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CYBERLAW: THE UNCONSCIONABILITY, UNENFORCEABILITY OF CONTRACTS (Shrinkwrap, Clickwrap, and Browsewrap) ON THE INTERNET: A MULTIJURISDICTIONAL ANALYSIS SHOWING THE NEED FOR OVERSIGHT.

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CYBERLAW: THE UNCONSCIONABILITY./ UNENFORCEABILITY OF CONTRACTS (Shrinkwrap, Clickwrap, and Browsewrap) ON THE INTERNET: A MULTIJURISDICTIONAL ANALYSIS SHOWING THE NEED FOR OVERSIGHT.

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Introduction

Contract law has been with us for many centuries. In the early years of humanity even before the invention of money, people bartered for goods and services. Like today, certain symbols meant ways of doing things and actions had certain meanings. What was fair and equitable between two people in those days largely determined a person’s ability to survive. Meaning, if a person did not barter, negotiate or conquer, the person did not survive. Much like today, that manifest destiny of survival leads ordinary people to purchase goods and services where the producer of those services is such in control of the offer that the terms and conditions are severely unfair, leaving people virtually no choice but to meet the terms; thus, bringing about the definition of contracts of adhesion or unconscionable contracts. In today’s society, the following circumstances now exist with shrink-wrap agreements and click-wrap agreements.

“An ordinary consumer walks into a store that sells computer software hoping to find a particular piece of software. Then, in her eagerness and excitement, she quickly clicks through several screens full of legal jargon. It is not until sometime later, after using the software, that she notices the “User Guide.” When she finally gets around to reading it, she finds out that she was asked to carefully read an enclosed license before using the software or accessing the software on the disk. Furthermore, by using the disk, she now learns that she supposedly agreed to be bound by the terms of the license for the software she thought she owned free and clear upon purchasing it back in the store.” ¹

With click-wrap agreements, one logs onto the computer and clicks “I agree” without even reading the contract.

“The above accounts are illustrative of the typical consumer/business persons’ experience. The majority of Off-the-Shelf software is acquired by means of self-executing shrink-wrap-agreement.”² The law aims at fairness and a meeting of the minds when it comes to contracts. The common law of contracts theories are Implied in Fact, Quasi-Contract, Promissory Estopple, Implied in Law, and Express Contracts.

Each of the five types of contracts requires some understanding and communication before a contract is formed. In other words, there cannot be an agreement by trickery. Both parties need correct information and willing acquiescence. For example, in order for an offer to be binding upon a party, the offer must be definitive and communicated in a meaningful way to the offeree. Such is not the case for shrink-


² Id.
wrap/clickwrap agreements and that is the problem. These shrink-wrap/clickwrap agreements are not communicated and are not definitive. The shrink-wrap/clickwrap agreements are not the product of negotiation. Thus, this is the quandary and perplexity of holding shrink-wrap/clickwrap agreements enforceable when they are not valid contracts.

“Can the unity of the law of contracts be maintained in the face of the increasing use of contracts of adhesion? ie. Shrink-wrap agreements, Click Wrap agreements. Although there is a general perception that different law must be applied to contracts of adhesion, there is little agreement on what principles should control. The currently applicable law is characterized by a lack of intelligible doctrine and a lack of consistent results. Perhaps this disarray is a function of diversity. It may be that contracts of adhesion can be understood only as a collection of disparate deviations from the paradigm of ordinary contract law. On this view better analysis might well yield more consistent results, but it could not provide any systematic approach, because the subject in inherently intractable.”

This area of the law regarding “shrink-wrap agreements” AND “clickwrap agreements” needs illumination. The perspectives on the status and extenuations of the law as the courts, legislatures and society continue to struggle with the consistency of the common law applied to internet transactions needs to be analyzed, debated and communicated to our system of justice.

Therefore, this article will analyze the evolving law of unconscionability or contracts of adhesion that courts currently apply to shrink-wrap/clickwrap agreements. Also at issue, “the question of where acts or omissions conducted in cyberspace actually occur, the courts, acknowledge that the law in the area of cyberspace based upon an internet presence is still evolving.”

I recommend that, the law of contracts must be applied to INTERNET agreements as follows:

1. Courts must apply a manifestation of intention (a meeting of the minds standard) to all internet contracts. This would imply that the parties have a choice among reasonable contract terms.
2. We need some sort of oversight board or regulatory body that oversees the shrinkwrap/clickwrap INTERNET agreement dilemma.

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3 Todd D. Rakoff , Contracts of Adhesion: An Essay in Reconstruction, 96 Harvard Law Review 1173 (1983). “If so, the appropriate legal response may be to expand the notions of fraud, duress, and mistake, or perhaps to make more frequent use of the concept of unconscionability.”

