

# **A Validity of Shrinkwrap and Clickwrap License Agreements in the USA : Should we follow UCITA?**

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## A. INTRODUCTION

Since the last decade, there has been a substantial Information Technology (IT) revolution. At that time, the Internet emerged in the United States and has been widespread throughout the world resulting us living among an era of World Wide Web inadvertently.

The growth of high technology resonates from the emergence of an information-based economy fueled by the interactive and communications capabilities of software and digital systems.<sup>2</sup> The commercial issues in creating, compiling, distributing, and enabling use of the output of these information-sector industries entail, overall, a vastly different enterprise than does manufacturing and distributing hard goods.<sup>3</sup> The subject matter is intangible; the rights and duties associated with them are defined not by the old law of personal property, but by technological control of systems or property rights under intellectual property law, such as copyright.<sup>4</sup> The dominant types of contracts for intangible property are licenses or limited grants, in which the transferor retains the right to control not only the information, but also the use of the information given to the transferee. This is far different model than a sale of goods, which give the buyer full rights in the subject matter(i.e., the item sold).<sup>5</sup>

The conspicuous transaction of the information technology is an “Electronic commerce” which can be generally defined as the business environment in which the advertising, buying, selling, and/or licensing of goods, service and/or information occurs electronically such as with computer network or wireless communication system<sup>6</sup>.

This article examines only the validity of software-license agreements-shrinkwrap and clickwrap license agreements- which are the core of software transactions in an era of information technology.

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<sup>2</sup> Raymond T. Nimmer, *Images and Contract Law--What Law applies to Transactions in Information*, 36Hous.L.Rev. 1(1999).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Holly K. Towle, *E-Transaction& Contracting*, OIL GLASS-CLE 135 (1998).

In Thailand, license agreements are actually not something nascent . I do believe that many lawyers and legal consultants have seen, drafted or even negotiated these kind of agreements either goods or service otherwise both. Nonetheless, software-licensing agreements are somewhat nascent in our country but I ensure they will be very common in the near future because the information technology revolution will make people get involve with the computer much more than the previous decade. Today software transactions have grown so tremendously that you will not be surprised how wealthy Bill Gates, a Principal of Microsoft company, is. It is common to notice not only companies or large organizations have computers to assist them to operate their works efficiently within a short period but individuals also have them for such purpose as well. The computer will, of course, play a pivotal role in human's life. Once you have a computer, you trend to be engaged in a software-licensing agreement, as the software enclosed must be used with your computer system. This is the point why software-licensing agreements are so important. You cannot use the software without the software owner's permission. To have an authorized usage of the software, under software commercial practices, is to make a software-licensing agreement with the owner.

Generally, there are three types of software-licensing agreements, which are examined from the perspective of acceptance and negotiation as follows:<sup>7</sup>

1. *The shrinkwrap license agreement* : involves acceptance by the signing through use of the software and no negotiation.
2. *The signed form agreement* : requires acceptance by the signing by the end user and possibly minor addendums to the negotiate license agreement.
3. *The negotiate license agreement* : involves considerably more negotiation and change than occurs within the signed form agreement

On the other hand, it makes no difference to say the software-license agreements can be sorted into two types, which are *bargain agreements for custom software* and

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<sup>7</sup> Robert Green Sterne and Edward J. Kessler, *From Shrinkwrap to Negotiate End User Software License Agreement: A Practical Perspective*, 276 PLI/Pat 501 (1989).

*unbargained shrinkwrap license imposed on mass-market purchasers.* As software has become a mass-market commodity, the shrinkwrap license has tended to predominant.<sup>8</sup>

## **B. HISTORY AND BACKGROUND**

In the early days of computer history, the only computers that existed were large mainframes.<sup>9</sup> Their costs were much more than hundred of thousands or even millions of dollars; consequently, they were available only for a select group of customers who could afford them.<sup>10</sup> In addition, most software during this period was customized for these mainframe computers and carried equally steep price tag.<sup>11</sup> A typical software package cost tens of thousands of dollars. Lawyers drafted the contracts for those software sales transactions and their clients usually were large corporations for whom contracts and lawyers were a way of life.<sup>12</sup> As computer technology advanced, personnel computers replaced the large mainframe computers. With their inexpensive prices, personnel computers became a mass market items resulting in the software becoming from mass-market items as well. At that time, the software developers adopted shrinkwrap licenses to save the costs of lawyers for the individual negotiations and to impede the end user from passing out their products to others without paying them.

## **C. WHAT ARE SHRINKWRAP AND CLICKWRAP LICENSE AGREEMENTS?**

Before we analyze the validity of shrinkwrap and clickwrap licenses, we need to make clear the concept of licensing and the meaning of shrinkwrap and clickwrap licenses. At least you have to understand that shrinkwrap and clickwrap agreements are not only limited for the license agreements but included the sale of goods agreements as well. However, as we said at the beginning, we will focus only on license agreement.

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<sup>8</sup> Mark A. Lemley, *Intellectual property and Shrinkwrap Licenses*, 68 S.Cal.L.Rev 1239, (1995).

<sup>9</sup> DAVID BENDER, *COMPUTER LAW* § 4A.02(4), at 4A-141 (1996).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

The concept of licensing has its origin in the common law of property, with most cases arising in the context of real property. The license grants a right of use in property.

The meaning of license is “a right granted which gives one permission to do something which he could not legally do absent such permission.”<sup>13</sup> We can say, in brief, a license is a restricted transfer of use of a property right under limited conditions and for a specific term.<sup>14</sup> From the definition, we notice the right of the licensor is not transferred to the licensee. The licensee has only the right to use something according to the permission that the licensor grants.

However, a *license* should not be confused with a *license agreement*. A license is an acquired right whereas the purpose of the license agreement is to establish the rights of the parties, their responsibilities and liabilities in relation to the subject matter of the license as between each other and, in some instances, as between themselves and a third party.<sup>15</sup>

### **I) Shrinkwrap License Agreements**

“Shrinkwrap License Agreements” have been an integral part of software transactions.<sup>16</sup> It is unknown when they were used or who first used them.<sup>17</sup> However it is generally known that shrinkwrap licenses became a feature of the computer market by the early 1980’s<sup>18</sup> and their increased usage paralleled the software industry’s movement from primarily customized software packages and agreements to a mass-market mode of software delivery.<sup>19</sup>

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<sup>13</sup> BARRON’S LAW DICTIONARY, 276 (3<sup>rd</sup> ed. 1991).

<sup>14</sup> MARK L. GORDON, COMPUTER SOFTWARE : CONTRACTING FOR DEVELOPMENT AND DISTRIBUTION, (1986).

<sup>15</sup> 2 D. ANDREWS, LICENSING IN THE 1980’S § 3B ,(1982).

<sup>16</sup> Lemley , *supra* note 4, at 1241.

<sup>17</sup> *Id.*

<sup>18</sup> David Einhorn, *The Enforceability of Tear-Me-Open Software License Agreement*, 67 J. PAT & TRADEMARK OFF SOC’Y 509 (1985).

