IT'S A WRAP: SHRINK-WRAP & CLICK-WRAP AGREEMENTS ARE ENFORCABLE

Over the past decade shrink-wrap agreements have been the subject of numerous lawsuits throughout the country. More recently, click-wrap agreements have been litigated, and the majority of courts have held that both of these types of agreements are typically enforceable. Despite arguments claiming that these agreements are contracts of adhesion or that the parties were not able to negotiate the terms, the agreements are held to be enforceable. For example, in *i.Lan Sys. Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp.2d 328 (D. Mass. 2002), the court held that the click-wrap agreement was enforceable and that the purchaser had assented to the terms of the agreement by installing and using the software. This Article will briefly analyze a few of the more recent decisions and identify key points that should be followed to enhance the likelihood of enforceability. There are a few cases that have not upheld the enforceability of shrink-wrap or click-wrap agreements and some of these will be discussed below as well.

Shrink-wrap agreements are typically used with off-the-shelf software or computer systems where the terms and conditions of use are set forth either on the box, inside the box, inside the user manual, on the CD case or located in some other fashion permitting a buyer or subscriber to review the agreement prior to purchase or installation. Generally speaking, acceptance of the shrink-wrap license agreement occurs by opening the box and installing the software or setting up the computer system. Click-wrap agreements, sometimes referred to as web-wrap agreements, are found on websites or with downloaded software where a user is required to click on the "I Accept" or "I Agree" button prior to proceeding with the next step. Browse-wrap agreements, on the other hand, refer to the terms and conditions of use for each website. Typically there is a hyperlink at the bottom of the website to another web page or to a pop-up window containing the terms of the agreement.

In addition to court opinions upholding such agreements, some jurisdictions have specific laws or regulations directly impacting their enforceability. For example, Maryland and Virginia have enacted the Uniform Computer Information Transaction Act (UCITA). This Model Act was proposed by the National Conference of Commissioners of Uniform State Laws. To date there have been no decisions from these jurisdictions on the enforceability of click-wrap agreements under UCITA. Please keep in mind that the National Conference of Commissioners on Uniform State Laws recently has withdrawn UCITA because of the significant backlash to the contents of the law and because many states have enacted laws preventing the application of UCITA to disputes in their courts. *See* Iowa Code 554D.104 (2003). For a more comprehensive analysis of this issue and the case for and against such agreements, please review the American Law Reports Annotation "Enforceability of 'click-wrap' or 'shrink-wrap' Agreements, and Computer Software, Hardware and Internet Transactions", 106 A.L.R. 5th 309 (2003).

One of the earliest and most influential cases addressing shrink-wrap agreements was decided in 1996 in *ProCD, Inc. ProCD, Inc., v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). Judge Easterbrook, writing for the court, held that the shrink-wrap agreement was enforceable as the purchaser had the opportunity, after opening and reviewing the software and shrink-wrap agreement, to return the product if the purchaser did not agree with the terms of the agreement. The court held that under the Uniform Commercial Code a shrink-wrap license agreement is enforceable unless the terms are objectionable on grounds under contract law, such as a violation of a rule of positive rule or unconscionability. In this particular instance, the purchaser was deemed to have notice of the license terms because they were on the outside of the box and the purchaser could have reviewed those terms prior to purchase. The terms were also available on the inside of the box. The terms provided a right to return the software for a refund if the terms were unacceptable. The purchaser did not return the software and therefore, the court reasoned, assented to the terms. Since the *ProCD* case, many other courts have held that similar agreements are enforceable and have relied on Judge Easterbrook's opinion as precedent.

The court in *i.Lan Systems*, held that the agreement would fill the void between a value-added reseller (VAR) agreement and a purchase order for any terms where the VAR agreement and purchase order were silent. Because both parties were merchants, under UCC § 2-207, additional terms were included in the agreement because they were not material. The court found that clicking the "I Agree" button while installing the software was an acceptable way to form a contract for the purchase of software.

