

ELECTRONIC COMMERCE: VERSION 2.0

MAIN MENU:	CALENDAR	SYLLABUS	DISCUSSION	ADMINISTRATION
NOTICES:	Welcome to Electronic Commerce!			

eContracts I: The Evolution of Contract Formation

Tuesday, September 26, 2001

READINGS

Introduction

The contract is the language of commercial exchange. As such, contracts have existed as long as law itself has been used to regulate activity. The contract has, if anything, become even more important in the digital age, though there a number of issues that have appeared in this transition to electronic contracting.

Margaret Jane Radin of Stanford Law School, a leading scholar in this field, has usefully identified six critical issues facing electronic contracts:

- *Authentication*: how do we know who made this deal and what will count as a definitive record of its terms?
- *Binding commitment*: How will interactions between people and computers create binding commitments?
- *Standardization*: Will uniform standardized "adhesion" contracts be enforceable?
- *Excluded terms*: Under what circumstances should particular terms in ecommerce deals be disallowed?
- *Viral contracts*: To what extent may distributors pass obligations on to everyone in a distribution chain?
- *Jurisdiction and choice of law*: Whatever the governing rules of choice of law and jurisdiction would otherwise be, can they be routinely altered by contract?

Margaret Jane Radin, *Retooling Contracts for the Digital Era*, Hoover Inst. (2000).

Radin's point is that electronic contracting presently lacks a firm "legal infrastructure" that fully addresses the variety of form and content made possible by new technology. Indeed, her six problematics for contract might helpfully be placed into the context of the pillars of contract law:

1. Challenges to contract *formation*: binding commitment between humans and computers, or computers and computers; the enforcement of uniform standard contracts.

2. Challenges to contract *terms*: terms excluded for public policy reasons; the allowance of "viral" contract terms.
3. Challenges to contract *enforcement*: authentication of deal-making; choice of law problems.

Note, of course, that these categorizations are not without fuzziness -- the limitation of terms may arise because of defects in formation, for example -- but are nonetheless useful for purposes of ordering our inquiry into these issues.

In this section of the class, we'll investigate the legal infrastructure of electronic contracting, reviewing the current status of electronic contracts, as well as positing the direction the law (and technology) might take in the future.

The Evolution of Contract Formation

In this part, we'll review the law of contract formation, as it applies to eContracts.

Note: We'll assume a basic working knowledge of the law of contract formation (i.e., successful completion of a 1L Contracts course). If you feel review is necessary, I recommend the following **[optional]**:

Mark Radcliffe and Diane Brinson, *Contracts Law*, FindLaw Professionals (1999).

Restatement 2nd of Contracts (1981). *Chapters 1-8 deal generally with formation of contracts. The document is available on Lexis.*

Part 1: Shrinkwraps

A "shrinkwrap" contract is one that manifests assent by the actions of one of the parties -- in the shrinkwrap context, the breaking of the packaging surrounding a purchased item.

Read the following two cases:

ProCd v Zidenberg, 86 F.3d 1447 (7th Cir. 1996). [pdf, 28 kb, edited]

Hill v Gateway, 105 F.3d 1147 (7th Cir. 1997) [pdf, 16 kb, edited]

Part 2: Clickwraps

ProCD, etc. deals with shrinkwrap contracts -- those that use the opening of a package as a manifestation of assent to terms contained therein. Close cousins to shrinkwraps, "clickwraps" are used in the online context, using the clicking of a button (or, at times, the mere use of a web site) as manifestations of assent. They are often also referred to as "Terms of Service (TOS)" or "Conditions of Use (COU)"

Example 1: eBay

When you register for eBay, you are required to "click-through" the following agreement:

eBay, *Registration Agreement (2001)* [pdf, 32 Kb]

[the portion of the agreement in the text box can be found by clicking here] [pdf, 20 kb]

Example 2: Disney.com [as suggested by Radin, *Humans, Computers & Binding Commitment*, 75 Ind. L. J. at 1129]

The Disney.com home page, if you scroll down far enough, contains the following link:

Use of this site signifies your agreement to the terms of use.
[\[click here to review the terms of use\]](#)

Did you notice anything interesting about the terms of use on either site? How would you analyze the contract formation issues raised by these examples? When is the contract formed? Are all terms included?

Clickwraps (at least some types) have an uncertain status, as the following case indicates:

[Specht v Netscape, 150 F. Supp. 2d 585 \(SDNY 2001\) \[pdf, 40 kb \]](#).

Part 3: Beyond Shrinkwraps and Clickwraps

Machine-Made Contracts

We're looking here at a different sort of contract -- one made by computers rather than with any direct participation by human beings. Radin describes this as follows:

By machine-made contract, I am referring to a loose category of transactions that are structured in the first instance by machines, with the humans in the background at some remove. Strictly speaking, it is a machine-implemented transactional structure when I use my personal computer to click on a box on my screen which then registers with a server computer somewhere else. I am dubbing transactional structures (whether or not contractual is a question to be answered) machine-made, however, only if the human pushing the key is not so directly involved. Machine-made contract in this sense falls into two broad categories: computers as electronic "agents," and computers as electronic enforcers.

1. Electronic "Agents"

In this category of machine-made contract, the idea is that two computers (rather than two humans, or one human and one computer) "negotiate" with each other and arrive at "agreement" with each other. Using the term "agency" in the locution "electronic agency" has become common, so I am adopting the usage, but before proceeding I want to register a caveat. The terms should seem peculiar in this context. When a computer does something "for" me that I have allowed it to be programmed to do, it is only an "agent" in a mechanical sense; it carries out the instructions of the program automatically so I will not have to do it manually. The term "agent" means something else when we are considering human "agency." Human "agency" refers to the freedom of autonomous beings. Human "agency" figures prominently in the traditional picture of contract-as-consent: it takes a human "agent" to be able to give voluntary consent. The law of "agency," which developed to cover situations in which one human delegated tasks to another, perhaps partakes of both senses; but no "agent" in a "principal-agent" relationship could be in the mechanized relationship that one who causes a computer to run a program is with that computer's activities. Use of the term "electronic agent" runs together these meanings and may cause us not to see how the issue of consent is being submerged or metamorphosed.

Right now, the computer-to-computer electronic agent scenario is primarily being developed in industrial procurement and general supply-chain management. In the generation following Electronic Data

Interchange ("EDI")-a set of protocols developed in the 1980s for information sharing between trading partners-both extranets and the Web are being used to couple the vast power of digital automation with principles of just-in-time manufacture and distribution. In this form of industrial organization, many repetitive tasks are or will be accomplished by machine. Among these tasks are ordering and paying for supplies that are routinely needed at certain points in a process. The ordering, delivery, and payment for such supplies means that there are contractual terms surrounding the transaction-the time of delivery, what to do if the supplies do not arrive in time or are defective, what to do if the payment is late, and all the other transactional parameters that people contract about. All of this can in principle be handled primarily by machine, using computer programs that "negotiate" with each other and enter into "agreements" with each other.

Although automated supply-chain management is in the vanguard of the form of machine-made contract I have (reluctantly) designated electronic agency, in the near future these machine-made contracts may well become very widespread. Electronic agents may shop for us, organize our homes and offices for us, and so on.

2. Electronic Enforcers

In the second category of machine-made contract, known as digital rights management systems or trusted systems, computer programs enforce the terms of a transfer of digital content. The system is "trusted" (more trustworthy than a human) because it is technologically incapable of deviating from the instructions it is given. Those instructions may be, for example, to enforce a thirty-day license by erasing the content from the licensee's machine when the thirty days are up; or to enforce a restriction against copying either by preventing the copy from being made or by erasing the content from the licensee's machine if copying is attempted. Such detailed self-enforcement mechanisms will likely be a significant aspect of the human/computer interface for electronic commerce. They are viewed with alarm by some, but welcomed by others whose vision of anarchic self-ordering in cyberspace includes widespread technological self-enforcement.

Humans, Computers & Binding Commitment, 75 Ind. L. J. at 1130-31.

With respect to "trusted systems," review the following article:

Mark Stefik, *Trusted Systems*, *Scientific American*, March 3, 1997

Viral or Unseen Contracts

A possible third type of contract seen in electronic commerce is what Radin describes as a "viral" contract -- one whose terms purport to run with an object regardless of whether the present user has manifested assent to the terms:

Viral Contracts

The analogy of viral propagation has proved apt for various aspects of information transfer in a networked digital environment. Information can be rapidly replicated, and each replica in turn can be rapidly replicated, and so on through a chain of replication throughout the network. Most people are familiar with computer viruses, which are destructive software programs that are spread through successive replication in this way. But the analogy holds more broadly. The economics of the networked environment have engendered a phenomenon known as viral marketing. In this form of marketing, the seller provides incentives for buyers to obtain other customers, and for

those customers in turn to obtain other customers, and so on. Many commercial web sites have "affiliates" programs designed to do this.

In the future, we should expect to see more and more viral marketing. Instead of locking up intellectual property, for example, many purveyors of content will be better off by allowing their content to propagate freely, as soon as there is a viable automatic payment mechanism than can cause payment to be extracted from whoever downloads the content, wherever it goes. Moreover, much content on the Web is (and more will be) free advertising for follow-on services. The more this content propagates, the better for its initiator, as long as technological safeguards exist to maintain its integrity and keep the advertiser's name on it.

In keeping with the viral character of content propagation, a transactional phenomenon I call viral contract is arising. A viral contract (or attempted viral contract, because we do not know yet whether these attempts will result in an actual contract) is simply an attempt to make commitments run with a digital object. For example, in the viral advertising program I described above, the advertiser who initiates the spread of the content would like to make each and every user into whose hands the content comes be obligated not to alter the content or remove the advertiser's name from it. The initiator would like, in other words, to attach the obligations regarding the content to the content itself, so that everyone who comes into possession of the content would also inherit the obligations to the initiator. Viral contract attempts to make the fine print run with the product. In a sense, it is the ultimate instantiation of the contract-as-product model.

The clearest instance of attempted viral contract today involves open source software. The Linux operating system, which now has a nontrivial share of the market, is governed by a version of the General Public License promulgated by Richard Stallman and the Free Software Foundation, in conjunction with a kernel developed by Linus Torvalds. The open source "movement" is based on the idea that each recipient in a chain of distribution is bound to make public (or make available to all those in the chain) any improvements effected in the source code. The license uses copyright to make copyright narrower (keeping in the public domain what otherwise would have been property of the improvers). Because of this narrowing effect, the license is known as "copyleft." However, in what might be called "supercopyright," the same technique can also be used to attempt to broaden copyright (or for that matter other intellectual property entitlement schemes). An example would be a "running" waiver of the fair use defense to copyright infringement, in which a distributor seeks to foreclose that defense for all users in a chain of distribution.

Software publishers have hitherto "licensed" rather than sold copies of their software so that they could restrict transfer, and so that they could maintain restrictions after a sublicense was effected. Software publishers most likely would prefer viral sales contracts with running obligations on all transferees in a chain of distribution, and merely doubt their legal enforceability (as well as whether transferees would accept such obligations in the market). But if market forces bring the total restraint-on-alienation model into disfavor, and changes in the law validate viral contracting, we might see viral contracting become very commonplace.

Humans, Computers & Binding Commitment, 75 Ind. L. J. at 1132-33.

NOTES & QUESTIONS

1. Although *ProCD* and *Hill* have become influential in courts' treatment of shrinkwrap contract issues, there is some confusion about the status of contract terms that are "agreed to" by subsequent performance. In *Klocek v Gateway*, 104 F. Supp. 2d 1332 (D. Kan. 2000), the court noted the following:

The Uniform Commercial Code ("UCC") governs the parties' transaction under both Kansas and Missouri law. See K.S.A. ? 84-2-102; V.A.M.S. ? 400.2-102 (UCC applies to "transactions in goods."); Kansas Comment 1 (main thrust of Article 2 is limited to sales); K.S.A. ? 84-2-105(1) V.A.M.S. ? 400.2-105(1) ("Goods' means all things . . . which are movable at the time of identification to the contract for sale"). Regardless whether plaintiff purchased the computer in person or placed an order and received shipment of the computer, the parties agree that plaintiff paid for and received a computer from Gateway. This conduct clearly demonstrates a contract for the sale of a computer. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Techn.*, 939 F.2d 91, 98 (3d Cir. 1991). Thus the issue is whether the contract of sale includes the Standard Terms as part of the agreement.