<sup>19</sup> Christopher L. Pitet, *The Problem With “Money Now, Terms Later” : ProCD, Inc v. Zeidbenberg And The Enforceability of “Shrinkwrap” Software Licenses* , 31 Loy. L.A.L.Rev. 325

The word “shrinkwrap” refers to the clear plastic wrapping that seals the software box and through which buyers can read the license agreement.<sup>20</sup>

The typical “Shrinkwrap License Agreement” is a single piece of paper containing the license terms wrapped in cellophane or transparent plastic along with the computer software installation diskettes or the owner’s manual. Sometimes the license is simply put in the box along with the software and the owner’s manuals. End users will be bound and will be considered to have agreed with the license if they tear open the package or, in the event that the license is not shrinkwrapped, if they use the software. If end users do not agree with the terms of the licensing agreement, they can return the unopened package for a full refund to the retail store from which they obtained the software.<sup>21</sup>

## II) Clickwrap License Agreements

“Clickwrap License Agreements ” come into existence at the rapidly evolving on line forum of electronic commerce. It is also described as “Web-wrap”, “click-proceed” or “click-through” agreement.<sup>22</sup> Software licensor does not receive a signed agreement from the user; instead he relies on the customer’s manifestation of assent via the computer.<sup>23</sup> You can see the clickwrap license agreements ordinarily on the Internet. For example, when you apply to use free e-mail such as in the ‘Hotmail’ or ‘Yahoo’ website, you will see the terms and conditions form for usage. Alternatively, when you want to get free software such as ‘Real Player’, before downloading the software, you will be asked if you agree with the terms or not. You have to click “I AGREE” to get the free software and then you will be bound by the terms and conditions of that license.

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<sup>20</sup> Page M. Kaufman, *The Enforceability of State ‘Shrinkwrap’ License Statutes in Light of Vault Corp. v. Quaid Software Ltd.*, 74 Cornell L.Rev. 222 (1988).

<sup>21</sup> Apik Minassian, *The Death of Copyright : Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA. L.Rev. 569 (1997).

<sup>22</sup> J.T. Westermeier, *Web Agreements*, 505 PLI/Pat 321 (1998).

<sup>23</sup> Zachary M. Harrison, *Just Click Here: Article 2B’s Failure to Guarantee Adequate Manifestation of Assent in Clickwrap Contracts*, 8 Fordham Intell.Prop.Media &Ent.L.J.907 (1998).

The concepts of clickwrap license agreement are similar to those of shrinkwrap license agreements. We can say the predecessor of clickwrap license agreements is the shrinkwrap license agreements. Therefore, they can be characterized as shrinkwrap license agreements that have been adapted to the recently established electronic commercial environment.<sup>24</sup> Under clickwrap license agreements, the users are generally asked to review the terms of the agreement and to indicate assent by clicking on the button at the end of the license.<sup>25</sup>

Unlike the shrinkwrap license counterpart, however, the buttons provided in these clickwrap license agreements include an “I AGREE” button and an “I DECLINE” button. If the viewer agrees with the terms, he/she can *click* the “I AGREE” button to complete the purchase transaction. Otherwise, the viewer can terminate the transaction prior to download by clicking the “ I DECLINE” button.<sup>26</sup>

The other variant on shrinkwrap is that clickwrap license agreements have license terms, which are first made available during installation of a program. A screen appears and the customer is asked to click to “agree” to license term. Nonetheless, the similar thing between them is clickwrap license agreements require the user to accept license terms before downloading a selected software program marketed on the web site. Another form of clickwrap licenses prevents a user from browsing the pages of a Web site unless the customer agrees to visitation terms.<sup>27</sup>

#### **D. OBJECTIVES OF SHRINKWRAP AND CLICKWRAP LICENSE AGREEMENTS**

The existing laws that are coherent to software transactions, such as Copyright, Trade secret and Patent laws, have failed to provide sufficient protection of proprietary

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<sup>24</sup> Jerry C. Liu et al., *Electronic commerce : Using clickwrap agreements*, 15 NO.12 CLW 10(1998).

<sup>25</sup> Michael D. Scott, *Electronic contracting : The use of clickwrap licenses*, L.W. GLASS-CLE 95 (1998).

<sup>26</sup> *Id.* at 1

<sup>27</sup> *Id.* at 2

interest in software.<sup>28</sup> Software Developers, consequently, rely on the use of contracts in the form of license agreements, as a means to protect software from unauthorized use and copying. By granting a license to the purchaser to use the software rather than selling the program outright, the Software Developer is able to retain and have control over his product. Such controls include retaining the title of software, limitation of customer's use, prohibition of reverse engineering, warranty disclaimers, elimination of battle of form dispute, limitation on the liability and the choice of governing law/ forum. Most of shrinkwrap and clickwrap license agreements are non-exclusive licenses which mean the licensor reserves the right to license the same software to other licenses. Exclusive licenses are uncommon because they prevent the re-licensing the software and receiving additional license fees.<sup>29</sup>

## **E. CHARACTERISTICS OF SHRINKWRAP AND CLICKWRAP LICENSE AGREEMENTS**

I just mentioned the reasons why Software Developers adopt and employ shrinkwrap and clickwrap license agreements into software transactions. To respond to the needs, the characteristics of the license agreements usually include the following provisions<sup>30</sup>

1. A conspicuous notice of agreement clause stating the opening of the shrinkwrap or using the software constitutes agreement to the license's terms.
2. A title retention clause which, in effect, states the user does not own the copy of the program he/she has contradicted for, but takes possession subject to a perpetual license.<sup>31</sup>

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<sup>28</sup>- Section 109 of Copyright Act limits the copyright owner's exclusive right over their copyright works. It governs about the "First sale Doctrine": once the copyright owner sells an authorized copy of copyright work, he can no longer control its disposition or further transfer.

-Section 117 also gives the purchaser a copy of copyright software the right to make another copy of the software if the user creates the new copy either as an essential step in using the software or for archival purposes.

-Section 302 limits copyright right for the life of the author and 50 years after author's death.

<sup>29</sup> H.Ward Classen, *Fundamentals of Software Licensing*, 37 IDEA:J.L.& Tech. 1 (1996).

<sup>30</sup> Stephen Fraser, *Canada-USA trade issues : Back from purgatory? Why Computer software "shrinkwrap licenses" Should be laid to rest.*, 6 Tul. J.Int'l & Comp. L. Rev. 183 (1998).

<sup>31</sup> The Software Developers want to avoid the "First Sale Doctrine"(section 117 of Copyright Act).

3. A strict anti-refuse clause prohibiting the user from lending, renting, or otherwise transferring the software to others.

4. An anti-reverse engineering clause, which prohibits the user from disassembling the program to discover how, it works.

5. A limited copying provision.

6. The usual, and sometimes unusual, limitations or disclaimers of warranties and liabilities.

7. A purchaser's right to decline the terms of the agreement by returning the software program and requesting a refund and

8. Miscellaneous provisions such as a governing law clause etc.

## **F. ENFORCEABILITY OF SHRINKWRAP AND CLICKWRAP LICENSE AGREEMENTS**

### **I) General Concepts of Contract Law**

Since the concept of modern contract law has its roots in the nineteenth century of the *freedom of contract*, the parties had broad freedom to make their own voluntary arrangements. As long as the contract came into existence by mutual assent of the parties, the courts' role was to interpret and enforce the parties' obligation by employing the principle of liberty, equality and reciprocity, the dominant value of a market economy.<sup>32</sup> In contrast, the classical contract theory ignores the law's role in legitimizing the position of the well-off who enjoy great power in the market. For that reason, there has been a counter-movement in modern contract theory moderating the harsh consequences that stem from unequal bargaining power. In a short time after that, the modern courts have increasingly scrutinized the underlying fairness of the contract where the parties are in vastly different bargaining positions.<sup>33</sup>

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<sup>32</sup> HUGH COLLINS, *THE LAW OF CONTRACTS* 1, (1986).