Many courts have held that the purchaser has accepted or assented to the terms set forth in the click-wrap or shrink-wrap agreement by merely keeping either the software or computer beyond the time period for return as stated in the agreement. *See Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (1st Dep't 1998) (finding that the buyer, who kept the computer system and software for more than thirty days (the time period for return), consented to and accepted the terms and conditions as set forth in the agreement.); *Levy v. Gateway 2000, Inc.*, 33 UCC Rep. Serv.2d 1060 (N.Y. Sup. 1997) (holding that the buyer assented to the terms of the shrink-wrap agreement by keeping the computer past the return date); *Rinaldi v. Iomega Corp.*, 41 UCC Rep. Serv.2d 1143 (Del. Super. Ct. 1999) (ruling that a disclaimer of warranty of merchantability contained on the inside packaging was "conspicuous" as required by Delaware UCC provisions and the purchaser had the opportunity to reject the terms after payment by returning the goods even though the purchaser did not exercise that right); *Adobe Sys. Inc. v. Stargate Software, Inc.*, 216 F. Supp.2d 1051 (N.D.Cal. 2002) (holding that the purchaser retained the software after time period for return as stated on the license agreement contained inside of the box).

There are numerous cases where the court determined that the click-wrap agreement was enforceable because the purchaser had adequate notice of the terms and conditions prior to purchase of the software, computer system or the seller's performance. *Forrest v. Verizon Comm. Inc.*, 805 A.2d 1007 (D.C. 2002) (finding that a forum selection clause which was not in all capital letters and that the full terms of the click-wrap agreement were contained in a scroll box that displayed only a portion of the agreement at any one time was enforceable and was not inadequate notice); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. App. Div. 1999) (ruling that notice of a forum selection clause, although not in capital letters, was not inconspicuous as there is an opportunity to review the terms prior to subscribing); *1-A Equip. Co., Inc. v. ICode, Inc.*, 43 UCC Rep. Serv.2d 807 (Mass. Dist. Ct. 2000) (holding that where the terms are printed on the outside of an envelope containing the software, which is located inside of the software box, is not sufficient to render the agreement unenforceable); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. App. Eastland 2001) (upholding a forum selection clause because the user was required to scroll down through the terms before accepting and proceeding to purchase).

Clicking on the "I Accept" or "I Agree" button when downloading software or accessing a service through the Internet constitutes an assent to the terms and conditions including the warranty, disclaimers, limitations of liability and forum selection clauses. Moreover, these agreements will likely be enforceable because the purchaser/subscriber had an opportunity to review the terms prior to clicking the button. *Moore v. Microsoft Corp.*, 293 A.D.2d 587 (N.Y.2d Dep't. 2002); *Groff v. America Online, Inc.*, 1998 WL 307001 (R.I. Super. Ct. 1998) (finding that the forum selection clause was not invalidated because the subscriber had to click the "I agree" button at the conclusion of the click-wrap agreement).

The majority of cases where the court found the shrink-wrap or click-wrap agreement not binding dealt with facts involving a purchaser who did not have prior notice of the terms and conditions of the agreement. In 2002, the Second Circuit held that the plaintiff was not bound to Netscape's click-wrap agreement for use of the software as the plaintiff was not required to view or accept the terms of the license agreement prior to downloading the software program. *Specht v. Netscape Comm. Corp.*, 306 F.3d 17 (2nd Cir. 2002). In *Specht*, notice of the license agreement was via a link at the bottom of the download page. In *Klocek*, a federal district court in Kansas held, contrary to other courts, that the shrink-wrap agreement, which was located on the inside of the computer box, was not binding on the purchaser because the purchaser did not have an opportunity to review the terms prior to making the purchase. *Klocek v. Gateway, Inc.*, 104 F. Supp.2d 1332 (D. Kan. 2000). Gateway attempted to rely on the UCC § 2-207 "battle -of -the –forms" argument employed in *I.Lan Systems*. However, the court ruled that because the purchaser was not a merchant, the additional terms did not become part of the agreement until the purchaser expressly agreed to them. The court identified that Kansas and Missouri case law clearly provides that the existence of one form did not preclude the application of UCC § 2-207. A California federal district court held that since the software was not installed, the purchaser was not bound to its terms and conditions. *Softman Prod. Co., LCC v. Adobe Sys., Inc.*, 171 F. Supp.2d 1075 (C.D. Ca. 2001). The court reasoned that the appropriate time for the purchaser to review the agreement was during the installation of the software. Apparently, a notice provision displayed on the outside of the box stating that the software was licensed pursuant to the terms and conditions of the agreement (found on the inside) was insufficient.

Finally, in an earlier case, an Arizona federal district court ruled that the license agreement did not constitute additional terms to the contract as it was not identified on the purchase order. *Arizona Retail Sys, Inc. v. Software Link*, 831 F. Supp. 715 (D. Ariz. 1993). The court found that the agreement constituted only a mere

proposal for additional terms under UCC § 2-209, which were not expressly accepted. Because the warranty terms were material to the contract, the court ruled that they did not become part of the contract. We can see from these few decisions that adequate notice is key and that it must be given to the purchaser, subscriber or user prior to the purchase of the product or service. The *Klocek* case out of Kansas is likely an anomaly as many courts have since upheld shrink-wrap agreements where the terms are located inside the box.