3. Assent needs to be measured by an objective standard that takes into account the manifestations and understanding of all the terms in a contract so that unconscionable terms and terms against public policy may be left out as unenforceable.
4. If the parties are to enter into a contract involving a shrink-wrap/clickwrap agreements, it should be done in a way where each party to the arrangement will fully and clearly comprehend the agreement and be given the opportunity to reject unconscionable terms.
5. Courts should be willing to understand the contextual foundation of the use of the internet involving shrink-wrap/clickwrap agreements.
6. The legislatures of this country have enacted the statute of frauds requiring certain contracts to be in writing to prevent fraud. The same should be done to prevent the unjust, incomprehensible outcome of the adjudication of shrink-wrap contracts.

To understand the extent and dimension of the problem, a very complete thorough contextual foundation of how business and society uses the internet needs to be presented to show as evidence the profound need for consistency in the law applied to contracts and shrink-wrap agreements. In the next few paragraphs of research, I will corroborate this foundation.

THE IMPLICATIONS OF GETTING IT RIGHT ON SHRINK-WRAP/CLICKWRAP AGREEMENTS

“The Internet can be described by a number of different metaphors, all fitting for different features and services that it provides. For example, the internet resembles a highway, consisting of many streets leading to places where a user can find information. The metaphor of the internet as a shopping mall or supermarket, on the other hand, aptly describes the Internet as a place where the user can shop for goods, information, and services. Finally, the Internet also can be viewed as a telephone system for computers by which data bases of information can be downloaded to the user, as if all the information existed in the user’s computer disc drive.”

Also, as a result of the internet and the information age, the parties to a transaction may not even be from the same country. “Software companies responding to the unique needs of the software developer attempting to protect his/her intellectual property rights have began to use a mass-market license attached to the front of the box in which the software is purchased. This license is generally referred to as a “shrink-wrap” license.”

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We live in a world where at a click of a button, we are receiving or sending information. Picture this “A defect is found in one of the world’s most popular products. Less than a month later, its consequences emerge – idling workers around the globe, causing huge losses for businesses and generally inconveniencing hundreds of thousands of people…. The product in question is software, and the companies that make it, claim special protections from liability through the licensing deals that come as a condition of using their programs.”

Almost all computer transactions involve computer software and shrink-wrap/clickwrap agreements.

“The issue becomes more problematic when the contract is between parties who are of different nationalities, and when the terms of the contract include an arbitration clause.”

“The Chinese government said recently its internet population has soared to 210 million people, putting it on track to surpass the U.S. online community this year to become the world’s largest.”

“The official China Internet Network Information Center also known as CNNIC, said the online population grew 53 percent, from 137 million reported at the same time in the prior year. According to the government’s Xinhua News Agency, China is only 5 million people behind the United States online, a figure consistent with some American estimates.”

“The number of Internet users in China hit 162 million people at the end of June of 2007, a state information center said, with growth in the first six months of 2007, nearly matching that for the whole of 2006.”

Different internet products lead to different expectations and applications of legal doctrine. The internet has such a wide diversity of use. Countries like Canada and China are typical of the cultures who will also have to make up their minds about how to decide contracts of adhesion. The typical response in Canada is “Although we only have a small number of Canadian retailers who accepted Hyperwallet, I bought some sweatshirts at a

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great price. I beamed cash over to my friends, even when they didn’t have a Hyperwallet. To beam cash, all the recipient needs is a valid email account.” 12 These every day usages of the internet like beaming cash all involve software that implicate the adhesion doctrine of contracts. The sheer number of transactions is phenomenal.

“Interpretation is a rapidly growing industry in its own right. This is a result of rapid globalization leading to an increase in cross-cultural encounters.” 13 From China to Canada and around the world, these nefarious shrink-wrap agreements show up either on the computer or in print in the box. We cannot escape the obfuscatory language of these shrink-wrap/clickwrap agreements anywhere in the world or other segments of our society. Think of the elderly population who now use the internet and have become subject to the manifestly one sided interpretations of the terms of shrink-wrap agreements.

As we know, internet contracts come in all forms and degrees of complexity. For example, “Many web site owners include as part of their home page a stated restriction on the downloading and reuse or retransmission of their Web site material. Typically this involves a license agreement that purports to bind end users who access the site.” 14 These are known as Click Wrap agreements. This is the logical corollary or “the brother” of the shrink-wrap agreement. In a click-wrap agreement, by clicking “I agree,” this binds a user to a contract.

Shrink wrap agreements, which are on paper are, “software licenses …that say when you take the software home, and you take it out of the box, you agree to a whole host of other terms that you didn’t agree to at the store. The courts are split on the validity of shrink-wrap and on-screen click – through licenses. By codifying the validity of these licenses, software vendors could gain an unfair advantage. Under current law, you can sneak in an unreasonable and surprising term and hope that it slips by. The UCITA would permit precisely such a term.” 15

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“At the center of the liability debate are the so-called end-user license agreements and clickwrap agreements, that come with every piece of computer software. Taken as written, they would prevent businesses and individuals from collecting damages from software makers for the ill effects of any product flaw, even if the flaw results from negligence.” 16 We are now getting into the nasty provisions of these agreements.