State courts in Kansas and Missouri apparently have not decided whether terms received with a product become part of the parties' agreement. Authority from other courts is split. Compare *Step-Saver*, 939 F.2d 91 (printed terms on computer software package not part of agreement); [**14] *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (license agreement shipped with computer software not part of agreement); and *U.S. Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201 (D. Kan. 1998) (single use restriction on product package not binding agreement); [*1338] with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808 (1997) (arbitration provision shipped with computer binding on buyer); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (shrinkwrap license binding on buyer); and *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (Wash. 2000) (following *Hill* and *ProCD* on license agreement supplied with software). It appears that at least in part, the cases turn on whether the court finds that the parties formed their contract before or after the vendor communicated its terms to the purchaser. Compare *Step-Saver*, 939 F.2d at 98 (parties' conduct in shipping, receiving and paying for product demonstrates existence of contract; box top license constitutes [**15] proposal for additional terms under ? 2-207 which requires express agreement by purchaser); *Arizona Retail*, 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest by shipping goods to buyer; license agreement constitutes proposal to modify agreement under ? 2-209 which requires express assent by buyer); and *Orris*, 5 F. Supp. 2d at 1206 (sales contract concluded when vendor received consumer orders; single-use language on product's label was proposed modification under ? 2-209 which requires express assent by purchaser); with *ProCD*, 86 F.3d at 1452 (under ? 2-204 vendor, as master of offer, may propose limitations on kind of conduct that constitutes acceptance; ? 2-207 does not apply in case with only one form); *Hill*, 105 F.3d at 1148-49 (same); and *Mortenson*, 998 P.2d at 311-314 (where vendor and purchaser utilized license agreement in prior course of dealing, shrinkwrap license agreement constituted issue of contract formation under ? 2-204, not contract alteration under ? 2-207).

Is the distinction based on "when" the contract was formed useful? When do you think the contract was "formed" in *ProCD*?

2. The *Klocek* court also noted that *ProCD* holds that UCC 2-207 is not relevant when only one form -- the vendor's -- is at issue. Instead, *ProCD* holds that UCC 2-204 is the relevant section.

§ 2-204. Formation in General.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

* * *

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) 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.

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

(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Is *ProCD* correct that 2-207 is inapplicable? Note that the Official Notes to 2-207 state the following:

This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction.

3. *ProCd* holds that, under the UCC (specifically 2-204): "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor

proposes to treat as acceptance" What do you think of this statement? Note that, as at least one court has noted,

the Seventh Circuit provided no explanation for its conclusion that "the vendor is the master of the offer." See *ProCD*, 86 F.3d at 1452 (citing nothing in support of proposition); *Hill*, 105 F.3d at 1149 (citing *ProCD*). In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree. See *Brown Mach., Div. of John Brown, Inc. v. Hercules, Inc.*, 770 S.W.2d 416, 419 (Mo. App. 1989) (as general rule orders are considered offers to purchase); *Rich Prods. Corp. v. Kemutec Inc.*, 66 F. Supp. 2d 937, 956 (E.D. Wis. 1999) (generally price quotation is invitation to make offer and purchase order is offer). While it is possible for the vendor to be the offeror, see *Brown Machine*, 770 S.W.2d at 419 (price quote can amount to offer if it reasonably appears from quote that assent to quote is all that is needed to ripen offer into contract), [plaintiff/vendor] provides no factual evidence which would support such a finding in this case.

Klocek v Gateway, 104 F. Supp. 2d 1332 (D. Kan. 2000),

4. Even aside from any doctrinal or technical problems in *ProCD* and its progeny, *ProCD* does embody a distinct view of contract. To this end, Margaret Jane Radin has made the following distinction between contract-as-consent and contract-as-product:

Contract-as-Consent and Contract-as Product

. . . I will distinguish between two views or models of contract. Call one model "contract-as-consent"; call the other model "contract-as-product." Contract-as-consent is the dominant view in ordinary discourse; contract-as-product is submerged in that discourse (except among some economists) but aptly describes much of transactional practice.

The contract-as-consent model is the traditional picture of how binding commitment is arrived at between two humans. It involves a meeting of the minds between two humans, or at least voluntariness, or at least consent. These terms are both fuzzy and contested; the traditional picture is out of focus. At minimum, consent involves a knowing understanding of what one is doing in a context in which it is actually possible for one to do otherwise, and an affirmative action in doing something, rather than a merely passive acquiescence in accepting something. These indicia translate into requirements that terms be understood, that alternatives be available, and probably that bargaining be possible.

The contract-as-product model is the typical model assumed by economists. In this model, the terms are part of the product, not a conceptually separate bargain; physical product plus terms are a package deal. The fact that a chip inside an electronics item will wear out after a year is no less and no more a feature of the item and its quality than the fact that the terms that come with the item specify that all disputes must be resolved in California under California law. In this model, unseen contract terms are no more and no less significant than unseen internal design features; and it is not remarkable that there is no choice other than the take-it-or-leave-it choice not to buy the package.

The contract-as-product model may describe a great deal of modern commercial practice, even before commerce started to move online. Commercial practice has long deviated from the traditional picture of minds meeting about terms, or autonomous consent. Nevertheless, the traditional picture hangs on in the conceptual apparatus legal actors bring to bear on contracts and contract disputes, and it is instantiated sometimes in commercial practice.

How will the move online affect contract, especially the disjunction-and hitherto uneasy coexistence-between the picture of contract-as-consent and the real world of contract-as-product? Two interrelated sets of questions arise here: one revolves around the future of the ideal of voluntary commitment, the other around the future of entitlement regimes, such as privacy and intellectual property. With respect to the ideal of voluntary commitment, will the move online exacerbate the disjuncture between the consent-based picture and the reality of transactions? Or, on the contrary, will availability of customization online to some extent create consent-based transactions where we do not have them now? With respect to the future of entitlement regimes, we should recognize that such regimes could become unstable because of waivers in ubiquitous form contracts. At least, we will have to start arguing about whether the normative backing of any entitlement rule is strong enough to make it nonwaivable by contract, so property arguments might metamorphose into arguments about impermissible contract terms.

Humans, Computers, and Binding Commitment, 75 Ind. L. J. 1125, 1125-26 (2000). Which view of contract does *ProCD* embody?

5. Why do you think the result of the "clickwrap" contract case (*Specht v. Netscape*) was different from *ProCD*? Is it because of a fundamentally different view of contract, or a different set of facts? Note that the *Specht* case itself notes differing outcomes within the Southern District of New York. Are you convinced by the court's explanation of the differences? If you were advising a client who wanted a clickwrap contract, what would you say?

6. How do you think the law will deal with the other forms of contracts mentioned above? Is there a need for specific legislation, or will the law evolve to take care of the issues?

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86 F.3d 1447, *; 1996 U.S. App. LEXIS 14951, **;
39 U.S.P.Q.2D (BNA) 1161; Copy. L. Rep. (CCH) P27,529

[note: edited version]

**PROCD, INCORPORATED, Plaintiff-Appellant, v. MATTHEW ZEIDENBERG
and SILKEN MOUNTAIN WEB SERVICES, INC., Defendants-Appellees.**

No. 96-1139

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*86 F.3d 1447; 1996 U.S. App. LEXIS 14951; 39 U.S.P.Q.2D (BNA) 1161; Copy. L.
Rep. (CCH) P27,529; 29 U.C.C. Rep. Serv. 2d (Callaghan) 1109*

**May 23, 1996, Argued
June 20, 1996, Decided**

[*1448] EASTERBROOK, *Circuit Judge*.

Must buyers of computer software obey the terms of shrinkwrap licenses? The [*1449] district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. *908 F. Supp. 640 (W.D. Wis. 1996)*. The parties and numerous amici curiae have briefed many other issues, but these are the only two that matter--and we disagree with the district judge's conclusion on each. Shrinkwrap 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). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer [*3] database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991). See Paul J. Heald, *The Vices of Originality*, 1991 *Sup. Ct. Rev.* 143, 160-68. ProCD sells a version of the database, called SelectPhone (trademark), on CD-ROM discs. (CD-ROM means "compact disc--read only memory." The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors

prefer "end user license," but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users' criteria (such as [*4] "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone (trademark) cost more than \$ 10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and sic codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could 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 a electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately \$ 150 for the set of five discs) while selling information to the trade for a higher price. It has adopted some intermediate strategies too: access [*5] to the SelectPhone (trademark) database is available via the America Online service for the price America Online charges to its clients (approximately \$ 3 per hour), but this service has been tailored to be useful only to the general public.

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.

[*1450] To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers [**6] than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves--for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price--ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well [**7] as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone (trademark) database. The corporation makes the database available on the Internet to anyone willing to pay its price--which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone (trademark) packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that

exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand [**8] no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to--and cannot be bound by--terms that were secret at the time of purchase. *908 F. Supp. at 654.*

II

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. See *Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846 F. Supp. 208 (E.D. N.Y. 1994). Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking [**9] price and leaving the store with the goods. *Peeters v. State*, 154 Wis. 111, 142 N.W. 181 (1913). In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good--but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract--except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this [*1451] way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are [**10] unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a

(1981) ("Standardization 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 the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance [**11] takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991); see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995) (bills of lading). Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the [**12] sale of tickets by phone or electronic data service.

Consumer goods work the same way. 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. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate

package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information--but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer pay place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never [**13] seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with Byte-Pusher 2.718"), and the terms of [*1452] sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms--so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. § 402.201 corresponds to UCC § 2-201, and other citations are easy to derive.) One of the court's reasons--that by proposing as part of the draft Article 2B a new UCC § 2-2203 that would explicitly validate standard-form user licenses, the American Law Institute and [**14] the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see *908 F. Supp. at 655-66*--depends on a faulty inference. To propose a change in a law's *text* is not necessarily to propose a change in the law's *effect*. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction--although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268-70 (5th Cir. 1988); *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993). As their titles suggest, these are not consumer transactions. *Step-Saver* is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide

which prevails. See *Northrop Corp. v. Litronic Industries*, 29 F.3d 1173 (7th Cir. 1994) [**15] (Illinois law); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of* § 2-207, 68 Va. L. Rev. 1217, 1227-31 (1982). Our case has only one form; UCC § 2-207 is irrelevant. *Vault* holds that Louisiana's special shrinkwrap-license statute is preempted by federal law, a question to which we return. And *Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

What then does the current version of the UCC have to say? We think that the place to start is § 2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg [**16] did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra \$ 10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

Section 2-606, which defines "acceptance of goods", reinforces this understanding. A buyer accepts goods under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1). ProCD extended an opportunity to reject if a buyer should find the license terms [**1453] unsatisfactory; Zeidenberg inspected the [**17] package, tried out the software, learned of the license, and did not reject the goods. We refer to § 2-606 only to

show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see *Gillen v. Atalanta Systems, Inc.*, 997 F.2d 280, 284 n.1 (7th Cir. 1993); but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be "conspicuous." UCC § 2-316(2), incorporating UCC § 1-201(10). Promises to make firm offers, or to negate oral modifications, must be "separately signed." UCC §§ 2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*. Zeidenberg has not located any Wisconsin case--for that matter, any case in any state--holding that under the UCC the ordinary terms found in shrinkwrap licenses require [**18] any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone (trademark) must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for \$ 100 rather than \$ 150--although any of these changes would be welcomed by the customer, if all other things were held constant--so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of "the product" than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996). 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. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has [**19] the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off.

* * *

REVERSED AND REMANDED

[note: edited version]

**RICH HILL and ENZA HILL, on behalf of a class of persons similarly situated,
Plaintiffs-Appellees, v. GATEWAY 2000, INC., and DAVID PRAIS, Defendants-
Appellants.**

No. 96-3294

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

105 F.3d 1147; 1997 U.S. App. LEXIS 176

**December 10, 1996, ARGUED
January 6, 1997, DECIDED**

[*1148] *EASTERBROOK, Circuit Judge.*

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?

...

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. ... "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." *Id.* at 1452. Gateway shipped computers with the same sort of accept-or-return offer *ProCD* made to users of its software. *ProCD* relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that might be pertinent; *ProCD* therefore applies to this dispute.

Plaintiffs ask us to limit *ProCD* to software, but where's the sense in that? *ProCD* is about the law of contract, not the law of software. Payment [*5] preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the

phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came [*6] with an operating system, without which it was useful only as a boat anchor. See *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 761 (7th Cir. 1996). Gateway also included many application programs. So the Hills' effort to limit *ProCD* to software would not avail them factually, even if it were sound legally--which it is not.

