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NOTE: HONEY, I SHRINK-WRAPPED THE CONSUMER: THE **SHRINK-WRAP** AGREEMENT AS AN ADHESION CONTRACT

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BIO:

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SUMMARY:

... An ordinary consumer walks into a store that sells computer software hoping to find a particular piece of software. ... Thus, the Seventh Circuit claimed ProCD's enclosure of a contract that the buyer, after reading the license, could accept by using the software, created a valid contract. ... Second, the computer software publisher offering these contracts enjoys superior bargaining power because it is impossible for the consumer to avoid doing business under the particular contract terms. ... While this Note asserts that the ProCD court erred by failing to consider adhesion contract analysis, the court was correct to point out the importance of efficiency in the computer software market. ... However, the legal analysis employed by the Seventh Circuit in ProCD would seemingly hold all **shrink-wrap** agreements enforceable, even in cases where there is a striking inequality in bargaining power and lack of knowledge of the computer software industry on the part of the specific consumer involved. ... Thus, in order to avoid inequitable results similar to that of ProCD, this Note proposes that the proper analysis invokes principles of adhesion contracts, which emphasizes the disparity of bargaining power between computer software publishers and consumers. ...

TEXT:

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Introduction

An ordinary consumer walks into a store that sells computer software hoping to find a particular piece of software. Once satisfied that she has found what she is looking for, she takes the software to the register to purchase it. After paying for the purchase, she reasonably assumes that no further obligations exist. Later, when she gets home, she can hardly wait to use the new program. Like a child at a birthday party, she rips through the cellophane that seals the package. She opens the box, finds the disk containing the program, and immediately loads it onto her computer. She does this so fast she doesn't even notice the "User Guide" packaged inside the box with the software. Then, in her eagerness and excitement, she quickly "clicks through" [n1] several screens full of legal jargon. It is not until sometime later, after using the software, that she notices the "User Guide." When she finally gets around to reading it, she finds out that she was asked to carefully read an enclosed license before using the software or accessing the software on the disk. Furthermore, by using the disk, she now learns that she supposedly agreed to be bound by the terms of the license for the software she thought she owned free and clear upon purchasing it back in the store.

The above account is illustrative of the typical consumer experience. [n2] The majority of off-the-shelf software is acquired by means of a self-executing **shrink-wrap** agreement. [n3] This type of **[*320]** agreement refers to vendors' usage of the plastic wrapping [n4] that encases their product "as a mechanism of attaching the terms under which they purport to make their product available." [n5] In transactions utilizing these agreements there is no direct negotiation, or even any contact, between the contracting parties. [n6] Thus, these agreements allow computer software publishers to impose standard terms and conditions for the transaction on a purely "take-it-or-leave-it" basis. [n7] The enforceability of these agreements has been considered in very few cases, [n8] with the law playing "tortoise to technology's hare." [n9] Even though the **shrink-wrap** agreement embodies the characteristics of the adhesion **[*321]** contract, the handful of major **shrink-wrap** agreement cases that has reached the courts [n10] surprisingly fails to apply adhesion contract principles. [n11]

Adhesion contracts comprise the vast majority of consumer contracts in this country. [n12] 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. [n13] Historically, these special contracts [n14] were developed in response to economic **[*322]** factors. [n15] During the early rise of capitalism, most exchanges took place at arms length. [n16] But, as the economy evolved into one in which distribution was more centralized, such contracts of adhesion became prevalent [n17] due to their efficient and utilitarian function. [n18]

The appearance of the **shrink-wrap** agreement, the contract of adhesion for the digital era, has generated much controversy surrounding the enforceability of its terms. [n19] However, in its decisions, today's judiciary has failed to give these new adhesion contracts the special treatment they deserve. [n20] This Note posits that principles governing enforcement of contracts of adhesion should be considered when determining whether parties entered into a contract as laid out in the **shrink-wrap** agreement. [n21]

Part I discusses contracts of adhesion and examines the issues surrounding their enforceability. [n22] Part II explains what **shrink-wrap** agreements are and provides a brief summary of their background, goals, and purposes. [n23] Part III reviews the few **shrink-wrap** cases that have reached the

courts, [n24] most notably ProCD, Inc. v. Zeidenberg. [n25] Finally, Part IV posits that there is a striking absence of adhesion contract law in the decisions dealing with the **[*323]** enforceability of **shrink-wrap** agreements, particularly in the consumer context. [n26] Thus, this Part concludes that a court should apply adhesion contract principles, which focus on the disparity of bargaining power between software publishers and consumers, in determining the enforceability of a **shrink-wrap** agreement. [n27]

I. Contracts of Adhesion [n28]

A. Generally

The traditional law of contracts was designed to deal with a paradigmatic agreement, arrived at through a process of free negotiation [n29] by two parties of equal bargaining power. [n30] The routine consumer transactions of today's business world, however, take place between parties with a disparity in bargaining power. [n31] Today, the typical agreement consists of a standard printed form [n32] prepared by one party in the superior bargaining position and adhered to by the other party, who has little or no opportunity for **[*324]** bargaining. [n33] The term "adhesion contract" refers to such standardized contract forms offered to consumers of goods and services on this take-it-or-leave-it basis. [n34]

The key to preventing a particular contract from being one of adhesion is the absence of a disparity in bargaining power. [n35] The common consumer transaction, however, is characterized by unequal bargaining power and therefore can be considered an adhesion contract. The adhesion contract fails to afford the consumer a realistic opportunity to bargain because the desired product or service cannot be acquired except by succumbing to the form contract. [n36] Thus, the consumer process of entering into a contract of adhesion is not one of haggling or cooperation, "but rather of a fly and flypaper." [n37]

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B. Advantages and Disadvantages Associated with Standardization [n38]

The standardization and mass production of contracts can serve both parties' interests. [n39] Since the forms can be customized, operations are simplified and costs reduced to the advantage of all concerned. [n40] As the fruits of the labor of the skilled drafter become available throughout the business, customers and personnel are released from the details involved in drafting contract terms. [n41] Costly time and skill can then be devoted to a class of transactions, rather than being spent on individual transactions. [n42] Furthermore, since "judicial interpretation of one standard form serves as an interpretation of similar forms," standardization promotes the accumulation of judicial experience. [n43]

In today's age of mass production of standardized goods and services, the movement of such items on the scale and speed with which they are produced or rendered requires that transactions not be encumbered by prolonged negotiations regarding ancillary terms. [n44] Thus, proponents of adhesion contracts argue that they are essential to the functioning of today's economy. [n45]

[*326] However, there is great potential for abuse from the use of these types of contacts. There are inherent evils associated with standardization since it provides the means for one party to impose terms on the other unknowing, or resisting, party. [n46] Thus, a significant drawback of the adhesion contract is that its terms may be drafted with the intent to provide the utmost protection for the party providing the form, thereby minimizing the actualization of the adhering party's reasona-

ble expectations. [n47] Moreover, the protection will commonly be wrapped up in deliberately obfuscating and incomprehensible language. [n48]

C. When is a Contract an Unenforceable Adhesion Contract?

It is a common misconception in the treatment of adhesion contracts that the alternative to treating them like every other contract [n49] is to per se invalidate any contract once it is deemed **[*327]** adhesive. [n50] The correct approach is that these contracts should not all be per se invalidated. [n51] More accurately, in order to be unenforceable, the contract in question must result in unfairness. [n52] Guthman v. La Vida Llena [n53] is one illustrative case where the court held that a contract is not per se unenforceable simply because it is found to be one of adhesion. [n54] Thus, an evaluation to determine the enforceability of adhesion contracts must pass through two stages. First, one must determine whether or not the contract is adhesive. Second, once it is determined to be adhesive, one must then examine the contract for unfairness. [n55]

In considering whether the contract is one of adhesion, one should note that the distinctive feature of an adhesion contract is the disparity in bargaining power, where the weaker party has no realistic choice as to the contract's terms. [n56] Thus, the operative issue is whether there was "a lack of true mutual assent" [n57] to the **[*328]** contract terms. [n58] In Guthman, the court succinctly identified three elements that must be satisfied before an adhesion contract may be found:

[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. [n59]

The determination that the **shrink-wrap** agreement is adhesive is the point of origin of the court's analysis, not its cessation. [n60] Thus, should a court determine that a contract is adhesive under the **[*329]** Guthman factors, the second step involves judicial review [n61] of the contract for fairness. [n62]

At the second stage, the court's objective is to identify good adhesion contracts that should be enforced and distinguish bad ones that should not. [n63] A term of an adhesion contract will be struck down if found to be "unconscionable or contrary to a rule of public policy that a party should not be permitted to shift the burden of his wrongdoing to a weaker party or to deprive the injured party of his right to recover for the wrong done to him." [n64] The court will typically only strike down terms of an adhesion contract that are demonstrably unfair to the adhering party. [n65] The **[*330]** terms not proven to be unfair will be enforced unless the remainder of the contract is so one-sided that justice is better served by discarding the contract in its entirety. [n66]

Enforceability of the adhesion contract also depends on whether any terms of which the adherent was unaware are beyond the reasonable expectations of an ordinary person or are oppressive or unconscionable. [n67] Thus, a provision of such an agreement will not be enforced against the compelled adherent absent a "plain and clear notification" of the terms and an "understanding assent" thereto. [n68]

In particular, if an adhesion contract has terms that are unfair under the circumstances, courts have been more willing to conclude that "the ordinary manifestation of assent implicit in a signature or acceptance of a document is insufficient because the assent is not reasoned and knowing." [n69] Thus, a finding of **[*331]** unfairness, under the second step of the analysis, may create a presumption that there was no mutual assent, thus satisfying the first step.

The judicial system's struggle to balance fairness [n70] with the commercial necessity of adhesion contracts in a society based on the mass distribution of consumer goods [n71] is evident in the indeterminate body of law that has been created. [n72] The judicial and legislative attempts [n73] to deal with the emergence of the **shrink** **[*332]** **wrap** agreement, a new type of adhesion contract, are further evidence of this continuing struggle.

II. **Shrink-Wrap** Agreements

A. The Agreement

A typical [n74] **shrink-wrap** agreement imposes restrictions on use, reproduction, transfer, and modification of the software program by the consumer. [n75] Generally, it stipulates that the software purchaser does not own the software, but is only a licensee who accepts the contract by opening the package or using the software, [n76] thereby agreeing to use the software in accordance with the **shrink-wrap** agreement terms. [n77]

Vendors have utilized these agreements, in any one of various forms, [n78] as a means of dictating the terms [n79] under which they **[*333]** purport to make their products available. [n80] One example [n81] occurs when a sheet of paper containing a list of fine print terms [n82] is tightly sealed in transparent plastic wrapping material [n83] along with at least one computer diskette. [n84] Theoretically, [n85] the purchaser will read the terms of the license before tearing open the plastic wrap and breaking the seal to use the software. [n86]

With the rapid expansion of computers and the Internet, **[*334]** those who make products available online or maintain web sites utilize **shrink-wrap** type agreements in the form of click-wrap and web-wrap agreements. [n87] Instead of a preprinted form that is supposedly assented to after purchase by tearing the **shrink-wrap** on the box, the click-wrap requires the purchaser to use his or her mouse to "click" on buttons appearing on the computer screen, thereby assenting to the terms and conditions. [n88] Like the click-wrap, the web-wrap agreement employs the same type of clicking; however, it refers to contracts formed entirely over the Internet to govern the use of information and products on the Internet. [n89]

B. Background, Goals, and Purpose

Shrink-wrap agreements have been included in transactions involving computers and computer software [n90] since the rise [n91] of the computer software industry. [n92] The mass marketing of computer software precluded computer software publishers from negotiating express contracts with each purchaser. [n93] In addition, the principles **[*335]** of intellectual property law failed to expand rap-

idly enough to prevent the perceived inadequacy of the law [n94] and to provide needed protection for new products. [n95] As a result, software publishers introduced a new adhesion contract [n96] known as the **shrink-wrap** agreement. [n97] Thus, in conjunction with current legal **[*336]** and technological [n98] innovations and the mass-marketing of computer software, the use of **shrink-wrap** [n99] was given an additional contractual function when used in computer software packaging. [n100]

The increase in the usage of these agreements paralleled the software industry's transition from one that dealt primarily in customized software packages and agreements to one employing a mass-market mode of software delivery. [n101] Today, some variation of a **shrink-wrap** agreement is included in almost every piece of software purchased [n102] since it is an efficient [n103] way for the software vendor to dictate the terms of the sale. [n104] The **shrink-wrap** agreements act as a substitute for the purchaser having to sign a standardized contract containing the same essential terms, while enabling the industry to function at the mass-market level. [n105]

From the perspective of the software companies, there are **[*337]** three main functions served by the **shrink-wrap** agreement. [n106] First, it characterizes the transaction as a license rather than a sale, thereby retaining title [n107] in the publisher. This instills in publishers the right to determine the purposes for which their software may be used. [n108] Second, the **shrink-wrap** agreement forbids reverse engineering [n109] of the software in order to protect trade secrets imbedded within the software. [n110] Finally, the **shrink-wrap** agreement defines and restricts the scope of allowable use of the software. [n111]

III. **Shrink-Wrap** Agreement Jurisprudence

At the start of its limited legal history, [n112] the **shrink-wrap** agreement did not fare well. [n113] Typically, courts would modify or not enforce these agreements, [n114] holding that the terms were not part of the bargained-for-exchange since consumers could only review the terms after making the purchase. [n115] The enforceability **[*338]** of the license terms was largely dependent on how one chose to view the sales contract for the particular copy of software involved. [n116]

A. Negative Judicial Treatment of **Shrink-Wrap** Agreements

1. Step-Saver Data Systems v. Wyse Technology [n117]

In 1991 the United States Court of Appeals for the Third Circuit first considered and ruled on the enforceability of a **shrink-wrap** agreement. [n118] The case involved an over-the-telephone **[*339]** transaction between Step-Saver Data Systems ("Step-Saver"), a value-added retailer of computer software and hardware systems, and The Software Link ("TSL"), [n119] a software vendor. [n120] The court refused to enforce the **shrink-wrap** agreement using a Uniform Commercial Code ("U.C.C.") section 2-207 "battle-of-the-forms" [n121] analysis. [n122]

TSL disclaimed alleged oral representations [n123] it had made to Step-Saver by arguing that the warranty disclaimers in the box-top license attached to the programs ordered by Step-Saver [n124] were incorporated into their contracts. [n125] The district court held that the **[*340]** **shrink-wrap** license constituted the complete and exclusive agreement between the parties. [n126] The Third Circuit reversed, stating that the issue did not involve the existence of a sales [n127] contract, but rather involved the definition of its terms. [n128] The court found that U.C.C. section 2-207 [n129] expressly rejects the common law's "last shot rule" [n130] and determined what agreement existed under section 2-207. [n131]

