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**THE PROBLEM WITH “MONEY NOW,
TERMS LATER”: *PROCD, INC. V.
ZEIDENBERG* AND THE
ENFORCEABILITY OF “SHRINKWRAP”
SOFTWARE LICENSES**

*Hope springs eternal in the commercial world and expectations are usually, but not always, realized.*¹

I. INTRODUCTION

You are an ordinary consumer looking to buy a piece of software for your new computer. You go to a software retailer hoping to find a computer program that will help you organize the finances of your home business. Once in the store, you become bewildered by the number of programs available for this purpose. You scan the shelves for one that will solve your company's financial woes. Finally, something catches your eye. You pull a box of software from the shelf to take a closer look. The title of the software, "Finance Made Easy," is on the front in large bold letters. The information on the box details what the software will do for you, and the pictures on the box show what the screens will look like on your computer. Satisfied that you have found just what you need, you take the software to the counter and purchase it.

When you get home, you can hardly wait to use the program, which promises to end your troubles forever. Like a child on Christmas morning, you tear open the cellophane that seals the package. You open the box, find the CD-ROM on which the program is stored, and load it onto your computer. You do this so fast that you don't even notice the "user guide" packaged inside the box with the software. It is not until sometime later, after you have already begun to use the software, that you notice it. When you finally read it, you see the following opening paragraph:

Please read this license carefully before using the software or accessing the listings contained on the discs. By using the

1. *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481, 482 (6th Cir. 1989).

discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software, listings that may have been exported, the discs and the User Guide to the place where you obtained it.²

Upon further review of the license, you are shocked to learn that the license limits use of the software to "individual or personal use" and prohibits any commercial or business use.³ Unfortunately, this means that you cannot use the software for your business.

This restriction presents a dilemma for you. You bought the software to improve the finances of your business. Certainly, you would not have purchased it had you been aware of the restriction. Now, you have the software at home, you have already opened the box, and you have even begun to use your new product. Although the license says that you can return the software to the store where you purchased it,⁴ the store is over fifty miles away.⁵ It does not seem fair that you should bear the burden of returning the software, considering that you were not apprised of this significant restriction before you purchased it. After pondering the apparent unfairness of the transaction, you begin to wonder: "Is something like this enforceable?"⁶

According to the court in *ProCD, Inc. v. Zeidenberg*,⁷ this "shrinkwrap license"⁸ is enforceable against you, the buyer, even if

2. *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996). This is the actual language found in ProCD's license. *See id.*

3. *Id.* at 645.

4. Actually, retailers typically will not give a refund on computer software if the shrinkwrap on the box has been opened. *See* TARGET STORES, COMPUTER SOFTWARE RETURN POLICY 12-105642 (on file with *Loyola of Los Angeles Law Review*). Target's policy provides that a refund will only be granted if the software is "unopened and factory-sealed." *Id.* The policy further provides that "[o]pened . . . [software] will be exchanged for the identical item." *Id.* As a result, purchasers who are unhappy with the terms of a license may be required to return the software directly to the manufacturer.

5. This is more likely to be a problem for those living in rural areas than for those living in urban areas. Still, both urban and rural purchasers may have to drive a considerable distance for hard-to-find software.

6. This type of reaction to a software vendor's purported power is not uncommon. *See* Terence P. Maher & Margaret L. Milroy, *Licensing in a New Age: Contracts, Computers and the UCC*, BUS. L. TODAY, Sept.-Oct. 1996, at 22, 22 ("Could this happen?").

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

8. Computer software is usually sealed in plastic under a process known as "shrinkwrapping." *See* Mark A. Lemley, *Intellectual Property and Shrinkwrap*

you were not aware of the terms at the time you purchased the software.⁹ In overturning the district court's decision, Judge Easterbrook, writing for the Court of Appeals for the Seventh Circuit, stated that "[s]hrinkwrap licenses are enforceable 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)."¹⁰

Judge Easterbrook made no secret of his laissez-faire approach to shrinkwrap licenses. He stated that "[c]ompetition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy."¹¹ In other words, the software vendors who provide the most attractive terms will sell more software than their counterparts who offer less attractive terms. As a result, those with less attractive terms will be forced to provide more favorable terms in order to compete in the market.¹² The beneficiaries of this market competition are the consumers who ostensibly will enjoy lower prices and better license terms. For Judge Easterbrook, this justified the enforceability of shrinkwrap licenses, regardless of whether the *individual*¹³ consumer knew about the terms at the time of purchase.

While lower prices and more favorable license terms for software consumers are laudable goals, they do not justify the disregard of established contract law; moreover, they should not come at the expense of the individual consumer who may be surprised—and harmed—by the hidden terms of a shrinkwrap license. The holding in *ProCD*, however, produces this inequitable result. Not only is it wholly inconsistent with the Uniform Commercial Code ("UCC"), but also it places an unfair and unnecessary hardship on software consumers.

Licenses, 68 S. CAL. L. REV. 1239, 1241 (1995). From this, the term "shrinkwrap license" was born.

9. See *ProCD*, 86 F.3d at 1449.

10. *Id.*

11. *Id.* at 1453 (citing *Digital Equip. Corp. v. Uniq Digital Tech., Inc.*, 73 F.3d 756 (7th Cir. 1996)).

12. Judge Easterbrook noted that "*ProCD* has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements." *Id.*

13. In *ProCD*, Judge Easterbrook drew a distinction between the "individual" consumer and the "collective" consumer. *Cf. id.* He wrote that "adjusting terms in [the] buyers' favor might help [the individual plaintiff] 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." *Id.*

Part II of this Note provides a history of shrinkwrap licenses, and discusses judicial treatment of shrinkwrap licenses prior to that in *ProCD*. Part III examines the background of *ProCD* and the basis for the decision. Part IV criticizes the decision in light of the UCC and the hardship that the decision places on software consumers. Part V proposes a solution that will make the use of shrinkwrap licenses consistent with the UCC, reduce the hardship placed on consumers, and preserve Judge Easterbrook's goal of transactional efficiency. Part VI concludes that "money now, terms later" not only is unfair and inconsistent with established legal principles but also is unnecessary in light of available alternatives.

II. BACKGROUND OF SHRINKWRAP LICENSES

A. A Historical Perspective

Shrinkwrap licenses have been an integral part of software transactions.¹⁴ It is not known, however, when they were first used or who first used them.¹⁵ Despite these questions, it is clear that their increased usage paralleled the software industry's movement from primarily customized software packages and agreements to a mass market mode of software delivery.¹⁶

In the early days of computer history, the only computers that existed were large mainframes.¹⁷ These computers could cost hundreds of thousands or even millions of dollars; consequently, they were available only to a select group of consumers who could afford them.¹⁸ In addition, most software during this period was customized for these mainframe computers and carried an equally steep price tag.¹⁹ Lawyers drafted the contracts for these software sales transactions, and their clients usually were large corporations for whom

14. See Lemley, *supra* note 8, at 1241.

15. See *id.* at 1241 n.5 ("Exactly who first used a shrinkwrap license provision in a software transaction is a fact lost in the arcane mists of computer history. Certainly, they were a feature of the licensing landscape by the early 1980s.").

