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CONTRACT LAW—ELECTRONIC
CONTRACT FORMATION—DISTRICT
COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA HOLDS THAT A WEB-WRAP
SITE LICENSE DOES NOT EQUATE TO AN
ENFORCEABLE CONTRACT—
TICKETMASTER CORP. V.
TICKETS.COM, INC.

*Susan Y. Chao**

THE seminal case regarding the enforceability of shrink-wrap license agreements¹ is *ProCD, Inc. v. Zeidenberg*² in which Judge Easterbrook overturned a district court ruling³ and held that shrink-wrap licenses limiting the rights of software purchasers are enforceable.⁴ In the recent case of *Ticketmaster Corp. v. Tickets.com, Inc.*,⁵ the District Court for the Central District of California had the opportu-

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1. Shrink-wrap licenses generally apply in the software-licensing context and refer to the list of "fine-print" terms that a licensee is expected to read prior to using a product. Shrink-wrap licenses purportedly become enforceable when the licensee opens the clear cellophane that has been used to wrap the license together with either the software product or owner's manual, hence the name "shrink-wrap." For a detailed discussion regarding the legal advent of shrink-wrap licenses, see Brian Covotta & Pamela Sergeef, Note, *I. Intellectual Property—A. Copyright—1. Preemption—b) Contract Enforceability: ProCd, Inc. v. Zeidenberg*, 13 BERKELEY TECH. L.J. 35 (1998); Stephen P. Tarolli, Comment, *The Future of Information Commerce Under Contemporary Contract and Copyright Principles*, 46 AM. U. L. REV. 1639 (1997).

2. 86 F.3d 1447 (7th Cir. 1996).

3. The District Court for the Western District of Wisconsin had held that the terms contained in a shrink-wrap license were unenforceable because the purchaser of the product had not agreed to them at the time of the purchase. See *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640 (W.D. Wis. 1996); *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

4. *ProCD*, 86 F.3d at 1448-49.

5. No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000). With the issuance of this opinion comes the first time a court has had the opportunity to adjudicate the inherently modern issues involved in the enforceability of electronic boilerplate contracts.

nity to apply the legal principles developed in *ProCD* and its progeny⁶ to a web-wrap site license.⁷ It declined to do so.⁸ By not applying the *ProCD* jurisprudence to the web-wrap site license question, the court correctly concluded that such a license was unenforceable. The opinion, however, fails to offer detailed substantive guidance concerning the enforceability question. Web-site owners who rely solely on this decision are provided with little more than cursory illustrations as to what will render a site license enforceable.

Ticketmaster Corporation and Ticketmaster Online – City Search, Inc. (Ticketmaster) operate an electronic commerce web site that primarily allows customers to purchase tickets to various events, such as concerts and ballgames, via the Internet.⁹ Throughout Ticketmaster's web site, visitors can also gain access to both basic information regarding each event, such as a brief description, date, time, venue, and price per ticket, and the process of ordering tickets, either through internet order, telephone, mail, or in person.¹⁰ Ticketmaster has exclusive agreements with the event promoters whose tickets are sold through the web site; such tickets are generally not otherwise available to the public.¹¹

The home page of Ticketmaster's web site contains user instructions and a directory of subsequent pages.¹² By scrolling down to the bottom of the home page, a visitor is also able to read the site license, labeled "Terms and Conditions," which provides that anyone going beyond the home page agrees to the terms and conditions set forth.¹³ The terms of the site license state that the information on Ticketmaster's web site is for personal use only and may not be used for commercial purposes.¹⁴ Deep

6. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (reaffirming the same basic rule of contract law applied in *ProCD*); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997) (citing to *ProCD* on a copyright preemption issue); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260 (6th Cir. 1996) (citing to *ProCD* in describing shrink-wrap licenses). *But see* sources cited *infra* note 39.

7. A web-wrap agreement is any substantive agreement that is merely displayed on a web site's home page. While web-wrap agreements are primarily characterized by placement, site licenses are concerned with those issues involving the access of web site content. Site licenses make explicit the copyright and trademark rights of the web site owner. Moreover, they make clear what the owner consents to as acceptable uses of the intellectual property contents within the web site. For a detailed discussion of site license agreements, see JANE K. WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE* §6.02 [I] (4th ed. forthcoming 2001).

