

Computer Law News

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Fall 2001

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MSBA Computer Law Section Website:
www2.mnbar.org/sec/computer_law/index.htm



2001-2002 officers Chris Schulte (left) Secretary, Kim Shepherd (center) Treasurer, Sandra Sedo (right) Chair, Dan Tysver (not pictured) Vice-Chair

MSBA
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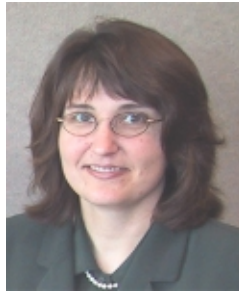
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Report From the Chair

By: Sandra Sedo

As I begin my term as Chair of the Computer Law Section, my goal for the next year is simple – to work with all interested members of the Section in order to continue, and hopefully to build on, our past successes and momentum, so that the Section’s activities continue to be relevant to our members and to their practices.



This year, as a first step toward that goal, we will be refocusing our monthly Section Council meetings on substantive legal topics and discussions, and will focus away from purely administrative functions. I hope that this new focus will be an incentive for all members to attend these meetings. Please look to the Schedule of Events elsewhere in this newsletter and also to the Section’s website at www2.mnbar.org/sec/computer_law/index.htm for current information on the dates and topics for the upcoming Section Council meetings.

Our first order of business for the upcoming year will be to co-sponsor, with Minnesota CLE, the Annual Computer Law Institute on Tuesday, October 16. Please mark your calendars and sign up to attend this outstanding CLE. See flier elsewhere in this newsletter. We are in need of a Chair for the 2001-2002 Annual Computer Law Institute. If anyone has an interest, they should contact me.

On August 16th I had the pleasure of meeting with Jarvis Jones, President of the MSBA, together with various MSBA staff members and chairs of several MSBA Committees and Sections. During this meeting, Mr. Jones discussed with us his objectives for the upcoming year, which include addressing the issues of pro se litigants, racial profiling, and advancing the beneficial use of technology in our practices. Also, I was given the opportunity to describe my view of our Section’s objectives for the upcoming year, and how the MSBA staff can help in meeting those objectives.

Other business of the Section has continued on through the summer and into the fall through the dedication and the hard work of our members. I would like to give a special thanks to all listed below who have volunteered to chair or serve on a committee of the Section to date:

2001 Technology Law Institute – Dan Tysver (Co-chair), B. Todd Jones (Co-chair) and

members Miguel Azar, Jim Blomquist, Bill Hefner, Charlie Johnson

Case Law Reports – Mike Atlass, Gillian Rosenquist and Kim Shepherd

Contracts – Katheryn Andresen, Christine Brick and Chris Schulte

Legislative Liaison – Becky Comstock

Newsletter Editor – Dianne Plunkett Latham

Noontime CLE – Tom Sheran

Programming – Dan Tysver

Website – Mike Atlass and Bill Hefner

We as yet need a Chair for the following committees. Please contact me if you would like to volunteer.

2002 Technology Law Institute – Chair needed

2002 Annual Meeting – Chair needed

Law School Outreach – Chair needed

I welcome any feedback or suggestions that you may have regarding the Section and its activities for the upcoming year. Since I firmly believe that the rewards of membership in our Section are strongly correlated with your participation in the Section’s activities, I encourage all of you to get involved in some way with the Section – come to the Annual Institute, attend one of the monthly meetings, join a committee, write an article for our newsletter or whatever! Please feel free to contact me by phone at (612)340-8746, or by email at sedo.sandra@dorseylaw.com. ■



2001-2002 Schedule of Events

10-16-01	Annual CLE	Minnesota CLE, City Center
11-13-01	Section Council Meeting	12:15 at MSBA Headquarters, City Center
12-1-01	Winter Newsletter Submission Deadline	
1- 8-02	Section Council Meeting	12:15 at MSBA Headquarters, City Center
2-12-02	Section Council Meeting	12:15 at MSBA Headquarters, City Center
3-12-02	Section Council Meeting	12:15 at MSBA Headquarters, City Center
4-1-02	Spring Newsletter Submission Deadline	
4- 9-02	Section Council Meeting	12:15 at MSBA Headquarters, City Center
5-14-02	Section Council Meeting	12:15 at MSBA Headquarters, City Center
6-TBA-02	Annual Meeting	TBA

Editor's Report

By: Dianne Plunkett Latham

Mini Convention – Thank you to all who participated in the Computer Law Section's Mini Convention for the MSBA Annual Convention on June 21st. Our conference room at RiverCentre, with its lovely view overlooking the Mississippi River, was a wonderful backdrop for the approximately 40 attendees at our program on Internet topics. We had excellent presentations by Chris Schulte, Carolyn Sandberg, Erika Koster, Katheryn Andresen, Christine Brick and Sandra Sedo. Cheryl Smith organized the drawing for the digital camera, for which Carla Condiff was the lucky winner. A special thanks to Katheryn Andresen, who brought a back-up monitor and additional handouts. Charlie Johnson chaired the officer elections, which were held immediately after the CLE. We expressed our appreciation for Charlie's excellent leadership last year and wished the new officers and Council members well in their new duties.



liaisons would coordinate our event announcements with their respective Student Intellectual Property Law Associations (SIPLA) and would also act as a representative in planning our programs at the local law schools. Any student interested in doing this should contact Sandra Sedo at 612-340-8746.

Noon CLEs – Tom Sheran is looking for speakers for the Computer Law Section Noon CLE. Anyone interested in speaking, or having suggestions for speakers should contact Tom at 612-347-0300.

Newsletter Submissions – Please e-mail your submissions for the Winter newsletter to me by 12-1-01. These can include articles, photographs, committee reports, CLE notices and other information of interest to the members of the Computer Law Section. My address is: PlunkettDi@mn.rr.com. ■

Law School Outreach – We are looking for a student representative from each of the 3 local law schools to act as a liaison with the Computer Law Section Council. The

Annual Law of Technology CLE

Tuesday, October, 16, 2001

Minnesota CLE Conference Center

8:30-9:00 a.m.

Check-In and Continental Breakfast

Morning Plenary Sessions

9:00-9:45 a.m.

