Richmond Journal of Law and Technology

Volume 3 | Issue 1 Article 8

1997

ProCD, Inc. v. Zeidenberg: Enforceability of Shrinkwrap Licenses Under the Copyright Act

Jennifer L. Hawkins
University of Richmond

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By Jennifer L. Hawkins[*]

October 24, 1997

Cite as: Jennifer L. Hawkins, ProCD, Inc. v. Zeidenberg: *Enforceability of Shrinkwrap Licenses Under the Copyright Act*, 3 RICH. J.L. TECH. 6 (1997) <http://www.richmond.edu/~jolt/v3i1/hawkins.html>[**].

{1}"*I didn't read all of the shrink-wrap license agreement on my new software until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion.*"[1]

I. INTRODUCTION

{2}Article I of the U.S. Constitution grants Congress the power to make laws "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] Prior to 1976, Congress only passed laws to protect discoveries after publication. Before publication, discoveries were protected by common law provisions under the control of the individual states.

{3}Congress passed the Copyright Act of 1976 which removed the distinction between pre-publication and post-publication copyright protection and extended the length of the protection to the lifetime of the author plus fifty years.[3] Because of the 1976 Act, the Federal government regulates all copyright protection. The individual states no longer have any regulatory power.[4]

{4}The 1976 Act did not expressly identify computer programs and computer technology. Congress was awaiting a report by the Commission On New Technological Uses (CONTU) before setting out how to protect computer programs and technology. CONTU's stated objective was "to assist in the resolution of issues relating to the impact of the computer on the use of copyrighted works."[5] In 1980, Congress amended the 1976 Copyright Act and extended copyright protection to computer programs based on the recommendations of CONTU.[6]

{5}A software program contains many elements. Included in a computer program are "a written work (e.g., the program code), a functional work (the tasks a computer executes while running the software), and a visual, physically manipulated work (the "look and feel" of the software's user interfaces)."[7] Federal copyright protects most but not all of the elements of a program. Both source code and object code are protected. [8] Copyright protection does not extend to systems, processes, and methods of operations.[9]

{6}Since the copyright fails to protect all aspects of the software program, manufacturers have augmented federal copyright protection with "shrinkwrap licenses." These licenses, which are either found on the outside of the box or are referenced on the shrinkwrap, contain restrictions on the use of the software program. These licenses are known as "shrinkwrap licenses" because the buyer is considered to have accepted the terms by opening the shrinkwrap encasing the package.

{7}This case note discusses the impact of *ProCD, Inc. v. Zeidenberg*[10] on shrinkwrap licenses. Section II discusses shrinkwrap licenses in greater detail and discusses the two major cases involving shrinkwrap licenses prior to the *ProCD* decision. Section III evaluates the reasoning and analysis behind the district court's decision in *ProCD*. Section IV analyzes the reasoning behind the reversal of the district court's ruling by the Court of Appeals for the Seventh Circuit. Finally, Section V questions the enforceability of shrinkwrap license if the buyer is not able to return the opened software to the retail store where it was purchased.

II. THE STATE OF THE LAW PRIOR TO *ProCD, INC. v. ZEIDENBERG*

A. Shrinkwrap Licenses

{8}With the advent of retail computer stores, most software is no longer sold directly from the manufacturer to the buyer. The addition of the third party retailer complicated agreement between the parties. When only the software manufacturer and buyer participated in contract negotiations, the manufacturer would try to increase protection on the software program by restricting the buyer's use of the program. The parties would discuss the additional restrictions during contract negotiations and the terms would be incorporated into the contract. Now, since most software is purchased from a third party, the manufacturer employs shrinkwrap licenses to introduce the additional use restrictions into the purchase contract.

{9}Shrinkwrap licenses usually contain provisions seeking to (1) prohibit unauthorized copies; (2) prohibit software rental; (3) prohibit reverse engineering and modifications of the software; (4) limit the use of software to one central processing unit; (5) disclaim warranties; and (6) limit liability.[11] Most manufacturers attach a reference to these additional license terms to the outside of the shrinkwrap encasing the software box. This reference usually does not list the additional terms. Rather, it directs the buyer to read the terms found inside the package. This license is an adhesion contract that claims to be effective once the buyer opens the shrinkwrap and keeps the software.[12] If the buyer decides not to accept the terms he must return the software to the retailer from which the software was purchased. Often, however, the buyer has to open the shrinkwrap to be able to read the terms of the license.

{10}Until the decision in *ProCD v. Zeidenberg*, the courts have never specifically addressed the validity of shrinkwrap licenses. The two leading cases which mention shrinkwrap licenses are *Step-Saver Data Systems, Inc. v. Wyse Technology*[13] and *Arizona Retail Systems, Inc. v. Software Link, Inc.*[14] Neither case, however, focus on the enforceability of the license.

1. *Step-Saver Data Systems, Inc. v. Wyse Technology*

{11}Step-Saver Data Systems, Inc. configured and sold computer systems to customers. System software was purchased from The Software Link, Inc. (TSL) and computer terminals were bought from Wyse Technology. The systems had serious operating problems. As a result, the customers complained and brought suit against Step-Saver. In response, Step-Saver filed suit against TSL and Wyse Technology, alleging breach of warranty.[15] The lower court granted summary judgment in favor of the defendants on three causes of action.[16] The lower court jury found in favor of the defendant on the three remaining issues: breach of express warranties, breach of implied warranties of merchantability and of fitness for a particular purpose, and breach of contract.[17]

{12}The Court of Appeals for the Third Circuit affirmed the lower court's decision regarding the breach of contract provisions but reversed its determination of the legal effect of the shrinkwrap license.[18] Since Step-Saver purchased the software program over the telephone, the court ruled that the contract was

completed when the seller performed by sending the software to the buyer. During the conservation culminating in the order, the seller did not mention any additional terms to be incorporated into the contract. The buyer only learned about these additional terms after payment and delivery. The court found the buyer never expressly assented to the license agreement, as its terms were unknown to him when he accepted the contract. Additionally, the court found that it could not infer the buyer's assent to the terms of the license from his conduct in continuing with the agreement.[19] Since the buyer never expressly assented, the shrinkwrap license was not part of the contract and the terms of the license could not be enforced.