<sup>33</sup> *Id.*

In summary, if the contract is not subject to the extra formal requirements imposed by a legislation, such as the Statute of Fraud that requires a sale contract which is over \$500 must be made in writing<sup>34</sup>, a contract may be formed provided there is a sufficient offer, an acceptance of the offer as well as a bargained-for exchange of consideration.<sup>35</sup>

According to the meanings of shrinkwrap or clickwrap license agreements that we discussed in topic C, we can conclude that they are adhesion contracts which do not really accomplish the concept of mutual assents and bargains as provided in the contract theory. Actually they are “take it or leave it” agreements in which the user is not made aware of the terms until late in the transaction which is different from traditional written contract.<sup>36</sup> We will see how the courts enforce these license agreements . Nevertheless, they remarked as follows:

1. Shrinkwrap licenses do not follow the normal practice of an agreement between the parties.
2. The provision of shrinkwrap licenses are often over-reaching and contravene other application law.
3. Consumers’ rights in the contractual relationship are severely limited when they are forced to agree to something that remains enveloped with the carton.<sup>37</sup>

## **II) The Approaches of the Law to Shrinkwrap and Clickwrap License Agreements**

In the United States, the Uniform Commercial Code (UCC) plays a pivotal role for the commercial transactions. However, in the aspect of shrinkwrap and clickwrap license agreements, there is no specific law to apply, even UCC, until the mid of this year , which we will discuss about that law later on.<sup>38</sup> Therefore, a relevant law, at this time, is

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<sup>34</sup> Compare with Section 456 of Thai Civil & Commercial Code B.E. 2468.

<sup>35</sup> E. ALLAN FRANSWORTH, FRANSWORTH ON CONTRACTS, § 2.2 and 3.3 (1998).

<sup>36</sup> Mark A.Lemley, *Shrinkwrap in Cyberspace*, 35 Jurimetrics J. 311, 317 (1995).

<sup>37</sup> Jane M.Rolling, *The UCC Under Wraps : Exposing the Need for More Notice to Consumer of Computer Software With Shrinkwrapped Licenses*, 104 COM.L.J.197 (1999).

<sup>38</sup> In July 1999, Uniform Computer Information Transaction Act (UCITA) was approved by NCCUSL.

only Article 2 of UCC governing the sales of goods transactions. However, some legal scholars disagree that Article 2 sales doctrine of the UCC should be applied to software-licensing agreements because it is fundamentally inconsistent with the commercial reality of such transactions.<sup>39</sup> I also agree with this point.

You may now wonder why the UCC is not fit for such advance technology transactions. As I already mentioned that the drafters of Article 2 did not contemplate with an advent of modern-mass market software industry at that time, a contract for the sale of goods, then, is one in which a seller agrees to transfer goods that conform to the contract in exchange for a valuable consideration. The main point is Article 2 of the UCC applies to sales of tangible goods only. Therefore, the question coming up is whether “software” is under the meaning of goods. Under Article 2, “Goods” mean all things movable at the time of identification to the sale.<sup>40</sup> Electricity is also treated as goods.<sup>41</sup> In addition, the vast majority of courts, at the earliest time, treated software as goods within the scope of Article 2. Some courts struggle with the intangible qualities of software applying the UCC by analogy.<sup>42</sup>

The other obscured issue making the parties feel frustrated is software-licensing agreements, both shrinkwrap and clickwrap licenses, are not sales of goods transactions where title passes from buyer to seller. For this point, generally, the courts distinguish between *sales* and *services*. Article 2 governs the former whereas the latter falls under the auspices of the common law.<sup>43</sup> Courts look to the “*predominant purpose*” of the software agreement to determine which law should be applied.<sup>44</sup> Nonetheless, Article 2 is inadequate for the new information technologies, as it does not address some fundamental issues of the shrinkwrap or clickwrap licensing. We, of course, need the law that has a

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<sup>39</sup> Michael Rustad and Lori L. Eisenschmidt, *the commercial law of Internet security*, 10 Berkeley Tech.L.J.2 (1995).

<sup>40</sup> See UCC, section 2-105

<sup>41</sup> Singer Co. v. Baltimore Gas&Elec.Co.,558 A.2d 419 (Ct. Spec. App. 1989).

<sup>42</sup> Herbert J. Hammond, *Limiting and Dealing with Liability in Software Contracts*, 9 Computer Law 22 (1992).

<sup>43</sup> The bifurcated treatment of sales and services was first conceived centuries ago in the law-merchant tradition. See *Milau Assocs.,Inc. V. North Ave. Dev. Corp.*, 368 N.E.2d 1247 (N.Y.1977).

See Rustad , *supra* note 39, at 27.

<sup>44</sup> *Micro-Managers, Inc. v. Gregory*, 434 N.W. 2d 97,100 (Wis. Ct. App. 1988).

See Rustad, *supra* note 39, at 27.

specific paradigm for dealing with issues such as contract formation and its enforceability, interpretation, warranties, and the transfer of rights in information technologies.

### **III) Prior Adjudication of Shrinkwrap and Clickwrap License Enforceability**

Shrinkwrap license agreements have existed since 1980's; there are a few cases relevant to the validity of shrinkwrap and clickwrap license agreements that you can see as follows :

#### *a) Unenforceable Shrinkwrap License Agreements*

The earliest case which addresses the enforceability of shrinkwrap license agreements is in *Vault v. Quaid Software Limited* <sup>45</sup>

*Vault*, the plaintiff, produced computer diskettes under the registered trademark "PROLOCK" which are designed to prevent the unauthorized duplication of programs placed on them by software computer companies, Vault's customers. By placing software on diskette encoded with Vault's anticopying software, Vault's customers could prevent unauthorized duplication of programs. Vault included a shrinkwrap license agreement that specifically prohibited copying, modification, translation, decomposition or disassembly of Vault's program for any purpose without Vault's prior written consent.<sup>46</sup> Quaid Software Ltd., the defendant, purchased a disc from Vault and tried to develop the program to defeat the PROLOCK's anticopying features. As a result, Vault brought a suit with a number of claims against Quaid including breach of contract for the shrinkwrap license agreement by reverse engineering of the PROLOCK software.

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<sup>45</sup> 847 F.2d 255 (5 th Cir. 1988).

<sup>46</sup> Vault's license agreement reads: IMPORTANT! VAULT IS PROVIDING THE ENCLOSED MATERIALS TO YOU ON THE EXPRESS CONDITION THAT YOU ASSENT TO THIS SOFTWARE LICENSE. BY USING ANY OF ENCLOSED DISKETTE(S), YOU AGREE TO THE FOLLOWING PROVISIONS. IF YOU DO NOT AGREE WITH THIS LICENSE PROVISIONS, RETURN THIS MATERIALS TO YOUR DEALER, IN ORIGINAL PACKAGING WITHIN 3 DAYS FROM RECEIPT, FOR A REFUND.

The district court held Vault's shrinkwrap license agreement was an adhesion contract, which could only be enforced if the Louisiana License Act is a valid and enforceable statute.<sup>47</sup> However, the court noted numerous conflicts between Louisiana's License Act and Copyright Act. The former authorized a software producer to impose a number of contractual terms on purchasers such as prohibition of copying of the program for any purpose and modifying or adapting the program in anyway including by reverse engineering.<sup>48</sup> However, the fifth Circuit Court of Appeals held that a shrinkwrap license agreement prohibiting reverse engineering was unenforceable contract of adhesion, and it found that federal copyright preempted Louisiana's shrinkwrap license statute.