The Step-Saver decision has potentially broad applicability to **shrink-wrap** agreement cases. [n132] Although the foundation of the decision is a contract formed through telephone orders before the **shrink-wrap** agreement is ever delivered, many commercial sales of software occur in analogous contexts. [n133] The **shrink-wrap** agreement contained inside the purchased package cannot be discovered and read [n134] until after the customer has returned home, **[*341]** opened the box, and begun the process of installing the software. [n135] However, the court's decision did not address the enforceability of **shrink-wraps** in general. Instead, it only addressed the enforceability of **shrink-wrap** terms as part of a thoroughly negotiated sales agreement between commercial, non-consumer parties. [n136] Therefore, the holding in Step-Saver offers little guidance under an adhesion contract analysis for **shrink-wrap** agreements that impose standard terms. [n137]

2. Arizona Retail Systems v. Software Link, Inc. [n138]

Arizona Retail involved multiple transactions [n139] between, coincidentally, the same vendor, TSL, and a different purchaser, Arizona Retail Systems ("Arizona Retail"). [n140] The United States District Court for the District of Arizona held the first **shrink-wrap** license in the series of sales enforceable and subsequent **shrink-wrap** licenses unenforceable. [n141]

Arizona Retail ordered a copy of one of TSL's software packages and then received two copies of the system. [n142] The diskettes containing the copies of the software came enclosed in plastic **shrink-wrap** including a "Limited Use License **[*342]** Agreement." [n143] Following an evaluation of the system and a reading of the license, Arizona Retail opted to keep the product [n144] and made additional purchases of the product over the telephone. [n145]

For the initial purchase, the court held that by including the live copy of the software along with the evaluation diskette, TSL made an offer that was accepted when Arizona Retail opened the sealed envelope containing the software, including the terms of the license. [n146] The court's decision was based on the fact that Arizona Retail was fully aware of the terms of the license from the use of the evaluation diskette, and was thus on notice [n147] that opening the **shrink-wrap** on the live copy would result in a contract being formed under those terms. [n148]

However, with regard to the subsequent purchases, [n149] the court concluded that Arizona Retail had not had an opportunity to read the license terms before a contract was formed. [n150] Thus, the Court held that the license did not apply. [n151] The distinction **[*343]** between the initial sale and the subsequent ones was that negotiations for the subsequent sales took place over the telephone where the warranty and liability terms were never discussed. [n152] In its decision, the court was influenced by numerous policy arguments against enforcing **shrink-wrap** agreements. [n153]

In each of the preceding two cases, the controlling issue was whether the buyer had an opportunity to read the license terms before the contract was formed. [n154] However, due to the unusual fact pattern in Arizona Retail, which resulted in the court's **[*344]** opposite holdings for the initial and subsequent transactions, [n155] the legal implications of the court's analysis on the enforceability of **shrink-wrap** agreements is unclear. [n156]

B. Positive Judicial Treatment of **Shrink-Wrap** Agreements: ProCD, Inc. v. Zeidenberg [n157]

A significant departure from prior **shrink-wrap** jurisprudence [n158] occurred in ProCD, Inc. v. Zeidenberg, where the court enforced the terms of a **shrink-wrap** agreement. [n159] This decision is distinguishable from the preceding **shrink-wrap** agreement cases since it dealt with an

over-the-counter, retail transaction. [n160] Therein lies the significance of the case: it represents a substantial shift in power away from the consumer to the computer software publishers who already occupy the position of superior bargaining power. [n161]

In ProCD, the producer of computer software programs, ProCD, Inc. ("ProCD") [n162] spent millions of dollars [n163] creating a telephone database called "Select Phone." [n164] To effectively market **[*345]** the software, ProCD varied its database sales price [n165] depending on whether the buyer intended commercial or private use. [n166] The program was sold in a box containing a set of CD-ROM diskettes and a user guide purportedly subject to a "Single User License Agreement," [n167] sealed in transparent plastic that prevented the buyer from reading the enclosed license prior to purchasing the software. [n168] In addition, a reminder that the product was subject to the license agreement was incorporated into the design of the software. [n169] Since it was impossible for ProCD to know who purchased its product off the store shelf, it included a term in its license restricting the noncommercial version to noncommercial uses only. [n170]

A commercial actor representing himself as a consumer, Matthew Zeidenberg ("Zeidenberg"), [n171] purchased a personal **[*346]** version of the software from a retailer. [n172] He ignored [n173] the license term limiting him to noncommercial uses and made a version of the database [n174] commercially [n175] available over the Internet. [n176]

ProCD sought an injunction against all activities proscribed by the **shrink-wrap** agreement packaged with the software. [n177] Chief Judge Crabb of the United States District Court for the Western District of Wisconsin denied the injunction. [n178] In addressing the software license agreement, the court stated that it would treat the purchase as a sale of goods under the U.C.C. as opposed to a license. [n179]

[*347] The court's analysis focused on the question of when the contract was formed. [n180] After noting that section 2-206 [n181] sets forth the basic framework for contract formation, the court found that ProCD made an offer by placing its product on the shelf of a retail store [n182] which was accepted when Zeidenberg took the software to the counter and purchased it. [n183] Thus, the court held that contract formation took place at the time of purchase. [n184] Ultimately, the court concluded that the additional terms of the **shrink-wrap** agreement would be more appropriately evaluated under sections 2-207 [n185] and 2-209. [n186]

In alternatively applying sections 2-207 and 2-209, [n187] the court reviewed Step-Saver [n188] and Arizona Retail, [n189] also finding that a **[*348]** contract had been formed before the buyer was given an opportunity to review the license. [n190] Thus, the court found that the **shrink-wrap** terms were not binding because Zeidenberg could not have consented to terms of a license that he did not have an opportunity to inspect at the time of the transaction. [n191]

On appeal, Judge Easterbrook, writing for the United States Court of Appeals for the Seventh Circuit, held that **shrink-wrap** agreements are enforceable as long as they do not violate generally accepted principles of contract law. [n192] In reaching its conclusion, the Seventh Circuit discussed the nature of the software market and the role of **shrink-wrap** agreements in preserving the viability of the mass-market software industry. [n193] **[*349]** Only then did the court turn to the U.C.C. to resolve the remaining issues, following the same analytical route as the district court, by treating the license terms as terms of a contract for a sale of goods governed by the U.C.C. [n194]

Unlike the district court, however, the Seventh Circuit concluded that both the common law and the U.C.C. support the enforceability of a money-now-terms-later transaction. [n195] The Seventh

Circuit's application of the U.C.C. utilized a different analysis than that of other courts by focusing on section 2-204. [n196] Specifically, the court invoked the section to support the contention that, as master of the offer, a vendor may invite acceptance by conduct and limit the kind of conduct that constitutes acceptance. [n197] The buyer may then accept the offer by **[*350]** performing the acts that have been proposed, thereby entering into a contract. [n198] Thus, the Seventh Circuit claimed ProCD's enclosure of a contract that the buyer, after reading the license, could accept by using the software, created a valid contract. [n199] This enforceable contract would thus include the terms of the license. [n200]

In its holding, the Seventh Circuit granted **shrink-wrap** agreements broad legitimacy similar to that of other enforceable standardized contracts, thus radically redefining their effect in the marketplace. [n201] But the court's decision to enforce the terms of the **shrink-wrap** agreement terms is troubling, given its failure to consider the principles governing adhesion contracts. [n202]

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C. Judicial Developments Following ProCD v. Zeidenberg [n203]

Seven months after handing down the ProCD decision, the Seventh Circuit extended the applicability of ProCD in Hill v. Gateway2000, Inc. [n204] The transaction in this case involved a phone-mail order for a computer. [n205] The question before the court was whether the **shrink-wrap** agreement terms were "effective as the parties' contract, or [was] the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent[.]" [n206] The court held that Gateway's offer was accepted when the consumer retained the computer after receipt of the terms for the allotted time. [n207] Thus, all the terms inside the box were enforceable since they were incorporated into the parties' contract and there was an opportunity to return the computer after reading those terms. [n208]

[*352] In holding the terms of the agreement in Gateway 2000 enforceable, [n209] the court placed emphasis on the conceptual similarities between ProCD and Gateway 2000. [n210] Essentially, both cases involved a consumer purchase of a product and an ensuing dispute over the terms of the accompanying **shrink-wrap** agreement. At this abstract level, it appears that the precedent established by the ProCD court produced the correct outcome. However, the consumer situation presented to the court in ProCD was radically different from the consumer situation found in Gateway 2000. ProCD involved a commercial actor misrepresenting himself as a consumer, who was educated in the field of computers, and who disregarded the terms of the **shrink-wrap** agreement he knew to be present because he thought they were unenforceable. [n211]

Gateway 2000, by contrast, involved a consumer lacking any special expertise in the area of computers and the dispute concerned an arbitration provision contained in the **shrink-wrap** agreement. In reaching its decision, the Gateway 2000 court took little notice of the factual differences between the two cases. [n212] Once again, the court failed to apply the principles of adhesion contracts to the **shrink-wrap** agreement in question and, instead, considered provisions of the U.C.C. This failure is most striking in Gateway 2000 where the purchase involved was a common consumer transaction characterized by a disparity in bargaining power between the parties.

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D. Discussion of the Existing State of **Shrink-Wrap** Jurisprudence

Although the ProCD and Gateway 2000 decisions only bind federal district courts in the Seventh Circuit, [n213] if other courts follow the same reasoning their alliance, coupled with the absence of an adhesion contract analysis, may deal a staggering blow to the rights of consumers. [n214] In the years following these decisions, other courts have cited, without criticism, the broad holding in ProCD, which enforces **shrink-wrap** agreements. [n215] However, it remains to be seen whether courts outside the Seventh Circuit will follow the decision in a consumer setting while also failing to apply adhesion contract principles. [n216] Furthermore, because there is a split in the circuits as a result of the ProCD decisions, [n217] the uncertain status of **shrink-wrap** agreements is an issue of considerable significance for the software industry. [n218]

Although the Seventh Circuit was astute in recognizing that **shrink-wrap** agreements have a substantial effect on the efficiency of the computer software industry, [n219] the opinion has been heavily criticized, [n220] leaving questions as to the reliability of **shrink-wrap** **[*354]** agreements as a mode of contracting. [n221] Though the court's concern for the efficiency of the software industry is well placed, it comes at the expense of consumer protection from onerous contractual obligations. By simply categorizing the **shrink-wrap** agreement as yet another enforceable contract whereby money is paid now and terms are disclosed later, the Seventh Circuit ignored the unique nature of software as a consumer product. Thus, some meaningful guidance for the **shrink-wrap** agreement in the consumer context is still needed and can be found by employing an analysis under the principles of adhesion contracts. [n222]

IV. Proposal

In today's computer software market, retail store sales account for an exorbitant number of total software sales. [n223] As a result of their superior bargaining power and by utilizing **shrink-wrap** agreements as money-now-terms-later contracts, publishers of computer software can totally control whether the consumer will ever be able to use the product. [n224] Furthermore, it is highly unlikely that the average consumer participating in these sales is aware of the license terms before paying for the software. [n225] Therefore, the consumer cannot understand and assent [n226] to these terms. [n227] Moreover, consumers enter retail stores without any power to bargain over the terms under which they make purchases. By their very nature, the actions required for **[*355]** acceptance, [n228] typically opening the product and using it, would not occur in the store - the usual point at which the reasonable consumer would see the sales contract as having been consummated. [n229] Thus, the average consumer making these over-the-counter computer software purchases requires the most protection from the terms of a **shrink-wrap** agreement. [n230]

The existing jurisprudence on **shrink-wrap** agreements has not taken advantage of an entire body of law that would more appropriately address the salient features surrounding the enforceability of **shrink-wrap** agreements. [n231] Furthermore, even though commentators [n232] have addressed them as contracts of adhesion, they have failed to focus on the disparity in bargaining power under adhesion contract principles. Instead, they have focused on the commercial need of computer software publishers, thus overlooking a glaring disparity in bargaining power between software publishers and consumers.

In dealing with **shrink-wrap** agreements in a consumer context, the focus should be on adhesion contract principles in order to protect the consumer who lacks any bargaining power. [n233] The consumer, rather than the party imposing the terms, is the one who needs increased protection from the terms imposed under a **shrink-wrap** agreement. Yet, this is exactly what the court in Seventh

Circuit has done in creating the broad holding that **shrink-wrap** agreements are enforceable. [n234] The Seventh Circuit's failure to apply adhesion contract principles created unfavorable precedent for consumers. Thus, courts should focus on fairness **[*356]** and disparity in bargaining power, [n235] the dominant issues in the use of **shrink-wrap** agreements, in evaluating their enforceability. [n236]

When a court is presented with a **shrink-wrap** agreement that appears to be adhesive, its investigation of the contract can be divided into two stages. [n237] The first stage is to reach a determination as to whether the contract before the court is truly one of adhesion. This involves three requirements: standardization, inequality in bargaining power, and a take-it-or-leave-it offer. [n238] If these aspects are present and the court concludes that the **shrink-wrap** agreement is adhesive, the second stage is to examine the specific facts before the court for fairness. [n239]

In a consumer context, all **shrink-wrap** agreements should meet these preliminary requirements. First, the **shrink-wrap** agreement is a standardized contract prepared or adopted by one party, the computer software publisher, for the acceptance of the other party, the consumer. Second, the computer software publisher offering these contracts enjoys superior bargaining power because it is impossible for the consumer to avoid doing business under the particular contract terms. Third, the terms of the **shrink-wrap** agreement are offered to the consumer on a take-it-or-leave-it basis with no opportunity for bargaining. Thus, when presented with a **shrink-wrap** agreement in a consumer situation, the courts should immediately proceed to the second stage and scrutinize the **shrink-wrap** agreement for fairness.

At the second stage, the application of adhesion contract principles to software purchased with a **shrink-wrap** agreement presents distinct problems concerning the buyer's awareness of the contractual provisions and his understanding assent thereto. [n240] The **shrink-wrap** agreement's provisions, viewed from the perspective of the consumer, are subsidiary to the primary exchange of money for software. [n241] Absent some guidance by the computer software **[*357]** publisher, the consumer has little reason to know anything at all about the provisions contained in the **shrink-wrap** agreement, let alone that clicking "OK" will bind him to such provisions. Nor should the publisher ordinarily expect a consumer to read or even understand a **shrink-wrap** agreement. [n242] Thus, the background circumstances surrounding the "choice" to enter such an agreement argue against enforcing such agreements. [n243] Furthermore, as major players in the industry seem to be consolidating, [n244] decreasing the competitiveness of the market and increasing the disparity in bargaining power, principles such as the doctrine of unconscionability [n245] should be applied [n246] to relieve parties from onerous conditions imposed by adhesion contracts. [n247]

The computer software industry has a unique status. The manufacturers are few in number, yet strong in bargaining position. Due to its nature, the balance of power is already tipped in favor of the software manufacturers. From the purchaser's standpoint, any negotiation is an impossibility because there is no contact with the computer software publisher and the purchaser must perform the act(s) required for acceptance in order to use the product. Since the relative bargaining power is so grossly **[*358]** disproportionate, the consumer is unable to bargain at all. Instead, the consumer must accept or reject the software on the terms dictated by the publisher and often cannot turn to a competitor for better terms. [n248] Thus, given the inequity in bargaining power, an analysis under adhesion contract principles is appropriate.

