
The Origin of Click-Wrap: Software Shrink-Wrap Agreements

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Introduction

Click-wrap agreements (sometimes called "click-through"; "click and accept" and "web-wrap" agreements) are agreements formed over the Internet. In some cases, an end-user can download a software product or electronic content only after "clicking and accepting" on license terms. In other cases, registration for an online service or purchase of tangible goods requires acceptance of such an agreement. Internet users have become familiar with screens flashing legal terms and requiring the clicking of an "I accept" button before such goods can be ordered, services procured, or information accessed. The Internet user must indicate his assent to be bound by the terms of the offer via express conduct -- typically the act of clicking on a button stating "I agree" or "I accept." No paper record is generally created nor is the signature (electronic or paper) of the Internet user typically required.

Within the U.S. legal community, these agreements have come to be generally considered valid and enforceable contracts. The analysis of click-wrap agreements follows that of so-called "shrink-wrap" agreements in which users of software products are deemed to accept license terms by opening or using packaged software. Shrink-wrap agreements have been found to be enforceable in a series of major U.S. court cases following the *Pro CD v. Zeidenberg*¹ case discussed below. U.S. lawyers generally believe that click-wrap agreements present an even stronger argument for enforceability, as the Internet user is in fact able to review the terms of such agreement prior to purchase and affirmatively indicate his or her acceptance of the terms.

Click-wrap agreements offer companies selling goods and services over the Internet significant protections beyond those afforded by whatever intellectual property rights they may have in their goods and services. Click-wrap agreements are frequently used to disclaim implied warranties, limit financial liability to the purchase price of the product, specify the governing law and forum for resolving disputes, limit permitted uses, protect non-copyrighted material, and prohibit decompilation or reverse engineering of software programs.

Click-wrap agreements are useful for Internet companies selling goods and services for several reasons. First, it is impractical to have separately negotiated agreements with each end-user. With the volume of traffic commercial websites hope to obtain, most Internet companies do not want the

burden of separately coming to an agreement with each end-user. Second, most end-users prefer ease and convenience when using the Internet. Most end-users do not want or expect to spend time and effort negotiating terms of use before using websites. Third, using click-wrap agreements discourages even large buyers from insisting on separately negotiated terms. This has the practical effect of increasing the bargaining position of the online merchant, vis-a-vis the consumer.

It is important to note, however, that there will be situations in which Internet companies may be well-advised not to use click-wrap agreements. For example, click-wrap agreements are more suitable when end-users are expected to be individuals, rather than organizations. Potential problems arise when a company, rather than an individual, enters into a click-wrap agreement. In this situation, the online merchant must be careful to ensure that the individual clicking to accept has power and authority to accept on behalf of the company. Of particular concern is an employee's ability to bind its employer to non-competition covenants and other contractual provisions affecting goods and services other than the software product being downloaded, installed or used by that employee. Digital signatures are preferable when authenticity and security are important. This issue may be particularly important in business-to-business ("B2B") transactions.

The Origin of Click-Wrap: Software Shrink-Wrap Agreements

Click-wrap agreements derive their name from so-called "shrink-wrap" agreements, the license agreements by which most packaged consumer software is sold today. The term "shrink-wrap" comes from the manufacturing process of "shrinking" the clear cellophane packaging around the product box. Originally, software manufacturers attempted to print the entire license text on the outside of the product box, visible through the cellophane wrapping, with a notice that by breaking the seal and opening the box, the user would become bound by the license terms. Today, a well-drafted shrink-wrap notice should contain a statement on the outside of the product packaging that software is copyrighted and that the data and its users are subject to the terms in an agreement within the box. License terms are printed in full in the user guide, licensing brochure or as part of the product's help menu.

Conceptually, an agreement is formed when the software vendor offers to license the use of software according to the license terms accompanying the software and the purchaser or licensee accepts those terms by its conduct, (i.e., the retention or use of the software). Increasingly, users are required to accept license terms electronically in order to complete the installation of the software. The license should state that the end-user can return the product for a full refund if the license terms are unacceptable to the end-user.