THE EXTENT OF THE CIVIL RESTRAINTS FROM THE UNCONSCIONABILITY OF SHRINK WRAP/CLICKWRAP AGREEMENTS

Today, the doctrine of unconscionability in the context of internet transactions has never needed so fervent an application. So many businesses use software licenses. “From business applications where your Web site’s ability to convert visitors into sales has tremendous influence on the success of your banner ad campaigns to teleconferencing that allows you to have a conference with the participants sitting in any part of the world, shrink wrap agreements are applicable. The Company, “Save on Conferences” was founded in the year 2003 and aims at providing services that speak of quality and commitment. The services offered by Saveonconferences allow you to have a cost efficient conference.” 17 “At this the webmaster, support staff can wait for the visitor to initiate contact or send out an invitation to the user who does not want to speak, he/she merely closes the window.” 18 Today’s corporation should have the benefit of an equitable determination of contracts of adhesion as this concept applies to shrink-wrap/clickwrap agreements. The debate on this issue is urgent.

Consumers are affected right down to the solo user at home. People are saying that “I discovered that setting up a home network was not that difficult providing you have user-friendly administration software and the ability to install network cards and attach cables…. My friend set up his home network….licensed and was very pleased with the easy configuration and reliability.” 19 The point here is that very common people are being asked to understand legalese. The list of usages of out of the box shrink-wrap transactions must be presented to understand that the extent of the problem, is endless and out of control.


The context of internet use and shrink-wrap agreements has no limits. Applications are as diverse as “How to make money online with your digital camera? Thinking out of the box this article suggests you see businesses and organizations are constantly looking for photographs to use in their promotions. Stock Photography …. can be landmarks, nature, given the explosion of the use of the internet.” 20

Businesses may “build a site that is both professional and functional, optimize it for the search engines, test your product, etc. Once you have all your ducks in a row and proved your worth, then you can think about your lifetime identity.” 21 “Many other people these days are starting their own internet businesses. Most people who get online wanting to start an Internet business have no idea where to start.” 22 This is indicative of the level of acumen currently in place and doing business on the internet. How are these business people expected to read and understand a complicated shrink-wrap agreement is a question that could not be envisioned by our, sage common law judges.

“Critics point out that consumers do not have any choice but to consent to such an agreement if they want to use a particular software program. Often consumers don’t even see the agreements until they’ve actually made the purchase. As a result, some lawyers say, the deals could be challenged and possibly negated as so-call contracts of adhesion, an agreement in which one party doesn’t truly have any bargaining power. These deals could be challenged and possibly negated as so-call contracts of adhesion; agreements in which one party doesn’t truly have any bargaining power.” 23 Huge, powerful software companies must have a vested interest.

“Despite Microsoft’s efforts to prevent the flaws and to issue patches when flaws are found, legal experts said the company may find itself facing increased resistance to the blanket protection from liability it asserts in its licensing agreements.” 24


24 Id.
“These licenses contain terms which basically limit the uses to which a purchaser can put the software.” 25

As contract law normally requires mutual assent for a contract to be binding, the terms of the “shrink-wrap” license state that the opening of the cellophane wrapping on the boxed software will act as an act of assent, thus binding the purchaser of the software to the terms of the license.” 26 “In short, the purchaser of the software has a take-it –or-leave-it contract where the simple act of opening the box binds them to the terms of the license. This is by definition, an adhesive contract.” 27 “In addition, the purchaser has not signed any agreement.” 28

These contracts, which arise in the absence of arms-length dealing between two equally powerful parties are not unknown in American law. 29 How is one to make sense out of such a confusing complicated set of facts?

LEGAL ANALYSIS: Sources of Law.

Like anything else, we must look to the law or the government to guide us through the process to solve these complicated issues. We need to start with the restatements of contract law because they are important; they read as follows:

“CONTRACT INTERPRETATION AND BREACH: In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable.

(a) an interpretation which gives reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or on no effect;
(b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;
(c) specific terms and exact terms are given greater weight than general language;
(d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.30

25 Id.


27 Id.

28 Id.

29 Id.
The search is for the manifested intention of the parties. For a legal business interpretation, the UCC is a reasonable source as well. If a term or a contract is unconscionable or otherwise against public policy, it should be dealt with directly rather than by spurious interpretation. See the Uniform Commercial Code section 2-302 and Comment. No surprise there, implicitly, the UCC says we need an Internet Code. On the other hand, the common law has always been wise and sage source. We need to look to history.

