

End User License Agreements: New Developments in Shrink- Wraps, Click-Wraps and Browse-Wraps

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Terminology

- Shrink-wrap agreement: originally, formed by user opening up the plastic “shrink-wrap” surrounding computer software
 - subsequently, applied to an agreement formed by a user’s opening and use of a product
- Click-wrap agreement: formed by user clicking on and accepting terms, either on a web site or as a screen in the installation procedure for the product
- Browse-wrap agreement: formed by user visiting and/or using a web site

Why impose any agreements at all on one's customers?

- Disclaim Implied Warranties
- Limit Direct Damages to Purchase Price of Product;
- Exclude Indirect Damages
- Choice of Law; Choice of Dispute Resolution; Choice of Forum

Why impose any agreements at all on one's customers?

- Limit Uses (e.g., only for internal purposes; not to be used to conduct service bureau for benefit of third parties; not for ASP business; etc.)
- Prohibit decompilation and reverse engineering
- Protect non-copyrighted material
- **BUT** does Copyright Act pre-empt licensing terms that limit the use of copyrighted material?
 - *Bowers v. Baystate Technologies, Inc.* – Federal Circuit says no, relying on *ProCD*, because state law claim required extra element, it does not lie within the general scope of copyright and there is no pre-emption
 - Law professors, librarians and computer industry groups asking for clarification that publishers cannot use licensing terms to waive fair use rights and other privileges under the Copyright Act

Enforceability of shrink-, click-and browse-wrap agreements domestically

- Enforceability of shrink-wrap agreements: ProCD Incorporated v. Zeidenberg (U.S. 7th Cir. 1996)
- Extension of ProCD to the enforceability of click-wrap and browse-wrap agreements
- Recommended five-step strategy to maximize chances of your online agreements being enforced

ProCD Incorporated v. Zeidenberg

- Shrink-wrap agreements are enforceable, provided that:
 - their terms are “commercially reasonable” and not otherwise unconscionable or subject to any other defense available under contract law
 - on unconscionability, see *PayPal* case
 - user has right to reject terms upon opening package and to receive a full refund
- Rejected argument that all of the terms and conditions of a shrink-wrap agreement must be printed on the outside of the product packaging

Extension of ProCD to Enforceability of Click- and Browse-Wrap Agreements

- Groff v. America Online, Inc.
(R.I. Superior Ct. 1998)
- Ticketmaster Corp. v. Tickets.com
(C.D. Cal. 2000)
- Williams v. America Online, Inc.
(Mass. Superior Ct. 2001)
- Specht v. Netscape Communications, Inc.
(S.D.N.Y. 2001)
- Comb v. PayPal, Inc.
(N.D.Cal. Aug. 30, 2002)

Groff v. America Online, Inc.

- Groff sues over unavailability of AOL service, due to load problems
- AOL seeks summary judgment, arguing that forum selection clause in click-wrap agreement requires litigation to be brought in Virginia
- Court finds that Groff effectively “signed” the click-wrap agreement by clicking on “I agree” button “not once, but twice”

Ticketmaster Corp. v. Tickets.com

- Tickets.com deep linked to pages on Ticketmaster web site, allegedly violating Ticketmaster's terms of use
- Court found that an agreement was not created merely by Tickets.com use of the Ticketmaster web site (a browse-wrap agreement)
 - terms located at bottom of page
 - user not required to assent to, or even read, those terms
 - judge left open possibility that Ticketmaster might be able to prove that Tickets.com knew or should have known about those terms
- Ticketmaster response: put terms at top of page
 - but is that enough?

Williams v. America Online, Inc.

- Massachusetts court refuses to enforce forum selection clause in AOL click-wrap agreement
- Strange set of facts
 - download first, then see and accept terms
 - plaintiffs' alleged injury incurred during download
- Court took issue with both methods used to provide click-wrap agreement and the license terms themselves

Williams v. America Online, Inc.

- Court took issue with the ways AOL presented users with opportunity to accept terms
 - “I agree” (set as the default) or “read now”
 - if click “read now,” user presented with “okay, I agree” (set as the default) or “read now”
 - user had to override two defaults in order to finally read terms
- Court determined that requiring consumers with small claims to litigate in Virginia would violate Massachusetts public policy
 - inconsistent with Groff, but consistent with PayPal

Specht v. Netscape Communications

- Court found that users were not bound by Netscape's arbitration clause in a browse-wrap agreement, for those users have never assented to those terms
- Free download
 - message "Please review and agree to the terms of Netscape . . . License before downloading and using the software"
 - terms only visible by scrolling down screen, below download button, to message, and then clicking on link from message

Specht v. Netscape Communications

- Court concluded that mere downloading did not equal assent
- Court also rejected the idea that user could be bound to a contract without even seeing the message referring to that contract
- In addition to the way the message was shown, court found that language used was merely an invitation to agree, rather than a requirement for use of the software

Specht v. Netscape Communications

- On appeal, 2nd Circuit affirmed in October 2002
- Rejected argument that because notice of the existence of the license terms was on the next scrollable screen, plaintiffs were on "inquiry notice" of those terms
 - THEORY: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."
 - FACTS: 2nd Circuit was not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of the license terms
 - "Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms."
 - Unwilling to draw analogy from paper contracting, where receipt of terms constituted inquiry notice

Comb v. PayPal, Inc.

- Court assumed the click-wrap agreement was valid, but refused to enforce its arbitration clause that required consumers to resolve disputes through litigation in PayPal's home city
- Court found that arbitration was unconscionable, both procedurally and substantively (two-part test)
 - Procedurally: adhesion contract
 - standardized contract, drafted and imposed by party with superior bargaining strength
 - consumers only could accept or reject; could not negotiate
 - availability of alternative products to consumers did not matter
 - it may matter outside California

Comb v. PayPal, Inc.

- Substantively: problems with five lopsided provisions
 - (1) requiring consumers from all over the U.S. to come to PayPal's home city to resolve disputes
 - (2) arbitration of consumer disputes under commercial arbitration rules
 - (3) arbitration clause prohibited consolidation of claims between consumers
 - (4) PayPal's ability to block (or even take over) customer accounts until dispute is resolved
 - (5) PayPal's unilateral ability to amend the agreement, simply by posting new terms on its web site
 - (1) and (2) are fairly common; (3), (4) and (5) are unusual
- Lessons to be learned
 - consider avoiding these types of one-side provisions when dealing with consumers
 - consider allowing consumers to resolve disputes under consumer arbitration rules in multiple venues of their choice

So when are click- and browse-wrap agreements enforceable?

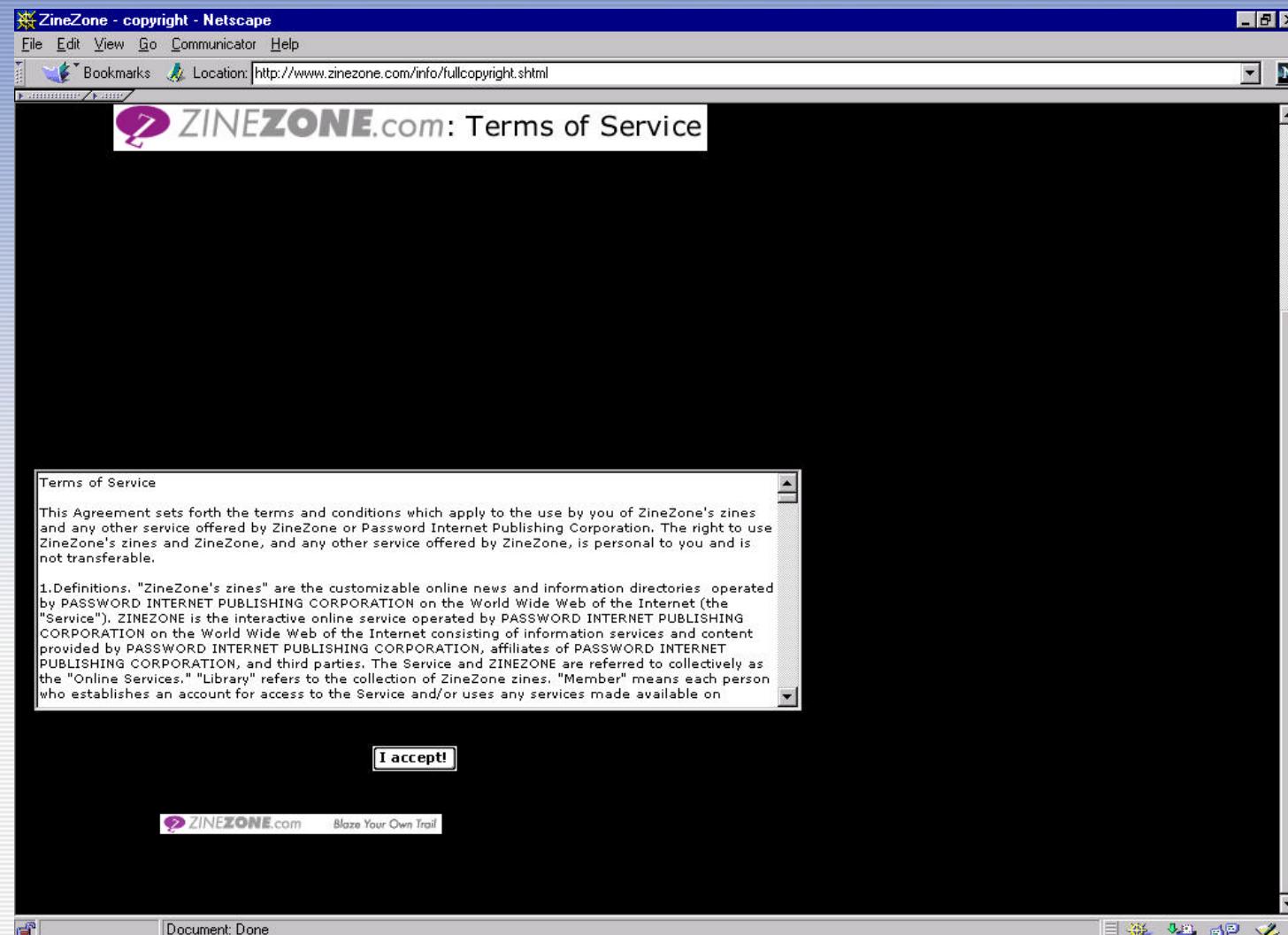
- In order to bind a buyer to an online agreement, seller must meet a two-part test
 - buyer must be aware of the requirement that a contract be entered into
 - *Pollstar v. Gigmania Ltd.* (E.D.Cal. 2000): in dicta, court notes that a hyperlink to a browse-wrap agreement, presented in small gray text on gray background and not underlined, might not be enough to make buyer aware
 - buyer must affirmatively manifest his or her assent, by taking a demonstrable step
- Even if the buyer is bound, whether specific provisions are enforceable will depend on the availability of normal contractual defenses, such as unconscionability

