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**The Validation of Shrink-Wrap and Click-Wrap Licenses by
Virginia's Uniform Computer Information Transactions Act**

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I. INTRODUCTION

{1} Shrink-wrap and click-wrap licenses^[1] play a vital role in enabling businesses and consumers to gain access to and use a variety of computer hardware and software. Such licenses effectively transfer computer-related technology to customers, vendors, and consumers by defining the terms of use of the software without implicating the "first sale doctrine" of the Copyright Act.^[2] While shrink-wrap and click-wrap licenses have become essential to the software industry and the new economy as a whole, the law applicable to such licenses has been unclear and unsettled. Courts have struggled to develop a coherent framework governing the validity and enforceability of such licenses.^[3]

{2} To remedy the law's seeming obsolescence, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") jointly met in the early 1990's to conceive and draft a comprehensive amendment (proposed as Article 2B)^[4] to the Uniform Commercial Code governing contracts in the information technology industry.^[5] Although the joint effort broke down, NCCUSL continued to study the complicated issues associated with contracting and licensing in the information technology industry.^[6] NCCUSL then promulgated the Uniform Computer Information Transaction Act ("UCITA") on July 29, 1999.^[7] One clear objective of UCITA was to settle the law governing the validity and enforceability of shrink-wrap and click-wrap licenses.^[8]

{3} Virginia became the first state to enact a version of UCITA (hereinafter "the Act" or "Virginia's UCITA") on March 14, 2000.^[9] Although Virginia decided to delay the effective date of UCITA until July 1, 2001,^[10] the Act's eventual application will affect profoundly the conduct of information technology transactions in the Commonwealth of Virginia. In view of the importance of the Act, particularly with regard to the burgeoning technology industry in northern Virginia, this article examines one narrow aspect of Virginia's UCITA; how the Act will affect the enforcement and validity of shrink-wrap and click-wrap licenses. This article begins with a brief description of shrink-wrap and click-wrap licenses and then discusses the significance of such licenses to the information technology industry. Next, this article describes the current legal framework applicable to shrink-wrap and click-wrap licenses. Finally, this article addresses the impact Virginia's UCITA will have on the legal framework governing the enforcement of shrink-wrap and click-wrap licenses.

II. THE USE OF SHRINK-WRAP AND CLICK-WRAP LICENSES

A. What are Shrink-Wrap and Click-Wrap Licenses?

{4} The term "shrink-wrap license"^[11] generally refers to retail software packages that are covered in plastic or cellophane (the shrink-wrap) and are accompanied by a license governing the terms of use of the software.^[12] Conventional shrink-wrap licenses state that the tearing of the shrink-wrap constitutes acceptance of the terms stated in the license, and the terms of such licenses typically are recited on the outside of the software box, which the purchaser can review without opening the package because of the transparent shrink-wrap.^[13] With regard to these traditional shrink-wrap licenses, the actual license is contained inside of the box in which the software is stored, and the terms tend to be limited to the use of the product. More sophisticated shrink-wrap licenses contain additional terms, including disclaimers of warranties and limitations on the licensor's liability. Some shrink-wrap licenses do not display the essential terms of the license on the outside of the box containing the software; rather, these shrink-wrap licenses are contained inside of the software box with an admonition on the outside of the box stating that the act of opening the package constitutes acceptance of the terms of the license. Other shrink-wrap licenses are contained in an envelope inside the software package, with the outside of the envelope reciting the essential terms of the license. Regardless of

the manner of packaging and the location of the license terms, the validity of shrink-wrap licenses has been questioned on the ground that the license imposed material terms on the licensee after purchase of the product.^[14]

{5}The term "click-wrap license," or "web-wrap license," refers to licenses executed on-line or over the Internet. There are two distinct types of click-wrap licenses. The first type of click-wrap license involves arrangements whereby the purchaser or user must scroll through the license terms and type "I accept" and then click an icon that executes the acceptance. The second type of click-wrap license requires purchasers or users to click an "accept" icon that actually transmits the acceptance to the vendor.^[15]

B. Objectives of Shrink-Wrap and Click-Wrap Licenses

1. Avoidance of the First Sale Doctrine

{6}Computer hardware manufacturers and software publishers rely heavily on shrink-wrap and click-wrap licenses to achieve a variety of objectives.^[16] First, the licensing of software or hardware avoids the application of the Copyright Act's first sale doctrine, which permits a purchaser of a copy of a copyrighted work to transfer or sell that copy of the copyrighted work.^[17] If the first sale doctrine were applied to transfers of software in the commercial marketplace, software vendors likely would lose considerable amounts of revenue as the original purchaser could sell his or her copy or could lend it to someone who might illegally duplicate it.^[18] The use of a license, in contrast to a sale that transfers ownership, restricts the user in transferring the software to others. Therefore, the licensing approach maximizes revenue, avoids software piracy, and obviates the need for the licensor to enforce its copyrights through infringement actions.^[19]