Another case is *Step-Saver Data System Inc. v. Wyse Technology and the Software Link, Inc.*<sup>49</sup> In 1981, Step-Saver, the plaintiff, performed its business as a value added retailer for International Business Machine (IBM). It would combine hardware and software to satisfy the word processing, data management, and communications needs for offices of physicians and lawyers. Step-Saver also developed and marketed a multi-user system. After evaluating the available technology, Step-Saver selected a program by The Software Link, Inc. (TSL), the defendant. Step-Saver obtained the copies of the software by placing telephone orders with TSL. They agreed, over the phone, that TSL would ship a certain number of copies of the software along with an invoice containing terms essentially identical with those on Step-Saver's purchase order which are price, quantity, and shipping and payment terms and Step-Saver would send TSL a purchase order. No reference was made during the telephone conversations, or either on the purchase orders or on the invoice with regard to a disclaimer of any warranties. However, the computer program was shipped to Step-Saver along with a shrinkwrap license that included a disclaimer of all express and implied warranties except for a warranty that the discs in the box were free of defects which was printed on the box containing the software. When the copy of TSL's software did not function properly, Step-Saver brought an action claiming for a breach of warranty. TSL argued the terms of shrinkwrap license absolved it any liability.

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<sup>47</sup> Vault Corp. v. Quaid Software Ltd., 655 F. Supp.750, 761(E.D. La. 1987).

<sup>48</sup> See 17 U.S.C. § 102, 117 (2).

<sup>49</sup> 939 F.2d 91.(3<sup>rd</sup> Cir. 1991).

The district court held the shrinkwrap license, as a matter of law, was a final and complete expression of the parties' agreement. However, the Third Circuit Court of Appeals reversed and concluded the shrinkwrap license was unenforceable because the contract had been formed before the shipment of the software (by the parties' performance). The court applied §2-207 of UCC by determining that, in the absence of express assent to additional terms in a subsequent form, § 2-207 provides the default rule that the parties intended, as to the terms of their agreement, those terms to which they have agreed prior to the subsequent form.<sup>50</sup>The terms were thus fixed at the time the contract was formed. The shrinkwrap could modify the already solidified contract terms without an express agreement from Step-Savor.<sup>51</sup>

Under §2-207, such an ex post shrinkwrap license is considered a 'last shot' standard form, the terms of which are enforceable only if they do not materially alter the terms of the original contract of license.<sup>52</sup>

Another case is *Arizona Retail Systems, Inc. v. The Software Link, Inc.*<sup>53</sup> ARS, the plaintiff, is a value added retailer whereas TSL, the defendant, designs and sells software. The lawsuit regards the sale of a software operating system designed and sold by TSL known as PC-MOS which is designed to allow multi-user systems to access software applications from a central host computer, thereby eliminating the need to purchase individual software for each user.<sup>54</sup>

The court found the parties had actually formed several contracts over a period and analyzed the initial purchase and subsequent purchases of the software separately.<sup>55</sup> For the initial purchase, ARS by Allen Rude-the system manager- ordered an evaluation diskette of PC-MOS from TSL for a software test. Accompanying the diskette was a "lives copy" of the software, which was sealed in an envelope with, printed upon it a notice that by opening the envelope, the user demonstrates " acceptance of this product", and consents to all the provisions of the Limited Use License Agreement. After

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<sup>50</sup> *Id.* at 99.

<sup>51</sup> *Id.* at 105.

<sup>52</sup> Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 Wm.& Mary L. Rev.1305,(1994). *See also* Darren C. Baker, *ProCD v. Zeidenberg : Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 Nw. U.L.Rev. 379 (1997).

<sup>53</sup> 831 F. Supp. 759 (D. Ariz.1993).

<sup>54</sup> *Id.* at 760.

<sup>55</sup> Pitet , *supra* note 19, at 332.

evaluating the system for about two hours, ARS decided to keep the software copy after it had opened and read the shrinkwrap license attached to the software package. The court, as a result, held by requesting an evaluation disc and keeping the product disc, ARS agreed to purchase the copy of PC-MOS that accompanied the evaluation disc. Under these circumstances, the contract was formed only after ARS opened the shrinkwrap on the product disc and was given notice that contract formation would result.<sup>56</sup> As ARS had an opportunity to read the terms before a contract was formed, the court then concluded the terms of shrinkwrap license became part of contract between the parties, which was not inconsistent with Step-Saver case. However, the court reached a different conclusion with the respect to the subsequent purchase.

The circumstances surrounding for the subsequent purchases are very similar to that presented in Step-Saver case. ARS typically contacted TSL and ordered copies of PC-MOS over the telephone. During the order calls, the parties agreed on the specific goods to be shipped, the quantity of goods, and the price for the goods. TSL would accept the order and promise to ship them promptly, and thereafter would ship the goods together with invoices. Although the parties apparently never discussed the license agreement, each copy of PC-MOS would have the license agreement attached to its packaging.<sup>57</sup> TSL made three arguments as to why the license agreement should become part of the agreement between the parties. *First*, the license agreement constituted a proposed modification of the original contract pursuant to UCC § 2-209 and that ARS accepted the modification by opening the shrinkwrap package. The court however rejected this argument, emphasizing that assent must be express and cannot be inferred merely from a party's conduct in continuing the agreement.<sup>58</sup> The shrinkwrap license, consequently, did not become part of the agreement. *Second*, the license agreement constitutes a conditional acceptance of ARS's offer to purchase, and ARS accepted TSL's conditional acceptance by opening the shrinkwrap package. The court disagreed as it found TSL entered into a contract with ARS by agreeing to ship the goods to ARS, or,

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<sup>56</sup> Darren C. Baker, *ProCD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 Nw. U.L.Rev. 379 (1997).

<sup>57</sup> *Id.*, *supra* note 53, at 764.

<sup>58</sup> *Id.*

at the latest, by shipping the goods.<sup>59</sup> Since a contract had already been formed by the time ARS received the software and the shrinkwrap license, the license could not have constituted a conditional acceptance, regardless of its terms.<sup>60</sup> *Third*, if the court applies UCC§ 2-207 to this dispute as it did in the Step-Saver court, the court should hold the terms of the warranty and the terms of license agreement became part of the contract between the parties because the terms were immaterial. The court rejected and concluded that the terms of the license agreement are not applicable.<sup>61</sup>

From the above case, we notice the timing of contract formation played a pivotal role.<sup>62</sup> In Step-saver, the court determined the parties' conduct formed a contract and the buyer did not have an opportunity to read the license until after the contract was formed. Consequently, the court held the terms of the licenses were not part of the agreement. Similarly, with the subsequent purchases in Arizona Retail, the court held the terms in the license were not part of the agreement since the formation of the contract had already occurred before the buyer read them. The controlling issue was whether the buyer had an opportunity to read the license before contract formation.<sup>63</sup>

#### *b) Enforceable Shrinkwrap License Agreements*

The leading case that overturned the precedent about the unenforceability of shrinkwrap license agreements is *ProCD, Inc v. Zeidenberg*<sup>64</sup> ProCD, the plaintiff, had compiled information of more than 30,000 telephone directories into the computer database. The database cost more than \$ 10 million to compile and it is expensive to keep update. It licensed the information in two versions, a customer version and a higher price commercial version. Matthew Zeidenberg, the defendant, purchased a customer version from a retail outlet. There was a notice in the box which noted that the package of the software he purchased is governed by the license enclosed inside. The license was both

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<sup>59</sup> *Id* at 765.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 766.

<sup>62</sup> Pitet, *supra* note 19, at 335.

<sup>63</sup> *Id.*

<sup>64</sup> 86 F. 3d.1447 (7<sup>th</sup>. Cir. 1996).

printed in a manual and decoded on the CD-ROMs containing the software and appeared on a user's screen each time the software run.<sup>65</sup> Zeidenberg continued uploading the database in his website without paying attention to the licensing agreement enclosed. As a result that the Internet users can get the same information from the defendant website with the less price comparing with the price of ProCD software. ProCD then sued to enforce its shrinkwrap license for restrictions of using.