For their second sally, the Hills contend that *ProCD* should be limited to executory contracts (to licenses in particular), and therefore does not apply because both parties' performance of this contract was complete when the box arrived at their home. This is legally and factually wrong: legally because the question at hand concerns the *formation* of the contract rather than its *performance*, and factually because both contracts were incompletely performed. *ProCD* did not depend on the fact that the seller characterized the transaction as a license rather than as a contract; we treated it as a contract for the sale of goods and reserved the question whether for other purposes a "license" characterization might be preferable. 86 F.3d at 1450. All debates about characterization to one side, the transaction in *ProCD* [*7] was no more executory than the one here:

Zeidenberg paid for the software and walked out of the store with a box under his arm, so if arrival of the box with the product ends the time for revelation of contractual terms, then the time ended in *ProCD* before Zeidenberg opened the box. But of course ProCD had not completed performance with delivery of the box, and neither had Gateway. One element of the transaction was the warranty, which obliges sellers to fix defects in their products. The Hills have invoked Gateway's warranty and are not satisfied with its response, so they are not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box. What is more, both ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides. Gateway offers "lifetime service" and has a round-the-clock telephone hotline to fulfil this promise. Some vendors spend more money helping customers use their products than on developing and manufacturing them. The document in Gateway's box includes promises of [*1150] future performance that some consumers [**8] value highly; these promises bind Gateway just as the arbitration clause binds the Hills.

Next the Hills insist that *ProCD* is irrelevant because Zeidenberg was a "merchant" and they are not. Section 2-207(2) of the UCC, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless. . .". Plaintiffs tell us that *ProCD* came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in *ProCD*, which concluded that, when there is only one form, " § 2-207 is irrelevant." 86 F.3d at 1452. The question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed--in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a chance to inspect both the item and the terms. *ProCD* answers [**9] "yes," for merchants and consumers alike. Yet again, for what little it is worth we observe that the Hills misunderstand the setting of *ProCD*. A "merchant" under the UCC "means 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", § 2-104(1). Zeidenberg bought the product at a retail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD's database on the Internet for

anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not. The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway's box, by contrast, is just a shipping carton; it is not on display [**10] anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers ("Fragile!" "This Side Up!") rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case--could it exceed the shipping charges?--is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty--30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms [**11] to distribute their warranty terms on request, 15 U.S.C. § 2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

...

The decision of the district court is vacated, and this case is remanded with instructions to compel the Hills to submit their dispute to arbitration.



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eBay Registration

Accept the User Agreement

- Review the eBay User Agreement
- Check off the four boxes below
- Click the 'I accept' button at the bottom of the page

This agreement helps keep eBay a safe place to buy and sell, and promotes trust among our community members.

eBay User Agreement

Information emailed to you by sending a letter to the foregoing address with your email address and a request for this information. Fees for our services are described at <http://pages.ebay.com/help/sellerguide/selling-fees.html>.

Parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist you in limiting access to material that is harmful to minors. If you are interested in learning more about these protections, information is available at <http://www.worldvillage.com/wv/school/html/control.htm> or other analogous sites providing information on such protections. The Complaint Assistance Unit of the Division of Consumer Services of the Department of Consumer Affairs may be contacted in writing at 400 R Street, Sacramento, CA 95814, or by telephone at (800) 952-5210.

I have read the User Agreement, accept all of its terms and conditions and specifically acknowledge and accept the following:

I must be an adult (18 years old (21 years old in some states)) to trade on eBay and I certify that I am an adult and can enter into this Agreement. I agree **required**

eBay cannot and does not control the quality, safety, legality or accuracy of any item listed or any item description. Trading over the Internet has certain inherent risks; I understand these risks exist even if I take advantage of various tools offered by eBay in order to minimize the risk of fraud. I agree **required**

I will not provide fraudulent information and I am solely responsible for any information I provide to eBay. I will comply with all laws applicable to my activities on the web site and with this Agreement. I will not sell any prohibited, illegal or infringing items on eBay and I will not do anything that will interfere with the proper working of the eBay web site. I agree **required**

I understand that this Agreement limits my rights to collect damages from eBay for operating the web site and providing its service and that if I violate this Agreement I may be liable to pay eBay for the damages caused by my violation. I agree **required**

Please send me an email update if this agreement is ever amended. Otherwise, I understand that amendments will be effective 30 days after such amendment is posted on the site.

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THE FOLLOWING DESCRIBES THE TERMS ON WHICH EBAY OFFERS YOU ACCESS TO OUR SERVICES.

Welcome to eBay Inc.'s User Agreement. This Agreement describes the terms and conditions applicable to your use of our services at eBay.com (including the Great Collections category) and our general principles of our International affiliates. If you have any questions that our User Agreement Frequently Asked Questions at (<http://pages.ebay.com/help/basics/f-agreement.html>) or our User Agreement Revision Frequently Asked Questions at (<http://pages.ebay.com/help/basics/uarevision1-faq.html>) cannot answer, please contact agree-questions@ebay.com. We may amend this Agreement at any time by posting the amended terms on our site. Except as stated below, all amended terms shall automatically be effective 30 days after they are initially posted on our site. This Agreement may not be otherwise amended except in a writing signed by you and eBay Inc. This agreement was last revised on September 27th, 1999.

1. Membership Eligibility.

Our services are available only to individuals who can form legally binding contracts under applicable law. Without limiting the foregoing, our services are not available to minors. If you do not qualify, please do not use our services. Further, our services are not available to temporarily or indefinitely suspended eBay members.

2. Fees and Services.

Joining and bidding on items at eBay is free. Our Fees and Credits Policy is available at <http://pages.ebay.com/help/sellerguide/selling-fees.html> and is incorporated by reference. We may change our Fees and Credits Policy and the fees for our services from time to time. Our changes to the policy are effective after we provide you with at least fourteen (14) days' notice of the changes by posting the changes on the announcements board. However, we may choose to temporarily change our Fees and Credits Policy and the fees for our services for promotional events (for example, free listing days) and such changes are effective when we post the temporary promotional event on the announcements board. When you list an item you have an opportunity to review and accept the fees that you will be charged for the use of our listing services. We may in our sole discretion change some or all of our services at any time. In the event we introduce a new service, the fees for that service are effective at the launch of the service. Unless otherwise stated, all fees are quoted in U.S. Dollars. You are responsible for paying all fees associated with using our service and our website and all applicable taxes.

3. eBay is Only a Venue.

3.1 Overview. Our site acts as the venue for sellers to list items (or, as appropriate, solicit offers to buy) and buyers to bid on items. We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items. We cannot ensure that a buyer or seller will actually complete a transaction.

3.2 Safe Trading. Because user authentication on the Internet is difficult, eBay cannot and does not confirm each user's purported identity. Thus, we have established a user-initiated feedback system to help you evaluate with whom you are dealing. We also encourage you to communicate directly with potential trading partners. You may also wish to consider using a third party escrow

service or services that provide additional user verification. See our Buying and Selling Tools page (at <http://pages.ebay.com/services/buyandsell/index.html>).

3.3 Release. Because we are not involved in the actual transaction between buyers and sellers, in the event that you have a dispute with one or more users, you release eBay (and our officers, directors, agents, subsidiaries and employees) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes. If you are a California resident, you waive California Civil Code §1542, which says: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

3.4 Information Control. We do not control the information provided by other users which is made available through our system. You may find other user's information to be offensive, harmful, inaccurate, or deceptive. Please use caution, common sense, and practice safe trading when using our site. Please note that there are also risks of dealing with foreign nationals, underage persons or people acting under false pretense.

4. Bidding and Buying.

If you are the highest bidder at the end of an auction (meeting the applicable minimum bid or reserve requirements) and your bid is accepted by the seller, you are obligated to complete the transaction with the seller, unless the item is listed in a category under the Non-Binding Bid Policy (at <http://pages.ebay.com/help/community/png-nbb.html>) or the transaction is prohibited by law or by this Agreement. By bidding on an item you agree to be bound by the conditions of sale included in the item's description (or linked to from the description) so long as those conditions of sale are not in violation of this Agreement or unlawful. Bids are not retractable except in exceptional circumstances such as when the seller materially changes the item's description after you bid, a clear typographical error is made, or you cannot authenticate the seller's identity. If you choose to bid on adult items, you are certifying that you have the legal right to purchase such items.

5. Listing and Selling.

5.1 Listing Description. Listings may only include text descriptions, graphics and pictures you supply to our site (or that you link to from our site) that describe your item for sale (or as appropriate, for which are soliciting offers to buy). All listed items must be listed in an appropriate category. All Dutch auction items must be identical (the size, color, make, and model all must be the same for each item). At any one time you may not promote identical items in more than ten (10) listings (whether Dutch or Regular auction style) on our site.

5.2 Binding Bids. Except for items listed in a category under the Non-binding Bid Policy, if you receive at least one bid at or above your stated minimum price (or in the case of reserve auctions, at or above the reserve price), you are obligated to complete the transaction with the highest bidder upon the auction's completion, unless there is an exceptional circumstance, such as: (a) the buyer fails to meet the terms of your listing (such as payment method), or (b) you cannot authenticate the buyer's identity.

5.3 Fraud. Without limiting any other remedies, eBay may suspend or terminate your account if you are found (by conviction, settlement, insurance or escrow investigation, or otherwise) to have engaged in fraudulent activity in connection with our site.

5.4 VeRO Program. eBay's Verified Rights Owner (VeRO) program works to ensure that listed items do not infringe upon the copyright, trademark or other rights of third parties. VeRO program participants and other rights owners can report infringing items, and have such items removed. VeRO program participants and other rights owners may have limited access to some of your personally identifiable information as described in the Privacy Policy (at <http://pages.ebay.com/help/community/png-priv.html>).

5.5 Manipulation. Neither bidders nor sellers may manipulate the price of any item nor may you interfere with other user's listings or auctions.

6. Your Information.

"Your Information" is defined as any information you provide to us or other users in the registration, bidding or listing process, in any public message area (including the Café or the feedback area) or through any email feature. You are solely responsible for Your Information, and we act as a passive conduit for your online distribution and publication of Your Information. With respect to Your Information:

6.1 Your Information (or any items listed therein): (a) shall not be false, inaccurate or misleading; (b) shall not be fraudulent or involve the sale of counterfeit or stolen items; (c) shall not infringe any third party's copyright, patent, trademark, trade secret or other proprietary rights or rights of publicity or privacy; (d) shall not violate any law, statute, ordinance or regulation (including without limitation those governing export control, consumer protection, unfair competition, antidiscrimination or false advertising); (e) shall not be defamatory, trade libelous, unlawfully threatening or unlawfully harassing; (f) shall not be obscene or contain child pornography or, if otherwise adult in nature or harmful to minors, shall be posted only in the Adults Only section and shall be distributed only to people legally permitted to receive such content; (g) shall not contain any viruses, Trojan horses, worms, time bombs, cancelbots or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information; (h) shall not create liability for us or cause us to lose (in whole or in part) the services of our ISPs or other suppliers; and (i) shall not link directly or indirectly to or include descriptions of goods or services that: (aa) are prohibited under this Agreement; (bb) are identical to other items you have up for auction but are priced lower than your item's reserve or minimum bid amount; (cc) are concurrently listed for auction on a web site other than eBay's; or (dd) you do not have a right to link to or include. Furthermore, you may not list any item on our site (or consummate any transaction that was initiated using our service) that, by paying to us the listing fee or the final value fee, could cause us to violate any applicable law, statute, ordinance or regulation, or that violates our current Prohibited, Questionable and Infringing Items list.

6.2 Solely to enable eBay to use the information you supply us with, so that we are not violating any rights you might have in that information, you agree to grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicenseable (through multiple tiers) right to exercise the copyright and publicity rights (but no other rights) you have in Your Information, in any media now known or not currently known, with respect to Your Information. eBay will only use Your Information in accordance with our Privacy Policy.

7. Access and Interference.

Our web site contains robot exclusion headers and you agree that you will not use any robot, spider, other automatic device, or manual process to monitor or copy our web pages or the

content contained herein without our prior expressed written permission. You agree that you will not use any device, software or routine to interfere or attempt to interfere with the proper working of the eBay site or any auction being conducted on our site. You agree that you will not take any action that imposes an unreasonable or disproportionately large load on our infrastructure. Much of the information on our site is updated on a real time basis and is proprietary or is licensed to eBay by our users or third parties. You agree that you will not copy, reproduce, alter, modify, create derivative works, or publicly display any content (except for Your Information) from our website without the prior expressed written permission of eBay or the appropriate third party.