In the United States, the 1996 landmark case of *Pro CD v. Zeidenberg* affirmed the validity of shrink-wrap agreements. In *ProCD*, a federal appeals court addressed the issue of whether a shrink-wrap license that is included with computer software is an enforceable contract. The defendant purchased CD-ROMs from ProCD, containing compilations of various telephone directories. These CD-ROMs were packaged along with a user's manual in a box. Printed on the box was a notice that the conditions of use of the CD-ROMs were defined by the terms in the user's manual. This license, also encoded on the CD-ROM disks themselves, restricted the CD's use to non-commercial purposes. The defendant published the directory information contained on the CD-ROMs on the

Internet and sold access to third parties, leading ProCD to bring suit for breach of contract, among other causes.

The lower court held that the license was not enforceable because the shrink-wrap license was inside the box, rather than printed on the outside. It further reasoned that the contract had been formed when the buyer purchased the goods, and could therefore not contain "hidden terms" that were not disclosed until the box was later opened. The appellate court rejected this analysis, holding that no contract was formed until the defendant opened the box and used the product. The court relied on Article 2 of the Uniform Commercial Code ("UCC") and common-law contract principles to hold that ProCD had restricted the manner of accepting its offer to the user's agreeing to the license terms. Under UCC §2-204, a "contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract." Similarly, Section 19 of the Restatement (Second) of Contracts provides that "[t]he manifestation of assent may be made wholly or partly by written or spoken words or by other action or by failure to act." The court held that these provisions supported the conclusion that a binding contract was created when the defendant used the software, indicating his assent to be bound by ProCD's license terms.

In the defining statement of the opinion, the court held that, "shrink-wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general." The court concluded that no contract was formed by the parties until the buyer "accepted" the seller's terms by electing to keep the software. The court observed that "[t]ransactions in which the exchange of money precedes the communication of detailed terms are common" not only within the software industry but in many service industries such as insurance, airline tickets and concert tickets. The court also focused on the impracticality of parties agreeing to an information license before money changed hands and concluded that, in the case at hand, a potential buyer simply had to return the goods for a full refund to prevent formation of a contract.

Click-Wrap Licenses, Like Shrink-Wrap Licenses, Found Enforceable in Courts

The *ProCD* decision soon defined the law on shrink-wrap licenses. Concurrently, the Internet phenomenon produced countless websites and innumerable end-users. Internet companies began using click-wrap agreements to define the terms of their websites' use and to apply to online purchases, much as software companies had used shrink-wrap agreements. Case law soon developed on the enforceability of click-wrap agreements which, not surprisingly, followed the rationale of *ProCD*.

In *Caspi v. The Microsoft Network*², plaintiffs sued for, among other things, breach of contract and fraud for Microsoft "rolling over" MSN membership into more expensive plans. The Appellate Division of New Jersey affirmed the Superior Court of New Jersey's decision that the forum selection clause contained in Microsoft Network subscriber agreements was enforceable and valid.

A forum selection clause in the Microsoft Network's terms of use had mandated that all suits concerning the subscriber agreement be brought in courts located in Kings County, Washington. The court found that the parties entered into a binding contract when the end-user agreed to be

bound by the terms of the Microsoft Network's subscriber agreement. The user could not use Microsoft Network unless she clicked the "I agree" button next to a scrollable window containing the terms of use. Each plaintiff clicked the "I agree" button to use Microsoft Network, indicating their assent to be bound by the terms of the subscriber agreement and thus forming a valid license agreement.

In *Groff v. America Online*³, the Rhode Island Superior Court affirmed the validity of AOL's click-wrap agreement which was entered into by a customer. Groff sued AOL as a result of AOL's decision to switch pricing models from a set fee for a limited time to unlimited internet access for a higher flat monthly fee. The plaintiff charged that this practice violated the Rhode Island Unfair Trade Practice and Consumer Act⁴ because AOL offered this pricing model despite knowing its computer system was incapable of accommodating the number of users AOL expected to switch to the plan.