16. See Lloyd L. Rich, *Mass Market Software and the Shrinkwrap License*, 23 COLO. LAW. 1321, 1321 (1994) ("Ever since the development of mass market computer software, companies have relied on the 'shrinkwrap license' for protection of their intellectual property rights.").

17. See 2 DAVID BENDER, *COMPUTER LAW* § 4A.02[4], at 4A-141 (1996).

18. See *id.*

19. See *id.* A typical software package cost tens of thousands of dollars. See *id.*

“contracts and lawyers were a way of life.”²⁰

As computer technology advanced, personal computers replaced the large mainframe computers.²¹ Personal computers, unlike their expensive mainframe predecessors, were relatively inexpensive²² and soon became a mass market item.²³ For software companies, the proliferation of personal computers was a “bonanza” and marked the birth of mass market software.²⁴

Though the advent of mass market software was an overall boon to software developers, it presented a problem absent from the customized software transactions that dominated the early days of software development. Customized software transactions generally involved sophisticated parties, each of whom generally had lawyers do their contracting. In contrast, the mass market transaction, by definition, did not allow such an arrangement.²⁵ Software developers needed to find a way to create a contractually binding agreement with the user without impeding the flow of their product into the stream of commerce. The software industry’s solution to this problem was the shrinkwrap license.

Today, shrinkwrap licenses are included, in some form or another, with nearly every piece of software sold.²⁶ However, there is little uniformity among shrinkwrap licenses. For instance, some licenses are one page documents, while others are more expansive booklets.²⁷ In addition, software developers place the licenses in

20. *Id.*

21. *See id.*

22. “Today, most computers in existence cost less than \$10,000, and many cost less than \$2,000.” *Id.*

23. *See* Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 339 (1996). Since the advent of the personal computer, sales have mushroomed, with some models enjoying sales in the millions. *See* 2 BENDER, *supra* note 17, § 4A.02[4], at 4A-141.

24. 2 BENDER, *supra* note 17, § 4A.02[4], at 4A-141.

25. “In the case of mass market software, usually distributed for use with high-volume hardware like personal computers (PCs), licensors cannot practically incur the huge transaction costs that would be involved if they attempted to negotiate with every licensee.” Maureen A. O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 495 (1995).

26. “Virtually no major mass-marketed software program is distributed today without a ‘shrinkwrap’ . . . license.” Carey R. Ramos & Joseph P. Verdon, *Shrinkwrap and Click-On Licenses After ProCD v. Zeidenberg*, COMPUTER LAW., Sept. 1996, at 1, 1.

27. *See* Lemley, *supra* note 8, at 1241. “The prototypical example is a single piece of paper Other examples of the genre include licenses printed on the

various locations within the software packaging.²⁸ Finally, software creators include a wide variety of contractual terms in their licenses, namely terms involving proprietary rights, limitation of warranties, and limitations on use of the software.²⁹

B. Prior Adjudication of Shrinkwrap License Enforceability

It is surprising that shrinkwrap licenses had seen little action in the courts prior to the decision in *ProCD, Inc. v. Zeidenberg*.³⁰ Even Judge Easterbrook commented that "businesses seem to feel less uncertainty [about shrinkwrap licenses] than do scholars."³¹ Before *ProCD*, two cases comprised the body of law on the contractual enforceability of shrinkwrap licenses: *Step-Saver Data Systems, Inc. v. Wyse Technology*³² and *Arizona Retail Systems, Inc. v. Software Link, Inc.*³³

In *Step-Saver* the court considered the enforceability of a shrinkwrap license in the context of a software transaction that oc-

outside of boxes containing software, licenses simply included somewhere within the box, or licenses shrinkwrapped with the owner's manual accompanying the software." *Id.*

28. See 2 MICHAEL D. SCOTT, SCOTT ON COMPUTER LAW § 12.08[D], at 12-17 to 12-18 (2d ed. 1996). The following practices are common: (1) putting the license on an envelope inside the package which contains the software diskettes; (2) programming the software so that the computer screen displays the terms of the license before the user can access the software; and (3) placing the license on the outside of the package but underneath the shrinkwrap so that it is visible to the user prior to purchase. See *id.* Note that the problem addressed in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), is not an issue when the license terms are visible through the plastic wrap because the user has an opportunity to review the terms prior to making the purchase.

29. See Lemley, *supra* note 8, at 1242-48. With regard to proprietary rights, a question often "arises as to why the program developer does not simply rely on copyright. The answer is that many developers perceive problems with placing reliance solely on copyright. For example: the vendor may wish to limit use to a particular [computer] terminal; copyright alone will not do that." 2 BENDER, *supra* note 17, § 4A.02[4], at 4A-142. "Shrinkwrap licenses are also important in protecting the elements of software products that are not protected by copyright law against widespread copying." Ramos & Verdon, *supra* note 26, at 2. For more on the relationship between contract and copyright, see generally O'Rourke, *supra* note 25 (discussing the relationship between contract and copyright in the context of software licensing).

30. 86 F.3d 1447 (7th Cir. 1996). "Despite the widespread use of such licenses, there has been a surprising paucity of court decisions addressing their enforceability." Ramos & Verdon, *supra* note 26, at 1.

31. *ProCD*, 86 F.3d at 1452. Judge Easterbrook referred to scholars having more uncertainty about the enforceability of shrinkwrap licenses than businesses because of the "flux of law review articles discussing shrinkwrap licenses." *Id.*

32. 939 F.2d 91 (3d Cir. 1991).

33. 831 F. Supp. 759 (D. Ariz. 1993).

curred over the phone.³⁴ The license, which was printed on each box of software that was sent to the buyer, purported to disclaim all warranties provided under the UCC.³⁵ The buyer, Step-Saver Data Systems, Inc. ("Step-Saver"), contacted the seller, The Software Link ("TSL"), to purchase the software.³⁶ The purchases took place in the following manner:

First, Step-Saver would telephone TSL and place an order. (Step-Saver would typically order twenty copies of the program at a time.) TSL would accept the order and promise, while on the telephone, to ship the goods promptly. After the telephone order, Step-Saver would send a purchase order, detailing the items to be purchased, their price, and shipping and payment terms. TSL would ship the order promptly, along with an invoice. The invoice would contain terms essentially identical with those on Step-Saver's purchase order: price, quantity, and shipping and payment terms. No reference was made during the telephone calls, or on either the purchase orders or the invoices with regard to a disclaimer of any warranties.³⁷

When the software failed, Step-Saver sued TSL for breach of warranty.³⁸ TSL argued that its license had effectively disclaimed all warranties.³⁹ The Court of Appeals for the Third Circuit, however, did not agree.⁴⁰

In its opinion, which was delivered by Judge Wisdom, the court determined that a contract had formed before Step-Saver had an opportunity to read the license.⁴¹ According to the court, the dispute was "not over the existence of a contract, but the nature of its terms."⁴² To determine which terms were part of the agreement, the court turned to section 2-207 of the UCC.⁴³

34. See *Step-Saver*, 939 F.2d at 95-98.

35. See *id.* at 94-95.

36. See *id.* at 95-96.

37. *Id.*

38. See *id.* at 94.

39. See *id.* at 94-95.

40. See *id.* at 105.

41. See *id.* at 98. "We see no need to parse the parties's [sic] various actions to decide exactly when the parties formed a contract. TSL has shipped the product, and Step-Saver has accepted and paid for each copy of the program." *Id.*

