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Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts

Zachary M. Harrison*

On the information highway lots of product information will be available directly from the manufacturers. As they do today, vendors will use a variety of entertaining and provocative techniques to attract us.

—Bill Gates¹

INTRODUCTION

Imagine yourself browsing the Internet, looking to download software to play classical music off the World Wide Web.² You are delighted to find a vendor selling a reasonably priced program that does what you want.³ So you input your name, address, e-mail address, and credit card number, and the opening page of a multi-page license agreement pops up on the screen.⁴ Hovering below it

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1. BILL GATES, *THE ROAD AHEAD* 159 (1995).

2. See Tim Blangger, *Music to Your Ears; Download the latest records at home for a price*, *NEWSDAY*, July 15, 1998, at C3 (reporting on the availability of downloadable music and music player software on the Internet); see also William M. Bulkeley, *Radio Stations Make Waves on the Web*, *WALL ST. J.*, July 23, 1998, at B1 (reporting on the growth of Internet radio broadcasting, which is available to listeners through downloadable music-reproduction software); cf. Paul Gilster, *Internet becoming regular interstate for audio traffic*, *NEWS & OBSERVER*, (Raleigh, N.C.), June 7, 1998, at E12 (evaluating several of the programs available for listening to online broadcasts).

3. As of July 1998, at least “five million software [music] ‘players’ in one music format, MP3, ha[d] been downloaded” from the Internet. Jon Pareles, *Digital Distribution Of Music Is Spreading*, *N.Y. TIMES*, July 16, 1998, at E2 (reporting that “anyone with a mid-level computer and an Internet connection can hear music in a multitude of forms”).

4. Such on-line licensing agreements are known as “click-wrap” licenses. See *Hot-mail Corp. v. Van Money Pie, Inc.*, No. C-98-20064, 1998 WL 388389, 47 U.S.P.Q.2d

are two large hyperlinks that read “I Accept” and “I Do Not Accept.”⁵ You are so eager to download the program that you click on “I Accept” without scrolling through the full agreement.⁶ That’s when the trouble begins. The software vendor inadvertently transmits a virus that infects your system and blocks access to your hard drive.⁷ You seek repair costs from the vendor and are stunned to learn that the “click-wrap”⁸ license that you failed to read on-screen disclaimed all vendor liability for viruses.

As Internet use has grown dramatically in recent years, so too has the use of click-wrap licensing⁹—for both on-line and retail sales of software.¹⁰ Click-wrap contracting involves the text of an

1020 (BNA) (N.D. Cal. Apr. 16, 1998) (order) (issuing preliminary injunction to enforce, *inter alia*, a click-wrap license agreement). *Hotmail* is billed as “the first judicial pronouncement” on the enforceability of click-wrap contracts. Martin H. Samson, *Outside Counsel: Click-Wrap Agreement Held Enforceable*, N.Y. L.J., June 30, 1998, at 1.

5. Click-wrap agreements operate without paper:

A party posts terms on its [Internet] Web site pursuant to which it offers to sell goods or services. To buy these goods, the purchaser is required to [manifest] his assent to be bound by the terms of the offer by his conduct—typically the act of clicking on a button stating “I agree.” Once the purchaser indicates his assent to be bound, the contract is formed on the posted terms, and the sale is consummated.

Samson, *supra* note 4.

6. *See id.*

7. *Cf.* Glyn Moody, *Build up your immunity to viruses over the Net*, COMPUTER WEEKLY, Sept. 4, 1997, at 46 (reporting on the widespread fear of Internet computer viruses and the elaborate precautions against them). *But cf.* Glyn Moody, *Virus talk gives users the wrong impression*, COMPUTER WEEKLY, Aug. 28, 1997, at 32 (downplaying widespread fears of computer viruses on the Internet).

8. *See* Adam Eric Jaffe, Note, *Red Alert! Add-On Games Are Coming!*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 655, 693 (1998) (full text of sample click-wrap license agreement). Click-wrap licenses operate in the same manner as the shrink-wrap agreements common to software packaging, except that a click-wrap license is accepted by a using a computer mouse, rather than by opening a sealed software package. *See id.* at 689 n.232; *cf.* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (enforcing provisions of a shrink-wrap license); *cf. also* William A. Streff, Jr. & Jeffrey S. Norman, *Courts, UCC Tackle Shrink-Wrap Licenses*, N.Y. L.J., Oct. 14, 1997, at S6 (reporting, *inter alia*, that the National Conference of Commissioners on Uniform State Laws and the American Law Institute has proposed and sponsored a new provision to the Uniform Commercial Code (“U.C.C.”) dealing with shrink-wrap, click-wrap, and electronic licenses).

9. *See* Streff & Norman, *supra* note 8 (reporting that “[t]he use of shrink-wrap and click-wrap licensing has become common practice in the sale of retail software”).

10. *See, e.g.*, Diane W. Savage, *The Impact of Proposed Article 2B of the Uniform*

offer for computer software, presented on a computer screen along with the license terms.¹¹ A computer user manifests his acceptance of the offer by clicking an on-screen box, which states that the user accepts the terms of the license.¹² Click-wrap licenses enable licensors to protect information that would be otherwise permissible to copy under the federal and international intellectual property laws; licensors also use the click-wrap system to disclaim implied warranties and consequential damages.¹³

Through click-wrap terms, software vendors attempt to use contract law to limit the rights of purchasers under intellectual property law, while simultaneously enhancing their own rights.¹⁴ If enforceable, click-wrap terms can effectively shield an on-line

Commercial Code on Consumer Contracts for Information and Computer Software, 9 LOY. CONSUMER L. REP. 251, 254 (1997) (discussing the growth of subscriptions to on-line services and electronic commerce).

11. See Carey R. Ramos & Joseph P. Verdon, *Shrinking and Click-On Licenses After ProCD v. Zeidenberg*, 13 COMPUTER LAW. 1 (1996).

12. See Marcus G. Larson, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*, 5 TUL. J. INT'L & COMP. L. 445, 482 (1997).

13. See Streff & Norman, *supra* note 8; see also Mark A. Lemley, *Intellectual Property and Shrink-Wrap Licenses*, 68 S. CAL. L. REV. 1239 (1995) [hereinafter Lemley I] (describing the purposes of shrink-wrap licenses as providing proprietary rights, limiting warranties, and limiting user rights). The opening text of a typical click-wrap agreement provides as follows:

ONLINE SOFTWARE LICENSE AGREEMENT IMPORTANT!

The Software you seek to download from the [Vendor] website ("Website") is licensed only on the condition that you (referred to as "YOU" or "CUSTOMER") agrees with [VENDOR] (referred to as "VENDOR") to the terms and conditions set forth below. PLEASE CAREFULLY READ THE TERMS OF THIS SOFTWARE LICENSE AGREEMENT.

IF YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT, YOU SHOULD CLICK ON THE BOX AT THE BOTTOM OF THIS PAGE LABELED "I ACCEPT" AT WHICH TIME THE SOFTWARE WILL BE DOWNLOADED TO YOUR COMPUTER.

IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, YOU SHOULD CLICK ON THE BOX AT THE BOTTOM OF THIS PAGE LABELED "I DO NOT ACCEPT" AT WHICH POINT YOU WILL RETURN TO THE PRIOR WEB PAGE WITHOUT THE SOFTWARE BEING DOWNLOADED.

Michael D. Scott, *Protecting Software Transactions On-line: The Use of "Clickwrap" Licenses*, 482 PLI/PAT. 101, 113 (1997).

14. See Lemley I, *supra* note 13, at 1239-40.

software transaction from rights given the user by intellectual property law.¹⁵ Recurring provisions in shrink-wrap and click-wrap licenses include proprietary rights, limitations on warranties, and limitations on user rights.¹⁶

Proprietary rights provisions typically assert that the information contained in the accompanying computer software is proprietary to the vendor and cannot be copied or disclosed without the vendor's permission.¹⁷ Warranty limitations typically disclaim implied contractual warranties such as the implied warranties of merchantability and fitness for a particular purpose.¹⁸ Typically, licenses with such limitations also disclaim all liability for consequential, incidental, special, or exemplary damages.¹⁹ Those disclaimers are important, given the significant damages that a user might suffer if a program crashes or a computer virus is transmitted on-line.²⁰

Wrap licenses typically prevent a user from selling or otherwise disposing of her particular copy of software.²¹ This conflicts with section 117 of the Copyright Act,²² which expressly grants owners of a copy of a computer program the right to make archival copies and to adapt the computer program as necessary to make sure it runs on the computer.²³ A wrap term also may limit a user's right to "decompile or disassemble" the program for any purpose.²⁴ Such a limitation conflicts with the rule followed by a majority of jurisdictions, which enables users to "reverse engineer" computer programs when necessary to gain access to unprotected ideas contained in those programs.²⁵ Wrap licenses also may prohibit copy-

15. See *id.* at 1245-46.

16. See *id.* at 1242-48.

17. See *id.* at 1242.

18. See *id.* at 1245.

19. See *id.*

20. See Woody Leonhard, *Virus Attack!*, PC-COMPUTING, May 1, 1997 (stating that viruses cost the typical company \$8,100 in lost time and productivity in 1996).

21. See Lemley I, *supra* note 13, at 1246.

22. 17 U.S.C. § 117 (1994).

23. See Lemley I, *supra* note 13; see also *infra* note 103 (citing 17 U.S.C. § 117).

24. See Lemley I, *supra* note 13, at 1247.

25. See *id.* (citing *Atari Games Corp. v. Nintendo of Am.*, 975 F.2d 832 (Fed. Cir. 1992); *Sega Enter., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992), *as amended*, 1993 U.S. App. LEXIS 78 (9th Cir. 1993); *Vault Corp. v. Quaid Software*,

ing all or part of a computer program even when such copying would constitute a “fair use” of the copyrighted material pursuant to section 107 of the Copyright Act.²⁶

Another term that commonly appears in wrap agreements is a forum selection clause.²⁷ Such a provision is used by the licensor to bring certainty to an Internet information-based transaction that lacks any fixed geographical location.²⁸ Under the proposed article 2B of the Uniform Commercial Code (“U.C.C.”), forum selection clauses are enforceable unless the chosen jurisdiction would not otherwise have jurisdiction over the consumer and the choice is “unreasonable and unjust” to the consumer.²⁹

Currently in its drafting stages, article 2B of the U.C.C. is designed to create an enforceable set of rules for shrink-wrap agree-

Ltd., 847 F.2d 255 (5th Cir. 1988)).