Cybercrime and Risk Management

As we move into the information age, we find ourselves becoming increasingly dependent on computers, networks, and the information they contain. Yet each week we hear of new attacks on the confidentiality, integrity and availability of computer systems, from economic espionage to distributed denial of service attacks. Each poses a serious threat to e-businesses but, like all other business risks, these too are capable of being managed intelligently. Scott Charney's presentation will detail the threats, and discuss effective steps companies can take to protect their systems.

- *Scott Charney* –
PricewaterhouseCoopers,
Washington, D.C.

9:45-10:00 a.m.

Questions and Answers

10:00-10:45 a.m.

Copyright and Trademark Case Update

Discussion of this year's significant court decisions on copyrights and trademarks in the technology arena. What was at stake? What are the practical implications of these decisions? What important cases are

currently pending that you need to keep your eye on?

- *Kenneth L. Port* - Visiting Professor,
William Mitchell College of Law, St. Paul.

- *Niels B. Schaumann* - Professor,
William Mitchell College of Law, St. Paul

10:45-11:00 a.m.

Break

11:00-11:45 a.m.

Privacy Initiatives at the FTC

Advances in computer technology have made it possible for detailed information about people to be compiled and shared more easily and cheaply than ever. Moreover, that information may well be one of a company's most valuable assets. In the face of compelling reasons for businesses to collect and disseminate personal data, what are the legal limits and privacy principles that afford some protections? And what enforcement activities and other initiatives are priorities at the U.S. Federal Trade Commission?

- *Joel C. Winston* - Acting Associate
Director for Financial Practices, U.S.
Federal Trade Commission,
Washington, D.C.

11:45-Noon

Questions and Answers

Noon-1:00 p.m.

Lunch (on your own)

Afternoon Breakout Sessions

1:00-1:50 p.m.

[Fundamentals]

Making Sense of E-Signatures

An overview of the state and federal laws governing the need for and effect of electronic signatures. Topics discussed in this session will include: Whether and how these laws affect your day-to-day business operations. Which state's laws apply to a particular online contract when the parties are located in different states that have conflicting digital signature laws. What recommendations you should be giving your clients regarding the need for and use of e-signatures.

- *Todd G. Hartman* - Robins, Kaplan,
Miller & Ciresi LLP, Minneapolis

[Advanced]

Beyond Source Code Escrow ...

***Really Thinking About
Bankruptcy Considerations***

The sudden fragility of the technology industry has highlighted a weak link in the "new" economy: the threat of key business partners closing their doors or ending up in bankruptcy, leaving customers, suppliers, lenders, and investors with a financial or operational hole to fill. The extent to which most technology agreements anticipate this threat are perfunctory calls for source code escrow and unenforceable provisions purportedly allowing the licensee to terminate if the licensor files for bankruptcy protection. In this session we will explore ways to provide more

meaningful protection than afforded by these limited provisions.
- *Michael R. Stewart* - Faegre & Benson LLP, Minneapolis
- *Gary S. Weinstein* - Faegre & Benson LLP, Minneapolis

1:50-2:00 p.m.

Break

2:00-2:50 p.m.

[Fundamentals]

Business Method Patents – A Primer

This session is designed for the non-patent attorney as a practical introduction to business method patents. What patent rights exist? How do you avoid their forfeiture? And how do business method patent considerations fit into a company's broader business strategies?

- *Stuart R. Hemphill* - Dorsey & Whitney LLP, Minneapolis

[Advanced]

End-Users Are Buying Information Technology the “Wrong” Way

This presentation will identify areas in which end-users err in negotiating and drafting Information Technology agreements. Learn how the end-user should structure an IT transaction, from the Request for Proposal to the acceptance of the product.

- *Raymond R. Bonnabeau* - Thomas & Bonnabeau, Minneapolis
- *Lawrence A. Thomas* - Thomas & Bonnabeau, Minneapolis

2:50-3:00 p.m.

Break

3:00-3:50 p.m.

[Fundamentals]

Drafting & Reviewing Software Licensing Agreements

This foundational session will assist you in properly analyzing and spotting issues within software licensing agreements. Learn about the legal and business considerations underlying significant provisions typically found within these

agreements. Examining these provisions from both a licensor's and licensee's perspective will help you prepare for and handle software contract negotiations.

- *Miki R. Kapsner* - Leonard, Street and Deinard, Minneapolis

[Advanced]

Aggregation Aggravation: The Problems of Pooling Internet Data.

The Internet was built on shared resources. But with its commercialization, a new generation of e-businesses has begun to view the content of their websites as valuable private property protected by the law. Is it? Should it be? The resolution of this debate may have serious implications for the future of the Internet.

- *Dan L. Burk* - Professor, University of Minnesota Law School, Minneapolis
- *Erika S. Koster* - Oppenheimer Wolff & Donnelly, Minneapolis

3:50-4:00 p.m.

Break

4:00-4:45 p.m.

[Fundamentals]

Gramm-Leach-Bliley Act

This nuts-and-bolts session will guide you through the Gramm-Leach-Bliley Act and the FTC Privacy Rules that implement the legislation. Learn about the various types of disclosures and what is necessary to ensure compliance.

- *Gregg M. Fishbein* - Lockridge Grindal Nauen P.L.L.P., Minneapolis

[Advanced]

Strategy: Protecting Trademarks on the Internet

An advanced examination of strategies to protect trademarks on the Internet. How to find potential infringers. What works? What doesn't? Analyzing whether the use is infringement. What are your options in response to the use

including negotiation, cease and desist letters, ICANN's UDRP process, and litigation?

- *Gregory C. Golla* - Merchant & Gould, Minneapolis

4:45 – 5:30 p.m.

Institute Reception

All attendees are invited to join us for a complimentary reception. Enjoy hors d'oeuvres, refreshments, and good conversation with faculty, colleagues, and friends.

Thanks to the following individuals who served on the Institute Planning Committee:

B. Todd Jones (Co-chair), Daniel A. Tysver (Co-chair), Miguel J. Azar, James A. Blomquist, William P. Hefner, and Charles A. Johnson.

Credits: Minnesota CLE is applying to the Minnesota State Board of CLE for 6.0 hours CLE credit.



Carolyn Sandberg (left) and Cheryl Smith attend the June 21, 2001 MSBA Mini Convention CLE on Internet topics sponsored by the Computer Law Section.