AOL moved to dismiss this suit from the Rhode Island Superior Court for improper venue on the ground that a forum selection clause in the parties' contract mandated that the suit be brought in Virginia, where AOL's base of operations was located. The court agreed, and dismissed the suit.

The court held that the plaintiff assented to AOL's terms of service online by the click of an "I agree" button. The terms of service included a clause mandating that suits concerning the service be brought in Virginia. AOL customers must first click on an "I agree" button indicating assent to be bound by AOL's terms of service before they can use the service. This button first appears on a web page in which the user is offered a choice either to read, or simply agree to be bound by, AOL's terms of service. It also appears at the foot of the terms of service, where the user is offered the choice of clicking either an "I agree" or "I disagree" button, by which he accepts or rejects the terms of service. The court held that a valid contract existed, even if the plaintiff did not know of the forum selection clause:

"Our Court ... stated the general rule that a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents. Here, plaintiff effectively "signed" the agreement by clicking "I agree" not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc. and is bound to the terms of his agreement."

In *Hotmail Corporation v. Van Money Pie, Inc.*⁵, the court held that a valid license agreement between Hotmail and the defendants existed by click-wrap agreement. Hotmail's terms of service prohibited the use of email accounts to facilitate the transmission of unsolicited mass e-mail ("spam"). To use the Hotmail service, the defendants were required to click on a box indicating their assent to Hotmail's terms of service. The court enjoined defendants from sending spam email which falsely stated it came from plaintiff's e-mail service, and from using Hotmail accounts as mailboxes for receiving reply spam.

The fact that click-wrap agreements can be enforced does not mean that every agreement is in fact enforceable. Contracting parties must still look to ordinary contract law principles to determine the enforceability of particular agreements. Principally, Internet companies should be sure that end-users have manifested their assent to be bound in a meaningful manner.

End-users do not manifest assent to an online license simply by using an Internet company's website. In *Ticketmaster Corp. v. Tickets.com, Inc.*⁶, a federal district court in California held that a contract is not created simply by use of a web site, and granted the defendant's motion to dismiss plaintiffs' breach of contract claim. Ticketmaster posted terms and conditions of use at the bottom of its site's home page. Within the terms and conditions of use, Ticketmaster stipulated that use of the website constitutes the user's assent to be bound by the site's terms and conditions. The court disagreed and held that no contract was entered into because the defendant did not take any actions that manifested assent to the terms and conditions. The court provided, however, that if the defendants used the website with knowledge of terms and conditions which declare such use evidences assent to be bound thereby, an enforceable contract could exist.

Internet companies should be careful that their terms and conditions not be adjudged so harsh as to be considered contracts of adhesion. Contracts of adhesion arise when a standardized form of agreement, drafted by the party having superior bargaining power, is presented to the other party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms. In *Tony Brower v. Gateway 2000, Inc.*⁷, the court followed the *ProCD* decision in holding that when contract terms shipped to a consumer along with computer products clearly state that they will be binding on the consumer if she retains the products for 30 days, and the consumer so retains the products, the supplier and consumer formed a valid and enforceable contract. Further, a clause mandating arbitration of disputes arising out of the contract in Chicago does not render the contract an unenforceable adhesion contract. However, the court found that a clause requiring that such disputes be arbitrated under the rules of the International Chamber of Commerce ("ICC") was unconscionable and, thus, unenforceable. The ICC rules require the payment of a \$4000 fee by the consumer, of which \$2000 is non-refundable even if the consumer prevails. Because this fee exceeded the price of Gateway's products, it effectively denied purchasers a forum in which to resolve disputes arising out of the purchase of the product. The court then selected an arbitrator to hear the dispute.

Click-Wrap Agreement Enforceability may be Codified with UCITA

The enforceability of click-wrap licenses in the United States may be established by statute in those states which choose to enact the proposed Uniform Computer Information Transactions Act ("UCITA"). In July 1999, the National Conference of Commissioners on Uniform State Laws, a panel of expert legal practitioners and academics, promulgated a "model" law and submitted it to the fifty states for consideration and approval. UCITA is designed to create a uniform set of state laws to deal with transactions in "computer information," broadly defined to include software, multimedia products, computer databases and online information. The law would create new rules concerning electronic contracting for information products. Currently, only the states of Virginia and Maryland have enacted UCITA into law, but several other states have it under consideration. For a number of reasons, most commentators believe that only a handful of states will enact UCITA in the short term.