26. *Id.* at 1247 (citing 17 U.S.C.A. § 107 (West Supp. 1996)). Specifically, section 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C.A. § 107.

27. *See Savage, supra* note 10, at 256.

28. *See id.*

29. U.C.C. § 2B-109 (Draft Sept. 25, 1997). Specifically, the proposed 2B-109 provides:

The parties may choose an exclusive forum. However, [other than in an access contract for informational content or services,] in a consumer contract the choice is not enforceable if the chosen jurisdiction would not otherwise have jurisdiction over the consumer. A choice-of-forum term is not exclusive unless the agreement expressly so provides.

Id.

ments and other electronic licensing arrangements, including click-wrap agreements.³⁰ In a retail context, a typical click-wrap license comes in the form of a notice appearing on a user's screen during the installation process that posts the terms and conditions under which the product is offered, and enables the user to click on either "accept" or "decline."³¹ On the Internet, web sites enable users to download software subject to the terms and conditions of electronically transmitted licenses. Once again, the purchaser is typically presented with the choice of clicking either "accept" or "decline."

The term click-wrap is derived from its similarity to shrink-wrap licenses or agreements sealed in plastic on the outside of computer software when purchased.³² Under both types of license, the software licensor does not receive a signed agreement from the user, and instead relies on the consumer's manifestation of assent via the computer.³³ Until recently, the enforceability of shrink-wrap and click-wrap agreements was uncertain.³⁴ The few cases that addressed the issue of both shrink-wrap and click-wrap agreements involved fact-specific rulings highly dependent on the contractual circumstances prior to the licensee's awareness of the wrap terms.³⁵ But two cases may signal a change in the way the electronic licenses are generally viewed. In *ProCD, Inc. v. Zeidenberg*,³⁶ the Seventh Circuit ruled a shrink-wrap license enforceable even where the licensed information was not protected by

30. See *id.* § 2B-101 n. 2.

31. See Scott, *supra* note 13 (containing portion of a typical license agreement).

32. See Apik Minassian, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569, 571 (1997) (describing the typical shrink-wrap licensing agreement as "a single piece of paper containing the license terms wrapped in cellophane or transparent plastic along with the computer software installation diskettes or the owner's manual").

33. See *infra* notes 171-191 (discussing section 2B-212's manifestation of assent provision).

34. See Rebecca S. Eisner, *Managing Customer Relationships and Avoiding Liabilities on the Internet*, 491 PLI/PAT. 205, 236-37 (1997).

35. See *infra* notes 87-88, 90-91, 103-104 and accompanying text (stating the holdings of *Step-Saver*, *Arizona Retail*, and *Vault*); cf. Ian C. Ballon, *The Law of the Internet: Developing a Framework for Making New Law*, 482 PLI/PAT. 9, 24 (1997) (noting that "Internet disputes have generated numerous unreported decisions, but little binding precedent").

36. 86 F.3d 1477 (7th Cir. 1996).

copyright.³⁷ More recently, in *Hotmail Corp. v. Van Money Pie, Inc.*,³⁸ a trial court issued a preliminary injunction, in part, to enforce the provisions of a click-wrap license.³⁹ Those rulings lend impetus to the proposals to amend the U.C.C. to deal with electronic wrap licensing.

This Note focuses on those current proposals to amend the U.C.C. through article 2B, and the challenge of creating a contract regime in which click-wrap agreements are enforceable and the consumer's rights are protected. Part I explores general contract principles applicable to click-wrap agreements and recent case law that addresses the enforceability of wrap agreements, culminating with the Seventh Circuit's landmark decision in *ProCD, Inc. v. Zeidenberg*. Part II examines the September 1997 draft of article 2B and its provisions most applicable to click-wrap contracts. Part III addresses consumer manifestation of assent to click-wrap terms, suggests deficiencies in article 2B's current form with respect to protecting licensees, and offers means of enhancing the consumer's psychological commitment to assent. This Note concludes that article 2B should be amended to require additional safeguards for consumers faced with click-wrap terms in order to achieve greater industry-consumer balance.

I. THE ENFORCEABILITY OF "WRAP" AGREEMENTS PRIOR TO THE *PROCD* DECISION

Click-wrap agreements do not fit neatly within the bargain theory of contract formation envisioned by the Second Restatement of Contracts.⁴⁰ Therefore, article 2B is necessary to clarify the rights

37. *Id.*; see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (holding that the arbitration clause included with a personal computer was enforceable, and deemed accepted, because the plaintiffs failed to return the computer within the thirty day limit set forth in the contract).

38. No. C-98-20064, 1998 WL 388389, 47 U.S.P.Q.2d 1020 (BNA) (N.D. Cal. Apr. 16, 1998) (order).

39. *Id.* at *6.

40. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); see Lemley I, *supra* note 13, at 1248-49. Specifically, section 71 of the Restatement sets forth the following: "(1) to constitute consideration, a performance or return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."

and obligations of the parties to such transactions. Under current practices, the parties to a click-wrap agreement do not engage in a bargain over the license terms. In *ProCD*, the Seventh Circuit's disagreement with the trial court turned largely on the level of review the vendee should be afforded in a contract where a bargain is absent⁴¹—an issue that also arose in the few fact-specific rulings on the enforceability of shrink-wrap licenses prior to *ProCD*. The common law of contracts and limited precedent provide a foundation for critiquing the efficacy of the proposed article 2B.

A. Common Law Contract Principles Applied to Click-Wrap License Agreements

A contract is a promise or set of promises that the law will enforce in some manner.⁴² Contract law requires three elements in order to effect a binding contract: offer, acceptance, and consideration.⁴³ The offer serves as a promise: a commitment to do or refrain from doing something in the future.⁴⁴ An offer creates the power of acceptance in the offeree, enabling him to turn the offeror's promise into a contractual obligation.⁴⁵ An offer is a manifestation of assent to enter into a bargain made by the offeror, conditional on assent by the offeree.⁴⁶ The offeree's assent may take

RESTATEMENT (SECOND) OF CONTRACTS § 71(1)-(2) (1981).

41. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452-53 (1997).

42. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS, § 1.1, at 4 (1990); see also RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty").

43. See Lemley I, *supra* note 13, at 1248; see also *Jenkins v. County of Schuylkill*, 441 Pa. Super. 642, 648, 658 A.2d 380, 383 (1995) (noting "[i]t is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds"); *Hyman Farm Serv., Inc. v. Earth Oil & Gas Co., Inc.*, 920 S.W.2d 452, 457 (1996) (holding buyer's agreement to pay federal excise taxes on fuel purchased from seller not a binding contract based on seller's failure to prove "[t]he requisites for contractual formation: an offer, acceptance of that offer, and consideration").

44. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-5, at 31 (3d ed. 1987); see also *Day v. Amax*, 701 F.2d 1258 (8th Cir. 1983) (discussing the function of an offer in a bargain).

45. See CALAMARI & PERILLO, *supra* note 44, at 32; see also *League Gen. Ins. Co. v. Tvedt*, 317 N.W.2d 40 (Minn. 1982) (discussing the function of acceptance).

46. See FARNSWORTH, *supra* note 42, § 3.3, at 163; see also RESTATEMENT

the form of a return promise or act.⁴⁷

Traditional contract law envisions contract formation only after the parties have bargained over the terms.⁴⁸ Mass-market click-wrap transactions, however, typically lack any bargaining between the vendor and user with respect to license terms.⁴⁹ Essentially, such transactions are “take it or leave it” agreements in which the user is not made aware of the terms, if at all, until late in the transaction.⁵⁰ Unlike traditional written contracts for the sale of goods or services, the party against whom the terms will be enforced in a click-wrap agreement never signs the license.⁵¹

A retail advertisement for the sale of goods may or may not constitute an offer—depending on its level of specificity. Typically, a reasonable person standard is used.⁵² It has long been established that an advertisement placed by a clothing store for a brand of suits sold for \$250 does not constitute an offer because it would be unreasonable to assume that the merchant has committed itself to reserve an unlimited supply of suits.⁵³ This problem could arise in the Internet context if an on-line service provider advertised its services for a very low price. By doing so, it would be

(SECOND) OF CONTRACTS § 24 (defining an offer as “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it”). See, e.g., *Eerdmans v. Maki*, 573 N.W.2d 329, 332 (1997) (holding that listing agreement between a real estate agent and property owner did not manifest a willingness on the part of the owner to enter into a bargain with a prospective purchaser).

47. See FARNSWORTH, *supra* note 42, § 3.3, at 163.

48. See *supra* note 40 and accompanying text (discussing the notion of a bargain between the parties to a contract).

49. See Lemley I, *supra* note 13, at 1249.

50. Mark A. Lemley, *Shrinkwraps in Cyberspace*, 35 JURIMETRICS J. 311, 317 (1995) [hereinafter Lemley II].

51. See Lemley I, *supra* note 13, at 1249.

52. See CALAMARI & PERILLO, *supra* note 44, § 2.6, at 37; see also *Jackson v. Investment Corp. of Palm Beach*, 585 So.2d 949, 950 (Fla. Dist. Ct. App. 1991) (quoting 1 WILLISTON ON CONTRACTS § 94, 339-340 (“[T]he test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.”)).

