CHAPTER 6

Shrink-wrap and Click-wrap Licenses

A. Shrink-wrap Licenses

Shrink-wrap licenses derive their name from the practice of containing them on (or currently in) a shrink-wrap package that also contains the software and documentation. The license is visible through the cellophane packaging and usually provides that the purchaser is bound by the terms of the license upon opening the shrink-wrap. If the licensee does not agree with and therefore does not wish to be bound by the terms of the license, it should return the unopened package to the licensor for a full refund. There is no opportunity to negotiate the terms of the license.

Initially, courts were hesitant to enforce shrink-wrap licenses. Courts upholding shrink-wrap licenses also use the UCC as well as other laws. See generally, Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991) (shrink-wrap license not enforceable under Section 2–207 of UCC as license terms mutually altered the contract between the parties); Arizona Retail Systems v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993) (shrink-wrap license not binding under UCC Sections 2–207 and 2–209). See also Vault Corporation v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir 1988) (provisions of shrink-wrap license unenforceable to the extent their validity is based on Louisiana Software License Enforcement Act that is preempted by federal copyright law.)

In ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), the Seventh Circuit held that “shrink-wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general” (i.e., unconscionable). The court rejected the applicability of UCC § 2–207 stating that a battle of the forms could not exist if only one form existed.
Thus, there was initially, a stark dichotomy of opinion as to the enforceability of shrink-wrap licenses. See also, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), cert. denied, 522 U.S. 808 (1997) (contract terms in computer box enforceable, including arbitration clause); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305 (Wash 2000), aff’d, No. 67796–4, 2000 Wash. LEXIS 287 (Wash Sup. Ct. May 4, 2000); Bowers v. Baystate Technologies, Inc., 320 F.3d 1317 (Fed Cir. 2003) (Copyright Act does not preempt or narrow contractual prohibition on reverse engineering contained in shrink-wrap license).


Given that most shrink-wrapped software is utilized in the consumer market it is possible that it is subject to the Magnuson-Moss Act. The contrary is also possible. Consequently, to avoid coverage under the Magnuson-Moss Act, and the accompanying limitations, a licensor must be very careful as to the warranties it makes. See Section III.B.1(b)(ii) for a detailed discussion of the Magnuson-Moss Act.

Section 209 of The Uniform Computer Information Act (“UCITA”) recognizes the validity of shrink-wrap licenses with certain limitations. See Section VII.B.3.(k) for a more detailed discussion.


For a general discussion see, Rowles, Shrink-Wrap and Click-Wrap Agreements Under the Uniform Computer Information Transactions Act, E-Commerce Advisor 3 (May 2001); Rowles, Enforceability of Click-Wrap Licenses- Revisited, 18 E-Commerce Advisor (June 2002).
B. Click-wrap Licenses

Click-wrap licenses are similar to shrink-wrap licenses except that they are viewed online and the software is usually downloaded over the Internet. Clickwrap licenses are generally held to be enforceable when the license terms are viewed prior to the software’s purchase or installation. See, e.g., *i.LAN Systems, Inc. v. NetScout Service Level Corp.*, 183 F. Supp. 2d 328 (D. Mass 2002); *Hughes v. McMenamon*, 204 F. Supp. 178 (D. Mass 2002). See generally, *Caspi v. Microsoft Corp.*, 743 A.2d 851 (N.J. App. Div. 1999) (forum selection clause in click wrap agreement was enforceable). For a general discussion see, Rowles, *Shrink-Wrap and Click-Wrap Agreement Under the Uniform Computer Information Transactions Act*, E-Commerce Advisor 3 (May 2001); Rowles, *Enforceability of Click-Wrap Licenses-Revisited*, 18 E-Commerce Advisor 1 (June 2002).