While this Note asserts that the ProCD court erred by failing to consider adhesion contract analysis, the court was correct to point out the importance of efficiency in the computer software market. Application of adhesion contract law to **shrink-wrap** agreements does not undermine that

policy goal. On the contrary, adhesion contract law is a flexible doctrine allowing a court to decide questions of enforceability while placing needed emphasis on the disparity in bargaining power between buyers and sellers. [n249]

For example, under the ProCD facts, application of adhesion contract law might lead to a similar result. In ProCD, the semi-commercial purchaser was a graduate student in computer science who had notice of the **shrink-wrap** agreement and used the software, which was purchased with a **shrink-wrap** agreement, to compete with the company from whom he purchased the software database. [n250] The particular facts suggest that it would be neither unfair nor unconscionable to hold such a consumer to a contract embodied in the terms of the **shrink-wrap** agreement. However, the legal analysis employed by the Seventh Circuit in ProCD would seemingly hold all **shrink-wrap** agreements enforceable, even in cases where there is a striking inequality in bargaining power and lack of knowledge of the computer software industry on the part of the specific consumer involved. To avoid the inequitable [n251] and unfair results created by this expansive holding, challenges to the enforceability of **shrink-wrap** agreements **[*359]** covering consumer products [n252] should be analyzed under the law of adhesion contracts.

Conclusion

While transactional efficiency is necessary in an increasingly technological world, [n253] it should not come at the cost of fairness [n254] or disregard of established contract law. [n255] Fairness is at the heart of adhesion contract doctrine, under which the efficiencies must be balanced against any potential unfairness and inequality of bargaining power. [n256] Each of the decisions dealing with **shrink-wrap** agreements focused on areas other than adhesion contracts. [n257] In the only case dealing with a **shrink-wrap** agreement in a purely consumer context, it is most striking that the court neglected to focus on the average consumer's [n258] total lack of bargaining power. [n259] Although the Seventh Circuit may have reached the correct result on its facts, [n260] the holding creates a bad precedent [n261] by binding the average consumer, lacking any bargaining power, to the terms of a **shrink-wrap** agreement. [n262] Thus, in order to avoid inequitable results similar to that of ProCD, this Note proposes **[*360]** that the proper analysis invokes principles of adhesion contracts, which emphasizes the disparity of bargaining power between computer software publishers and consumers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsAdhesion ContractsCopyright LawConveyancesLicensesShrinkwrapContracts LawDefensesUnconscionabilityAdhesion Contracts

FOOTNOTES:

n1. " Clicking through" takes place by continually clicking with a mouse on buttons with the term "OK" or "I accept" or "I agree" on them, although there are numerous variations of this scheme.

n2. This account of the typical consumer's experience was adapted from the version appearing in Christopher L. Pitet, The Problem With "Money Now, Terms Later": ProCD, Inc. v. Zeidenberg and the Enforceability of "Shrinkwrap" Software Licenses, 31 Loy. L.A. L. Rev. 325, 325-26 (1997).

n3. See Kent Stuckey, Internet and Online Law 45 (1998); Martin H. Samson, Click-Wrap Agreement Held Enforceable, N.Y. L.J., June 30, 1998, at 1, 1 ("Click-wrap agreements derive their name from **shrink-wrap** agreements, by which most software is sold today.").

For the purposes of this Note, unless otherwise stated, the term "**shrink-wrap** agreements" is used interchangeably with other variations of the term which include, but are not limited to: **shrink-wrap** licenses, click-wrap agreements or licenses, point-and-click agreements or licenses, web-wrap agreements or licenses, blister-pack agreements or licenses, box-top agreements or licenses, tear-open or tear-me-open agreements or licenses, point-and-click agreements or licenses, end user license agreements, etc. Software vendors prefer to call them end user licenses. See Mark L. Gordon, Computer Software Contracting for Development and Distribution 262 (1986).

It should be noted, however, that a click-wrap agreement and a web-wrap agreement have more specific connotations. See discussion infra, notes 87-89 and accompanying text. See generally Brian Covotta & Pamela Sergeeff, ProCD, Inc. v. Zeidenberg, 13 Berkeley Tech. L.J. 35, 35 n.3 (1998); Stephen J. Davidson & Michael J. Wurzer, **Shrink-Wrap** Licenses: The Continuing Controversy, 453 PLI/Pat 673, 691-92 (1996); Gary H. Moore & J. David Hadden, On-Line Software Distribution: New Life for "**Shrink-wrap**' Licenses?, The Computer Lawyer, April 1996, at 8; Samson, supra, at 1.

n4. This type of plastic covering, known as "shrink-wrapping," is where the **shrink-wrap** agreement derived its name. See Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. Cal. L. Rev. 1239, 1241 n.6 (1995). Today, most consumer purchases come wrapped up in this plastic shrink-wrapping. See The Wiley Encyclopedia of Packaging Technology 335 (Marilyn Bakker & David Eckroth eds., 1986). The wrapping is commonly used to preserve the product and prevent tampering. See id. at 708 ("The shrinkwrapping process was first introduced in 1948 as a protective-packaging technique for frozen poultry."). See also The Random House College Dictionary 1219 (Jess Stein ed., 1984) (defining "**shrink-wrap**" as to "wrap and seal [a product] in a flexible film that, when exposed to heat, shrinks to the contour of the merchandise").

n5. Robert J. Morrill, Contract Formation and the **Shrink Wrap** License: A Case Comment on ProCD, Inc. v. Zeidenberg, 32 New Eng. L. Rev. 513, 515 (1998).

n6. See Stuckey, supra note 3, at 1.

n7. See id.

n8. See Carey R. Ramos & Joseph P. Verdon, Shrinkwrap and Click-On Licenses after ProCD v. Zeidenberg, The Computer Lawyer, Sept. 1996, at 1.

n9. Thomas Finkelstein & Douglas C. Wyatt, Shrinkwrap Licenses: Consequences of Breaking the Seal, 71 St. John's L. Rev. 839, 839 (1977). It still remains to be seen whether the law will develop to "appropriately resolve the multitude of problems posed by the advent of computer technology." Id.; see also Bonna Lynn Horovitz, Note, Computer Software as a Good Under the Uniform Commercial Code: Taking a Byte Out of the Intangibility Myth, 65 B.U. L. Rev. 129, 129 (1985) (noting the expansive computer related litigation resulting from legal problems with computer programs).

n10. See infra Part III (discussing the existing case law on **shrink-wrap** agreements).

n11. Although one court noted that the **shrink-wrap** agreement at issue was a contract of adhesion, it failed to analyze the **shrink-wrap** agreement before it as such. See Vault Corp. v. Quaid Software, Ltd., 655 F. Supp. 750 (E.D. La. 1987), aff'd, 847 F.2d 255 (5th Cir. 1988); see also infra note 118 (discussing the case).

n12. As one commentator notes:

Standard form contracts probably account for more than ninety-nine percent of all contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theatre tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.

W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 529 (1971). See also 1 Arthur Linton Corbin, Corbin on Contracts 1.4 (1993); 3 Arthur Linton Corbin, Corbin on Contracts 559A, at 430 (Lawrence A. Cunningham & Arthur J. Jacobson eds., Supp. 1999) ("The bulk of contracts in this country ... are adhesion contracts ...."); Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1188-89 (1983) (noting the already widespread use these types of contracts enjoyed as early as 1983).

n13. See Black's Law Dictionary 40 (6th ed. 1990).

n14. The fact that today's legal system treats contracts of adhesion differently from traditional contracts is manifested in many ways. See C. & J. Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975) (en banc) (engaging in an extensive discussion of why courts cannot mechanically apply common law principles of contract to contracts of adhesion); Estrin Constr. Co. v. Aetna Cas. & Sur. Co., 612 S.W.2d 413, 422-26 (Mo. App. 1981) (showing that the new rules courts follow for adhesion contracts are sufficiently consistent with the better, modern rules followed by the courts in negotiated contract cases); Arthur Allen Leff, Unconscionability and the Crowd - Consumers and the Common Law Tradition, 31 U. Pitt. L. Rev. 349, 352 n.18 (recognizing that adhesion contracts were unique and that classical contract law was ill-equipped to handle them); Rakoff, supra note 12, at 1174-75.

In addition, adhesion contracts and the applicable black-letter law have their own section in the Restatement of Contracts and the supplement to Corbin on Contracts. See Restatement (Second) of Contracts 211 (1981); 3 Corbin, supra note 12, 559A-559I. Judges have even made broad declarations that adhesion contracts are special. See, e.g., Chandler v. Aero Mayflower Transit Co., 374 F.2d 129, 135 n.11 (4th Cir. 1967) ("There is a difference between contracts negotiated between coequals and standard printed form contracts offered the public by industries so powerful, by reason of franchise or otherwise, to effectively impose terms (called an "adhesion contract') ...."); C. & J. Fertilizer, 227 N.W.2d at 173-74 (beginning with an extensive discussion of why courts cannot mechanically apply common law principles of contract to contracts of adhesion); Estrin Constr., 612 S.W.2d at 418-25.

n15. See Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55, 58 (1963); Harold Shepherd, Contracts in a Prosperity Year, 6 Stan. L. Rev. 208, 212 (1954) ("The "printed form' contracts are involved in more or less stereotyped and commonly recurring fact situations such as sales of household appliances, real estate broker contracts, etc.").

n16. See Friedrich Kessler et al., Contracts Cases and Materials 3-22 (3d ed. 1986) (discussing the contract as a principle of order); Michael G. Ryan, Note, Offers Users Can't Refuse: **Shrink-Wrap** License Agreements as Enforceable Adhesion Contracts, 10 Cardozo L. Rev. 2105, 2118-20 (1989) (discussing classic contract law); infra note 232 (addressing the faults in Mr. Ryan's alternate proposal that **shrink-wrap** agreements should be enforceable adhesion contracts).

n17. See supra note 12.

n18. For a discussion on the utility of standardization, see Restatement, supra note 14, 211 cmt. a (1981).

n19. See infra Part I (discussing adhesion contracts); infra Part II (discussing **shrink-wrap** agreements).

n20. See infra Part III (discussing the existing **shrink-wrap** agreement jurisprudence); supra note 14 and accompanying text.

n21. See infra Parts I.C and IV.

n22. See infra notes 28-73 and accompanying text.

n23. See infra notes 74-111 and accompanying text.

n24. See infra notes 112-222 and accompanying text.

n25. 908 F. Supp. 640 (W.D. Wis. 1996), rev'd, 86 F.3d 1447 (7th Cir. 1996).

n26. See infra notes 223-52 and accompanying text.

n27. See infra notes 253-62 and accompanying text.

n28. The term "adhesion" was borrowed from French scholars and was imported into the United States by Edwin Patterson. It was first applied to insurance policies and was popularized by scholars who were educated in Europe and who later taught in the United States. See Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 856-57 (1964); Edwin W. Patterson, The Delivery of a Life-Insurance Policy, 33 Harv. L. Rev. 198, 222 (1919) ("Life-insurance contracts are contracts of "adhesion.'"). The term was probably borrowed from the language of international law where treaties were negotiated by a group of states and were sometimes left open for "adhesion" by other States who were at liberty to agree to adopt or reject the treaty. However, they frequently would not have a say in drafting its terms. An example can be found in the Hague Convention for the Pacific Settlement of International Dispute of 1899. The convention invited certain non-signatory states to adhere to it and required them to make their adhesion to the Contracting Powers known by a written notification addressed to a particular government authority. See 1 Corbin, supra note 12, 1.4, at 13 n.2; see also, Albert A. Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum. L. Rev. 1072 (1953) (providing general background information on adhesion contracts as they first became so predominantly used); Friedrich Kessler, Contracts of Adhesion - Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943) (same).

n29. See E. Allan Farnsworth, 1 Farnsworth 4.26, at 478-79 (2d ed. 1990).

n30. Common law contract rules anticipated transactions between two individuals coming together to negotiate all terms of their contract. See Edward A. Dauer, Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction, 5 Akron L. Rev. 1, 1 (1972) ("The archetypal contract in American law is the "bargain' transaction, a relationship among two or more parties ...."); see also sources cited supra note 16.

n31. See Farnsworth, supra note 29, 4.26, at 479.

n32. The standard terms printed on the form are commonly referred to as "boilerplate." See id.

n33. Thus, a substantial amount of modern business takes place through the use of a contract, the terms of which are dictated by one party to the other, who has no voice in its formulation. See 1 Corbin, supra note 12, 1.4; Farnsworth, supra note 29, 4.26, at 479. Occasionally, however, the basic terms concerning quality, quantity, and price will be negotiable. See Farnsworth, supra note 29, 4.26, at 479. But the boilerplate is not subject to bargain and must simply be adhered to. See id.

For example, a person applies to take out a loan from a financial institution where, upon approval, the clerk inserts a limited amount of information and terms into blanks on pre-printed forms prepared by the bank. An attempt by the borrower to read the pre-printed provisions of the document will likely be met with resistance or impatience. Furthermore, reading the provisions is rather pointless since the only choice is between taking the offered terms or leaving them. This process can be repeated with appropriate modifications for many everyday transactions. Some common examples include purchase orders for cars, credit card agreements, and insurance policies. See id.

n34. See Standard Oil Co. of Cal. v. Perkins, 347 F.2d 379, 383 n.5 (9th Cir. 1965). The court defined the term as follows:

"Adhesion contract" is a handy shorthand descriptive of standard form printed contracts prepared by one party and submitted to the other on a "take it or leave it" basis. The law has rec-

ognized there is often no true equality of bargaining power in such contracts and has accommodated that reality in construing them.

