

Shrink-wrap Licenses

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- Adhesion contract (**terms are established unilaterally**) – *"take-it-or-leave-it"* basis;
- The majority of **off-the-shelf software** is acquired by means of a self-executing shrink-wrap agreement, which content regulates the use of the software;
- It refers to vendors' usage of any kind of wrapping that encases their product and **attached are the terms** under which they purport to make their product available.

Shrink-wrap - concept

- "An adhesion contract is a **standardized form contract** offered to consumers of goods and services on essentially a ***take-it-or-leave-it basis***, without affording the consumer a **realistic opportunity to bargain**. Under such conditions the consumer cannot obtain the desired product or service without acquiescing to the form contract." (GOODMAN, 1999)

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- **Meeting of the minds – Contract Law** - a paradigmatic agreement concluded between two parties, of equal bargaining power, after a process of **free negotiation**.

Shrink-wrap - concept

- Off-the-shelf software and mass production;
- are essential to the functioning of today's economy;
- great potential for abuse from the use of these types of contracts;

Advantages and Disadvantages of Adhesion contracts

- Surprising terms;
- deliberately obfuscating and incomprehensible language;
- Problem of adhesion contracts' enforceability;

Advantages and Disadvantages of Adhesion contracts

- [1] The agreement must occur in the form of a **standardized contract** prepared or adopted by one party for the acceptance of the other...
- [2] The party proffering the standardized **contract must enjoy a superior bargaining position** because the weaker party virtually cannot avoid doing business under the particular contract terms...
- [3] The contract must be offered to the weaker party on a **take-it-or-leave-it basis**, without opportunity for bargaining.

Guthman v. La Vida Llena

- Shrink-wrap licenses are usually used to **impose restrictions on use, reproduction, transfer, and modification of the software program by the consumer.**
- computer software industry uses it mainly (GOODMAN, 1999):
- 1st) it characterizes the transaction as a license rather than a sale;
- 2nd) the shrink-wrap agreement forbids reverse engineering of the software in order to protect trade secrets imbedded within the software.
- 3rd) the shrink-wrap agreement defines and restricts the scope of allowable use of the software.

Shrink-wrap – background and purposes

- The buyer consents at the moment of purchase at the store where he/she by a software;
- The contractual terms will be fully accessed afterwards when he/she installs the software at home;
- On the condition that after the knowledge of the contractual terms by the buyer when she/he installs it, he/she agrees with them (**consent by a conduct**).

Shrink-wrap – consent and contract formation



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Shrink-wrap – Creative Commons

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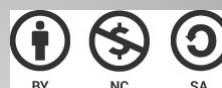


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- ***Vault Corp. versus Quaid Software Ltd.***
- Court of Appeals 5th Circuit (Louisiana, Mississippi and Texas) - August 1985
- Valut Corporation (California – PROLOC)
- Quaid Software Ltd (Canada)
- Over-the-telephone transaction (discs)
- Courts` conclusion: unenforceable because the clauses which prohibited to copy, to transfer, to adapt or to modify the software needed a specific regulation.

Shrink-Wrap Agreement Jurisprudence

- ***North American Systemshops Ltd. versus King***
- Canada (april 1986)
- Software "With Interest"
- On the evidence, I conclude that: the program was sold to the defendants shrink-wrapped; that no copyright symbol was visible to the purchaser, (since the copyright symbol on the booklet is on the inside front cover of the booklet and not on the outside cover and the copyright symbol on the floppy disk is in the same general location on the disk as the registration number and the evidence of the witness Wallace is that the registration number was not visible through the shrink-wrap); [...]

Shrink-Wrap Agreement Jurisprudence

- ***North American Systemshops Ltd. versus King***
- [...] and that no licence statement was visible (the licence statement being on the inside back cover of the booklet and not being on the floppy disk). In addition, the evidence establishes that the copyright symbol comes up on the first screen when the program is used, but no licence statement comes up on the screen. Finally, I am satisfied that the user of the program would not have to refer to the booklet for general use of the program as the program was designed to be, and was in fact, "user-useful" in Mr. Syrja's phrase.

Shrink-Wrap Agreement Jurisprudence

- ***Step-Saver Data Systems, Inc. versus Wyse Technology***
- United States Court of Appeals for the Third Circuit (1991)
- over-the-telephone transaction
- The court refused to enforce the shrink-wrap agreement using a Uniform Commercial Code ("U.C.C.") section 2-207 "battle-of-the-forms" analysis.

Shrink-Wrap Agreement Jurisprudence

- ***ProCD, Inc. versus Zeidenberg***
- Court of Appeals 7th Circuit (1996)
- creating a telephone database called "Select Phone"
- Consumer version X commercial version
- The court has concluded that the contract was valid because the buyer had an opportunity to read the terms and to agree with them

Shrink-Wrap Agreement Jurisprudence

- Adhesion contract
- Unequality of bargaining powers
- Meeting of the minds
- Surprising terms – unenforceable
- Right to withdraw the contract

Conclusion