53. See CALAMARI & PERILLO, *supra* note 44, § 2.6, at 34-5; see also *Georgian Co. v. Bloom*, 108 S.E. 813 (Ga. Ct. App. 1921); *Steinberg v. Chicago Med. School*, 371 N.E.2d 634 (Ill. App. Ct. 1977); *Rhen Marshall, Inc. v. Purolator Filter Div.*, 318 N.W.2d 284 (Neb. Ct. App. 1982).

pledging itself to handle only the number of orders a reasonable person would have anticipated and not an infinite number of orders.⁵⁴

Acceptance can be defined as an action taken by the offeree through either a promise or performance that creates a contract.⁵⁵ The offeree's acceptance makes the offeror's promise legally enforceable.⁵⁶ Agreements with certain classes of persons such as infants or persons suffering from mental infirmity are either void, or more often, voidable.⁵⁷

Consideration, the traditional contractual requirement of either a benefit to the promisor or a detriment to the promisee, has been replaced in the Second Restatement of Contracts by bargain theory.⁵⁸ Under the Second Restatement of Contracts, something is considered bargained for "if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."⁵⁹

A key issue in the common law of contracts that is especially relevant to determining the enforceability of click-wrap agreements is whether assent should be determined on the basis of the parties' actual or apparent intentions.⁶⁰ The subjective approach looks to the actual intentions of the parties⁶¹ and is reflected in the Second Restatement of Contracts.⁶² In order for a contract to be formed under the subjective approach, there must be a "meeting of the minds" between the parties.⁶³ Assent is binding only to those terms to which the parties have agreed in fact.⁶⁴ The objective ap-

54. See *supra* note 52 and accompanying text (discussing the reasonable person standard applied to offer and acceptance based on advertisements).

55. See FARNSWORTH, *supra* note 42, § 3.3, at 164; see also RESTATEMENT (SECOND) OF CONTRACTS § 50 (defining acceptance).

56. See FARNSWORTH, *supra* note 42, § 3.3, at 164.

57. See CALAMARI & PERILLO, *supra* note 44, § 8-2, at 306-07.

58. See *id.* § 2.2, at 62-63.

59. *Id.* at 63 (citing RESTATEMENT (SECOND) OF CONTRACTS § 71).

60. See FARNSWORTH, *supra* note 42, § 3.6, at 168.

61. See *id.*

62. RESTATEMENT (SECOND) OF CONTRACTS §§ 210, 212, 215, cmt. b (1981).

63. FARNSWORTH, *supra* note 42, § 3.6, at 168.

64. See Celeste L. Tito, *The Servicewrap: "Shrink-Wrap" for Mass-Marketed Software Services*, 13 COMPUTER LAW. 19, 22 (1996).

proach, in contrast, looks to the external or objective appearance of the parties' intentions as manifested by their actions.⁶⁵ If the parties' actions, based on a standard of reasonableness, manifest an intention to agree, the parties' real but unexpressed states of mind are irrelevant.⁶⁶ In its current form, U.C.C. article 2B's approach to wrap agreements strongly reflects the objective approach.⁶⁷

It is well established that a party, who has the capacity to understand a written document but fails to read it before signing it, is bound by the signature.⁶⁸ An exception to this duty to read arises where the provisions are not sufficiently called to the attention of the party.⁶⁹ Whether a contractual provision is sufficiently called to the attention of a party is determined by whether a reasonable person, considering all the circumstances of the case, would know that the terms in question would be a part of the proposed contract.⁷⁰ With adhesion contracts, courts also have declined to impose a duty to read rule if the term or terms buried in the contract are either unconscionable or contrary to public policy.⁷¹ It is unclear whether the duty to read would apply in the click-wrap context because inexperienced users may not be aware that the additional wrap terms are binding.⁷²

A model example of post-sale terms in a context outside electronic contracting is the additional terms attached to the back of a cruise ship ticket as discussed in *Carnival Cruise Lines, Inc. v. Shute*.⁷³ In *Carnival*, the Shutes, a Washington State couple, filed suit against Carnival Cruise Lines, Inc. ("Carnival"), a Florida-based company, in the Western District of Washington for injuries suffered by Mrs. Shute when she slipped on a deck mat on Carni-

65. See FARNSWORTH, *supra* note 42, § 3.6, at 168-69.

66. See *id.* at 169.

67. See *supra* notes 60-66 and accompanying text (discussing the objective and subjective approaches under article 2B).

68. See CALAMARI & PERILLO, *supra* note 44, § 9-42, at 410.

69. See *id.* at 412.

70. See *id.* at 413.

71. See *id.* at 421.

72. See *infra* notes 200-201 and accompanying text (discussing how article 2B's reasonable person standard for conspicuous language is problematic when applied to computer users because their computer knowledge varies greatly).

73. 499 U.S. 585 (1991).

val's cruise ship off the coast of Mexico.⁷⁴ The Washington Federal District Court granted Carnival summary judgment.⁷⁵ The Court of Appeals reversed, holding that Carnival's forum selection clause on the back of the tickets was unenforceable because it was not freely bargained for and would effectively deprive the Shutes of their day in court in light of evidence they were incapable of pursuing the litigation in Florida.⁷⁶ The Supreme Court reversed in a seven to two decision, holding the forum selection clause reasonable and enforceable based on its effects of reducing litigation and insurance costs, as well as passenger fairs.⁷⁷

B. *Shrink-Wraps Were Invalid Prior to ProCD*

Prior to *ProCD*,⁷⁸ only three reported cases discussed the issue of the enforceability of wrap licenses.⁷⁹ All three addressed the enforceability of shrink-wrap licenses.⁸⁰ Although those decisions established some general principles to guide software developers and consumers, none of them involved a click-wrap agreement in a mass-market consumer transaction.⁸¹ The common issue to all of those cases was whether a licensee could be subject to post-sale license terms when those terms were either not completely displayed or not known to the purchaser until after the licensee had purchased the program.

74. *See id.* at 585.

75. *See id.*

76. *See id.*

77. *See id.* at 597.

78. 86 F.3d 1447 (7th Cir. 1996).

79. *See infra* notes 82, 89, 101 (citing *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991), *Arizona Retail Systems v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993), and *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988)).

80. *See infra* notes 84, 97, 103 (discussing the shrink-wrap license at issue in *Step-Saver*, *Arizona Retail*, and *Vault*).

81. *See Ramos & Verdon, supra* note 11, at 3; *see also infra* Part II.A (discussing the definitions of "mass-market license" and "mass-market transaction" in section 2B-107(28) and section 2B-107(29) respectively).

1. Courts Finding Contract Formed Prior to Shipment
With Shrink-Wrap Terms as Additional Terms

In *Step-Saver Data Systems Inc. v. Wyse Technology and Software Link, Inc.*,⁸² the plaintiff purchaser contested the enforceability of terms contained in a shrink-wrap license received from the defendant Wyse Technology and Software Link, Inc. (“Wyse”).⁸³ In a series of telephone orders, Wyse agreed to ship software at an agreed-upon price; the parties did not discuss the shrink-wrap license.⁸⁴ Wyse nevertheless included a shrink-wrap license in each shipment of the software and petitioned the court to enforce the terms of the license.⁸⁵ The Third Circuit, applying section 2-207 of the U.C.C.,⁸⁶ held that the shrink-wrap license was not part of the contract established between the parties.⁸⁷ In reaching its conclusion, the court emphasized that Wyse “did not clearly express its unwillingness to proceed with the transactions unless its additional [shrink-wrap license] terms were incorporated into the parties’ agreement.”⁸⁸

In *Arizona Retail Systems, Inc. v. Software Link, Inc.*,⁸⁹ the United States District Court for the District of Arizona followed

82. 939 F.2d 91 (3d Cir. 1991).

83. *Id.* at 102-03.

84. *Id.* at 97.

85. *Id.* at 103.

86. Section 2-207(2) provides, in relevant part:

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become a part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

U.C.C. § 2-207(2) (1991). Official comment 4 of section 2-207 states:

Examples of typical clauses which would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches

Id. § 2-207 cmt. 4.

87. *Step-Saver*, 939 F.2d at 105.

88. See Ramos & Verdon, *supra* note 11, at 3 (quoting *Step-Saver Data Sys. Inc. v. Wyse Tech.*, 939 F.2d 91, 103 (3d Cir. 1991)).

89. 831 F. Supp. 759 (D. Ariz. 1993).

Step-Saver. The court concluded that a shrink-wrap license was not part of the contract established in a series of telephone orders in which neither party discussed the license or its terms.⁹⁰ The court further held, however, that the shrink-wrap license was enforceable based on an initial transaction prior to the multiple telephone orders.⁹¹

In the initial transaction, the purchaser's system manager telephoned to inquire about a specific software program.⁹² The vendor Software Link, Inc. ("Software Link") sent two copies of the software, an "evaluative" copy and a "live" copy.⁹³ Arizona Retail Systems spent two hours using the evaluative copy, determined it wanted to purchase the program, and then opened the live copy, which had the license attached to it.⁹⁴ Subsequently, Arizona Retail Systems purchased additional copies of the software through telephone orders.⁹⁵

The court considered the initial transaction separately from the subsequent transactions, finding that the initial offer took place when Software Link sent the live copy of the software with the evaluation diskette.⁹⁶ The court held that Arizona Retail Systems accepted Software Link's offer and entered into a contract when Arizona Retail Systems opened the "live disk" envelope, which expressly stated that, by opening the envelope, the user acknowledged acceptance of the product and consented to all the provisions of the license agreement.⁹⁷ The terms of the box-top license were incorporated into that contract because they were visible on the outside of the envelope and Arizona Retail Systems had been ex-

90. *See id.* at 764.

91. *See id.* at 763.

92. *See id.* at 760.

93. *See id.* at 761. An "evaluative" copy of software is a sample of the software program intended to enable the potential purchaser to evaluate the software prior to purchase. *See* Jeffrey C. Selman & Christopher S. Chen, *Steering the Titanic Clear of the Iceberg: Saving the Sale of Software from the Perils of Warranties*, 31 U.S.F. L. REV. 531, 535 (1997). A "live" copy of software is the complete software program with a license printed on shrink-wrap encasing the software. *Cf. id.*

94. *See id.*

95. *See id.*

96. *See id.* at 764.