8. Feedback.

You may not take any actions which may undermine the integrity of the feedback system. If you earn a net feedback rating of -4 (minus four), your membership will be automatically suspended, and you will be unable to list or bid.

8.1 Export. You acknowledge that your feedback consists of comments left by other users and a composite feedback number compiled by eBay, and that the composite number without the comments does not convey your full user profile. Because feedback ratings are not designed for any purpose other than for facilitating trading between eBay users, you agree that you shall not market or export your eBay feedback rating in any venue other than eBay.

8.2 Import. We do not provide the technical ability to allow you to import feedback from other websites to eBay because a composite number, without the corresponding feedback does not reflect your true online reputation within our community.

9. Breach.

Without limiting other remedies, we may immediately issue a warning, temporarily suspend, indefinitely suspend or terminate your membership and refuse to provide our services to you: (a) if you breach this Agreement or the documents it incorporates by reference; (b) if we are unable to verify or authenticate any information you provide to us; or (c) if we believe that your actions may cause legal liability for you, our users or us.

10. Privacy.

We are TRUSTe and BBBOnline certified. These organizations are dedicated to building trust in the Internet by having member organizations such as eBay disclose information practices. Our policy on privacy is held to high standards by these independent third party organizations. Our current Privacy Policy is available (at <http://pages.ebay.com/help/community/png-priv.html>).

11. No Warranty.

WE AND OUR SUPPLIERS PROVIDE OUR WEB SITE AND SERVICES "AS IS" AND WITHOUT ANY WARRANTY OR CONDITION, EXPRESS, IMPLIED OR STATUTORY. WE AND OUR SUPPLIERS SPECIFICALLY DISCLAIM ANY IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. Some states do not allow the disclaimer of implied warranties, so the foregoing disclaimer may not apply to you. This warranty gives you specific legal rights and you may also have other legal rights which vary from state to state.

12. Liability Limit.

IN NO EVENT SHALL WE OR OUR SUPPLIERS BE LIABLE FOR LOST PROFITS OR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH OUR SITE, OUR SERVICES OR THIS AGREEMENT (HOWEVER ARISING, INCLUDING NEGLIGENCE).

OUR LIABILITY, AND THE LIABILITY OF OUR SUPPLIERS, TO YOU OR ANY THIRD PARTIES IN ANY CIRCUMSTANCE IS LIMITED TO THE GREATER OF (A) THE AMOUNT OF FEES YOU PAY TO US IN THE 12 MONTHS PRIOR TO THE ACTION GIVING RISE TO LIABILITY, AND (B) \$100. Some states do not allow the limitation of liability, so the foregoing limitation may not apply to you.

13. Indemnity.

You agree to indemnify and hold us and our subsidiaries, affiliates, officers, directors, agents, and employees, harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your breach of this Agreement or the documents it incorporates by reference, or your violation of any law or the rights of a third party.

14. Legal Compliance.

You shall comply with all applicable laws, statutes, ordinances and regulations regarding your use of our service and your bidding on, listing, purchase, solicitation of offers to purchase, and sale of items.

15. No Agency.

You and eBay are independent contractors, and no agency, partnership, joint venture, employee-employer or franchisor-franchisee relationship is intended or created by this Agreement.

16. Notices.

Except as explicitly stated otherwise, any notices shall be given by postal mail to eBay Inc. Attn: Legal Department 2125 Hamilton Ave., San Jose, CA 95125 (in the case of eBay) or to the email address you provide to eBay during the registration process (in your case). Notice shall be deemed given 24 hours after email is sent, unless the sending party is notified that the email address is invalid. Alternatively, we may give you notice by certified mail, postage prepaid and return receipt requested, to the address provided to eBay during the registration process. In such case, notice shall be deemed given 3 days after the date of mailing.

17. Arbitration.

Any controversy or claim arising out of or relating to this Agreement or our services shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. Any such controversy or claim shall be arbitrated on an individual basis, and shall not be consolidated in any arbitration with any claim or controversy of any other party. The arbitration shall be conducted in San Jose, California, and judgment on the arbitration award may be entered into any court having jurisdiction thereof. Either you or eBay may seek any interim or preliminary relief from a court of competent jurisdiction in San Jose, California necessary to protect the rights or property of you or eBay pending the completion of arbitration.

18. Additional Terms.

The following documents are incorporated by reference:

18.1 Our Privacy Policy is available at <http://pages.ebay.com/help/community/png-priv.html>. We may change our Privacy Policy from time to time and our changes are effective after we provide you with at least thirty (30) days' notice of the changes by posting the changes on the announcements board and sending email to users who select such notification.

18.2 Our Outage Policy is available at <http://pages.ebay.com/help/community/png-extn.html>. We may change our Outage Policy from time to time and our changes are effective after we provide you with notice of the changes by posting the changes on the announcements board.

18.3 Our Board Usage Policy is available at <http://pages.ebay.com/help/community/png-board.html>. We may change the Board Usage Policy from time to time and our changes are effective after we provide you with notice of the changes by posting the changes on the announcements board.

18.4 Our Non-Binding Bid Policy is available at <http://pages.ebay.com/help/community/png-list.html>. This policy is available at <http://pages.ebay.aol.com/services/safeharbor/safeharbor-npb.html>. We may change the Non-Binding Bid Policy from time to time and our changes are effective after we provide you with notice of the changes by posting the changes on the announcements board.

18.5 Our Listing Policy is available at <http://pages.ebay.com/help/community/png-list.html>. We may change the Listing Policy from time to time and our changes are effective after we provide you with notice of the changes by posting the changes on the announcements board.

18.6 Our SafeHarbor Policy is available at <http://pages.ebay.com/services/safeharbor/safeharbor-investigates.html>. We may change the SafeHarbor Policy from time to time and our changes are effective after we provide you with notice of the changes by posting the changes on the announcements board.

18.7 Our Prohibited, Questionable & Infringing Item Policy is available at <http://pages.ebay.com/help/community/png-items.html>. We may change the Prohibited, Questionable & Infringing Item Policy from time to time and our changes are effective after we provide you with notice of the changes by posting the changes on the announcements board.

18.8 Our Non-Paying Bidder Policy is available at <http://pages.ebay.com/services/safeharbor/safeharbor-npb.html>. We may change the Non-Paying Bidder Policy from time to time and our changes are effective after we provide you with notice of the changes by posting the changes on the announcements board.

19. General.

This Agreement shall be governed in all respects by the laws of the State of California as such laws are applied to agreements entered into and to be performed entirely within California between California residents. We do not guarantee continuous, uninterrupted or secure access to our services, and operation of our site may be interfered with by numerous factors outside of our control. If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced. Headings are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section. Our failure to act with respect to a breach by you or others does not waive our right to act with respect to subsequent or similar breaches. This Agreement sets forth the entire understanding and agreement between us with respect to the subject matter hereof.

20. Disclosures.

The services hereunder are offered by eBay Inc., located at 2125 Hamilton Ave., San Jose, CA 95125. If you are a California resident, you may have this same information emailed to you by sending a letter to the foregoing address with your email address and a request for this

information. Fees for our services are described at <http://pages.ebay.com/help/sellerguide/selling-fees.html>.

Parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist you in limiting access to material that is harmful to minors. If you are interested in learning more about these protections, information is available at <http://www.worldvillage.com/wv/school/html/control.htm> or other analogous sites providing information on such protections. The Complaint Assistance Unit of the Division of Consumer Services of the Department of Consumer Affairs may be contacted in writing at 400 R Street, Sacramento, CA 95814, or by telephone at (800) 952-5210.

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WALT DISNEY INTERNET GROUP (WDIG) TERMS OF SERVICE

INTRODUCTION

Welcome to the Internet Sites of the Walt Disney Internet Group ("WDIG"). WDIG includes Disney.com, ABCNEWS.com, ABC.com, ESPN.com, EXPN.com, Movies.com, and Family.com and other sites affiliated with The Walt Disney Company (each a "WDIG Site"). WDIG is operated by The Walt Disney Company and its affiliates (referred to herein as "we," "us," or "our").

PLEASE READ THESE TERMS AND CONDITIONS OF USE CAREFULLY BEFORE USING THIS WDIG SITE. By using the WDIG Site, you signify your agreement to these terms of use. If you do not agree to these terms of use, please do not use the WDIG Site. We reserve the right, at our discretion, to change, modify, add, or remove portions of these terms at any time. Please check these terms periodically for changes. Your continued use of this WDIG Site following the posting of changes to these terms will mean you accept those changes.

RESTRICTIONS ON USE OF MATERIALS

All materials contained in any WDIG Site are the copyrighted property of Disney Enterprises, Inc., or its subsidiaries or affiliated companies and/or third-party licensors. All trademarks, service marks, and trade names are proprietary to Disney Enterprises, Inc., or its affiliates. No material from any WDIG Site or any Internet site owned, operated, licensed, or controlled by us or our affiliates may be copied, reproduced, republished, uploaded, posted, transmitted, or distributed in any way, except that you may download one copy of the materials on any single computer for your personal, noncommercial home use only, provided that (i) you keep intact all copyright and other proprietary notices, (ii) you make no modifications to the materials, (iii) you do not use the materials in a manner that suggests an association with any of our products, services, or brands, and (iv) you do not download quantities of materials to a database that can be used to avoid future downloads from any WDIG Site. For purposes of these terms, the use of any such material on any other Web site or computer environment is prohibited. All trademarks, service marks, trade names, and trade dress are proprietary to us.

In the event you download software from any WDIG Site, the software, including any files, images incorporated in or generated by the software, and data accompanying the software (collectively, the "Software") are

licensed to you by us or third-party licensors for your personal, noncommercial home use only. We do not transfer title to the Software to you. You own the medium on which the Software is recorded, but we (or third-party licensors) retain full and complete title to the Software and all intellectual property rights therein. You may not redistribute, sell, de-compile, reverse engineer, disassemble, or otherwise reduce the Software to a human-readable form.

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SUBMISSIONS

We are pleased to hear from our visitors and welcome your comments regarding our products and services. Unfortunately, however, our long-standing company policy does not allow us to accept or consider creative ideas, suggestions, or materials other than those that we have specifically requested. We hope you will understand that it is the intent of this policy to avoid the possibility of future misunderstandings when projects developed by our professional staff might seem to others to be similar to their own creative work. Please do not send us any unsolicited original creative materials such as stories or ideas, screenplays, or original artwork. While we do value your feedback on our services and products, we request that you be specific in your comments on those services and products, and not submit any creative ideas, suggestions, or materials (unless specifically requested by us).

If, at our request, you send certain specific submissions (e.g., postings to chat, boards, or contests) or, despite our request, you send us creative suggestions, ideas, notes, drawings, concepts, or other information (collectively, the "Submissions"), the Submissions shall be deemed, and shall remain, our property. None of the Submissions shall be subject to any obligation of confidence on our part and we shall not be liable for any use or disclosure of any Submissions. Without limitation of the foregoing, we shall exclusively own all now-known or hereafter existing rights to the Submissions of every kind and nature throughout the universe and shall be entitled to unrestricted use of the Submissions for any purpose whatsoever, commercial or otherwise, without compensation to the provider of the Submissions.

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FORUMS AND PUBLIC COMMUNICATION

"Forum" means a chat area, message board, or e-mail function offered as part of any WDIG Site. If you participate in any Forum within a WDIG Site, you must not:

- defame, abuse, harass or threaten others;
- make any bigoted, hateful, or racially offensive statements;
- advocate illegal activity or discuss illegal activities with the intent to commit them;
- post or distribute any material that infringes and/or violates any right of a third party or any law;
- post or distribute any vulgar, obscene, discourteous, or indecent language or images;
- advertise or sell to or solicit others;
- use the Forum for commercial purposes of any kind;
- post or distribute any software or other materials that contain a virus

- or other harmful component; or
- post material or make statements that do not generally pertain to the designated topic or theme of any chat room or bulletin board.

It is our policy to respect the privacy of all customers. Therefore, in addition to the privacy of Registration data (see our Privacy Policy), we will not monitor, edit, or disclose the contents of a customer's e-mail unless (a) you authorize us to do so, (b) we must do so in order to resolve technical problems on any WDIG Site; or (c) unless required to do so by law or in the good-faith belief that such action is necessary to: (1) comply with the law or comply with legal process served on us; (2) protect and defend our rights or property; or (3) act in an emergency to protect the safety of our customers or the public. Customers shall remain solely responsible for the content of their messages.

We reserve the right to remove or edit content from any Forum at any time and for any reason.