Id; see also Smith v. Westland Life Ins. Co., 539 P.2d 433, 441 n.12 (Cal. 1975); Steven v. Fidelity & Cas. Co. of N.Y., 377 P.2d 284, 296-97 (Cal. 1962); Spence v. Omnibus Indus., 119 Cal. Rptr. 171, 172-73 (Cal. Ct. App. 1975); Farnsworth, supra note 29, 4.26, at 480.

n35. See 3 Corbin, supra note 12, 559C, at 436.

n36. See Smith, 539 P.2d at 441 n.12 (citing Steven, 377 P.2d at 297) ("The "adherer' cannot obtain the desired product or service save by acquiescing in the form agreement."); Spence, 119 Cal. Rptr. at 172-73; Farnsworth, supra note 29, 4.26, at 479.

n37. Arthur Allen Leff, Contract as Thing, 19 Am. U. L. Rev. 131, 143 (1970). In his article, Professor Leff states :

The adhesion contract theorists ... detected the non-process nature of some "contracts" (including consumer transactions) and thus created, so they thought, a new category, roughly speaking "that which would be a contract except that no bargaining process really shapes it." For describing such a beast the phrase "contract of adhesion" is not half bad. Its picture, such as it is, is not one of haggle or cooperative process but rather of a fly and flypaper.

Id.

n38. See Kessler, supra note 28 (discussing adhesion contracts). See generally Slawson, supra note 12 (discussing standard form contracts).

n39. See Farnsworth, supra note 29, 4.26, at 479; Restatement, supra note 14, 211 cmt. a; Ryan, supra note 16, at 2132 ("Adhesion contracts ... benefit both parties to the transaction[] ....").

n40. For example, these contracts can be tailored to fit office routines, the training of personnel, and the requirements of mechanical equipment. See Farnsworth, supra note 29, 4.26, at 479; Restatement, supra note 14, 211 cmt. a; Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 588 (1933) (stating that standardization helps make risks calculable and "increases that real security which is the necessary basis of initiative and the assumption of tolerable risks"); Ryan, supra note 16, at 2132 ("Adhering parties benefit from enforcement because goods and services are available at a lower cost because of reduced transaction costs.").

n41. See Farnsworth, supra note 29, 4.26, at 479; Restatement, supra note 14, 211 cmt. a. Attention can shift from dealing with innumerable possible variations to focus on making meaningful choices from a limited number of significant features such as transaction-type, style, quantity, and price. See Restatement, supra note 14, 211 cmt. a.

n42. Legal rules can be shaped to fit the particular type of transaction. The form also serves additional purposes such as record keeping, coordination, and supervision of transactions. See Restatement, supra note 14, 211 cmt. a.

n43. Farnsworth, supra note 29, 4.26, at 479.

n44. See 1 Corbin, supra note 12, 1.4, at 15; Ryan, supra note 16, at 2132 ("Adhesion contracts promote distribution of goods and services which would otherwise be restricted because of the cost of negotiating a tailored contract with each purchaser.").

n45. See 1 Corbin, supra note 12, 1.4, at 15. Moreover, this is from where the legitimacy of the adhesion contract is derived. See Estrin Constr. Co. v. Aetna Cas. & Sur. Co., 612 S.W.2d 413, 422-23 (Mo. App. 1981) (citing Colin Kelly Kaufman, The Resurrection of Contract, 17 Washburn L.J. 38, 48 (1977), and Kessler, supra note 28, at 632) ("The legitimacy of an adhesion contract derives, not from the social value of a transaction freely negotiated, but from the social value of goods produced more abundantly and cheaper from the reduced cost of legal and other distribution services."); Slawson, supra note 12, at 554. The standardization of forms was an economically efficient and sensible response to the speed of market transactions

and high cost of negotiations. See Kessler, supra note 28, at 631-32. The firm preparing the standard form to be used on a take-it-or-leave-it-basis can rationally calculate the cost and risks of performance, thus lowering overall costs. See id.

n46. See Farnsworth, supra note 29, 4.26, at 480. This imposition is assisted by the following circumstances: First, the party that proffers the form has the advantage of time and expert advice in the preparation of the form. On the other hand, the adhering party is completely or relatively unfamiliar with its terms, having no actual occasion to read the form, and is often expected not to do so. In addition, the chance to read the form may be diminished by the use of fine print and convoluted clauses. Second, dickering over contract terms may not take place between parties of equal power. More often, the case will be that there is no opportunity to bargain at all where the enterprise has such disproportionately strong economic power that it simply dictates the terms. See id.

n47. See 1 Corbin, supra note 12, 1.4, at 14.

n48. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (involving a contract containing a cross-collateral clause adhered to by a single welfare mother).

n49. A literal application of traditional contract law's emphasis on true assent would invalidate most adhesion contracts. Thus, enforcing contracts of adhesion prevented a mechanical application of classical contract law. As Professor Williston explains:

Few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what I called the contract ... The subject, therefore, is sui generis [of its own kind or class], and the rules of a legal system devised to govern the formation of ordinary contracts between man and man cannot be mechanically applied to it.

Samuel Williston, 7 Williston on Contracts 900, at 29-30 (Walter H. E. Jaeger ed., 1963).

n50. See 3 Corbin, supra note 12, 559C, at 436; Kaufman, supra note 45, at 51 (contrasting contract professors, "some of whom have used their influence to lobby for a return to the old days of the bargained for contract, rather than recognizing that modern realities have made change essential," with academic leaders in the field of torts) (emphasis added); Rakoff, supra note 12 (arguing that adhesion contracts should be presumed invalid).

Some courts, influenced by this perspective, have felt compelled to deny a particular writing that is a mass standardized form contract presented to a person who is dealing with a business on a take-it-or-leave-it basis the status of an adhesion contract. See, e.g., Powell v. Central Cal. Fed. Sav. & Loan Ass'n, 130 Cal. Rptr. 635, 642 (Cal. Ct. App. 1976); Commonwealth v. Monumental Properties, Inc., 314 A.2d 333, 339 (Pa. Commw. Ct. 1973), aff'd in part, 329 A.2d 812 (Pa. 1974). According to one scholar such decisions are wrong and usually explainable on the basis that the court was convinced the contracts in question were not necessarily unfair, and did not want to automatically thrown them out. See 3 Corbin, supra note 12, 559A, at 429, 559C, at 436.

n51. See 3 Corbin, supra note 12, 559A, at 429, 559C, at 436.

n52. See id. 559, at 401-02 (citing Guthman v. La Vida Llena, 709 P.2d 675 (N.M. 1985)); infra notes 65-66 and accompanying text (discussing the fairness issue).

n53. 709 P.2d 675 (N.M. 1985).

n54. See id.

n55. See id.

n56. See Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 788 (Cal. Ct. App. 1976) (citing Madden v. Kaiser Found. Hosps., 552 P.2d 1178 (Cal. 1976)):

The court observed that the legal rules which operate to absolve a party from the consequences of provisions contained in a contract of adhesion have focused upon terms imposed by a party with superior bargaining power which unexpectedly and often unconscionably limit the obligations or liabilities of the stronger party.

Id.; see also Smith v. Westland Life Ins. Co., 539 P.2d 433, 441 n.12 (Cal. 1975); Steven v. Fidelity & Cas. Co., 377 P.2d 284, 297 (Cal. 1962); Kessler, supra note 28, at 632; W. David Slawson, Mass Contracts: Lawful Fraud in California, 48 So. Cal. L. Rev. 1, 47 (1974).

n57. John D. Calamari & Joseph M. Perillo, The Law of Contracts 9-44, at 424 (3d ed. 1987).

n58. The enforceability of such contracts also touches on both the duty to read and the doctrine of unconscionability through which the courts play a role in protecting the adhering party from oppression. See 1 Corbin, supra note 12, 1.4, at 15. For a review of the duty to read, see Calamari & Perillo, supra note 57, 9-41 to 9-46. As for the doctrine of unconscionability, such a "determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made - i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Gillman v. Chase Manhattan Bank, N.A., 534 N.E.2d 824, 828 (N.Y. 1988) (internal quotations omitted) (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)). Procedural unconscionability "requires an examination of the contract formation process and the alleged lack of meaningful choice." Id. The focus of the examination "is on such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." Id. (citations omitted). Substantive unconscionability focuses on formation of the agreement. It "entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged." Id. at 829 (internal citation omitted). For further information on the doctrine of unconscionability see U.C.C. 3-302 (1996); Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51 (Ariz. 1995); State v. Avco Fin. Serv. of N.Y., Inc., 406 N.E.2d 1075 (N.Y. 1980); State v. Wolowitz, 468 N.Y.S.2d 131 (N.Y. App. Div. 1983); Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969); Resource Management Co. v. Weston Ranch, 706 P.2d 1028 (Utah 1985); James J. White & Robert S. Summers, Uniform Commercial Code ch. 4 (4th ed. 1995).

n59. Guthman, 709 P.2d at 678 (citations omitted).

n60. See Wheeler, 133 Cal. Rptr. at 783 ("[The determination that a standardized form contract] is adhesive is merely the beginning and not the end of the analysis insofar as enforceability of its terms is concerned. Enforceability depends upon whether the terms of which the adherent was unaware are beyond the reasonable expectation of an ordinary person or are oppressive or unconscionable."); 3 Corbin, supra note 12, 559A, at 429; see also supra note 58 (discussing the doctrine of unconscionability).

n61. See Telxon Corp. v. Hoffman, 720 F. Supp. 657, 662-63 (N.D. Ill. 1989) (recognizing that the finding of an adhesion contract does not end the analysis, since a court must further decide whether the contract is a good or bad adhesion contract); Melso v. Texaco, Inc., 532 F. Supp. 1280, 1297 (E.D. Pa. 1982) (quoting 3 Corbin, supra note 12, 559C, F-G) (showing the effect of finding a contract to be one of adhesion only means that courts must review its terms for fairness employing a similar judicial review as is employed when the issue of unconscionability arises), aff'd, 696 F.2d 983 (3d Cir. 1982); 3 Corbin, supra note 12, 559A, at 429; see also supra note 58 (discussing the doctrine of unconscionability).

n62. See American Home Improvement, Inc. v. MacIver, 201 A.2d 886 (N.H. 1964) (finding that adhesion contracts must be fair, unless the unfairness is so extreme that one party demonstrably received several times as much consideration as the other, in which case unconscionability will give a remedy); supra note 58 (discussing the doctrine of unconscionability).

n63. See American Food Management, Inc. v. Hensen, 434 N.E.2d 59, 62-63 (Ill. App. Ct. 1982) (quoting 3 Corbin, supra note 12, 599A (Colin Kelly Kaufman ed., Supp. 1980)).

n64. Calamari & Perillo, supra note 57, 9-44, at 424.

n65. See 3 Corbin, supra note 12, 559B, at 433. At a minimum, the terms of an adhesion contract cannot be fair unless there is a good reason for the party to impose a particular burden. See Melso, 532 F. Supp. at 1298 (citing 3 Corbin, supra note 12, 559G (Colin Kelly Kaufman ed., Supp. 1980)); Almers v. South Carolina Nat'l Bank of Charleston, 217 S.E.2d

135, 140 (S.C. 1975); see also 3 Corbin, supra note 12, 559E, at 440. Furthermore, fairness forbids giving one party all the benefits and the other all the burdens. See Melso, 532 F. Supp. at 1298 (citing 3 Corbin, supra note 12, 559F (Colin Kelly Kaufman ed., Supp. 1980)). The simplest cases for finding that there is no legitimate purpose for inserting a certain provision in an adhesion contract are those where the provisions give all benefits to the party providing the form and all burdens to the adhering party. One such class of cases is that in which one party includes in the adhesion agreement a term exculpating itself against its own negligence in harming another. See 3 Corbin, supra note 12, 559F, at 442. Courts will routinely strike down such clauses as unfair. See, e.g., Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 381-82 (1873); Fluor W., Inc. v. G & H Offshore Towing Co., 447 F.2d 35 (5th Cir. 1971); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); Bank of Ind., Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 109 (S.D. Miss. 1979); American Food Management, 434 N.E.2d at 62-63; C. & J. Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975) (en banc); Allen v. Michigan Bell Tel. Co., 171 N.W.2d 689, 692 (Mich. Ct. App. 1969) (finding that the court should inquire into the relative bargaining power of the parties and whether the challenged term is substantively unreasonable); K. D. v. Educational Testing Serv., 386 N.Y.S.2d 747, 751-52 (N.Y. Sup. Ct. 1976); J & J Food Centers, Inc. v. Selig, 456 P.2d 691, 693 (Wash. 1969); Blakely v. Housing Auth., 505 P.2d 151, 156 (Wash. Ct. App. 1973). Compare United States v. Atlantic Mut. Ins. Co., 343 U.S. 236 (1952) and Galligan v. Arovitch, 219 A.2d 463 (Pa. 1966), with Rutter v. Arlington Park Jockey Club, 510 F.2d 1065, 1068-69 (7th Cir. 1975) (finding superior ability of horse owners to insure against loss conclusive in upholding an agreement placing the loss on them).

n66. See Campbell Soup, 172 F.2d at 80. In such a case the contract can be entirely unenforceable by the adhering party. See 3 Corbin, supra note 12, 559A, at 429. However, when a contract is not any more one-sided than other typical contracts of adhesion encountered in the same line of commerce, justice is more often achieved when the courts strike down only the offending provision, or reform the provision so that its operation is fair. See, e.g., H & R Block, Inc. v. Lovelace, 493 P.2d 205, 215-16 (Kan. 1972) (Owsely, J., dissenting).

n67. See Gray v. Zurich Ins. Co., 419 P.2d 168, 172 (Cal. 1966) (quoting Kessler, supra note 28, at 637) ("In dealing with standardized contracts[, such as **shrink-wrap** agreements,] courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's "calling', and to what extent the stronger party disappointed reasonable expectations based on the typical life situation."); Stanley D. Henderson, Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice, 58 Va. L. Rev. 947, 991-92 (1972).

n68. Smith v. Westland Life Ins. Co., 539 P.2d 433, 441-42 (Cal. 1975); Bauer v. Jackson, 93 Cal. Rptr. 43, 50-51 (Cal. Ct. App. 1971); James R. McCall, Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance - Repossession and Adhesion Contract Issues, 26 Hastings L.J. 383, 417-18 (1974) (discussing the conflict over the significance of the awareness of the submitting party).

n69. Calamari & Perillo, supra note 57, 9-44, at 421; see also Stuckey, supra note 3. The following three cases were the earliest to employ such a rationale:

First, in Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960), a consumer brought an action for personal injuries against both the vendor and manufacturer of his car. The court held that a disclaimer of the implied warranty of merchantability appearing in small print on the reverse side of a contract was invalid as being contrary to public policy. See id. The case involved a standardized form designed for mass use that was imposed on a-take-it-or-leave-it basis. See id.; Calamari & Perillo, supra note 57, 9-44, at 418-21; Farnsworth, supra note 29, 4.26, at 489-90.

Second, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), involved an installment sales agreement containing a provision which resulted in a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. The court concluded that the provision in the installment sales agreement was unenforceable because the provision was unfair and the parties had unequal bargaining power. See id.; Calamari & Perillo, supra note 57, 9-44, at 420-21; Farnsworth, supra note 29, 4.28, at 501.