2. *Arizona Retail Systems, Inc. v. Software Link, Inc.*

{13}The Software Link sent a demonstration copy and a 'real' copy of the software program to a prospective customer, Arizona Retail Systems, Inc. The complete shrinkwrap license terms were printed on the outside of the envelope containing the 'real' copy of the disk.[20] After trying the demonstration copy, the user decided to purchase the 'real' software program copy and called the seller to complete the transaction. Over time, the buyer ordered additional copies of the software over the telephone without first receiving demonstration copies . The issue before the court was whether the shrinkwrap license was incorporated into all of the contracts. The court held the shrinkwrap license was incorporated into the first contract for purchase.[21]

{14}The court limited incorporation of the terms of the shrinkwrap license to the first contract because it was the only contract where the buyer could read all the terms of the contract prior to telephoning the seller and completing the initial purchase. Prior to telephoning the seller to complete the initial purchase, the buyer could read all the terms of the shrinkwrap license printed on the outside of the software package in buyer's possession. The silence of the buyer as to these additional license terms was his assent to their inclusion into the contract. The license terms were not included in subsequent contracts, however, as the buyer did not know the terms of the license prior to making the contract. The court ruled, that the buyer must impliedly assent to the terms in each subsequent contract.[22] If the buyer is not given this opportunity to expressly agree to the terms of the license, the buyer is not bound by their terms.[23] Thus, the court ruled the shrinkwrap license was not incorporated into any contract but the original.[24]

III. *ProCD, Inc. v. ZEIDENBERG*

A. Factual Background

{15}ProCD, Inc. spent millions of dollars creating a comprehensive national telephone listing database. Their database contained the full names, street addresses, telephone numbers, zip codes and industry or "SIC" codes for more than 95,000,000 residential and commercial properties. ProCD included this database in its SelectPhone™ program. The company sold the program to three different groups of consumers at three different prices. The public could purchase a limited use version of the program which ProCD sold at a lower price but restricted its use to personal use only. For a higher price, a commercial version of the program was available. This version did not have the same restrictions on use, but it cost much more than the personal use version. Finally, ProCD sold access to the SelectPhone program to Internet users through America Online.[25] ProCD held a federal copyright on the SelectPhone program. In order to successfully participate in price discrimination, ProCD had to restrict the use of the program. As a result, all versions of the program had a shrinkwrap license to further limit use. The shrinkwrap license on the personal use version contained the most restrictions on the use of the program, and it is this version of the license at issue in this case.

{16}The terms of the shrinkwrap license were found inside the package in the user guide.[26] The shrinkwrap license did not detail the specific terms of the license; instead the SelectPhone box only "mentioned the agreement in one place in small print."[27] Also, a screen reminded the user of the personal use version of these additional terms each time a search was conducted by the user.[28]

{17}Zeidenberg purchased his first copy of the SelectPhone program at a retail computer store. In March and April 1995, he also purchased two updated versions of the SelectPhone program containing expanded databases.[29] Zeidenberg ran the search and access program from each version of the SelectPhone software to download each program's database listings to one comprehensive database on his computer's hard drive. This combined database also included listings downloaded from another company's software. Zeidenberg wrote a new software program to access and search the combined database. Finally, he formed a corporation, Silken Mountain Web Services, Inc. (SMWS). The new corporation sold access to the database to Internet users.[30]

{18}ProCD found SMWS's site on the Internet and contacted Zeidenberg about ending access to the database. After he refused, ProCD filed an action against Zeidenberg and SMWS in Wisconsin District Court for the Western District. The action claimed that the defendants violated the Copyright Act, Wisconsin's Computer Crimes Act, and Wisconsin contract and tort law in their use of the SelectPhone database.[31] The court granted a temporary injunction which prohibited defendants from distributing SelectPhone listings over the Internet.[32]

B. Lower Court Opinion

{19}The United States District Court for the Western District of Wisconsin ruled in favor of Zeidenberg on the cross-motions for summary judgment. The court granted Zeidenberg's motion for summary judgment holding: (1) the telephone listings were not protected by copyright[33]; (2) Zeidenberg used the program software consistently with plaintiff's copyright[34]; and (3) Zeidenberg never assented to the license agreement[35].

1. Copyright Infringement

{20}Chief Judge Crabb first looked at the SelectPhone program to decide what elements of the program were protected by copyright. The court found that federal copyright law protected the software's searching program but not the database of alphabetical telephone listings.[36] As a basis for its finding that copyright protection did not extend to the ProCD database, the court relied on the decision by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*[37] In that case, the Court ruled that alphabetical telephone listings in a printed directory did not contain the element of originality that is necessary for copyright protection.[38]

{21}Rural Telephone Service Company published a printed directory of telephone listings. Feist Publications approached Rural in an attempt to license the listings for use in its own printed directory. After Rural's refusal, Feist went ahead and published the listings in its own printed directory. Rural brought suit against Feist alleging that Feist infringed Rural's copyright by reprinting the telephone listings.

{22}The Kansas District Court granted Rural's motion for summary judgment, finding that the white pages of a telephone directory constitute original work of authorship and thus are copyrightable.[39] The Court of Appeals for the Tenth Circuit affirmed this judgment,[40] but the Supreme Court reversed the decision.[41] The court found Rural's white pages were not entitled to copyright protection, and Feist's use of the listings was not infringement.[42]

{23}Justice O'Connor opinion differentiated between facts and compilations, noting that facts by themselves are not entitled to copyright protection. However, if facts are arranged in an original way and a minimal degree of creativity exists, the factual compilation could be protected by copyright.[43] The Court found Rural's telephone listings to be factual information, and unprotectable by copyright.[44] Also, the Court found the selection or arrangement to be "devoid of even the slightest trace of creativity" necessary for copyright protection.[45] In order for a compilation to satisfy the creativity requirement, the work must

display "more than a de minimis quantum of creativity."[46]

{24}In *ProCD*, the court applied the *Feist* reasoning to the issue of whether the SelectPhone database was protected by copyright. Chief Judge Crabb reasoned that despite the additional information in the database telephone listings, the database was sufficiently similar to the information and arrangement of the compilation at issue in *Feist*. As a result, the court found that the SelectPhone database was not protected.