8. *Ticketmaster Corp.*, 2000 U.S. Dist. LEXIS 4553, at *8.

9. *Id.* at *2.

10. *See id.*

11. *Id.* at *3. A limited quantity of tickets is usually reserved by the event promoters themselves or sold through premium brokers who charge substantially higher than the ticket's face value. *Id.*

12. *Id.* at *2.

13. *Id.* at *2, *7. Commercial web sites also frequently post site licenses behind a small hyperlink on an obscure corner of the home page.

14. *Id.* at *7-8.

linking¹⁵ to the site is also not permitted.¹⁶ A visitor, however, need not view these terms and conditions to proceed straight to the subsequent pages which interest him or her.¹⁷

Tickets.com, Inc. (Tickets.com) also operates a web site that performs services similar to Ticketmaster's site.¹⁸ Tickets.com provides information on various events, including description, time, date, venue, and ticket prices. In contrast to Ticketmaster's site, however, Tickets.com offers only a limited amount of tickets for sale through its web site.¹⁹ In the numerous cases where Tickets.com does not itself sell the tickets, the web site offers a place where visitors can click for a reference to another ticket broker or another Internet ticket seller.²⁰ Where Ticketmaster is the exclusive ticket broker for an event, and the visitor clicks on the active text "Buy this ticket from another on-line ticketing company," the visitor is instantly transferred by deep link from the Tickets.com site to an interior page of the Ticketmaster web site, bypassing the Ticketmaster home page.²¹ Thus, through this link to the Ticketmaster web site, a customer can buy tickets that are not offered through Tickets.com.²²

Ticketmaster filed suit against Tickets.com in the District Court for the Central District of California, alleging, in part, that through the use of deep linking Tickets.com had copied its interior web pages and then extracted basic event information from them.²³ The information was then placed on Tickets.com's web site using a different format.²⁴ In its complaint, Ticketmaster claimed ten separate causes of action, including breach of contract, copyright infringement, and unfair competition.²⁵ In response, Tickets.com moved for the court to dismiss all claims.²⁶ The court granted in part and denied in part Tickets.com's motion to dismiss.²⁷

15. Hyperlinking is a general term for the electronic transfer from one web page to another by the use of an active button or text. Deep linking is a specific method of hyperlinking where the home page is bypassed after the transfer. Although each meaning is technically different, often the terms hyperlinking and deep linking are used synonymously in a colloquial sense. For a detailed discussion on the legal implications of both hyperlinking and deep linking, see J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:70 (4th ed. 1997); Allison Roarty, Note, *Link Liability: The Argument for Inline Links and Frames as Infringements of the Copyright Display Right*, 68 FORDHAM L. REV. 1011 (1999).

16. *Ticketmaster Corp.*, 2000 U.S. Dist. LEXIS 4553, at *7-8.

17. *Id.* at *2-3.

18. *Id.* at *3.

19. *Id.*

20. *Id.*

21. *Id.* at *3-4.

22. *Id.* at *3-4. Ticketmaster's interior web pages display the Ticketmaster logo. Thus, customers should know they are dealing with Ticketmaster, not Tickets.com. *Id.* at *4.

23. *Id.* at *4.

24. *Id.*

25. *Id.* at *1. Ticketmaster's ten causes of action are (1) copyright infringement; (2) breach of contract; (3) passing off; (4) reverse passing off; (5) false advertising; (6) misappropriation; (7) state unfair business practices; (8) trespass; (9) unjust enrichment; and (10) tortious interference with prospective business advantage. *Id.*

26. *Id.* at *1.

27. *Id.*

Writing for the court, Judge Hupp fully considered the second of Ticketmaster's causes of action—breach of contract.²⁸ He noted that the breach of contract claim was based upon the web-wrap site license set forth on the home page of Ticketmaster's web site, particularly the conditions that the web site could not be used for commercial purposes and that deep linking was not allowed.²⁹ Since Tickets.com, a commercial entity, had deep linked into Ticketmaster's web site, the court addressed whether such action, which was prohibited by the site license, constituted a breach of contract.³⁰