97. *See id.*

posed to them before the contract was formed.⁹⁸

2. Shrink-Wrap Agreement Invalidated Based on Section 117 Preemption of Louisiana State Law

In addition to a developer's failure to manifest intent not to proceed unless wrap terms are incorporated,⁹⁹ click-wrap terms also may fail through preemption by federal law when they impede the user from engaging in activities authorized under federal copyright law.¹⁰⁰ Preemption was at the heart of the only other reported case, prior to *ProCD*, that discussed the enforceability of shrink-wrap licenses: *Vault Corp. v. Quaid Software Ltd.*¹⁰¹ In *Vault*, the defendant Quaid Software Ltd. ("Quaid") reverse engineered software diskettes manufactured by the plaintiff Vault Corp. ("Vault").¹⁰² Clearly, that was the antithesis of the diskettes' intended purpose. The Fifth Circuit found that Quaid's activities in copying and reverse engineering Vault's software were within the copying privileges granted under section 117 of the Copyright Act.¹⁰³ Therefore, the court refused to enforce the contrary prohi-

98. *See id.*

99. *See supra* note 87-88 and accompanying text (describing the holding of *Step-Saver*).

100. *See* Gary H. Moore & J. David Hadden, *On-Line Software Distribution: New Life for "Shrinkwrap" Licenses?*, 13 *COMPUTER LAW*, 1, 4-5 (1996). *But see* *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) ("Courts usually read preemption clauses to leave private contracts unaffected.").

101. 847 F.2d 255 (5th Cir. 1988).

102. *See id.* at 261.

103. *See id.* Section 117 of the Copyright Act states:

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

bitions of Vault's shrink-wrap license on the grounds of preemption by federal law.¹⁰⁴ The court proceeded from the premise that the license was a "contract of adhesion" that would be invalid but for the provisions of Louisiana's License Act, which provided that a software user was "deemed to have accepted" a shrink-wrap license if it accompanied the software in the manner prescribed by the statute and contained terms authorized by the statute.¹⁰⁵

3. The District Court and Seventh Circuit in *ProCD, Inc. v. Zeidenberg*: Competing Views on Consumer Consent to Wrap Terms

Although courts and legislatures have yet to squarely confront click-wrap enforceability issues, the Seventh Circuit Court of Appeals did uphold the enforceability of a restriction in a click-wrap license agreement in *ProCD, Inc. v. Zeidenberg*.¹⁰⁶ Unlike the preceding cases, *ProCD* considered the enforceability of both click-wrap and shrink-wrap licenses in a mass-market consumer transaction. In *ProCD*, the licensor, had spent more than \$10 million compiling more than 3,000 publicly available telephone and address directories into a CD-ROM database.¹⁰⁷ The shrink-wrap and click-wrap licenses included with the program provided that the data could be copied only for non-commercial purposes.¹⁰⁸ Zeidenberg, the defendant, purchased ProCD's database and subsequently resold the information over the Internet in violation of the click-wrap license terms.¹⁰⁹ The license had been designed by ProCD to appear on the user's screen when the program was first installed and required the user to click a button indicating his or her agreement to the displayed terms before proceeding.¹¹⁰

17 U.S.C.A. § 117 (West 1996).

104. *See Vault*, 847 F.2d at 261.

105. *Id.* at 269.

106. 86 F.3d 1447 (7th Cir. 1996).

107. *See id.* at 1449.

108. *See id.* at 1450.

109. *See id.*

110. *See id.* at 1452. In its *ProCD* ruling, the Seventh Circuit noted that:

ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice because the software splashed the license on the screen and

a. The Wisconsin District Court Decision

The United States District Court for the Western District of Wisconsin granted Zeidenberg's motion for summary judgment, holding that ProCD's shrink-wrap license was unenforceable because Zeidenberg did not consent to the terms on the interior of the package at the time of the purchase.¹¹¹ In refusing to enforce the shrink-wrap license, the court rejected ProCD's argument that the license, which was referenced on the outside of the box, should be part of the contract formed between ProCD and Zeidenberg.¹¹² The district court reasoned that "[m]ere reference to the terms at the time of initial contract formation does not present buyers an adequate opportunity to decide whether they are acceptable. They must be able to read and consider the terms in their entirety."¹¹³

The court also discussed the proposed U.C.C. section 2-2203,¹¹⁴ which would validate shrink-wrap licenses if the consumer had an opportunity to review the terms of the license before manifesting assent.¹¹⁵ The court viewed this proposal as evidence that shrink-wrap licenses were invalid under the current U.C.C., reasoning that the proposed change would not be necessary if shrink-wrap licenses were valid.¹¹⁶ The court concluded that Zeidenberg was not bound by the terms of ProCD's shrink-wrap license.¹¹⁷

would not let him proceed without indicating acceptance.

Id.

111. ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640 (W.D. Wis.), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

112. *See id.* at 654-55.

113. *Id.* at 654.

114. *See id.* at 655 (citing Lemley I, *supra* note 13, at 1293). The proposed section 2-2203 on which the district court based its ruling would have made standard form licenses enforceable if:

[P]rior to or within a reasonable time after beginning to use the intangibles pursuant to an agreement, the party

(1) signs or otherwise by its behavior manifests assent to a standard form license; and

(2) had an opportunity to review the terms of the license before manifesting assent, whether or not it actually reviewed the terms.

Lemley I, *supra* note 13, at 1293.

115. *See ProCD*, 908 F. Supp. at 655.

116. *See id.*

117. *See id.*

b. Reversal by the Seventh Circuit

The Seventh Circuit reversed the district court's holding with respect to the shrink-wrap license, holding that shrink-wrap licenses in mass-market consumer transactions are enforceable under the U.C.C. "unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)."¹¹⁸ The Seventh Circuit disregarded *Step-Saver*¹¹⁹ as merely a battle-of-the-forms case, and proceeded to determine that the ProCD license agreement was enforceable.¹²⁰ The court found that the contract was formed when the purchaser agreed to the license that was displayed on the screen.¹²¹ The court reasoned that although contracts are frequently formed by simply paying and walking out of the store, ProCD's sale was expressly subject to a license agreement.¹²²

The Seventh Circuit emphasized that parties are free to "structure their relations so that the buyer has a chance to make a final decision after a detailed review" of the license agreement.¹²³ Under the court's rationale, Zeidenberg could have prevented formulation of the contract pursuant to U.C.C. section 2-201(1),¹²⁴ sim-

118. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996). The weight of the Seventh Circuit's reversal has been brought in question recently by the proposed Digital Era Copyright Enhancement Act. The Digital Era Copyright Enhancement Act would preempt non-negotiable contracts that attempt to limit the use of non-copyrighted material and non-negotiable licenses that attempt to restrict a user's right to use copyrighted work in ways permitted under Copyright Act provisions. See David L. Loundy, *The Good, Bad, Ugly of Copyright Law Rewrites*, CHI. DAILY L. BULL., Jan. 8, 1998, at 5.

119. See *supra* notes 82-87 and accompanying text (discussing *Step-Saver Data Systems Inc. v. Wyse Technology and Software Link, Inc.*, 939 F.2d 91 (3d Cir. 1991)).

120. See *ProCD*, 86 F.3d at 1452.

121. See *id.*

122. See *id.* at 1450.

123. *Id.* at 1453.

124. According to section 2-201(1):

Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such

ply by returning the software after he found any objectionable terms in the click-wrap agreement.¹²⁵ The Seventh Circuit reasoned that it is fair to enforce the terms of the shrink-wrap license as long as basic protections are provided to the consumer: notice of the existence of the shrink-wrap license, opportunity to review and reject the license, and an available refund if the license is not acceptable.¹²⁶

4. *Step-Saver, Arizona Retail, Vault and ProCD*: Fact-Specific Approaches to Wrap Enforceability

Based on current precedent, the enforceability of click-wrap licenses appears to be a fact-specific determination, depending heavily on the rules selected by the court in its analysis.¹²⁷ Of the available means of ensuring the enforceability of electronic agreements, paper agreements between the parties that govern the communications are currently the safest way to proceed.¹²⁸ The key issues regarding wrap enforceability are whether the developer manifested an intention not to proceed unless the wrap terms were incorporated into the agreement.¹²⁹ The issue is at what point, if any, during the transaction did the wrap license become a part of the contract,¹³⁰ and whether federal copyright law preempts any of the license terms.¹³¹ A court's view as to when contract formation takes place is crucial to determining how that court will rule on the second issue.¹³² A court treating post-sale terms as new or addi-

writing.
U.C.C. § 2-201(1).

125. See *ProCD*, 86 F.3d at 1452 (quoting U.C.C. § 2-204(1)) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

126. See *id.* at 1452-53; see also Ramos & Verdon, *supra* note 11, at 5.

127. Cf. Ramos & Verdon, *supra* note 11, at 5 (noting "[there are] only a few cases addressing the issue of enforceability in rather fact-peculiar circumstances").

128. See Eisner, *supra* note 34, at 237.

129. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d at 103-05; see also *supra* notes 86-88 and accompanying text (stating the holding of *Step-Saver*).

130. See *Arizona Retail Sys. v. Software Link, Inc.*, 831 F. Supp. at 763-64; see also *supra* notes 89-91 and accompanying text (stating the holding of *Arizona Retail*).

131. See *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d at 270; see also *supra* notes 103-105 and accompanying text (discussing the issue raised in *Vault*).