{25}Next, the court evaluated whether Zeidenberg's action of copying the listings to his computer violated the software's copyright. Section 501 of the Copyright Act prohibits "any unauthorized copying of a copyrighted work."[47] However, section 117 of the Act allows software owners to make a copy of the software provided "that such new copy or adaption is created as an essential step in the utilization of the computer program with a machine and that it is used in no other manner."[48] Chief Judge Crabb ruled that programs on CD-ROM can be "used more effectively" when installed on a computer's hard drive; thus copying is an essential step.[49] The Wisconsin court limited this exception by following the Second Circuit Court of Appeal's decision in *Aymes v. Bonelli*[50] and limited the allowable copies under section 117 to copies made for the owner's personal use.[51]

{26}The court reviewed Zeidenberg's actions to see if his copies fell into the personal use exception of section 501. Chief Judge Crabb found that, although the defendants made the database widely available over the Internet, Zeidenberg only used the protected software to make one copy of the database for his 'own personal use' on his computer's hard drive. The court concluded that Zeidenberg made the single copy of each version's database in accord with the section 117 exception so he did not violate the software's copyright.[52] The court then turned to the issue of the validity of the shrinkwrap license.

2. Shrinkwrap License

{27}The court's first step in determining the validity of the shrinkwrap license was to look to see if Zeidenberg assented to its terms. When Zeidenberg purchased each version of the program, the SelectPhone box was completely encased in shrinkwrap. Attached to the shrinkwrap at the bottom of the box was a message in small print. The message stated that the buyer was subject to the terms and conditions of the enclosed license.[53] Until the shrinkwrap was removed, the buyer was unable to read the terms of the license which was found inside the box.[54]

{28}In order the determine whether Zeidenberg assented to the terms of the license when he removed the shrinkwrap, the court looked to the reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*[55] and *Arizona Retail Systems, Inc. v. Software Link, Inc.*[56] to give insight into the application of the U.C.C. to the SelectPhone agreement.[57] Both cases involved transactions between the manufacturer and the buyer. During the offer and acceptance phase, the seller did not mention the additional shrinkwrap license restrictions. It was not until the buyer had the package and removed the shrinkwrap did the buyer learn the terms of the license and its restrictions. The Court of Appeals for the Third Circuit and the Arizona District Court held that when the buyer did not know the terms of the shrinkwrap license at the time he entered into the contract, the terms contained in the licenses were not part of the contract.[58]

{29}The Wisconsin court adopted the reasoning behind these courts' decisions and concluded that the terms of the license agreement must to be apparent at the time of the contract for the buyer to be bound. Mere reference is not enough. The purchaser needs an opportunity to read all the conditions. The court noted that the "potential incorporation of the terms can occur only after the purchaser opens the package and has a reasonable opportunity to inspect the user agreement." [59] If the buyer did not expressly assent to the shrinkwrap license terms, these terms were not part of the contract and could not be enforced.

{30}The court found Zeidenberg never expressly assented to the terms of the shrinkwrap license during the

original purchase as he had been unable to inspect its terms at the time of the agreement.[60] Zeidenberg did not have access to the terms when he implicitly accepted the offer by paying for the software. The contract between the parties was completed at the time of sale, not when Zeidenberg used the software.[61]

{31}In addition, the court found that the defendants were not bound by the user agreements in the subsequent purchases of the SelectPhone upgraded versions. Chief Judge Crabb stated that the need for the buyer to see the terms before accepting the contract is not waived for subsequent purchases. Since software manufacturers could change the terms of the license for each new version of the program, the terms are not incorporated into the contract unless the buyer reads the terms of the current license before the contract is completed. Purchasers must have the opportunity to review all the terms of a shrinkwrap license before accepting the contract.[62] The court concluded by holding, "because defendants did not have the opportunity to bargain or object to the proposed user agreement or even review it before purchase and they did not assent to the terms explicitly after they learned of them, they are not bound by the user agreement."[63]

3. Preemption of State Law Claims

{32}Finally, the court reviewed the preemption clause of the copyright act to see if it preempted any of plaintiff's state law claims. ProCD claimed the defendants violated Wisconsin's Computer Crimes Act[64] and the Wisconsin contract and tort law in their use of the SelectPhone database. The preemption clause is found in section 301 of the Copyright Act.[65] The clause preempts and abolishes rights granted by states that are equivalent to rights granted by federal copyright law. The court concluded that even if the Select Phone user agreement was incorporated into the contract the preemption clause would render the license invalid.[66] The court also found the act preempted the plaintiff's remaining state claims.[67]

{33}After ruling that Zeidenberg's use of the Select Phone database was within the personal use exception to the federal ban on making unauthorized copies, the court found that the terms of the shrinkwrap license were not binding on Zeidenberg because he did not have the opportunity to read the terms prior to the completion of the contract. The Copyright Act's preemption of state law section applies, thus the court dismissed ProCD's claims brought under the Wisconsin Computer Crimes Act and claims under Wisconsin contract and tort laws. The court granted the defendants' motion for summary judgment and dissolved the preliminary injunction.[68]

C. Court of Appeals Opinion

{34}The United States Court for Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Western District of Wisconsin and remanded with instructions to enter judgment for the plaintiff, ProCD.[69] The court held that (1) copyright did not protect the SelectPhone database, (2) the terms of the shrinkwrap license were binding on Zeidenberg,[70] and (3) enforcement of the shrinkwrap license under state law did not create rights equivalent to exclusive rights within the general scope of copyright law and, therefore, the state law claims were not preempted by the Copyright Act.[71]

1. Copyright Infringement

{35}The court began by determining whether the database in the Select Phone program was copyrighted. Judge Easterbrook, writing for the court, found that the database was not protected by copyright. Even though the database was "more complex, contain[ed] more information [nine-digit zip codes and census industry codes], was] organized differently, and therefore was" no more original than the single alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service Co.*(citation omitted)"[72] The higher court accepted the lower courts finding that the database was not original and did not conduct its own evaluation.[73]

2. Shrinkwrap License

{36}Next, the court reviewed the terms of the shrinkwrap license. Judge Easterbrook focused on the Select Phone program, detailing the considerable investment made by ProCD in creating this database.[74] The court noted that ProCD engaged in price discrimination when selling the three different versions of the product and relied on the shrinkwrap license to add additional terms to the contract by which the user agreed to abide by the restrictions on use. On the personal use version of Select Phone, the box had a notice which directed the buyer to the user agreement inside the box.[75]