Under UCITA, the offeree, typically the consumer, must manifest assent to be bound by the offeror's contract terms. A party manifests assent if he/she engages in the conduct the seller clearly indicates will result in acceptance of the proposed agreement and formation of a contractual relationship. To be binding, the offeree must be afforded an opportunity both to review the contract's terms, and to decline or accept the offer. Moreover, mere retention of information without further action is insufficient to create an online contract.

To ameliorate the superior bargaining position of mass-market licensors, UCITA contains certain protections for licensees. UCITA Section 112 requires that licensors give licensees an opportunity to review the terms of a proposed online contract and requires a manifestation of assent to the terms before an enforceable contract is created. Expressly agreed terms between the parties will overrule conflicting mass market license terms. Finally, Sections 112 and 209 of UCITA require mass market licenses to contain a provision for a full refund when a user is required to pay before seeing contract terms. The purchaser may recover any costs associated with returning the software or for harm caused to hardware if installation is required in order to view the terms of the mass market license.

Creating Enforceable Click-Wrap Agreements

We recommend a four-step strategy for enforcing click-wrap agreements in the United States. Creating an initial click-wrap page with the following parameters should maximize the chances of Internet companies enforcing their click-wrap agreements.

Step #1: (before the end-user can access the web site or download a product)

At the start screen of a web site or before downloading a product, Internet companies should show the terms and conditions that will govern use of the web site or downloaded product. The end-user must hit an "Accept" key twice before he/she can then use the web site or download the product. If he/she hits the "Reject" key, access to the web site will be denied, or the user will not be able to download the product.

Step #2: (acceptance as part of installation)

Once the click-wrap agreement is initially accepted, if software or another product is downloaded, the user would repeat this procedure as part of the installation protocol for the product.

Step #3: (using a splash screen and help menu)

Although the user would not be asked to accept the click-wrap terms each time he or she uses the product, every time the user entered the product, the splash screen for the product should display, in addition to the typical copyright and trademark notices, the following statement: "Use of this product is subject to the terms and conditions found under this product's help menu."

Step #4: (continuing access to terms and conditions of a click-wrap agreement)

Even after a product has been downloaded and installed and a click-wrap agreement accepted, the user should be able to review the terms and conditions of the click-wrap agreement, if he or she so chooses. Those terms and conditions can be set out in the "about product" box, behind the help menu or in another prominent location. While terms could be provided online at the vendor's website, the vendor of a product that might not always be used online should consider including those terms and conditions as part of the electronic documentation included on the product media. This would ensure that the user always had access to these terms and conditions.

International Enforceability

Unfortunately, companies offering goods and services electronically over the Internet cannot assume that all of their "click-wrap" contractual terms will be enforced internationally. Courts in some other countries may not accept the legality of click-wrap agreements as readily as in the United States. However, with advance planning and country-by-country adjustments, Internet companies can significantly increase their prospects of being able to enforce most of the terms of their click-wrap agreements in most major international markets.

Based on the advice of local counsel, we believe that traditional shrink-wrap agreements are likely to be enforced in countries including Canada, France, Italy, Spain, Netherlands, Denmark, Norway, Sweden, Finland, Brazil, Saudi Arabia and Hong Kong. Subject to consumer protection laws, shrink-wrap agreements are also likely to be enforced in Mexico, Argentina, and Chile. Enforceability is less certain in Japan and Korea, and unlikely in Germany, the United Kingdom, China and possibly Australia.

Click-wrap agreements, however, may be a different matter. Click-wrap licenses may actually be easier to enforce in most of the above countries because the licensee can review the terms and conditions before accepting and affirmatively manifesting his or her acceptance of such terms and conditions.