The district court held that the shrinkwrap license was unenforceable because the license was inside the packaging rather than on the outside of the package. It also held that even if the shrinkwrap license agreement was an enforceable contract, federal copyright law preempted enforcement of the contract under the state law.<sup>66</sup> However, the Seventh Circuit Court of Appeals reversed the district court's decision, holding that shrinkwrap licenses should be treated "as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code".<sup>67</sup> The court stated that shrinkwrap agreement are enforceable unless their terms are objectionable on grounds applicable to contracts in general".<sup>68</sup> The court discussed that trade of "money precedes the communication of detail terms" or "post-sale terms" are common for routine commercial and customer transactions such as the purchase of insurance where the buyer goes to the agent, who explains the essentials amount of coverage, number of years and remits the premium to the home office, which sends back a policy. Another example is the purchase of an airline ticket or a ticket to a concert. These tickets contain elaborate terms which the purchaser can reject by canceling the reservation. To use the ticket is to accept the terms, even terms in that in retrospect are disadvantageous.<sup>69</sup> Furthermore the court also addressed consumer goods such as radios which also work in the same way in which inside the box containing some terms, mostly about warranty.<sup>70</sup> The court also stated it was impractical to require that the license must be printed on the packaging.<sup>71</sup> Of pivotal importance to the court's holding

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<sup>65</sup> *Id* at 1450.

<sup>66</sup> *Id* at 1499.

<sup>67</sup> *Id* at 1450.

<sup>68</sup> *Id* at 1451.

<sup>69</sup> *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed. 622 (1991). *See also* *Vimar Seguros, S.A. v. M/V Sky Reefer*,--U.S.--, 115 S.Ct. 2322, 132 L.Ed. 2d 462 (1995).

<sup>70</sup> *Id*, *supra* note 64, at 1451.

<sup>71</sup> *Id*.

was the fact the buyer had notice that a licensing agreement was contained in the box, and the license expressly extended to the buyer the right to return the software for refund.<sup>72</sup> For the other issue regarding the preemption of federal copyright law, the court held the shrinkwrap agreement's protection of an uncopyrightable database did not create rights "equivalent to any of the exclusive rights within the general scope of copyright" and thus was not preempted by federal copyright law.<sup>73</sup>

The other two cases have dealt with sales of goods transactions. However, it was also relevant to license agreement. The court validated the shrinkwrap agreement by following the Pro CD case.

One case is *Hill v. Gateway 2000*<sup>74</sup> Hill, the plaintiff, purchased a computer from Gateway 2000, the defendant, over the phone. The computer arrived by shipping together with a list of terms inside, said to govern the transaction of the computer unless the buyer returned the computer within 30 days.<sup>75</sup> One of the terms was an arbitration clause. From the fact, the Hills kept the computer for more than 30 days, after which they became dissatisfied with the computer's component and sued for breach of contract. Gateway argued that an arbitration clause within the licensing agreement was binding upon the Hills.<sup>76</sup> The district court refused by writing that "the person record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice to arbitration clause"<sup>77</sup> The Seventh Circuit Court of Appeals upheld the validity of this shrinkwrap license, even though the license pertained to not only the software, but also the computer.<sup>78</sup> The court reasoned that "if the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four page statements of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of time... Customers as a group are better off

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<sup>72</sup> Liu, *supra* note 24, at 11.

<sup>73</sup> *Id.*, *supra* note 64, at 1454.

<sup>74</sup> 105 F.3d. 1147 (7<sup>th</sup>. Cir. 1997).

<sup>75</sup> *Id.* at 1148.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Liu, *supra* note 24, at 3.

when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device.”<sup>79</sup> Since the Hills were aware that terms would be presented to them with the shipped computer, this reason was influenced by the court.<sup>80</sup>

Another case is *Brower v. Gateway 2000, Inc.*<sup>81</sup> It was a class action. Brower, one of the plaintiffs in the class action, was one of the many customers who purchased computers and software products from Gateway 2000, the defendant, through a direct-sales system, by mail or telephone order.<sup>82</sup> Gateway shipped the merchandise to the customer together with a copy of its “standard terms and conditions agreement” and the warranties of products as its practice. The agreement begins with “A NOTE TO CUSTOMER”, which provides, in slightly larger print than the remainder of the documents, in a box that spans the width of the page : “This document contains Gateway 2000’s Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond thirty days after the date of delivery, you accept these Terms and Conditions.”<sup>83</sup> One of the terms governed an arbitration clause with the rules of International Chamber of Commerce. Nonetheless the plaintiffs took an action alleging Gateway 2000 had deceptive sales practices in seven causes of action, including breach of warranty, breach of contract, fraud and unfair practice trade especially in the technical support.<sup>84</sup> Gateway moved to dismiss on basis of arbitration clause contained in terms and conditions agreement which was sent along with goods shipped. An appellate court in New York held the arbitration clause was enforceable contract of adhesion but the clause which required arbitration to take place in Chicago under rules of International Chamber of Commerce (ICC), was substantively unconscionable<sup>85</sup> and therefore unenforceable.<sup>86</sup> The court concluded the contract was not formed with the placement of a telephone order nor

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<sup>79</sup> *Id.*, *supra* note 74, at 1149.

<sup>80</sup> *Id.* at 1150.

<sup>81</sup> 246 A.D.2d. 246 ; 676 N.Y.S. 2d. 569; 377 UCC Rep. Serv. 2d. 54 (1998).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 570.

<sup>84</sup> *Id.*

<sup>85</sup> The arbitration clause imposed excessive costs on individual consumer as the ICC procedure require an advance deposit of \$4,000 before the arbitration can commence, of which the \$ 2,000 registration fee is nonrefundable with any reason.

<sup>86</sup> *Id.*, *supra* note 81, at 569.

when paid for it or with the delivery of the goods. Instead, an enforceable contract was formed only with the customer's decision to retain the goods beyond the 30 days period specified in the agreement.<sup>87</sup> This decision is inconsistent with a traditional formation of contract law. The formation of a contract between seller and buyer typically occurs before the buyer takes possession of the goods. The buyer and seller negotiate the terms of the sale, often memorizing their understanding in a written agreement, and the goods are tendered.<sup>88</sup>

However, there was the recent case which is *M.A. Mortenson Co., Inc v. Timberline Software Corp.*<sup>89</sup> Prior to 1993, Mortenson, the plaintiff, licensed and used the Medallion Version of Timberline's Bid Analysis Software from Timberland, the defendant. Mortenson negotiated the price and number of copies of the upgrade with SDS. On July 12, 1993, Mortenson confirmed to purchase the software by issuing the purchase order of eight copies of precision which were signed by Neil of Mortenson and by Reich of SDS. The software sent by Timberline arrived at SDS and was unpacked by Reich to check the contents against the order. However Reich did not unpack the diskette from the small white product boxes. After that he delivered the software to Mortenson's office. The full text of license agreement is printed on the outside of each sealed envelope and user manuals. Moreover the license also appears on the introductory screen each time the program is executed. The licenses provide for a return and refund if the terms were unacceptable. After installing, Mortenson used the program to prepare its bid for the Harborview Hospital project. Its employees received an error message from the program. Mortenson and Timberline employees attempted to discover what caused the incorrect bid. However the source of the problem was not determined at that time. Then, Mortenson brought an action against the seller alleging that the software caused it to submit an inaccurate bid and it was damaged as a result.