{37}After agreeing with the lower court that the shrinkwrap license should be treated as an "ordinary contract[] accompanying the sale of products," the court found the license was governed by the common law and the Uniform Commercial Code.[76] The court also adopted the lower court's finding of how the contract was formed, "placing the package of software on the shelf is an 'offer', which the customer 'accepts' by paying the asking price and leaving the store with the goods."[77] But the court disagreed with the lower court concerning licenses, holding that "one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license."[78] The message on the outside of the shrinkwrap gave Zeidenberg notice at the time of the purchase that additional terms of the contract could be found in the user agreement. The court stated that notice was enough for these terms to be incorporated into the contract. Judge Easterbrook held, "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable" to the purchaser relieves the seller from having to place all the terms on the outside of the package, but allows the buyer to enter into an agreement without knowing all the terms.[79]

{38}Judge Easterbrook noted that there are many instances where contracts are formed even though the exchange of money precedes the communication of detailed terms.[80] These contracts are upheld by courts and are commonly used for the sale of insurance policies, airline tickets,[81] consumer goods,[82] and pharmaceuticals. The court found the contract between ProCD and Zeidenberg to fall within this category. [83] Zeidenberg purchased the software, knowing from the outside of the box that additional terms to the contract existed.[84] By paying the seller, Zeidenberg bound himself to the unseen terms. The court noted with approval that a contractual provision existed where the buyer, after reading the unknown terms promptly after purchase could return the software for a full refund if the buyer did not want to be bound by the terms. [85]

{39}The court then reviewed the two cases concerning shrinkwrap licenses cited by the lower court. Although the lower court relied upon those cases in reaching its decision, Judge Easterbrook rejected them as not being applicable to the issue. The court also cited a third case, *Vault Corporation v. Quaid Software Limited*, [86] as being inapplicable to the issue since it held that Louisiana's shrinkwrap license statue is preempted by federal law.[87] The court found that while these cases may touch on shrinkwrap license "none [of the cases] directly addresse[d] it."[88] The court also noted that none of these cases concerned consumer transactions.[89] *Step-Saver Data Systems, Inc. v. Wyse Technology* was dismissed as a battle-of-the-forms case, where the court decided which of the "incompatible forms" prevailed.

{40}In ProCD there was only one form.[90] Finally, the court rejected *Arizona Retail Systems*, as "not reach[ing] the question, because the court found that the buyer knew the terms of the license before purchasing the software."[91]

{41}The court analyzed the shrinkwrap license agreement under U.C.C. sections 2-204 and 2-206. Section 2-204 provides the parties may make a contract in any manner as long as it shows agreement.[92] The vendor "as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposed to treat as acceptance."[93] ProCD proposed a contract which the buyer could only accept by using the software after having the opportunity to read the license "at leisure."[94]

{42}If the terms of the agreement were unacceptable to Zeidenberg, he could prevent formation of the contract by merely returning the software to the seller.[95] Additionally, Section 2-206 of the U.C.C. details what constitutes acceptance.[96] Acceptance occurs after the buyer has an opportunity to inspect the terms and fails to make an effective rejection under this section. The court found that Zeidenberg accepted the terms of the license when he used the product. He could have returned the software if he found the terms of the license objectionable.[97] The opinion of the Court of Appeals differed from the lower court's belief that the buyer must assent to all the terms when making a contract and that a buyer cannot assent to secret terms. The higher court believed that giving the buyer a way out of the contract after he reads the additional provisions was enough of an "out" to be fair to both parties. Judge Easterbrook ruled that Zeidenberg accepted the contract knowing that additional but unseen terms were included in the contract between the parties.[98]

3. Preemption of State Law Claims

{43}The lower court found that even if Wisconsin law treats shrinkwrap licenses as a contract, the preemption clause of the Copyright Act[99] prevents the enforcement of the contract under state law.[100] The Court of Appeals reversed, holding "a simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore may be enforced."[101]

{44}Judge Easterbrook began a review of this issue by inquiring if the rights created by the shrinkwrap license are equivalent to any of the rights granted by the Copyright Act. Although section 301 preempts and abolishes any right granted by states that are equivalent to those granted by federal copyright law, non-equivalent rights granted by the states are not preempted.[102] Three courts of appeal have reviewed this issue and found that the rights created by the shrinkwrap license are not 'equivalent to any of the exclusive rights within the general scope of copyright.'[103] Their decisions were rejected by the lower court, but were found 'sound' by Judge Easterbrook.[104]

{45}The court stated, "a copyright is a right against the world. Contracts, by contrast, generally effect only their parties, strangers may do as they please, so contracts do not create 'exclusive rights.'"[105] Judge Easterbrook pointed out that the terms of the shrinkwrap license would not apply to a person who found a copy of the SelectPhone program on the street since there would be no contract between the manufacturer and the finder.[106] Federal copyright protection, however, would still cover the software even though there is no agreement between the parties.

{46}The court reviewed a number of instances where private contracts granting rights to items protected by copyright are not preempted by section 301 and can be enforced under state laws. The court cited the Supreme Court decision in *Aronson v. Quick Point Pencil Co*.,[107] which held that "promises to pay for intellectual property may be enforced even though federal law (in Aronson, the patent law) offers no protection against third-party uses of that property."[108] Judge Easterbrook found "[j]ust as § 301(a) does not itself interfere with private transactions in intellectual property, so it does not prevent states from respecting those transactions."[109] Thus, a contract between two parties may be enforced as it is "not equivalent to any of the exclusive rights within the general scope of copyright".[110] Applying this reasoning, the court held that section 301 does not preempt state law, thus, ProCD can bring action against the defendants under Wisconsin law.

{47}Judge Easterbrook then remanded the case with instructions to enter judgment for the plaintiff.[111] After this decision was issued, a settlement was reached by the parties, and a final order and permanent injunction was entered by Judge Crabb on August 12, 1996.

IV. ISSUES RAISED AFTER *ProCD, Inc. v. ZEIDENBERG*

A. Shrinkwrap Licenses

{48}The Seventh Circuit became the first federal appeals court to validate the enforceability of shrinkwrap licenses. Judge Easterbrook found that Zeidenberg accepted the contract with ProCD when he paid the asking price for the Select Phone program and left the computer store.[112] The court found that the verbiage on the outside of the box put Zeidenberg on notice that the additional terms found in the shrinkwrap license were part of the contract. This license was enforceable even though Zeidenberg was not able to read the terms at the time of purchase.