42. *Id.*

43. See *id.* at 98-106.

Section 2-207, which governs situations where an acceptance of an offer contains additional terms such as warranty disclaimers, provides that

[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.⁴⁴

Section 2-207 further provides that when both parties are merchants,⁴⁵ the additional terms become part of the contract only if they do not materially alter it.⁴⁶

With little trouble, the court found that the license's disclaimer of warranties provision materially altered the contract between Step-Saver and TSL.⁴⁷ Relying on this finding, the court determined that this term was not part of the contract.⁴⁸

Two years later another court addressed the contractual enforceability of shrinkwrap licenses in *Arizona Retail*.⁴⁹ In that case, the buyer, Arizona Retail Systems ("ARS"), purchased software from TSL.⁵⁰ The court found that the parties had actually formed several contracts over a period of time and analyzed the initial purchase and subsequent purchases of the software separately.⁵¹

For the initial purchase, the court found that ARS had ordered an "evaluation diskette" so that it could first test the software

44. U.C.C. § 2-207(1) (1995).

45. A merchant is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." *Id.* § 2-104(1).

46. *See id.* § 2-207(2)(b) (providing that, between merchants, additional terms in an acceptance will become part of a contract unless the terms materially alter the contract). The official comment to section 2-207 sets forth that "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.

47. *See Step-Saver*, 939 F.2d at 105 ("[W]e must conclude that adding the disclaimer of warranty and limitation of remedies provisions from the box-top license would, as a matter of law, substantially alter the distribution of risk between Step-Saver and TSL.").

48. *See id.*

49. *See Arizona Retail*, 831 F. Supp. at 761.

50. *See id.*

51. *See id.* at 763.

product.⁵² A “live copy” of the software, which was sealed in an envelope, came with this diskette.⁵³ A printed message on the envelope stated that “by opening the envelope the user acknowledges ‘acceptance of this product, and [consents] to all the provisions [of] the Limited Use License Agreement.’”⁵⁴ The court concluded that TSL made an offer by including the live copy of the software along with the evaluation diskette; furthermore, the court found that ARS accepted the offer by opening the sealed envelope that contained the software.⁵⁵ In finding that the terms of the shrinkwrap license were part of the contract between the parties, the court explained that its decision was “not inconsistent with *Step-Saver*” because ARS, the buyer, had an opportunity to read the terms *before* a contract was formed.⁵⁶

The court, however, reached a different conclusion with respect to the subsequent purchases. Unlike the initial purchase, the court determined that a contract had been formed before ARS had an opportunity to read the terms of the license.⁵⁷ The court outlined in detail the usual business procedure between ARS and TSL:

ARS typically contacted TSL and ordered copies of PC-MOS over the telephone. During the order calls, the parties agreed on the specific goods to be shipped, the quantity of goods, and the price for the goods. TSL would accept the orders and promise to ship them promptly, and thereafter would ship the goods together with invoices. Although the parties apparently never discussed the license agreement, each copy of PC-MOS would have the license agreement attached to its packaging.⁵⁸

Noting that the circumstances surrounding the subsequent purchases were very similar to those in *Step-Saver*, the court addressed TSL’s three arguments as to why its license was part of the agreement between the parties.⁵⁹

TSL first argued that its shrinkwrap license constituted a proposed modification of the contract under section 2-209 of the UCC.⁶⁰

52. *See id.*

53. *See id.* at 763-64.

54. *Id.* at 764 (alteration in original).

55. *See id.*

56. *Id.* at 763.

57. *See id.* at 764-65.

58. *Id.* at 764.

59. *See id.*

60. *See id.*

TSL maintained that ARS had "assented"⁶¹ to this modification by opening the software after it had a chance to review the license.⁶² The court, however, rejected this argument, emphasizing that "assent must be express and cannot be inferred merely from a party's conduct in continuing with the agreement."⁶³ In short, the court found that while the shrinkwrap license may have been a proposed modification under section 2-209, ARS did not assent to it; consequently, it did not become part of the agreement.⁶⁴

Next, TSL argued that its shipping of the software with a shrinkwrap license constituted a "conditional acceptance" of ARS's offer to purchase.⁶⁵ Specifically, TSL claimed that its acceptance was conditioned upon ARS accepting the terms of the license included with the shipment.⁶⁶ The court disagreed, however.⁶⁷ It found that TSL entered into a contract with ARS "[b]y agreeing to ship the goods to ARS, or, at the latest, by shipping the goods."⁶⁸ Since a contract had already been formed by the time ARS received the software and the shrinkwrap license, the license could not have constituted a conditional acceptance, regardless of its terms.⁶⁹

Lastly, as it did in *Step-Saver*, TSL proposed the application of section 2-207 and argued that its warranty disclaimer provisions were part of the agreement since they were not material.⁷⁰ Once again, the court was not impressed, stating simply that "[t]he *Step-Saver* court

61. "Assent" is defined as "[c]ompliance; approval of something done; a declaration of willingness to do something in compliance with a request; acquiescence; agreement. To approve, ratify and confirm. It implies a conscious approval of facts actually known, as distinguished from mere neglect to ascertain facts. Sometimes it is equivalent to 'authorize.'" BLACK'S LAW DICTIONARY 115 (6th ed. 1990).

62. See *Arizona Retail*, 831 F. Supp. at 764.

63. *Id.* Note that UCC section 2-209 contains no specific "assent" requirement for a modification to be valid. See U.C.C. § 2-209. The court, referring to *Step-Saver*, stated that "TSL has cited no authority to contradict this interpretation of section 2-209 and this court concludes that the Third Circuit correctly decided the issue." *Arizona Retail*, 831 F. Supp. at 764. Recall, however, that the *Step-Saver* court applied section 2-207, not section 2-209. See *supra* notes 34-48 and accompanying text. The *Step-Saver* court gave little attention to section 2-209 but did indicate a requirement of assent. See *Step-Saver*, 939 F.2d at 98 ("[A] writing will be . . . a binding modification . . . only if the parties so intend.").

64. See *Arizona Retail*, 831 F. Supp. at 764.

65. See *id.* at 764-65.

66. See *id.*

67. See *id.*

68. *Id.* at 765.

69. See *id.*

70. See *id.* at 766.

rejected this exact argument and so [do we]."⁷¹

In both cases under consideration above, the timing of contract formation played a pivotal role. In *Step-Saver* the court determined that the parties' conduct formed a contract and that the buyer did not have an opportunity to read the license until *after* the contract was formed.⁷² Consequently, the court held that the terms of the license were not part of the agreement.⁷³ Similarly, with the subsequent purchases in *Arizona Retail*, the court held that the terms in the license were not part of the agreement since the formation of the contract had already occurred before the buyer could read them.⁷⁴ As for the initial purchase, however, the court concluded that the license was part of the agreement because the buyer did have an opportunity to read it *before* contract formation.⁷⁵ For both courts, the controlling issue was whether the buyer had an opportunity to read the license before contract formation.