2. Minimization of Transaction and Product Costs

{7}Shrink-wrap and click-wrap licenses, as standard form agreements used in a mass market setting, reduce transaction costs between software publishers and consumers.^[20] If the law required software publishers to negotiate licenses with each consumer, the publisher's transaction costs would increase substantially. These increased costs would then be passed on to consumers in the form of higher software costs.^[21] Consequently, shrink-wrap and click-wrap licenses allow software publishers to sell more software to more consumers at cheaper prices.

3. Imposition of Limitations on Liability

{8}Software vendors also use licenses to apprise users of warranties made with respect to the software and to disclaim such warranties. The expression and disclaimer of warranties in the license enable the software vendor to comply with Uniform Commercial Code ("UCC") rules on notice and disclaimer of warranties.^[22] Additionally, many shrink-wrap and click-wrap licenses contain forum selection clauses, governing law clauses, and limitations on damages clauses, all of which are designed to minimize liability and litigation costs.^[23]

III. THE LAW OF SHRINK-WRAP LICENSES PRIOR TO UCITA

{9}The law governing shrink-wrap licenses has changed significantly over the last ten years. The development of case law in this area occurred in two distinct stages. Judicial hostility toward shrink-wrap licenses marked the first stage under which the licenses were not enforced pursuant to Article 2 of the Uniform Commercial Code.^[24] The second stage involved judicial recognition of the pervasiveness of shrink-wrap licenses, their indispensability to the rapidly expanding information technology industry, and the urgent need to enforce such licenses in order to maintain low prices for consumers of computer hardware or software.^[25] These two stages are examined more fully below.

A. Invalidation of Shrink-Wrap Licenses Under Article 2 of the UCC

{10}The Third Circuit Court of Appeals in *Step-Saver Data Sys., Inc. v. Wyse Tech.*^[26] issued the first sweeping decision invalidating shrink-wrap licenses under the UCC. The contracting parties in *Step-Saver*, Step-Saver Data Systems and The Software Link ("TSL"), engaged in negotiations over the phone. Step-Saver then sent a purchase order to TSL, who then delivered the software with an invoice.^[27] A shrink-wrap license accompanied the delivered software and contained, among others, the following terms: (i) a disclaimer of all express and implied warranties; (ii) an integration clause asserting that the license is part of the parties' contract; and (iii) a statement asserting that the opening of the package constituted acceptance of the license's terms and conditions.^[28] Step-Saver Data Systems then experienced substantial problems with the software provided by TSL and brought suit against TSL.^[29]

{11}The Third Circuit analyzed the shrink-wrap license under section 2-207 of the UCC.^[30] Under section 2-207, an additional matter will be considered a conditional acceptance when the proponent of the additional term conditions acceptance of the contract as a whole on the other party's acceptance of the additional term or terms.^[31] If the proposal for an additional term is not considered a conditional acceptance, the additional term will be analyzed under section 2-209, which governs modifications to already-existing contracts.^[32]

{12}The court concluded that TSL never indicated that its acceptance of the contract as a whole depended upon the acceptance by Step-Saver Data Systems of the new terms contained in the shrink-wrap license.^[33] Therefore, the "consent by opening" language in the shrink-wrap license was insufficient to constitute a conditional acceptance under section 2-207.^[34]

{13}The court further observed that section 2-207 requires the recipient of the additional term to expressly consent to the new term.^[35] If the recipient party merely proceeds with the contract without affirmatively communicating its assent to the additional term, the writing containing the additional term is not considered part of the contract if the new term would materially alter the contract.^[36] Accordingly, the court held that the license could not be enforced as part of the contract because the terms contained in the shrink-wrap license materially altered the contract between the parties.^[37]

{14}The Third Circuit's decision in *Step-Saver* was followed in *Arizona Retail v. Software Link, Inc.*^[38] The underlying facts of the transaction and the terms of the license in *Arizona Retail* were very similar to those in *Step-Saver*, and the District Court relied heavily on *Step-Saver* in rendering its decision. The court first noted that section 2-207 of the UCC "requires sellers who express general agreement with an offer, but who do not wish to consent to the offer unless certain terms are included in the agreement, to state expressly that their 'acceptances' essentially are counteroffers."^[39] The court concluded that the seller, The Software Link, did not meet the requirements of section 2-207, and therefore, the license could not be considered a conditional acceptance.^[40]