**CASELAW**

**UNITED STATES SUPREME COURT**

The U.S. Supreme Court as early as the 1800’s, defined unconscionable by example in Hume *vs. U.S.*, the Court states “at the time the contract was made shucks were worth from $12 to $35 a ton, or from 6 mills to 1 ¾ cents a pound, while the claimant was to receive nearly forty times as much as the highest value. That an agreement to pay $1200 a ton for shucks, actually worth not more than $35 a ton, is a grossly unconscionable bargain, defined in Bouvier’s Law Dictionary to be a contract which no man in his senses and not under delusion, would make, on the one hand, and

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Restatement Contract Law (2\textsuperscript{nd}) section 208 current through 2007” Comment

a. Scope. The rules of this section are applicable to all manifestations of intention and all transactions. They apply only in choosing among reasonable interpretations. They do not override evidence of the meaning of the parties, but aid in determining meaning or prescribe legal effect when meaning is in doubt.

b. Superfluous terms. Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous. The parties may of course agree to supersede prior manifestations of intention; indeed, this is the normal effect of an integrated agreement. See section 213. But particularly in cases of integrated agreements, terms are rarely agreed to without reason. Where an integrated agreement has been negotiated with care and in detail and has been expertly drafted for the particular transaction, an interpretation is very strongly negated if it would render some provisions superfluous. On the other hand, a standard form may include provisions appropriate only to some of the transactions in which the form is to be used; or the form may be used for an inappropriate transaction. Even agreements tailored to particular transactions sometimes include overlapping or redundant or meaningless provisions.(section omitted)

c. Unreasonable and unlawful terms. In the absence of contrary indication, it is assumed that each term of an agreement has a reasonable, rather than an unreasonable meaning, and that the agreement is intended to be lawful rather than unconscionable, fraudulent or otherwise illegal. But parties are free to make agreements which seem unreasonable to others, and circumstances may show that even an agreement innocent on it face has an illegal purpose.
which no fair and honest man would accept on the other, nobody can doubt. Such a contract, whether founded on fraud, accident, mistake, folly or ignorance, is void at common law. It is not necessary to invoke the aid of a court of equity to reform it. Courts of law will always refuse to enforce such a bargain, as against the public policy of honesty, fair-dealing, and good morals.” 31 Quoting Earl of Chesterfield, in Chesterfield vs. Jannssenn 32

Further interpretation of unconscionability is provided by the Restatement: Section 208 Unconscionable Contract or Term: “If a contract or term thereof in unconscionable at the time the no contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.” 33

“In computer software, hardware, and the Internet transactions especially mass market consumer transactions sellers typically use terms and conditions contained in either “shrink-wrap” (terms contained inside the software box) or clickwrap (terms that appear on the computer screen when a software user attempts to install the software).” 34 Many states have used a wide variety of rationales.

VIRGINIA

In Virginia the Courts find that the parties entered into a valid contractual agreement when Plaintiffs clicked “I Agree” to acknowledge their acceptance of the terms of the Clickwrap Agreement. The first line of the Clickwrap Agreement, which appears directly above the “I Agree” link, states: “Turnitin and its services ... are offered to you, the user [‘User’], conditioned on your acceptance without modification of the terms, conditions, and notices contained herein.” Also, the Clickwrap Agreement provides that iParadigms will not be liable for any damages “arising out of the use of this web site.” By clicking “I Agree” to create a Turnitin profile and enter the Turnitin web site, Plaintiffs accepted iParadigms' offer and a contract was formed based on the terms of the Clickwrap Agreement. Because a limitation of liability clause was among the terms of the Agreement, the Court finds that iParadigms cannot be held liable for any damages.

31 Hume vs. U.S., 132 U.S. 406, 10 S. Ct. 134 (1889)
32 Quoting Earl of Chesterfield, Chesterfield v. Jannssenn, 2 Ven Sen 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750).
33 Kevin W. Grierson, Enforceability of “Clickwrap or “Shrinkwrap”Agreements Common in Software, Hardware, and Internet Transaction, 106 A.L.R. 5th 309.
34 Id.
arising out of Plaintiffs' use of the Turnitin web site, which includes the submission and archiving of their written works.  

TEXAS

In Texas cases the courts upheld a “forum selection clause in online contracts for registering Internet domain names that required users to scroll through terms before accepting or rejecting the terms of a clickwrap or shinkwrap agreement.” In this case, arguably, the Court struggles with the idea of notice and opportunity to assent. As well the court should struggle. These contracts are not agreements. They are the product of a person trying to get from one website to another in many cases. Other states rule in other ways.

WASHINGTON STATE

In Washington there is an exceptional case on point where Timberline provided software to Mortensen for bidding contracts. Timberline had an exculpatory clause in the contract which was a clickwrap agreement. When the software failed, Mortenson brought an action against Timberline for breach of contract. The Washington State Supreme Court ruled that the buyer (Mortenson) “manifested assent to software license terms by installing and using software. To that extent this case held that the purchaser of a computer or tangible software is contractually bound after failing to object to printed license terms provided with the product.” By clicking “I agree” Mortensen Co. was bound by the exculpatory clause. In an internet transaction, who in their right mind assents to an exculpatory provision or even reads the contract before clicking “I agree”? Some courts take a “void and against public policy” stand against the enforceability of these exculpatory provisions.

