Maximizing the Enforceability of Click-Wrap Agreements

Francis M. Buono

Jonathan A. Friedman

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By Francis M. Buono and Jonathan A. Friedman [*]

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{1} A "click-wrap agreement" is an agreement, formed entirely in an online environment such as the Internet, which sets forth the rights and obligations between parties. The term "click-wrap" is derived from the fact that such online agreements often require clicking with a mouse on an on-screen icon or button to signal a party's acceptance of the contract. Among other things, click-wrap agreements are used to: (1) establish the terms for the download and use of software over the Internet; (2) set forth a Web site's Terms of Service, *i.e.,* the rules by which users may access the Web site or a portion of the Web site such as a chat or message service; and (3) establish the terms for the sale of goods and services online.

I. THE IMPORTANCE OF CLICK-WRAP AGREEMENTS

{2} Click-wrap agreements are intended to substitute for direct bargaining between parties in an online environment and can be used in a wide array of applications. It would be inefficient, if not impossible, for example, for a Web site owner or other online service provider ("OSP") to bargain with each person who visits its Web site. Accordingly, the Web site owner may instead place an agreement (the click-wrap) on its Web site and require visitors to assent to the terms of the agreement in order to access the site, download software, purchase a product/service, and so forth. A click-wrap agreement may, for example: (1) put users on notice that the material contained on the Web site, as well as any software downloaded from that site, is proprietary; (2) impose limitations on the use of the site and the

downloaded software; and (3) make it easier for the OSP to pursue users for any violations or infringement.

{3} Click-wrap agreements can also be used to limit the OSP's potential liability. For example, through the use of a click-wrap, an OSP can attempt to absolve itself from liability associated with content on the OSP's Web site. This includes any losses associated with use of such content, any errors or problems. with respect to software downloaded, or products/services purchased, from the Web site.

II. TYPES OF CLICK-WRAP AGREEMENTS

{4} In a written contract, parties typically sign paper documents to signal their assent to be bound by the contract. In an online environment, "signing" a click-wrap agreement may be accomplished in several ways, each with its own advantages and drawbacks. The two principal types of click-wrap agreements are the "type and click" and the "icon clicking" agreements described below.

- o **Type and Click.** Under this approach, a party must type "I accept" or other specified words in an on-screen box and then click a "send" or similar button to signal acceptance of contractual terms. Without such action, the user cannot proceed to access the targeted Web site, download the desired software, or purchase the desired product or service.
- o **Icon Clicking.** Here, a party simply clicks an "I accept," "I agree," or similar icon to signal acceptance of the terms in the click-wrap agreement. Access is denied unless the button is · clicked. Users not wishing to enter click a "No" or "I do not agree" icon, which takes them elsewhere [1]

III. ENFORCEABILITY OF CLICK-WRAP AGREEMENTS

{5} The enforceability of click-wrap agreements remains an open legal issue. Most of the cases in this area analyze the enforceability of "shrink-wrap" agreements (*i.e.*, software licensing agreements included along with software diskettes and packaging materials, which the seller deems to be accepted by the user when the software is opened and not returned for a refund) and do not directly involve the enforceability of click-wraps. Moreover, even with respect to shrink-wrap agreements, there is no controlling law throughout the United States. That said, use of click-wrap agreements has become standard practice for the distribution of software and the sale of products/services online, and most courts have upheld the enforceability of shrink-wrap agreements provided such agreements are not objectionable under general contract principles.

{6} The single reported U.S. federal court decision dealing specifically with click-wraps involved Hotmail's click-wrap ("icon clicking") agreement. In that case, a district court in California concluded that Hotmail's click-wrap was an enforceable agreement and therefore granted a preliminary injunction prohibiting a Hotmail user from sending thousands of "spam" e-mails in violation of Hotmail's click-wrap agreement. [2]

{7} Other federal court cases which analyze "accept or return agreements" shrink-wrap agreements also implicate the validity of click-wraps. In *ProCD*, for example, a federal court of appeals held that shrink-wrap agreements are enforceable against consumers where: (1) the box containing the software indicated to a purchaser that the software was subject to an enclosed license; (2) the purchaser had ample opportunity to read the license; and (3) the purchaser had the opportunity to reject the license by returning the software for a refund. [3] In addition, like *Hotmail*, the *ProCD* case involved a "speed bump" preventing software purchasers from accessing the software without first pulling up the on-screen agreement.

{8} Similarly, in two cases involving Gateway 2000, [4] a federal court of appeals and a New York State appellate court separately concluded that written agreements placed in Gateway 2000's computer boxes constituted binding agreements because purchasers had an opportunity to return the computers after reviewing the enclosed agreement. According to the federal appeals court, customers are "better off" when vendors use an "approve or return" agreement instead of lengthy recitations of the contract because purchasers would view reading the agreement as a "waste of time" and "[c]ashiers cannot be expected to read legal documents to customers before ringing up sales." [5]

{9} Following the reasoning in *ProCD* and *Gateway*, a Washington State appellate court in *M.A. Mortenson Co. v. Timberline Software Corp.* recently concluded that license terms sent in software packaging materials and which appear on the program's introductory screens constituted a valid agreement. [6] The court thus upheld the limitation of remedies and liability clause in the contract.