{15}The court also analyzed the license under section 2-209 of the UCC, which the court construed as requiring express assent to the proposed modification of a contract.^[41] The court noted that "the assent must be express and cannot be inferred merely from a party's conduct in continuing with the agreement."^[42] Because *Arizona Retail* never expressly assented to the terms and conditions of the license, the proposed modifications were found not to be part of the contract. The court held, therefore, that the license was unenforceable.^[43]

{16}During the early 90s, both *Step-Saver* and *Arizona Retail* cast serious doubt on the enforceability of shrink-wrap licenses. These decisions reflected judicial unease with transactions in which significant terms of the deal were communicated to the purchaser/licensee after payment for the software. The "by opening I accept" language contained in the *Step-Saver* and *Arizona Retail* licenses did not cure the otherwise defective transaction under the pertinent provisions of Article 2 of the UCC. By the mid 1990s, however, the ubiquity

of shrink-wrap and click-wrap licenses and their indispensability to the information technology industry persuaded courts that enforcement of such licenses was vital to the continued expansion and development of the nation's high-tech economy.

B. Validation and Enforcement of Shrink-Wrap Licenses

1. *ProCD v. Zeidenberg*

{17}The Seventh Circuit Court of Appeals in the late 1990s led a trend toward recognition and enforcement of shrink-wrap licenses. In *ProCD, Inc. v. Zeidenberg*,^[44] and *Hill v. Gateway 2000, Inc.*,^[45] the Seventh Circuit enforced shrink-wrap licenses and validated technology transactions in which many of the terms and conditions governing the transfer of technology followed payment for the product. The Seventh Circuit, in both *ProCD* and *Hill*, formulated its own test for enforcing shrink-wrap licenses and departed substantially from the analysis used by the Third Circuit in *Step-Saver* and the District Court in *Arizona Retail*.

{18}In *ProCD*, Mathew Zeidenberg, acting as an individual consumer, purchased ProCD's software and its accompanying license.^[46] Every box of software sold by ProCD stated that the product came with restrictions described in an enclosed license.^[47] The license itself was encoded on the CD-ROM housing the software, was printed in the software manual, and appeared on the computer screen every time the software was run.^[48] The license expressly limited the use of the software to noncommercial purposes.^[49] After purchasing the software, Zeidenberg established a company for the purpose of reselling ProCD's software, and he actually resold the software in violation of the terms of the license.^[50] ProCD then brought suit alleging a breach of the license and copyright infringement.

{19}The court first reasoned that it would treat the license as an ordinary contract, and as such, the license would be governed by the common law of contracts and the UCC.^[51] The court enumerated in great detail, and placed substantial emphasis on, other commercial transactions in which payment precedes the communication of many key terms of the deal.^[52] The court found that the uniqueness of the software industry, including the fact that only a small portion of sales occur over the counter, and its increasing importance in the nation's economic development, justified the recognition of "pay now, terms later" transactions.^[53]

{20}The court side-stepped the UCC section 2-207 problem confronted in *Step-Saver*^[54] and *Arizona Retail*^[55] by concluding that "[o]ur case has only one form; UCC § 2-207 is irrelevant."^[56] The court, instead, analyzed the validity of the shrink-wrap license under other UCC provisions, including section 2-204(1) and section 2-606.^[57] Under section 2-204(1) of the UCC, a buyer may accept a contract or term by performing the acts proposed by the other contracting party as acts that would constitute acceptance.^[58] The court found that "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did."^[59]

{21}The court also noted that section 2-606 of the UCC allows parties to structure their contractual relationships in such a way as to vest the buyer with a final right to accept only after a detailed review of the product and its terms and conditions.^[60] The court found that "ProCD extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods."^[61] The court held, therefore, that the shrink-wrap license was an enforceable contract as it complied with all of the pertinent provisions of the UCC.^[62]

2. The Progeny of *ProCD*

(a) *Hill v. Gateway 2000, Inc.*^[63]

{22}The Seventh Circuit, in *Hill v. Gateway 2000, Inc.*, followed *ProCD* and cemented, at least in that

circuit, judicial recognition of shrink-wrap licenses. In *Hill*, the Hills purchased a computer over the phone from Gateway 2000.^[64] Gateway then shipped the computer along with a shrink-wrap license.^[65] The license contained an arbitration clause requiring licensees to arbitrate disputes arising out of the purchase of the computer.^[66]