CALIFORNIA

In California, the debate has been substantial even to the point of considering the UCC. California law takes the position that the shrink wrap agreement in question is void against public policy. The Court does make some interesting findings regarding the validity of shrink-wrap agreements: “With respect to subsequent modification of the original user license,MDBS offers the forum selection clauses that appeared in the


shrink-wrap licenses that appeared on its software boxes after the May 1991 agreement went into effect. As noted earlier, however, these shrink-wrap licenses were not signed by Morgan, and thus cannot be read to modify the material terms of the May 1991 agreement or any supplemental terms that may have been incorporated into that agreement. The provisions of paragraph 9 of the May 1991 agreement, at the very least, evince an intention by the parties to bar unilaterally-presented, unsigned modifications of that agreement’s material terms.” 38

In Morgan Laboratories, Inc., Micro Data Base Systems, Inc. contends, notwithstanding the provisions of paragraph 9, that Morgan has modified the May 1991 agreement by its “course of conduct” in opening and using the software modules for nearly 4 years after the inclusion of the shrink-wrap license. As an initial matter, it is not at all clear that a “course of conduct” in the case should displace the percentage of no-modification-unless-in-writing provision of paragraph 9.” 39 (“Section 2-209 requires assent to proposed modifications and the assent must be express and cannot be inferred merely from a party’s conduct in continuing with the agreement.”)

Even assuming that a course of performance might modify the May 1991 agreement, however, MDBS states the issue too broadly. “Ordinarily, a ‘course of dealing or ‘course of performance analysis’ focuses on the action of the parties with respect to a particular issue.” 40 Here the court went on to hold “In the final analysis, it is plain that the May 1991 agreement, even if it did incorporate the terms of a prior user license, did not include a forum selection clause. It is similarly plain that the May 1991 agreement provided that modification to its terms must be in writing and signed by both parties.” 41 The court takes the position that the shrink-wrap agreement is void.

Similarly to Morgan, other cases such as, Comb v. Paypal, Inc. v. PayPal the court found the arbitration clause in a click wrap agreement with PayPal, Inc. to be


41 Id.
unconscionable because of the following “The FAA was enacted to overcome longstanding judicial reluctance to enforce agreements to arbitrate.” 42

The court goes on to state in Comb “It applies to all written contracts involving interstate or foreign commerce and provided in relevant part that arbitration agreements contained within such contracts “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the reallocation of any contract. The FAA creates a body of federal substantive law of arbitrability, enforceable in both state and federal courts and pre-empting any state laws or policies to the contrary.” 43 “As a result, state laws hostile to arbitration agreements have been held invalid on the ground that such laws frustrate congressional intent to place arbitration agreements on the same footing as other contracts.” 44

State law is not entirely displaced from FAA analysis, however. It is undisputed that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening section 2.” 45 The court goes on to hold: “Even though California has a strong policy favoring arbitration, “it is beyond cavil that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agree so to submit. Extrinsic evidence is admissible, however, if the offered evidence is relevant to prove the meaning of ambiguous language and such interpretation is reasonable in light of all the facts, circumstances, and conditions surrounding the execution of the agreement.” 46

Again, Morgan and Comb provide the legal foundation for the courts to find shrink-wrap agreements to be void and unconscionable. Furthermore, the next case is the best example of the type of precedent that provides rationale for holding shrink-wrap agreements unconscionable/unenforceable.

Considering a claim by a software manufacturer against a distributor for copyright infringement, other courts hold that a software purchase is a sale of goods under the


Uniform Commercial Code, not a license, and that shrink-wrap agreements are therefore void to the extent that they purport to maintain title to the software in the manufacturer.\textsuperscript{47} By contrast, in \textit{Morgan Laboratories Inc.}, the Court stated: “Although shrink-wrap licenses may, in some cases, be enforceable, they do not trump explicit prior agreements where those agreements contain integration clauses and “no-modification-un less-in-writing” clauses.\textsuperscript{48}

\textit{Vault, Novell and Morgan} are more cases that hold shrink-wrap agreements unenforceable. The common logic in all three of these cases that adds to prior cases is that courts are willing to look beyond the mere language of the agreement. \textit{Vault} stands for the proposition that the enforceability of a shrink-wrap agreement must fall to a contravening statute. \textit{Novell} holds that a shrink-wrap agreement falls under the U.C.C. and \textit{Morgan} holds that the shrink-wrap agreements are not enforceable against prior agreements that contain integration clauses and no modification clauses unless they are in writing.