{10} Under *ProCD*, *Gateway 2000*, and *Mortenson*, it appears that "accept or return" agreements are valid, enforceable, and part of modern business practice. [7] These cases also suggest that buyers may accept contracts by performing the acts that the seller proposes to treat as an acceptance (*i.e.*, keeping the merchandise).

{11} In fact, click-wrap agreements, if implemented properly, are arguably even more likely to be held enforceable by courts than "accept or return" shrink-wrap agreements. The disclosure of the license terms and affirmative indication of user acceptance of those terms prior to the use of the OSP's service or the distribution of the software or product to the user permit the click-wrap agreement and online distribution process to avoid some of the critical problems that have caused certain courts to reject the enforceability of shrink-wrap agreements. In this regard, "type and click" click-wraps provide a high degree of protection as they: (1) require clear assent to the terms as evidenced by a writing ("I agree"); and (2) preclude parties not accepting the terms from accessing the site or desired function. However, this method can be cumbersome as it requires users to type a word or phrase, thereby slowing down the enrollment process, and must account for misspellings, or other errors by users. By comparison, the "icon clicking" click-wrap provides a slightly lower threshold of protection because it is susceptible to claims of mistake or error (e.g., my finger slipped, the dog stepped on my mouse) not present when one is required to type "I accept."

{12} On July 29, 1999, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved a uniform law entitled "Uniform Computer Information Transactions Act" ("UCITA"). UCITA is a contract law statute that applies to computer information transactions that take place online, including agreements to create, modify, transfer, or distribute computer software, multimedia interactive products, computer data and databases, and Internet and online information. Among other things, UCITA makes clear that click-wrap agreements that allow a user to convey his or her assent through an on-screen "click" are legally binding as long as the user had an opportunity to review the terms before assenting. [8] UCITA, which will now be sent to the states for their respective review and possible approval, [9] confirms the analysis above, namely that click-wrap agreements, if implemented properly, will likely be held to be legally enforceable.

IV. RECOMMENDATIONS TO ENHANCE THE ENFORCEABILITY OF CLICK-WRAP AGREEMENTS

{13} While the law on the enforceability of click-wrap agreements is unsettled, implementation of the suggestions set forth below will maximize the likelihood that an OSP's click-wrap agreement would be enforceable: [10]

- **Provide Notice Regarding Terms**. The OSP should expressly notify the user that use of the Web site, software, product, etc. will be subject to the terms and conditions contained in the click-wrap agreement.
- **Place User Accept Option at the End of All Terms**. The OSP should require the user to view the entire click-wrap agreement before the Web site can be viewed, software can be downloaded, product can be purchased, etc. and before any applicable registration process begins. Any "Accept" button (or any prompt to the user to enter words of acceptance, such as "I ACCEPT") to indicate assent to the terms set forth in the click-wrap should not appear until the end of the final screen of the click-wrap. This will ensure that the user has an opportunity to page through and review all of the agreement's terms before being able to accept the agreement.
- **Require an Affirmative Act for User to Convey Assent**. The OSP should next require the user to take an affirmative act to indicate his or her assent to the terms of the click-wrap agreement. For example, as noted, a common approach in the industry is to have the user click an "Accept" button. A button allowing the user to "Reject" the click-wrap agreement should also be presented alongside the "Accept" button. To enhance still further the likelihood of the click-wrap's enforceability, the OSP could instead require the user to type in specific words of acceptance, such as "I ACCEPT" or "I AGREE." Regardless of what mechanism the OSP selects to implement user assent to the click-wrap agreement, the OSP should program the registration process to terminate immediately if the user does anything other than signal his or her assent. For example, if the user clicks on the "Reject" button, he or she should not be permitted to proceed with the use of the Web site, software download, product purchase, etc.
- **Record and Maintain Date and Time of User Acceptance**. For evidentiary purposes, the date, time, and fact of the user's clicking of the "Accept" button (or typing in of the specified terms of assent) should be recorded electronically and retained by the OSP for use in possible future enforcement of the click-wrap agreement. [11]
- **Allow User to Exit the Process at Any Time**. The OSP should provide the user with the option to terminate the process at any point before final acceptance of the terms of the click-wrap agreement. This will reinforce the fact that the user's assent to the terms of the click-wrap agreement is voluntary and purposeful.
- **Implement Online User Registration**. To further heighten the likelihood of enforceability of the click-wrap agreement, the OSP should consider requiring each user, after indicating his or her assent to the click-wrap, to fill in the fields of a user registration form (to collect, for example, user name and address). If used, the online user registration form should contain a statement reciting that use of the Web site, downloaded software, purchased product, etc. will be governed by the terms of the click-wrap agreement and that the user has accepted that agreement.

ENDNOTES

[*] Francis Buono and Jonathan Friedman are associates in the Washington, D.C. office of Willkie Farr & Gallagher, specializing in communications and Internet law and policy. They are contributors to *Emerging Issues in Internet Law* (Willkie Farr & Gallagher, 1999).

