate, or otherwise.  
19 Simply put, it is not part of the software package (and resulting functionality) that is  
20 SmartDownload.

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23 <sup>2</sup> “Downloading” is simply the process of transferring a file from Computer A to Computer B.  
24 Before the Internet came of age, this was accomplished in the physical world by copying a file  
25 from operating system A onto a disk (or other storage medium) and then physically walking it  
26 over to operating system B and reversing the process (an “upload”). None of this depended on  
27 third party Internet access. Today, the Internet obviates the need for the transaction’s middle  
28 step – interim storage and walking the saved file between computers – to affect a data transfer.  
Rather, information can be simply sent along the Internet from Computer A to Computer B. To  
make this work, however, an ISP must have already provided both users with Internet access  
which, as noted, is a function wholly separate and apart from the actual download/upload  
process.

1 (e) I have also reviewed the deposition testimony of St. Paul claim  
2 adjusters Dale Evensen and Daniel Weiss. From what I've read, they do not appear to  
3 understand SmartDownload, its functionality, or technical aspects of what's being said in the  
4 complaints comprising the SmartDownload Lawsuits:

5 (i) Dale Evensen. For example, Mr. Evensen testifies that he  
6 believed SmartDownload triggered the policy's "Online Activities" exclusion and, specifically,  
7 its reference to the "providing of internet access to third parties." See 180:12-15. As explained  
8 by Mr. Evensen, this was so because

9 "The claims as alleged arose out of the use of the program  
10 [SmartDownload], which was obtained on or over the internet,  
11 and it arose out of internet access that was provided by AOL and  
12 Netscape." Id. at 180:18-21.

13 In the case of Netscape, Mr. Evensen further explained that its browser provided internet access  
14 (see id. at 180:22-181:4) because it allowed users "to search the internet and access various  
15 websites." See id. at 180:22-181:7. Mr. Evensen also testified that the term "internet access"  
16 included "finding your way around the internet." See id. at 181:8-13. As applied to  
17 SmartDownload, neither conclusion is correct. As noted above, Internet access was not among  
18 the functionalities provided by the SmartDownload product. Similarly mistaken is Mr.  
19 Evensen's views regarding the purpose and function of an Internet browser. A "browser" is just  
20 a fancy term for a navigational device that allows users to search-out information on the Internet  
21 *once access has been established through a user's chosen ISP*. As with SmartDownload itself,  
22 Internet access is a pre-requisite to a browser's functionality and, in any event, SmartDownload  
23 does not contain a browser. Netscape's browser (dubbed "Communicator") functioned  
24 independently of the SmartDownload product. Moreover, SmartDownload was designed to  
25 work no matter what browser a user had chosen for his operating system. As with ISPs, Internet

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1 browser options are many.<sup>3</sup> Simply put, Mr. Evensen's conclusions do not accord with the  
2 realities of the SmartDownload product or basic understandings of the Internet and its environs.

3 (ii) **Daniel Weiss**. For his part, Mr. Weiss takes issue with aspects  
4 of Mr. Evensen's conclusions. For example, Mr. Weiss (rightly) acknowledges that it is not  
5 reasonable to assimilate the concept of "internet access" to a "browser." See Weiss Depo Tr. At  
6 133:21-134:19. Yet despite this understanding, Mr. Weiss goes on to misconstrue  
7 SmartDownload's functionality, as well as the allegations contained in the SmartDownload  
8 complaint. Indeed, Mr. Weiss testifies that, in his view, the SmartDownload complaints satisfy  
9 the policy's Online Activities exclusion's "providing internet access" descriptor because

10 " [t]aking the [lawsuit's] allegations as a whole in the underlying  
11 complaints it was clear to me that the only way this information  
12 could be – the allegedly private information could be obtained  
13 was through internet access to third parties, and that's what was  
14 being alleged here is that through access to the internet that  
15 SmartDownload was capturing private information and  
16 transmitting it back to Netscape and AOL." Id. at 126:9-20.

17 I disagree. As noted (repeatedly) above, SmartDownload's functionality does not include any  
18 means/mechanism for providing any type of access to the Internet. I also disagree with Mr.  
19 Weiss' conclusion – purportedly drawn from the SmartDownload Lawsuit's complaints – that  
20 the claimants' private information was being transmitted to Netscape and AOL through Internet  
21 access provided by SmartDownload. *Actually*, the SmartDownload complaints merely allege  
22 that SmartDownload transmitted data. They don't allege *how* it transmitted data or, more  
23 fundamentally, *who* provided the Internet access that allowed such transmission to take place.  
24 This is not surprising because (to once again state the obvious), SmartDownload's functionality  
25 does not include the provision of Internet access to anyone, let alone third parties. Finally, I also

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28 <sup>3</sup> By way of example, the website <http://browsers.evolt.org/> lists more than 100 different types of Internet browsers, ranging from 1x to WorldWideWeb (Nexus).

1 disagree with Mr. Weiss' conclusion that SmartDownload provides Internet access by reason of  
2 the fact that it allows users to

3           “[f]ind and use and download files. That's what a hugh  
4           [sic] part of internet access is all about. This product  
5           [SmartDownload] was distributed in connection with the  
6           web browser Communicator, It's a component of the  
7           browser that allows – the portal that allows some one to  
8           access the internet and then to further access it through  
9           SmartDownload.” See *id.* at 128:10-17

10 Mr. Weiss' mistakes here are many. While SmartDownload *does* help users “download” files, it  
11 does *not* help them find or use them. Finding files on the Internet is more properly described as  
12 a function of the user's browser which, as noted, operates independently of the SmartDownload  
13 product. As for files' use, those functionalities are bound-up in other portions of individual  
14 users' existing hardware and operable software programs. SmartDownload's functionality does  
15 not touch on the “use” of acquired files. It simply facilitates the download process. Once the  
16 transfer process is completed, SmartDownload's job is finished.

17           Mr. Weiss is also wrong when he states that SmartDownload is a  
18 “component” of Netscape Communicator. In truth, the two programs are not bundled. They  
19 function independently of each other. In practice, a user would locate files on the Internet  
20 through his browser, be it Netscape “Communicator” or one of a 100+ other Internet browsers.  
21 Thereafter, SmartDownload would be independently activated to download any files located.  
22 Whereas the two functions (browser and download) may be called into play one after another, 1-  
23 2, that timing coincidence is wholly a function of the user's decision-making and usage habits. It  
24 is not inherent in either SmartDownload or Netscape Communicator which each provide “stand  
25 alone” functions. Lastly, Mr. Weiss (wrongly) links together the SmartDownload,  
26 Communicator, and the concept of an internet “portal.” While those concepts are interrelated at  
27 an abstract level, functionally, they are not dependent on each other or any specific product. For  
28 while it is true (a) an internet portal (access) is needed before a user can; (b) launch a browser to

1 locate files; and (c) download them with a tool like SmartDownload, each of these functions is  
2 independent of the others. For example, a user might choose Earthlink for his Internet portal  
3 (access), Microsoft Explorer for its Internet browser, and SmartDownload for his file transfer  
4 program. Were that the case, a user could easily access the Internet, locate a required file, and  
5 download it to his system. None of these applications is dependent on the presence,  
6 functionality, or operability of any specific product, let alone SmartDownload.

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