The first issue presented to the court was whether the purchase order constituted an integrated contract. The court held it was not. The other issue is whether the terms of the license agreement are a part of the contract as formed between the parties. The court

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<sup>87</sup> *Id* at 572.

<sup>88</sup> Peter Brown, *Clickwrap Licenses*, 533 PAL/Pat 209 (1998).

<sup>89</sup> 970 P.2d. 803 (Wash. App.1999).

found the Seventh Circuit Court's reasoning in *PROCD v. Zeidenberg* and *Hill v. Gateway* are persuasive and similar to this case. In those cases, the Seven Circuit Court upheld license terms in a pay-now-terms-later transaction with an accept-or-return provision. Therefore the court concluded Mortenson's installation and use of the software manifested its assent to the terms of the license and it is bound by all terms of that license that are not found to be illegal or unconscionable although the parties never mentioned the license agreement or any of its terms during the negotiations. The court also held limitation of liabilities clauses are widely used in the software industry and they are not unconscionable.

*c) Enforceable Clickwrap License Agreements*

As we already knew that clickwrap license agreements were adapted by shrinkwrap license agreements, so the court also validated them as analogy. The followings are the cases dealing with clickwrap license agreements :

*Compuserve v. Patterson*<sup>90</sup> This case was related to a non mass-market clickwrap license agreement.

Compuserve, the plaintiff, is a computer information service headquartered in Columbus, Ohio. It contracts with individual subscribers, such as Patterson, the defendant, to provide access to computing and information services via the Internet. Patterson is a resident of Houston, Texas subscribed to Compuserve and he also placed items of 'shareware' on the Compuserve system for others to use and purchase. Patterson entered into a 'Shareware Registration Agreement' (SRA) with Compuserve.<sup>91</sup> Under the SRA, an online agreement, Compuserve was entitled to a percentage of the fee when a user paid a shareware licensing fee. After that Compuserve would pass the remainder to the shareware's creator. The SRA also referred two documents which are the CompuServe Service Agreement (Service Agreement) and the Rules of Operation. Both of them expressly provide the agreements would be governed and construed by Ohio law. Later, Compuserve began to market a similar product by using software that infringed the

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<sup>90</sup> 89 F.3d 1257 (6<sup>th</sup>. Cir.1998).

<sup>91</sup> *Id.* at 1259.

Patterson's trademark used in his shareware program. When Patterson complained, CompuServe sought from an Ohio court a declaratory judgment that it was not infringing on any of the Patterson's trademark. The appellate court held Patterson's contacts with Ohio were sufficient for the Ohio court to exercise personal jurisdiction over the non-residence.<sup>92</sup> The court also reasoned Patterson manifested assent to the SRA, which by its terms was to be governed by Ohio law, by typing 'Agree' at various points in the agreement.<sup>93</sup> Therefore, a contract formed online is enforceable.

*Hotmail v. Van \$ Money Pie*<sup>94</sup> This is the first case to consider the enforceability of a mass-market clickwrap agreements.<sup>95</sup>

Hotmail, the plaintiff, is a Silicon Valley company that provides free electronic mail (e-mail) on the World Wide Web. Hotmail's online services allow its over ten million registered subscribers to exchange e-mail messages over the Internet with any other e-mail users who has an Internet e-mail address throughout the world.<sup>96</sup> To become a Hotmail subscriber, one must agree to abide by the Service Agreement (Terms of Service) which specifically prohibits subscribers from using Hotmail's services to send unsolicited commercial bulk e-mail or "spam" or, to send obscene or phonographic messages. Hotmail can terminate the account of any Hotmail subscriber who violates the Terms of Service.<sup>97</sup> In the fall of 1997, Hotmail found out that Van\$Money Pie Inc., the defendant, created Hotmail's accounts to facilitate sending "spam" e-mails to thousands of internet e-mail users including Hotmail's domain name and its mark. The spam messages advertised pornography, bulk e-mailing software, and "get-rich-quick" schemes. The Hotmail's account served as a drop box for collecting unopened responses to the spam messages and receiving bounced back e-mails sent to nonexistent or incorrect email addresses.<sup>98</sup> Hotmail, after receiving complaints from Hotmail's subscribers, sued the defendant claiming the defendant had breached the terms of service Agreement by

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<sup>92</sup> *Id.* at 1268-1269.

<sup>93</sup> *Id.* at 1260.

<sup>94</sup> 1998 WL 388389, 47 U.S.P.Q.2d. 1020. (N.D.Cal. 1998).

<sup>95</sup> Brown, *supra* note 88, at 212.

<sup>96</sup> *Id.*, *supra* note 94, at 1021.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1021-1022.

arguing the defendant had agreed to abide by the terms of the Service Agreement before obtaining Hotmail account and using Hotmail's email services.<sup>99</sup> Moreover Hotmail also claimed the defendant's actions damaged Hotmail's reputation and goodwill.<sup>100</sup> The court granted Hotmail an injunction prohibiting the defendant from "Spamming" via Hotmail's email services.

From this case, even though the court did not directly address the validity of this online agreement, the judgment implied the validity of clickwrap license agreement which is a good sign for the electronic commerce community.

*Caspi v. The Microsoft Network,LL.C. et al.*<sup>101</sup> This case was a class action. Subscribers to on-line computer service, the plaintiff, brought action against the Microsoft Network (MSN), an Internet service provider (ISP) and the defendant, to recover for the way it rolled over service into more expensive plans. The issue of the case is whether a forum selection clause contained in an on-line subscriber agreement is enforceable. From the fact, before becoming an MSN member, a prospective subscriber is prompted by MSN software to view multiple computer screens of information, including a membership agreement which contains the above clause.<sup>102</sup> MSN's membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices "I Agree" and "I Don't Agree." Prospective members assent to the terms of the agreement by clicking on "I Agree" using a computer mouse. Prospective members have the option to click "I Agree" or "I Don't Agree" at any point while scrolling through the agreement.<sup>103</sup> Registration may proceed only after the potential subscriber has had the opportunity to view and has assented to the membership agreement, including MSN's forum selection clause. No charges are incurred until after the membership agreement review is completed and a subscriber has clicked on "I Agree."<sup>104</sup> The Superior Court, Appellate Division, by affirming the trial court's decision,

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<sup>99</sup> *Id.* at 1025.

<sup>100</sup> *Id.* at 1024.

<sup>101</sup> 323 N.J. Super 118 ; 732 A.2d 528 (1999).

<sup>102</sup> *Id.* at 530.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

held the application of MSN's forum selection clause at Washington did not contravene public policy and would not inconvenience a trial.<sup>105</sup>

## **G. UNIFORM COMPUTER INFORMATION TRANSACTION ACT (UCITA)-- A SOLUTION OF CLICKWRAP AND CLICKWRAP LICENSE AGREEMENTS IN THE UNITED STATES**

### **I) Why adopt UCITA?**

Computer transaction information today is governed by a myriad of legal rules primarily derived either from case precedent or analogy to statutory laws in other areas. In many instances, the law is simply not clear. That lack of clarity is multiplied across the 50 states, discouraging legal claims by consumer users and other licensees because the validity of those claim is unclear. The uncertainty creates additional, unnecessary risks for which American consumers ultimately pay.<sup>106</sup>

The Uniform Computer Information Transaction Act (UCITA) is intended to create a legal framework for a transaction in computer information and will provide greater certainty for the millions of transactions which are occurring daily under less than clear rules.<sup>107</sup> The core concept of UCITA is to validate shrinkwrap and clickwrap license agreement after the lack of uniformity in the case law.