III. *PROCD, INC. V. ZEIDENBERG*

A. *The Software Purchase*

ProCD is a producer of computer software programs.⁷⁶ It has spent millions of dollars creating Select Phone, a national directory of residential and business listings placed on CD-ROM discs.⁷⁷ The program is sold in a box which contains both the discs and a "Single User License Agreement."⁷⁸ The box is sealed in cellophane, which prevents the buyer from reading the license prior to purchasing the software.⁷⁹

In creating its software, ProCD identified two distinct groups of potential Select Phone users.⁸⁰ The first group, personal users, "could

71. *Id.*

72. *See Step-Saver*, 939 F.2d at 98.

73. *See id.* at 105.

74. *See Arizona Retail*, 831 F. Supp. at 764-66.

75. *See id.* at 763-64.

76. *See ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

77. *See id.* The listings are gathered from telephone books and include full names, street addresses, telephone numbers, and zip codes. *See id.* A search program, which enables the user to find desired listings by typing in search words, is included with the software. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

78. *See ProCD*, 908 F. Supp. at 644.

79. *See ProCD*, 86 F.3d at 1449.

80. *See id.*

use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book."⁸¹ The second group, commercial users, such as manufacturers and retailers, who "pay high prices to specialized information intermediaries for such mailing lists," could use the information "to compile lists of potential customers."⁸²

In determining the marketing strategy for its software, ProCD recognized that its product would be "much more valuable to some users than to others."⁸³ As a result, ProCD decided to sell its software to personal users at a price lower than that charged to commercial users.⁸⁴ The "commercial version" and "personal version" of the software were essentially identical in substance; however, the personal version's license agreement prohibited the user from using the software for commercial purposes.⁸⁵

After purchasing the personal version of the software from a retailer, Matthew Zeidenberg ignored ProCD's prohibition against commercial use.⁸⁶ Zeidenberg, though aware of the license and its terms,⁸⁷ began using the product for commercial purposes despite the

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* ProCD sold its personal version of Select Phone for approximately \$150. *See id.* The commercial version sold for considerably more. *See id.*

The act of selling an identical product at different prices to different classes of consumers is known as "price discrimination." *See id.* In his opinion, Judge Easterbrook explained the necessity of price discrimination as it related to ProCD's product:

If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially over \$150. The ensuing reduction in sales would harm consumers who value the information at, say, \$200. They get consumer surplus of \$50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

Id.

85. *See id.* at 1450.

86. *See ProCD*, 908 F. Supp. at 645.

87. *See id.* The district court, noting both the user guide in which the license was printed and the computer screens which reminded the user of the license, found that Zeidenberg was aware of the license at the time he used the software and that he disregarded it because he "did not believe the license to be binding."

prohibition in the license.⁸⁸ ProCD demanded that Zeidenberg cease all commercial use of the software, but Zeidenberg refused.⁸⁹ To enforce its license and prevent Zeidenberg from continuing his commercial endeavors, ProCD filed suit and sought a preliminary injunction.⁹⁰

B. In the District Court

In the district court, Judge Crabb first confirmed that ProCD's software was a "good"⁹¹ and that the UCC therefore applied to the transaction.⁹² She then discussed three possible applications of the UCC to the transaction.⁹³

Judge Crabb first applied UCC section 2-206 to the transaction and noted that this section "sets forth basic notions of offer and acceptance" in sales contracts.⁹⁴ In applying section 2-206, Judge Crabb found that ProCD had made an offer to sell its software by placing the software on the retailer's shelf.⁹⁵ Furthermore, she determined that Zeidenberg accepted the offer when he took the software to the counter and purchased it.⁹⁶ In sum, she concluded that a contract was formed at the time of purchase.⁹⁷

Id.

88. *See id.* Zeidenberg provided the information to third parties over the Internet. *See id.* This frustrated ProCD's price discrimination scheme because commercial users, who would otherwise have to purchase the commercial version of the software, could now get it from Zeidenberg for less. *See ProCD*, 86 F.3d at 1450 ("[Zeidenberg] makes the database available on the Internet to anyone willing to pay [his] price—which, needless to say, is less than ProCD charges its commercial customers.").

89. *See ProCD*, 908 F. Supp. at 645.

90. *See id.* at 645-46.

91. Under the UCC, goods are "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." U.C.C. § 2-105(1) (1995).

92. *See ProCD*, 908 F. Supp. at 650-51. The UCC only applies to "transactions in goods." U.C.C. § 2-102. For a discussion on the applicability of the UCC to software sales, see generally Bonna Lynn Horovitz, Note, *Computer Software As a Good Under the Uniform Commercial Code: Taking a Byte Out of the Intangibility Myth*, 65 B.U. L. REV. 129 (1985) (discussing whether software is a "good" under the UCC).

93. *See ProCD*, 908 F. Supp. at 651-55.

94. *Id.* at 651. Section 2-206 provides that "[u]nless otherwise unambiguously indicated by the language or circumstances, . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." U.C.C. § 2-206(1)(a).

95. *See ProCD*, 908 F. Supp. at 651-52.

96. *See id.* at 652.

97. *See id.*

ProCD argued that Zeidenberg's acceptance was "contingent upon [his] rights of inspection, rejection or revocation."⁹⁸ Judge Crabb rejected this argument and confirmed that these rights do not apply in the context of contract formation.⁹⁹ Instead, they work to ensure that "buyers will not be saddled with goods that have been damaged or are otherwise unsatisfactory upon arrival, but [they do] not create a right to inspect *additional written contractual terms*."¹⁰⁰ The court concluded that the additional terms of ProCD's license would be more appropriately evaluated under sections 2-207 and 2-209.¹⁰¹

In alternatively applying sections 2-207 and 2-209, the court, as did the courts in *Step-Saver Data Systems, Inc. v. Wyse Technology*¹⁰² and *Arizona Retail Systems, Inc. v. Software Link, Inc.*,¹⁰³ found that a contract had formed *before* the buyer was given opportunity to review the license.¹⁰⁴ Unlike the previous courts, however, Judge Crabb felt it was "unnecessary to consider in detail the distinctions between [sections] 2-207 and 2-209 because the terms of the user agreement are not binding on defendants regardless which section is applied."¹⁰⁵ Like the court in *Arizona Retail*, Judge Crabb determined that since Zeidenberg did not give "express assent,"¹⁰⁶ the terms of the license did not modify the contract under section 2-209.¹⁰⁷ With regard to section 2-207, Judge Crabb noted that *Step-Saver* was different because that case involved a transaction between two merchants, rather than one between a consumer and a merchant.¹⁰⁸ She found that since the terms of the license in *Step-Saver* were not valid against the merchant, "it is improbable to think that the drafters wanted consumers to be held to additional proposed terms in situations in which merchants were given protection."¹⁰⁹ In summary, if additional terms are

98. *Id.*

99. *See id.*

100. *Id.* (emphasis added).

101. *See id.*

102. 939 F.2d 91 (3d Cir. 1991).

103. 831 F. Supp. 759 (D. Ariz. 1993).

104. *See ProCD*, 908 F. Supp. at 652.

105. *Id.*

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.* Article 2 of the UCC "assumes that transactions between professionals in a given field require *special* and *clear* rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable 'between merchants' and 'as against a merchant', wherever they are needed . . ." U.C.C. § 2-104 cmt. 1 (emphasis added).

not valid against a merchant, they certainly are not valid against an individual consumer.