Third, and possibly most significantly, is Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971). This case involved a lease by an oil company to an individual where the court held that a provision in a contract should not be enforced on the grounds that the provision was contrary to public policy. See id. The importance of this decision lies in the following quote:

When a party can show that the contract which is ... to be enforced, was ... an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, ... the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy. The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting.

Id. at 148; see also Calamari & Perillo, supra note 57, 9-44, at 418-19.

n70. See supra notes 61-62 and accompanying text (discussing the fairness issue).

n71. See Ryan, supra note 16, at 2110 n.21.

n72. See Kessler, supra note 28, at 632; Slawson, supra note 56, at 47.

n73. The legislative attempts to deal with the situation are beyond the scope of this Note, but it is "doubtless a state could forbid the use of standard contracts in the software business." ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996). The American Law Institute and the National Conference of Commissioners on Uniform State Laws have appointed a drafting committee to create a supplement to Article 2 of the Uniform Commercial Code in a direct assault on the confusion surrounding the law of **shrink-wrap** agreements. The supplement aims to consolidate the law of **shrink-wrap** agreements and balance the competing interests of consumers with those of software manufacturers. See American Law Institute and National Conference of Commissioners on Uniform State Laws, Uniform Commercial Code Article 2B: Licenses (Draft May 1997) (discussing the proposed Article 2B of the U.C.C., which may emerge as the most significant law reform of this century in providing a legal infrastructure for the information age); Michael L. Rustad, The Uniform Commercial Code Proposed Article 2B Symposium: Commercial Law Infrastructure for the Age of Information, 16 J. Marshall J. Computer & Info. L. 255 (1997) (same); see also Covotta & Sergeeff, supra note 3, at 53; Finkelstein & Wyatt, supra note 9, at Part II (examining some of Article 2B's revisions); Terrence P. Maher & Margaret L. Milroy, Licensing in a New Age: Contracts, Computers and the UCC, Bus. L. Today, Sept-Oct. 1996, at 22 (same); Moore & Hadden, supra note 3, at 1 (discussing the potential impact of a new Article 2B); Richard Raysman & Peter Brown, Clickwrap License Agreements, N.Y. L.J., Aug. 11, 1998, at 3, 7 (examining some of Article 2B's revisions); William A. Streff, Jr. & Jeffery S. Norman, Courts, UCC Tackle **Shrink-Wrap** Licenses, N.Y. L.J., Oct. 14, 1997, at S6, S13-14 (same).

n74. See, e.g., Vault Corp. v. Quaid Software, Ltd., 655 F. Supp. 750 (E.D. La. 1987), aff'd, 847 F.2d 255 (5th Cir. 1988). The following is the actual language from the **shrink-wrap** license that was at issue in Vault Corp.:

[Vendor] is providing the enclosed materials to you on the express condition that you assent to this software license. By using any of the enclosed diskette(s), you agree to the following

provisions. If you do not agree with these license provisions, return these materials to your dealer, in original packaging within 3 days from receipt, for a refund.

Vault Corp., 847 F.2d at 257 n.2.

n75. See Covotta & Sergeeff, supra note 3, at 34. Other common terms are those limiting the warranties of the software vendor in an attempt to avoid liability for incidental or consequential damages. See Finkelstein & Wyatt, supra note 9, at 840 n.3; see also Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 105-06 (3d Cir. 1991) (finding that warranty disclaimer could not be incorporated into parties' agreement).

n76. See Ramos & Verdon, supra note 8, at 2 ("Shrinkwrap licenses generally provide that the purchaser does not "own' the software but, instead, has merely been granted a license ...."); Lloyd L. Rich, Mass Market Software and the Shrinkwrap License, 23 Colo. Law. 1321, 1321 (1994).

n77. See Lemley, supra note 4, at 1241-42 ("Vendors intend that, by opening the plastic wrap and actually using the software, customers will bind themselves to the terms of the **shrink-wrap** license."); Ryan, supra note 16, at 2110.

n78. See Lemley, supra note 4, at 1241 (stating that **shrink-wrap** agreements may take many forms).

n79. The software license typically includes the following provisions:

(i) a conspicuous notice of agreement clause stating that opening the **shrink wrap** or using the software constitutes agreement to the license's terms;

(ii) a title retention clause which, in effect, states that the user does not own the copy of the program s/he has contracted for, but takes possession subject to a perpetual license;

(iii) a strict anti-transfer clause prohibiting the user from lending, renting, or otherwise transferring the software to others;

(iv) an anti-modification clause which bars the user from modifying the software in any way;

(v) an anti-reverse engineering clause which prohibits the user from disassembling the program to discover how it works;

(vi) limited copying provision; and

(vii) the usual, and sometimes unusual, limitations or disclaimers of warranties and liability.

Stephen Fraser, Canada-United States Trade Issues: Back from Purgatory? Why Computer Software "**Shrink-Wrap**" Licenses Should Be Laid to Rest, 6 Tul. J. of Int'l & Comp. L. 183, 187-88 (1998). See id. Part II.A, footnotes and accompanying text, and Appendix I for more detailed information. See also Moore & Hadden, supra note 3, at 6.

n80. See Gordon, supra note 3; Fraser, supra note 79; Rich, supra note 76; Michael Schwarz, Note, Tear-Me-Open Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion, 7 Computer L.J. 261 (1986).

n81. Other examples include licenses printed on the outside of boxes containing software, licenses simply included somewhere within the box, or licenses shrink-wrapped with the owner's manual accompanying the software. See Lemley, supra note 4, at 1241. The terms may also be printed on an envelope within the package containing the disks. Software may also be pre-loaded onto a computer in which case acceptance of the agreement is often expressed by conforming to conduct as indicated in the text displayed on the computer next to the power switch or electric cord. The text will usually state that turning on the machine or plugging in the power cord and booting up the computer constitutes acceptance of the license. See Robert W. Gomulkiewicz & Mary L. Williamson, A Brief Defense of Mass Market

Software License Agreements, Rutgers Computer & Tech. L.J. 335, 340-41 (1996) (discussing license acceptance when software is pre-loaded on a computer).

n82. See Covotta & Sergeeff, supra note 3, at 35 n.3.

n83. See supra note 4 for information on the **shrink-wrap** process.

n84. See Covotta & Sergeeff, supra note 3, at 35 n.3 (citing Lemley, supra note 4, at 1241).

n85. See Lemley, supra note 4, at 1241 (explaining that, in theory, purchasers will read license terms before using software).

n86. The agreement itself may even require that the terms be read prior to opening the sealed package. For example, one such agreement provides:

You agree to the terms of this agreement by the act of opening the sealed package which contains ... the software ... Do not open the sealed package without first reading, understanding, and agreeing to the terms and conditions of this agreement. You may return the software for a full refund before opening the sealed package.

Richard H. Stern, **Shrink-wrap** Licenses of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?, 11 Rutgers Computer & Tech. L.J. 51, 85 (1985) (emphasis added). However, according to at least one article, it is more likely that the user will ignore the terms prior to using the product. See Finkelstein & Wyatt, supra note 9, at 840; see also Streff & Norman, supra note 73, at S6.

n87. See Covotta & Sergeef, supra note 3, at 35 n.3. However, for the remainder of this Note, the term "**shrink-wrap** agreement" will continue to be used interchangeably with the variety of terms used to refer to these agreements. See generally sources cited supra note 3.

n88. See Moore & Hadden, supra note 3, at 1.

n89. See Covotta & Sergeef, supra note 3, at 35 n.3; Elizabeth S. Perdue, Challenges of On-Line Contracts With a Point and a Click, Internet Newsl. (Dec. 1997) <www.ljx.com/Internet/97<uscore>12<uscore>click.html>.

n90. See David Einhorn, The Enforceability of "Tear-Me-Open" Software License Agreements, 67 J. Pat. & trademark Off. Soc'y 509 (1985); Lemley, supra note 4, at 1241 n.5 ("Exactly who first used a shrinkwrap license provision in a software transaction is a fact lost in the arcane mists of computer history. Certainly, they were a feature of the licensing landscape by the early 1980s [at which point the mass market software industry was still in its early stages].").

n91. The following is a good description of what **shrink-wrap** licenses were like in the late 1980s and early 1990s:

In the practice of software licensing, many off-the-shelf programs are "sold" at retail, pre-packaged, in sealed boxes, or wrapped cellophane packages. The complete terms of the purchase or license, as the case may be, are set forth on the package, and provide that the opening of the package constitutes acceptance of those terms.

Jeffrey B. Ritter, Scope of the Uniform Commercial Code: Computer Contracting Cases and Electronic Commercial Practices, 45 Bus. Law. 2533, 2549 (1990). However, notice of the terms is often printed on the box in which the software is sold with the complete licensing agreement located within the package, software, or both. See ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 644-45, 654 (W.D. Wis. 1996) (noting that ProCD placed notice of the license on the bottom of the box itself), rev'd, 86 F.3d 1447 (7th Cir. 1996) .

n92. See Lemley, supra note 4, at 1241; Ritter, supra note 91, at 2548-49.

n93. See Gordon, supra note 3, at 396-97; Ryan, supra note 16, at 2108; Schwarz, supra note 80, at 262 (noting the difficulty of obtaining signed contracts from each mass market purchaser, and how the **shrink-wrap** agreement solves the problem).

n94. See Covotta & Sergeeff, supra note 3, at 35 ("**Shrink-wrap** licenses [are used] ... in an attempt to prevent unauthorized duplication of the program, and to give the software owner a breach of contract action should the restrictions be violated.") (citing Lemley, supra note 4, at 1246); Thomas M.S. Hemnes, Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing, 71 Denv. U. L. Rev 577, 577-81 (1994); Streff, & Norman, supra note 73, at S6.

The strength and appeal of the **shrink-wrap** agreement lies in its avoidance of the "first sale doctrine." See 17 U.S.C. 109(a) (1994). The doctrine divests the copyright holder of control over the copy of his intellectual property transferred by sale. The **shrink-wrap** agreement avoids this by transforming the transfer into a licensing arrangement. For a discussion of the first sale doctrine and its effect on the software industry, see Step-Saver Data Sys. v. Wyse Technology, 939 F.2d 91, 96 n.7 (3d Cir. 1991); Ryan, supra note 16; and text accompanying notes 26-35. But see Daniel T. Brooks, Shrink-Wrapped License Agreements: Do They Prevent the Existence of a "First Sale"?, The Computer Law., Apr. 1984, at 17, 22 (noting that ambiguities in form licenses may result in a sale for copyright purposes).

n95. See Gomulkiewicz & Williamson, supra note 81 (discussing how end user license agreements and **shrink-wrap** licenses afford greater protection for software manufacturers); Deborah Kemp, Mass Marketed Software: The Legality of the Form License Agreement, 48 La. L. Rev. 87, 90-94 (1987) (noting that software manufacturers are trying to protect their proprietary rights in their computer programs); Rich, supra note 76, at 1321 ("Ever since the development of mass market computer software, companies have relied on the "shrinkwrap license' for protection of their intellectual property rights."). See generally Pamela Samuelson et al., A Manifesto Concerning the Legal Protection of Computer Programs, 94 Colum. L. Rev. 2308 (1994).

One circumstance in which a software publisher may desire greater protection than that afforded a copyright owner under intellectual property laws occurs when the information sought to be protected may not be subject to copyright or patent protection. Such a situation is also present when the laws permit the use of intellectual property without regard to the agreement of the intellectual property owner. See Streff & Norman, supra note 73, at S6.

n96. **Shrink-wrap** agreements differ from other adhesion contracts in that they do not invite a signature on the contract, but rather purport to infer acceptance from the offeree's conduct,

thus increasing the questions surrounding their enforceability. See generally Schwarz, supra note 80; Stern, supra note 86; see supra Part I (discussing adhesion contracts).

n97. A software vendor's standard printed **shrink-wrap** agreement form possesses all the characteristics of an adhesion contract. The purchaser is in no position to reject the proffered agreement, bargain with the software company, or, in lieu of the agreement, find another piece of software. The purchaser sitting at his computer trying to install the software is not at a bargaining table where, as in a private business transaction, the parties can debate the terms of their contract. As a result, one cannot help but conclude that these agreements manifest the characteristics of the so-called adhesion contract. For a similar conclusion and analysis of an arbitration clause contained in a hospital's admission form, see Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963) (finding the form to be an adhesion contract and the arbitration clause contained on the form not enforceable under adhesion contract principles).

n98. See David Bender, Computer Law 4A.02[4], at 4A-141 (1998) for a historical perspective on the development of computers. See also Ira V. Heffan, Copyleft: Licensing Collaborative Works in the Digital Age, 49 Stan. L. Rev. 1487, Part I (1997) (providing a more detailed examination of the historical development of computers); Pitet, supra note 2, at Part II.A (same).

n99. See supra note 4 for additional information on the **shrink-wrap** process.

n100. With respect to the ready availability to consumers, no comparable product on the market today places as many restrictions on its purchasers as do **shrink-wrap** agreements for computer software. See Fraser, supra note 79, at 183-84. **Shrink-wrap** agreements are special for many reasons; but they are singular in that they attempt to alter, if not create, a contractual relationship between the owner of the intellectual property rights in the product purportedly sold and the buyer, after the contract of sale has already taken place. Through the agreement, the software publishers attempt to control what the purchasers can and cannot do with the software they acquire and use. See id.

n101. See Horovitz, supra note 9, at 129 (noting the tremendous increase in use of personal computers due to more sophisticated and less expensive computer software).

n102. See Ramos & Verdon, supra note 8, at 1 ("Virtually no major mass-marketed software program is distributed today without a "shrinkwrap' ... license.").

n103. See Moore & Hadden, supra note 3, at 1 ("They [**shrink-wrap** agreements] are basically costless and if enforced they offer valuable protection to computer software vendors."); see also Ryan, supra note 16, at 2109 n.19 (discussing the considerable economic and commercial justifications of these types of agreements).

n104. See Morrill, supra note 5, at 516-17; Ramos & Verdon, supra note 8, at 2 ("**Shrink-wrap** licenses are an attractive substitute for negotiated licenses ....").

n105. See Ryan, supra note 16, at 2108-09; see also Maher & Milroy, supra note 73, at 25 (noting that there is widespread reliance on **shrink-wrap** agreements by the computer software companies in the mass-market distribution of software). Furthermore, there was a "desire to increase the sale of software, and hence increase the incentive to create new software, by curbing the duplication of rented software." Fraser, supra note 79, at 198 (quoting Kenneth R. Corsello, Note, The Computer Software Rental Amendments Act of 1990: Another Bend in the First Sale Doctrine, 41 Cath. U. L. Rev. 177, 197 (1991)). The software computer developers were utilizing the imposition of the **shrink-wrap** agreement terms to achieve this end.