Computer Law Section Meeting Minutes

April 10, 2001

Attendees: Charles Johnson; Sandra Sedo; Daniel Tysver; Katheryn Andresen; Michael Atlass; James Blomquist; Charles Brink; Stephen Buckingham; Bill Hefner; Mehmet Konar-Steenberg; Ron Marmo; Dianne Plunkett Latham; Chris Schulte; Kim Shepherd; Cheryl Smith; ; and John Taft. Also attending were Christine Brick, Carla Condiff, and Michael Trittipio (from the MSBA).

The meeting was called to order by Charles Johnson at 12:20 p.m. The minutes from the March meeting were approved.

Treasurer's Report: No Report

Committee reports were as follows:

Contracts: A mock negotiation CLE is planned for May 10, 2001 from 8:30 to 11:30 a.m. Three CLE credits will be sought, and a \$10.00 fee will be charged. There will be a maximum of forty attendees, who will be split into two groups for the mock negotiation.

Noontime CLE: The last CLE was well attended. Charlie will do the next presentation on April 24, 2001.

Newsletter: The next newsletter will arrive before May 1, 2001. The process is working better, but there are still some glitches. The hardest part is that the assisting staff member is doing the work that was previously done by two individuals.

Case Law: Kim Shepherd passed out a summary of cases that she and Gillian Rosenquist prepared. The cases covered the areas of patent law, trademark law, trade dress, copyright, and Internet jurisdiction. Kim walked the committee through the case summaries, which were most appreciated.

Web Site: Michael Atlass indicated that we would be sending out an announcement explaining how to access the chat room portion of the web site. Only thirty-one of the more than three hundred members of our Section do not have an e-mail address on file, so the main

announcement will be by e-mail. It was also noted that Dick Ericson would receive materials to be posted on the web site to keep it up to date.

Legislation: Kate Andresen handed out a summary of pending Federal legislation relating to computers and the Internet. Kate led a discussion of the pending legislation, and then explained several state bills relating to employee monitoring and telecommuting.

Computer Law Institute: Charlie Johnson indicated that Todd Jones was willing to assist on the Computer Law Institute. Dan Tysver, Jim Blomquist, and Bill Hefner also indicated a willingness to assist.

Nominations: John Taft indicated that they are finalizing the nominations for next year. The committee would like to find people who are interested in joining. As many as five current members stated that they may not want to be on the committee next year.

New Business: Charlie led a discussion on the MSBA's involvement with Habitat for Humanity. A discussion followed on whether the Section would be interested in assisting or contributing to Habitat. No motion was made, and the discussion was terminated.

Kate Andresen indicated that she had lectured at a course at William Mitchell during the previous month.

Upon motion duly made and seconded, the meeting was adjourned at 1:20 p.m.

Dan Tysver
Secretary



*Carla J. Condiff
is the winner of the
drawing for the digital
camera at the
June 21, 2001 MSBA
Mini Convention CLE on
Internet topics sponsored
by the Computer Law
Section.*

Committee Report

Nominations Committee

By: *John Taft*

Pursuant to Article V of the Bylaws of the MSBA Computer Law Section the following persons have been endorsed by the Elections Committee for their respective positions for 2001-2002:

Officers

Chair:	Sandra Sedo
Vice Chair	Daniel A. Tysver
Secretary	Chris Schulte
Treasurer	Kim E. Shepherd

Council Members

Katheryn Andresen	Mehmet Konar-Steenberg
Michael Atlass	Dianne Plunkett Latham
Miguel Azar	Ronald P. Marmo
James A. Blomquist	Gillian Rosenquist
Christine Brick	Carolyn M. Sandberg
Charles P. Brink	Tom Sheran
Stephen W. Buckingham	Cheryl A. Smith
Carla Condiff	John P. Sumner
Frank S. Farrell, Jr.	John A. Taft
Julie L. Finch	
Barbara J. Grahn	
William Hefner	

Legislative Liaison

By: *Katheryn A. Andresen*

Federal Legislation Update (5-8-01)

H.R.573: To provide grants to State educational agencies and local educational agencies for the provision of classroom-related technology training for elementary and secondary school teachers.

Sponsor: Rep Capps, Lois - Latest Major Action: 3/29/2001 Referred to House subcommittee

Committees: House Education and the Workforce

H.R.718: To protect individuals, families, and Internet service providers from unsolicited and unwanted electronic mail.

Sponsor: Rep Wilson, Heather - Latest Major Action: 4/4/2001 House preparation for floor

Committees: House Energy and Commerce; House Judiciary

H.R.1034: To amend the National Telecommunications and Information Administration Organization Act to establish a digital network technology program, and for other purposes.

Sponsor: Rep Towns, Edolphus - Latest Major Action: 3/22/2001 Referred to House subcommittee

Committees: House Education and the Workforce; House Energy and Commerce

H.R.1188: To encourage the use of technology in the classroom.

Sponsor: Rep Lucas, Ken - Latest Major Action: 3/22/2001 Referred to House committee

Committees: House Education and the Workforce; House Ways and Means

H.R.1259: To amend the National Institute of Standards and Technology Act to enhance the ability of the National Institute of Standards and Technology to improve computer security, and for other purposes.

Sponsor: Rep Morella, Constance A. - Latest Major Action: 3/28/2001 Referred to House committee

Committees: House Science

H.R.1411: To amend the Internal Revenue Code of 1986 to allow qualified technological equipment and computer software to be expensed, and for other purposes.

Sponsor: Rep Weller, Jerry - Latest Major Action: 4/4/2001
Referred to House committee
Committees: House Ways and Means

H.R.1545: To amend the Fair Labor Standards Act of 1938 to clarify the exemption from the minimum wage and overtime compensation requirements of that Act for certain computer professionals.

Sponsor: Rep Andrews, Robert E. - Latest Major Action: 4/24/2001 Referred to House committee
Committees: House Education and the Workforce

H.R.1553: To repeal export controls on high performance computers.

Sponsor: Rep Dreier, David - Latest Major Action: 4/24/2001 Referred to House committee
Committees: House Armed Services; House International Relations

S.124: A bill to exempt agreements relating to voluntary guidelines governing telecast material, movies, video games, Internet content, and music lyrics from the applicability of the antitrust laws, and for other purposes.

