

The Contractual Validity of "E-Contracts": An Overview

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Introduction

It is quite unlikely for most computer literate people in India that a day has passed without him or her coming across a point while dealing with computers where he or she did not had to manifest his or her assent to some terms. In case of surfing the Internet, it is generally done by clicking on some icon like "I Agree" and in cases of installing a software, assent is generally shown by the conduct of tearing the CD package and using it. Most of us do it as just another "necessary evil" to get our job done. However miniscule it may seem to a lay man, these actions of ours is of immense importance because it leads to a valid and enforceable contract and those terms, that we hardly even bother to read, can be strictly enforced against us.

The Three Basic genre

Generally the basic forms of "E-Contracts" that a person comes across if he is computer savvy are:

- Ø The Click-wrap or Web-wrap Agreements.
- Ø The Shrink-wrap Agreements.
- Ø The Electronic Data Interchange or (EDI).

Now let us see the peculiarities of these contracts and the specific industries that put it to use.

First and foremost are the Click-wrap¹ agreements. Click-wrap agreements are those whereby a party after going through the terms and conditions provided in the website or program has to typically indicate his assent to the same, by way of clicking on an "I

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¹ See *Click-wrap Agreements Held Enforceable*; downloaded from <http://www.philipnizer.com>.

Agree” icon or decline the same by clicking “I Disagree”. These type of contracts are extensively used on the Internet, whether it be granting of a permission to access a site or downloading of a software or selling something by way of a website.

Shrink-wrap agreements² have derived their name from the “shrink-wrap” packaging that generally contains the CD Rom of softwares. The terms and conditions of accessing the particular software are printed on the shrink-wrap cover of the CD and the purchaser after going through the same tears the cover to access the CD Rom. Sometimes additional terms are also imposed in such licenses which appear on the screen only when the CD is loaded to the computer. The user always has the option of returning the software if the new terms are not to his liking for a full refund.

Electronic Data Interchange or EDI is

*“ The electronic communication between trading partners of structured business messages to common standards from computer application to computer application ”.*³

In other words they are contracts used in trade transactions which enables the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgment of export and other official documents, leading eventually to the shipment of the goods) can be processed with virtually no paperwork.⁴ Here unlike the other two there is exchange of information and completion of contracts between two computers and not an individual and a computer.

² See David G. Post & Dawn C. Nunziato, *Shrink-wrap Licenses and the licensing on the Internet*, in *Technology Licensing and Litigation* (1997) at 519.

³ Simon Edwards, *EDI - Electronic Trading In The Book World: A Series Of Six Case Studies*.

⁴ *Overview of Electronic Data Interchange (EDI) Services*; downloaded from <http://www.tid.gov.hk>.

The Cardinal Question

Now we come to the cardinal question: *Are these agreements valid and binding contracts in the eyes of law?* Can they be enforced and if so why!

The very basic bedrock of any contract is the intention to enter into a legal relationship and that there should be ‘meeting of minds’. But as it must be already clear by now that in most of these contracts the party assenting to the terms does it without knowing or having intention to enter into any contract and even if has knowledge of the terms has no meaningful choice but to adhere to certain standard clauses put by the other party, thereby frustrating the very concept of meeting of minds.

But all these contracts are held valid and enforceable in a catena of judgments and statutory recognition of its validity is also forthcoming.

The Click-wrap Or Web Wrap Agreements

Judicial Decisions

The question of the validity of Click-wrap agreements came for consideration for the first time in 1998 in the famous case of *Hotmail Corporation v. Van \$ Money Pie Inc, et al* ⁵, where the court for northern district of California indirectly upheld the validity of such licenses where it said “that the defendant is bound by the terms of the license as he clicked on the box containing “I agree” thereby indicating his assent to be bound”⁶. This decision was followed and upheld in a catena of judgments like *Groff v. America Online, Inc*,⁷ *Steven J. Caspi, et al v. the Microsoft Network LLC, et al*⁸ and *I lan Systems, Inc v. Netscout services Level corp*⁹

⁵ C98-20064 (N.D. Ca, April 20, 1998).

⁶ 47 U.S.P.Q. 2D (BNA) 1020, 1025(N.D.Cal 1998).

⁷ File No C.A. No PC 97-0031 1998 WL 307001 (R.I.Superior Ct 1998).

⁸ 323 N.J.super 118 (N.J. App., 1999).

⁹ Civ Act No.00-11489-WGY(D.Mass. Jan 2 2002).

Statutory Recognition

Legislators have recognized the validity of mass market licenses like Click-wrap and Shrink-wrap whose proof is the proposed Article 2B of the UCC¹⁰ which is now replaced by NCCUSL¹¹ with the UCITA¹² which was passed by the majority of the states of America on the 29 th of July 1999.

Sec 209 of the UCITA states that the terms and conditions of the mass-market licenses can only be effectively adopted if the other party agrees to the license by manifesting his or her assent before or during the party's initial performance or use and access of the information.