More cases are offered to further support that shrink-wrap agreements are not enforceable because the original offer from the buyer is to purchase the computer and the shrink-wrap agreement constituted additional terms governed by the U.C.C. for which there must be express agreement. Therefore, no agreement to the shrink-wrap agreement, no contract. Other courts even apply the UCC.

Kevin W. Grierson, J.D., “Enforceability of “Clickwrap” or “Shrink-wrap” Agreements Common in Computer Software, Hardware, and Internet Transactions stated: “In \textit{Klocek}, the court refused to enforce an agreement contained inside a box for a personal computer. The plaintiff computer purchaser brought an action against the defendant computer manufacturer claiming that the manufacturer made false statements about product support to induce him to purchase a computer from the manufacturer and alleging breach of contract and breach of warranties. The computer manufacturer moved for summary judgment, claiming that the shrink-wrap agreement inside the box disclaimed the warranties under which the action was brought, and required arbitration of any claims. The court denied the motion to dismiss, holding that the purchaser was master of the offer, and that a computer seller that receives an offer from a purchaser, in order to make the contract conditional upon acceptance of additional terms, must clearly express such reservations that it is unwilling to proceed unless additional or different terms are included in the agreement.


UNIFORM COMMERCIAL CODE

Some Courts are so confused that judges have considered the UCC on a very precarious basis. In this case, this particular court declined to follow the Seventh Circuit decisions in discussed in § 3[b], is en banc denied, (Feb. 3, 1997), discussed in § 3[a]. The court noted that in both cases the Seventh Circuit had refused to apply the terms of U.C.C. § 2–207 regarding proposals for additional terms, finding U.C.C. § 2–207 was irrelevant because there was only one form. The court acknowledged that the statute was traditionally applied to the "battle of the forms," but found that the language of U.C.C. § 2–207 and both Kansas and Missouri case law clearly provided that the existence of only one form did not preclude the application of U.C.C. § 2–207. The purchaser's offer to purchase the computer and tender of the purchase price thus constituted an offer that was accepted by the manufacturer when it responded to the offer by shipping the computer. The terms in the shrink-wrap agreement inside the box thus constituted a proposal for additional terms under U.C.C. § 2–207. Because the purchaser was not a merchant, the additional terms did become part of the agreement unless the purchaser expressly agreed to them. The court held that the fact that the purchaser kept the computer past the five day return requirement in the shrink-wrap agreement did not demonstrate express agreement to the additional terms.”

Additional components that add to the analysis split unconscionability into two parts. “Unconscionability has both procedural and substantive components.” The procedural component focuses on the unequal bargaining positions and hidden terms common in the context of adhesion contracts.” The substantive component is satisfied by overly harsh or on-sided results that “shock the conscience.” The two elements operate on a sliding scale such that the more significant one is, the less significant the other need be.” A claim of unconscionability cannot be determined merely by

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50 Id.


52 Id.

53 Id.
examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, its purpose, and effect. 54

“By contrast, according to California statutes, when a contract is alleged to be unconscionable, “the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.” 55

Thus, the language of the courts defining unconscionability into two parts supports the principle that a shrink-wrap agreement is invalid when it is the product of unequal bargaining power and is so overly harsh or one-sided that it shocks the conscience of a reasonable person.

This temporarily concludes the argument for the unconscionability/enforceability of shrink-wrap agreements. Now that we have identified the legal requirements to show the unenforceability/unconscionability of shrink-wrap agreements, by the following case analysis it is important to show why the majority of courts hold shrink-wrap agreements to be valid and enforceable so that in the final conclusion a comparison and contrasting of principles can take place to offer a solution to solve the perplexities of this legal dilemma. The federal Courts have also analyzed the problem stating that shrinkwrap agreements fall within the authority of the UCC.

NEW YORK

Other states like New York struggle with assent. In the U.S. Court of Appeals, Second Circuit which affirmed the decision of the lower Court unequivocally holding that: (1) users did not assent to the terms of software license, including the arbitration clause; (2) claims relating to a plug-in program were not subject to arbitration agreement contained in license terms governing use of separate browser software; and (3) legal doctrine requiring non-signatories to arbitration agreement to arbitrate when they have received direct benefit under contract containing an arbitration agreement did not apply to require website owner to arbitrate.” The Court goes on to make the distinction between click wrap and shrink wrap agreements. Here there was a click-wrap agreement and because “Arbitration agreements are no exception to the requirement of manifestation of assent, this principle of knowing consent applies with particular force to provisions for


55 Id. citing Internet Law Treatise, Contracts: Click Wrap Licenses, available at http://ilt.eff.org/index.php?title=Contracts:_Click_Wrap_Licenses&redirect=no (last visited 2/7/2008) Cal. Civ.Code section 1670.5. See also Stirlen v. Supercuts, Inc., Cal.App.4th 1519, 1536(1997)(this is a “legislative recognition that a claim of unconscionability often cannot be determined merely by examining the face of the contract, but will require inquiry into its setting, purpose, and effect.”)
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arbitration.” Looking to California law, the Judge states “thus California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.” “Clarity and conspicuousness of arbitration terms are important in securing informed assent.” “If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto. Internet users and website operators brought putative class actions against a computer software producer, alleging that “plug-in” software program, created to facilitate internet use and made available on producer’s website for free downloading, invades the plaintiffs’ privacy rights by clandestinely transmitting personal information to the software provider when plaintiffs employed the plug-in program to browse the internet. At issue was the arbitration agreement in the shrink-wrap agreement. 56