Sponsor: Sen Brownback, Sam - Latest Major Action: 1/22/2001 Referred to Senate committee
Committees: Senate Judiciary

S.307: A bill to provide grants to State educational agencies and local educational agencies for the provision of classroom-related technology training for elementary and secondary school teachers.

Sponsor: Sen Feinstein, Dianne - Latest Major Action: 2/13/2001 Referred to Senate committee
Committees: Senate Health, Education, Labor, and Pensions

S.414: A bill to amend the National Telecommunications and Information Administration Organization Act to establish a digital network technology program, and for other purposes.

Sponsor: Sen Cleland, Max - Latest Major Action: 2/28/2001 Referred to Senate committee
Committees: Senate Commerce, Science, and Transportation

S.487: A bill to amend chapter 1 of title 17, United States Code, relating to the exemption of certain performances or displays for educational uses from copyright infringement provisions, to provide that the making of a single copy of such performances or displays is not an infringement, and for other purposes.

Sponsor: Sen Hatch, Orrin G. - Latest Major Action: 3/13/2001 Senate committee/subcommittee actions
Committees: Senate Judiciary

S.512: A bill to foster innovation and technological advancement in the development of the Internet and electronic commerce, and to assist the States in simplifying their sales and use taxes.

Sponsor: Sen Dorgan, Byron L. - Latest Major Action: 3/9/2001 Referred to Senate committee
Committees: Senate Finance

S.591: A bill to repeal export controls on high performance computers.

Sponsor: Sen Bennett, Robert F. - Latest Major Action: 3/21/2001 Referred to Senate committee
Committees: Senate Banking, Housing, and Urban Affairs

S.630: A bill to prohibit senders of unsolicited commercial electronic mail from disguising the source of their messages, to give consumers the choice to cease receiving a sender's unsolicited commercial electronic mail messages, and for other purposes.

Sponsor: Sen Burns, Conrad R. - Latest Major Action: 3/27/2001 Referred to Senate committee
Committees: Senate Commerce, Science, and Transportation

S.803: A bill to enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Sponsor: Sen Lieberman, Joseph I. - Latest Major Action: 5/1/2001 Referred to Senate committee
Committees: Senate Governmental Affairs

Technology & Data Privacy

Legislation to address concerns that the private sector's Internet privacy policies are insufficient, including lack of an adequate means of recourse for consumer complaints, was introduced by Representative Matt Entenza (DFL-St. Paul) and Senator Steve Kelley (DFL-Hopkins). The bill was viewed as a preventative measure to keep privacy laws current with new forms of technology and imposed the same requirements as for video rentals and cable television. The Minnesota Attorney General's office strongly supported the bill. The bill traveled through two Senate policy committees but was dormant in the House.

We expect privacy issues to be more prominent in the 2002 session as legislators seek issues that resonate with the public in preparation for the November 2002 election. It

also appears that no federal privacy bill which could short-circuit state initiatives will pass in the near term. Add to the mix an Attorney General who thrives on pursuing “consumer protection” issues and you have more than enough ingredients for a vigorous debate next session.

Internet Service Catalyst Grants: Passed as part of the omnibus jobs and economic development finance bill, this initiative was first introduced in 1999 by Representative

McElroy (R-Burnsville) and Senator Kelley (DFL-Hopkins). Catalyst grants, which are popular with members as an economic development tool, will be used to create public-private partnerships in advancing telecommunications services, such as Internet access expansion, particularly in rural areas. Grants are for equipment and construction, not planning and preliminary design costs. ■

Case Law Summaries

By: Kim Shepherd and Gillian Uecker Rosenquist

Patent

Amazon.com Inc. v. Barnesandnoble.com Inc., No. 00-1109 (Fed. Cir. March 14, 2001). The U.S. Court of Appeals in Washington overturned a ruling that barred Barnesandnoble.com from using so-called one click (“Express Lane”) Web technology that Amazon.com claims it patented. The preliminary injunction had been granted in December 1999, and the case is scheduled to go to trial in September in Seattle.

Intergraph Corp. v. Intel Corp., No. 00-1048 (Fed. Cir. March 1, 2001). Intergraph Corp., a technology concern with a long-running legal battle against Intel Corp., Thursday said that a U.S. Court of Appeals ruling that the chip giant does not have rights to use some of Intergraph’s technology means that it can now go after Intel for royalty payments. In its ruling, the U.S. Court of Appeals for the Federal Circuit said that Intergraph received “the full and exclusive right, title and interest” to its Clipper patents.

SciMed Life Systems, Inc. v. Advanced Cardiovascular Systems Inc., No. 99-1499 (Fed. Cir. March 14, 2001). Devices with structure disclaimed in specification are non-infringing. Accused devices with a structure that is disclaimed in the patent specification do not infringe literally or under the doctrine of equivalents.

Honeywell, Inc. v. Victor Co. of Japan Civ. No. 99-1607 (D. Minn. March 29, 2001). This case involves the scope of a Honeywell patent on a structure to mask light in passive auto-focus systems for cameras and similar

devices. Honeywell sued JVC, alleging that a JVC masking structure infringed Honeywell’s patent. The Court disagreed. “Given that the JVC imaging chip has a mask which is essentially under the lenslet-an embodiment expressly criticized in the patent specification-the Court finds that the accused device does not literally read on the ‘501 patent. Moreover, the Court finds that the Plaintiff cannot, through the doctrine of equivalents, recapture subject matter which it has disclaimed in the patent itself.

Black Clawson Co., Inc. v. Kroenert Corp., Klaus Dieter Reinhardt, and Maschinenfabrik Max Kroenert GmbH and Co., No. 00-1409 (8th Cir. March 28, 2001). Clawson entered into a licensing agreement with a German company (GmbH), which transferred the exclusive right within the United States to use certain technology, including any and all inventions covered under the agreement. The technology was stolen by another German company, who began marketing it in the United States. GmbH reached a settlement agreement with the German company in Germany. Subsequently, Clawson brought a claim for infringement in the U.S., and the district court granted summary judgment in favor of the defendants on claims of unfair competition, Lanham Act and other federal and state causes of action based on res judicata. The Eighth Circuit held that the licensor did not possess substantial rights in the technology (due to the licensing agreement), the licensee and licensor interests were divergent, Clawson’s interests were not represented in the German litigation by privity with the licensor and therefore, res judicata had no effect of this action.