C. In the Seventh Circuit Court of Appeals

In reversing the district court's decision, Judge Easterbrook, writing for the Court of Appeals for the Seventh Circuit, held that shrinkwrap licenses are enforceable unless their terms violate a rule of positive law or are unconscionable.¹¹⁰ For Judge Easterbrook, it did not matter that Zeidenberg was unable to see the license before purchasing the software.

The Seventh Circuit concluded that both the common law of contracts and the UCC sanction the sequence of money now, terms later.¹¹¹ The court first discussed the commonality and desirability of non-UCC transactions in which "money precedes the communication of detailed terms."¹¹² For example, the court discussed the purchase of insurance where typically the buyer and agent discuss only the essential terms—amount of coverage, number of years, and premium amount—of the contract when payment is made.¹¹³ Only later does the insured receive a policy which outlines other detailed terms.¹¹⁴ The court also discussed the purchase of airline and concert tickets.¹¹⁵ In both instances, the buyer often purchases the ticket over the phone.¹¹⁶ Only later does the buyer get an opportunity to read the terms that accompany the use of the ticket.¹¹⁷ Finally, the court discussed software transactions themselves and noted the increasing amount of transactions that take place electronically, without boxes and accompanying documents.¹¹⁸ The court asserted that to hold contractual terms invalid in transactions like these simply because they were delivered to the purchaser after the purchase "would drive prices through the ceiling or return transactions to the horse-and-buggy age."¹¹⁹

Like courts before it, the Seventh Circuit applied the UCC to the transaction; however, it provided a dramatically different analysis.

110. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

111. See *id.* at 1450-53.

112. *Id.* at 1451.

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*

117. See *id.*

118. See *id.* at 1451-52.

119. *Id.* at 1452.

The court asserted that the proper starting point for the analysis was section 2-204(1), which provides that “[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.”¹²⁰ The court found that ProCD, as master of the offer, had the power to limit the manner of acceptance of its offer to particular conduct.¹²¹ Furthermore, the court concluded that ProCD had effectively prevented contract formation until the time Zeidenberg had an opportunity to take the software home and read the license.¹²² The Seventh Circuit, unlike prior courts, found that contract formation did not take place at time of purchase.¹²³ Instead, it found that a contract was formed some time after the buyer was given an opportunity to read the license.¹²⁴ This allowed the court to conclude that the terms of the license were part of the agreement since Zeidenberg was aware of the terms prior to contract formation.¹²⁵

IV. THE PROBLEM WITH *PROCD, INC. V. ZEIDENBERG*

A. A Contract Was Formed When Zeidenberg Purchased the Software

As in earlier cases, the timing of contract formation played a central role in *ProCD, Inc. v. Zeidenberg*.¹²⁶ Whereas prior decisions found that contract formation occurred before the buyer was given an opportunity to read the shrinkwrap license,¹²⁷ the Seventh Circuit concluded that a contract was not formed until after the buyer was given an opportunity to read the license.¹²⁸ This deferral of contract formation, however, is wholly inconsistent not only with the purpose

120. *Id.*; see also U.C.C. § 2-204 (1995) (discussing contract formation in general).

121. See *ProCD*, 86 F.3d at 1452. The court confirmed that although “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.” *Id.*

122. See *id.* at 1450-52.

123. See *id.* at 1452.

124. See *id.*

125. See *id.* at 1452-53.

126. 86 F.3d 1447 (7th Cir. 1996).

127. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (finding that contract formation occurred when the buyer ordered and seller shipped the product); *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640 (W.D. Wis. 1996) (concluding that the purchase of software over the counter formed a contract); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (finding that a contract formed when the buyer ordered the software by telephone, and the seller shipped it).

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

of the UCC, but also with its plain language.

The UCC was designed to make contracts easier to form.¹²⁹ Specifically, its aim was to eliminate the often harsh and rigid rules of the common law which "ignored the modern realities of commerce."¹³⁰ For example, under the common law rule, an acceptance has to "mirror" an offer.¹³¹ Thus, if the offeror offers to sell an automobile and deliver it in 10 days, the offeree has no choice but to accept the offer as stated by the offeror. If the offeree states, "I accept your offer and will expect delivery in 5 days," no contract results; instead, the offeree has made a counter-offer.¹³² Under the UCC, however, a contract would result. The offeree's response would be considered an acceptance, and the delivery term would be considered a proposal for addition to the contract.¹³³

Similarly, the form and manner of acceptance have been significantly liberalized as well. Under the common law rule, the form and manner of acceptance have to be identical to that of the offer.¹³⁴ Thus, if a buyer sends a written offer to buy fifty bushels of grain, the seller cannot accept the offer by shipping the grain. Instead, the

129. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-2, at 4 (4th ed. 1995).

130. *Id.* § 1-3, at 7.

131. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-21, at 101-02 (3d ed. 1987). This is known as the "mirror image" rule. See *id.* "It is a basic principle of contract law that, in order to create a contract, an acceptance must be unconditional, identical to the offer, and must not modify, delete or introduce any new terms into the offer." *Gyurkey v. Babler*, 651 P.2d 928, 931 (Idaho 1982). "Rigid application of the rule has proved detrimental to commerce, particularly since business today is largely done through the mails on printed forms and the buyer's and seller's forms frequently clash as to ancillary terms of the transaction." CALAMARI & PERILLO, *supra*, § 2-21, at 102; see also *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319 (N.M. 1993) (finding that the drafters of the UCC intended to change the common law "mirror image" rule).

132. See CALAMARI & PERILLO, *supra* note 131, § 2-21, at 101.

133. See U.C.C. § 2-207(1)-(2) (1995) & cmt. 1.

134. See *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978) ("At common law, in order to prove the existence of a contract, the proponent must adduce credible evidence that an offer was made which was then accepted by a communication in the same medium purporting to accept it in the exact terms of the offer."); see also John E. Murray, Jr., *Contracts: A New Design for the Agreement Process*, 53 CORNELL L. REV. 785, 785-86 (1968) ("[I]f the offeror requires a promise, the only manner of acceptance is by promise, and, if the offeror requires an act, the only manner of acceptance is by performance."); CALAMARI & PERILLO, *supra* note 131, § 2-17, at 81 ("Clearly the offeree, as a reasonable man, should understand that the offeror expects to know that the offeree has made the requested return promise so that he may guide his conduct accordingly.").

seller has to communicate an acceptance to the buyer, which thereby cuts off the buyer's power to revoke.¹³⁵ The UCC eliminates this requirement and allows an offeree to accept an offer "in any manner and by any medium reasonable in the circumstances."¹³⁶ The UCC restricts the ability of an offeree to accept in any manner reasonable only if the seller "unambiguously" specifies a manner of acceptance.¹³⁷

The *ProCD* court did not dispute that ProCD made an offer by placing its software on the retailer's shelf.¹³⁸ The court felt, however, that the offer precluded Zeidenberg from accepting it by simply making the purchase.¹³⁹ The court stated that "ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure."¹⁴⁰ The court, however, did not state exactly how ProCD made this proposal. It simply concluded that "ProCD proposed such a different way."¹⁴¹

The court's conclusion is at odds with both the plain language of the UCC and its intent to liberalize the common law rules of contract formation. Section 2-206 provides that absent specification from the offeror, an offeree can accept an offer in any reasonable manner.¹⁴² The official comment further provides that "[a]ny reasonable manner of acceptance is intended to be regarded as available unless the offeror has made *quite clear* that it will not be acceptable."¹⁴³ ProCD was anything but clear. It simply placed a box of software on the shelf for purchase. Nothing on the box instructed Zeidenberg to take the box home, review a license, and then determine whether he was still interested in the software. Certainly, ProCD could have clearly manifested its intention to preclude contract formation until a later time; but it did not do so here. Hence, the court incorrectly determined that no contract was formed at the time of purchase.