{23}The court first noted that it would not have been practicable for Gateway to recite the license terms over the phone to the Hills.^[67] Consequently, the court found that a writing containing the license terms and conditions operated as a more effective way to communicate with purchasers, particularly in a transaction where the purchaser has a right to return the goods after receiving and disapproving of the license terms.^[68]

{24}The court placed principal emphasis on when the contract was formed and concluded that the Hills accepted Gateway's offer by keeping and using the computer.^[69] The court reasoned that, under *ProCD*, the Hills' acceptance formed the contract because a vendor may propose that the contract is formed after the customer has had a chance to inspect the product and review the terms of the license.^[70] Accordingly, the court held that the shrink-wrap license was a part of the parties' contract, and the arbitration provision contained in the license was enforceable.^[71]

(b) State Court Cases

{25}Although the enforceability of shrink-wrap licenses is not a settled issue, the logic of *ProCD* now appears to have taken hold.^[72] Two recent state court cases evidence the recent trend toward enforcement of shrink-wrap licenses. In *Mortenson Co. v. Timberline Software*,^[73] the court held a limitation on damages clause contained in a shrink-wrap license to be enforceable. The court, noting that it found the Seventh Circuit's reasoning in *ProCD* and *Gateway* persuasive,^[74] held that the contract was formed when the purchaser installed and continued to use the software.^[75] Accordingly, the court held that the shrink-wrap license was part of the contract and that the limitation clause on damages, contained in the license, was enforceable.^[76]

{26}In *Caspi v. Microsoft Network*, the Superior Court of New Jersey enforced a forum selection clause contained in a click-wrap license that was entered into by the plaintiffs in order to use Microsoft Network, an Internet service provider.^[77] Curiously, the court did not discuss, or even cite, *ProCD* or *Hill*. Rather, the court analyzed the validity of the forum selection clause under case law governing forum selection clauses contained in ordinary contracts.^[78] The court, in reasoning that the Supreme Court's decision in *Carnival Cruise Lines v. Shute* controlled, stated that "[t]he scenario presented here is different because of the medium used, electronic versus printed; but, in any sense that matters, there is no significant distinction."^[79] Because the forum selection clause satisfied the general test applicable to forum selection clauses, it was enforced by the court.^[80]

IV. VIRGINIA'S UCITA

{27}On March 14, 2000, Virginia became the first state to enact a version of UCITA.^[81] Although the Act does not take effect until July 1, 2001, software vendors and purchasers need to be aware of the Act as it will have far-reaching implications on the future of licensing computer hardware and software in Virginia.^[82]

{28}The original drafters of UCITA, as well as the scholars and practitioners who have critiqued the law, agree that UCITA validates shrink-wrap and click-wrap licenses, provided certain procedural protections are afforded to purchasers.^[83] As will be discussed more fully below, Virginia's UCITA similarly provides that shrink-wrap and click-wrap licenses will be enforceable after July 1, 2001, under certain circumstances.^[84]

A. Mass-Market Licenses

1. Mass-Market Transactions

{29} Virginia's UCITA introduces the term "mass-market license" to describe licenses that are used in mass-market transactions.^[85] The term "mass-market transaction" encompasses both consumer contracts and any transaction involving an end-user licensee.^[86] However, a transaction with an end-user licensee is considered a mass market transaction only if the transaction involves a standard form contract in which the same terms are available to all members of the public, and the transaction is in a retail setting.^[87] If these conditions are met, business-to-business transactions may be considered mass-market transactions.^[88]

{30} The term "mass-market transaction" excludes four different types of contracts.^[89] First, contracts for the redistribution, "public performance, or public display of a copyrighted work" are not considered mass-market transactions.^[90] Second, contracts involving information that is "customized or otherwise [specifically] prepared by the licensor for the licensee" are excluded from the definition of mass-market transactions.^[91] Finally, the Act excludes site licenses and access contracts from the definition of mass-market transactions.^[92]

2. Manifesting Assent in Shrink-Wrap and Click-Wrap Environments

{31} The Act provides that mass-market licenses are enforceable if the licensee adopts the terms of the license.^[93] A licensee will be deemed to have adopted the terms of the license if it manifests assent to the terms "before or during [its] initial performance," use, or access to the information or software.^[94] Whether a licensee has manifested assent to the terms of a license will depend largely on whether the licensee has had an opportunity to review the terms of the license.^[95] Thus, the concept of an opportunity to review takes on considerable importance in determining whether a party has assented to a term of a license or an entire license. The Act provides that a party has had an opportunity to review a license or a term of a license only when the term or license has been "made available in a manner that ought to call it to the attention of a reasonable person and permit review."^[96] The licensor, therefore, cannot bury a license term in unreasonably small text and then assert that the licensee has had an opportunity to review the term at issue.