By uploading materials to any Forum or submitting any materials to us, you automatically grant (or warrant that the owner of such materials expressly granted) us a perpetual, royalty-free, irrevocable, nonexclusive right and license to use, reproduce, modify, adapt, publish, translate, publicly perform and display, create derivative works from and distribute such materials or incorporate such materials into any form, medium, or technology now known or later developed throughout the universe. In addition, you warrant that all so-called "moral rights" in those materials have been waived.

When participating in a Forum, never assume that people are who they say they are, know what they say they know, or are affiliated with whom they say they are affiliated with in any chat room, message board, or other user-generated content area. Information obtained in a Forum may not be reliable, and it is not a good idea to trade or make any investment decisions based solely or largely on information you cannot confirm. We cannot be responsible for the content or accuracy of any information, and shall not be responsible for any trading or investment decisions made based on such information.

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CONTENT LINKED TO ANY WDIG SITE

Please exercise discretion while browsing the Internet using any WDIG Site. You should be aware that when you are on a WDIG Site, you could be directed to other sites that are beyond our control. There are links to other sites from WDIG pages that take you outside of our service. For example, if you click on a banner advertisement or a search result, the click may take you off the WDIG Site. This includes links from advertisers, sponsors, and content partners that may use our logo(s) as part of a co-branding agreement. These other sites may send their own cookies to users, collect data, solicit personal information, or contain information that you may find inappropriate or offensive. In addition, advertisers on WDIG Sites may send cookies to users that we do not control.

We reserve the right to disable links from third-party sites to any WDIG Site.

We make no representations concerning the content of sites listed in any

of our directories. Consequently, we cannot be held responsible for the accuracy, relevancy, copyright compliance, legality, or decency of material contained in sites listed in our search results or otherwise linked to a WDIG Site.

Please keep in mind that whenever you give out personal information online --- for example, via message boards or chat --- that information can be collected and used by people you don't know. While WDIG strives to protect your personal information and privacy, we cannot guarantee the security of any information you disclose online; you make such disclosures at your own risk.

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DISCLAIMER

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We explicitly disclaim any responsibility for the accuracy, content, or availability of information found on sites that link to or from any WDIG Site. We cannot ensure that you will be satisfied with any products or services that you purchase from a third-party site that links to or from any WDIG Site or third-party content on our sites. We do not endorse any of the merchandise, nor have we taken any steps to confirm the accuracy or reliability of, any of the information contained in such third-party sites or content. We do not make any representations or warranties as to the security of any information (including, without limitation, credit card and other personal information) you might be requested to give any third-party, and you hereby irrevocably waive any claim against us with respect to such sites and third-party content. We strongly encourage you to make whatever investigation you feel necessary or appropriate before proceeding with any online or offline transaction with any of these third parties.

Search and Directory are free services offered by us. Because the Web changes constantly, no search engine technology can possibly have all accessible sites at any given time. Thus, we explicitly disclaim any responsibility for the content or availability of information contained in our search index or directories.

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CREDIT CARDS

WDIG takes the issue of your privacy seriously. We provide your credit card number, billing and shipping information to participating merchants from whom you buy goods or services. The merchants are solely responsible for how they use that information and any other information they independently acquire from you or about you. Otherwise, we do not share your credit card information with anyone else. For more information, please read our Privacy Policy.

To protect the security of your credit card information, we employ the industry-standard Secure Sockets Layer (SSL) technology. We also encrypt your credit card number when we store your order and whenever we transfer that information to participating merchants.

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SUBSCRIPTIONS/BILLING

Some services offered on WDIG Sites are subscription-based services, such as Disney's Blast and ESPN Insider. If you open a subscription-based account with any of our sites, you hereby agree to pay all charges to your account, including applicable taxes, in accordance with billing terms in effect at the time the fee or charge becomes payable. We reserve the right to change the amount of, or basis for determining, any fees or charges for services we provide, and to institute new fees, charges, or terms effective upon prior notice to customers. We reserve the right to terminate any account at any time for any reason.

WDIG agrees that it will terminate Customer's account upon notice from Customer. If cancellation is received within the first 30 days of Customer signing up for a service, Customer will be refunded all subscription fees for that service, but Customer will still be obligated to pay any other charges incurred. If Customer cancels a service after 30 days of signing up for a service, no refund for unused time on such service will be made. If Customer has a balance due on any WDIG account, Customer agrees that WDIG can charge these unpaid fees to their credit card.

Please Note: Your Subscription will be automatically renewed and your credit card account will be charged as follows:

- Every Month for Monthly Subscriptions
- Upon every one(1) year anniversary for Annual Subscriptions
- Upon every six (6) Months for six (6) Month Subscriptions

The renewal charge shall be equal to the original customer signup price, unless otherwise notified in advance by the WDIG site (i.e. ESPN or Disney). Customer will have forty-five (45) days after the date that any renewal fee is posted to Customer's charge account to give notice that he or she wishes to cancel his or her subscription. The subscription will be cancelled upon receipt of such notification and a credit will be posted to Customer's charge account equal to the latest renewal fee charged.

Customer's right to use the Service is subject to any limits established by WDIG or by Customer's credit card issuer. If payment cannot be charged to Customer's credit card or Customer's charge is returned for any reason, including chargeback, WDIG reserves the right to either suspend or terminate Customer's access and account, thereby terminating this

Agreement and all obligations of WDIG hereunder.

If Customer has reason to believe that Customer's account is no longer secure (for example, in the event of a loss, theft or unauthorized disclosure or use of Customer's ID, password, or any credit, debit or charge card number stored on the WDIG of the problem to avoid possible liability for any unauthorized charges to Customer's account.

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INDEMNIFICATION

You are entirely responsible for maintaining the confidentiality of your Password and account and for all activities that occur under your account. You hereby indemnify, defend, and hold us and our affiliates and our officers, directors, owners, agents, information providers, affiliates, licensors, and licensees (collectively, the "Indemnified Parties") harmless from and against any and all liabilities and costs (including reasonable attorneys' fees') incurred by the Indemnified Parties in connection with any claim arising out of any breach by you of this Agreement or claims arising from your account. You shall use your best efforts to cooperate with us in the defense of any claim. We reserve the right, at our own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by you.

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LIMITATION OF LIABILITY

UNDER NO CIRCUMSTANCES, INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE, SHALL WE BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES THAT RESULT FROM THE USE OF, OR THE INABILITY TO USE, ANY WDIG SITE OR MATERIALS OR FUNCTIONS ON ANY SUCH SITE, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN NO EVENT SHALL OUR TOTAL LIABILITY TO YOU FOR ALL DAMAGES, LOSSES, AND CAUSES OF ACTION (WHETHER IN CONTRACT, TORT [INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE], OR OTHERWISE) EXCEED THE AMOUNT PAID BY YOU, IF ANY, FOR ACCESSING ANY WDIG SITE.

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JURISDICTIONAL ISSUES

Unless otherwise specified, the materials in any WDIG Site are presented solely for the purpose of promoting programs, films, and other products available in the United States and its territories, possessions, and protectorates. WDIG is controlled and operated by The Walt Disney Company and its affiliates from its U.S. offices in California, Washington, New York, and Connecticut. We make no representation that materials on any WDIG Site are appropriate or available for use in any particular location. Those who choose to access a WDIG Site do so on their own initiative and are responsible for compliance with local laws, if and to the extent local laws are applicable. Software from this site is further subject to United States export controls. No software from this site may be

downloaded or otherwise exported or reexported (i) into (or to a national or resident of) Cuba, Iraq, Libya, North Korea, Iran, Syria, or any other country to which the U.S. has embargoed goods; or (ii) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Deny Orders. By downloading or using the Software, you represent and warrant that you are not located in, under the control of, or a national or resident of any such country or on any such list.

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TERMINATION

These terms are effective until terminated by either party. You may terminate these terms at any time by discontinuing use of all WDIG Sites and destroying all materials obtained from any and all such sites and all related documentation and all copies and installations thereof, whether made under these terms or otherwise. Your access to any and all WDIG Sites may be terminated immediately without notice from us if in our sole discretion you fail to comply with any term or provision of these terms. Upon termination, you must cease use of the WDIG Site and destroy all materials obtained from such site and all copies thereof, whether made under these terms or otherwise.

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GENERAL PROVISIONS

These terms shall be governed by and construed in accordance with the laws of the State of California, without giving effect to any principles of conflicts of law. You agree that any action at law or in equity arising out of or relating to these terms shall be filed only in the state or federal courts located in Los Angeles County, California, and you hereby consent and submit to the personal jurisdiction of such courts for the purposes of litigating any such action. If any provision of these terms shall be unlawful, void, or for any reason unenforceable, then that provision shall be deemed severable from these terms and shall not affect the validity and enforceability of any remaining provisions. This is the entire agreement between us relating to the subject matter herein and shall not be modified except in writing, signed by both parties.

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NOTICE AND PROCEDURE FOR MAKING CLAIMS OF COPYRIGHT INFRINGEMENT

We may give notice to our users by means of a general notice on any WDIG Site, electronic mail to a user's e-mail address on our records, or by written communication sent by first-class mail to a user's address on our records.

Pursuant to Title 17, United States Code, Section 512(c)(2), notifications of claimed copyright infringement should be sent to Service Provider's Designated Agent. See Notice and Procedure for Making Claims of Copyright Infringement.

Notification must be submitted to the following Designated Agent:

Service Provider: WDIG

Name of Agent Designated to Receive Notification of Claimed Infringement: Laurence J. Shapiro

Full Address of Designated Agent to Which Notification Should be Sent: 500 South Buena Vista Street, Burbank, CA 91521-7710

Telephone Number of Designated Agent: (818) 623-3200

Facsimile Number of Designated Agent: (818) 623-3637

E-Mail Address of Designated Agent: designated.agent@dig.com

E-Mail Address of Designated Agent for ESPN.com: <http://espn.go.com/sitertools/s/terms.html>

To be effective, the notification must be a written communication that includes the following:

1. A physical or electronic signature of person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
2. Identification of the copyrighted work claimed to have been infringed, or multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site;
3. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material;
4. Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted;
5. A statement that the complaining party has a good-faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and
6. A statement that the information in the notification is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

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CHRISTOPHER SPECHT, JOHN GIBSON, MICHAEL FAGAN and SEAN KELLY, individually and on behalf of all others similarly situated, Plaintiffs, - against- NETSCAPE COMMUNICATIONS CORP. and AMERICA ONLINE, INC., Defendants. SHERRY WEINDORF, individually and on behalf of all others similarly situated, Plaintiff, -against- NETSCAPE COMMUNICATIONS CORP. and AMERICA ONLINE, INC., Defendants. MARK GRUBER, individually and on behalf of all others similarly situated, Plaintiff, -against- NETSCAPE COMMUNICATIONS CORP. and AMERICA ONLINE, INC., Defendants.

00 Civ. 4871 (AKH), 00 Civ. 6219 (AKH), 00 Civ. 6249 (AKH)

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

150 F. Supp. 2d 585; 2001 U.S. Dist. LEXIS 9073

July 3, 2001, Decided

July 5, 2001, Filed

**MEMORANDUM AND ORDER DENYING MOTION
TO COMPEL ARBITRATION AND STAY PROCEEDINGS**

ALVIN K. HELLERSTEIN, U.S.D.J.:

Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even willful inaction, as long as it is unequivocally referable to the promise, may create a contract.

The three related cases n1 before me all involve this timeless issue of assent, but in the context of free software offered on the Internet. If an offeree downloads free software, and the offeror seeks a contractual understanding limiting its uses and applications, under what circumstances does the act of downloading create a contract? [*2] On the facts presented here, is there the requisite assent and consideration? My decision focuses on these issues.

n1 While the cases have not been consolidated, all briefs and supporting materials on this motion, and my opinion deciding the motion, apply equally to all three cases. See Fed. R. Civ. P. 42(a).

In these putative class actions, Plaintiffs allege that usage of the software transmits to Defendants private information about the user's file transfer activity on the Internet, thereby effecting an electronic surveillance of the user's activity in violation of two federal statutes, the Electronic Communications Privacy Act, *18 U.S.C. § 2510 et seq.*, and the Computer Fraud and Abuse Act, *18 U.S.C. § 1030*. Defendants move to compel arbitration and stay the proceedings, arguing that the disputes reflected in the Complaint, like all others relating to use of the software, are subject to a binding arbitration clause in the End User License Agreement ("License [*3] Agreement"), the contract allegedly made by the offeror of the software and the party effecting the download. Thus, I am asked to decide if an offer of a license agreement, made independently of freely offered software and not expressly accepted by a user of that software, nevertheless binds the user to an arbitration clause contained in the license.