n106. See Maher & Milroy, supra note 73, at 25; Moore & Hadden, supra note 3, at 1-2; Morrill, supra note 5, at 517.

n107. Such a characterization would avoid the first sale doctrine. See Maher & Milroy, supra note 73, at 25; Moore & Hadden, supra note 3, at 2 ("If effective, [the] transmogrification avoids the first sale doctrine and eliminates [certain rights] of the "owner' ...."); Morrill, supra note 5, at 517; discussion supra note 94 (addressing the first sale doctrine).

n108. See Ryan, supra note 16, at 2108. The importance of title retention is that it provides publishers with the right to prohibit certain uses of the software. See id. Thus, they can prevent software rental and its facilitation of piracy by contractually prohibiting transfer of the software. See id.

n109. The process by which a party disassembles or decompiles the object code and reverse engineers the source code to learn the algorithms, data structures, compatibility requirements, and other secrets of the program. See Moore & Hadden, supra note 3, at 2; Ramos & Verdon, supra note 8, at 2.

n110. See Maher & Milroy, supra note 73, at 25; Moore & Hadden, supra note 3, at 2; Morrill, supra note 5, at 517.

n111. See Maher & Milroy, supra note 73, at 25; Moore & Hadden, supra note 3, at 2; Morrill, supra note 5, at 517. For example, the licensor may seek to limit the licensee to internal use. See National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426 (8th Cir. 1993). The licensor may also restrict use in multi-user and network environments, or prevent use by third party service providers. See Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Cir. 1995).

n112. The first case involving a **shrink-wrap** agreement appeared as recently as 1988. See Vault Corp. v. Quaid Software, Ltd., 655 F. Supp. 750 (E.D. La. 1987), aff'd, 847 F.2d 255 (5th Cir. 1988). Since then only a handful more has reached the courts. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) ("Only three cases (other than ours) touch on the subject, and none directly addresses it.").

n113. See cases discussed infra Part III.A.

n114. See Thomas A. O'Rourke, Recent Developments in **Shrink-Wrap** Licenses, A.B.A. Sec. of Intell. Prop. Law, IPL Newsl., Summer 1996, at 7, 7-8.

n115. See Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 104 (3d Cir. 1991) (finding that license terms were not part of bargained for agreement); Arizona Retail Sys. v. Software Link, Inc. 831 F. Supp. 759, 762 (D. Ariz. 1993) (holding that the terms of the **shrink-wrap** agreement were not enforceable for the subsequent purchases); Finkelstein & Wyatt, supra note 9, at 841; infra Part III.A (discussing these cases).

n116. Most courts and commentators that have considered the issue have concluded that distribution of mass-market software with a **shrink-wrap** agreement constitutes a sale of goods rather than a license and is thus covered by Article 2 of the U.C.C. See, e.g., Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 673-76 (3d Cir. 1991); Step-Saver, 939 F.2d at 99-100; Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 742-43 (2d Cir. 1979); Synergistic Techs., Inc. v. IDB Mobile Communications, Inc., 871 F. Supp. 24 (D.D.C. 1994) (finding software transferred with hardware product was sold, not licensed); Arizona Retail, 831 F. Supp at 762; In re Amica, Inc., 135 B.R. 534, 552-53 (Bankr. N.D. Ill. 1992); Hospital Computer Sys. v. Staten Island Hosp., 788 F. Supp. 1351, 1360 (D.N.J. 1992); Neilson Bus. Equip. Ctr., Inc. v. Monteleone, 524 A.2d 1172, 1174-76 (Del. 1987); Photo Copy, Inc. v. Software, Inc., 510 So.2d 1337, 1338-39 (La. Ct. App. 1987); USM Corp. v. Arthur D. Little Sys., Inc., 546 N.E.2d 888, 894-97 (Mass. App. Ct. 1989); Dreier Co., Inc. v. Unitronix Corp., 527 A.2d 875, 879-80 (N.J. Super. Ct. App. Div. 1986); Communications Groups, Inc. v. Warner Communications Inc., 527 N.Y.S.2d 341, 343-44 (N.Y. Civ. Ct. 1988); Schroders, Inc. v. Hogan Sys., Inc., 522 N.Y.S.2d 404, 405-06 (N.Y. Sup. Ct. 1987); Fraser, supra note 79, at 204-13 (discussing contractual issues involved in **shrink-wrap** agreements including the classification of the software contract as a transaction in goods and sales); Horovitz, supra note 9; Lemley, supra note 4, at 1244-45 and accompanying footnotes (same). But see Finkelstein & Wyatt, supra note 9, at 843-44 n.26 (discussing the irony of calling the transaction a license in order to avoid the effect of the first sale doctrine, but then looking to the U.C.C. which specifically governs sales for relief).

n117. 939 F.2d 91(3d Cir. 1991).

n118. Although there are other cases dealing with software licensing that precede Step-Saver, this court was the first to actually rule on the enforceability of a **shrink-wrap** agreement. See Finkelstein & Wyatt, supra note 9, at 842 n.17. See, e.g., Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988).

Vault Corp. is the most celebrated decision on intellectual property preemption. See Lemley, supra note 4, at 1256. In Vault Corp., the Fifth Circuit held that federal copyright law

preempted provisions in a **shrink-wrap** agreement. See Vault Corp., 847 F.2d at 270. As a result, the court found that any licenses granted pursuant to state law were unenforceable because they interfered with the copyright privileges granted to consumers by federal law. See id. Therefore, the court was not called on to decide the enforceability of the actual **shrink-wrap** license agreement. See id. at 255. As one commentator notes, however, the court should have resolved the issue of whether the **shrink-wrap** was an enforceable adhesion contract before analyzing the statute. See Ryan, supra note 16, at 2126. Thus, this decision is "characterized by its failure to analyze **shrink-wrap** licenses as adhesion contracts." Id. For a more in depth look at this case, see Fraser, supra note 79, at nn.179-93 and accompanying text; Lemley, supra note 4, at nn.67-78 and accompanying text; Moore & Hadden, supra note 3, at 5-6; Morrill, supra note 5, at nn.71-84 and accompanying text.

n119. See Step-Saver, 939 F.2d at 93-94.

n120. The court described the purchases as taking place in the following manner:

First, Step-Saver would telephone TSL and place an order. TSL would accept the order and promise, while on the telephone, to ship the goods promptly. After the telephone order, Step-Saver would send a purchase order, detailing the items to be purchased, their price, and shipping and payment terms. TSL would ship the order promptly, along with an invoice. The invoice would contain terms essentially identical to those on Step-Saver's purchase order: price, quantity, and shipping and payment terms. No reference was made during the telephone calls, or on either the purchase orders or the invoices with regard to a disclaimer of any warranties.

Id. at 95-96. However, each copy of software sent to Step-Saver arrived in standard packaging with **shrink-wrap** license terms. See id. at 96.

n121. U.C.C. section 2-207 provides as follows:

(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.

U.C.C. 2-207 (1996).

n122. See Step-Saver, 939 F.2d at 98-104.

n123. The representations concerned both the compatibility of TSL's Multilink program with existing software, and the capabilities of the program. See id. at 95.

n124. The orders were allegedly placed in reliance on the representations. See id.

n125. See id. at 98.

n126. See id. at 94-95.

n127. The court assumed that the transaction was a sale while reserving opinion on the question of whether the contract could be construed as a license falling outside the U.C.C.'s provisions, "for the sake of simplicity." Id. at 101 n.27. But see sources cited supra note 116 (discussing the debate over the classification of mass-marketed software with a **shrink-wrap** agreement as a sale of goods or a license).

n128. See Step-Saver, 939 F.2d at 98 ("TSL has shipped the product, and Step-Saver has accepted and paid for each copy of the program. The parties's [sic] performance demonstrates the existence of a contract. The dispute is ... not over the existence of a contract, but the nature of its terms.").

n129. See supra note 121 (providing the language of this section).

n130. See Step-Saver, 939 F.2d at 99. The court described the rule as follows:

Under the common law of sales, and to some extent still for contracts outside the UCC, an acceptance that varied any term of the offer operated as a rejection of the offer, and simultaneously made a counteroffer. This common law formality was known as the mirror image rule, because the terms of the acceptance had to mirror the terms of the offer to be effective. If the offeror proceeded with the contract despite the differing terms of the supposed acceptance, he would, by his performance, constructively accept the terms of the "counteroffer", and be bound by its terms. As a result of these rules, the terms of the party who sent the last form, typically the seller, would become the terms of the parties's [sic] contract. This result was known as the "last shot rule". [sic]

Id.

n131. See Step-Saver, 939 F.2d at 103. The court held that because the license would materially alter the parties' agreement, it was not part of the agreement. See id. at 106.

n132. See Lemley, supra note 4, at 1251. But see Streff & Norman, supra note 73, at S13 (describing the Step-Saver court holding "as limited due to the unusual allegations involving, among other things, a reseller who allegedly objected to the terms of the license, and was told that the license did not apply to him ....") (parentheticals omitted).

n133. See Lemley, supra note 4, at 1251 ("Often the software is ordered by letter or telephone. Even if it is purchased over the counter, the purchase transaction is completed - and an agreement between retailer and customer is reached - at the point of sale.").

n134. This, of course, presumes it has been read. See supra notes 85-86 and accompanying text.

n135. See Lemley, supra note 4, at 1251.

n136. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (noting that Step-Saver touched on enforceability of **shrink-wrap** licenses but did not address the issue fully). As one commentator notes:

In Step-Saver the transactions were conducted face-to-face with sufficient opportunity to discuss the terms of the agreement. Therefore, there was no need for the court to decide whether a **shrink-wrap** agreement per se would be enforceable where it constituted the only expression of an agreement between the parties and where there was no opportunity for negotiation as to the terms of the agreement.

Finkelstein & Wyatt, supra note 9, at 846.

n137. See Finkelstein & Wyatt, supra note 9, at 846. The question of the enforceability of the **shrink-wrap** as an adhesion contract, which is the sole expression of the agreement between the parties, was confronted in the facts before the court in the ProCD decisions. See infra Part III.B (discussing the ProCD case and decisions).

n138. 831 F. Supp. 759 (D. Ariz. 1993).

n139. The court found that the parties had actually formed several contracts over a period of time and therefore analyzed the initial purchase and subsequent purchases of software separately. See id. at 763.

n140. See id. at 760.

n141. See id. at 763-66.

n142. See id. at 761. There was some dispute as to whether the order was for a live copy and an evaluative copy was sent in addition to the live copy, or vice versa. For the initial purchase, the court concluded that Arizona Retail had ordered a test copy, and in addition was sent a live copy. See id. at 763 ("It appears ... that [Arizona Retail] did order an evaluation disk with the intent to first test the system ...."). The live copy was sealed in an envelope that accompanied the evaluation disc. See id. at 764.

n143. See id. at 761. There was a printed message on the envelope containing the live copy that read: "by opening the envelope the user acknowledges "acceptance of this product, and [consents] to all the provisions [of] the Limited Use License Agreement.'" Id. at 764 (alterations in original).

n144. See id. at 761. Arizona Retail claimed that it believed the license agreement was "unenforceable." See id.

n145. However, terms such as the quantity of copies, the specific goods, and the price were not agreed upon during the telephone orders prior to the goods being sent. Furthermore, there was no discussion of the warranty disclaimers or the limitations on liability before the goods were sent, but they were included on the software packages sent. See id.

n146. See id. at 764.

n147. The court's finding that the terms of the **shrink-wrap** license were part of the contract was consistent with Step-Saver since notification afforded the buyer an opportunity to read the terms prior to contract formation. See id. at 763.

n148. See id. The importance lies in Arizona Retail's ordering of the evaluation diskette with the intention of testing it prior to buying a copy. This included a review of the license agreement, which was lacking with respect to the subsequent transactions. See id. at 760-61.

n149. The court summarized the usual business procedure for the subsequent purchases between Arizona Retail and TSL as follows:

[Arizona Retail] typically contacted TSL and ordered copies of PC-MOS over the telephone. During the order calls, the parties agreed on the specific goods to be shipped, the quantity of goods, and the price for the goods. TSL would accept the orders and promise to ship them promptly, and thereafter would ship the goods together with invoices. Although the parties apparently never discussed the license agreement, each copy of PC-MOS would have the license agreement attached to its packaging.

Id. at 764.

n150. See id. at 764-65.

n151. Noting similarity between the circumstances in Step-Saver and those surrounding the subsequent sales as laid out supra note 149, the court addressed TSL's three arguments that the license was enforceable. See id. at 766. TSL argued that the license was enforceable either as:

(1) a valid contract modification under U.C.C. section 2-209; or

(2) a conditional acceptance of Arizona Retail's offer to purchase; or

(3) non-material terms that, under section 2-207, became a part of their contract.

See id. at 764-66. The court found that by the time Arizona Retail received the software, contract formation had already occurred. See id. at 765. The court rejected all three arguments, respectively, as follows:

(1) express assent is required for any proposed modification to the pre-existing contract to be enforceable, and since such express assent was lacking here, it consequently failed as an effective modification;

(2) by agreeing to ship goods to Arizona Retail or by shipping the goods, TSL entered into a contract with Arizona Retail and was thus not free to treat the license agreement as a conditional acceptance; and

(3) the Step-Saver court rejected the exact same argument as does this court.

See id. at 764-66.

n152. See id. at 764.

n153. Specifically, the court identified the following considerations weighing against enforcing such an agreement:

Section 2-207 was drafted to ensure neutrality between contracting parties - i.e., to ensure that a party, usually the selling party, does not gain an advantage merely by being the last one to send a form... [Enforcement would allow] sellers to take advantage of the fact that purchasers often invest considerable time and money before ordering goods, and, therefore, are somewhat less likely to return goods once they arrive. In addition, the realities of the workplace sometimes might be used unfairly against purchasers ... In some cases ordered goods might never even be seen by the particular department or employee charged with ordering the goods or the goods might be needed as soon as they arrive. Requiring the seller to discuss terms it considers essential before the seller ships the goods is not unfair; the seller can protect itself by not shipping until it obtains assent to those terms it considers essential.