(a) Shrink-Wrap Environment

{32} As has been the customary practice in off-the-shelf software transactions, a licensor could supply the licensee with a complete paper copy of the license governing the use of the product. If the licensee is supplied with a complete paper version of the license and has no objection to the terms of the license, he or she may manifest assent simply by installing and/or using the product.^[97]

(b) Click-Wrap Environment

{33} Software publishers can also place the license and its terms online. The licensee then can retrieve the license, and review the terms on-line. In such a click-wrap environment, the licensee's opportunity to review is triggered when he or she initiates the installation process. The terms of the license appear on the computer screen prior to the installation of the software. The licensee may manifest assent by scrolling through the terms of the license and clicking on "I agree" or by typing "I Agree" as often as required before the software can be installed and stored in the memory of the licensee's computer. Either of these situations occurs after the purchase of the product, and the licensee would have taken affirmative steps to indicate that he or she agrees with the terms of the license, and desires to use the software even in the face of the license terms.^[98]

3. When Does a Licensee Have a Right to Return the Product

{34} The Act vests mass-market licensees with a right to return the product when the licensee has not had an opportunity to review the mass-market license, or a copy thereof, prior to making payment for the product.^[99] In fact, the Act specifically provides that in pay-now-terms-later transactions, a party has an opportunity

to review only if he or she has a right to return the product.^[100] If, after reviewing the license, the licensee does not assent to the terms of the license, the licensee is entitled to a right of return.^[101] The licensee also would be entitled to "reimbursement of any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information or, in the absence of instructions, expenses incurred for return postage or similar reasonable expense in returning the computer information."^[102] If the licensee's information processing system needs to be restored as a result of the installation of the product, the licensee will be entitled to the reasonable and foreseeable costs of such restoration if: (i) the installation was necessary for the licensee to review the terms of the license;^[103] and (ii) "the installation alters the system or information in it but does not restore the system or information after removal of the installed information because the licensee rejected the license."^[104]

{35}A licensee, however, enjoys no right to return the product in certain situations. If the license constitutes a proposed modification to the contract or specifies the details of performance, the licensee has no right to return the product.^[105] Additionally, if "the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and at the time of contracting the parties had reason to know that the record or term would be presented after performance, use, or access to the information began," the licensee has no right to return the product.^[106]

4. When Does the Licensor Have a Right to Compel a Return of the Product?

{36}The Act also provides licensors with a right of return in certain mass market transaction situations. Where the licensee proposes terms to the license, the licensor has not had an opportunity to review the terms prior to delivering or being obligated to deliver the product, and the licensor does not assent to the proposed terms upon an opportunity to review the terms, the licensor may require the licensee to return the product.^[107]

V. CONCLUSION

{37}Virginia's UCITA constitutes a significant piece of legislation because it clarifies the heretofore ambiguous legal status of licenses and contracts executed in connection with technology transactions. Software publishers and consumers will be able to transact business with each other knowing that the licenses, shrink-wrap or click-wrap, governing the transactions are both valid and enforceable. Virginia's UCITA, therefore, accomplishes one of the principal objectives of the proposed uniform law, the validation of shrink-wrap and click-wrap licenses and settling the law governing such licenses.

ENDNOTES

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[1]. "Click Wrap" and " Shrink Wrap" licenses refer to Mass-market licenses as defined in VA. CODE ANN. § 59.1-501.2(a)(43) (Michie Supp. 2000) (effective July 1, 2001).

[2]. 17 U.S.C. § 106(3) (2000) as modified by 17 U.S.C. § 109(a)(2000).

