

Creating Enforceable “Click Through” End-User Agreements, Domestically and Internationally

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Overview

- Why use “click through” (a/k/a web-wrap) end-user agreements?
- Enforceability of click through end-user agreements domestically
- Enforceability of click through end-user agreements internationally
- When should you not use click through agreements?

Why use end-user agreements at all?

- Disclaim Implied Warranties
- Limit Direct Damages to Purchase Price of Product
- Exclude Indirect Damages
- Choice of Law; Choice of Dispute Resolution; Choice of Forum
- Limit Uses (e.g., only for internal purposes; not to be used to conduct service bureau for benefit of third parties; etc.)
- Prohibit decompilation and reverse engineering
- Protect non-copyrighted material

Why use “click through” end-user agreements?

- Given the volume of transactions (hopefully!), it is impractical to have separately negotiated agreements
- Given the nature of the Internet, both buyers and sellers want the convenience of “agreeing to terms” online
- Using click through agreements discourages even large buyers from insisting on separately negotiated terms

Enforceability of click through end-user agreements domestically

- Traditional methods of shrink-wrapping
- enforceability of shrink-wrap agreements: ProCD Incorporated v. Zeidenberg (U.S. 7th Cir. 1996)
- enforceability of click through agreements: Groff v. America Online, Inc. (R.I. Superior Court 1998)
- recommended four-step strategy

Traditional Methods of Shrink- Wrapping

- Initial -- License Terms on Envelope Containing Media
- More Refined
 - statement that software is copyrighted and that the data is subject to an enclosed license agreement
 - license terms printed in full in user guide or licensing brochure
 - license terms appear on screen and must be accepted in order to install the software
 - the end-user can return product for a full refund if license terms are unacceptable to the end-user

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
 - 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.

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 through agreement requires litigation to be brought in Virginia
- Court finds that Groff effectively “signed” the click through agreement by clicking on “I agree” button “not once, but twice”

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 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.
- Below scroll field:
 - By submitting this order, I accept the terms and conditions set forth above.
 - “Submit Order” or “I accept” button



Domestic Strategy for Enforceability: Step #2 - Installation

- As part of the installation program for any downloaded software 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 #3 - 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 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 #4 - Battle of Forms

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

Domestic Strategy for Enforceability: Step #4 (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 user's purchase order and is subject to Licensor's terms; and (ii) if the user does not accept those terms, it should return the product and Licensor will refund any amounts that the user may have already paid for that product.
- The product then shipped to that customer will also have to follow Steps #2 and #3 described above.

Enforceability of click through end-user agreements internationally

- Current status
- Special international issues
- Suggested three-stage strategy in adjusting U.S. click through end-user agreements for international use

Current Status of Shrink-Wrap Agreements, based on current statutes and advice of foreign counsel

- Likely to Be Enforced: U.S., Canada, France, Italy, Spain, Netherlands, Scandinavia, Brazil, Saudi Arabia, Hong Kong
- Likely to Be Enforced, Subject to Consumer Protection Laws: Mexico, Argentina, Chile
- Less Certain: Japan and Korea
- Unlikely to Be Enforced: Germany, United Kingdom, Australia (?), China -- yet still worth trying
- click through easier to enforce (licensee sees terms before accepts) -- but still not likely to be enforced in China

Special Issues Affecting International Enforceability

- Translate terms into local language
- Comply with localization requirements
 - Spain: all packaging in Spanish
 - France: documentation and on-line help in French
- Variations in consumer warranty requirements
- European Union Software Directive
 - cannot block assignments of software
 - cannot prohibit reverse engineering

Special Issues Affecting International Enforceability

- European Union Distant Selling Directive (Articles 5 and 6): buyer must receive written confirmation or confirmation “in another durable medium”; 7-day right of return runs from receipt of confirmation
- Most consumer protection laws will ignore consumer’s acceptance of choice of law and dispute resolution provisions which choose a foreign law or forum
 - Japan (?), the Netherlands, Norway and the United Kingdom (?) are the exceptions

Strategy for Using Click Through Agreements Internationally - #1

- As much as we might like to think to the contrary, concede that it is, under current law, impossible to apply a single click through end-user agreement worldwide
- Develop a U.S./Canadian contract that serves as an “international default” agreement
- Have foreign counsel review that agreement for key markets

Strategy for Using Click Through Agreements Internationally - #2

- Many foreign counsel advise that choice of law, dispute resolution and other provisions might not be enforceable
 - Don't concede issue -- leave choice of law and dispute resolution provisions as is
 - no harm in trying to impose those provisions
 - those provisions still might be enforceable vs. pirates and with respect to IP issues
 - as a precaution, make changes in substantive provisions, so that agreement will still be enforced, even if local law is applied before local courts

Strategy for Using Click Through Agreements Internationally - #3

- A smaller group of foreign counsel advise that choice of law and dispute resolution provisions will not be enforceable, and must be changed
 - for limitations on liability to apply, must submit to local law (France)
 - attempt to choose foreign law and foreign dispute resolution may invalidate entire agreement, including substantive provisions (e.g., Sweden and Denmark)
 - stipulating a prohibited governing jurisdiction and forum for arbitration is a false or misleading representation (Quebec)
 - special case -- Germany: choice of U.S. law and forum will not invalidate agreement, but may lead to order that company cease using these provisions
- In those countries, choose local law, local courts and make substantive changes recommended by foreign counsel

When should you not use click through agreements?

- Problem of Contractual Authority
 - Can the “clicker” bind the company?
 - Better for individuals, rather than organizations
- When Digital Signatures are preferable
 - when authenticity and security are important

When should you not use click-through agreements

- Internationally -- dilemma
 - enforceability is most certain with respect to non-consumers, yet given lower number of contracts and high dollar values, perhaps it is worth the effort to execute a traditional contract
 - enforceability is least certain with respect to consumers, yet most licensors feel it is impracticable to collect thousands of individually-executed agreements

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