Trademark

TCPIP Holding Co. v. Haar Communication Inc., No. 99-7744 (2d Cir. Feb. 28, 2001). TCPIP Holding operates a chain of children's clothing stores, "The Children's Place" and clothing bearing that label. TCP owns the trademarks "The Children's Place" and the domain names *tcpkids.com* and *childrensplace.com*. Haar Communication attempted to develop an Internet portal and registered the domain name "thechildrensplace.com" and other similar domain names. TCPIP sued for trademark infringement and dilution. The District Court granted TCPIP's preliminary injunction and Haar appealed. The Second Circuit held that trademarks that are descriptive and enjoy secondary meaning, such as "The Children's Place" do not qualify for protection under the Federal Dilution Protection Act. The court relied in part on the Act's legislative history in analyzing the degree of fame a mark must have to be protected and stated that marks such as "Dupont", "Buick" and "Kodak" are the type of marks, which were intended to be protected by the Act.

Chance v. Pac-Tel Teletrak Inc., No 98-55160 (9th Cir. March 20, 2001). Where the owner of a service mark cannot show any sales of the service, the totality of the circumstances test suggests insufficient use in commerce to justify the protection of the Lanham Act.

Trade Dress

Traffix Devices, Inc. v. Mktg Displays, Inc., No 99-1571 (U.S.S.C March 20, 2001). A mechanism for keeping portable signs erect in a high wind, which has not otherwise established secondary meaning in its trade dress, is a functional feature for which there is no trade dress protection, as shown by the fact that the expired patent was a utility patent.

Copyright

Lyons Partnership L.P. v. Morris Costumes Inc., No. 99-2255 (4th Cir. March 14, 2001). Lyons is the trademark and copyright owner of the purple dinosaur character "Barney". Morris rents costumes including the various purple dinosaur costumes (called "Duffy" and "NDC"). The District Court ruled that Morris' dragon costume(s) did not infringe Lyons' copyrights in the Barney costumes because the Duffy costume is not subjectively similar when viewed from the perspective of the average adult renter or purchaser. The 4th Circuit reversed based

on the lower court reasoning that the perspectives of children were irrelevant. When a copyrighted work is intended for a particular audience, a court's substantial similarity inquiry must focus on the perspective of persons who comprise that group. The court of appeals followed the "intended audience" rule adopted in *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731 (4th Cir. 1990). In *Dawson*, the court replaced the "ordinary observer rule" with "intended audience" because copyright law it intended to protect the creator's economic market and resulting financial returns.

Internet Jurisdiction

Amazon.com v. Kalaydijan, No. C00-1740R (W.D. Washington, Feb. 20, 2001). The defendant is a passive web site owner and the sole proprietor of a California company, which manufactures and sells tanning products. The defendant owns the trademarks *amazontan.com* and *amazon*. Plaintiff sells cosmetics and sun tan products on its web site. When the plaintiff brought suit for trademark infringement, dilution and violation of the Anticybersquatting Act in Washington, the court held that the plaintiff could not assert personal jurisdiction over the defendant. Because the defendant's web site was passive, there was no purposeful availment based on the nature of the defendant's actions within the forum.

Cases to Watch

Tasini v. New York Times, U.S., No. 00-201, briefs filed 1/5/01 and 2/20/01. Articles written by freelance journalists and published in newspapers and magazines may be republished in electronic media such as NEXIS without the authors' consent as a revision of the original collective work, according to a Supreme Court brief filed recently by publishers.

Compaq Computer has filed a lawsuit against *RLX Technologies*, a server start-up run by a number of former Compaq executives. The lawsuit, filed in the District Court of Harris County in Texas, alleges that RLX violated Compaq's trade secrets by recruiting key Compaq executives, including one-time vice presidents Mike Perez and Keith McAuliffe. These former Compaq employees, the suit alleges, then improperly divulged confidential Compaq intellectual property. Houston-based Compaq filed the suit Wednesday. The court issued a temporary restraining order Friday that prevents RLX from recruiting more Compaq employees for a week, according to The Woodlands, Texas-based RLX. ■

Clickwraps and other Electronic Contracts – Are They Enforceable?

By: Sandra Sedo

Introduction

As companies look to the Internet as a means to sell or license their tangible and intangible products, they need a reliable and standardized means to limit buyers' rights and remedies with respect to those products. As a result, it has become commonplace for websites to use a variety of on-line electronic contracts, more commonly known as "clickwraps," in connection with sales and other activities that occur through such websites. Despite such widespread usage on the Internet, some still question whether clickwraps are legally enforceable.

The term clickwrap actually describes the formation of an on-line contract, rather than the specific terms of the contract itself. It is a term that is derived from a predecessor agreement, the "shrinkwrap," which has been used for some time in the licensing of software and other forms of intellectual property delivered in tangible form (e.g., on a CD-ROM). Shrinkwrap agreements are used by licensors to prohibit certain uses of licensed intellectual property that otherwise would be permissible under federal and international intellectual property laws, and to limit liabilities and disclaim implied warranties. While a shrinkwrap relies on an opening of the package and use of the product to indicate acceptance, a clickwrap requires "clicking" on an electronic button or some other form of affirmative act to indicate assent to the formation of an on-line agreement. One other significant difference between shrinkwraps and clickwraps is that it is common practice for customers to have the option to view the terms of a clickwrap before consummation of the on-line transaction (and delivery of the resulting product or service) that is governed by such clickwrap; this is unlike a typical shrinkwrap transaction where the terms of the agreement are not generally made available to the buyer until after the deal is concluded.

Enforceability in General

The enforceability of both shrinkwraps, clickwraps and other forms of electronic contracts raise two fundamental issues of contract law – proper contract formation and assent.

Formation of a contract for goods under the Uniform Commercial Code (UCC) typically occurs before the buyer takes possession of the goods. The buyer and seller agree to the terms of the deal, a contract memorializing those terms is executed by the parties in a writing and then the goods are delivered to the buyer. The typical transaction involving a shrinkwrap does not follow this standard contracting model. Instead, the buyer has already agreed to purchase the goods before being asked to consent to the terms of the shrinkwrap that memorializes the transaction. This leads to the legal question of whether a valid contract between the buyer and seller is formed at the time of purchase or when the buyer actually accepts the terms of the shrinkwrap.