- [3]. Compare *ProCD v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (enforcing shrink-wrap licenses), with *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 93, 99 (3rd Cir. 1991) (invalidating shrink-wrap licenses under the UCC). Both of these cases are discussed in detail in Section III of this article.
- [4]. Press Release, National Conference of Commissioners on Uniform State Laws (April 7, 1999), available at <http://www.law.upenn.edu/bll/ulc/ucita/2brel.htm>.
- [5]. CARLYLE C. RING, JR. & RAYMOND T. NIMMER, Series of Papers on UCITA Issues, National Conference of Commissioners on Uniform State Laws, (2000), at http://www.nccusl.org/uniformact_qanda/uniformacts-q-ucita.htm. (A revised version of this is available at <http://www.2bguide.com/docs/q&apm.html>.)
- [6]. Jean Braucher, *Why UCITA, Like UCC Article 2B, is Premature and Unsound*, at <http://www.2bguide.com/docs/0499jb.html> (last visited Oct. 25, 2000).
- [7]. RING & NIMMER, *supra* note 5 (stating that NCCUSL promulgated UCITA by a vote of 43 to 6).
- [8]. See generally Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 36 HOUS. L. REV. 179, 189-91 (Spring 1999) (discussing the effects of Article 2B on the open-source movement); Braucher, *supra* note 6 (arguing against NCCUSL adoption of UCITA).
- [9]. UCITA ONLINE, WHAT'S HAPPENING TO UCITA IN THE STATES, at <http://www.ucitaonline.com/whathap.html> (last updated June 18, 2000). This web site, <http://www.ucitaonline.com>, is an excellent source of information regarding the uniform law promulgated by NCCUSL and state developments concerning UCITA
- [10]. VA. CODE ANN. §59.1-501.1 (Michie Supp. 2000).
- [11]. Some software publishers use the term "end-user license" instead of shrink-wrap license. Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L. J. 335, 336, 339 (1996).
- [12]. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).
- [13]. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 97 (3rd Cir. 1991).
- [14]. See *id.* at 96-97.
- [15]. Francis M. Buono & Jonathan A. Friedman, *Maximizing the Enforceability of Click-Wrap Agreements*, 4 J. TECH. L. & POL'Y 3, ¶ 1 (1999) at <http://journal.law.ufl.edu/%7Etechlaw/4-3/friedman.html>.
- [16]. David L. Hayes, *The Enforceability of Shrinkwrap License Agreements On-Line and Off-Line*, § 1 (Fenwick & West LLP 1997), at <http://www.fenwick.com/pub/shrinkwrap.htm>.
- [17]. See 17 U.S.C. § 109(a) (2000)(noting that after transfer, the owner may sell or dispose at will).
- [18]. Hayes, *supra* note 16, at n.2.
- [19]. Gomulkiewicz & Williamson, *supra* note 11, at 349; See Lawrence G. Townsend and Evelyn Davidson, *Limited Licenses: The Unfortunate Fragility of Shrinkwrap* (1996), at <http://www.ipmag.com/atownsend.html>.

[20]. See Gomulkiewicz & Williamson, *supra* note 11, at 339, 341-42.

[21]. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (8th Cir. 1996); see Gomulkiewicz & Williamson, *supra* note 11, at 342.

[22]. UCC § 2-316(1), cmt. 1 (1998).

[23]. See *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532-33 (N.J. Super. Ct. App. Div. 1999) (enforcing a forum selection clause contained in a click-wrap license).

[24]. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 104 (3rd Cir. 1991); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 764 (D. Ariz. 1993).

[25]. *ProCD*, 86 F.3d at 1451; see *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148, 1150 (7th Cir. 1997).

[26]. *Step-Saver Data Sys., Inc. v. Wyse Tech.* 939 F.2d 91 (3rd Cir. 1991).

[27]. *Id.* at 96.

[28]. *Id.* at 96-97.

[29]. *Id.* at 94.

[30]. *Id.* at 98.

[31]. UCC § 2-207 (1998).

[32]. See UCC § 2-209 (1998).

[33]. *Step-Saver*, 939 F.2d at 103.

[34]. *Id.* at 103.

[35]. *Id.* at 98.

[36]. See *id.* at 98, 105.

[37]. *Id.* at 105.

[38]. 831 F.Supp. 759 (D. Ariz. 1993).

[39]. *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F.Supp. 759, 763 (D. Ariz. 1993).

[40]. *Id.* at 765-66.

[41]. *Id.* at 764.

[42]. *Id.*

[43]. *Id.* at 766.

[44]. 86 F.3d 1447, 1449 (7th Cir. 1996).

[45]. 105 F.3d 1147, 1148, 1151 (7th Cir. 1997).

[46]. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

[47]. *Id.* at 1450.

[48]. *Id.*

[49]. *Id.*

[50]. *Id.* ProCD charged consumers considerably lower prices than commercial purchasers, so Zeidenberg was able to purchase the software at one price and then resell it to businesses at a higher price that was in fact lower than the price charged by ProCD to commercial purchasers. The court recognized that the licensing of the software was designed to minimize these instances of arbitrage.

[51]. *Id.* at 1450. The court expressly left for another day the question of whether there are any legal differences between licenses and contracts.

