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## Clickwrap Agreement Found Valid and Controlling over Written Purchase Order

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Over the past five years, courts have recognized the validity of shrinkwrap and clickwrap, or click-and-accept, software license agreements. Most of these cases, however, have involved transactions where the shrinkwrap or clickwrap license was the only written document involved. For example, the seminal case on the issue, *ProCD v. Zeidenberg* (1996), involved a consumer transaction with an end-user purchasing the product in a retail store and no other written document. (See our [July 1996 Intellectual Property Bulletin](#) for more on the *ProCD v. Zeidenberg* case.)

But what should the result be where the user sends out a purchase order, and then receives software with a shrinkwrap or clickwrap license containing additional or different terms? Until this month, this question had never been answered by any court.

The United States District Court for the District of Massachusetts has now provided an answer. In *ILLAN v. NetScout Serv. Level Corp.*, Civ. No. 00-11489-WGY (D. Mass. January 2, 2002), Chief District Judge Young determined that a clickwrap agreement not only was valid and enforceable, but also that it, and not the buyer's purchase order, controlled the transaction. The buyer, a value added reseller of the software, sent a purchase order which specified that the requested software would be purchased with the right to perpetual upgrades and support. The seller subsequently sent software containing a

clickwrap agreement providing different support terms, as well as a limitation capping the seller's liability at the amount of the license fees paid by the buyer. When the buyer sought to enforce its right to receive perpetual upgrades under the purchase order, the seller refused, citing the clickwrap agreement, and the buyer sued.

The court held that the clickwrap agreement was an enforceable contract. In fact, the court determined that enforcing a clickwrap agreement was even an easier question than enforcing a shrinkwrap agreement. With shrinkwrap, the buyer implicitly provides its assent by opening a package, or keeping or using the product. With a clickwrap agreement, the buyer accepts the terms explicitly by clicking and accepting the license or contract itself. According to the court, such explicit acceptance of terms forms a binding contract.

Regarding the limitation of liability, the court held that the clickwrap must control. The court observed that the valid and enforceable clickwrap agreement had been accepted by both parties, where the terms of the buyer's purchase order had never been accepted by the seller. In addition, the court read the language of the clickwrap to take precedence over any points on which a purchase order was silent. Given that the purchase order did not place any limitation on liability, the clickwrap agreement contained no expressly conflicting terms and the court enforced the more detailed and explicit clickwrap agreement. While a question still remains over how a court would settle disputes where the purchase order and the clickwrap both had express terms in direct opposition to each other, the rationale in *I.LAN* weighs in favor of enforcing the clickwrap agreement to which both parties have assented.

The court considered an alternative view of the case, in which the purchase order itself was a contract and the seller attempted to add additional terms through its clickwrap agreement. The court reached the same result under that view, based on some special circumstances arising from the history of the relationship between the parties.

Some buyers have anticipated just such a result, and have provided expressly in their master purchase agreements that the terms of those agreements cannot be superseded by clickwrap or shrinkwrap agreements contained in the software that they are licensing, or the packaging for such software. The effect of such provisions remains to be seen. However, without such an express provision dealing with this issue, courts can be expected to look closely at the terms clicked and accepted by the buyer when installing the software. The classic "battle of the forms" is thus likely to be won by that final electronic step.