{49}The court appears to base its willingness to enforce the Select Phone shrinkwrap license and other shrinkwrap licenses on certain conditions being met: 1) The buyer has notice that additional terms exist when he gives his assent to the contract; 2) the buyer must has the opportunity to review the terms of the license; 3) the buyer is allowed the opportunity to reject the terms, return the software, and obtain a refund if he views the terms as objectionable.[113] Does this final condition, however, adequately protect the buyer under current industry practices? Most computer software retailers refuse to accept returns of opened software, and the manufacturers usually do not provide the buyer with information about to whom they can return the software. Since Judge Easterbrook bases the court's decision on the ability of the buyer to return the software, how does this effect the enforceability of shrinkwrap licenses?

1. Current Industry Practice

{50}Most computer software is sold by computer retail stores. Consequently, the contract is not a result of direct negotiations between the buyer and seller but occurs through a third party, the retailer.

{51}Zeidenberg purchased the Select Phone program from a computer retailer. The program's shrinkwrap license contained the following return policy: "[i]f 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."[114] However, if Zeidenberg purchased the program from most software retailers, he would be unsuccessful in his attempt to return the software. The current practice in the software retail industry is to not accept any returns of software once the shrinkwrap has been opened. Some retailers will let the buyer exchange the software after the package has been opened, but only for the same software title. Major software retailers who follow this practice include CompUSA, Circuit City, Egghead Computer, and Wal Mart.[115] Dell Computers and Midwest Micro also follow this policy for software preloaded onto their computers and for software sold separately.[116] Thus, with most retailers, a buyer who opens the shrinkwrap to read the terms of the license is then unable to return the software to the retailer.

2. Returning the Software to the Manufacturer

{52}The court record does not indicate whether the license inside the Select Phone package gave the manufacturer's address to return the program if Zeidenberg was unable to return the program to the retailer. It is highly unlikely, however, that the license included this information because the court does not cite to its presence for support and most shrinkwrap licenses do not give buyers this information. Thus, Zeidenberg and purchasers of other software do not receive information concerning whether they can return the program to the manufacturer if they decide to reject the terms of the license.

{53}An example of a major producer not telling the buyer how to return the software to the manufacturer if the buyer is unable to return the product to the retailer, can be found in Microsoft's *End-User License Agreement For Microsoft Software* (EULA). Microsoft software sold through a retailer contains the following shrinkwrap license:

> [i]f you do not agree to the terms of this EULA, PC Manufacturer and Microsoft

> Corporation ("Microsoft") are unwilling to license the SOFTWARE PRODUCT to you. In such event, you may not use or copy the SOFTWARE PRODUCT, and you should promptly contact PC Manufacturer for instructions on the return of the unused products(s) for a refund.[117]

The agreement goes on to state in bold type, "[p]roduct support for the SOFTWARE PRODUCT is *not* provided by Microsoft Corporation or its subsidiaries. . .Should you have any questions concerning this EULA, or if you desire to contact PC Manufacturer for any other reason, please refer to the address provided in the documentation the COMPUTER."[118] The license refers the buyer to a warranty booklet for explanation of the limited warranties. Even in the warranty the buyer is directed to the PC Manufacturer for remedies under the "Limited Warranty".[119] The document does not provide Microsoft corporation's address. The buyer may be able to find the company's address but the buyer is not told whether he or she can obtain a refund from the manufacturer.

3. Effect on the *ProCD* Decision

{54}The court of appeals should not have enforced the terms of the shrinkwrap license against Zeidenberg. Under the common practice in the software retail industry, Zeidenberg does not have an opportunity to reject the license terms and receive a refund. No matter what the terms inside the license were, Zeidenberg was bound.

{55}The court of appeals based its decision on the belief that Zeidenberg could return the program for a refund if he objected to the terms of the license.[120] While the retailer is unnamed, it is improbable that the store's return policy differs from the common practice in the industry. Nothing in the court record indicates that Zeidenberg could have returned the software to the store where he purchased it. Zeidenberg might have been able to find the manufacturer's address, but there is no indication in the license that ProCD would have remitted a refund.

{56}Zeidenberg and other software buyers are bound to license terms they are unable to read before purchase and are unable to object to afterwards, as a result of Judge Easterbrook's opinion. The court ruled that the agreement between the parties was a contract for the sale of goods, covered by the Wisconsin U.C.C., rather than a license agreement granting specific rights to use the software and data. The court found that ProCD could determine what constitutes acceptance of its offer.[121] Acceptance of ProCD's offer was made prior to all the terms being read.

{57}The court supported its position by citing other transactions "in which the exchange of money precedes the communication of detailed terms."[122] Transactions identified by the court included:

> the purchase of insurance (insured pays premium after having a conservation with an insurance agent, but before receiving terms of policy), purchase of an airline ticket (traveler pays quoted price after having conservation with airline carrier or its agent, but before receiving the ticket with elaborate terms), purchase of a concert ticket (patron pays for ticket before receiving ticket, precluding the use of recording devices), and purchase of electronic equipment (customer pays for equipment, before opening packaging and reading a warranty card).[123]

With the transactions cited by the court, however, buyers have the opportunity for returns if they object to the additional terms.

{58}Airlines tell a buyer, prior to purchasing an airline ticket, that the ticket is not transferrable and may or may not be refundable depending on the type of ticket. With refundable tickets, if the buyer objects to the

terms they may return the ticket for a full refund. With non-refundable fares, the buyer is told that they cannot return the ticket for a full refund, but can exchange it for a fee. The buyer is also told prior to purchasing the ticket that "other restrictions may apply." The buyer can either ask the airline representative while ordering the ticket or call the airline reservation number, if purchasing the tickets over the Internet, to learn about any additional restrictions and to have the back side of the ticket read over the phone or faxed.[124] Prior to purchase, the buyer can learn the terms of the agreement and have refund restrictions explained.

{59}Electronic equipment can usually be returned if the buyer objects to the warranty terms. Most retailers follow a thirty day money back refund if the buyer is not completely satisfied with the purchase.[125] The buyers of items, referenced by the court, are able to return the item if the buyer finds the terms objectionable. Zeidenberg was probably unable to do so.