[1] With respect to general Terms of Service for a Web site, the "type and click" or "icon clicking" approaches may be problematic as they: (1) require the home page to be devoted to the Terms of Service; (2) obligate users to agree each time they access the Web site; and (3) provide no access or content to users until they signal acceptance of the agreement. For Web site Terms of Service, therefore,

these approaches can be particularly cumbersome and annoying to users. For these reasons, most Web sites implement general Terms of Service regarding use of the Web site through a hyperlink at the bottom of each Web page of the site. Compared to click-wrap agreements, such hyperlinked Terms of Service provide a lower level of protection because they do not require the user to view the Terms or indicate affirmative consent either by typing in words of assent or by clicking an "I agree" icon.

[2] *See* Hotmail Corp. v. Van Money Pie, Inc., et al., 47 U.S.P.Q. 2D (BNA) 1020, 1025 (N.D. Cal. 1998), 1998 US Dist. LEXIS 10729, at *20.

[3] *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449-50 (7th Cir. 1996).

[4] *See* Hill v. Gateway 2000, 105 F.3d 1147, 1148 (7th Cir. 1997; Brower v. Gateway 2000, Inc., 246 A.D. 2d 246, 250 (N.Y. App. Div. 1998), 1998 WESTLAW 481066.

[5] *See Hill v. Gateway 2000*, 105 F.3d at 1149.

[6] *See* M.A. Mortenson Co. v. Timberline Software Corp., 970 P.2d 803, 812 (Wash. Ct. App. 1999). (holding that a software license embedded in the software's packaging materials as a valid agreement when determining whether the license had been violated by a user of the software). *See also* Green Book Int. Corp. v. Inunity Corp., 2 F. Supp.2d 112 (D. Mass. 1998) (declining to grant preliminary injunction on grounds that license had not been violated by the user of the software).

[7] We note that a few older cases have gone the other way in the shrink-wrap context. *See generally* Arizona Retail Systems v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993); Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991) (rejecting the enforceability of shrink-wrap agreements). The *Step-Saver* and *Arizona Retail* courts held that, unless the terms of the shrink-wrap license are presented or otherwise known at the time, price, quantity, and goods are offered and accepted, such terms will not form part of the initial contract. For a more detailed discussion of these cases and the enforceability of shrink-wrap license agreements both online and off-line. *See* David L. Hayes, Esq., *The Enforceability of Shrink-wrap License Agreements On-Line and Off-line* (Nov. 11, 1999) <http://www.fenwick.com/pub/shrinkwrap.htm>.

[8] *See* UCITA, § 112, <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>, Reporters Notes #5 ("Illustration 1: The registration screen for NY Online prominently states: "Please read the license. It contains important terms about your use and our obligations with respect to the information. Click here to review the License. If you agree to the license, indicate this by clicking the "I agree" button. If you do not agree, click "I decline." The on-screen buttons are clearly identified. The underlined text is a hypertext link which, if selected, promptly displays the license. *A party that indicates "I agree" manifests assent to the license and adopts its terms.")* (emphasis in original).

[9] State approval of UCITA is likely to be a very difficult proposition as there are many interest groups that have pledged to fight this approval. For example, at the NCCUSL level, 24 state attorneys general, the FTC's Consumer Protection Bureau, and several industries -- primarily the motion picture, communications, and publishing industries -- aggressively opposed approval of UCITA as a proposed uniform law.

[10] *See also* David L. Hayes, Esq., *The Enforceability of Shrinkwrap License Agreements On-line and Off-line* (Nov. 11, 1999) <http://www.fenwick.com/pub/shrinkwrap.htm>.

[11] Over forty states have enacted digital and/or electronic signature statutes, and Congress is

considering legislation to standardize the use of electronic signatures in interstate commerce. In general, electronic signature statutes provide that use of an electronic signature on an electronic record will be treated in the same manner as a handwritten signature on paper (although a plaintiff in any lawsuit would still have to prove the signature was authentic). Digital signature statutes, in contrast, provide that digitally signed messages will be treated as self-authenticating documents, provided the signature is properly verified. Click-wrap agreements would probably not benefit from digital signature statutes because click-wraps do not generally involve the use of cryptographic technology. Click-wraps might be covered by electronic signature statutes if, for example, the user typed in or even clicked "I ACCEPT" and that qualified as an electronic signature. (The Reporter's Notes to the Uniform Electronic Transactions Act ("UETA"), recently approved by the National Conference of Commissioners on Uniform State Law, state that clicking "I ACCEPT" would qualify as an electronic signature for purposes of UETA.) However, several states, such as California, require that, for certain communications, the signature be unique to the person using it, so typing "I ACCEPT" may be inadequate. In sum, it is unclear whether click-wraps enjoy the benefits of these state statutes, but, even if they do not, courts may still bind the parties to the click-wrap agreement on other grounds, particularly given the prevalent use of click-wraps to signify acceptance online and the fact that such user action is a good indicator of user assent.

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