135. See CALAMARI & PERILLO, *supra* note 131, § 2-20(d), at 96 ("A revocable offer may be revoked at any time prior to effective acceptance by the offeree.").

136. U.C.C. § 2-206(1)(a).

137. *Id.* § 2-206(1).

138. See *ProCD*, 86 F.3d at 1450.

139. See *id.* at 1452.

140. *Id.*

141. *Id.*

142. See U.C.C. § 2-206(1)(a).

143. *Id.* § 2-206 cmt. 1 (emphasis added).

B. The UCC Does Not Sanction "Money Now, Terms Later"

In *ProCD, Inc. v. Zeidenberg*¹⁴⁴ the court concluded that the terms of the shrinkwrap license were enforceable against Zeidenberg even though he was not aware of them at the time he purchased the software.¹⁴⁵ The court provided the following hypothetical to illustrate its conclusion: "Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home."¹⁴⁶ In support of their enforceability, the court stated that as "far as [it was] aware, no state disregards warranties furnished with consumer products."¹⁴⁷

Contrary to the proposition set forth in *ProCD*, courts consistently require disclosure of terms, especially warranty disclaimers, prior to consummation of a sale. In *Sanco, Inc. v. Ford Motor Co.*,¹⁴⁸ also a Seventh Circuit case, the court considered the enforceability of warranty disclaimers located in booklets that were placed in the glove boxes of the seller's trucks.¹⁴⁹ Though the court ultimately enforced the disclaimers against the buyer based on the parties' long-standing relationship, the court clearly agreed with the buyer that "a seller may not 'spring' a warranty disclaimer on a customer after a sale has been consummated."¹⁵⁰

In another case involving an automobile sale, a court considered the enforceability of warranty disclaimers placed inside the owner's

144. 86 F.3d 1447 (7th Cir. 1996).

145. *See id.* at 1452-53. The court noted that the outside of the software box contained a statement that indicated that the transaction was "subject to a license." *Id.* at 1450. The court found that Zeidenberg agreed to this term at the time of purchase because of its location on the outside of the box, and that the sales transaction operated to incorporate the terms of the license located inside the box. *See id.* It is important to note, however, that the holding of the case did not require this language or any other type of notice for the terms of an enclosed shrinkwrap license to be enforceable. *See id.* at 1449. In addition, after the decision in *ProCD*, Judge Easterbrook delivered another Seventh Circuit decision confirming the enforceability of shrinkwrap licenses, regardless of whether the buyer had notice of a license at the time of purchase. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-50 (7th Cir. 1997). In *Hill*, Judge Easterbrook conceded that "ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not," but found this difference to be "functional, not legal." *Id.* at 1150.

146. *ProCD*, 86 F.3d at 1451.

147. *Id.*

148. 771 F.2d 1081 (7th Cir. 1985).

149. *See id.* at 1087 n.7.

150. *Id.* at 1086.

manual.¹⁵¹ In that case, the buyer did not receive the owner's manual until after he had purchased the car; but prior to purchase, he signed an order form that purported to "incorporate by reference" the terms included in the owner's manual.¹⁵² Even with the "incorporation" term on the order form, the court concluded that "the conditions appearing in the [owner's] manual, standing alone, would not be binding, for a 'mere delivery of a printed and unexecuted form after the sale had been consummated would not bind the purchaser.'"¹⁵³ Courts in other jurisdictions also have consistently invalidated terms presented to buyers after purchase.¹⁵⁴

Clearly, the software purchase in *ProCD* and the subsequent presentation of the shrinkwrap license, with its significant limitations, amounted to just the type of situation that prior courts have treated with disdain. When Zeidenberg purchased the software at the retailer, he knew nothing more than the information presented on the box—price, software title, subject matter, etc.¹⁵⁵ Had the use restriction been on the box, Zeidenberg probably would not have parted with his money and made the purchase. But this information did not appear on the box, and he proceeded with his purchase based on the

151. See *Koellmer v. Chrysler Motors Corp.*, 276 A.2d 807, 809 (Conn. Cir. Ct. 1970).

152. *Id.* at 811.

153. *Id.* (quoting *Sensabaugh v. Morgan Bros. Farm Supply*, 165 A.2d 914, 916 (Md. 1960)).

154. See, e.g., *Marion Power Shovel Co. v. Huntsman*, 437 S.W.2d 784 (Ark. 1969) (holding warranty disclaimer invalid because buyer did not become aware of it until after purchase price was paid); *Mack Trucks, Inc. v. Jet Asphalt & Rock Co.*, 437 S.W.2d 459 (Ark. 1969) (concluding that a warranty disclaimer is ineffective when attempted at time of delivery rather than before contract was signed); *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (Ct. App. 1966) (finding that warranty disclaimers made on or after delivery by means of language on invoice, receipt, or similar notice are ineffectual when made after the sale is complete); *Hahn v. Ford Motor Co.*, 434 N.E.2d 943 (Ind. Ct. App. 1982) (finding that when a seller does not attempt a limitation of remedy until after the contract for sale has been made, even a properly worded limitation is ineffective); *Sensabaugh v. Morgan Bros. Farm Supply*, 165 A.2d 914 (Md. 1960) (concluding that conditions could not be attached to sales of machines after they had been delivered and after the sales had been consummated); *Miller v. Andy Burger Motors, Inc.*, 370 S.W.2d 654 (Mo. Ct. App. 1963) (finding dealer warranty ineffective when given to buyer after purchase); *Pfizer Genetics, Inc. v. Williams Management Co.*, 281 N.W.2d 536 (Neb. 1979) (determining that disclaimers of warranty made after delivery of goods are ineffective); *Gaha v. Taylor-Johnson Dodge, Inc.*, 632 P.2d 483 (Or. Ct. App. 1981) (finding that a warranty limiting consequential damages is not enforceable when given to buyer after purchase).

155. See *ProCD*, 86 F.3d at 1450-51.

information available to him at the time.

Sellers must disclose terms before the buyer enters into an agreement to purchase.¹⁵⁶ Accordingly, ProCD had a duty to make Zeidenberg aware of the use limitation before he purchased the software. Requiring this disclosure is "both an equitable and logical interpretation of the Uniform Commercial Code."¹⁵⁷ ProCD did not, however, make Zeidenberg aware of the limitation until after he had already made the significant decision to purchase the software. If ProCD considered the term to be of great importance, it should have communicated it to Zeidenberg before he parted with his money. For the courts to allow otherwise is simply inequitable and illogical.

C. *The Holding in ProCD Exploits the Consumer*

The holding in *ProCD* exploits the modern consumer. In its analysis, the Seventh Circuit ignored consumer behavior. The court concluded that as long as the consumer has "a right to return the software for a refund if the terms are unacceptable,"¹⁵⁸ the terms of the license are enforceable. In light of established principles of consumer behavior, however, the right to return the software is practically meaningless.