Id. at 766 (citations omitted).

n154. In Step-Saver, the court determined that the parties' conduct formed a contract and there was no opportunity for the buyer to read the license until after the contract was formed. See Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 98 (3d Cir. 1991). Thus, the terms were not held to be a part of the agreement. See id. at 105. Likewise, with regard to the subsequent purchases, the Arizona Retail court held that the terms in the license were not part of the agreement since contract formation did not take place after the buyer had an opportunity to read the terms. See Arizona Retail, 831 F. Supp. at 764-66. But, as to the initial purchase, the court found the license terms to be a part of the agreement since the buyer had an opportunity to read the terms prior to contract formation. See id. at 763-64.

n155. It is important, however, to note that just as the **shrink-wrap** agreement appeared on the face of the package delivered in the initial transaction, so too did it appear on each of the additional packages of software in the subsequent transactions. Nonetheless, the court found that Arizona Retail's opening of the **shrink-wrap** agreements in connection with the subsequent transactions did not constitute assent to its terms. See Arizona Retail, 831 F. Supp. at 764-66; Stuckey, supra note 3, at 62-63.

n156. See, e.g., Lemley, supra note 4, at 1252 ("Because of its schizophrenic result, Arizona Retail is at best limited authority for enforcing shrinkwrap licenses.").

n157. 908 F. Supp. 640 (W.D. Wis. 1996), rev'd, 86 F.3d 1447 (7th Cir. 1996).

n158. See Fraser, supra note 79, at 213 ("In the United States ... there was, until the Seventh Circuit Court of Appeal's [sic] decision in ProCD, Inc. v. Zeidenberg, a developing trend in the case law not to enforce **shrink-wrap** licenses ...."); Morrill, supra note 5, at 514.

n159. See ProCD, 86 F.3d at 1449.

n160. Until ProCD, the cases had not dealt directly with concerns of consumers who buy mass-marketed software over the counter. See Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991) (involving a value added retailer as the purchaser); Arizona Retail Sys. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993) (dealing with a transaction between a designer/seller of software and a retailer of computer systems); Vault Corp. v. Quaid Software, Ltd., 655 F. Supp. 750 (E.D. La. 1987), aff'd, 847 F.2d 255 (5th Cir. 1988) (observing that the product was sold to "software computer companies"); Fraser, supra note 79, at 213.

n161. The significance of ProCD would be different if viewed as an aberration based on unusual facts. See Morrill, supra note 5, at 514. For a more in depth analysis of the case and its unusual facts, see Morrill, supra note 5. See also Pitet, supra note 2, at 335-45; infra note 171 (laying out some of the unique facts of the case).

n162. See ProCD, 908 F. Supp. at 644.

n163. See ProCD, 86 F.3d at 1449 (noting that the database cost in excess of $ 10 million).

n164. The database was created by compiling information from over three thousand directories into a telephone book database that was then placed on CD-ROM. See ProCD, 908 F. Supp. at 644. The listings included both commercial and residential listings of full names, street addresses, telephone numbers, and zip codes. ProCD developed a search engine that comes with the software to be used in conjunction with the software to enable the user to find a desired listing by use of several different search commands. See id. at 645.

n165. See ProCD, 86 F.3d at 1449. ProCD decided to sell their software to personal users at a lower price than what they charged commercial users since they recognized that their product would be more valuable to some users than others. See id. For Judge Easterbrook's explanation of the necessity for this price discrimination see id. at 1450.

n166. See id. at 1449. In creating its software, ProCD had identified two distinct groups of potential users of its product. The first group was comprised of personal users who would be able to use the database instead of calling long distance information. See id. The second group was made up of commercial users, such as manufacturers and retailers, who are willing to "pay high prices to specialized information intermediaries for such mailing lists." Id.

n167. See ProCD, 908 F. Supp. at 644.

n168. See id. at 645, 651, 654. The agreement is mentioned on the outside of the box "in one place in small print ... [but it] does not detail the specific terms of the license." Id. at 645. The full text of the license is laid out in the users guide contained inside the box, beginning as follows:

Please read this license carefully before using the software or accessing the listings contained in the discs. By using the discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software, listings that may have been exported, the discs and the User Guide to the place where you obtained it.

Id. at 644.

n169. See id. The reminder notice flashes across the screen stating: "The listings contained within this product are subject to a License Agreement. Please refer to the Help menu or to the Users Guide." Id. at 644-45. There are other screens displaying additional warnings. See id. at 645.

n170. See ProCD, 86 F.3d at 1450.

n171. Zeidenberg was a private user and graduate student pursuing a Ph.D. in computer science. See ProCD, 908 F. Supp. at 644. Therein lies a unique element of this case. One commentary has noted that anyone who has the computer skills to reverse engineer a software program would be aware of the existence of **shrink-wrap** agreements and their prohibitions against such activity. See Ronald L. Johnson & Allen R. Grogan, Trade Secret Protection for Mass Distributed Software, The Computer Law., Nov. 1994, at 1, 9 ("When someone sufficiently experienced in the computer industry to be capable of sophisticated disassembly and reverse engineering of a program acquires commercial software, he or she is fully aware of the prohibitions on disassembly and reverse engineering contained in shrinkwrap license agreements."). Although it is not alleged that Zeidenberg reverse engineered ProCD's software, the pervasiveness of selling computer software contingent on a **shrink-wrap** agreement, coupled with Zeidenberg's ability to design his own software, supports the premise that he also would have been aware of the likely presence of **shrink-wrap** agreements. See ProCD, 908 F. Supp. at 649; Morrill, supra note 5, at 538 n.244; supra notes 87-102 and accompanying text (discussing the widespread use of **shrink-wrap** agreements); see also supra note 109 (describing the reverse engineering process).

n172. Zeidenberg purchased his copy of Select Phone in 1994, paying the lower price for a limited use version of the software. See ProCD, 86 F.3d at 1450. He decided he could "download data from Select Phone and make it available to third parties over the Internet for commercial purposes." ProCD, 908 F. Supp. at 645.

n173. See ProCD, 86 F.3d at 1450. Noting both the user guide in which the license was printed and the computer screens that reminded the user of the license, the District Court found that Zeidenberg was aware of the license at the time he used the software and that he disregarded it because he "did not believe the license to be binding." ProCD, 908 F. Supp. at 645.

n174. Zeidenberg partly compiled his own database by using data that had been loaded into his personal computer from Select Phone and "data from another company's product." Id.

n175. After purchasing an updated version of the software, Zeidenberg opened a business called Silken Mountain Web Services. See id. Zeidenberg created the corporation to make an Internet-based database of telephone listings available. See id.

n176. See id. Zeidenberg wrote his own software program to access the raw data, which allowed for a more limited search than could be conducted on the Select Phone software. See id.

n177. See id. at 643.

n178. The court found that the Supreme Court's decision in Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991) (holding that the white pages of a telephone directory are not sufficiently original to be copyrightable and that copyright protection does not extend to "sweat of the brow" works), defeated the copyright claim since ProCD's telephone listings lacked sufficient originality. See ProCD, 908 F. Supp. at 647. For further discussion of the copyright issue, see Morrill, supra note 5, at 529-30.

n179. See ProCD, 908 F. Supp. at 650-51 ("In analyzing the parties' transaction, [the court] will apply the U.C.C....."); see supra note 116 (discussing the debate over the classifi-cation of mass-marketed software with a **shrink-wrap** agreement as a sale of goods or a license).

n180. See ProCD, 908 F. Supp. at 651-52.

n181. The relevant provision of U.C.C. section 2-206 provides that "unless otherwise unambiguously indicated by the language or circumstances an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." U.C.C. 2-206 (1996).

n182. See ProCD, 908 F. Supp. at 651-52.

n183. See id. at 652. By taking the product off the shelf, bringing it to the counter, and exchanging money for it, the offer was accepted in a manner reasonable under the circumstances as called for in section 2-206(1)(a). The exchange of money for goods was also seen as conduct sufficient to create a contract under section 2-204. The relevant portion of section 2-204 reads: "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." U.C.C. 2-204 (1996). But see infra notes 197-199 (discussing the Seventh Circuit's analysis under this section, which resulted in a contrary holding on the issue of **shrink-wrap** agreement enforceability).

n184. See ProCD, 908 F. Supp. at 652. Thus, the court rejected ProCD's arguments that action beyond payment of the sales price was required to form the sales contract and that acceptance was contingent on Zeidenberg's rights of inspection, rejection or revocation. See id. The court confirmed that these rights do not apply in the context of contract formation, but rather work to ensure that "buyers will not be saddled with goods that have been damaged or are otherwise unsatisfactory upon arrival ... [but these rights do not] create a right to inspect additional written contractual terms." Id. (emphasis added).

n185. See supra note 121 (supplying the language of this section).

n186. Section 2-209 governs modification, rescission, and waiver by requiring the express assent of a party to any proposed contractual modifications. See U.C.C. 2-209 (1996).

n187. However, unlike the previous courts, this court felt it "unnecessary to consider in detail the distinction between sections 2-207 and 2-209 because the terms of the user agreement are not binding on defendants regardless which section is applied." ProCD, 908 F. Supp. at 655.

n188. The court noted that Step-Saver differed from the case at bar in that it involved a transaction between merchants, while ProCD involved a transaction between a consumer and merchant. See ProCD, 908 F. Supp. at 655. The court found that since the terms of the license in Step-Saver were not valid against a merchant and "keeping in mind the legislative goal behind 2-207, it is improbable to think that the drafters wanted consumers to be held to additional proposed terms in situations in which merchants were given protection." Id.; see also supra Part III.A.1 (discussing the Step-Saver case).

n189. The court found that, unlike the defendant in Arizona Retail, Zeidenberg did not know of the license terms at the time of contract formation. See ProCD, 908 F. Supp. at 654 ("The terms of the Select Phone user agreement were not presented to defendants at the time of sale."). Thus, the terms were not part of the initial contract. See id. Nor were they found to be binding as to the subsequent purchases. See id. at 654-55 (holding that where the vendor can change the terms between the times of the various sales, the consumer must be given an opportunity, prior to each and every sale, to review the terms). Furthermore, like the Arizona Retail court, Judge Crabb concluded that Zeidenberg did not give the requisite express assent for the license terms to be binding as modifications under section 2-209. See id. at 655; see also supra Part III.A.2 (discussing the Arizona Retail case).

n190. The court stated that, like any other party to a contract, "computer users should be given the opportunity to review the terms to which they will be bound each and every time they contract. Although not all users will read the terms anew each time under such circumstances, it does not follow that they should not be given this opportunity." Id. at 654.

n191. The detailed license terms were not on the exterior of the package. See supra note 168 and accompanying text. However, the remainder of the court's opinion focused on issues relating to federal preemption of the state law causes of action, holding that even if there were a binding contract, the terms of the **shrink-wrap** agreement were unenforceable because they were preempted by federal copyright law. See ProCD, 908 F. Supp. at 656-62.

n192. See ProCD, 86 F.3d at 1449. The court did not dispute the district court's ruling on the copyright infringement claim, but found that a breach of an enforceable contract had occurred. See id. at 1450-53. The Seventh Circuit also disagreed with the lower court in finding that federal copyright law did not preempt enforcement of the **shrink-wrap.** See id. at 1455; Covotta & Sergeeff, supra note 3, at 41, 44-52 (looking at the court's treatment of the federal preemption claim); D.C. Toedt, III, Counterpoint: Shrinkwrap License Enforceability Issues, The Computer Law., Sept. 1996, at 7, 8-9 (same); see also Lemley, supra note 4, at 1269-74 (discussing the federal preemption problem).

n193. The court discussed price discrimination schemes and the benefit of giving private users the ability to use powerful software at a reduced cost. See ProCD, 86 F.3d at 1449-50. According to the court, a negligible amount of revenue is derived from licensing to private users, resulting in the software developers licensing similar versions of their software to commercial users at much higher prices as compensation. See id. Thus, if a private user were to utilize the software for commercial purposes, the software developer would suffer great economic harm in the form of lost potential revenue. See id. This could result in either a disincentive to sell to private individuals or an incentive to sell to private individuals at a higher price in order to recover the costs of abuse of the **shrink-wrap** agreement. See id. The court also noted that the use of standardized **shrink-wrap** agreements permits an efficient means of mass production and distribution without having to deal with the practically impossible task of negotiating each individual transaction. See id. at 1451-52. Therefore, because **shrink-wrap** agreements were fast becoming an accepted means of doing business in the mass-produced software market, the court felt that the dynamics of the market necessitated the preservation of the **shrink-wrap** agreement. See id.

n194. See id. at 1450 ("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.").

n195. See id. at 1452. The court discussed the commonality and desirability of non-U.C.C. transactions of this sort. See id. at 1451. The court likened the nature of the transaction at bar to that of other cases in which the specific terms of the bargain are not disclosed until after the sale. See id. One example given was the sale of insurance where, at the time payment is made, the buyer and agent typically deal only with essential terms of the contract (such as amount of coverage, number of years, and premium amount). See id. Only later will the insured receive a policy outlining the remaining terms. See id. Other examples include the purchase of airline and concert tickets, where the buyer will often purchase the tickets over the

phone and only later have an opportunity to read the terms accompanying the use of the ticket. See id. In these instances, manufacturers choose not to put all of the contract terms on the outside of the package where other information, relevant to the transaction and of greater value to the consumer, could be placed. See id. In ProCD, the Seventh Circuit agreed that to do otherwise would require that certain terms, not of immediate interest to the average consumer (i.e., description of system requirements, potential incompatibilities, standard warranty, and license information) would take up most of the space on the package. See id.