The purposes of the Act are, First, to support and facilitate the realization of the full potential of computer information transactions in cyberspace. Second, to clarify the law governing computer information transactions. Third, to enable expanding commercial practice in computer information transaction by commercial usage and agreement of the parties. Forth, to make the law uniform among the various jurisdictions.<sup>108</sup>

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<sup>105</sup> *Id.* at 531.

<sup>106</sup> Donald A. Cohn and Mary Jo Dively, *The Need for a More Objective look at the Myths of the Proposed Uniform Computer Information Transaction Act*, (visited May 5, 1999). <http://www.2Bguide.com/docs/myths.html>

<sup>107</sup> *Id.*

<sup>108</sup> UCITA, Prefatory Note, <http://www.law.upenn.edu/bll/ulc/ucita/citam99htm>.

UCITA has five basic themes which are :<sup>109</sup>

1. the paradigm transaction is a license of computer information, rather than a sales of goods;
2. innovation and competitiveness have come from small entrepreneurial companies as well as larger companies;
3. computer information transactions engage fundamental free speech issues;
4. a commercial law statute should support contract freedom and interpretation of agreements in light of the practical commercial context; and
5. a substantive framework for Internet contracting is needed to facilitate commerce in computer information.

## II) Background

UCITA, in various forms, has been under development for about 12 years. For the last four years, it was called Article 2B and was drafted as a proposed amendment to the Uniform Commercial Code.<sup>110</sup>

Since 1950's, the Uniform Commercial Code (UCC) Article 2 has been the key statute for commercial dealing with sales of tangible goods in the U.S.A. We, at this period, have shifted from a goods to a service-based economy and a major new commercial and consumer tangible product-software has come to play an important role in the national market.<sup>111</sup> We learned that a body of law tailored to transactions whose primary purpose was to pass title of intangible property from one party to another could not be simply transported and applied to transactions whose purpose was to convey rights and privileges in the use of intangible property, information assets and the like.<sup>112</sup> Therefore in response to fundamental changes in business practices as well as the development of a new and faster method of communication, the National Conference of Commissions for the Uniform State Law (NCCUSL) formed a drafting committee to

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<sup>109</sup> *Id.*

<sup>110</sup> Cem Kaner and David Pels, *Flash : Meeting on UCITA/ Article 2B*, (visited Sept 27,1999). <http://www.badsoftware.com/index.htm>.

<sup>111</sup> Carol A. Kunze, *The 2B guide-background*, (visited Sept 8,1999) <http://www.2Bguide.com/bkgd.html>.

<sup>112</sup> Raymond T. Nimmer, *Article2B Preface Meeting –The Information Age* (visited April 24, 1999).

revise Article 2 of the UCC in 1991.<sup>113</sup> The two organizations that originally developed and currently revise the UCC are the NCCUSL and the American Law Institute (ALI).<sup>114</sup> At the time the decision was made to initiate an Article 2 revision project by ‘hub and spoke’ approach, a separate project existed addressing questions about what action should be considered for treating software and similar digital information contracts--Article 2B.<sup>115</sup> This project, then, was begun with the recommendation of an ABA study Committee to consider the developing uniform law treatment of software contracts, either in or outside the UCC. In 1995, the Committee of NCCUSL, after failing the ‘hub and spoke’ approach, decided to develop a separate article of the UCC--Article 2B-- dealing with licensing and other transactions involving digital information and related rights in intangible property.

The Article 2B first draft was made in 1994 and discussed by a wide range of groups such as Business Software Alliance (BSA), ABA Business Law Section, Computer Law Association, Licensing Executives Society etc. in the period of March 1994 to September 1995. The first revision of the draft was made in January 1996. However the draft encountered substantial criticism for consumer groups who believed the draft was too accommodating of the software industries concerns.<sup>116</sup> During 1998-1999, the UCC 2B drafting committee made a lot of efforts to respond to those concerns.

Ultimately, in April 1999, the ALI and NCCUSL announced Article 2B would no longer be pursued as a proposed new UCC article to cover computer information transactions. NCCUSL, instead, is proceeding on its own without the co-sponsorship of the ALI. Article 2B was renamed and changed into a freestanding uniform law outside as

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<sup>113</sup> Diane W. Savage, *The Impact of Proposed Article 2B of the Uniform Commercial Code in Consumer Contracts for Information and Computer Software*, (visited April 24, 1999) <http://www.cooley.com/publication/content.ix?section=Article+Reprints&id+34>.

<sup>114</sup> *Id.* The NCCUSL is a national organization comprised of a commissioner appointed from every state. Its purpose is to draft uniform legislation that can be adopted by all states while the ALI is a national organization which was formed in 1923 to promote the clarification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific work.

<sup>115</sup> *Id.*

<sup>116</sup> Jane K. Winn, *Formation of Electronic Contracts* 70, (Oct. 14, 1999) (unpublished manuscript on file of Law of Electronic Commerce).

“the Uniform Computer Information Transaction Act (UCITA).”<sup>117</sup> In July 1999, at the annual meeting in Denver, the committee finalized and approved the UCITA and let it be considered and approved by the each states as a uniform law.

### III) Scope

The scope of UCITA, by its name, governs with a “computer information transaction”<sup>118</sup> which means an agreement which has a primary purpose of which it is to require a party to create, modify, transfer, or license computer information or information rights in computer information.<sup>119</sup> On the other hand, as appeared in the Prefatory Note , UCITA is a contract law statute that covers transactions in computer software, multimedia interactive products, computer data or databases and online information. However, the mere fact that information related to a transaction is sent or recorded in digital form is insufficient.<sup>120</sup> For example, a contract for airplane transportation is not a transaction within this Act simply because the ticket is in digital form. The subject matter is not the computer information, but the service-air transportation from one location to another.<sup>121</sup> This Act does not apply to the many cases in which a person provides information to another person for purposes of another transaction such as making an employment or loan application.<sup>122</sup> Sales or leases of goods, casual or incidental exchange of information, employment contracts, computer/ televisions/VCR’S/DVD players/or similar goods, printed books/magazines/newspapers, motion pictures/ sound recordings/ musical works and broadcast/ cable programs are outside this Act.<sup>123</sup> In addition, in case there are mixed transactions between goods and computer information, good-based rules apply to the goods while this Act applies to the computer information.<sup>124</sup>

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<sup>117</sup> Jean Braucher, *Why UCITA, Like UCC Article 2B, is Premature and Unsound*, (visited April 30, 1999) <http://www.2Bguide.com/docs/0499jb.html>.

<sup>118</sup> UCITA § 103 (a).

<sup>119</sup> UCITA § 102 (12).

<sup>120</sup> UCITA, Reporter’s Note § 103.

<sup>121</sup> *Id.*, §103 (d).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* and *see* UCITA § 103 (c)(1).