In contrast, Spect adds to Morgan and Comb holding shrink-wrap agreements are unenforceable because (1) in a shrink-wrap agreement users, do not assent to the terms of the software licenses and that these software shrink-wrap/clickwrap agreements under California law assent is measured by an objective standard. Spect provides a legal precedent to hold shrink-wrap agreements unenforceable because Spect holds that for a contract to exist both parties must assent to the terms of the agreement and that the parties must fully comprehend the agreement. The other litany of cases in this paper are used to describe the conclusions of different courts involving different circumstances holding shrink-wrap agreements unenforceable follow from here on out.

LOUISIANNA

No surprise that in this case decided in Louisiana, the court refused to enforce the terms of a license agreement. The district court held that Vault's license agreement was “a contract of adhesion which could only be enforceable if the [Louisiana License Act] is a valid and enforceable statute.” 57 The Seventh Circuit takes a much different position.

SEVENTH CIRCUIT

By contrast, Pro.CD vs. Zeidenberg., a case that involves a shrink-wrap license involving a “compact disc read only memory” takes the opposite view. Matthew Zeidenberg bought a consumer package of Select Phone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. Zeidenberg tried to


57 Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 7 U.S.P.Q.2d (BNA) 1281 (5th Cir. 1988) (applying Louisiana law)
resell the information in the SelectPhone (trademark) database. Pro.CD filed this lawsuit. The court takes the position that the shrink wrap agreement, falling within the authority of the U.C.C., is valid and states the following: “In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good - but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg’s position therefore must be that the printed terms on the outside of the box are the parties’ contract-except for printed terms, that refer to or incorporate other terms.

But why would Wisconsin fetter the parties’ choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyer might find more useful…. The ‘Read me’ file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages or type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and right to return the software for a refund if the terms are unacceptable, may be a means of doing business valuable to buyers and sellers alike. The Court goes on to say, “Standardization of agreements serves many of the same functions as standardization of good and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transaction rather than the details of individual transactions.

Transactions in which the exchange of money precedes the communication of detailed terms are common. By comparison: “consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of year) and remits the premium to the home office, which sends back a policy. The binder for the policy takes effect immediately (even though the home office reserves the right to withdraw coverage later)”58 “Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the term, even terms that in retrospect are disadvantageous.” 59

“Zeidenberg argues, these unboxed sales are unfettered by terms-so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two promises that if taken seriously would drive prices through the ceiling or return transactions to the horse- and -buggy age.”60

58 Pro. CD vs. Zeidenberg 86 F.3d 1447 (1996)


60 Id.
The Court decides the case based on the U.C.C. said to govern the transaction. “We think the place to start in section 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. A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer proposes to treat as acceptance. And that is what happened. 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 would not let him proceed without indication acceptance. So although the District Court was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed.” “Ours is not a case in which a consumer opens a package to find an insert saying “you owe us and extra $10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concluded that the terms of the license make the software worth less than the purchase price.”

“Section 2-606, which defines “acceptance of goods”, reinforces this understanding. A buyer accepts goods under section 2-606(1) (b) when, after an opportunity to inspect, he fails to make an effective rejection under section 2-602(1). ProCD extended an opportunity to reject of a buyer should fine the license terms unsatisfactory. Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to section 2-606 only to show that the opportunity to return goods can be important; acceptance of this offer differs from acceptance of goods after delivery. Some portions of the UCC impose additional requirements in the way parties agree on terms. A disclaimer of implied warranty of merchantability must be “conspicuous.” Promises to make firm offers, or to harbor oral modifications, must be “separately signed.” These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum selection clause on the back of the cruise ship ticket in Carnival lines. Zeidenberg has not indicated any Wisconsin case for that matter, any case in any state-holding that under the UCC the ordinary terms found in shrink-wrap licenses that require any special prominence, or otherwise are to be undercut rather than enforced.”