{60}The court of appeals reviewed the parties' contract under U.C.C. §§ 2-204 and 2-206. Judge Easterbrook found that the offer made by ProCD was accepted by Zeidenberg. ProCD indicated in the offer that they would interpret the buyer's purchase of the software and the decision not to return the software after reading the terms of the license as an acceptance.

{61}Although the court states, "[a]ny buyer finding such a demand ['you owe us an extra $10,000'] can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price."[126] Under current industry practices, however, the buyer cannot return the product for a refund. As a result, the terms of the license should not be enforced against the buyer.

B. Database Protection

{62}The introduction of CD-ROM storage has caused an increase in database computer programs.[127] However, the *ProCD* decision finds that databases are not protected by a program's copyright. The court of appeals accepted the district court's finding even though Judge Easterbrook found that the Select Phone database is "more complex, contains more information..., [and] is organized differently" than the alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service Co.*[128] The district court was one of the first courts to use *Feist* to determine whether computer databases would be protected. In reaching its conclusion, the district court did not clarify what constitutes a "minimal degree of creativity" necessary for database copyright protection.[129] The court also did not clarify what types of organization are so 'obvious' that protection will not be extended.

{63}Judge Easterbrook's acceptance of the district court's findings glosses over the major difference between the phone listings in *Feist* and the database in the SelectPhone program. The organization of the facts inside the computer database are never seen by the user. Instead, a searching program scans through the facts, selects the appropriate listings and presents them to the user. The listings in *Feist* are arranged in a specific order so the user can find the appropriate listing. Thus, the creator of the phone book compilation has an incentive to order the listings in such a way as to make the easily accessible to the user.

{64}The computerized database does not have to be in any specific order. The searching program can find the data no matter what order it is in. Under both the Supreme Court decision in *Feist* and the Court of Appeal's decision in *ProCD*, the more disorganized the facts are within the compilation or database, the likelier the database will be protected. As a result, it appears that to copyright a database, the creator must merely organize the information inside in a creative, original way. If the manufacturer arranges the facts inside the database in alphabetical, numerical or some other "obvious" order, the database will not be protected by copyright.

V. CONCLUSION

{65}The Court of Appeals should not have enforced the terms of the shrinkwrap license against the defendants. Zeidenberg was unable to return the software if he disagreed with the terms. Under the court's decision, the purchaser is bound to terms he or she was unable to read prior to purchase and completion of the contract. Additionally, if the buyer disagreed with these terms, he is unable to return the software as directed by the license for a refund since the shrinkwrap must be removed to read the license terms. Since the basis for the court's decision is faulty, the shrinkwrap license terms should not have been enforced against Zeidenberg.

Footnotes

[*] Jennifer L. Hawkins is a third year student at the T.C. Williams School of Law at the University of Richmond. She is currently serving as the Editor-in-Chief of the Richmond Journal of Law & Technology

The author would like to thank Professor John Paul Jones and Mary Rose Campbell for their assistance.

[**]**NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Jennifer L. Hawkins, ProCD, Inc. v. Zeidenberg: *Enforceability of Shrinkwrap Licenses Under the Copyright Act*, 3 RICH. J.L. TECH. 6 (1997), *at* http://www.richmond.edu/~jolt/v3i1/hawkins.html.

1. Scott Adams, *Dilbert*, RICHMOND TIMES-DISPATCH, January 14, 1997, at D5.

2. U.S. CONST., art. I, § 8, cl. 8.

3. The 1976 Copyright Act was passed after a decade-long revision process. The new 1976 Act superseded all earlier copyright acts and brought the copyright laws closer in line with copyright laws around the world. *See* MEVILLE B. NIMMER ET AL,. CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY 1 (4th ed. 1991).

4. 17 U.S.C. §§ 101-301 (1976). Although there have been changes to the Code since 1976, none have affected federal preemption in copyright protection.

5. MICHAEL A. EPSTEIN, MOD. INT. PROP. Ch.10, I., A. (2d ed. 1992)

6. *See id*.

7. Bruce G. Joseph & David A. Vogel, *Copyright Protection of Software and Compilations a Review of Critical Developments, in* ADVANCED SEMINAR ON COPYRIGHT LAW 1996, 441 PLI/PAT 369, May 16-17, 1996, 381.

8. *See e.g*., Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1246-48 (3d Cir. 1983) (stating that object code and source code are copyrightable); Williams Electronics, Inc. v. Arctic International, Inc.

685 F.2d 870, 877-77 (3d Cir. 1982) (stating that object code and source code are copyrightable); Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 855 n.3 (2d Cir. 1982) (stating that written computer programs are copyrightable as literary works).

9. *See* Joseph & Vogel, *supra* note 7, at 382.

10. 86 F.3d 1447.

11. *See* Lloyd L. Rich, *Mass Market Software and the Shrinkwrap License*, 23 COLO. LAW. 1321 (1994).

12. *See* Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1472 n. 23 (1995).

13. 939 F.2d 91 (3rd Cir. 1991).

14. 831 F.Supp. 759 (D.Ariz. 1993).

15. Step-Saver first brought suit against its suppliers seeking indemnity, but this action was dismissed by the lower court. *See Step-Saver Data Systems,* 939 F.2d at 94.

16. The three causes of action dismissed by the court were (1) intentional misrepresentation, (2) negligent misrepresentation, and (3) negligence. *See* Step-Saver Data Systems, Inc. v. Wyse Technology, 752 F.Supp. 181, 185 (E.D.Pa. 1990).

17. *Id*. at 184.

18. *Step-Saver Data Systems*, 939 F.2d at 93.

19. *Id*. at 98. UCC § 2-207 establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties's contract is not sufficient to establish the party's consent to the terms of the writing to the extent that the terms of the writing either add to, or differ from, the terms detailed in the parties's earlier writings and discussions.

Id. at 99.

20. The court noted the relevant provisions of the shrinkwrap license.

> 1. A clause stating that the customer has not purchased the software itself, but merely has obtained a personal, non-transferable license to use the program; 2. a disclaimer of all warranties, except for a warranty covering physical defects in the program disks; 3. a clause purporting to limit the purchaser's remedies to repair and replacement of defective disks, and to exclude all liability for damages caused by using the program; 4. an integration clause providing that the license was the final and complete expression of the parties' agreement; 5. a provision prohibiting the assignment of the program or license without the express prior consent of TSL; and 6. a provision purporting to trigger the purchaser's acceptance of the license upon opening the package.