In the case of clickwraps, it is common for the buyer to have the opportunity to review the terms of the agreement prior to him/her actually having to agree to purchase the goods. However, in this context the legal question arises whether the act of the buyer clicking on an "I agree" icon or other symbol is sufficient assent in order to bind the buyer to the terms of the applicable clickwrap.

Shrinkwrap Cases

The present trend appears to be for most courts to uphold shrinkwrap agreements as valid and enforceable. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) the Seventh Circuit held that shrinkwrap agreements are enforceable unless their terms are objectionable upon general contract principles (i.e., if they violate a rule of positive law or are unconscionable). In particular, the court determined that UCC §2-204(1) was applicable to shrinkwraps since it provides that a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by the parties recognizing the existence of such a contract. The court considered three factual issues, all of which arise in the context of contract formation, important in its determination that the agreement in question was enforceable under the UCC: 1) the box containing the software indicated to the purchaser that the software was subject to an enclosed license; 2) the purchaser had ample opportunity to read the license; and 3) the purchaser had the opportunity to

reject the license by returning the software for a refund. In short, the court considered – and determined – the enforceability of a shrinkwrap in terms of traditional contract law.

In Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), the Seventh Circuit again enforced an agreement where the terms became available to the purchaser after delivery of the product. Hill purchased a computer system from Gateway by phone. The terms of the agreement in question were included in the box sent to Hill, without notice of the terms on the box itself. The agreement provided that the buyer assented to the proposed terms by keeping the computer system for more than 30 days. Even though the box itself did not have a notice of the terms on the outside, the court held that the plaintiff had: 1) notice of the proposed terms (through Gateway advertising); 2) time to read the terms of the agreement (30 days); and 3) a right to return the computer system rather than being bound by the terms of the agreement. As a result, the court found the terms of the applicable shrinkwrap binding on the plaintiff.

In MA Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000), the Washington Supreme Court enforced the terms of a shrink-wrap agreement included in the packaging of software. The court held that the buyer, MA Mortenson, was bound by the agreement since there was: 1) notice of the license agreement (on the packaging, on the welcome screen, and through a course of dealing); and 2) assent by use of the software. The court did not explicitly refer to the opportunity of returning the software rather than assenting to the terms of the agreement. However, it did explicitly adopt the Hill and ProCD reasoning, including their references to the “accept-or-return” type of agreements. The court also rejected the notion that the agreement would actually have to be read by the plaintiff in order to be enforceable.

While most legal commentators believe that the courts will follow the reasoning in ProCD and Hill and enforce shrinkwrap agreements, there have been a few exceptions. In Novell v. Network Trade Center, 15 F. Supp. 1218 (D. Utah 1997), the District Court held that the transaction was a sale of goods under the UCC rather than a license, and it applied the first sale doctrine. The first sale doctrine gives full ownership rights of the goods in question to the purchaser. The court concluded that the defendant, as an “owner” of the software, is entitled to the use and enjoyment of the software with the same rights given to a purchaser of

any other type of good. Consequently, the court held the shrinkwrap license included with the software invalid insofar as it purported to retain title to the software for the copyright owner. The court rejected the ProCD and Hill reasoning and instead relied on older case law to find the shrinkwrap license to be invalid as a contract of adhesion, unconscionable and unacceptable pursuant to the UCC. See Step-Saver Data Sys., Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988).

In a more recent case the District Court of Kansas also declined to follow the ProCD and Hill line of reasoning. When applying either Kansas or Missouri law, the court concluded that the terms of the shrinkwrap agreement in question were proposed additional terms governed by UCC § 2-207. However, in order for those additional terms to be enforceable, UCC § 2-207 requires the recipient to affirmatively accept the additional terms. The court concluded that in this case the consumer had not accepted the additional terms proposed through the shrinkwrap agreement, and therefore he/she was not bound by its terms. Klocek v. Gateway, Inc., 104 F.Supp2.d 1332, 1338 (D.Kan. 2000).

Electronic Agreements

Clickwrap Agreements

To date, there are relatively few decisions that directly address the enforceability of clickwrap agreements. However, most agree that case law regarding enforceability of clickwraps should mirror case law determining the enforceability of shrinkwrap agreements.

In Hotmail v. Van\$ Money Pie, Inc., 47 U.S.P.Q. 2d (BNA) 1020 (N.D. Cal. 1998), the Northern District Court of California granted a preliminary injunction for the plaintiff, determining that it was likely to succeed on a breach of contract claim based the Terms of Service agreement on its website. The agreement in question was a clickwrap agreement that Hotmail required all users of its website service to consent to prior to use of such service. The court in its holding: 1) assumed that there was sufficient notice to the user regarding the existence of the Terms of Services clickwrap; and 2) concluded that the creation of a Hotmail account for a user constituted the user’s assent to the terms of the clickwrap.

In Storm Impact v. Software of Month Club, 13 F.Supp. 2d. 782 (N.D. Ill. 1998), the Northern District Court of Illinois held that an express reservation of rights in an electronic agreement displayed on end users’ computer

screen was valid and enforceable. The reservation prohibited commercial distribution of the software in question, and appeared on a user's screen at startup.

Terms of Service Agreements

In *Ticketmaster Corp. v. Ticket.com, Inc.*, 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000), the court dismissed the plaintiff's breach of contract claim, which was brought based on Ticketmaster's Terms of Service agreement from its website. This agreement was accessible to users through a hyperlink on the plaintiff's homepage, and provided that "anyone going beyond the home page agrees to the terms and conditions set forth, which include that the information is for personal use only, may not be used for commercial purposes, and no deep linking to the site is permitted." Ticketmaster cited the ProCD line of case law in support of enforcing the specific terms in its Terms of Service agreement. The court, however, distinguished Ticketmaster's Terms of Service agreement from the existing shrinkwrap case law by pointing out that "the 'shrink-wrap license agreement' is open and obvious and in fact hard to miss." The court also noted that 1) Ticketmaster could have used a clickwrap agreement (i.e., required affirmative action by the user to accept the terms of the electronic contract); and 2) the location of the Terms of Service agreement required the user to scroll down the home page to find and read them. The court dismissed the breach of contract claim holding that "[i]t cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with anyone using the web site."