According to the court, Ticketmaster's site license did not create a contract with A PERSON using its web site, and Ticketmaster's breach of contract claim was therefore dismissed.³¹ The court thereby rejected Ticketmaster's argument that its web-wrap site license should be given the legal weight comparable to that of a shrink-wrap license.³² Shrink-wrap licenses, where the packaging on the outside of a software product states that opening the package constitutes adherence to the license agreement, have been found by the *ProCD* jurisprudence to be enforceable, and Ticketmaster asserted that by analogy, its site license terms were also enforceable.³³ The court rejected Ticketmaster's analogy and stated that instead of being "open and obvious and in fact hard to miss" as shrink-wrap licenses generally are, Ticketmaster's site license was not sufficiently prominent.³⁴

The court remarked that since a web-site visitor would need to scroll down to the bottom of the home page to find and read the terms and conditions, it was more likely that a visitor would instead proceed to subsequent pages rather than read the "small print."³⁵ The court also noted that Ticketmaster did not require visitors to click on an "I agree" button before proceeding through the web site, as many web-site owners commonly do to ensure that visitors read, or at least are aware of, site licenses.³⁶ Therefore, the court found distinctions sufficient to differentiate Ticketmaster's web-wrap site license from the usually enforced shrink-wrap license. The court, however, gave Ticketmaster leave to amend the breach of contract claim and the opportunity to assert facts showing Tickets.com's actual knowledge of the terms and conditions and its implied agreement to them.³⁷

28. *Id.* at *7-8.

29. *Id.*

30. *Id.*

31. *Id.* at *8.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* In general, contracts where web site visitors must click on an "I agree" button after viewing the contractual language are referred to as click-wrap agreements.

37. *Id.* at *8. The court also granted Tickets.com's motion to dismiss the claims of misappropriation, trespass, and unjust enrichment. The court, however, denied the dismissal of Ticketmaster's claims of passing off, reverse passing off, false advertising, copyright

The *Ticketmaster* court correctly refused to apply the legal principles as developed in the shrink-wrap cases to a web-wrap license. Although courts had originally been reluctant to recognize the enforceability of shrink-wrap licenses, it is now clear that most courts believe that shrink-wrap licenses equate to, in the words of Judge Easterbrook, a “simple two-party contract,”³⁸ one that is governed by the common law of contracts and the Uniform Commercial Code.³⁹ This belief is based upon the idea that when examining a product, a consumer cannot help but notice the words of a shrink-wrap license and must actually tear through the cellophane to use the product. The inference of assent to the terms of such a license seems quite reasonable.

On the other hand, the mere display of a web-wrap site license does not ensure that a visitor to a web site has either the opportunity to view the terms of the license, or even the knowledge that a license is present. This is of special concern in instances where the license terms are displayed on the bottom of the home page, as was Ticketmaster’s, or are posted under an obscure hyperlink. But Tickets.com was not a casual web-site visitor; it was, instead, a sophisticated business entity that provided commercial services in competition with Ticketmaster.⁴⁰ Even so, for the sake of uniformity and bright-line rules, the court was absolutely correct in holding that Ticketmaster’s web-wrap site license was unenforceable.

The court’s analysis, however, fails to take the next step by not providing any substantive rules as to what factors would definitively render a site license enforceable. Instead, the opinion merely muses about the absence of an “I agree” button and the obscure placement of Ticketmaster’s site license.⁴¹ Such remarks offer only slight guidance as to the characteristics of an enforceable site license because they can only be understood as illustrative examples of what other web sites have done—not mandatory rules of enforceability. Ambiguity remains because the court does not issue a bright-line rule regarding whether one or both of the two factors, an “I agree” button and site license visibility, are all that is required for enforceability or whether more is needed. The only un-

infringement, state unfair business practices, and tortious interference with prospective business advantage. *Id.* at *4, 8-12.

38. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996).

39. *Id.* at 1450. *But cf.* *Klocek v. Gateway, Inc.*, 104 F. Supp.2d 1332, 1339-41 (D. Kan. 2000) (holding that consumer did not assent to shrink-wrap license); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 764 (D. Ariz. 1993) (holding shrink-wrap license invalid without the express assent of both parties as proscribed by UCC section 2-209); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 103 (3d Cir. 1991) (holding that under UCC section 2-207, the terms of a shrink-wrap license did not become part of the parties’ sales agreements); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (holding shrink-wrap license enforceability preempted by the Copyright Act).

40. *See Ticketmaster Corp.*, 2000 U.S. Dist. LEXIS 4553, at *3.