I. Factual and Procedural Background

Defendant Netscape, n2 a provider of computer software programs that enable and facilitate the use of the Internet, offers its "SmartDownload" software free of charge on its web site to all those who visit the site and indicate, by clicking their mouse in a designated box, that they wish to obtain it. SmartDownload is a program that makes it easier for its users to download files from the Internet without losing their interim progress when

they pause to engage in some other task, or if their Internet connection is severed. Four of the six named Plaintiffs - John Gibson, Mark Gruber, Sean Kelly and Sherry Weindorf -- selected and clicked in the box indicating a decision to obtain the software, and proceeded to download the software on to the hard drives of their computers. The fifth named [*4] Plaintiff, Michael Fagan, allegedly downloaded the software from a "shareware" n3 web site operated by a third party. The sixth named Plaintiff, Christopher Specht, never obtained or used SmartDownload, but merely maintained a web site from which other individuals could download files. n4

n2 Defendant American Online, Inc. ("AOL") is Defendant Netscape's corporate parent.

n3 Various companies and individuals maintain "shareware" web sites containing libraries of free, publicly available software. The ZDNet site library included SmartDownload. The pages that a user would see in downloading SmartDownload from ZDNet, however, differ from the pages that a user would see in downloading SmartDownload directly from the Netscape web site. Notably, there is no reference to the License Agreement on the ZDNet pages, merely a hypertext link to "more information" about SmartDownload, which, if clicked, takes the user to a Netscape web page which, in turn, contains a link to the License Agreement. In other words, an individual could obtain SmartDownload from ZDNet without ever seeing a reference to the License Agreement, even if he or she viewed all of ZDNet's web pages. [*5]

n4 As discussed infra, Defendants contend that because other individuals could use SmartDownload to facilitate their downloading of files from Specht's web site, Specht is a third-party beneficiary of the License Agreement.

Visitors wishing to obtain SmartDownload from Netscape's web site arrive at a page pertaining to the download of the software. On this page, there appears a tinted box, or button, labeled "Download." By clicking on the box, a visitor initiates the download. The sole reference on this page to the License Agreement appears in text that is visible only if a visitor scrolls down through the page to the next screen. If a visitor does so, he or she sees the following invitation to review the License Agreement:

Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software.

Visitors are not required affirmatively to indicate their assent to the License Agreement, or even to view the license agreement, before proceeding with a download of the software. But if a visitor chooses to click on [*6] the underlined text in the invitation, a hypertext link takes the visitor to a web page entitled "License & Support Agreements." The first paragraph on this page reads in pertinent part:

The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below the paragraph appears a list of license agreements, the first of which is "License Agreement for Netscape Navigator and Netscape Communicator Product Family (Netscape Navigator, Netscape Communicator and Netscape SmartDownload)." If the visitor then clicks on that text, he or she is brought to another web page, this one containing the full text of the License Agreement.

The License Agreement, which has been unchanged throughout the period that Netscape has made SmartDownload [*7] available to the public, grants the user a license to use and reproduce SmartDownload, and otherwise contains few restrictions on the use of the software. The first paragraph of the License Agreement describes, in upper case print, the purported manner in which a user accepts or rejects its terms.

BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE (THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT("LICENSEE") IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

The License Agreement also contains a term requiring that virtually all disputes be submitted to arbitration in Santa Clara County, California.

Unless otherwise agreed in writing, all disputes relating to this Agreement (excepting any dispute relating to intellectual property rights) shall be subject to final and binding arbitration in Santa Clara County, California, under the auspices of JAMS/EndDispute, with the losing [*8] party paying all costs of arbitration.

All users of SmartDownload must use it in connection with Netscape's Internet browser, which may be obtained either as an independent product, Netscape Navigator, or as part of a suite of software, Netscape Communicator. Navigator and Communicator are governed by a single license agreement, which is identical to the License Agreement for SmartDownload. By its terms, the Navigator / Communicator license is limited to disputes "relating to this Agreement."

II. Applicable Law

The Federal Arbitration Act expresses a policy strongly favoring the enforcement of arbitration clauses in contracts.

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The interpretation of an arbitration agreement is governed by the federal substantive law of arbitration. See, e.g., *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554, 559 (2d Cir. 1995) [*9] ("We have long held that 'once a dispute is covered by the [FAA], federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability.'" (citation omitted). n5 On this basis, Defendants argue that this motion properly is analyzed using the federal common law regarding the arbitrability of disputes, and that such federal common law "simply 'comprises generally accepted principles of contract law.'" *McPheeters v. McGinn, Smith & Co.*, 953 F.2d 771, 772 (2d Cir. 1992) (citations omitted).

n5 See also 9 U.S.C. § 4 ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would

have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. ... Where such an issue is raised, the party alleged to be in default may ... demand a jury trial of such issue If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.").

[*10]

However, Defendants' approach elides the distinction between two separate analytical steps. First, I must determine whether the parties entered into a binding contract. Only if I conclude that a contract exists do I proceed to a second stage of analysis: interpretation of the arbitration clause and its applicability to the present case. The first stage of the analysis -- whether a contract was formed -- is a question of state law. n6 If, under the law, a contract is formed, the interpretation of the scope of an arbitration clause in the contract is a question of federal law.

n6 To hold otherwise would lead to a nonsensical result. Consider two hypothetical cases, each involving an alleged contract to which the plaintiff claims never to have agreed. The putative contract in Case A contains an arbitration clause; the putative contract in Case B does not. Otherwise, the two cases are identical. The question before the court is whether a contract was formed. The analysis of that

question, and its outcome, should be the same in both cases. However, were I to accept Defendant's reasoning, the analysis in Case A would be governed by federal law, while the analysis in Case B would be governed by state law. The results of the analyses therefore could differ despite the fact that all the particulars regarding contract formation are identical.

[*11]

In determining which state law to apply, I look first to the choice-of-law doctrine of the forum state, New York. n7 Under New York's choice-of-law rules, when determining which state's law to apply to a contract dispute, "the court evaluates the 'center of gravity' or 'grouping of contacts,' with the purpose of establishing which state has 'the most significant relationship to the transaction and the parties.'" *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 394 (2d Cir. 2001) (citing *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 618 N.Y.S.2d 609, 612, 642 N.E.2d 1065 (N.Y.1994); Restatement (Second) of Conflict of Laws § 188(1)). The named Plaintiffs reside in various states, including Florida, Louisiana, and New Jersey. None of these states appears to have any other connection to the litigation. The product at issue -- SmartDownload -- was created by Netscape, a Delaware corporation with its principal offices in California. Plaintiffs argue in their motion papers that SmartDownload was designed in California and is distributed from Netscape's web site, which is maintained by employees at Netscape's California offices, [*12] to Internet users throughout the world. Netscape appears not to dispute these assertions. California necessarily has an interest in the enforceability of an arbitration clause pertaining to a product created in California by a California-based corporation. Likewise, California has an interest in whether a California-based corporation has created a product that violates federal privacy and electronic surveillance statutes. Although the record evidence on this point is sparse at best, no other state appears to have an interest of comparable strength. Therefore, I conclude that California has the most significant connection to the litigation, and I apply California law to the issue of contract formation.

n7 Plaintiff's claims arise under this Court's federal question jurisdiction. Hence, I would ordinarily refer to federal choice-of-law rules. See, e.g., *Wells Fargo Asia Ltd. v. Citibank N.A.*, 936 F.2d 723, 726 (2d Cir. 1991) ("In federal question cases, we are directed to apply a federal common law choice of law rule to determine which jurisdiction's substantive law should

apply."). However, my determination of the instant motion involves a question of state law: was a contract formed? Therefore, in determining which state's law to apply to this question, I find it appropriate to rely upon the forum state's choice-of-law rules rather than the federal choice-of-law rules. Cf. *Totalplan Corp. of America v. Colborne*, 14 F.3d 824, 832 (2d Cir. 1994) ("Because jurisdiction in this case is based on diversity of citizenship as well as the presence of a federal question, we follow the choice of law rules of New York, the forum state."); *Barkan v. CAAC*, 923 F.2d 957, 960-61 (2d Cir. 1991) (federal court deciding federal question may apply state choice-of-law rules if it finds that doing so would best effectuate intent of Congress); *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989) ("A federal court ... adjudicating state law claims that are pendent to a federal claim must apply the choice of law rules of the forum state.") (citing *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941)). This may be a distinction without a difference. The Second Circuit Court of Appeals has "discerned no significant difference between the applicable federal and New York choice-of-law rules. The federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation." *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992). This formulation mirrors the New York "center of gravity" test, which also focuses on which state has the strongest connection to the litigation. See *infra*.

[*13]

By its terms, Article 2 of the Uniform Commercial Code "applies to transactions in goods." See Cal. Com. Code § 2102. The parties' relationship essentially is that of a seller and a purchaser of goods. Although in this case the product was provided free of charge, n8 the roles are essentially the same as when an individual uses the Internet to purchase software from a company: here, the Plaintiff requested Defendant's product by clicking on an icon marked "Download," and Defendant then tendered the product. Therefore, in determining whether the parties entered into a contract, I look to California law as it relates to the sale of goods, including the Uniform Commercial Code in effect in California.

n8 In order to form a contract, parties must exchange some consideration. "Among the

limitations on the enforcement of promises, the most fundamental is the requirement of consideration." E. Allan Farnsworth, *Farnsworth on Contracts* § 2.2 (2d ed. 2000). In general, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (Second) of Contracts, § 17. The apparent failure of consideration on Plaintiff's side -- put simply, Plaintiff's obtaining SmartDownload without giving anything in return -- might support a finding that no contract exists. However, because I rely on other grounds to find that the parties did not enter into a contract, see *infra*, I need not decide this issue.

[*14]

III. Did Plaintiffs Consent to Arbitration?

Unless the Plaintiffs agreed to the License Agreement, they cannot be bound by the arbitration clause contained therein. My inquiry, therefore, focuses on whether the Plaintiffs, through their acts or failures to act, manifested their assent to the terms of the License Agreement proposed by Defendant Netscape. More specifically, I must consider whether the web site gave Plaintiffs sufficient notice of the existence and terms of the License Agreement, and whether the act of downloading the software sufficiently manifested Plaintiffs' assent to be bound by the License Agreement. I will address separately the factually distinct circumstances of Plaintiffs Michael Fagan and Christopher Specht.

In order for a contract to become binding, both parties must assent to be bound. "Courts have required that assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective." E. Allan Farnsworth, *Farnsworth on Contracts* § 3.1 (2d ed. 2000). "To form a contract, a manifestation of mutual assent is necessary. Mutual assent may be manifested by written or spoken words, or by conduct." *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850, 89 Cal. Rptr. 2d 540, 551 (Cal. Ct. App. 1999) [*15] (citations omitted). "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." Cal. Com. Code § 2204.

These principles enjoy continuing vitality in the realm of software licensing. The sale of software, in stores, by mail, and over the Internet, has resulted in several specialized forms of license agreements. For example, software commonly is packaged in a container or wrapper that advises the purchaser that the use of the

software is subject to the terms of a license agreement contained inside the package. The license agreement generally explains that, if the purchaser does not wish to enter into a contract, he or she must return the product for a refund, and that failure to return it within a certain period will constitute assent to the license terms. These so-called "shrink-wrap licenses" have been the subject of considerable litigation.

In *ProCD, Inc. v. Zeidenberg*, for example, the Seventh Circuit Court of Appeals considered a software license agreement "encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every [*16] time the software runs." 86 F.3d 1447, 1450 (7th Cir. 1996). The absence of contract terms on the outside of the box containing the software was not material, since "every box containing [the software] declares that the software comes with restrictions stated in an enclosed license." *Id.* The court accepted that placing all of the contract terms on the outside of the box would have been impractical, and held that the transaction, even though one "in which the exchange of money precedes the communication of detailed terms," was valid, in part because the software could not be used unless and until the offeree was shown the license and manifested his assent. *Id.* at 1451-52.

A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license [*17] on the screen and *would not let him proceed without indicating acceptance.*

Id. at 1452 (emphasis added). The court concluded that "shrinkwrap 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)." *Id.* at 1449. n9

n9 In a breach-of-warranty suit involving software, the Supreme Court of Washington, en banc, enforced a license agreement that, like the agreement at issue in ProCD, was presented on the user's computer screen each time the software was used, and also was located on the outside of each diskette pouch and on the inside cover of the instruction manuals. See *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (Wash. 2000).