132. Cf. Christopher L. Pitet, *The Problem With "Money Now, Terms Later"*: *ProCD, Inc. v. Zeidenberg and the Enforceability of "Shrinkwrap" Software Licenses*, 31

tional terms to an already formed contract will likely not enforce additional click-wrap terms.¹³³ A court treating the sale as conditioned on assent to the license agreement, however, is likely to enforce the agreement, especially if, as in *ProCD*, there are basic protections for the purchaser if he chooses to reject it.¹³⁴

Because of the fact-specific rulings and the paucity of cases, it appears premature to consider shrink-wrap and click-wrap licenses categorically enforceable.¹³⁵ The United States District Court for the Northern District of California, for example, applied a fact-specific approach to rule against the enforceability of a shrink-wrap term in *Morgan Laboratories, Inc. v. Micro Data Base Systems, Inc.*¹³⁶ *Morgan* involved a vendor who attempted to enforce a forum selection clause provided in a shrink-wrap license included with the software, which the licensee had not agreed to in writing as required by the parties' prior "no-modification-unless-in-writing" agreement.¹³⁷ In denying the vendor's motions to dismiss for improper venue and transfer,¹³⁸ the district court stated that although shrink-wrap agreements may be enforceable in some cases, they do not trump explicit prior agreements where those agreements contain integration and "no-modification-unless-in-

LOY. L.A. REV. 325, 340 (1997) (noting that in *ProCD*, the Seventh Circuit found that a contract was formed some time after the buyer was given an opportunity to read the license, and not at the time of purchase as prior courts had).

133. See, e.g., *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 655 (concluding that "because defendants did not have the opportunity to bargain or object to the proposed user agreement or even review it before purchase and they did not assent to the terms explicitly after they learned of them, they are not bound by the user agreement").

134. See *Streff & Norman*, *supra* note 8, at S6.

135. See *id.*; see also D.C. Toedt III, *Counterpoint: Shrinkwrap License Enforceability Issues*, 13 *COMPUTER LAW* 7, 9 (1996) ("Technically, the *ProCD* decision applies only to Wisconsin law, and is binding only in the federal district courts supervised by the Seventh Circuit.").

136. 41 U.S.P.Q.2d 1850 (N.D. Cal. 1997).

137. *Id.* at 1851. The contract read in relevant part: "This Agreement and the License Agreement for the System are the entire agreement between the MDDBS and the Licensee regarding the subject matter; no verbal representations are binding; any amendment must be signed by MDDBS and Licensee." *Id.*

138. *Id.* at 1853 (citing 28 U.S.C. § 1404(a)). Specifically, section 1404(a) of title 28 of the United States Code states: "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (West 1998).

writing clauses.”¹³⁹

Despite the uncertainty, *ProCD*, *Step-Saver*, and *Arizona Retail Systems* suggest certain steps that software developers may take to increase the likelihood that click-wrap licenses will be enforced.¹⁴⁰ Such steps include bringing the existence of the click-wrap license to the purchaser’s attention before concluding the sale, providing the purchaser with an opportunity to carefully review the license and decline to accept the software, and enabling the consumer to obtain a refund if the license is objectionable.¹⁴¹

5. *Hotmail*: A Sea Change in Click-Wrap Enforcement or Another Fact-Specific Ruling?

The next step in click-wrap license enforcement could come from a yet-to-be-completed case in the Northern District of California. In *Hotmail Corp. v. Van Money Pie, Inc.*,¹⁴² the district court found that a click-wrap agreement was so likely to be enforced that it met the strict test for a preliminary injunction to prevent a breach. Hotmail, a California e-mail provider, sued for trademark dilution, computer fraud, and breach of its click-wrap prohibition against “spam”—unsolicited commercial e-mail similar to postal junk mail.¹⁴³ In ruling that Hotmail was likely to prevail on its breach of contract claim,¹⁴⁴ the court equated the click-wrap agreement with a traditional contract.¹⁴⁵

Nevertheless, *Hotmail’s* impact on future click-wrap enforce-

139. See *Morgan*, 41 U.S.P.Q.2d at 1853 (citing *Arizona Retail*, 831 F. Supp. at 763-66).

140. See Ramos & Verdon, *supra* note 11, at 5.

141. See *id.*

142. No. C-98-20064, 1998 WL 388389, 47 U.S.P.Q.2d 1020 (BNA) (N.D. Cal. Apr. 16, 1998) (order).

143. *Id.* at *1.

144. *Id.* at *6.

145. In ruling that Hotmail was likely to prevail on its click-wrap enforcement claim, the court ruled that:

The evidence supports a finding that . . . defendants agreed to abide by Hotmail’s Terms of Service . . . that defendants breached their contract with Hotmail . . . that Hotmail complied with the conditions of the contract except those from which its performance was excused . . . and that if defendants are not enjoined they will continue . . . in violation of the Terms of Service.

Id. at *6.

ment is clouded by the presence of numerous other claims against the defendants. Although there is no way of knowing the weight the court attributed to the click-wrap enforcement claim, it seems unlikely that it was the most important cause of action—given that the litigation also alleged violation of the Computer Fraud and Abuse Act¹⁴⁶ and violations of the Lanham Act for trademark dilution¹⁴⁷ and false designation.¹⁴⁸ Consequently, *Hotmail* could signal a sea change in click wrap enforcement by the courts, or, if in fact the click-wrap breach was merely an afterthought by the court, *Hotmail* could join the ranks of the extremely fact-specific rulings on click-wrap enforceability.

II. PROPOSED ARTICLE 2B OF THE UNIFORM COMMERCIAL CODE

The lack of uniformity in the caselaw prompted the National Conference of Commissioners on Uniform State Laws has to form a committee to draft a new article 2B in the U.C.C.¹⁴⁹ to govern transactions in the computer industry, including licenses.¹⁵⁰ The committee, comprised of representatives from computer software, consumer, and entertainment groups, has met numerous times since March 1994.¹⁵¹ Article 2B would supersede the proposed U.C.C. provision discussed by the district court in *ProCD*.¹⁵²

Article 2B deals with transactions in information.¹⁵³ It focuses on transactions relating to the “copyright industries,” including computer software contracts.¹⁵⁴ It is intended to create a uniform body of law that would apply to transactions in software, including retail software transactions such as shrink-wrap and click-wrap li-

146. 18 U.S.C.A. § 1030 (West, WESTLAW through Pub. L. No. 105-175 (May 11, 1998)) (barring knowing accessed to a computer without authorization or exceeding authorized access).

147. See 15 U.S.C.A. § 1125(c) (West Supp. 1998).

148. See 15 U.S.C.A. § 1125(a) (West 1998).

149. U.C.C. 2B pt. 1 (Draft September 25, 1997).

150. See *id.* preface.

151. See *id.* pt. 1.

152. See *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 655 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996); see also *supra* notes 87-87 and accompanying text (discussing the district court's use of proposed section 2-2203 in its analysis of why shrink-wraps were unenforceable under then current law).

153. U.C.C. 2B preface.

154. *Id.*

censes.¹⁵⁵ The draft presents new means of contract adapted to electronic contract formation.¹⁵⁶ For example, a “record” replaces the traditional “writing” requirements, “authentication” replaces the traditional signature requirements, and programmed electronic “agents” may form a contract even though there is no actual review by the parties of the terms of their agreement.¹⁵⁷

The movement to amend article 2 arose broadly out of the need to create a new U.C.C. provision to cover the American economy’s shift from a goods-based economy to one rooted in information, as illustrated by the growth of on-line contracting.¹⁵⁸ More narrowly, the article 2-amendment process resulted from the software industry’s concerns over the contradictory decisions regarding the enforceability of shrink-wrap agreements¹⁵⁹ and consumer group desires for greater protections.¹⁶⁰ Among the central goals of the article 2B drafting committee are creation of a balanced structure for electronic contracting, reduction uncertainty and non-uniformity in software and on-line contract law, and confirmation of freedom in commercial transactions.¹⁶¹

One of the greatest challenges facing the drafters of article 2B is the need to strike a proper balance between the vendor’s requirement for post-sale terms in mass-market licenses and the danger they pose to unwary consumers.¹⁶² Post-sale terms are particu-

155. See Streff & Norman, *supra* note 8, at S6.

156. U.C.C. 2B pt. 3.

157. Streff & Norman, *supra* note 8.

158. U.C.C. 2B pt. 1.

159. See *infra* Part I.B (discussing the shrink-wrap cases leading up to *ProCD*).

160. See Ed Foster, *Software Industry has Little Incentives*, INFOWORLD, Apr. 7, 1997, available in WESTLAW, 1997 WL 10395347. According to Mark Nebergall, vice president and counsel for the Software Publishers Association:

When the [Software Publishers Association] first got involved in this three or so years ago, the thing our members wanted to see most was some certainty in the law regarding enforcement of our license agreements There were some cases at that point that cast some uncertainty on the enforceability of some provisions. But things have changed.

Id.

161. See U.C.C. 2B, preface.

162. Cf. Darren C. Baker, *ProCD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 NW. U. L. REV. 379, 381 (1997) (noting that “[w]hile the court’s decision in *ProCD* is correct, courts wishing to apply the decision should limit the holding to its facts

larly important for electronic databases because such information easily can be copied and distributed over the Internet.¹⁶³ Given this situation, developers are unlikely to expend significant time and money to develop and market such products without effective contractual protections.¹⁶⁴ The final draft of U.C.C. article 2B will be all the more important given the lack of state legislation on Internet commercial issues.¹⁶⁵

A. *Definition of Terms: Section 2B-102 of the Uniform Commercial Code*

Under section 2B-102(a)(7), “conspicuous,” when applied to a term or terms, means “written, displayed or presented [so] that a reasonable person against whom it is to operate ought to have noticed it”¹⁶⁶ Under subsections (A) through (E), a term is conspicuous if it is (1) in all capitals, displayed in larger or contrasting color than other language in the record; (2) prominently referenced in the body or text and can be readily accessed; (3) positioned so that the user cannot proceed without taking action with respect to the term; or (4) readily distinguishable in any other way.¹⁶⁷

Under section 2B-107(a)(28), a “mass-market” license is a defined as a standard form that is prepared for and used in a “mass-market transaction.”¹⁶⁸ Under subsection (29), “mass-market transactions” are “transactions in a retail market involving information directed to the general public as a whole under substantially the same terms for the same information, and involving an end-user licensee . . . consistent with an ordinary transaction in the general retail distribution.”¹⁶⁹ That covers the typical click-wrap

thereby ensuring the proper balance between consumer protection and the freedom of software manufacturers to protect their products with the use of contract”).