61 Id.

62 Id. See Gillen v Atlanta Systems, Inc., 997 F2d 280, 284 n.1 (7th cir 1993), but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.”
“...we believe Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of the product than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of the package’s contents, is how consumers are protected in a market economy. ProCD has rivals, which may elect to compete by offering superior software, monthly updated, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers’ favor might help Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make Consumers as a whole worse off.” 63

NEW JERSEY

Courts in New Jersey take the position that forum selection clauses are prima facie valid and enforceable in New Jersey. “New Jersey courts will decline to enforce a clause only if it fits into one of three exceptions to the general rule: (1) the clause is a result of fraud or “overweening” bargaining power; (2) enforcement would violate the strong public policy of New Jersey; or (3) enforcement would seriously inconvenience trial. The New Jersey Supreme Court upheld a forum selection clause where subscribers to online software were required to review license terms in scrollable window and to click "I Agree" or "I Don't Agree".” 64

“But it wasn’t to be, for the Internet has a new master, No, it’s not Google. No, it’s not Microsoft. And no, it’s not even good ole’ Uncle Sam. They’re just caretakers. The Internet’s new master is bigger than they’ll ever be, and far, far older. The Internet’s new master is the same master who holds the leash of all traditional commercial media. The Internets’ new master is money and power.” 65 Thus, a majority of jurisdictions still hold shrink-wrap/clickwrap agreements valid and enforceable.

“The internet has revolutionized the computer and communication world like nothing before the telegraph, telephone, radio and computer set the stage for this unprecedented integration. The Internet is at once a world-wide broadcasting capability, a mechanism for information medium for collaboration and interaction between individuals and their computers without range for geographic location. The internet represents one of the most successful examples of the benefits of sustained international commitment to research and development of information infrastructure. Beginning with

63 Id. UCC section 2-316(2), incorporating UCC section 1-201(10), UCC sections 2-205, 2-209(2). See Gillen v. Atlanta Systems, Inc., 997 F2nd 280, 284 n.1 (7th Cir. 1993)


the packet switching, the government, industry and academia have been partners in evolving an exciting new technology.”

**RECENT INTERPRETATIONS AND BROWSER WRAP AGREEMENTS**

Recent cases show that the Courts are moving in the direction of actual, in fact assent. This case held that the plaintiff could only be bound by the terms of an internet agreement “if it could be shown objectively that the Plaintiff and Defendant’s minds met and they assented to all the essential terms.” These are all good developments and this shows that we are making some progress.

As we know, the facts push the development of the law. In this case, the Court heard evidence on “browser wrap agreements”. These agreements bind a person into a contract by simply using the website. Here the Court put a stop to this interpretation requiring the necessity of actual and constructive notice of the terms of the contract for the contract to be binding. This is a standard commensurate with rationality and assent. Some form of constructive notice is necessary for Due Process. Otherwise, the Courts would be arbitrary and capricious.

“This case held that Hines had no actual or constructive notice to the terms of any of the clickwrap, shrinkwrap, or browserwrap agreements. The reason was that the user needed to understand the terms of the agreement and not merely get trapped into an agreement without a meeting of the minds.”

Hope springs eternal.

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68 Burcham v. Expedia, Inc 2009 WL 586513 (E.D.Mo., 2009). “User agreements that do not require the user to click a specific box but rather operate by binding the user through use of the website alone are referred to as “browsewrap” agreements. Courts considering browsewrap agreements have held that “the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site.” This Court held that Use of a browse wrap agreement may give rise to “an inference” of assent”

69 Hines v. Overstock.com, Inc., 2009 WL 2876667 E.D. (N.Y., 2009)” It is a basic tenet of contract law that in order to be binding, a contract requires a “meeting of the minds” and “a manifestation of mutual assent.” On the internet, the primary means of forming a
FINALLY AND IN DEFENSE OF CONTRACT LAW

Most ordinary people do not read these exculpatory provisions and apparently forum selection clauses or other provisions in clickwrap/shrinkwrap agreements. Even if the provisions are read, most people do not understand the language. Where there is no understanding, there is no contract. It is as though the contract was written in a foreign language. The law is not consistent and very confusing upon comparing and contrasting the varied applications across the United States.

“Ordinary contract law - represents an attempt to systematize a segment of social interaction. Regarding the analysis, reasonable minds will differ as to the change that needs to take place judging the validity of shrink–wrap and clickwrap agreements. With computer technology taking over the world in all the segments of our population, we need to be more careful. We need to examine the facts and the circumstances that 250 years of common law has analyzed and for our institutions to make the appropriate changes if we are to continue as a civil, rational society.”

“Developing the analysis into a fully articulated system is a process that requires the confrontation of thought with experience; it cannot be accomplished in the study alone. The particular types of situations we have just examined do not, of course, exhaust the case law concerning contracts of adhesion, nor do they represent all the ways in which the underlying issues can come into conflict or be resolved.”

This research is a plea to return to a rational common law system, devise a system that would educate users and help people understand their obligations and rights in these internet transactions by following my recommendations. If we do this, we will save time, money and promote fairness.

contract are the so-called “clickwrap” agreements, in which website users typically click an “I agree” box after being presented with a list of terms and condition of use, and the “browsewrap” agreements, where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, a browsewrap agreement “does not require the user to manifest assent to the terms and conditions expressly ... [a] party instead gives his assent simply by using the website.”


Id.