There are almost no cases dealing with the enforceability of browse-wrap agreements, however, there are a couple of cases from California which provide some guidance. Many of the issues addressed in the shrink-wrap/click-wrap opinions equally apply to browse-wrap agreements. In the first browse-wrap case, the court held that posting the terms and conditions for use on a website's home page, but not on subsequent event pages of Ticketmaster's website, was not sufficient notice and the agreement was therefore not enforceable. *Ticketmaster, Corp. v. Tickets.com, Inc.*, 2000 WL 525390 (C.D. Cal. March 27, 2000). The California Appellate Court differed slightly from the Central District in *Net2Phone,* by upholding a forum selection clause in a browse-wrap agreement where the subject agreement was only available through a hyperlink that was contained on each page. The terms stated that access and use of the service are bound by the agreement. *Net2Phone, Inc. v. Superior Court*, 2003 WL 21310814 (Cal. App. Ct. 2003)

This Article highlights only a handful of recent cases on the subject of shrink-wrap and click-wrap agreements. The overall trend of the courts is towards upholding the enforceability of these agreements. The following is a list of practice pointers that have been learned and gleaned from cases on this topic. These pointers should be considered strategies rather than black-letter law. It is important to remember that these cases often turn on their own facts and circumstances. However, if the strategies set forth below are followed, a finding of enforceability should be more likely to result.

1. Above all, adequate notice should be given prior to consummation of a purchase or installation. Notice can take many forms. For example, it can be printed on the outside of the box, on the outside of the software envelope, on the screen or in a pop-up window, attached to a purchase order or referenced on the purchase order. What ever is the most effective way to get the full agreement in front of the purchaser before consummation should be done. If a purchase order is involved, the purchase order should have a conspicuous provision referencing the shrink-wrap agreement and that the purchase order and use of the software, computer system or whatever it may be, is subject to the terms and conditions of the shrink-wrap agreement. The full agreement should be either attached to the purchase order or readily available from the vendor or its website.

2. The terms of the agreement should be clearly presented in a straight-forward and easy to navigate format and, where applicable, prior to proceeding, require the assent to, or declination of, the terms. If the terms are not accepted then the user's ability to proceed should be terminated.

3. The terms should be reasonable and not unconscionable. Although many of these agreements are for software which is not typically considered a good under UCC Article 2, the general provisions of Article 2 should be applied in drafting the agreement, e.g. the use of all capital letters, conspicuous, bold italics fonts etc.

4. The terms of the agreement should not be in conflict with any other information available about the product or service.

5. Use the "I Agree" or "I Accept" button, along with displaying all of the terms, either on the screen or in a scroll box. Some companies have gone so far as to require the purchaser to type in "I Agree" or that the "I Agree" or "I Accept" button is grayed out until the purchaser has scrolled to the bottom of the agreement.

6. The purchaser should have the ability to print the full agreement from the scroll box prior to acceptance. It should also be included as one of the installation files or as a link on the website, depending on the circumstances, so that a subscriber or purchaser can review the agreement at any time.

7. There should be an opportunity to return the product for a full refund, especially where the shrink-wrap agreement is contained inside of the box.

8. For browse-wrap agreements, the terms and conditions link should be prominently displayed as a link on all web pages. This link typically is found at the bottom of each web page, however for the home page it should be located towards the top of the page so that the first screen that the browser views has a link to the agreement. Locating additional links at the top and the bottom of all pages may be warranted where practical.

Although there is apparently no Iowa case to date that has addressed this issue (that I have knowledge of), it is highly likely that the Iowa courts, both state and federal, will adopt the majority of other state and federal courts' positions by holding that shrink-wrap, click-wrap, web-wrap and browse-wrap agreements are enforceable provided that customers or users have adequate notice of the agreement and have the opportunity to accept or reject the agreement. There are also other issues that need to be considered with these types of agreements, including, but not limited to, the effect of UCC sections§ 2-207 and § 2-209 as well as the interplay of copyright law and the agreement (for example, the agreement may contain a prohibition on reverse engineering - but under copyright law one is generally permitted to reverse engineer). I strongly encourage anyone who practices in this area to review both the ALR annotation and the most recent case law for and against the enforceability of such agreements.

BIO

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