Arizona Retail Systems, 831 F. Supp. at 761.

21. *Id*. at 763.

22. Arizona Retail purchased many copies of the software program over the next year. *Id*. at 761.

23. *See id*. at 766.

24. The court noted that the additional purchases were of upgrades of the original program that the buyer purchased. The decision was based on the buyer's acceptance of the contract before the program was sent. *Id*. at 766, 761.

25. *See ProCD, Inc*., 86 F.3d at 1449.

26. *See* ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 644-5 (W.D.Wis. 1996). The agreement states in its first paragraph "[p]lease read this license carefully before using the software or accessing the listings contained on the discs. By using the discs and the listings licenses 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." The court in its opinion, summarizes the remainder of the license, "the license informs the user that plaintiff's software is copyrighted and that copying the software is authorized only for particular purposes and uses. Once the product is installed on the user's computer, the computer screens remind users that the product and the data is subject to the Single User License Agreement and that the products are licensed for authorized use only. Before a user can access the listings a field appears on the computer screen, stating: "[t]he listings contained within this product are subject to a License Agreement. Please refer to the help menu or to the user guide." *Id*.

27. *Id*. at 645.

28. *See ProCD, Inc*., 86 F.3d at 1452.

29. *See ProCD, Inc*., 908 F. Supp. at 645.

30. *See ProCD, Inc*., 86 F.3d at 1450. The lower court found that Zeidenberg gave free access through the Internet. Chief Judge Crabb wrote, "[b]ecause the public could access defendant's database for free, plaintiff believed its ability to sell SelectPhone was jeopardized." 908 F. Supp. at 646.

31. *See id*. at 1447.

32. *ProCD, Inc*., 908 F. Supp. at 645.

33. *Id*. at 646.

34. *Id*. at 649.

35. *Id*. at 651.

36. *See id*. at 647. The defendants conceded that ProCD has a valid copyright in the SelectPhone software. *Id*.

37. 499 U.S. 340 (1991).

38. *Id*. at 349.

39. *See* 663 F. Supp. 214, 217 (D. Kan. 1987).

40. *See* 916 F.2d 718 (1990).

41. *See Feist Publication, Inc*., 499 U.S. 340 (1991).

42. *Id*. at 364.

43. *Id*. at 348.

44. *Id*. at 349.

45. *Id*. at 362.

46. *Id*. at 363. In reaching its decision, the Court specifically rejected the "sweat of the brow" test used by the Seventh, Eighth, and Tenth Circuits where copyright protection was extended almost as a reward for the hard work that went into compiling facts. *Id*. at 352. Justice O'Connor echoed the Second Circuit's view that using this test would "risk putting large areas of factual research off limits and threaten the public's unrestricted access to information." *Id*. at 353 quoting Financial Information, Inc. v. Moody's Investor's Service, Inc., 751 F.2d 507 (2d Cir. 1984), cert. denied, 484 U.S. 820 (1987).

47. 17 U.S.C. § 501 (1990).

48. 17 U.S.C. § 117(1) (1990).

49. *ProCD, Inc*., 908 F. Supp. at 648-649.

50. 47 F.3d 23(1995).

51. *ProCD, Inc*., 908 F. Supp. at 649.

52. *Id*.

53. *See id*. at 654.

54. *See id*.

55. 939 F.2d 91.

56. 831 F. Supp. 759.

57. *See ProCD, Inc*., 908 F.Supp. at 652.

58. *See id*. at 653.

59. *Id*. at 654.

60. *See id*. at 655.

61. *See id*. at 652.

62. *See id* at 654.

63. *Id* at 655. Chief Judge Crabb found that the defendants never expressly agreed to the terms of the user agreement nor did they accept the agreement by their continued use of the product. *Id*.

64. Computer crimes: (2) Offenses against computer data and programs. (a) Whoever wilfully, knowingly and without authorization does any of the following may be penalized as provided in par. (b): 1. Modifies data, computer programs or supporting documentation. 2. Destroys data, computer programs or supporting

documentation. 3. Accesses data, computer programs or supporting documentation. 4. Takes possession of data, computer programs or supporting documentation. 5. Copies data, computer programs or supporting documentation. 6. Discloses restricted access codes or other restricted access information to unauthorized persons. (b) Whoever violates this subsection is guilty of: 1. A Class A misdemeanor unless subd. 2., 3. or 4. applies. 2. A Class E felony if the offense is committed to defraud or to obtain property. Wis. Stat. § 943.70 (1996).

65. (a) On and after January 1, 1978 all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. 17 U.S.C. § 301 (1976).

66. *See ProCD, Inc.,* 908 F.Supp. at 644.

67. *See id*.

68. *See id*. at 662.

69. *ProCD, Inc.,* 86 F.3d 1447. After this case was remanded back to the lower court, the parties reached a settlement. Chief Judge Crabb entered a final order and permanent injunction on August 12, 1996.

70. *Id*. at 1455.

71. *Id*. at 1454.

72. *Id*. at 1449.

73. *Id*.

74. "The database in Select Phone cost more than $10 million to compile and is expensive to keep current." *Id*.

75. *Id*. at 1450. The court does not consider the notice on the outside of the box to be a part of a shrinkwrap license per se. "[S]ome vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package." *Id*. at 1449.

76. *Id*. at 1450. The court refused to consider the legal differences between licenses and contracts, finding that to be "a subject for another day." *Id*.

77. *Id*.

78. *Id*. at 1450.

79. *Id*. at 1451.

80. *Id*.

81. *Id*. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); *see also* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) (bills of lading).

82. The court describes the situation where a customer purchases a radio and inside the box is a pamphlet

listing some terms, including the warranty provision which can only be read after the box is open. "By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we know no state disregards warranties furnished with consumer products." *ProCD, Inc*., 86 F.3d at 1451.

83. *Id*.

84. *Id*.

85. *Id*.

86. 847 F.2d 255 (5th. Cir.1988).

87. *ProCD, Inc*., 86 F.3d at 1452.

88. *Id*. at 1452.

89. *Id*.

90. *Id*.

91. *Id*.

92. "A contract for the 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(1) (1997).