In *Pollstar v. Gigmania, Ltd.*, 2000 WL 33266437 (E.D. Cal 2000), the District Court denied the defendant's motion to dismiss the case and elaborated on the enforceability of Terms of Service type agreements. Plaintiff had argued for enforceability based on the fact that defendant had used the website services that were purported to be governed by the Terms of Service. The case is interesting in that the court highlighted the following facts as troublesome: 1) the license agreement was set forth on a different web page that was accessible via a link from the home page; and 2) the active link from the home page to the agreement was not underlined as is common Internet practice. While these facts seemingly weighed against proper notice of the agreement to the user, and while the court seemed to indicate some doubt regarding notice of the agreement, it stated that the license agreement in question *might* be enforceable. This was sufficient to defeat a motion to dismiss, but it is uncertain what the court will hold at trial.

The case law regarding Terms of Service type agreements indicates that sufficient notice of the agreement is important, and that courts are concerned that adequate notice may not be occurring based on standard practices in the industry today. It is yet to be decided by the courts exactly what type of notice is actually required to achieve enforceability of Terms of Service type agreement, but, at a minimum, a website should contain clear notice that such an agreement governs the use of such website. It might, however, be preferable to use a clickwrap agreement if possible, since it requires the user to affirmatively assent to the terms of the agreement.

Enforceability of Specific Contract Clauses

In addition to the issues related to contract formation discussed in the previous section, normal limitations imposed by contract law govern the enforceability of specific terms contained in shrinkwrap and clickwrap agreements.

Choice of Law and Forum

Choice of Law clauses are subject to limitations under the doctrine of unconscionability, and the treatment of overriding fundamental public policy of the forum state. *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App.4th 881, 72 Cal. Rptr.2d 73 (Cal. App. 1998), but compare to *Lowry Computer Products, Inc. v. Head*, 984 F. Supp. 1111 (E.D. Mich. 1997). Contract terms that select an exclusive forum are also subject to the doctrine of unconscionability and the fundamental public policy. A choice of an exclusive judicial forum is not enforceable if it is unreasonable and unjust. *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y.A.D. 1998). Choice of a forum at one party's primary place of business is ordinarily reasonable if both parties are merchants. In the case where one party to the transaction is a consumer, the courts are much more reluctant to accept a forum selection clause.

In *Mark Williams, et al. v. America Online, Inc.*, 00-0962, the Middlesex County Superior Court in Massachusetts denied AOL's motion to dismiss for lack of proper forum. Plaintiffs had brought suit alleging that their computers, as a result of installing AOL 5.0, sustained damage. AOL argued for dismissal on grounds that the Terms of Service agreement on its website explicitly deemed Virginia as the proper venue for any lawsuits arising out of such agreement. The court held Massachusetts was the proper venue based on the following facts: 1) the damage to the computers occurred upon installation and

before the customers clicked on the Terms of Service; 2) public policy suggests that a Massachusetts consumer who individually may have damages of only a few hundred dollars should not have to pursue AOL in Virginia; and 3) AOL's forum selection clause is not being enforced in similar federal claims against AOL.

In Decker v. Circus Circus Hotel, 49 F. Supp.2d 743 (D.N.J. 1999), the New Jersey District Court upheld a forum selection clause included in an online agreement. The hotel website required assent to a forum selection clause by anyone making a reservation online. The forum selection clause designated state and federal courts in Nevada as the exclusive forum, and the New Jersey court transferred the case to that jurisdiction.

In Groff v. AOL, Inc., 1998 WL 307001 (R.I. Super. 1998), the Rhode Island court upheld a forum selection clause included in AOL's online mass-market license. The license was a click-wrap agreement requiring the user to affirmatively accept the Terms of Service before gaining access to AOL's system. The matter was dismissed for improper venue, pointing out that the plaintiff "had the option not to accept the defendant's terms, [but] did not."

In Caspi v. Microsoft Network LLC et. al., 732 A.2d 528 (N.J. A.D. 1999), the Superior Court of New Jersey, Appellate Division, enforced a forum selection clause in a clickwrap license agreement on the Microsoft homepage. The court focused on three factors in reaching its holding: 1) adequate notice of the existing of a clickwrap license; 2) sufficient market competition; and 3) adequate time to review the clickwrap license and return the software. The court found that allowing subscribers to freely scroll through various computer screens, rather than delivering a hardcopy of the clickwrap agreement, did not make the terms of clickwrap unconscionable. It also considered important the fact that the subscriber had affirmatively indicated his/her assent to the agreement by clicking on an "I Agree" button, which showed assent to the terms of the agreement.

Disclaimer of Implied Warranty of Merchantability
In Rinaldi v. Iomega Corp., 1999 WL 1442014 (Del. Super. 1999), the Delaware Superior Court considered the issue of conspicuousness of a disclaimer of the implied warranty of merchantability included in a shrinkwrap agreement. Applying the Delaware UCC, the court dismissed the plaintiffs' claim for a breach of the implied warranty of merchantability and held that the disclaimer

of the warranty was sufficiently conspicuous. The court concluded that the disclaimer was effective even though it was not available until after opening the package

Disclaimer for Incidental and Consequential Damages
In MA Mortenson Co., Inc. v. Timberline Software Corp., the court upheld a disclaimer of incidental and consequential damages included in a shrinkwrap agreement. The plaintiff argued that the "license terms were never presented to Mortenson in a contractually meaningful way," thereby rendering the terms procedurally unconscionable. The court disagreed and noted that Mortenson had ample opportunity read and understand the terms of the license. The court also pointed out that Mortenson is not an inexperienced retail consumer, but rather have previous experience from purchasing software from the defendant.

Legislative Responses

While the issue of enforceability of electronic contracts continues to percolate in the courts, there has been some legislative action of interest with respect to this issue. The legislation most applicable to this issue is the Uniform Electronic Transactions Act (UETA), Electronic Signatures in Global and National Commerce Act (E-Sign), and Uniform Computer Information Transactions Act (UCITA). UETA and E-Sign have limited scope, but they likely will have a substantial impact on electronic commercial environment. On the other hand, UCITA has the broadest scope, but its failure to attract much support at the state level means its practical impact on electronic contracting has been (and its likely to remain) minimal. Given this fact, UCITA is not discussed below.