Although only China appears to refuse to enforce click-wrap agreements outright, other countries may also make enforcement difficult due to a combination of factors, including local language requirements and variations in consumer protection laws. In particular, the European Union's Long Distance Selling Directive gives consumers the right to revoke electronic agreements without cause within seven days from the purchaser's receipt of written confirmation of such agreements.

Some steps can be taken to increase the likelihood of enforcing click-wrap agreements internationally. Internet companies should try to translate the terms of the click-wrap agreement into the local language and to comply with applicable local law requirements. In addition, in Spain, all packaging must be in Spanish. In France, documentation and on-line help must be in French. Additionally, there will be country-by-country variations in consumer warranty requirements which should be reflected in click-wrap agreements created in those countries. Local counsel should be retained and consulted to ensure that the necessary changes are made to enable click-wrap agreements to be enforced against individuals and

companies in those countries.

The International Use of Click-Wrap Agreements

The authors suggest three steps be followed when adjusting U.S. domestic click-wrap agreements for international use.

First, one should concede that it is impossible to apply a single click-wrap agreement worldwide under current law. Country-by country adjustments should be made accordingly, particular for those key markets where the Internet company anticipates selling significant quantities of products. For example, U.S. Internet companies should develop a U.S./ Canadian contract that serves as an "international default" agreement. These companies should then have non-U.S. counsel review that agreement for key markets.

Second, there will be situations in which an Internet company decides to leave key provisions "as is," despite contrary advice from non-U.S. counsel. For example, non-U.S. counsel will often advise that choice of law, dispute resolution and other provisions might not be enforceable within their jurisdictions. Internet companies should not always concede this issue. They may wish to leave choice of law and dispute resolution provisions "as is" given that (i): in most circumstances (but see Step #3 above), there is no harm in trying to impose those provisions, and (ii): these provisions might still be enforceable against pirates with respect to intellectual property issues.

Third, there will be situations in which an Internet company must change key provisions of its click-wrap agreements for certain jurisdictions. Some non-U.S. counsel will advise that choice of law, dispute resolution and other provisions will not be enforceable, and must be changed, lest they result in the entire click-wrap agreement being voided as unreasonable. In Sweden and Denmark, for example, any attempt to choose non-U.S. law and U.S. dispute resolution in click-wrap agreements with consumers may invalidate the entire agreement, including the substantive provisions. In other cases, to achieve the same result the Internet company expects under U.S. law, provisions need to be adjusted or alternative choices of law made. For example, one must choose local law in France for limitations on liability to be respected. In Quebec, Canada, stipulating a prohibited governing jurisdiction and forum for arbitration can be a false or misleading representation. In these jurisdictions, Internet companies should choose local law, local courts and make substantive changes recommended as critical by relevant local counsel.

Internationally, Internet companies face a dilemma. Enforceability of click-wrap agreements is most certain with respect to large non-consumer organizations (e.g. B2B transactions), yet given the lower number of contracts and high dollar values, it may be worth the effort to execute a traditional (paper) contract.

The use of click-wrap agreements may ultimately be less effective for international mass-market use. Enforceability is least certain with respect to individual consumers, but it is impracticable to collect thousands of individually-executed agreements.

Whatever Internet companies decide to do, they must think through these issues carefully before proceeding.

¹ 86 F.3d 1447 (7th Cir. 1996)

² *Steven J. Caspi, et al. v. The Microsoft Network, L.L.C., et al.*, 1999 WL 462175, 323 NJ Super. 118 (NJ App. Div., July 2, 1999)

³ *Groff v. America Online, Inc.*, File No. C. A. No. PC 97-0331, 1998 W L 307001 (RI Superior Court, May 27, 1998)

⁴ R.I.G.L (1956) 6-13.1-1, et seq.

⁵ C98-20064 (N.D. Ca., April 20, 1998)

⁶ *Ticketmaster Corp., et al. v. Tickets.com, Inc.*, (C.D.Cal., March 27, 2000)

⁷ 1998 N.Y. App. Div. Lexis 8872 (1st Dept. N.Y., August 13, 1998)