UCITA has been criticized in many aspects by both proponents and opponents. The latter condemned the Act wouldn't only validate shrinkwrap and other mass-market licenses of information which eliminate "first sale doctrine", it would also set rules about electronic contracting for information products and services, establish new rules about warranties, and allow software developers to embed in the "software technical self-help" feature which can be triggered if licenses fail to pay royalties for the software.<sup>125</sup> Some alleged the problem of UCITA is the drafting committee has been dominated by lobbyists for software publishers.<sup>126</sup> Most opponents believe that UCITA will slash consumer rights, reduce competition, introduce unnecessary risks for consumers in electronic commerce, and lead to lower quality software.<sup>127</sup> On the other hand, the proponents posed many advantages issues of UCITA. For example, UCITA would create a statutory right to eliminate unconscionable terms by a court and licensing lets the software developer grant more rights than a licensee ordinarily would get in a sale.<sup>128</sup> Moreover, UCITA provides the user with more legal benefits than recent court decisions because UCITA statutorily mandates there be an opportunity to review and reject the license terms, coupled with a right to a cost-free refund from the retailer if the terms are not acceptable.<sup>129</sup> It also provided strong incentive to licensors to provide the license terms up front. In addition, UCITA extends warranty rules to all software licenses, and in mass market transactions where there may be no negotiation, protects against unfair surprise by requiring that a warranty disclaimer must be conspicuous.<sup>130</sup> For damages, UCITA also requires the licensor to be liable for consequential damages.<sup>131</sup> UCITA will decrease the choice of law dispute only if the Act becomes a uniform law among 50 states.<sup>132</sup> Personally, after reviewing the Act, I do support the Act as the problems mentioned above already have the solutions provided in the provisions if you consider this act

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<sup>125</sup> Pamela Samuelson, *Legally Speaking: Does Information Really Want to be Licensed?* ,(visited Sept. 27,1999) <http://www.2Bguide.com.doc.nuaa.html>. See also UCITA § 816.

<sup>126</sup> Kaner, *supra* note 110.

<sup>127</sup> *Id.*

<sup>128</sup> Cohn, *supra* note 106. and see UCITA §111.

<sup>129</sup> *Id.* AND see UCITA § 112 and 211.

<sup>130</sup> *Id.* and see UCITA § 406(b)(5).

<sup>131</sup> *Id.* and see UCITA § 808 (b)(2).

<sup>132</sup>Cohn, *supra* note 106.

carefully.<sup>133</sup> For example, the right to “self-help” is constrained under the circumstances that it creates a foreseeable risk of personal injury or significant damage to information or property other than the license information.<sup>134</sup> For the issue of mass-market license agreements, to be enforceability, this Act requires affirmative manifestation of assent, refund and return right in the event of there being no agreement until after payment, and the form cannot conflict with expressly negotiated terms of the agreement. I do think that the terms of mass-market license (shrinkwrap and clickwrap license agreements) will also be controlled by the free-market. If the software developers put a lot of unscrupulous terms in their licenses, they will be defeated by other competitors and will be out of business finally. The consumers have many choices. They can try another one which may make more sense for them, both terms and prices. I agree the Act may not an ideal statute for computer information in all aspects, but it’s better than letting the consumers face their uncertain destinies. I agree with the statement that *“No piece of legislation is perfect. To be adopted, and beneficial to society as a whole, legislation must consider a variety of interests. The goal of good legislation is not, therefore, perfection, but striking the right balance among competing views”*.<sup>135</sup>

## **H. POTENTIAL ENFORCEABILITY OF SHRINKWRAP AND CLICKWRAP LICENSE AGREEMENTS IN THAILAND**

In Thailand, at this time, we have not had a model law to deal with an electronic commerce. However, I learned there have been many efforts from both public and private sectors trying to brainstorm the ideas on how to enact the law to facilitate an online transaction.

I learned, The National Electronics and Computer Technology Center (NECTEC) are assigned by the National Information Technology Committee (NITC) to develop IT laws. There will be six IT laws promulgated which are:

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<sup>133</sup> See Ray Nimmer, *Correcting Some Myths About UCITA*, (visited Jul 20,1999) <http://www.2Bguide.com/docs/rne.html>.

<sup>134</sup> UCITA § 816.

<sup>135</sup> Micalyn S.Harris, Esq., *Memorandum to NCCUSL*,(visited Aug 9, 1999) <http://www.2Bguide.com/docs/71999mh.html>.

1. *Electronic Transaction Law* : To set the effective legal framework to support successful electronic contract.
2. *Electronic Signature Law* : To provide the security of electronic commerce transactions by using asymmetric-key cryptography.
3. *Computer Crime/Computer-related Crime Law* : To criminalize the new type of the offenses in the virtual world.
4. *Data Protection Law* : To protect rights of privacy in the Information Society.
5. *Electronic Funds Transfer Law* : To promote consumer protection and allocate the liability incurred from the technological risks.
6. *Universal Access Law* (By-law of Section 78 of the Constitution) : To create equitable Information Society by promoting universal access in the National Information Infrastructure (NII).<sup>136</sup>

Under the condition these bills will be approved, there will be certain criteria about online transactions which will decrease the impediment occurring both domestic and international online commercial transactions. I learned the first bill, Electronic Transaction Law, will be considered and approved by the parliament within this month; this will be good news. The bill follows the UNCITRAL model law provided by United Nation in 1996.<sup>137</sup> The most important concept of the act is “the admissibility as evidence of a data message shall not be denied on the ground that is a data message.”<sup>138</sup>

Nonetheless, I noticed that, among six bills mentioned above, none of them will cover the “computer information transactions.” I think that not only the 6 bills being prepared by NECTEC we also urgently need the legal criterion about computer information transactions as well. As you learned from the article how shrinkwrap and clickwrap license agreements are so significant on software transaction nowadays. At least, first, the agreements cut down on the cost of software products and make them more affordable for consumers. Second, it is unrealistic to expect consumers to read a

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<sup>136</sup> <http://www.nitc.go.th/itlaws/news02.html>.

<sup>137</sup> See <http://www.uncitral.org>.

<sup>138</sup> The Electronic Commerce Act (by NECTEC), Section 10.

four page license while standing in the aisle.<sup>139</sup> The ability of consumers to read the terms and conditions in the comfort of their own homes is more likely to encourage them to actually review such terms. Third, consumers who encounter objectionable terms are most often able to return the product for a full refund.<sup>140</sup>

However, in Thailand, the cases of shrinkwrap or clickwrap license agreements may haven't come to the courts yet. But, I ensure that it will in the near future as the Internet community has been used for commercial transactions in our society for at least 4 –5 years and will be increased more. The research shows that Thai people using the Internet will be increased to 12 million by the year 2008.<sup>141</sup> The courts have to face such a case without any certain legal criterion if we do not have the law to support. The court may struggle with the cases by trying to apply the Uniform Civil and Commercial Code as analogy (in Sales of Goods or Juristic Acts and Contracts) but it will not be a good result. It is possible the courts may enforce shrinkwrap and clickwrap license agreements by applying the Unfair Contract Terms Act B.E. 2540 as analogy since the Act validates the adhesion contract. Yet, the court may have to face other advance legal and technology issues as the US court did.

## I. CONCLUSION

Whenever the technology has come into existence, the law is an essential factor being needed to facilitate the advance technology. The higher technology we have, the more sophisticate law we need. The United States is a leading country in creating the Internet community; therefore, it is not surprising why they try to enact the Uniform Computer Information Act (UCITA) to facilitate the high technology. The reason is that they realized that the tremendous incomes coming in the United States each year are from licensing the software. Shrinkwrap and Clickwrap License Agreements, in the near future, will be ordinary things we get involved in as long as we deal with software transactions in anywhere around the world. Therefore, in addition to six bills as being

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<sup>139</sup> *Id.*, *supra* note 74.

<sup>140</sup> *Id.*, *supra* note 64.

<sup>141</sup> Somkiet Tungkijvanij, *The forecast of Internet usage in Thailand by the year 2000-2005*, TDRI (September 2542).

drafted by NECTEC, we need one more legal criterion, Computer Information Act. We can learn from UCITA but we do not have to follow them all aspects they are. We can apply and adjust some articles of UCITA to our software industry. The reason why the law should be drafted is we should not underestimate the Thai people's ability to create many kinds of software and will license them to the users in both domestic and International markets. The law will facilitate these creative people to trade the software by licensing with certain guidelines and encourage them to develop good software to distribute in our country, which I ensure the costs will be much less than importing them.

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