93. *ProCD, Inc*., 86 F.3d at 1452.

94. *Id*.

95. *Id*. "Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price." *Id*.

96. § 2-206.

> Offer and Acceptance in Formation of Contract. (1) Unless otherwise unambiguously indicated by the language or circumstances: (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances; (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer. (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

UCC § 2-206.

97. *ProCD, Inc*. 86 F.3d at 1452-53.

98. *Id*. at 1452.

99. 17 U.S.C. § 301 (1976).

100. *See ProCD, Inc*., 908 F.Supp. at 659.

101. *ProCD, Inc*., 86 F.3d at 1455.

102. *Id*.

103. *See* National Car Rental Systems, Inc. v. Computer Assoc. Internet, Inc., 991 F.2d 426, 433 (8th Cir. 1993); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990); Acorn Structures, Inc. v. Swantz, 846 F.2d 423, 426 (4th Cir. 1988).

104. *ProCD, Inc*., 86 F.3d at 1455.

105. *See id*. at 1454. Judge Easterbrook provided an illustration: "someone who found a copy of SelectPhone on the street would not be affected by the shrinkwrap license -- though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program." *Id*. at 1454.

106. *Id*. at 1454.

107. 440 U.S. 257 (1979).

108. *ProCD, Inc*., 86 F.3d at 1454

109. *Id*. at 1455.

110. *Id*.

111. *Id*. at 1449.

112. *See ProCD, Inc*., 86 F.3d at 1450.

113. *See id* at 1451-1453.

114. *ProCD, Inc*. *v*., 908 F.Supp. at 644.

115. CompUSA, *#1 Money Back Guarantee*, (Sept. 12, 1997) <http://info.compusa.com> "Unopened software may be returned within thirty (30) days of the invoice date. Opened software may be returned for exchange only within ten (10) days of the invoice date and not for any refund." *Id*.; Circuit City, *Return / Refund Guarantee*, (Sept. 8, 1997) <http://circuitcity.pic.net/help/policy.html> "Circuit City will gladly give you a full refund within 30 days of your purchase if you are not satisfied for any reason. . .This guarantee does not apply to computers* or to opened compact discs, cassettes or software**. . . ** Opened and defective music and computer software may be exchanged for the same title within 30 days." *Id*.; Egghead Computer, *Information F.A.Q*., (Sept. 21, 1997) <http://www.egghead.com/frontdoor/?MIval=Questions> "Q. What is the return policy? A. Software: Returns or exchanges that are unopened, undamaged, and accompanied by an original Egghead sales receipt will be accepted within 30 days of purchase. Defective product may only be exchanged for the same title within 30 days of purchase." *Id*.; The Good Guys!, *30 Day Satisfaction Guarantee (On-line Shopping)*, (Sept. 21, 1997) <http://www.thegoodguys.com/Shop.html> (Accepts returns on most merchandise within 30 days. Opened software is not included under the 30 day guarantee and computer items must be returned within 14 days.)

Id.; Wal-Mart, *Refund & Return Policy*, (Sept. 21, 1997), <http://wmonline.wal-mart.com/cgi-bin/vstore/wm/wmonline.exe?U+GN+CUSTSERV+G:0.0.0.0#refund> "If you receive an item that you are dissatisfied with, you may return the item within 45 days of receipt...Exceptions: 2. Unopened software, CD's, cassettes, videotape and computer memory may be returned for refund or exchange WITHIN 30 DAYS of receipt. 3. Opened software, CD's cassettes, videotapes and computer memory that are defective will be exchanged for the same title or item WITHIN 30 DAYS of receipt." *Id*. *See generally* Family Shopper, *Can You Return Software?*, FAMILYPC, July/August 1995, at 135; Tami D. Peterson, *Ten Tips For Direct Success*, (Sept. 21, 1997) <http://www.zdnet.com/cshopper/content/9704/cshp0069.html>.

116. For Dell's policy *see* Gregg Keizer, *Buying for Business on a Budget*, COMPUTER SHOPPER, (Aug. 1, 1997) *available in* 1997 WL 9025428; Midwest Micro, *Warranties and Policies*, (Sept. 21, 1997) <http://www.mwmicro.com/public/warranty/return_policy.htm> "Software that is not defective can only be returned if the product has not been opened." *Id*.

117. Microsoft Office 97 Small Business Edition, *End-User License Agreement for Microsoft Software*, (June 5, 1995).

118. *Id*.

119. Microsoft Corporation, *Warranty and Special Provisions for the United States of America and Any Other Country*, April 4, 1995, 10-12.

120. *ProCD, Inc*., 86 F.3d at 1452.

121. *Id*.

122. *Id*. at 1451.

123. Al Harrison, *Shrinkwrap Software Licenses Are Enforceable*, 34 - OCT. HOUS. LAW. 9 (1996) at 10.

124. Telephone interview with Melissa, American Airlines Reservation Agent, (Sept. 21, 1997). (Reservation agents are identified by their first names and time of call. The interview occurred at 9:10 p.m. at 1-800-433-7300.) *See* American Airlines, *Fare Information*, (Sept. 21, 1997) <http://www5.americanair.com/cgi-bin/ff/fq/>. "The following conditions apply to all fares shown: Most advance purchase fares are non-refundable but may be charged for a fee." *Id*.; Delta Air Lines, *Reservations/Fares*, (Sept. 21, 1997) <http://www.delta-air.com/reserve/info/info.htm> "The following conditions apply to all fares shown through our online system: Limited seating, advance purchase requirements and other restrictions may apply. Most advance purchase fares are nonreturnable but may be changed for a $50.00 fee." *Id*.

125. For the policies of major retailers s*ee supra* n.115.

126. *ProCD, Inc*., 86 F.3d at 1452.

127. A CD-ROM can store a large amount of data in a small space and allow easy retrieval of the data. A traditional CD-Rom disc can store .68 gigabytes of information in comparison to the 31/4 inch floppy disk which has only a 1.44 megabyte capacity. For more information on CD-Rom developments *see* Alan E. Bell, *Next Generation Compact Discs*, SCIENTIFIC AMERICAN, July 1996, at 42.

128. *See ProCD, Inc*., 86 F.3d at 1449, *citing* 499 U.S. 340 (1991).

129. *See ProCD, Inc*., 908 F. Supp. at 657.