41. *Id.* at *8. Judge Hupp writes, “Many web site makes you click on ‘agree’ to the terms and conditions [sic] before going on, but Ticketmaster does not. Further, the terms and conditions are set forth so that the customer needs to scroll down the home page to find and read them.” *Id.*

problematic inference that can be drawn is that Ticketmaster's site license did not rise to even a minimum level of possible enforceability since the court dismissed Ticketmaster's breach of contract claim without further discussion.

The Uniform Computer Information Transactions Act (UCITA)⁴² is a model statute covering a broad spectrum of contract law and especially focuses on those issues that arise in the modern electronic commerce context.⁴³ The notion of "manifestation of assent" is a critical concept in UCITA and is the key in determining whether a contract that had been formed via the Internet, such as a site license, is enforceable. Under UCITA, to manifest assent requires meeting three conditions.⁴⁴ The party must have knowledge of the contractual terms or an opportunity to review them before assenting; the party must then manifest assent through conduct; and such conduct must be attributable to the party.⁴⁵ The comments to the statute illustrate two scenarios to demonstrate how assent can be properly established. If a web site asks a visitor to read a site license that is readily displayable, and it presents an "I agree" button and an "I decline" button, a visitor indicating agreement has both assented and adopted the terms of the license.⁴⁶ Similarly, a visitor who views a site license, clicks "I agree," and then confirms the agreement has also properly assented.⁴⁷

Although UCITA has been enacted in only two states thus far,⁴⁸ the statute's impact is sure to be wide-reaching since it adds much-needed guidance to the scarce body of modern Internet law. Web-site owners, therefore, should go beyond Judge Hupp's opinion to ascertain examples of enforceable site licenses to guide them in developing their web sites. To protect themselves fully, web-site owners must not, as Ticketmaster did, merely display the site license on the bottom of their home pages, but

42. UCITA (2000).

43. UCITA prefatory note (Final Version 2000). For primers on UCITA, see generally Michael J. Lockerby, *UCITA: The Uniform Computer Information Transactions Act*, 7 RICH. J.L. & TECH. 2 (2000); Raymond T. Nimmer, *UCITA: A Commercial Contract Code*, 17 COMPUTER LAW. 3 (2000); JANE K. WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE* § 5.08, § 6.04 (4th ed. forthcoming 2001).

44. UCITA § 112 cmt. 2.

45. *Id.* The party may also authenticate the contractual terms through a verbal statement, see *id.*, but "most [electronic commerce] interactions involve conduct rather than words." *Id.*

46. *Id.* at cmt. 5, illus. 1.

47. *Id.* at cmt. 5, illus. 3. Consistent with Judge Hupp's opinion, a web site containing a hyperlink labeled "site license" that is hidden in small print will likely not provide a visitor an opportunity to manifest assent under UCITA. See *id.* at cmt. 5, illus. 2. The comments also acknowledge that many different acts can establish assent. Although the use of double-assent procedures is emphasized, this encouragement does not alter the effectiveness of a single indication of assent under proper circumstances. *Id.* at cmt. 5. See, e.g., *Caspi v. The Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J.A.D. 1999).

48. As of August 2000, UCITA had been introduced in five states. Virginia became the first state to enact UCITA in March 2000 (with an effective date of July 1, 2001). Maryland enacted it in April (with an effective date of October 1, 2000). Charles H. Fendell & Dennis M. Kennedy, *UCITA is Coming!!! Part Two: Practical Analysis for Licensees' Counsel*, 17 COMPUTER LAW. 3, 3 (2000).

instead assure that the visitor has an opportunity to clearly assent to the license.

Unfortunately, such burdens undoubtedly render a web site less visitor-friendly. Thus, web-site owners will want to impose "fine-print" contract terms on their visitors without a complicated interface.⁴⁹ Web-site owners, however, must compromise between the goal of attracting visitors and the equally important goal of assuring that visitors have agreed to the terms governing the web site. If not, there is grave risk that such contract terms will be unenforceable and common-law default rules will determine the terms of the agreement, if one even exists at all.

49. If such legal protection is truly too burdensome, then site owners could develop technology to prevent unwanted actions on their web site. Interestingly, Ticketmaster has done just that. Currently, Ticketmaster has the technical means to prevent anyone from deep-linking to its site. Kathleen Fay, *Ticketmaster's Request for Preliminary Injunction Denied*, 17 E-COMMERCE 11 (2000).