Sec 112 of the same deals with how assent can be manifested .It clearly lays down that a person can manifest assent to a record or a term by his conduct if he intentionally engages in such conduct with reasons to know that such behavior will be construed by the other party or his electronic agent to be a form of assent. But all this will only hold good if the terms and condition are within the knowledge of the party assenting and that he has the chance to review the same. Thus in a Click-wrap license if a person reads the terms and clicks "I agree" he assents to the same by way of **Sec 209&112**.

In the **Illus 1** attached to **Sec 112** the example of the NY online registration is given whereby a party can either chose to accept the terms by clicking the "I agree "button or decline the same by resorting to "I decline". It is made clear that whoever clicks "I Agree" assents to the license and adopts its terms.

Apart from the UCITA even UNCITRAL¹³ *Model law on Electronic Commerce (1996)* in **Sec 11** gives statutory recognition of Click-wrap licenses where it says that an offer and acceptance can be validly expressed by data messages which include

¹⁰ Universal Commercial Code .

¹¹ National Conference of Commissioners on Uniform State Laws .

¹² Uniform Computer Information Transaction Act.

¹³ United Nations Commission On International Trade

information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.¹⁴

Mention may be also made of India's **Information Technology Act 2000** whereby by way of Sec **11** the legislators accept offer by way of data message either by himself or by any electronic system programmed for that specific purpose. (Which would include offer in case of Click-wrap) but is silent as regards mode of assent or acceptance of the same.

Thus Click-wrap agreements are valid and enforceable contracts as far as offer and acceptance is concerned.

The Shrink-wrap Agreements

Judicial Decisions

The validity of the Shrink-wrap agreements first came up for consideration in the famous case of *ProCd, Inc v. Zeidenburg*¹⁵ where it was held "that the very fact that purchaser after reading the terms of the license featured outside the wrap license opens the cover coupled with the fact that he accepts the whole terms of the license that appears on the screen by a key stroke, constitutes an acceptance of the terms by conduct. ProCd's lead was also followed in a no of judgments like *Compuserve Inc v. Paterson*,¹⁶ *Hill v. Gateway 2000, Inc*,¹⁷ *Tony Brower et al v. Gateway 2000,inc et al*¹⁸ and many others.

¹⁴ Sec 2 (a) <http://www.uncitral.org>.

¹⁵ 86 F.3d 1447 (7th Cir. 1996).

¹⁶ 89 F.3d 1257 (6th Cir. 1996).

¹⁷ 105 F.3d 1147 (7th Cir. 1997).

¹⁸ 1998 N.Y. App.Div.Lexis 8872.

Statutory Recognition

As it is already clear from **Sec 112** and **Sec 209** of the UCITA that mass market licenses like Click-wrap can be assented to by way of conduct, it is but a logical conclusion that the very conduct of the purchaser of softwares(which have Shrink-wrap licenses on them), by which he tears the wrap and uses the CD after reading the terms and condition, manifests his or her assent to the terms.¹⁹

Additional terms might be displayed on the screen when the purchaser is loading the CD on to the computer after tearing the Shrink-wrap, which had the initial terms of the license. The question is these terms enforceable too. It is clear from **Sec 208 (2)** that in a mass-market license, if the parties had reason to know that terms would be proposed later for assent and the later terms are agreed on, there is a contract including those terms; but if the later terms are rejected, there is no contract under Section 209(b).

Thus Shrink-wrap agreements are valid and enforceable contracts.

Electronic Data Interchange EDI

Judicial decisions

There are no reported cases on the enforceability of EDI as of recently²⁰ and as such we have to resort to statutory provisions to establish the validity of EDI's

¹⁹ Please read Sec 112 and 209 in the previous page.

²⁰Electronic Data Interchange (EDI) and the Law By Eric S. Freibrun, Esq.
<http://www.freibrunlaw.com>.

Statutory provisions

A plain and simple reading of **Sec 206** of the UCITA reveals that legislators have recognized the fact that a contract can be formed by the interaction of two electronic agents. For the above to occur it stipulates that there has to be offer and acceptance of the offer by the agents.

Under **Sec 112** of the same it is further laid down that an electronic agent can manifest its assent to a term if after reading the terms it engages in operations that in the circumstances indicate acceptance of the term.

An example may prove to be handy; say one computer X sends an order for two hundred kg of rice to another computer Y of the supplier as agreed by the EDI agreement beforehand by the two parties. Computer Y according to Sec 112 will accept the offer if it starts sending a receipt of the bill for such order to computer X.

Thus even EDI's are valid and binding contracts under the UCITA.

It will be also pertinent to mention over here that **Sec 11** of the UNCITRAL recognizes the validity of EDI wherein it has expressly laid down that offer and acceptance by electronic agents especially EDI's are valid and binding contracts.

Conclusion

So the next time you uninterestingly click on an "I agree" button without even caring to see the terms or hurriedly tear the wrap of software CD being least interested about the terms typed on it "Think Twice"! They are all are valid contracts and you could be made liable for the terms and conditions laid down there.
