Do you ever read the “fine print” on the contracts that come in boxes of software, or that are tucked in the corners of the Web sites you visit? One recent contract for an Internet service aid disclaimed that it was “not intended for use in the operation of nuclear facilities,” and that use of the aid in such facilities “could lead to death, personal injury, or severe physical or environmental damage.” That certainly sounds ominous. But do such clauses have any real legal significance? Can they be enforced against consumers who often don’t even bother to read them?

At this stage in development of the information economy, the use of “shrink-wrap” and “click-wrap” agreements is extensive, if not near-universal. The difference is mostly one of form. A “shrink-wrap” agreement gets its name from the fact that many retail software packages are covered in plastic or cellophane “shrink-wrap.” Many vendors provide (in language on the box or package or sometimes on the wrap itself) that customers accept the various agreements that pertain to such software by simply tearing the wrapping from the package. In many instances, customers are given the option of returning the item if they do not wish to be bound by the terms of the shrink-wrap agreement. There is a developing body of law on whether shrink-wrap agreements are enforceable.

The term “click-wrap” is derivative of the term “shrink-wrap,” and it is a natural result of the fact that the computer industry began using one, and then the other, form of agreement in rapid succession. Unlike shrink-wrap agreements, where a customer learns the terms of the agreement after buying the product, the terms of a click-wrap agreement are typically provided to a user online, during a visit to a Web site. The user manifests assent to the agreement online, often by clicking on an icon indicating “I Accept” the terms of the agreement. There have been fewer court decisions that specifically address the enforceability of click-wrap agreements.

The stakes here are high: If courts were to find these agreements generally unenforceable, the potential impact on product and service providers could be significant. What we see here is the inherent tension between Internet time and Internet law; the former is a lot faster than the development of the latter. Is this likely to cause problems, and what can the product or service provider do to minimize these problems?

Shrink-Wrap Agreements

As a general matter, it is fairly well established that shrink-wrap agreements can be enforced. In 1996, a federal appeals court held that a shrink-wrap license included with software was binding on a buyer. The court noted that, even outside the information economy, transactions in which the exchange of money precedes the communication of detailed terms are “common,” and in any event, with off-the-shelf software, a shrink-wrap license is perhaps the only practical method of dealing. The court noted, moreover, that the risk that an unfair term would be imposed upon an unsuspecting consumer was not present, since the consumer had a right to return the software package for a refund.

A year later, the same court reaffirmed its view that “[p]ractical considerations” justified the use of agreements with “[p]ayment preceding the revelation of full terms[.]” If the buyers did not wish to form a contract in that manner, they could either have chosen not to buy a software box with additional terms inside or could have returned the product after examining the terms.
Federal and state courts have generally followed the reasoning of these decisions. At this point, it would appear that shrink-wrap agreements are likely to be an effective means of protecting the interests of the product or service provider.

Click-Wrap Agreements

There have been fewer court decisions on the enforceability of click-wrap agreements. As with shrink-wrap agreements, the outcome will generally depend upon the law of the individual state. One federal appeals court implicitly upheld the validity of a click-wrap agreement by finding that a subscriber to a network service was subject to personal jurisdiction in the service provider’s home state because the click-wrap agreement connected him to that state. Similarly, a federal district court in California granted a preliminary injunction, based in part on the likely finding that the defendants had violated the terms of their click-wrap subscription agreement with an Internet service provider. This conclusion implicitly assumed that the click-wrap agreement was valid.

In addition, at least two courts have held that forum selection clauses in click-wrap agreements are valid. In one case, subscribers to the MSN Network were required to click “I Agree” at appropriate points in approving a membership agreement. No charges would be incurred unless the subscriber agreed to the proffered terms. A New Jersey state appellate court concluded that there was “no significant distinction” between this form of forum selection clause and forms presented in other standard agreements. Similarly, in a case where AOL subscribers were required to click “I Agree” to terms of service if they wished to become subscribers, a Rhode Island trial court held that the forum selection clause in the click-wrap agreement was “prima facie valid,” and that the plaintiff’s assertion that he had not knowingly agreed to the clause was insufficient, given that he had clicked “I Agree” twice in approving the service agreement.

Most recently, a federal district court in Illinois this year considered a case in which free RealNetworks software packages were available on the company’s Web site. The software permitted users to see and hear audio and video products on the Internet and to download, record, and play music. Before users could install the software packages, they were required to accept the terms of a license agreement. The agreement provided, among other things, that any unresolved disputes arising under the license agreement would be submitted to arbitration in the State of Washington. Applying a “presumption in favor of arbitrability,” the court granted the defendant’s motion to stay class action proceedings, pending arbitration.

Given this authority (limited though it may be), and given that it appears that no court has yet invalidated a click-wrap agreement merely because of the form by which the agreement was completed, one may fairly predict that such agreements will be accepted by other courts. Indeed, by comparison to shrink-wrap agreements, a click-wrap agreement seems even more fair and appropriate. With a click-wrap agreement, the user typically is allowed to review the agreement before buying anything. Because of the nearly instantaneous availability of competitive options on the Internet, if the user finds the proffered terms unacceptable, it is generally easy to back out of a transaction, without facing any cost or burden in returning merchandise or losing a service after it has become a matter of dependence. Further, the typical click-wrap agreement requires the user to take some affirmative step (typing “I Agree” or clicking on an “I Agree” icon) after reviewing the agreement. These actions are arguably more powerful indicators of actual consent than mere failure to reject an agreement (for example, after breaking the shrink-wrap on a box and discovering the terms of an agreement inside).