[52]. *See id.* at 1451. Specifically, the court cited insurance contracts, airplane tickets, concert tickets, and consumer goods transactions as examples of commercial transactions in which a party pays for the product and later is apprised of new and frequently material terms.

[53]. *Id.* at 1451-52.

[54]. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3rd Cir. 1991).

[55]. *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).

[56]. *Id.* at 1452.

[57]. *Id.* at 1452, 1453.

[58]. UCC § 2-204(1) (1996).

[59]. *ProCD, Inc. v. Zeidenberg*, 86 F.3d at 1452 (7th Cir. 1996).

[60]. *Id.* at 1453.

[61]. *Id.* at 1452-53.

[62]. *Id.* at 1452-54. The Seventh Circuit also addressed the copyright implications of licenses since the district court invalidated the shrink-wrap license on the ground that it was preempted by the Copyright Act. The court of appeals overruled the district court and held that the preemption clause in section 301 of the Copyright Act was intended to prevent the states from substituting their own regulatory judgment for those of the national government as expressed in the Copyright Act. Accordingly, the court found that the shrink-wrap license at issue did not interfere with copyright objectives and was not preempted by section 301 of the Copyright Act. *ProCD*, 86 F.3d at 1453-54 (7th Cir. 1996).

[63]. 105 F.3d 1147 (7th Cir. 1997).

[64]. *Hill*, 105 F.3d at 1148.

[65]. *Id.*

[66]. *Id.*

[67]. *Id.* at 1149.

[68]. *Id.*

[69]. *Id.* at 1150.

[70]. *Id.*

[71]. *Id.* at 1151; *see also* Graves v. Pikulski, No. 99cv-04296-JLF, 2000 U.S. Dist. LEXIS 14406, *10 (S.D. Ill. Aug. 29, 2000) (relying on Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) in determining that a forum selection clause applied even though plaintiffs had not read the agreement when it was renewed); Kaczmarek v. Microsoft Corp., 39 F. Supp.2d 974, 977 (N.D. Ill. 1999) (relying on Hill to find that warranty constituted a contract between the buyer and seller even where the buyer did not read it); Filias v. Gateway 2000, Inc., No. 97 C 2523, 1998 U.S. Dist. LEXIS 20358, *3 (N.D. Ill., Jan. 15, 1998) (applying Hill to find arbitration clause placed in box valid and enforceable).

[72]. *See* Rinaldi v. Iomega Corp., No. 98C-09-064 RRC, 1999 Del. Super. LEXIS 563, *19 (Del. Super. Sept. 3, 1999) (relying on ProCD to find disclaimer conspicuous and thus valid despite being located inside the packaging). *But see* Klocek v. Gateway, Inc., 104 F.Supp.2d 1332, 1341 (D. Kan. 2000) (rejecting the ProCD and Hill analysis in finding that the parties did not agree to the arbitration terms where Gateway shipped the terms with its computer package)

[73]. 970 P.2d 803 (Wash. Ct. App.1999), *aff'd en banc*, 998 P.2d 305 (Wash. 2000).

[74]. *Id.* at 809.

[75]. *Id.* at 812.

[76]. *Id.*

[77]. 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

[78]. *See id.* at 530-32.

[79]. *See id.* at 532.

[80]. *See id.* at 530 (holding that the forum selection clause did not contravene a fundamental public policy of New Jersey, it was not the result of overweening bargaining power, it would not inconvenience a trial, and it was agreed to after reasonable notice).

[81]. *E.g.* UCITA ONLINE, *supra* note 9 (referring to VA. CODE ANN. § 59.1-501.1, et seq. (Michie 2000); S. 372, approved March 14, 2000).

[82]. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL), (Mar. 15, 2000), *Virginia Leads Nation in Enacting New Legal Rules for Computer Information Transactions*, at <http://www.nccusl.org/pressreleases/pr3-15-00.htm>.

[83]. *See e.g.*, RING & NIMMER, *Shrinkwrap licenses*, *supra* note 5; Gomulkiewicz, *supra* note 8, at 191-93; LORIN BRENNAN & GLENN A. BARBER, *WHY SOFTWARE PROFESSIONALS SHOULD SUPPORT THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT AND WHAT WILL HAPPEN IF THEY DON'T*, at

[84]. This article does not address UCITA's various contract formation rules, nor does it examine the scope of Virginia's UCITA. Thus, this article assumes that a given technology contract or license is subject to UCITA and has been formed in conformance with UCITA.