Domestic Strategy for Enforceability: Step #1 - Before Submitting Order

- Immediately above key where customers submit orders, cause customer to accept terms and conditions
- Two alternative methods
- Method #1: Use of this product is subject to your acceptance of Licensor's terms and conditions of sale

Domestic Strategy for Enforceability: Step #1 - Before Submitting Order

- Method #2: Terms and Conditions visible through scroll field
 - this method is preferable to hyperlink or pop-up window, for it is harder for the buyer to argue that it was not aware of these terms
- Below scroll field:
 - by submitting this order, I accept the terms and conditions set forth above
 - “submit order” or “I accept” button
- Open question -- must terms be shown in full, or is scroll field enough?



Domestic Strategy for Enforceability: Step #2 - Accessibility of Terms

- Make terms easily accessible, both before and after acceptance
- BEFORE: Available on web site or by fax
- AFTER: Set out in full within delivered product in a normal font size
 - some states (e.g., California) and countries (e.g., France) will not enforce contractual provisions which are too hard to read, in certain circumstances
 - behind “About Product” box, under “Help” menu
 - printed version in brochure within package or in user manual (if there is one)

Domestic Strategy for Enforceability: Step #3 - Installation

- As part of the installation program for any downloaded product, show those terms and conditions again (after all, installer may not be downloader)
 - the user must be able to scroll down through the agreement if he so chooses. The user must hit an "Accept Terms" key TWICE before he can complete installation and then use the product
 - if he hits the "Reject Terms" key, the installation program aborts and the user will not be able to use the product

Domestic Strategy for Enforceability: Step #4 - Splash Screen and Help Menu

- Once installed, the user would not be asked again to accept the terms
- However, every time the user enters the product, the splash screen for the product will display, in addition to the typical copyright and trademark notices, the following statement (after all, user may not be installer or downloader):
 - use of this product is subject to the terms and conditions found under this product's Help Menu

Domestic Strategy for Enforceability: Step #5 - Battle of Forms

- If seller receives a purchase order from a prospective buyer, then it must either:
 - (a) send that prospective buyer a copy of the terms and state very clearly that: (i) Seller's acceptance of the purchase order is expressly conditioned upon those terms; and (ii) Seller shall not ship the product until the prospective buyer communicates its acceptance of those terms; or

Domestic Strategy for Enforceability: Step #5 (continued)

- (b) (although a bit riskier) ship the product with a packing slip that clearly and prominently states that:
 - (i) shipment of the product is pursuant to the buyer's purchase order and is subject to Seller's terms; and
 - (ii) if the buyer does not accept those terms, it should return the product and Seller will refund any amounts that the buyer may have already paid for that product
- The product then shipped to that buyer will also have to follow Steps #2, #3 and #4 described above