The Seventh Circuit expanded this holding in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), cert. denied, 522 U.S. 808 (1997). [*18] In *Hill*, a customer ordered a computer by telephone; the computer arrived in a box also containing license terms, including an arbitration clause, "to govern unless the customer returned the computer within 30 days." *Id.* at 1148. The customer was not required to view or expressly assent to these terms before using the computer. More than 30 days later, the customer brought suit based in part on Gateway's warranty in the license agreement, and Gateway petitioned to compel arbitration. The court held that the manufacturer, Gateway, "may invite acceptance by conduct," and that "by keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause." *Id.* at 1149, 1150. n10 Although not mentioned in the decision, the customer, by seeking to take advantage of the warranty provisions contained in the license agreement, thus could be fairly charged with the arbitration clause as well. It bears noting that unlike the plaintiffs in *Hill* and *Brower*, who grounded their claims on express warranties contained in the contracts, the Plaintiffs in this case base their claims on alleged privacy rights independent of [*19] the License Agreement for SmartDownload.

n10 See also *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (in suit for breach of warranty, enforcing shrink-wrap license agreement identical to that in *Hill*).

Not all courts to confront the issue have enforced shrink-wrap license agreements. In *Klocek v. Gateway, Inc.*, the court considered a standard shrink-wrap license agreement that was included in the box containing the computer ordered by the plaintiff. 104 F. Supp. 2d 1332 (D. Kan. 2000). The court held that Kansas and Missouri courts probably would not follow *Hill* or *ProCD, supra*. The court held that the computer purchaser was the offeror, and that the vendor accepted the purchaser's offer by shipping the computer in response to the offer. Under Section 2-207 of the Uniform Commercial Code, n11 the court held, the vendor's enclosure of the license agreement in the computer box constituted "[a] definite and seasonable [*20] expression of acceptance ... operating as an acceptance even though it stated terms additional to or different from those offered or agreed upon, unless acceptance [was] expressly made conditional on assent to the additional or different terms." *Id.* (quoting K.S.A. § 84-2-207). The court found that the vendor had not made acceptance of the

license agreement a condition of the purchaser's acceptance of the computer, and that "the mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the [license terms.]" *Id.* at 1340. Therefore, the court held, the plaintiff did not agree to the license terms and could not be compelled to arbitrate. *Id.* at 1341.

n11 Although Section 2-207 of the Uniform Commercial Code, codified by Kansas at K.S.A. § 84-2-207, generally is invoked in a "battle of the forms," the *Klocek* court held that "nothing in [the] language [of Section 2-207] precludes application in a case which involves only one form." *Id.* at 1339.

[*21]

For most of the products it makes available over the Internet (but not SmartDownload), Netscape uses another common type of software license, one usually identified as "click-wrap" licensing. A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. n12 The product cannot be obtained or used unless and until the icon is clicked. For example, when a user attempts to obtain Netscape's Communicator or Navigator, a web page appears containing the full text of the Communicator / Navigator license agreement. Plainly visible on the screen is the query, "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." Below this text are three button or icons: one labeled "Back" and used to return to an earlier step of the download preparation; one labeled "No," which if clicked, terminates the download; and one labeled "Yes," which if clicked, allows the download to proceed. Unless the user clicks "Yes," indicating his or her assent to the license agreement, the user cannot obtain the [*22] software. The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable. See, e.g., *In re RealNetworks, Inc. Privacy Litigation*, 2000 U.S. Dist. LEXIS 6584, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Hotmail Corp. v. Van Money Pie, Inc.*, 1998 U.S. Dist. LEXIS 10729, No. C98-20064, 1998 WL 388389 (N.D. Cal. April 16, 1998).

n12 In this respect, click-wrap licensing is similar to the shrink-wrap license at issue in *ProCD, supra*, which appeared on the user's

computer screen when the software was used and could not be bypassed until the user indicated acceptance of its terms. See *ProCD*, 86 F.3d at 1452.

A third type of software license, "browse-wrap," was considered by a California federal court in *Pollstar v. Gigmania Ltd.*, No. CIV-F-00-5671, 2000 WL 33266437 (E.D. Cal. Oct. 17, 2000). In *Pollstar*, the plaintiff's web page offered allegedly proprietary information. Notice of a license agreement appears on the plaintiff's [*23] web site. Clicking on the notice links the user to a separate web page containing the full text of the license agreement, which allegedly binds any user of the information on the site. However, the user is not required to click on an icon expressing assent to the license, or even view its terms, before proceeding to use the information on the site. The court referred to this arrangement as a "browse-wrap" license. The defendant allegedly copied proprietary information from the site. The plaintiff sued for breach of the license agreement, and the defendant moved to dismiss for lack of mutual assent sufficient to form a contract. The court, although denying the defendant's motion to dismiss, expressed concern about the enforceability of the browse-wrap license:

Viewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement. Notice of the license agreement is provided by small gray text on a gray background. ... No reported cases have ruled on the enforceability of a browse wrap license. ... While the court agrees with [the defendant] that the user is not immediately confronted with the notice of the license [*24] agreement, this does not dispose of [the plaintiff's] breach of contract claim. The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time.

Id. at *5-6. n13

n13 Judge Barbara Jones of this Court considered a similar license arrangement in *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) (Jones, J.). The plaintiff posted license terms on its web site, alongside a statement that "by submitting this query [to the plaintiff's database], you agree to abide by these terms." *Id.* at 248. The court held that, "in light of this sentence at the end of Register.com's terms of use, there can be no question that by proceeding to submit a [] query, Verio manifested its assent

to be bound by Register.com's terms of use, and a contract was formed and subsequently breached." *Id.* Judge Jones was applying New York law. *Id.* at 241. Here, I am applying California law. But, whether under California or New York law, the promisee's assent to be bound is a required condition, and I find no such assent on the facts presented in this case.

[*25]

The SmartDownload License Agreement in the case before me differs fundamentally from both click-wrap and shrink-wrap licensing, and resembles more the browse-wrap license of *Pollstar*. Where click-wrap license agreements and the shrink-wrap agreement at issue in *ProCD* require users to perform an affirmative action unambiguously expressing assent before they may use the software, that affirmative action is equivalent to an express declaration stating, "I assent to the terms and conditions of the license agreement" or something similar. For example, Netscape's Navigator will not function without a prior clicking of a box constituting assent. Netscape's SmartDownload, in contrast, allows a user to download and use the software without taking any action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being formed.

California courts carefully limit the circumstances under which a party may be bound to a contract. "An offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is [*26] not obvious. ... This principle of knowing consent applies with particular force to provisions for arbitration." *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993, 101 Cal. Rptr. 347 (Cal. Ct.App. 1972). *Accord Lawrence v. Walzer & Gabrielson*, 207 Cal. App. 3d 1501, 1507, 256 Cal. Rptr. 6 (Cal. Ct.App. 1989); *Cory v. Golden State Bank*, 95 Cal. App. 3d 360, 366, 157 Cal. Rptr. 538 (Cal. Ct.App. 1979).

Netscape argues that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent. Netscape's failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed.

Furthermore, unlike the user of Netscape Navigator or other click-wrap or shrink-wrap licensees, the

individual obtaining SmartDownload is not made aware that he is entering into a contract. [*27] SmartDownload is available from Netscape's web site free of charge. Before downloading the software, the user need not view any license agreement terms or even any reference to a license agreement, and need not do anything to manifest assent to such a license agreement other than actually taking possession of the product. From the user's vantage point, SmartDownload could be analogized to a free neighborhood newspaper, readily obtained from a sidewalk box or supermarket counter without any exchange with a seller or vender. It is there for the taking.

The only hint that a contract is being formed is one small box of text referring to the license agreement, text that appears below the screen used for downloading and that a user need not even see before obtaining the product:

Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software.

Couched in the mild request, "Please review," this language reads as a mere invitation, not as a condition. The language does not indicate that a user must agree to the license terms before downloading and using the software. While clearer language appears [*28] in the License Agreement itself, the language of the invitation does not require the reading of those terms n14 or provide adequate notice either that a contract is being created or that the terms of the License Agreement will bind the user.

n14 Defendants argue that this case resembles the situation where a party has failed to read a contract and is nevertheless bound by that contract. See, e.g., *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102, 1109, 63 Cal. Rptr. 2d 261 (Cal.Ct.App. 1997); *Rowland v. PaineWebber Inc.*, 4 Cal. App. 4th 279, 287, 6 Cal. Rptr. 2d 20 (Cal.Ct.App. 1992). This argument misses the point. The question before me is whether the parties have first bound themselves to the contract. If they have unequivocally agreed to be bound, the contract is enforceable whether or not they have read its terms.

The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the [*29] law will give force. Defendants' position, if

accepted, would so expand the definition of assent as to render it meaningless. Because the user Plaintiffs did not assent to the license agreement, they are not subject to the arbitration clause contained therein and cannot be compelled to arbitrate their claims against the Defendants.

Defendants further contend that even if the arbitration clause in the SmartDownload License Agreement is not binding, the license agreement applicable to Netscape Communicator and Navigator applies to this dispute. As discussed earlier, the Communicator and Navigator agreement is a conventional click-wrap contract; it prevents any use of the software unless and until the user clicks an icon stating his or her assent to the terms of the license. The agreement contains a clause requiring arbitration of "all disputes relating to this Agreement." Assuming arguendo that it is enforceable, the Communicator / Navigator license agreement is a separate contract governing a separate transaction; it makes no mention of SmartDownload. Plaintiffs' allegations involve an aspect of SmartDownload that allegedly transmits private information about Plaintiffs' online [*30] activities to Defendants. These claims do not implicate Communicator or Navigator any more than they implicate the use of other software on Plaintiffs' computers. Resolution of this dispute does not require interpretation of the parties' rights or obligations under the license agreement for Netscape Communicator and Navigator. Defendants were free to craft broader language for the Communicator / Navigator license, explicitly making later applications such as SmartDownload subject to that click-wrap agreement. They did not do so. Therefore, I reject Defendants' argument that the arbitration clauses in the Communicator and Navigator license agreements mandate arbitration of this dispute.

IV. Plaintiff Michael Fagan

Unlike most of his fellow Plaintiffs, Michael Fagan alleges that he obtained SmartDownload from a shareware web site established and managed by a third party. Defendants dispute Fagan's allegations, insisting that the record shows that he must have obtained SmartDownload from Netscape's web site in the same manner as the other Plaintiffs discussed above. I need not resolve this factual dispute. If Fagan in fact obtained SmartDownload from the Netscape site, his [*31] claims are equally subject to my earlier analysis. If, however, Fagan's version of events is accurate, his argument against arbitration is stronger than that of the other Plaintiffs. While Netscape's download page for SmartDownload contains a single brief and ambiguous reference to the License Agreement, with a link to the

text of the agreement, the ZDNet site n15 contains not even such a reference. The site visitor is invited to click on a hypertext link to "more information" about SmartDownload. The link leads to a Netscape web page, which in turn contains a link to the License Agreement. Assuming, for the sake of argument, that Fagan obtained SmartDownload from ZDNet, he was even less likely than the other Plaintiffs to be aware that he was entering into a contract or what its terms might be, and even less likely to have assented to be bound by the License Agreement and its arbitration clause. Therefore, Plaintiff Michael Fagan cannot be compelled to arbitrate his claims. n16

n15 See note 3, supra.

n16 Netscape's acquiescence to the distribution of the SmartDownload software through shareware sites such as ZDNet -- sites containing minimal or no reference to the License Agreement -- demonstrates its indifference to obtaining users' assent to the terms of the License Agreement.

[*32]

V. Plaintiff Christopher Specht

The connection between the sixth named Plaintiff, Christopher Specht, and the SmartDownload License Agreement is even more attenuated than the connection between Fagan and the Agreement. Specht never obtained or used SmartDownload. Defendants seek to compel arbitration on the basis that Specht maintained a web site from which others could download files, possibly by using SmartDownload, and therefore, Defendants argue, Specht became a third-party beneficiary of the License Agreement. The haziness of Specht's connection to SmartDownload might later prove fatal to his claims in this case; it certainly dooms Defendants' efforts to compel him to arbitrate those claims.

California courts will compel arbitration of the claims of a non-signatory to an arbitration agreement only in certain narrowly-defined circumstances:

The California cases binding nonsignatories to arbitrate their claims fall into two categories. In some cases, a nonsignatory was required to arbitrate a claim because a benefit was conferred on the nonsignatory as a result of the contract, making the nonsignatory a third party

beneficiary of the arbitration agreement. In [*33] other cases, the nonsignatory was bound to arbitrate the dispute because a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim.