[85]. VA. CODE ANN. § 59.1-501.2(a)(43) (Michie Supp. 2000) (effective July 1, 2001).

[86]. *Id.* at § 501.2(a)(44).

[87]. *Id.* at § 501.2(a)(44)(B)(i-ii). The Act defines a standard form as a "record or a group of related records containing terms prepared for repeated use in transactions and so used in a transaction in which there was no negotiated change of terms by individuals except to set the price, quantity, method of payment, selection among standard options, or time or method of delivery." *Id.* at § 501.2(a)(60).

[88]. See RING & NIMMER, *Mass Market Licenses*, *supra* note 5 (noting that many of the Act's protections guaranteed to consumers also will extend to businesses).

[89]. *Id.* at § 501.2(a)(44)(B)(iii).

[90]. *Id.*

[91]. *Id.*

[92]. *Id.*

[93]. VA. CODE ANN. § 59.1-502.9(a) (Michie Supp. 2000) (effective July 1, 2001).

[94]. *Id.*

[95]. VA. CODE ANN. § 59.1-501.12(a) (Michie Supp. 2000) (effective July 1, 2001).

[96]. *Id.* at § 501.12(e)(1).

[97]. *Id.* at § 501.12(a)(2)(providing that a party may manifest assent by engaging in conduct or making statements with reason to know that the other party will infer assent).

[98]. *Id.* at § 501.12(a)(2)(providing that a party may manifest assent by engaging in conduct or making statements with reason to know that the other party will infer assent).

[99]. *Id.* at § 502.9(b).

[100]. *Id.* at § 501.12(e)(3).

[101]. *Id.* at § 502.9(b); cross-citing to *Id.* at § 501.12 (explaining when a licensee will have a right of return).

[102]. *Id.* at § 502.9(b)(1).

[103]. *Id.* at § 502.9(b)(2)(A).

[104]. *Id.* at § 502.9(b)(2)(B).

[105]. *Id.* at § 501.12(e)(3)(A).

[106]. *Id.* at § 501.12(e)(3)(B).

[107]. *Id.* at § 502.9(c).

Related Browsing

1. <http://www.arl.org/info/frn/copy/ucitapg.html>. Association of Research Libraries, Uniform Computer Information Transactions Act (UCITA). An index page that contains links to letters, statements and testimony concerning UCITA. There are also links to other UCITA resources as well links to Article 2B of the UCC including letters, drafts and comments.
2. http://www.law.upenn.edu/bll/ulc/ulc_frame.htm. The National Conference of Commissioners on Uniform State Laws (NCCUSL) - Drafts of Uniform and Model Acts - Official Site hosted by the University of Pennsylvania Law School. Contains all of the various drafts of UCITA as well as the finalized draft. The drafts are available in WordPerfect, ASCII and PDF formats.
3. <http://law.com/>. Law.com. New York. Search for articles containing information on click-wrap and the current law surrounding click-wrap.
4. <http://www.oikoumene.com/SoftwareLicensing.html>. "Software Licensing Flexibility Compliments the Digital Age" by Sandy J. Wong. This article summarizes current and future trends in software licensing practices. Article focuses on U.S. issues but some global issues are also discussed since there is a trend toward global computing environments combined with the importance of international revenues to the U.S. software industry.
5. http://www.oikoumene.com/softwr_licnsetrnds98.html. "Trends in Software Licensing and Legal Protection for Software" by Fred Greguras. Author concludes that the "U.S. software industry is evolving toward more flexible licensing practices and pricing methods that reflect the overall business value of software to customers and the changes in computing environments." Author states that copyright and patent statutory protection is important because of the many methods software companies distribute software. Article also discusses how statutes need to evolve and keep pace with the software industry.
6. <http://www.mactech.com/articles/mactech/Vol.09/09.03/Shrinkwrap/index.html>. "Shrink Wrap License Agreements: Unraveling Some of the Confusing Legal Issues" by Paul Goodman. Article discusses the benefits and validity of shrink wrap licensing. Article also dissect a license and lays out the purpose behind each section. Author expresses final opinion that shrink wrap licensing is fair to the consumer.
7. <http://www.nmsvr.com/~kaner/nader.htm>. "Restricting Competition in the Software Industry: Impact of the Pending Revisions to the Uniform Commercial Code" by Cem Kaner, Ph.D., J.D. Gives a brief overview of UCC 2B. Addresses problems with UCC 2B (i.e. anti-competitive measures created by UCC 2B and the ambiguous language permitted by 2B). Finally, the author makes recommendations for the direction that UCC 2B should take.

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