Though the study of consumer behavior emphasizes the dynamics of consumer behavior *before* the sale,¹⁵⁹ much attention and effort go into the study of postpurchase behavior as well.¹⁶⁰ After purchasing a product, a consumer may have a variety of reactions.¹⁶¹ Some

156. See *Hahn*, 434 N.E.2d at 948.

157. *Pfizer Genetics*, 281 N.W.2d at 539.

158. See *ProCD*, 86 F.3d at 1451.

159. See C. GLENN WALTERS, *CONSUMER BEHAVIOR: THEORY AND PRACTICE* 159 (3d ed. 1978). The purchase process is intricate and involves many steps before a sale is actually consummated. See *id.* Before a sale, the consumer must recognize a particular need, gather information, and choose among alternatives. See *id.* Only after this can the consumer make a decision to purchase. See *id.*

160. See JAMES F. ENGEL ET AL., *CONSUMER BEHAVIOR* 532-44 (2d ed. 1973). It is a common misperception that the study of consumer behavior focuses only on prepurchase influences. See *id.* The study of consumer behavior is very important for marketers charged with making sure that the customer buys a particular product again. See *id.* Those who must understand consumer behavior realize that "[t]he consumer decision process is not over when the final [purchase] is made." TERELL G. WILLIAMS, *CONSUMER BEHAVIOR: FUNDAMENTALS AND STRATEGIES* 45 (1981).

161. See DOUGLAS W. MELLOTT, JR., *FUNDAMENTALS OF CONSUMER BEHAVIOR* 432 (1983). The common post-decision question that consumers have is, "Did I make the best purchase?" *Id.*

consumers may be extremely happy with their purchases and become loyal customers to a particular brand.¹⁶² For a variety of reasons, however, others may not be pleased with their purchases.¹⁶³ Consumer researchers focus on these dissatisfied buyers because they pose the highest risk of not repurchasing a particular product.¹⁶⁴

Researchers have found that many consumers experience tension or discomfort after purchasing a product.¹⁶⁵ This discomfort, commonly referred to as "postdecision dissonance,"¹⁶⁶ results from a consumer's inconsistent feelings about a purchase.¹⁶⁷ For example, consumers who believe that they made the best deal with their purchases may experience postdecision dissonance when later reading an advertisement for the same product at a lower price. The belief that the best bargain has been made clashes with the advertisement, which shows a better deal.

The prototypical *ProCD* purchase presents fertile ground for the creation of postdecision dissonance. The software purchaser who is lulled into buying the product by a fancy box that describes what the software can do is bound to experience conflict when later reading a shrinkwrap license that disclaims warranties or limits usage of the software to particular purposes. According to the Seventh Circuit, this is not a problem because the buyer will simply return the software, right? Wrong.

Consumer behavior researchers have established that consumers who experience postdecision dissonance will naturally strive to relieve this discomfort.¹⁶⁸ Though returning a product is clearly one way to relieve dissonance, consumers are not likely to do this because it requires them to admit that a mistake has been made.¹⁶⁹ One author noted that

American customers might shop carefully, but they rarely

162. See ENGEL ET AL., *supra* note 160, at 532.

163. See WILLIAMS, *supra* note 160, at 46.

164. See *id.*

165. See ENGEL ET AL., *supra* note 160, at 536.

166. *Id.*

167. See *id.*

168. See MELLOTT, JR., *supra* note 161, at 431 ("Because dissonance is uncomfortable, the individual will be motivated by the resulting tension to reduce or eliminate the dissonance."); see also WILLIAM L. WILKIE, CONSUMER BEHAVIOR 620 (2d ed. 1990) ("And, since dissonance produces unpleasant feelings, we'll be motivated to act to *reduce* the amount of dissonance we are experiencing.").

169. See ENGEL ET AL., *supra* note 160, at 535 ("[T]he average person is reluctant to admit that he has made a mistake once funds have been committed to an alternative.").

retract a deal after the sale has been closed. This gives the seller an unfair advantage within our cultural context because the customer doesn't get the bad news about the license until after comparison shopping is complete and the purchase is made.¹⁷⁰

Instead, consumers are more likely to undergo an attitude change about their decisions and rationalize that the best decision has in fact been made despite the new information.¹⁷¹ Following this attitude change, consumers will then use the product and further attempt to reconcile any remaining negative feelings.¹⁷²

The revelations of the dissonance reduction process illuminate the weakness of the *ProCD* decision. The result is a windfall for software producers. Not only do they get to advertise without having to risk turning away the buyer with unfavorable terms, but also they get to retain the sale, even if the buyer is not happy with the terms of the agreement.¹⁷³

V. A PROPOSED SOLUTION

A. Notice to the Buyer That the Sale Does Not Create a Contract

According to the Seventh Circuit in *ProCD*, "[a] buyer may accept [a contract] by performing the acts the vendor proposes to treat

170. Cem Kaner, *Proposed Article 2B: Problems from the Customer's View*, UCC BULL., Feb. 1997, at 1, 4. "[I]t is unrealistic to expect customers to return products under these circumstances, even if the terms are entirely unreasonable." *Id.* at 3.

171. *See id.*

172. *See* MELLOTT, JR., *supra* note 161, at 432.

173. The drafting committee of the National Conference of Commissioners on Uniform State Laws is currently drafting Article 2B, which will apply to shrinkwrap licenses. Under Article 2B, a shrinkwrap license will be enforceable if the buyer agrees, or manifests assent, to the license. *See* U.C.C. § 2B-208(a) (Discussion Draft Sept. 25, 1997). A party manifests assent when, after having an opportunity to review the license, it (1) authenticates the license or engages in other affirmative conduct or operations that the license conspicuously provides or the circumstances clearly indicate will constitute acceptance of the license; and (2) has an opportunity to decline to authenticate the license or engage in the conduct. *See id.* § 2B-112(a). The draft further provides that when a license cannot be reviewed until after the sale, the buyer does not have the requisite opportunity for review unless the buyer has a right to a full refund if the license is unacceptable. Although requiring a refund right is a step in the right direction, it does not alleviate the burden of returning the product. More importantly, it fails to consider the tendency of American consumers to retain unsatisfactory products—especially where the dissatisfaction is not with the product itself, but with terms found in an accompanying agreement.

as acceptance.”¹⁷⁴ The court found that ProCD “proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure.”¹⁷⁵ In addition, the court found that Zeidenberg agreed to this proposal “without protest.”¹⁷⁶ The court did not, however, state exactly how ProCD made this proposal to Zeidenberg.¹⁷⁷

Software vendors who wish to defer contract formation until after a buyer has had an opportunity to review an enclosed license should indicate this in a prominent position on the software box. The statement could be as simple as the following:

Purchase of this software does not create a contract between the buyer and the manufacturer. Acceptance of our offer to sell you the software can only occur after you agree to the terms printed on the enclosed envelope that contains the software disk. Opening the envelope signifies your agreement to the terms.

Requiring such a statement not only effectively defers contract formation under the UCC,¹⁷⁸ but also communicates to the buyer that the purchase is not the end of the product evaluation process. Furthermore, the burden to the vendor in placing this statement on the software box is slight. A review of software boxes reveals that such a statement would fit quite easily without displacing other valuable information.

174. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

175. *Id.*

176. *Id.*

177. *See id.* The court of appeals found that “[e]very box containing its consumer product declares that the software comes with restrictions stated in an enclosed license.” *Id.* at 1450. But see *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 645 (W.D. Wis. 1996), in which the district court found that the box merely “mentions the [license] in one place in small print.” Regardless of the nature of the statement on the box, the court of appeals did not assert that this was the basis of ProCD’s proposal to defer contract formation until after Zeidenberg was able to read the license. *See ProCD*, 86 F.3d at 1452.

178. *See supra* Part IV.A. Recall that section 2-206 allows a contract to be accepted “in any manner and by any medium reasonable” unless otherwise “unambiguously indicated by the language or circumstances.” U.C.C. § 2-206 (1995). The official comment to that section further provides that “[a]ny reasonable manner of acceptance is intended to be regarded as available unless the offeror has made it *quite clear* that it will not be acceptable.” *Id.* § 2-206 cmt. 1 (emphasis added).

B. Notice to the Buyer of Particular Terms

The Seventh Circuit apparently believed that Zeidenberg was given proper notice of the terms inside the box. Judge Easterbrook found that “[n]otice on the outside, terms on the inside . . . may be a means of doing business valuable to buyers and sellers alike.”¹⁷⁹ But just what notice did Zeidenberg really have? The software box in *ProCD* stated “that the software comes with restrictions stated in an enclosed license.”¹⁸⁰ The box did not state that the software could not be used for commercial purposes.¹⁸¹ For the Seventh Circuit, this constituted notice.

Informing consumers that a product is “subject to a license” does not sufficiently communicate that the transaction may involve terms that, if known, would cause them not to purchase the product. The

179. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996). It is interesting that in support of this proposition, Judge Easterbrook cited the comment to section 211 of the Restatement of Contracts. *See id.* The comment provides that “[s]tandardization of agreements serves many of the same functions as standardization of goods 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 transactions rather than to details of individual transactions.” RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

Judge Easterbrook’s citation of section 211 here misses the point. It is true that shrinkwrap licenses have been attacked on the grounds that as standard form contracts, they are contracts of adhesion. *See Gomulkiewicz & Williamson, supra* note 23, at 343; *see also* JOHN T. SOMA, *COMPUTER TECHNOLOGY AND THE LAW* § 2.16A, at 88-89 (1996) (“[Shrinkwrap licenses are] essentially adhesive.”). Contracts of adhesion raise two problems. First, because they are pre-printed forms, there is no negotiation between the parties. *See* SOMA, *supra*, § 2.16A, at 89. A consumer has the option of taking the terms, or leaving them. Second, people often fail to read standard form contracts. *See* CALAMARI & PERILLO, *supra* note 131, § 9-44, at 418. The general rule is that contracting parties have a duty to read the contract. *See id.* § 9-42, at 410. Failure to do so is not a valid defense. *See id.* However, “[t]here has been a tendency, particularly in recent years, to treat contracts of adhesion or standard form contracts differently from other contracts.” *Id.* § 9-44, at 418. With this type of contract, courts are more willing to excise terms in the name of fairness. *See id.* § 9-44, at 418-24.

The license in *ProCD* is undoubtedly subject to criticism because of its adhesive quality. But there is a much greater problem. In *ProCD*, the consumer did not neglect to read the contract; he was prevented from doing so because it was in a sealed box. *See ProCD*, 86 F.3d at 1450. With other standard form contracts, the problem is not that people are prevented from reading them; they simply neglect to do so. It is far different to say that a contract is objectionable because people neglect to read it than to say it is objectionable because people are unable to read it.

180. *ProCD*, 86 F.3d at 1450. The district court noted that the “box mentions the agreement in one place in small print.” *ProCD*, 908 F. Supp. at 645.

181. *See ProCD*, 908 F. Supp. at 645.

facts in *ProCD* prove this point. Buyers who purchase ProCD's software for use in a commercial application are not going to have any idea that the software cannot be used for this purpose. Instead, they will buy the software, only to find out later that they will have to return it or use it in violation of the license. This makes no sense, especially because the software vendor can prevent this hardship with minimal burden.

The Seventh Circuit maintained that "[v]endors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both."¹⁸² This, however, is not what needs to be done to give consumers notice of terms that might be materially relevant to their intended plans for the software.

In the same amount of text needed to inform prospective users that the transaction was subject to a license, ProCD could have informed buyers that the software was for personal use only. This is all that would have been required. A consumer that sees this on a box can hardly claim ignorance later.

Disclaimers of warranties work the same way. A software vendor that wishes to disclaim warranties or limit remedies need not put the entire language of the terms on the box. Instead, a phrase such as "significant disclaimer of warranties and limitation of remedies applies to this transaction" would be sufficient to let consumers know that before buying the product, they should consider whether they are covered should use of the software result in a loss. Again, though consumers may not like this term—especially if a loss does in fact result—they cannot complain that they were not aware of it up front. This is all that fairness demands.

The Seventh Circuit was correct to recognize that buyers might find software's attributes "more useful" than license terms. Certainly, people are more interested in what a piece of software can do for them as opposed to what it cannot. This fact, however, does not obviate the need to let buyers know about contractual limitations at the time of purchase. It does not make sense to say that we should postpone telling buyers about the terms of a contract simply because they do not want to be troubled with it at the time of purchase. It makes even less sense when one considers that a software vendor can effectively inform the consumer of important terms with no more

182. *ProCD*, 86 F.3d at 1451.

burden than letting them know the transaction is subject to a license.

C. *An Opportunity to Review*

Giving the consumer notice of significant license terms on the box does not mean that a consumer should not have an opportunity to review a license prior to making the purchase. In fact, giving notice of terms to a buyer may increase the need to have the license available for review before the sale is consummated.

Software vendors, in cooperation with retailers, can give buyers the opportunity to review shrinkwrap licenses before purchase. Software vendors need only send a copy of the license to the retailer. The retailer could then compile the licenses in a binder. Software consumers wishing to review a particular license could then find the license in the binder and review it in greater detail.

Making the licenses available for review will reduce the inequity caused by consumers having to return software with undesirable terms. It is true that not every software consumer will need to see the entire license before purchasing the product. There are those, however, who may want to use software for a particular purpose, namely commercial applications. In these situations, a review of the license may be necessary. By reviewing the license before purchase, buyers can avoid the hardship of returning the software by making an informed decision before walking out of the store.

VI. CONCLUSION

Transactional efficiency is necessary in an increasingly technological world, but it should not come at the cost of fairness. The opinion in *ProCD* was correct to recognize that shrinkwrap licenses can play an important role in making software transactions more efficient; however, in not providing any meaningful guidance for their use, it left the door open for abuse.

The use of shrinkwrap licenses can be a "win-win" situation for both the software producer and consumer. Software producers can make shrinkwrap transactions fair with minimal burden. By putting a few extra lines of text on the box and sending a copy of the license to the retailer, they can be confident that their licenses will not be rendered unenforceable.¹⁸³ In addition, consumers will know what they are getting up front, without uncertainty or the potential

183. Established concepts of contract law would still apply. Thus, a court could still excise terms based on unconscionability.

inconvenience of having to return desirable software with undesirable contract terms.

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