163. See Ramos & Verdon, *supra* note 11, at 5.

164. See *id.*

165. See also Koh Su Haw, *E-commerce: Technology Can Bypass the Legal Pitfalls*, BUS. TIMES, Oct. 14, 1996, available in WESTLAW, 1996 WL 6288344 (noting that “existing laws . . . are [not] equipped to handle the vastly different Internet communications medium”).

166. U.C.C. § 2B-102(a)(7) (Draft Sept. 25, 1997).

167. *Id.* § 2B-102(a)(7)(A)-(E).

168. *Id.* § 2B-102(a)(28).

169. *Id.*

agreement because such agreements consist of the same terms for the use of information directed to the general public through the Internet, and an end-user license consistent with software retail purchases.¹⁷⁰

B. *Manifestation of Assent: Section 2B-212 of the Uniform Commercial Code*

Section 2B-112, in conjunction with section 2B-113, attempts to create a procedural background for manifestation of assent in order to provide consumers with protections against inadvertent and unknowing assent.¹⁷¹ Section 2B-112 provides that a contract is not enforceable unless the consumer agrees or manifests assent.¹⁷² Assent requires an opportunity to review and affirmative conduct, not mere retention without objection.¹⁷³

Manifestation of assent differs in operation from traditional contract offer and acceptance.¹⁷⁴ Under the common law, offer and acceptance create a contract.¹⁷⁵ Under article 2B, objective manifestations of assent bind a party to a term or to the terms of a record if there was an opportunity to review the record and the party takes an affirmative act or manifests conduct that indicates consent.¹⁷⁶

The Reporter's Notes to section 2B-212 list three elements that are required for manifestation of assent.¹⁷⁷ First, the party manifesting assent must be one that can bind the licensor being charged with providing the benefits or limitations of the terms of the record and, where assent equals acceptance, the contract itself.¹⁷⁸ Second, the assenting party must take an affirmative act.¹⁷⁹ In traditional transactions for the sale of goods, a signature manifests assent to a record and initials attached to a particular clause manifest assent to that

170. *See id.*

171. *Id.* § 2B-112 n.1.

172. *Id.* app. A.

173. *See id.*

174. *See id.* n.2.

175. *See supra* notes 42-77 and accompanying text (discussing the elements of contract formation and general contract principles).

176. U.C.C. § 2B-112 n.2.

177. *Id.* n.3.

178. *See id.*

179. *See id.*

clause.¹⁸⁰ Under article 2B, the affirmative act of clicking on a displayed button in response to an on-screen description constitutes acceptance of a particular term or an entire contract.¹⁸¹ Third, the assent must come after a party had an opportunity to review the record or term.¹⁸² Contractual assent requires proof that the party actually read the terms to which it assents.¹⁸³ “Opportunity to review,” in contrast, requires that the term or record be called to the party’s attention before the actions occur.¹⁸⁴ The terms do not have to all be in a single record for the requirement to be met, provided the location creates an opportunity to review and the requirements of explicit consent are met.¹⁸⁵ Thus, a hyper-linked reference to a license, actually contained in a different record, would satisfy the third element enunciated in the Reporter’s Notes to section 2B-212.¹⁸⁶

The illustrations in the notes to section 2B-212 make clear that one way in which a consumer may manifest assent is by clicking on a box on a screen that states that he or she accepts the terms of the license.¹⁸⁷ The illustrations in the current draft do not include, however, any examples of the more traditional case in retail purchases, in which a consumer manifests assent by failing to reject the shrink-wrap license after opening a box that states on the outside that it is subject to the enclosed license.¹⁸⁸ A similar problem arises with click-wrap agreements when the terms are provided only after clicking “O.K.” where the license is hyper-linked and not readily provided to the consumer prior to assent, or where the license terms are provided but the consumer must scroll through many pages in order to read the important warranty disclaimers in the agreement.¹⁸⁹ The Reporter’s Notes to section 2B-212 state

180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.* But see *supra* notes 68-68 and accompanying text (discussing the duty to read and its exception).

184. U.C.C. § 2B-112 n.3.

185. *See id.*

186. *See id.* at 72-77.

187. *See id.* n.3, illus. 1.

188. *See id.* illus. 1-3.

189. For an example of a subscriber license agreement requiring a user to scroll down in order to read it, visit *N.Y. Times On-Line Website* (visited May 3, 1998)

that a hyper-linked reference to a license contained in a different record gives the consumer sufficient opportunity to review assuming all other conditions are met.¹⁹⁰ It is unclear, however, whether this means article 2B endorses a failure to reject the license as a means of consumer assent to the terms.¹⁹¹

C. *Opportunity to Review Under Section 2B-213 and Limits on Wrap Enforceability Under Sections 2B-208 and 2B-104 of the Uniform Commercial Code*

Section 2B-213(a) provides that a consumer is deemed to have an opportunity to review for the purposes of assent if the term “is made available in a manner to call attention of the party and to permit review of its terms or enable the electronic agent to react to the record or term.”¹⁹² Section 2B-212(a) makes opportunity to review a prerequisite to manifestation of assent.¹⁹³ If the terms are not provided for review until after the fee is paid, then under section 2B-113(b) the opportunity to review requires a “right to a refund of any contract fees paid or to stop any payment already initiated if [the consumer] refuses the terms, discontinues use, and returns all copies.”¹⁹⁴

Section 2B-208 provides some narrow restrictions on the enforceability of wrap licenses.¹⁹⁵ Pursuant to section 2B-208(c), a court may exclude a term under section 2B-208(a)(1)¹⁹⁶ if it finds

<http://www.nytimes.com/subscribe/sub-bin/new_sub.cgi/html>.

190. See U.C.C. § 2B-212 n.3.

191. See Ramos & Verdon, *supra* note 11, at 5-6.

192. U.C.C. § 2B-113(a).

193. See *id.* § 2B-112(a). Section 2B-212(a) provides: “(a) A party or electronic agent manifests assent to a record or term in a record if, with knowledge of the terms or after having an opportunity to review the record or term under Section 2B-113 . . .” *Id.*

194. *Id.* § 2B-113(b). *But see* Pitet, *supra* note 132, at 340-48 (concluding “money now, terms later” in wrap contracts is unfair and inconsistent with established legal principles).

195. U.C.C. § 2B-208.

196. *Id.* Specifically, section 2B-208(a) provides:

(a) Except as otherwise provided in Section 2B-209, a party adopts the terms of a mass-market license for purposes of Section 2B-207(a) if the party agrees, including by manifesting assent, to the license before or in connection with the initial performance or use of or access to the information. However, except as otherwise provided in this section, a term [for which there was no opportunity

the term “bizarre or oppressive by industry standards or commercial practices.”¹⁹⁷ Section 2B-104(b)(3) also makes clear that a court may exclude a term that is unenforceable due to failure to meet other express requirements of article 2B, such as the requirement of conspicuous language.¹⁹⁸

III. MANIFESTATION OF ASSENT: DEFICIENCIES IN THE CURRENT ARTICLE 2B DRAFT

The most crucial issue in determining the enforceability of click-wrap agreements is ascertaining how a consumer manifests assent to click-wrap terms. Under article 2B as it stands, authentication or signing is one method of manifesting assent, but assent may also be manifested by the licensee’s actions.¹⁹⁹ In setting out what constitutes manifestation of assent, the current draft fails to sufficiently protect the first time Internet user, and those users unfamiliar with license terms.

The “reasonable person” test as to what constitutes conspicuous language presented in section 2B-102(a)(7) is particularly problematic.²⁰⁰ Greater linguistic precision is in order for the “reasonable person” standard because the level of computer knowledge among Internet users varies greatly from seasoned computer professionals to those who have just purchased their first computers and are making their inaugural attempts to log onto the Internet. It stands to reason that the novice user is unlikely to be cognizant of click-wrap terms and those attached by hyperlink. Therefore,

to review before payment of the contract fee is not adopted and] does not become part of the contract if the party does not know of or manifest assent to the particular term and the term creates an obligation or imposes a limitation that:

- (1) the party proposing the form should know would cause an ordinary reasonable person acquiring this type of information in the general mass market to refuse the license if that party knew that the license contained the particular term; or
- (2) conflicts with the negotiated terms of the agreement between the parties to the license.

Id.

197. *Id.* § 2B-208(c).

198. *Id.* § 2B-104(b)(3).

199. *See id.* § 2B-101.

200. *See supra* notes 166-167 and accompanying text (reviewing section 2B-102(a)(7)).

those consumers may be unable to review the terms as envisioned by section 2B-213²⁰¹ prior to manifesting assent.²⁰²

Section 2B-102's current "reasonable person standard" for what constitutes conspicuous terms²⁰³ is too broad, lacking sufficient protection for novice computer users who lack experience with on-line contracts. The conspicuous standard should be amended to terms that a minimally competent computer user would notice in order to place due emphasis on the problem of the first time computer user. This is a unique problem to on-line contract law, because all persons have at least minimal everyday experience with contracts for the sale of goods covered by article 2.

A. *Subjective Versus Objective: Conflicting Approaches to Contractual Assent*

Article 2B rejects the subjective assent model and relies on objective assent.²⁰⁴ The Reporter for the Article 2B Revisions points out that the subjective assent approach does not reflect real life commercial or consumer practices as most agreements are not fully negotiated or read.²⁰⁵ Although the subjective assent approach would likely require an agreement executed by signature for on-line services and is thus not practical, article 2B should strive to replicate the assurances inherent in subjective assent.²⁰⁶

The "objective assent" model assumes the consumer has a duty to read and understand the contract.²⁰⁷ The objective assent approach views assent as an act that demonstrates, generally, one's

201. See *supra* Part II.C (discussing section 2B-213's opportunity to review provision).

202. See *supra* Part II.B (discussing section 2B-212's manifestation of assent provision).

203. See *supra* notes 166-167 and accompanying text (discussing section 2B-102's provision for conspicuous terms).

204. See *generally supra* notes 60-67 and accompanying text (discussing the conflict between subjective and objective approaches to contractual assent).