Uncertainty regarding the enforceability of click-wrap agreements would, of course, be eliminated if uniform legislation were adopted on this subject. In July 1999, the National Conference of
Commissioners on Uniform Laws proposed a new uniform law, specific to electronic transactions, entitled “Uniform Computer Information Transactions Act,” or “UCITA.” UCITA has already been adopted in Virginia and is under consideration in other states. [For a more detailed discussion of UCITA, see Jones Day Technology Commentaries Volume 1 Number 2 at http://www.jonesday.com/html/news_051200.asp.]

Some Practical Suggestions

Construction of a click-wrap agreement must be considered in the context of the overall contractual needs of a site owner. The first issue in that regard is what purpose the click-wrap agreement is meant to serve. There are a variety of different contractual arrangements that could be used. These include:

(1) A site-use agreement, under which the user of the site agrees to terms concerning access to the Web site. Such an agreement could set forth limitations on representations, warranties, and liabilities of the site owner. The agreement may also specify what the user can and cannot do with information contained in the site.

(2) A contract for sale of goods offered through the site. Such an agreement could contain many of the terms and conditions (concerning payment, shipping arrangements, risk of loss, rejection and return, etc.) that a traditional sales contract would contain. The agreement could also contain some special provisions (e.g., how to handle orders for out-of-stock items) that may be unique to ordering goods online.

(3) A contract for services offered through the site. Services may be ancillary to the sale of goods (e.g., maintenance, training, software support), or may be stand-alone services. Again, a mix of traditional and unique provisions will likely be required.

(4) A privacy policy for information gathered from users of the site. Given the significant ongoing regulatory and litigation activities relating to privacy, a carefully prepared privacy policy is an essential element of a prudent approach to Internet commerce.

The site owner may choose, for many reasons, to keep these various forms of agreement separate. Separation of documents on different issues may make it easier to individualize and to update and revise the documents. If the choice is made to offer separate agreements, then careful attention must be paid to what issues an individual click-wrap agreement covers, and what it does not cover. The provisions of one click-wrap agreement (on terms of sale, for example) will not automatically apply to issues that may arise under another agreement (on site use, for example), even though the agreements are offered on the same site.

More specifically, the enforceability of a click-wrap agreement will likely turn on the notice given to users and buyers about the terms of the agreement, and the gathering of clear evidence of assent to those terms. Several “best practice” principles should be considered. This list is not intended as a recipe for contract terms in every click-wrap agreement; indeed, a fully valid and enforceable agreement may exist without any number of these terms. These suggestions may, however, be used as a checklist, to be adapted as commercial necessity, and the law in a given jurisdiction, dictate:

(1) Make sure that the click-wrap agreement is the only form of agreement offered. Avoid separate correspondence or other communications that might be construed as establishing contractual obligations that are separate from the click-wrap agreement.

(2) Make sure that promotional materials and preliminary offers clearly state that the final agreement is the exclusive source for terms of any actual transaction.

(3) Conspicuously display the click-wrap terms to prospective users. At a minimum, at the first opportunity in a site visit, provide notice that use of the site is subject to the terms and conditions of an agreement. Offer an immediate link to the terms of the agreement. The notice should include conspicuous warnings about the conduct that will be deemed
acceptance of the agreement, e.g., “Use of this site constitutes acceptance of the terms of this agreement.”

(4) Make the agreement clear and concise, so that the average person can understand its nature and terms. If the agreement contains terms that are uncommon in the industry, or that are likely to surprise the user or buyer, such terms should be highlighted and explained, if necessary.

(5) Require users to manifest their assent to the terms of the click-wrap agreement with some affirmative action. Methods may include: (a) typing the words “I Agree,” or “I Consent” in response to the agreement; (b) clicking on icons with the same words; or (c) typing the user’s name in a space provided, such as completion of the sentence: “I, ____________________, hereby agree to the terms of this contract.” To provide additional evidence that the user has had an opportunity to review the terms of the agreement before providing assent, place the “I Agree” prompt, icon, or fill-in-the-blank at the end of the terms (requiring the user to scroll through the agreement before manifesting assent).

(6) Provide for the alternative of rejection. The user should have the option to terminate the process of registration at any point before final acceptance of the click-wrap agreement. If the user rejects the terms of the agreement, the process of entry into the site should be terminated. Users should not be permitted to purchase products or gain access to the Web site unless consent has been manifested.

(7) If the site operation involves delivery of a product, provide a restated copy of the sales agreement along with the shipment of the product. As with a shrink-wrap agreement, the buyer may be reminded that use of the product constitutes acceptance of the terms. The buyer may also be offered the option of a refund on return of the goods, if he or she decides to reject the terms. If so, the buyer should be provided with an easy method of returning the goods.

(8) Provide reminders, where appropriate, throughout the site that use of the site is subject to the terms of the click-wrap agreement. Many Web sites include hyperlinks to the terms of the agreement at various points, along with a running notice that use of the site is subject to the terms.

(9) Maintain accurate records of the user’s acceptance of terms. Standard terms may change from time to time. Records of acceptance should indicate the specific terms that were accepted by a particular user and the date of such acceptance.

Finally, as with all agreements, seek the advice of counsel. Agreements that are fair, balanced, and adapted to the practical realities of commerce are most likely to be upheld by the courts.

Conclusion

Practical and legal considerations indicate that shrink-wrap and click-wrap agreements are here to stay. The trick is to make sure that courts and practitioners, and perhaps soon legislatures, accept the concept behind such agreements as fair and effective, and that legal developments continue to enhance the usefulness of such agreements. The best way to accomplish that goal is to construct agreements that can be persuasively defended as fair to all parties and effective and practical solutions to genuine business problems. The suggestions set forth above will help to move in that direction.

Further Information

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