

## Project: Technology – Law Firms

# Amendments To UCC Article 2: Computer Software Shrinkwrap And Other Delayed Contract Terms

By Ernest W. Schoellkopff



On May 13, 2003 the American Law Institute gave final approval to amendments to Uniform Commercial Code Articles 2 (Sales) and 2A (Leases). Final publication will pave the way for introduction of the amendments in state legislatures. The amendments to Article 2 leave to the courts to sort out in individual cases the Code's application to computer and software licensing transactions. The amended Code excludes "information" from the definition of "goods" in section 2-103(k), and the Preliminary Official Comment states that Article 2 does not directly apply to any electronic transfer of information, such as the transaction involved in *Specht v. Netscape*.<sup>1</sup> In that case the Second Circuit, observing that downloadable software "is scarcely a tangible good," opted instead for the common law of contracts as it declined to enforce license terms, including mandatory arbitration, which appeared on a separate web page to which the user was referred only in a screen submerged below a "download" button.<sup>2</sup>

This reluctance to address computer and computer-based transactions is consistent with the ALI's unprecedented exit in early 1999 from work toward a new Article 2B, applicable to software and digital content contracts. The UCC's co-sponsor, the National Conference of Commissioners on Uniform State Laws,<sup>3</sup> proceeded on its own to draft and sponsor the controversial Uniform Computer Information Transactions Act. UCITA's facilitation of software publishing interests has drawn opposition from manufacturers, retailers, consumer advocates, financial institutions, libraries and other technology users.<sup>4</sup> Among the objectors' chief concerns has been UCITA's thorough validation of delayed contract terms which follow shipment and delivery.<sup>5</sup>

Well before UCITA, however, courts were enforcing software license terms in "shrinkwrap" documents typically enclosed in clear plastic wrapping on product packaging (hence the name). Shrinkwrap documents may set forth a vendor's terms or refer to terms within the package or in the program itself. The trend in commercial law could be described as the ascendance of "money now, terms later." To the extent the vendor clearly expresses the intention to bind the purchaser to these post-payment terms, the vendor can remain "master of the offer [and] may invite acceptance by conduct and may propose limitations on the kind of conduct that constitutes acceptance."<sup>6</sup> The phrases "money now terms later" and "master of the offer" were coined in the Seventh Circuit's seminal 1996 opinion, *ProCD v. Zeidenberg*, where the court applied the UCC and enforced a shrinkwrap license to prevent the defendant from reselling ProCD's telephone directory software database over the Internet.<sup>7</sup>

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Following *ProCD* a growing number of federal and state courts have countenanced the "money now, terms later" approach where the user was given the opportunity to return the product in order to avoid an unacceptable term or condition.<sup>8</sup> The Supreme Court itself had laid the foundation for the trend with its 1991 opinion in *Carnival Cruise Lines, Inc. v. Shute*,<sup>9</sup> which enforced a forum-selection cause printed on the back of a cruise-ship ticket mailed to passengers after purchase. *ProCD* and its progeny placed computers and software on the same footing with travel and entertainment tickets, and insurance, where it would be inefficient and cumbersome to require the purchaser to sign off on every detail before it is binding. Instead, the seller may well provide that the purchaser will be bound to otherwise lawful terms if he or she does not cancel.

Opponents of shrinkwrap and other delayed contract terms have argued that they are not enforceable on account of current UCC §2-207, governing additional contract terms and "the battle of the forms." Current section 2-207(2) can allow a merchant-buyer to ignore the additional terms where it has submitted an offer expressly limiting the acceptance to its own terms, where the additional terms constitute material alterations, or where the buyer has objected within a reasonable time after notice of the additional terms. Non-merchant consumers must expressly assent to the additional terms in order to be bound. A purchaser who successfully turns the table on the vendor and places the vendor in the position of offeree can argue that the vendor's shrinkwrap requirements are at best a proposal for additional terms following acceptance. Then, under the prevalent view, the seller must "demonstrate an unwillingness to proceed with the transaction unless the additional or different terms are included in the contract."<sup>10</sup>

The Third Circuit held in *Step-Saver Data Systems, Inc. v. Wyse* that an integration clause and "consent by opening" language in a shrinkwrap (or "box top") license accompanying operating system software did not suffice for a conditional acceptance which would have rendered the shrinkwrap terms a counteroffer.<sup>11</sup> As a result, the software vendor could not enforce its warranty disclaimers and rem-

edy limitations, which were deemed additional material terms to which the vendor failed to obtain the buyer's assent.

*ProCD* distinguished *Step-Saver* and averted the application of section 2-207 with the terse observation: "Our case has only one form; UCC §2-207 is irrelevant."<sup>12</sup> One opinion, *Klocek v. Gateway, Inc.*,<sup>13</sup> took direct issue with the *ProCD* rationale; without factual evidence to establish the vendor as the offeror and the purchaser as the offeree, the court presumed the opposite and denied a motion for dismissal based on an arbitration cause in standard shrinkwrap terms.<sup>14</sup>

The new amendments to Article 2 include a substantially revised section 2-207. New section 2-207 will not pose the same barrier to enforcement of delayed contract terms. The new version does not require additional terms in a written confirmation to be construed as proposed additions to a contract already made. It provides a decidedly more flexible (if arguably vague) and certainly less formalistic approach to "the battle of the forms" and treatment of terms the vendor seeks to impose after an order has been placed. Now entitled "TERMS OF CONTRACT; EFFECT OF CONFIRMATION," section 2-207 states:

"Subject to section 2-202 [the parol evidence rule], if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are:

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and
- (c) terms supplied or incorporated under any provision of this Act."

