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Court Draws a Line on Unreasonable "Click and Accept" License Terms

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A new case has cast significant doubt over the enforceability of certain provisions in click and accept agreements against consumers, particularly when the consumer is allowed to download software prior to indicating his acceptance of such an agreement. This new case also appears to be consistent with earlier cases in the area, which emphasized that shrink-wrap agreements, and by extension click and accept agreements, should not place unreasonable burdens on licensees.

In ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7 th Cir. 1996), the Seventh Circuit U.S. Court of Appeals upheld the enforceability of "shrink-wrap" licenses and contracts. In its decision, the Seventh Circuit rejected the idea that license and warranty terms contained only inside the product box or within the software itself are unenforceable because consumers cannot read them prior to paying for the product. The court allowed licensors of computer software to condition a licensee's acceptance upon the use of the product or through some other method of indicating agreement. The ProCD case was previously discussed in our March 22, 2000 Internet Alert. Subsequent cases have relied on ProCD in enforcing online click and accept agreements.

Lying at the heart of the Seventh Circuit's opinion, however, was the fact that the terms of the license agreement did not place an unreasonable burden on the licensee. Not only were the license terms themselves reasonable, but so were the methods licensees used to indicate acceptance. Therefore, an ongoing question since ProCD has been how far a licensor can push the boundaries of reasonableness with either the substantive terms of its license agreements or its methods of acceptance. The need to prominently display click and accept terms was discussed in the Ticketmaster Corp. v. Tickets.com case, and in our June 26, 2000 Internet Alert. A recent decision in Massachusetts goes even further, addressing both sides of this reasonableness question.

In Williams v. America Online, Inc., a Massachusetts Superior Court ruled that America Online (AOL) could not enforce the forum selection clause in its click and accept agreement, and thus could not force users of its AOL version 5.0 to move their lawsuits from Massachusetts to Virginia. In so doing, the court found that neither the substantive terms of AOL's license agreement nor its methods of acceptance were reasonable.

First, the court determined that it was unfair to hold the plaintiffs to the forum selection clause,

because of the mechanism AOL used to obtain the user's acceptance. AOL used a procedure where users seeking to upgrade to version 5.0 downloaded the new software onto their computers and installed it. Only once the installation process was complete were the users presented with the forum selection clause and other terms of the agreement. The plaintiffs in this suit, however, complained that it was during the initial installation -- before they were even given the opportunity to accept or reject -- that the product damaged their systems by making it difficult if not impossible for them to use other internet service providers and e-mail systems. Because the plaintiffs were seeking redress for harm caused before they had a chance to read and accept the terms, the court found that they could not be bound by the terms of that agreement to redress precontractual injuries.

Second, the court also took issue with the ways AOL presented users with the opportunity to accept the agreement's terms. Once the installation process was complete, the user was presented with a complicated process in which the customer was given the option of selecting "I agree" with the agreement or "read now". The default between these two choices was set to "I agree". Even if a customer selected "read now," it was not presented with the agreement itself, but rather a second choice between the default "okay, I agree" and "read now". Only by overriding both of these defaults was a customer actually presented with the text of the agreement. Moreover, the plaintiffs alleged that even if the customer declined to accept the agreement and terminated the installation process, the harmful computer changes were not reversed by the program. The court refused to accept this process as reasonable.

Second, the court also was concerned with the reasonableness of the forum selection clause itself. The clause required plaintiffs seeking to represent a class of Massachusetts resident customers, each with only a few hundred dollars worth of damages, to litigate in Virginia. The court determined that requiring Massachusetts consumers with such small individual damages to litigate in Virginia would violate Massachusetts public policy.

In short, Williams v. AOL illustrates that licensors of software must be careful not to offend courts' views of reasonableness, either in the methods that they provide to customers for accepting click and accept license agreements or in the terms of those agreements themselves. Even prior to this case, many licensors allowed users to scroll through a field or link to a page that set out those click and accept terms prior to indicating acceptance, and required acceptance of those terms both prior to download and again as part of installation. The wisdom of such procedures is even more apparent after the Williams case. In addition, when consumer products are involved, licensors should ensure that those terms are reasonable from a consumer's point of view, particularly with respect to the consumer's remedies in the event of a breach of contract or other damages resulting from the downloaded product.