Uniform Electronic Transactions Act – UETA

The National Conference of Commissioners on Uniform State Laws (NCCUSL) developed UETA to create a model statute enabling use of electronic records and signatures to transact business electronically. NCCUSL adopted the final version of UETA in July 1999. Since then 29 states have adopted statutes incorporating UETA into state legislation.

UETA sets out the applicable requirements to validate electronic records and signatures in connection with electronic contracting. UETA provides that: 1) a record or signature may not be denied legal effect or enforceability solely because it is in electronic form; 2) a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation; 3) if a law requires a record to be in writing, an

electronic record satisfies the law; and 4) if a law requires a signature, an electronic signature satisfies the law. See Minn. Stat. 325L.07.

UETA does not apply to transactions governed by: 1) a law governing the creation and execution of wills, codicils, or testamentary trusts; 2) UCC other than Sections 1-107 and 1-206, Article 2, and Article 2A; 3) UCITA; and 4) other laws specified by the implementing state.

The basic import of UETA is to validate electronic contracts and transactions at the state law level. It does not, however, address the validity or invalidity of any of the specific terms of an electronic contract. Rather, its purpose is to ensure that a contract is not denied enforceability just because it is in electronic form, or entered into via an electronic “signature.”

Electronic Signatures in Global and National Commerce Act – E-Sign

E-Sign states, in brief, that a signature, contract or record in interstate commerce shall not be denied validity because it is implemented in electronic form. In transactions affecting interstate or foreign commerce, electronic versions of agreements, notices, records, and signatures must be enforced as valid equivalents of those required in tangible media. E-Sign provides that when “writing”, “written”, “signature” or “signed” is a legal requirement such terminology automatically includes electronic versions. Electronic formats are thereby acceptable ways to satisfy the Statute of Frauds and other writing or signature requirements.

E-Sign preempts state law that conflicts with E-Sign’s uniform national framework validating electronic records and signatures and requiring technological neutrality. E-Sign provides for exemptions to preemption by the federal law. States that implement UETA are exempt from preemption if UETA is adopted without changes. E-Sign, however, applies to any limitation in the scope of UETA adopted by the state legislatures, if those limitations are in conflict with E-Sign. State statutes adopting UETA after E-Sign’s enactment must specifically refer to E-Sign to avoid preemption.

E-Sign explicitly preempts a few aspects that state law cannot contravene. 1) Electronic signatures and records cannot be denied legal effect just because they are electronic. 2) Use of specific electronic technology may not be a prerequisite for legal effectiveness of electronic

records and signatures. 3) E-Sign may not be circumvented with regard to transferable records through the imposition of additional non-electronic delivery methods, such as those authorized under Section 8(b)(2) of UETA.

E-Sign does not apply to contracts or other records to the extent they are governed by 1) a law governing the creation and execution of wills, codicils, or testamentary trusts; 2) a law governing adoption, divorce, or other matters of family law; 3) UCC other than Sections 1-107 and 1-206, Article 2, and Article 2A. E-Sign, furthermore, does not apply to court documents, notices of cancellation of utility services, cancellation or termination of health insurance, notice of recall of a product, certain correspondence under credit agreements secured by a primary residence by an individual, and documentation required to accompany hazardous materials.

In the most basic terms, E-Sign is the federal counterpart to UETA. Just as with UETA, it does not attempt to determine or influence the validity or invalidity of any of the specific terms of an electronic contract. Rather, its purpose is to ensure that a contract is not denied enforceability at just because it is in electronic form, or entered into via an electronic “signature.”

Conclusion and Checklist for Enforceable Electronic Contracts

Although the courts and legislature have not yet universally and explicitly validated electronic contracts such as clickwraps, the trend clearly points to their general enforceability in most U.S. courts. When counseling your clients on this issue, the checklist below is intended to give guidance and suggested ways to strengthen the likelihood of enforceability of such agreements.

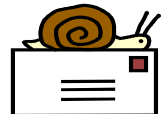
1. When electronic contracts are used on the Internet, there should be hyperlinks to the agreement from all relevant web pages to maximize the ability of the end user to review such contracts. The agreement should reside on an independent web page for easy printing and reading. It is also important to keep the interplay between different agreements used on a website in mind; this means that the Terms of Service agreement, Privacy Policy and relevant clickwrap agreements all should work in concert together and be consistent with each other.

2. The agreement should give the user or buyer clear notice at the time of purchase that the transaction is subject to an agreement, and that by agreeing to such agreement the user is entering into a legal contract just as if he/she signing a paper document.
3. The notice should be clearly visible to the user or buyer at the outset of the transaction and should include conspicuous warnings about the conduct deemed to be acceptance of the terms of the agreement (for example, as part of an online ordering screen).
4. Since the agreement will typically be directed to non-lawyers, the notice and the agreement should be clear and concise so that an average person can understand the nature and terms of the agreement.
5. The detailed terms of the agreement must be disclosed to the user or buyer prior to, or shortly after, the start of use of the licensed or purchased product. In the on-line environment the user should not receive access to the product before he/she agrees to the terms of the agreement.
6. The user or buyer should be provided with a reasonable opportunity to return the purchase or cancel the agreement, and a refund should be offered if the terms of the agreement are rejected. This is particularly important if the terms of the agreement do not become available until after delivery of the product.
7. Acceptance of the terms of the agreement should involve a specific affirmative action. Example are clicking an "I Agree" button or typing "yes" or before consummating a transaction. Prompts that require a consumer to read (or scroll through) the terms of the agreement are preferable. This may be done by placing an acceptance button at the bottom of each page.
8. If a clickwrap agreement will include terms that are unusual in the industry or are likely to surprise or affect the decision of the user or buyer, such terms should be highlighted and brought to the user's attention before the consummation of the transaction.
9. The agreement should be objectively drafted to protect the substantive interests of all sides. Clickwrap agreements rarely offer an opportunity for bilateral and equally based negotiations, and as a result may be interpreted against the drafting party.
10. Include an integration clause in the agreement.
11. Consumers should be able to contact a representative who can explain confusing portions of the agreement (however, note items 2 and 8 above).
12. The user or buyer should warrant that he/she is properly authorized to enter into the agreement (e.g., over 18 years old). ■

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