Preliminary Official Comment 1 clarifies that the section applies to all contracts for the sale of goods, and not only to a "battle of the forms." Comment 2 states: "When forms are exchanged before or during performance, the result from the application of this section differs from the prior section 2-207 of this Article and the common law in that this section gives no preference to either the first or the last form; the same test is applied to the terms in each."

Where terms do not appear in the records of both parties or are not supplied by the Code itself, here also it is left to the courts to determine whether a party "agrees" to the other party's terms. According to Preliminary Official Comment 3, "this section is intended to give greater discretion to include or exclude terms than was intended for in original section 2-207." Again evincing the drafters' ambivalence toward computer software, Comment 5 states: "The section omits any specific treatment of terms on or in the container in which the goods are delivered. This Article takes no position on whether a court should follow reasoning in *Hill v. Gateway 2000* ... or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse*."

As much as the new Code provisions have attempted to differentiate between

transactions in "hard" goods and "soft" information and to maintain the separation between the UCC and UCITA, amended section 2-207 and the "no position" statement in Comment 5 leave courts free to enforce shrinkwrap terms proved to be part of the parties' agreement, and likely portend further acceptance of "money now, terms later" in the sale of goods under the UCC, as well as transactions in computer and other information governed more directly by other law. From all indications, the decisions upholding shrinkwrap agreements have influenced the more flexible standards in amended section 2-207.

The revision may afford commercial vendors additional confidence that clearly expressed terms and conditions, including the purchaser's acceptance of those terms and conditions by accepting and retaining the goods, will "stick" in the event it is not feasible to obtain a signed agreement (written or electronic) from the purchaser. With proper drafting and presentation, the vendor can satisfy the concern in *Specht v. Netscape* that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent... are essential if electronic bargaining is to have integrity and credibility."<sup>15</sup>

<sup>1</sup> 306 F.3d 17 (2d Cir. 2002) (applying California law).

<sup>2</sup> Id. at 29 n.13.

<sup>3</sup> NCCUSL approved the amendments to Articles 2 and 2A at its August 2002 meeting.

<sup>4</sup> Only two states, Maryland and Virginia, have enacted UCITA, albeit with exclusions for the motion picture, newspaper and magazine publishing, music recording and telecommunications industries. (Maryland also excludes insurance, in part.) West Virginia, Iowa, North Carolina and Vermont have enacted bomb-shelter legislation to prevent application of UCITA via choice-of-law or forum-selection clauses. Bomb-shelter legislation has been pending in the New York State Assembly since 2001. In New Jersey, UCITA was introduced in both the Senate and the Assembly in May 2001, and was referred to the Senate Judiciary Committee and the Assembly Telecommunications and Utilities Commission, respectively.

<sup>5</sup> UCITA §112(a)(2) (rev. ed. Oct. 15, 2002) provides that "[a] person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it ... intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term."

<sup>6</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

<sup>7</sup> The program further prompted the buyer's express acceptance of the license via "clickwrap". Internet click-wrap typically presents the vendor's provisions on the screen or scroll box, and compels the buyer to click on an "Accept" or "I agree" button. The vendor will have obtained a definite manifestation of assent to the desired terms, the virtual equivalent of a signed agreement and acceptance, and the purchaser will be hard-pressed to avoid them if they are otherwise lawful.

<sup>8</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149-50 (7th Cir. 1997), cert. denied, 522 U.S. 808, 118 S. Ct. 47, 139 L.Ed.2d 13 (1997); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003); *Lozano v. AT & T Wireless*, 216 F.Supp.2d 1071, 1073 (C.D. Cal. 2002); *iLan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337-38 (D. Mass. 2002); *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 741 N.Y.S.2d 91 (2002); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251, 676 N.Y.S.2d 569 (1998); *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wash. App. 819, 970 P.2d 803, 809 (1999).

<sup>9</sup> 499 U.S. 585, 111 S. Ct. 1522, 113 L.Ed.2d 622.

<sup>10</sup> *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 102 (3d Cir. 1991).

<sup>11</sup> Id. at 102.

<sup>12</sup> 86 F.3d at 1452.

<sup>13</sup> 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000) (applying Kansas and Missouri law).

<sup>14</sup> *Brower v. Gateway 2000*, a 1998 New York case in point, agrees with *ProCD* and *Hill*:

the clause was not a 'material alteration' of an oral agreement, but, rather, simply one provision of the sole contract between the parties. That contract ... was formed and acceptance was manifested not when the order was placed but only with the retention of the merchandise beyond the 30 days specified in the Agreement enclosed in the shipment of merchandise. Accordingly, the contract was outside the scope of UCC 2-207.

246 A.D.2d at 250, 676 N.Y.S.2d at 57.

<sup>15</sup> 306 F.3d at 35.