205. See Tito, *supra* note 64, at 22.

206. Cf. *id.* (noting that the subjective approach is not useful for the servicewrap because it would likely require an agreement executed by the customer with language to the effect that by its signature, the customer verifies it has read and understood, and assents to all provisions of the agreement).

207. *Id.*

assent to the contract.²⁰⁸ Such manifestation of assent is deemed to be assent to all of the contract terms, whether or not they are read and understood.²⁰⁹

Article 2B's heavy reliance on the objective approach suffers infirmities when applied to the newly developed click-wrap agreement and Internet medium.²¹⁰ Under section 2B-212, click-wrap is generally enforceable if the licensee "manifests assent" to the license before or within a reasonable time after beginning to use the information, provided that the licensee had an "opportunity to review" the terms of the license before the licensee manifested assent.²¹¹ The key problem here is that the statute does not require that the licensee *actually* review the click-wrap terms; only an *opportunity* to review is required.²¹²

Click-wrap licenses typically involve important warranty disclaimers and forum selection clauses about which consumers must

208. *See id.*

209. *See* Tito, *supra* note 64, at 22.

210. *See supra* note 67 and accompanying text (discussing article 2B's use of the objectivist approach).

211. *See* Tito, *supra* note 64, at 22.

212. *See* U.C.C. § 2B-112 (Draft Sept. 25, 1997). Specifically, section 2B-112 provides:

(a) A party or electronic agent manifests assent to a record or term in a record if, with knowledge of the terms or after having an opportunity to review the record or term under Section 2B-113, it:

(1) authenticates the record or term, or engages in other affirmative conduct or operations that the record conspicuously provides or the circumstances, including the terms of the record, clearly indicate will constitute acceptance of the record or term; and

(2) had an opportunity to decline to authenticate the record or term or engage in the conduct.

....

(b) The mere retention of information or a record without objection is not a manifestation of assent.

(c) If assent to a particular term in addition to assent to a record is required, a party's conduct does not manifest assent to that term unless there was an opportunity to review the term and the authentication or conduct relates specifically to the term.

(d) A manifestation of assent may be proved in any manner, including by a showing that a procedure existed by which a party or an electronic agent must have engaged in conduct or operations that manifests assent to the contract or term in order to proceed further in the use it made of the information.

Id.

be informed so they can make educated purchasing decisions before proceeding.²¹³ Instead of permitting a click on an “O.K.” button to be sufficient affirmative conduct indicating manifestation of assent,²¹⁴ article 2B should require more substantial consumer acts to assure assent to click-wrap terms.²¹⁵

B. *Article 2B Assent Problems Applied to the Common Click-Wrap Agreement*

The most recent draft of article 2B provides an instructive illustration as to how a customer manifests assent to the *New York Times On-Line* click-wrap agreement.²¹⁶ In the site’s pre-registration file, the *New York Times On-Line* provides, “Please read the license. Click here to read the License. If you agree to the terms of the license, indicate your agreement by clicking the ‘I agree’ button. If you do not agree to the license, click on the ‘I decline’ button.”²¹⁷ The user is presented with a hypertext link that, if selected, displays the license.

Under section 2B-212, a party who clicks “I agree” manifests assent to the license.²¹⁸ Additionally, moving forward to use the information resource would also indicate acceptance of the offer for a contract.²¹⁹ The current draft fails to adequately address some potential problems that may arise out of this common click-wrap agreement.

The first problem regards the related issues of mistake and a lack of psychological commitment by the consumer.²²⁰ Although

213. See *supra* notes 13-28 and accompanying text (discussing typical warranty disclaimers and forum selection clauses in click-wrap agreements).

214. See *supra* note 181 and accompanying text (discussing section 2B-212’s approval of clicking a box as means of manifesting assent).

215. See *infra* Part III.C (noting methods of obtaining a greater psychological commitment on the part of the consumer in manifesting assent to click-wrap terms).

216. See U.C.C. § 2B-112 n.3.

217. *Id.* To see the actual *New York Times* on-line subscriber agreement, visit the N.Y. Times On-Line Website (visited May 3, 1998) <http://www.nytimes.com/subscribe/sub-bin/new_sub.cgi/html>.

218. U.C.C. § 2B-112 n.3.

219. See *id.*

220. See *supra* notes 60-67 and accompanying text (discussing the subjective and objective approaches to contract formation).

it is unlikely that a consumer in an article 2 transaction would accidentally pay for a product and take it home from the store, with an article 2B transaction all it takes is an accidental click on "O.K." to bind the consumer to the click-wrap terms.²²¹ Because software services are not tangible goods and because assent gives the user access to information only, the consumer may not be aware that a mistake has occurred. A completed on-line transaction does not afford the same level of perceptual impact on the consumer as a goods transaction. For similar reasons, Internet transactions, as currently constructed, fail to attain sufficient psychological commitment on the part of the user. Free trial memberships and attractive facades encourage users to click "O.K." and neglect the click-wrap terms.²²² The interactive nature of the Internet invites users to click on to the next page. A consumer who quickly provides her personal information and clicks "O.K." bypasses the license terms that the *New York Times* will seek to enforce.²²³ Here, the consumer's lack of subjective intent to agree to the license agreement is hidden behind her computer interface.

The second problem regards the manifestation of assent with click-wrap agreements in cases where the consumer is made aware of the terms only after clicking "O.K."²²⁴ With respect to a license provided after acceptance, section 2B-213 does provide for a refund if the license is refused.²²⁵ Issues of timing may arise, however, with respect to the customer's rights in this regard.

221. See *supra* notes 11-12 and accompanying text (discussing the process by which click-wrap contracts are formed).

222. See, e.g., Netscape Website (visited May 2, 1998) <<http://www.home.netscape.com/download/index.html#list.html>> (displaying a colorful exclamation point followed by a hyperlinked offer to "[g]et the latest version of Netscape web browser Software"); see also GATES, *supra* note 1 (stating that vendors will find ways to entice consumers on the Internet).

223. See *supra* notes 13-28 and accompanying text (discussing typical wrap terms).

224. See *supra* notes 172-174, 193 and accompanying text (noting that under sections 2B-212 and 2B-213, only manifestation of assent combined with an opportunity to review the terms is necessary for a consumer to assent to click-wrap terms).

225. See U.C.C. § 2B-213 n.2 (Draft Sept. 25, 1997). Note 2 of the Reporter's Notes to 2B-213 specifically states, "[u]nder this section, the opportunity to review can come at or before payment, or later. If the opportunity follows payment, there is no opportunity to review unless the party can return the product and receive a refund if it declines the terms of the record." *Id.*

The telephone service lines of many Internet service providers lack sufficient capacity to handle the flow of member calls, thus requiring a consumer to wait a significant amount of time for assistance.²²⁶ The charge against the member's credit card may be still running during this time. Furthermore, some Internet service providers do not provide immediate termination of on-line contracts, requiring the customer to be bound until the end of the next billing cycle.²²⁷ The essential question is whether consumers are truly able to withdraw their consent to objectionable click-wrap terms based on the current prevailing practices of Internet service providers. Even with the refund provision in section 2B-213,²²⁸ the safeguard can be ineffective. The refund provision also raises the issue of whether consumers would actually return software after having purchased and used it upon learning of unfavorable terms in the license agreement.²²⁹

The third problem arises when a party lacking legal capacity, such as child younger than eighteen, clicks acceptance. Under a common law goods transaction, such a contract is voidable by the infant or by his heirs, administrators, or executors.²³⁰ In the Internet context, however, the Internet service provider may attempt to hold liable the parent whose name is listed as the member on the service—merely because her child clicked a mouse or computer keyboard.²³¹ Based on children's tremendous access Internet,²³²

226. See, e.g., *Long Wait for Technical Support Hard on the Nerves*, ATLANTA J. & CONST., Sept. 22, 1996 (describing problems that computer users seeking computer help over the phone face, including "[j]ammed telephone lines and harried support technicians").

227. Telephone Interview with Prodigy Classic Member Services (Oct 10, 1997).

228. See U.C.C. § 2B-113.

229. Cf. Lemley I, *supra* note 13, at 1294 n.47 ("Because a purchaser has made a decision to buy a particular product and has actually obtained the product, the purchaser may use it despite the refund offer, regardless of the additional terms specific after the contract formed.") (quoting *Step-Saver Data Sys., Inc. v. Wyse Tech. and Software Link, Inc.*, 939 F.2d 91, 102 (3d Cir. 1991)).

230. See CALAMARI & PERILLO, *supra* note 44, § 8-2, at 306-07; see also *supra* note 57 and accompanying text (discussing that infant contracts are either void or voidable).

231. See *supra* note 57 and accompanying text (discussing section 2B-212's approval of clicking a box as means of manifesting assent).

232. See, e.g., *PC-Savvy Kids Moving to the Web*, INTERACTIVE HOME, Apr. 1, 1997, available in WESTLAW, 1997 WL 9639932 (noting that "[t]he number of children actively using the Internet and online services during 1996 increased significantly over

the U.C.C. drafting committee must address this problem in future drafts.

Finally, a potential problem arises with attempts to execute contracts requiring signatures by state statute on-line. Article 2B attempts to address this issue through section 2B-104.²³³ It is debatable whether such contracts can be executed on-line. Under section 2B-104, state statutes requiring a writing take priority over conflicting provisions of article 2B.²³⁴ In the absence of an applicable state statute, parties may need to use digital signatures or download, sign, and transmit by fax or mail documents containing written signatures, as is customarily done in connection with certain on-line securities transactions.²³⁵ An explicit demarcation of rules is in order for on-line contracts in states devoid of statutory guidelines.