County of Contra Costa v. Kaiser Foundation Health Plan, Inc., 47 Cal. App. 4th 237, 242, 54 Cal. Rptr. 2d 628 (Cal.Ct.App. 1996). See also *Norcal Mutual Ins. Co. v. Newton*, 84 Cal. App. 4th 64, 76, 100 Cal. Rptr. 2d 683 (Cal.Ct.App. 2000) (In the absence of "an agency or similar relationship between the nonsignatory and one of the parties to an arbitration agreement ... courts have refused to hold nonsignatories to arbitration agreements."); cf. *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) ("A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause."). The record is devoid of evidence that Specht has any preexisting relationship with Netscape, America Online, or the other Plaintiffs; certainly there is no indication that Specht [*34] was an agent for any party to the License Agreement, or vice versa. Nor is Specht a direct beneficiary of the License Agreement. Netscape contends that, because users of Specht's shareware site may use SmartDownload to obtain files from that site, Specht benefits -- for example, Specht receives a commission from a company called WhyWeb for each time a user downloads WhyWeb's software from Specht's shareware site. However, Internet users could download Specht's files without ever using SmartDownload, or while using a download facilitator other than SmartDownload. The marginally reduced frustration enjoyed by users who obtain files from Specht's site using SmartDownload can hardly be said to provide a "direct benefit" to Specht. I decline to compel arbitration of Specht's claims.

VI. Conclusion

For the reasons stated, I deny Defendants' motion to compel arbitration. The parties shall appear for a status conference on July 26, 2001 at 11:00 a.m., and shall prepare and bring to the conference a Civil Case Management Plan addressing, inter alia, a motion for class certification.

SO ORDERED.



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Image: Jeff Brice

SPECIAL REPORT

Trusted Systems

Devices that enforce machine-readable rights to use the work of a musician or author may create secure ways to publish over the Internet

by Mark Stefik

SUBTOPICS:

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- ◆ [Exercising Usage Rights](#)

ILLUSTRATION:

- ◆ [Transferring A Digital Work](#)
- ◆ [Usage Rights](#)

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FURTHER READING

BACK TO THE INTRODUCTION

Everyday experience with computers has led many people to believe that anything digital is ripe for copying--computer programs, digital books, newspapers, music and video. Some digital-age pundits have gone so far as to proclaim that the ease of duplicating data heralds an end to copyright: information "wants to be free," they assert. It is impossible to thwart the spread of information, so the argument goes. Anything that can be reduced to bits can be copied.

This provocative notion undermines the dream behind the creation of the Internet: the possibility of universal access in a digital age--where any author's work could be available to anyone, anywhere, anytime. The experience of most people, however, is not that the Net contains great works and crucial research information. Instead most of what is there is perceived to be of low value.

The root of the problem is that authors and publishers cannot make a living giving away their work. It now takes only a few keystrokes to copy a paragraph, an entire magazine, a book or even a life's work. Uncontrolled copying has shifted the balance in the social contract between creators and consumers of digital works to the extent that most publishers and authors do not release their best work in digital form.

Behind the scenes, however, technology is altering the balance again. Over the past few years, several companies, including Folio, IBM, Intertrust, Net-Rights, Xerox and Wave Systems, have developed software and hardware that enable a publisher to specify terms and conditions for digital works and to control how they can be used. Some legal scholars believe the change is so dramatic that publishers will be left with too much power, undercutting the rights and needs of consumers and librarians.

Yet consumers' needs can be served even as this transformation progresses. As technology brings more security, better-quality works will reach the Net. Noted authors might be willing to publish directly on the World Wide Web. Although information might not be free, it will most likely cost less because of lower expenses to publishers for billing, distribution and printing. These savings could be passed on to consumers.

The key to this technological shift is the development of what computer scientists know as trusted systems: hardware and software that can be relied on to follow certain rules. Those rules, called usage rights, specify the cost and a series of terms and conditions under which a digital work can be used. A trusted computer, for instance, would refuse to make unauthorized copies or to play audio or video selections for a user who has not paid for them.

Trusted systems can take different forms, such as trusted readers for viewing digital books, trusted players for playing audio and video recordings, trusted printers for making copies that contain labels ("watermarks") that denote copyright status, and trusted servers that sell digital works on the Internet. Although the techniques that render a system trustworthy are complex, the result is simple. Publishers can distribute their work--in encrypted form--in such a way that it can be displayed or printed only by trusted machines. At first, trusted security features would be bundled into a printer or handheld digital reader at some additional cost to the consumer, because they would provide the ability to access material of much higher value. Eventually the costs would fall as the technology became widely implemented. Of course, a publisher could still opt to make some works available for free--and a trusted

server would still allow anyone to download them.

How does a trusted system know what the rules are? At Xerox and elsewhere, researchers have attempted to express the fees and conditions associated with any particular work in a formal language that can be precisely interpreted by trusted systems. Such a usage-rights language is essential to electronic commerce: the range of things that people can or cannot do must be made explicit so that buyers and sellers can negotiate and come to agreements. Digital rights fall into several natural categories. Transport rights include permission to copy, transfer or loan. Render rights allow for playing and printing. Derivative-work rights include extracting and editing information and embedding it in other publications. Other rights govern the making and restoring of backup copies.

How Trusted Systems Work

Different intellectual works have different security requirements. But trusted systems allow publishers to specify the required security level to safeguard a document or video. The most valuable digital properties might be protected by systems that detect any tampering, set off alarms and erase the information inside. At an intermediate level, a trusted system would block a nonexpert attack with a simple password scheme. And at a lower security level, it would offer few obstacles to infringers but would mark digital works so that their source could be traced (such digital watermarking is now embedded in some image-manipulation software).

Most trusted computers have the capability to recognize another trusted system, to execute usage rights and to render works so that they either cannot be copied exactly or else carry with them a signature of their origin. For executing a highly secure transaction, two trusted systems exchange data over a communications channel, such as the Internet, providing assurances about their true identities. Managing communications over a secure channel can be accomplished with encryption and what are known as challenge-response protocols.

One example of the use of this protocol would be if computer A wishes to communicate with computer B. Computer A has to prove to B that it is a trusted

system and that it is who it says it is. The interaction begins when A sends B a digital certificate confirming that it has entered its name with a registry of trusted systems. B decrypts the certificate. This action confirms that the certificate is genuine. But because a certificate can be copied, how does B know it is really in communication with A? To verify A's identity, B composes a random string of numbers called a nonce. It encrypts the nonce with a public software key that A has sent within the digital certificate. The public key allows B to send messages that only A will understand when it decrypts them with its own private key.

B sends the nonce to A, which decrypts it and returns an unencrypted message to B containing the numbers in the nonce. If the return message matches the one it first sent, B knows it is, in fact, communicating with A, because only A could have decrypted the message with its private key. In a few more steps, the two computers may be ready to transfer a book or carry out some other transaction.

Although not all trusted systems use a challenge-response protocol, most use encryption for exchanging digital works. They may also incorporate other security features. Some systems contain tamperproof clocks to prevent a user from exercising expired rights. Others have secure memories for recording billing transactions. Still others must be connected to an on-line financial clearinghouse during transactions.

Trusted systems can place identifying watermarks that make it possible to track down unauthorized duplications or alterations. Watermarks maintain a record of each work, the name of the purchaser and a code for the devices on which they are being played. This information can be hidden--in the white space and gray shades of a text image, for instance. As such, the identifying information would be essentially invisible to lawful consumers--and unremovable by would-be infringers.

Publishers would still need to be watchful for unlicensed distribution of their property. A computer user can always print a digital page and then photocopy it. A digital-movie pirate can sit in front of the screen with a camcorder. What trusted systems prevent, however, is the wholesale copying and

distribution of perfect digital originals. With appropriate watermarks, for instance, even pirated copies should still be traceable.

In digital publishing, trusted systems would allow commerce to proceed in a manner not unlike the way it is carried out in the distribution of paper copies. Suppose that Morgan wishes to buy a digital book on the Web. Copying the book initiates a transaction between the seller's system and Morgan's computer. At the end of the transaction, Morgan has used a credit card or digital cash to buy a copy of a book that can be read with a personal computer or some other digital reader. The entire transaction, moreover, is preceded by an exchange of information in which the seller ensures that Morgan's machine is a trusted system.

Exercising Usage Rights

As with a paper book, Morgan can give away his digital opus. If Morgan's friend Andy asks for it, Morgan can exercise a free-transfer right. At the end of the transaction, the book resides on Andy's reader and not on Morgan's. Andy can then read the book, but Morgan cannot. The transfer preserves the number of copies. Their computers, reading and interpreting the rights attached to the file containing the book, perform the transfer in this way, and neither Morgan nor Andy can command otherwise.

Morgan can also lend a book to a friend. If Ryan wants to borrow a book for a week, Morgan can transfer it to his computer, but while the digital book is on loan, Morgan cannot use it. When the week runs out, Ryan's system deactivates its copy, and Morgan's system marks its copy as usable again. Without any action by either of them, the digital book has been "returned" to its lender. The right to lend is crucial in enabling the establishment of digital libraries. Usage rights can be tailored for reading a work, printing it or creating derivative works. Depending on the publisher, particular rights can carry a fee or not. For some works, copying is free, but viewing them costs a fee. Fees can be billed for each use or by the hour; they may be billed when the user obtains the work or whenever a right is exercised. There can be discounts, sales and free trials. Distribution can be limited to people who can certify that they are members of a book club, a certain age group or citizens of a

particular country.

Trusted systems can also respect the type of fair-use provisions that currently apply to libraries and some other institutions, allowing a reasonable number of free copies or quotations to be used. Members of the public with special needs--librarians, researchers and teachers--could receive licenses from an organization representing publishers that let them make a certain number of free or discounted copies of a work, if the rights of an author are understood. To balance against the risks of illegal copying, an insurance fund could be set up to protect against losses.

What's in all this for consumers? Why should they welcome an arrangement in which they have less than absolute control over the equipment and data in their possession? Why should they pay when they could get things for free? Because unless the intellectual-property rights of publishers are respected and enforced, many desirable items may never be made digitally available, free or at any price. Trusted systems address the lack of control in the digital free-for-all of the Internet. They make it possible not only for entire libraries to go on-line but also for bookstores, newsstands, movie theaters, record stores and other businesses that deal in wholly digital information to make their products available. They give incentives for 24-hour access to quality fiction, video and musical works, with immediate delivery anywhere in the world. In some cases, this technological approach to protecting authors and publishers may even avoid the need for heavy-handed regulations that could stifle digital publishing.

Fully realizing this vision will necessitate developments in both technology and the marketplace. Users will need routine access to more communications capacity. Publishers must institute measures to ensure the privacy of consumers who use trusted systems, although the same technology that guards the property rights of publishers could also protect personal details about consumers. Trusted systems also presume that direct sales, not advertising, will pay the costs of distributing digital works. Advertising will most likely prevail only for works with substantial mass-market appeal. By protecting authors' rights, trusted systems will enable specialized publishing to flourish: compare, for instance, the diverse collection of books in a library to the relative paucity of programs for

television.

The dynamics of a competitive marketplace form the most imposing roadblock to fashioning protections for digital rights. Several companies have trusted systems and software in the early stages of testing. With some exceptions, though, the software is proprietary and incompatible. Whereas the technology could provide the infrastructure for digital commerce, the greatest benefits will accrue only if the various stakeholders, from buyers and sellers to librarians and lawmakers, work together.

Further Links

[Internet Dreams](#)

[Interactive Multimedia Association](#)--information on intellectual property and government affairs

[The Creative Incentive Coalition](#)

[Copyright and Fair Use information](#) from Stanford University Libraries

[Copyright information](#) from the University of Delaware Library

[The Internet Technology Association of America](#)

Further Reading

Legally Speaking: Regulation of Technologies to Protect Copyrighted Works. Pamela Samuelson in *Communications of the ACM*, Vol. 39, No. 7, pages 17-22; July 1996.

Forum on Technology-Based Intellectual Property Management: Electronic Commerce for Content. Edited by Brian Kahin and Kate Arms. Special issue of the *Interactive Multimedia News*, Vol. 2; August 1996.

Letting Loose the Light: Igniting Commerce in Electronic Publication. Mark Stefik in *Internet Dreams: Archetypes, Myths, and Metaphors.* Edited by Mark Stefik. MIT Press, 1996.

The Author

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