The court then addressed the distinctive characteristics of the software market, noting that an increasing number of transactions takes place electronically where there is no tangible object to be transferred. See id. at 1451-52. Thus, many sales occur without any accompanying packaging or documentation. Since there is no box, there is no opportunity to present the license terms prior to the transfer of the product. See id. The court then asserted that to hold contractual terms invalid in transactions like these, simply because they were delivered to the purchaser after the purchase, "would drive prices through the ceiling or return transactions to the horse-and-buggy age." Id. at 1452.

n196. See id.; see also supra note 183 (supplying the relevant portion of this section).

n197. See ProCD, 86 F.3d at 1452 (quoting U.C.C 2-204(1) (1977)). The offeror is free to require anything as the acceptance, no matter how bizarre. See, e.g., Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893) (finding that acceptance occurred when the purchaser used the "carbolic smoke ball" daily for the set time period stated in the offer).

n198. See ProCD, 86 F.3d at 1452. According to the Seventh Circuit, although the district court was correct in saying that an offer to enter into a contract can be accepted simply by paying the purchase price, the U.C.C. allows for contract formation to take place in other ways. See id.

n199. See id. at 1452. The additional conduct ProCD required was for Zeidenberg to take the product home, have an opportunity to view the license terms, and then elect to keep it. See id. Thus, all terms known to Zeidenberg upon his acceptance would become part of the contract. See id. at 1450-52.

n200. See id. at 1450-55. Viewing **shrink-wrap** agreement terms as contract terms makes their inclusion as part of the contract dependent on when the contract was formed. See Morrill, supra note 5, at 533-34. Thus, the only terms a court will enforce are those terms known and agreed to by the parties at the time the contract was formed. See id. In finding that the contract was formed at the store when Zeidenberg did not know the terms of the license, the district court in ProCD held that they were not a part of the contract and thus unenforceable. See ProCD, 908 F. Supp at 654. However, in moving the point at which the contract was formed forward to when Zeidenberg either knew of the license terms or had a reasonable opportunity to know of them, the Seventh Circuit found the license terms to be a part of the contract and hence enforceable. See ProCD, 86 F.3d at 1452-53; Morrill, supra note 5, at 533-34.

n201. See Covotta & Sergeeff, supra note 3, at 41; Finkelstein & Wyatt, supra note 9, at 850.

n202. The consumer sale is one characterized by a total inequality in bargaining positions. The terms of the sale are offered on a take-it-or-leave it basis typical of the adhesion contract. See Pitet, supra note 2, at nn.158-73 and accompanying text (discussing how the holding in ProCD exploits the consumer); see also supra Part I (discussing adhesion contracts); infra note 220 (addressing, generally, the criticism).

n203. Another 1996 decision, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), appeared to acknowledge the validity of these types of agreements without providing any analysis. CompuServe, an Internet service provider, required those subscribers who placed objects of shareware on the system for others to use and buy to enter a shareware registration agreement ("SRA"). "The SRA asks a new shareware "provider' ... to type "AGREE' at various points in the document, "in recognition of your online agreement to all the above terms and conditions.'" Id. at 1260-61 (alteration in original). One such term provided for the application of Ohio law. See id. at 1260. The court held that a Texan subscriber was subject to jurisdiction in Ohio where "assent to the SRA was first manifested at [the subscriber's] computer in Texas, then transmitted to the CompuServe computer system in Ohio[]" because of the contacts with Ohio through email to CompuServe. Id. at 1261, 1268-69.

n204. 105 F.3d 1147, 1149 (7th Cir. 1997), cert. denied, 118 S. Ct. 47 (1997).

n205. The court succinctly set forth the pertinent facts pertaining to the transactions as follows: "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." Gateway 2000, 105 F.3d at 1148. The plaintiff had received notice that the terms would govern the relationship unless the computer was returned within the allotted time, which the plaintiff failed to do. See id.

n206. Id.

n207. See id. at 1150-51.

n208. See id. A more recent case, Hotmail Corp. v. Van Money Pie, Inc., No. C98-20064JW, 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. April 20, 1998), involved issues similar to those in Gateway 2000 surrounding enforceability of these agreements on the Internet. See Raysman & Brown, supra note 73, at 7. Hotmail is a Silicon Valley company providing free electronic mail services on the World Wide Web to over ten million customers. See Hotmail, 1998 U.S. Dist. LEXIS 10729 at *2. In order to make use of the services, Hotmail requires that one must agree to their terms of service, which is done via a click-wrap agreement. See id. at *4. After an opportunity to view the terms on the computer screen, the customer clicks a box indicating his assent to be bound thereby. See Samson, supra note 3, at 1. The court held that "the evidence supports a finding that plaintiff will likely prevail on its breach of contract claim ...." Hotmail, 1998 U.S. Dist. LEXIS 10729 at *16-17. To reach this conclusion, the court first found that the contract in question involved an enforceable agreement, thereby indicating its willingness to uphold the validity of a click-wrap agreement. See id. This is true since one agrees to be bound by Hotmail's terms of service solely by clicking "I agree" after being presented with an opportunity to view the terms of service. See Samson, supra note 3, at 1. However, this ruling has only limited significance since it was not a formal decision specifically dealing with the enforceability of click-wrap agreements. See Raysman & Brown, supra note 73, at 7 ("The vast majority of the order focused not on the defendants' alleged breach of contract but on the defendants' dilution of Hotmail's trademark, violation of the Computer Fraud and Abuse Act, common law unfair competition, fraud and misrepresentation and trespass to chattel.").

n209. The result of this ruling is that software vendors, at least in the Seventh Circuit, now have firmer contractual protections against being sued by buyers seeking to recover the full value of their purchases. See Covotta & Sergeeff, supra note 3, at 53 n.93.

n210. First, both products came with terms making the same kind of accept-or-return offer. See Gateway 2000, 105 F.3d at 1147. Second, the court discussed the advantages of placing the terms inside a product's package as compared to a sales agent reading aloud a multiple page agreement at the time of purchase. See id. Third, the court gave weight to industry practice in which people pay for products with terms to follow. See id.

n211. See supra note 171.

n212. See Raysman & Brown, supra note 73, at 7.

n213. See Covotta & Sergeeff, supra note 3, at 53; Toedt, supra note 192, at 9.

n214. See infra Parts III.D, IV.

n215. Neither have any of them applied the principles of adhesion contracts to a **shrink-wrap** agreement. See, e.g., National Basketball Assn. v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (copyright preemption issue); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Architectronics, Inc. v. Control Sys., Inc., 935 F. Supp. 425 (S.D.N.Y. 1996) (copyright preemption issue).

n216. See Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), cert. denied, 118 S. Ct. 47 (1997). The one case specifically following the decision is also a Seventh Circuit case. See supra notes 204-12 and accompanying text (discussing this case).

n217. See Step-Saver Data Sys. v. Wyse Technology, 939 F.2d 91, 105-06 (3d Cir. 1991) (holding that under section 2-207 the terms of a **shrink-wrap** agreement did not become a part of the parties' sales agreement); Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988) (holding **shrink-wrap** agreement enforceability was preempted by federal copyright law); Arizona Retail Sys. v. Software Link, Inc., 831 F. Supp. 759, 762 (D. Ariz. 1993) (holding **shrink-wrap** agreement invalid without express assent of both parties under section 2-209).

n218. See Covotta & Sergeeff, supra note 3, at 53. For suggestions and recommendations to help parties increase the likelihood that the terms and conditions of a **shrink-wrap** agreement will be enforced, see Stuckey, supra note 3, at 5-6; Perdue, supra note 89; Ramos & Verdon, supra note 8, at 5; Raysman & Brown, supra note 73, at 7; Samson, supra note 3, at 4; Toedt, supra note 192, at 11.

n219. See supra Part II (discussing **shrink-wrap** agreements in general and their background, goals, and purposes).

n220. Much of the criticism has been directed at flaws in the Seventh Circuit's contract formation analysis focusing on the following issues: classification of the transaction as a sale of goods; the U.C.C. and money-now-terms-later transactions; vendor's method of acceptance as master of the offer; and prominence of the notice of the terms. See generally, e.g., Covotta & Sergeeff, supra note 3; Finkelstein & Wyatt, supra note 9; Fraser, supra note 79; Morrill, supra note 5; Pitet, supra note 2.

n221. See Covotta & Sergeeff, supra note 3, at 54.

n222. See supra Part I (discussing adhesion contracts).

n223. See Jacqueline Savaiano, Grade Expectations, Entertainment Wkly., June 30, 1995, at 102 (stating that "1994 software retail sales were $ 4 billion in the U.S. alone").

n224. In most of these transactions, the product is not prevented from functioning, as is the case when the money-now-terms-later contract is a **shrink-wrap** agreement.

n225. See Rich, supra note 76, at 1322 ("In most transactions, the purchaser does not become aware of the terms of the license until after the sale is consummated ....").

n226. See Lemley, supra note 4, at 1288 nn.215-26 and accompanying text ("Shrinkwrap licenses represent a further step away from the basic idea of contract law, and stretch even the concept of blanket assent beyond its limits."). Furthermore, this may be the strongest challenge to the market's use of adhesion contract **shrink-wrap** agreements since ""consent' is coerced and not truly voluntary in [this type of] marketplace." Jerry Kang, Information Privacy in Cyberspace Transactions, 50 Stan. L. Rev. 1193, 1265 (1998). But see Ryan, supra note 16, at 2127-31 (discussing further the assent issue and concluding that the enforcement issue under a **shrink-wrap** agreement is whether opening the package or using the software constitutes sufficient awareness of the agreement to satisfy the assent requirement, since "the assent required to validate [adhesion contracts] is not "true' assent but rather a nominal assent or simple awareness by the adhering party that a contract has been executed").

n227. See Covotta & Sergeeff, supra note 3, at 35.

n228. See Rich, supra note 76, at 1321 ("Acceptance of the license terms and conditions is acknowledged by the purchaser when the purchaser opens the software **shrink-wrap** or other packaging, or by using the software.").

n229. See Morrill, supra note 5, at 517.

n230. See id. at 514.

n231. See Pitet, supra note 2, at 327 ("While lower prices and more favorable license terms for software consumers are laudable goals, they do not justify the disregard of established contract law ....").

n232. See, e.g., Ryan, supra note 16. Ryan's Note argued that **shrink-wrap** agreements are enforceable adhesion contracts and thus concluded "that **shrink-wrap** licenses present a workable solution to the software rental companies' facilitation of piracy." Id. at 2110. However, this argument may be criticized for its broad holding based on a flawed analysis of adhesion contract principles. The adhesion contract analysis focused on privity of contract, assent, and fairness and commercial justification, but erred in that it did not address the issue of disparity in bargaining power between the parties, the determinative factor in a contract of adhesion analysis. See id. at Parts III.A-C. Furthermore, the conclusion was reached from the perspective of computer software publishers and their commercial need to prevent piracy of mass-marketed software.

n233. See supra Part I.A (discussing principles of adhesion contracts).

n234. See supra Parts III.B-D (discussing the ProCD case and the court's holding).

n235. See supra Part I (discussing adhesion contracts).

n236. The court in ProCD only saw the issue as one of contract formation, i.e., whether an enforceable contract was formed by the terms in the **shrink-wrap** agreement. See supra Part I.C (discussing when a contract of adhesion is unenforceable).

n237. See supra Part I.C (discussing when a contract of adhesion is unenforceable).

n238. See supra note 59 and accompanying text.

n239. See supra notes 61-66 and accompanying text.

n240. See Maher & Milroy, supra note 73, at 22; Pitet, supra note 2, at 326 (noting that it is not uncommon for a consumer to ponder the apparent unfairness of these purchases wondering whether something like this is enforceable).

n241. See Gomulkiewicz & Williamson, supra note 81, at 357 ("Most purchasers of off-the-shelf software, however, care little, if at all, about the right to reverse engineer, and they certainly are not interested in paying more money to acquire this right."); Maureen A. O'Rourke, Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms, 45 Duke L.J. 479, 516 (1995) (stating that "it is questionable whether the end user wishes to purchase anything more than the functionality that is obtained by running the object code"); cf. Lemley, supra note 4, at 1262 n.103 (opining that, while most purchasers do not intend to engage in reverse engineering, it is an open question as to whether they expect to have that option when they make the purchase).

n242. Cf. Wheeler v. Saint Joseph Hosp., 133 Cal. Rptr. 775 (Cal. Ct. App. 1976) (involving an arbitration clause included on a hospital admittance form).

n243. But see Ryan, supra note 16, at 2127-35 (discussing these issues and concluding that as an adhesion contract requiring only a nominal assent to initiate an adhesion contract review for fairness and commercial justification, the **shrink-wrap** agreement should be enforceable).

n244. For example, America Online has bought out portions of CompuServe. See Kang, supra note 226, at 1267.

n245. Moreover, in the context of the computer industry the doctrine of unconscionability would seem rather easy to apply. See Gary E. Clayton et al., The Year 2000 Headache "Two Thousand Zero-Zero. Party's Over. Oops, Out of Time.", 28 Tex. Tech. L. Rev. 753 (1997). "Computers are by their very nature a scientific and technical area. Naturally, there are those who excel in this area and those who, despite their continuous efforts, cannot grasp the concepts and rely on others to help them choose appropriate equipment and software." Id. at 784. Thus, it seems more likely in such situations that an unconscionability cause of action could be maintained. See supra note 58 (discussing the doctrine of unconscionability).

n246. See Kang, supra note 226, at 1267.

n247. See Jennifer M. Franco, Note, Undermining the Protection of Health Insurance: The Preexisting Condition Clause, 30 New Eng. L. Rev. 883, 905 n.198 (1996) ("The trend is to relieve parties from onerous conditions imposed by such contracts.") (citation omitted).

n248. See Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 94 (N.J. 1960); see also, Ponder v. Blue Cross of S. Cal., 193 Cal. Rptr. 632 (Cal. Ct. App. 1983) (involving a standardized contract that was prepared in its entirety by a major insurance company whose bargaining power was superior to individual members of the general public). But cf. Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., 47 Cal. Rptr. 518 (Cal. Ct. App. 1965) (holding valid a disclaimer of liability for consequential damages due to negligence by the seller of a new aircraft to an airline, since it lacked the elements of an adhesion contract, most significantly, disparity in bargaining power).

n249. See Christian Joerges, History as Non-History: Points of Divergence and Time Lags Between Friedrich Kessler and German Jurisprudence, 42 Am. J. Comp. L. 163, 192 (1994).

n250. See supra note 171 (discussing the particular facts of ProCD).

n251. See Pitet, supra note 2, at 327 ("While lower prices and more favorable license terms for software consumers are laudable goals ... they should not come at the expense of the individual consumer ... The holding in ProCD, however, produces this inequitable result.").

n252. This is true even if the consumer is a small corporation rather than an individual, since the small corporation is still generally in no position to alter the terms of the **shrink-wrap** agreement. See Lemley, supra note 4, at 1287; see also 3 Corbin, supra note 12, 559C, at 437 ("Bargaining power floating in the air, so to speak, but not capable of proximately causing any difference in the ultimate contract terms is as negligence floating in the air, irrelevant to any proper outcome of a case.").

n253. In order to keep pace with emerging technology, it is important to maintain flexibility in the manner in which computer software publishers can contract with those who buy their products. See Covotta & Sergeeff, supra note 3, at 42; see also supra Part I.B (discussing the advantages and disadvantages associated with standardization); Part II.B (discussing the background, goals, and purposes of **shrink-wrap** agreements).

n254. See Covotta & Sergeeff, supra note 3, at 42; Pitet, supra note 2, at 327 (stating that the ProCD holding produces the inequitable result of transactional efficiency at the expense of the individual consumer). But see Gomulkiewicz & Williamson, supra note 81, at 344 n.31 (listing reasons why this type of an agreement is fair and so should be enforced).

n255. See supra note 231.

n256. See supra Part I (discussing adhesion contracts).

n257. See supra Part III (discussing the existing jurisprudence on **shrink-wrap** agreements).

n258. See supra note 171 for the proposition that Zeidenberg was not an average consumer.

n259. The equality of bargaining power is what matters to prevent a particular contract from being one of adhesion. See 3 Corbin, supra note 12, 559C, at 436.

n260. See supra Part III.B for the facts of the case.

n261. See Morrill, supra note 5, at 550 (concluding that the case creates bad precedent since "the average consumer lacks the special knowledge that Zeidenberg possessed").

n262. See supra notes 1-2 and accompanying text (describing an account that is typical of the consumer experience).

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