C. *Suggested Means of Obtaining Greater Psychological Commitment on the Part of the Consumer*

A significant group of commentators has questioned the validity of shrink-wrap licenses, primarily because software users do not have an opportunity to bargain over their terms.²³⁶ Even if the

that of 1995”).

233. See U.C.C. § 2B-104(b)(5) (Draft Sept. 25, 1997). Specifically section 2B-104(b)(5) provides:

(b) If a law of this State existing on the effective date of this article applies to a transaction governed by this article, the following rules apply:

....

(5) A statute authorizing electronic or digital signatures, or authorizing electronic or digital substitutes for requirements of a writing controls over the provisions of this article to the extent of a conflict with this article.

Id.

234. See *id.*

235. See Ballon, *supra* note 35, at 30 n.30.

236. See Lemley I, *supra* note 13; Moore & Hadden, *supra* note 87; Ramos & Verdon, *supra* note 11; David A. Einhorn, *Box-Top Licenses and the Battle-of-the-Forms*, 5 SOFTWARE L.J. 401 (1992) (concluding shrink-wrap licenses are unlikely to be enforced under contract law); Gary Hamilton & Jeffrey Hood, *The Shrink-Wrap License: Is it Really Necessary?*, 9 COMPUTER L. 16 (1993) (stating that shrink-wrap licenses are unnecessary to enforce intellectual property law and undesirable otherwise); David L. Hayes, *Shrinkwrap License Agreements: New Light on a Vexing Problem*, 9 COMPUTER L. 1 (1992) (noting that shrink-wrap licenses are unlikely to be enforced under section 2-207); Thomas Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal*

consumer browses through the agreement before clicking, the typical consumer will not become aware of any disclaimers of warranties until the software has been purchased and something goes wrong.²³⁷ Many consumers fail to read the licenses because once they install the software, they act on the reflexive impulse to click “O.K.” to any agreement that is posted.²³⁸ It is difficult to say that clicking “O.K.” constitutes a “meeting of the minds” sufficient to indicate contractual assent, because the purchaser might be simply making an irrational act, devoid of psychological commitment.²³⁹ Under the logic of the Wisconsin District Court in *ProCD*, an on-line user who clicks “I agree,” but does not scroll down to see the terms of the agreement, could be viewed as having not consented to the terms.²⁴⁰

Consumer advocates voice strong concerns about this problem.²⁴¹ An on-line contract regime that successfully protects con-

Nature of Computer Software Licensing, 71 DENV. U. L. REV. 577 (1994) (maintaining that shrink-wraps are an attempt to return to feudal controls on the alienability of property); David W. Maher, *The Shrink-Wrap License: Old Problems in a New Wrapper*, 34 J. COPYRIGHT SOC'Y 292 (1987) (stating that equitable servitude law is inadequate to address problems of shrink-wrap licensing); Richard H. Stern, *Shrink-Wrap Licenses of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?*, 11 RUTGERS COMPUTER & TECH. L.J. 51, 53 (1985) (proposing separate U.C.C. provisions for software to decide which terms in shrink-wrap licenses are reasonable and should be enforced); Page M. Kaufman, Note, *The Enforceability of State “Shrink-Wrap” License Statutes in Light of Vault Corp. v. Quaid Software, Ltd.*, 74 CORNELL L. REV. 222, 235 n.92 (1988) (noting that laws validating shrink-wrap licenses are preempted by federal copyright law); James Peys, Note, *Commercial Law—The Enforceability of Computer “Box-Top” License Agreements Under the U.C.C.*, 7 WHITTIER L. REV. 881 (1985) (arguing that shrink-wrap licenses should not be enforceable).

237. See *supra* note 172 and accompanying text (stating that under section 2B-212 and 2B-213 only manifestation of assent combined with an opportunity to review the terms is necessary for a consumer to assent to click-wrap terms).

238. Cf. *supra* note 172 and accompanying text (noting that consumers are in a different frame of mind with respect to license terms after leaving the store with the software).

239. See *supra* note 172 and accompanying text (addressing the subjective approach’s “meeting of the minds” concept); see also Ballon, *supra* note 35, at 17 (stating that because information travels quickly through the Internet, people take less care in what they write, and their statements, typed in the heat of passion, are electronically stored).

240. See *supra* notes 111-113 and accompanying text (discussing the Wisconsin District Court’s grounds for finding *ProCD*’s shrink-wrap license unenforceable).

241. See Lisa Picarille, *License Law May Limit Liability Software Contracts May*

sumers must bridge the gap between the consumer's purchasing mode and the consumer's need to take advantage of the opportunity to review the license terms. In essence, it must force consumers to wake up and take notice of the terms they are agreeing to before clicking on "O.K."

One way to solidify the consumer's acceptance of click-wrap terms would be to require the consumer to type in an affirmative statement, such as "I assent to the terms of the license agreement," in order to signify binding assent to the license terms. Another possibility would be for the click-wrap page to have a clause that says, "in order to signify that you agree to be bound by the foregoing terms, please type in the following code." The act of typing in actual words of assent or a code, as opposed to merely clicking on "O.K.," would force the consumer to give more thought to the terms of the agreement.²⁴² Such acceptance would create a closer approximation of the "bargain" between offeror and offeree envisioned by modern contract law.²⁴³ Certainly, those positive acts would be a much clearer form of acceptance than the buyer refraining from returning the software as suggested by the Seventh Circuit in *ProCD, Inc. v. Zeidenberg*.²⁴⁴ The current prevailing method of acceptance by clicking on "O.K." sanctioned by article 2B does not have sufficient psychological impact on the licensee.²⁴⁵ Pursuant to sections 2B-312 and 2B-313, an additional safeguard for the customer would be the placement of a warning

Threaten User Recourse, COMPUTERWORLD, May 12, 1997, at 1. Todd Paglia, a staff lawyer for the Consumer Project on Technology at the Center for the Study of Responsive Law, stated that "[t]he licenses are postsale, and consumers are in a different mode. Buying is one decision, and getting the software home and installing it is a different decision" *Id.*

242. Cf. *Arizona Retail Sys. v. Software Link, Inc.*, 831 F. Supp. 759, 764 (D. Ariz. 1993) ("ARS . . . accepted TSL's offer on TSL's terms when the envelope was opened.") (emphasis added).

243. See *supra* notes 58-59 (discussing the bargain theory of contracts).

244. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (holding arbitration clause included with personal computer was enforceable, and deemed accepted, because plaintiffs failed to return computer within thirty day limit set forth in contract; and disclosure of full terms is not required as part of telephone sale unless buyer specifically requests warranty information).

245. See *supra* note 171 and accompanying text (discussing article 2B's manifestation of assent provision).

surrounding the click-wrap agreement, providing conspicuous and explicit instructions, telling consumers who enter the web site how to assent or decline additional terms.²⁴⁶

Article 2B also should encourage click-wrap licensors to take steps to make it technologically impossible for a user to access the material offered by a site unless the consumer has indicated assent to the license before the software is downloaded.²⁴⁷ The current draft falls short of requiring such a safeguard²⁴⁸ by actually validating click-wrap contracts under which the terms are provided after the user's agreement through section 2B-213's refund provision.²⁴⁹ A technological impediment would protect both consumer rights and vendor intellectual property rights.²⁵⁰ Without such a restriction, it is conceivable that a potential user could download and copy software before reading the license and then reject the license and return the software.²⁵¹ Under such a scenario, the vendor has no assurance that the user will delete the software from his computer if he decides to return it.²⁵² In light of the current lack of

246. Cf. *infra* note 253 and accompanying text (noting the need for conspicuous terms to improve the likelihood of click-wrap enforceability).

247. See Allen R. Grogan, *Implied Licensing Issues in the On-line World*, 14 COMPUTER LAW. 1, 5 (1997). Specifically, Grogan notes:

[A] Web site host could block direct access to Web pages other than its home-page, and require, as a condition to permitting any user to follow a link to any subsequent page, that the user first read the terms of a license agreement imposing limitations and restrictions on use and distribution of materials appearing on the Web site, and that the user click on a button or icon evidencing the user's consent to those terms.

Id.

248. See U.C.C. § 2B-112(a)(2)(d) (Draft Sept. 25, 1997). Section 2B-112(a)(2)(d) provides:

A manifestation of assent may be proved in any manner, including by a showing that a procedure existed by which a party or an electronic agent must have engaged in conduct or operations that manifests assent to the contract or term in order to proceed further in the use it made of the information.

Id.

249. See *supra* notes 193-194 and accompanying text (discussing section 2B-213's validation of contracts where terms are provided following payment provided the consumer has the right to a refund).

250. See Baker, *supra* note 162, at 411 (discussing the need for ProCD to prevent copying in order to maintain price discrimination and keep prices reasonable for consumers).

251. See Ramos & Verdon, *supra* note 11, at 5.

252. See *id.*

firm legal precedent on click-wrap agreements, it is clear that, to increase the likelihood of license enforceability, licensors must be take significant steps to solidify the consumer's assent.²⁵³

CONCLUSION

Article 2B presents a unique opportunity to apply contract principles to a new frontier of information-based commercial transactions. The decisions made by the drafting committee will play a significant role in the growth and development of electronic commerce well into the next century. But the draft's current provisions enforce click-wrap agreements without sufficient safeguards for inexperienced consumers or those who seek to withdraw assent. Article 2B must be amended to provide stronger guarantees of the consumer's psychological commitment to be bound by the terms. While no perfect compromise exists between industry and consumer concerns, the proposals advocated by this Note would give due consideration to consumer concerns without impinging on the software industry's interest in enforceable contracts.

253. See Eisner, *supra* note 34, at 238. Eisner recommends that licensors:
(a) Use methods to assure validity and authenticity of the communications, such as passwords, user IDs and encryption; (b) Present the terms to the user, and have the user accept the terms before the user gives consideration for the services; (c) Obtain something from the user that qualifies as a signature, and/or clearly manifests the user's consent to the terms; (d) Use terms that are industry standard; (e) Make all terms, but especially unusual ones, conspicuous and clear to the user.

Id.