

IEEE Discussion Proposal  
Are shrink wrap licenses contracts?  
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My initial objection to shrink wrap agreements was that they contain specific legal terms that the user will not only probably never read, but even if read will not be understood. Specifically, I object to the user disclaiming the implied warranty of fitness for a particular purpose. When the typical software purchaser reads that he or she is disclaiming the warranty of fitness for a particular purpose, will he/she know what this means and if not is the contract still enforceable?

Even more so, while in the midst of installing software, a screen comes up and says, “by the way you agree to the following terms of this license by clicking I Agree.” You say, “yeah, yeah, yeah...CLICK.”

**Is clicking an “I agree” button a contract?**

I discuss arguments for and against enforcement of such contracts.

The different types of shrink wrap contracts and discussed:

- 1) “Shrink wrap” licenses
- 2) “Click wrap” licenses
- 3) "Browse-wrap licenses.

**Shrink wrap Licenses In General- are they enforceable?**

Courts have reached differing results when analyzing shrink- wrap agreements.

Several cases are discussed:

- I. *Step-Saver Data Sys., Inc. v. Wyse Techn.*, 939 F.2d 91 (3rd Cir. 1991)
- II. *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F.Supp. 759 (D. Ariz. 1993).
- III. *Klocek v. Gateway, Inc.*, 104 F.Supp.2d 1332 (D. Kan 2000), (rejecting *ProCD* and finding that the in-the-box agreement was unenforceable for lack of consent). F. Supp. 759 (D. Ariz 1993)
- IV. *U.S. Surgical Corp. v. Orris, Inc.*, 5 F. Supp.2d 1201 (D.Kan 1998)

These courts have refused to recognize a bargain in “shrinkwrap” license that is not signed by the party against whom it is enforced.

In contrast, other courts have determined that the “shrinkwrap” license is valid and enforceable.

I. *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 587, 741 N.Y.S.2d 91, 92 (2d Dep’t 2002)

II. *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251, 676 N.Y.S.2d 569, 572 (1st Dep’t 1998)

III. *M.A. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803, 809 (Wash. Ct. App. 1999)

IV. *i.LAN Sys.*, 183 F. Supp. 2d at 338

I discuss the two part test for enforceability of click, shrink and browse wrap agreements will be based on two factors:

- 1) First and foremost...
- 2) the enforcement of these agreements...

This conclusion comes from reading a series of cases, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996), *Specht v. Netscape* and *Combs v. Paypal*.

1) In *ProCD, Zeidenberg*...

1) In *Specht v. Netscape Communications Corp.*...

In *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002)...

Shrink wrap agreements can be enforceable provided that:  
Terms are discussed.

### **Click and Browse wrap agreements:**

In order to bind a buyer in an online agreement, the seller must meet a two part test:

### **Why license agreements anyway? The first sale doctrine.**

From *SOFTMAN PRODUCTS COMPANY, LLC v. ADOBE SYSTEMS INC.*

The “first sale” doctrine was first analyzed by the United

States Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). The Court held that the exclusive right to “vend” under the copyright statute applied only to the first sale of the copyrighted work. The doctrine has been codified at 17 U.S.C. § 109(a). It states in relevant part: **“the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.”** 17 U.S.C. § 109(a). One significant effect of § 109(a) is to limit the exclusive right to distribute copies to their first voluntary disposition, and thus negate copyright owner control over further or “downstream” transfer to a third party. *Quality King Distrib. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135, 142-44 (1998). (See *Rice Decl.* ¶ 11.) The first sale doctrine vests the copy owner with statutory privileges under the Act which operate as limits on the exclusive rights of the copyright owners.

#### **Peripheral issue and cautionary note:**

But what if the seller does not know or understand the terms of the EULA, is it enforceable then? Because software installation products come equipped with standard contracts as part of an installation package, it’s possible that software vendors include EULA’s without knowing, understanding or even reading the terms they contain. What if the seller tries to enforce the waiver of the implied warranty for a particular purpose or warranty of merchantability because of damage done by use of the software and the seller never read the license agreement?

What if the disclaimer is simply copy and pasted into the source file header?

Discussion:

Questions: