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Licensing: Open Source and Otherwise

- Shrinkwrap: *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988)
- *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)
- Browsewrap: *Specht v. Netscape*, 306 F.3d 17 (2d Cir. 2001)
- GNU General Public License (GPL)
- Creative Commons: Commons Deed and Legal Code to Attribution-ShareAlike 2.5
- *Code*, chapter 8

For further reading (optional):

- Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 Yale L.J. (2002)
- Jessica Litman, *Sharing and Stealing*, 26 Comm/Ent 1 (2004)
- Mark Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing*, 87 Cal. L.Rev. 111 (1999)

A key feature of online commerce and digital intellectual property is the rise of licensing. Here, we examine two distinct aspects of that shift: The primacy of contractual private ordering and the open source revolution.

One can hardly venture online without encountering (claimed) contracts. ISPs condition connection to the Internet on acceptance of "terms or service"; websites offer up terms of use; digital purchases carry shrink-wrap or click-wrap licenses. Contractual private ordering allows parties to customize the legal rules of their interactions when the defaults don't suit.

Yet this private ordering raises intertwined substantive and procedural questions. Substantively, should we permit parties to "opt out" of legal rules with a signature or the click of a mouse? Why do the courts in *Vault v. Quaid* and *ProCD v. Zeidenberg* reach different conclusions about the preemption of state contract law and the enforceability of contract? Think about the limits of these arguments: Would Judge Reavley (*Vault)* invalidate a negotiated agreement that granted access to software conditioned on a corporate user's agreement not to reverse engineer it? Would Judge Posner (*ProCD*) permit software publishers to eliminate any possibility of reverse engineering – even where it is fair use under copyright law – by including prohibitory terms in click-wraps for all future software packages? How do efficiency and fairness choices factor in the decisions?

At the procedural level, even before we get to the terms of a contract, we must ask whether a contract was validly formed. Compare the *ProCD* and *Specht* contracts: Was there offer and acceptance? meeting of the minds?

Newspapers and weblogs have been reporting recently on Sony BMG's copy-protection, which showed up on CDs including albums by Van Zant, Neil Diamond, and Celine Dion. When fans tried to play or rip these CDs on Windows computers, they were not given direct access to the music files, but instead were asked to permit the installation of

a software program for digital rights management. If they clicked "OK," they got set of files that many security experts termed a "rootkit," a program that hid itself deep within the Windows operating system and opened their computers to potential security risks. Along with the technical vulnerabilities, the Sony BMG End-User License Agreement (EULA) subjected them to some fairly stringent legal conditions, including:

> All of your rights to enjoy the DIGITAL CONTENT, as described herein, shall be subject to your continued ownership of all rights in and to the physical CD on which such DIGITAL CONTENT is embodied; should you transfer your ownership rights in the physical CD on which such DIGITAL CONTENT is embodied (in whole or in part) to any other person (whether by sale, gift or otherwise), your rights in both the physical CD and such DIGITAL CONTENT shall terminate.

See <http://www.sysinternals.com/blog/sony-eula.htm>, as posted to the weblog of Mark Russinovich, the researcher who first publicized the Sony program's technical risks. Should we find that Van Zant fans *agreed* to these terms? (For more on the Sony BMG story, *see* Tom Zeller, "CD's Recalled for Posing Risk to PC's," *New York Times*, Nov. 16, 2005, <http://www.nytimes.com/2005/11/16/technology/16sony.html>; BoingBoing roundup: <http://www.boingboing.net/2005/11/14/sony_anticustomer_te.html>).

Now for something completely different.

Licensing can also be used to create entirely new ways of doing business. The GNU General Public License (GPL) is a copyright license that uses copyright to enforce not closure but openness. The GPL encourages users to modify software and redistribute it – provided they do so on the same terms: with the source code to enable *their* users to do the same. Read the text of the GPL and watch how it accomplishes these "copyleft" attributes.

Since the GPL's introduction in 1984, a whole ecosystem of "Free Software" and open source development has emerged. As the Free Software Foundation puts it, "you should think of 'free' as in 'free speech,' not as in 'free beer.'" The GPL-licensed Linux kernel and GNU software power everything from embedded devices to TiVo digital video recorders (*see* <http://www.tivo.com/linux/linux.asp>) to Google. Companies like RedHat sell packaging and services around Free Software. The GPL has rarely been litigated because most companies confronted with evidence of violations have preferred to settle. *See, e.g.*, Aaron Weiss, "The Open Source WRT54G Story," Wi-Fi Planet, <http://www.wi-fiplanet.com/tutorials/article.php/3562391>.

Creative Commons has more recently turned the open-source spirit to non-software copyrights. Look again at the Creative Commons model in the "Commons Deed" and "Legal Code" to the Attribution-ShareAlike license reproduced here – options for authors and artists to publish with "*some* rights reserved." Creative Commons now writes that "Yahoo! reports over 50,000,000 link-backs to our licenses" and 24 international jurisdictions have "ported" license to their legal systems.

How do Free and open-source software and Creative Commons licensing fit into broader copyright law? How do their licenses compare with the shrink-wrap of ProCD?

Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988)

REAVLEY, Circuit Judge:

Vault brought this copyright infringement action against Quaid seeking damages and preliminary and permanent injunctions. The district court denied Vault's motion for a preliminary injunction, holding that Vault did not have a reasonable probability of success on the merits. Vault Corp. v. Quaid Software Ltd., 655 F.Supp. 750 (E.D.La.1987). By stipulation of the parties, this ruling was made final and judgment was entered accordingly. We affirm.

I

Vault produces computer diskettes under the registered trademark "PROLOK" which are designed to prevent the unauthorized duplication of programs placed on them by software computer companies, Vault's customers…. Each version of PROLOK has been copyrighted and Vault includes a license agreement with every PROLOK package that specifically prohibits the copying, modification, translation, decompilation or disassembly of Vault's program. Beginning with version 2.0 in September 1985, Vault's license agreement contained a choice of law clause adopting Louisiana law.

Quaid's product, a diskette called "CopyWrite," contains a feature called "RAMKEY" which unlocks the PROLOK protective device and facilitates the creation of a fully functional copy of a program placed on a PROLOK diskette. …

Quaid first developed RAMKEY in September 1983 in response to PROLOK version 1.0. In order to develop this version of RAMKEY, Quaid copied Vault's program into the memory of its computer and analyzed the manner in which the program operated. When Vault developed version 1.07, Quaid adapted RAMKEY in 1984 to defeat this new version. …

II

Vault brought this action against Quaid seeking preliminary and permanent injunctions to prevent Quaid from advertising and selling RAMKEY, an order impounding all of Quaid's copies of CopyWrite which contain the RAMKEY feature, and monetary damages in the amount of $100,000,000. Vault asserted three copyright infringement claims cognizable under federal law, 17 U.S.C. § 101 et seq. (1977 & Supp.1988) (the "Copyright Act"), which included: (1) that Quaid violated 17 U.S.C. §§ 501(a) & 106(1) by copying Vault's program into its computer's memory for the purpose of developing a program (RAMKEY) designed to defeat the function of Vault's program; (2) that Quaid, through RAMKEY, contributes to the infringement of Vault's copyright and the copyrights of its customers in violation of the Copyright Act as interpreted by the Supreme Court in Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984); and (3) that the second version of RAMKEY, which contained approximately thirty characters from PROLOK version 1.07, and the latest version of RAMKEY, constitute "derivative works" of Vault's program in violation of 17 U.S.C. §§ 501(a) & 106(2). Vault also asserted two claims based on Louisiana law,

contending that Quaid breached its license agreement by decompiling or disassembling Vault's program in violation of the Louisiana Software License Enforcement Act, La.Rev.Stat.Ann. § 51:1961 et seq. (West 1987), and that Quaid misappropriated Vault's program in violation of the Louisiana Uniform Trade Secrets Act, La.Rev.Stat.Ann. § 51:1431 et seq. (West 1987). …

C. Contributory Infringement

Vault contends that, because purchasers of programs placed on PROLOK diskettes use the RAMKEY feature of CopyWrite to make unauthorized copies, Quaid's advertisement and sale of CopyWrite diskettes with the RAMKEY feature violate the Copyright Act by contributing to the infringement of Vault's copyright and the copyrights owned by Vault's customers. Vault asserts that it lost customers and substantial revenue as a result of Quaid's contributory infringement because software companies which previously relied on PROLOK diskettes to protect their programs from unauthorized copying have discontinued their use.

While a purchaser of a program on a PROLOK diskette violates sections 106(1) and 501(a) by making and distributing unauthorized copies of the program, the Copyright Act "does not expressly render anyone liable for the infringement committed by another." Sony, 464 U.S. at 434, 104 S.Ct. at 785. The Supreme Court in Sony, after examining the express provision in the Patent Act which imposes liability on an individual who "actively induces infringement of a patent," 35 U.S.C. § 271(b) & (c), and noting the similarity between the Patent and Copyright Acts, recognized the availability, under the Copyright Act, of vicarious liability against one who sells a product that is used to make unauthorized copies of copyrighted material. Id. at 434-42, 104 S.Ct. at 785-89. The Court held that liability based on contributory infringement could be imposed only where the seller had constructive knowledge of the fact that its product was used to make unauthorized copies of copyrighted material, id. at 339, 104 S.Ct. at 787, and that the sale of a product "does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." Id. at 442, 104 S.Ct. at 789.

While Quaid concedes that it has actual knowledge that its product is used to make unauthorized copies of copyrighted material, it contends that the RAMKEY portion of its CopyWrite diskettes serves a substantial noninfringing use by allowing purchasers of programs on PROLOK diskettes to make archival copies as permitted under 17 U.S.C. § 117(2), and thus that it is not liable for contributory infringement…. [W]e find that RAMKEY is capable of substantial noninfringing uses and thus reject Vault's contention that the advertisement and sale of CopyWrite diskettes with RAMKEY constitute contributory infringement.

…The focus of Vault's allegation of contributory infringement in its amended complaint is that CopyWrite, through RAMKEY, enables purchasers of PROLOK protected programs to infringe the copyrights of Vault's customers and that, as a result, Vault has suffered damages due to its loss of customers. While Vault does not own the copyrights to its customer's programs, it does own the copyright to the program it places on each

PROLOK diskette. This program operates in conjunction with the "fingerprint" to prevent the duplication of Vault's customer's programs. Uncontroverted testimony established that both Vault's protective program and its customer's program are copied onto a CopyWrite diskette when an individual executes a computer's "copy" function in order to duplicate the customer's program from a PROLOK diskette onto a CopyWrite diskette, and that RAMKEY then interacts with Vault's program to defeat its protective function and to make the computer operate as if the original PROLOK diskette was in one of its disk drives. Therefore, CopyWrite diskettes, through RAMKEY, facilitate not only the copying of Vault's customer's software programs but also the copying of Vault's protective program, and, in addition, RAMKEY interacts with Vault's program to destroy its purpose.

2. Substantial Noninfringing Uses of RAMKEY

Vault's allegation of contributory infringement focuses on the RAMKEY feature of CopyWrite diskettes, not on the non-RAMKEY portions of these diskettes. Vault has no objection to the advertising and marketing of CopyWrite diskettes without the RAMKEY feature, and this feature is separable from the underlying diskette upon which it is placed. Therefore, in determining whether Quaid engaged in contributory infringement, we do not focus on the substantial noninfringing uses of CopyWrite, as opposed to the RAMKEY feature itself. The issue properly presented is whether the RAMKEY feature has substantial noninfringing uses.

The starting point for our analysis is with Sony. The plaintiffs in Sony, owners of copyrighted television programs, sought to enjoin the manufacture and marketing of Betamax video tape recorders ("VTR's"), contending that VTR's contributed to the infringement of their copyrights by permitting the unauthorized copying of their programs. 464 U.S. at 419-20, 104 S.Ct. at 777. After noting that plaintiffs' market share of television programming was less than 10%, and that copyright holders of a significant quantity of television broadcasting authorized the copying of their programs, the Court held that VTR's serve the legitimate and substantially noninfringing purpose of recording these programs, as well as plaintiffs' programs, for future viewing (authorized and unauthorized time-shifting respectively), and therefore rejected plaintiffs' contributory infringement claim. Id. at 442-55, 104 S.Ct. at 789-95.

Quaid asserts that RAMKEY serves the legitimate purpose of permitting purchasers of programs recorded on PROLOK diskettes to make archival copies under § 117(2) and that this purpose constitutes a substantial noninfringing use. At trial, witnesses for Quaid testified that software programs placed on floppy diskettes are subject to damage by physical and human mishap and that RAMKEY protects a purchaser's investment by providing a fully functional archival copy that can be used if the original program on the PROLOK protected diskette, or the diskette itself, is destroyed. Quaid contends that an archival copy of a PROLOK protected program, made without RAMKEY, does not serve to protect against these forms of damage because a computer will not read the program into its memory from the copy unless the PROLOK diskette containing the original undamaged program is also in one of its disk drives, which is impossible if the PROLOK

diskette, or the program placed thereon, has been destroyed due to physical or human mishap. ...

A copy of a PROLOK protected program made with RAMKEY protects an owner from all types of damage to the original program, while a copy made without RAMKEY only serves the limited function of protecting against damage to the original program by mechanical and electrical failure. Because § 117(2) permits the making of fully functional archival copies, it follows that RAMKEY is capable of substantial noninfringing uses. Quaid's advertisement and sale of CopyWrite diskettes with the RAMKEY feature does not constitute contributory infringement. ….

IV. Vault's Louisiana Claims

Seeking preliminary and permanent injunctions and damages, Vault's original complaint alleged that Quaid breached its license agreement by decompiling or disassembling Vault's program in violation of the Louisiana Software License Enforcement Act (the "License Act"), La.Rev.Stat.Ann. § 51:1961 et seq. (West 1987), and that Quaid misappropriated Vault's program in violation of the Louisiana Uniform Trade Secrets Act, La.Rev.Stat.Ann. § 51:1431 et seq. (West 1987). On appeal, Vault … seeks an injunction to prevent Quaid from decompiling or disassembling PROLOK version 2.0.

Louisiana's License Act permits a software producer to impose a number of contractual terms upon software purchasers provided that the terms are set forth in a license agreement which comports with La.Rev.Stat.Ann. §§ 51:1963 & 1965, and that this license agreement accompanies the producer's software. Enforceable terms include the prohibition of: (1) any copying of the program for any purpose; and (2) modifying and/or adapting the program in any way, including adaptation by reverse engineering, decompilation or disassembly. La.Rev.Stat.Ann. § 51:1964. The terms "reverse engineering, decompiling or disassembling" are defined as "any process by which computer software is converted from one form to another form which is more readily understandable to human beings, including without limitation any decoding or decrypting of any computer program which has been encoded or encrypted in any manner." La.Rev.Stat.Ann. § 51:1962(3).

Vault's license agreement, which accompanies PROLOK version 2.0 and comports with the requirements of La.Rev.Stat.Ann. §§ 51:1963 & 1965, provides that "[y]ou may not ... copy, modify, translate, convert to another programming language, decompile or disassemble" Vault's program. Vault asserts that these prohibitions are enforceable under Louisiana's License Act, and specifically seeks an injunction to prevent Quaid from decompiling or disassembling Vault's program.

The district court held that Vault's license agreement was "a contract of adhesion which could only be enforceable if the [Louisiana License Act] is a valid and enforceable statute." The court noted numerous conflicts between Louisiana's License Act and the Copyright Act, including: (1) while the License Act authorizes a total prohibition on copying, the Copyright Act allows archival copies and copies made as an essential step in the utilization of a computer program, 17 U.S.C. § 117; (2) while the License Act authorizes a perpetual bar against copying, the Copyright Act grants protection against

unauthorized copying only for the life of the author plus fifty years, 17 U.S.C. § 302(a); and (3) while the License Act places no restrictions on programs which may be protected, under the Copyright Act, only "original works of authorship" can be protected, 17 U.S.C. § 102. The court concluded that, because Louisiana's License Act "touched upon the area" of federal copyright law, its provisions were preempted and Vault's license agreement was unenforceable.

In Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964), the Supreme Court held that "[w]hen state law touches upon the area of [patent or copyright statutes], it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law." Id. at 229, 84 S.Ct. at 787 (quoting Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176, 63 S.Ct. 172, 173, 87 L.Ed. 165 (1942)). See Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964)…. Section 117 of the Copyright Act permits an owner of a computer program to make an adaptation of that program provided that the adaptation is either "created as an essential step in the utilization of the computer program in conjunction with a machine," § 117(1), or "is for archival purpose only," § 117(2). The provision in Louisiana's License Act, which permits a software producer to prohibit the adaptation of its licensed computer program by decompilation or disassembly, conflicts with the rights of computer program owners under § 117 and clearly "touches upon an area" of federal copyright law. For this reason, and the reasons set forth by the district court, we hold that at least this provision of Louisiana's License Act is preempted by federal law, and thus that the restriction in Vault's license agreement against decompilation or disassembly is unenforceable.

V. Conclusion

We hold that: (1) Quaid did not infringe Vault's exclusive right to reproduce its program in copies under § 106(1); (2) Quaid's advertisement and sale of RAMKEY does not constitute contributory infringement; (3) RAMKEY does not constitute a derivative work of Vault's program under § 106(2); and (4) the provision in Vault's license agreement, which prohibits the decompilation or disassembly of its program, is unenforceable.

The judgment of the district court is AFFIRMED.

ProCD Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)

EASTERBROOK, Circuit Judge.

Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. … [W]e disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). …

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). ProCD sells a version of the database, called SelectPhone, on CD-ROM discs. (CD-ROM means "compact disc-read only memory." The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer "end user license," but we use the more common term.) …

The database in SelectPhone cost more than $10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and SIC codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as a electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately $150 for the set of five discs) while selling information to the trade for a higher price. It has adopted some intermediate strategies too: access to the SelectPhone database is available via the America On-line service for the price America Online charges to its clients (approximately $3 per hour), but this service has been tailored to be useful only to the general public.

If ProCD had to recover all of its costs and make a profit by charging a single price--that is, if it could not charge more to commercial users than to the general public--it would have to raise the price substantially over $150. The ensuing reduction in sales would harm consumers who value the information at, say, $200. They get consumer surplus of

$50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out--and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday--night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves--for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price--ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone database. The corporation makes the database available on the Internet to anyone willing to pay its price--which, needless to say, is less than ProCD charges its commercial customers. …

II

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. … Zeidenberg [argues], and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods. In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good--but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license.

Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract--except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. … Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995) (bills of lading). Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information--but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract. Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A

customer pay place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with BytePusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms--so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. … One of the court's reasons--that by proposing as part of the draft Article 2B a new UCC sec. 2-2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see 908 F. Supp. at 65566--depends on a faulty inference. To propose a change in a law's text is not necessarily to propose a change in the law's effect. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction--although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268-70 (5th Cir. 1988); Arizona Retail Systems, Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993). As their titles suggest, these are not consumer transactions. Step-Saver is a battle-of the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails. See Northrop Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir. 1994) (Illinois law); Douglas G. Baird & Robert Weisberg, Rules, Standards, and the Battle of the Forms: A Reassessment of sec. 2-207, 68 Va. L. Rev. 1217, 1227-31 (1982). Our case has only one form; UCC sec. 2-207 is irrelevant. Vault holds that Louisiana's special shrinkwrap-license statute is preempted by federal law, a question to which we return. And Arizona Retail Systems did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

What then does the current version of the UCC have to say? We think that the place to start is sec. 2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the

store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra $10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

Section 2-606, which defines "acceptance of goods", reinforces this understanding. A buyer accepts goods under sec. 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under sec. 2-602(1). ProCD extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to sec. 2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see Gillen v. Atalanta Systems, Inc., 997 F.2d 280, 284 n.1 (7th Cir. 1993); but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be "conspicuous." UCC sec. 2-316(2), incorporating UCC sec. 1-201(10). Promises to make firm offers, or to negate oral modifications, must be "separately signed." UCC secs. 2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in Carnival Lines. Zeidenberg has not located any Wisconsin case--for that matter, any case in any state--holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for $100 rather than $150--although any of these changes would be welcomed by the customer, if all other things were held constant--so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of "the product" than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 (7th Cir. 1996). ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off.

III

The district court held that, even if Wisconsin treats shrinkwrap licenses as contracts, sec. 301(a) of the Copyright Act, 17 U.S.C. sec. 301(a), prevents their enforcement. The relevant part of sec. 301(a) preempts any "legal or equitable rights [under state law] that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103". ProCD's software and data are "fixed in a tangible medium of expression", and the district judge held that they are "within the subject matter of copyright". The latter conclusion is plainly right for the copyrighted application program, and the judge thought that the data likewise are "within the subject matter of copyright" even if, after Feist, they are not sufficiently original to be copyrighted. … One function of sec. 301(a) is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain, which it can accomplish only if "subject matter of copyright" includes all works of a type covered by sections 102 and 103, even if federal law does not afford protection to them. Cf. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (same principle under patent laws).

But are rights created by contract "equivalent to any of the exclusive rights within the general scope of copyright"? Three courts of appeals have answered "no." National Car Rental Systems, Inc. v. Computer Associates International, Inc., 991 F.2d 426, 433 (8th Cir. 1993); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990); Acorn Structures, Inc. v. Swantz, 846 F.2d 923, 926 (4th Cir. 1988). The district court disagreed with these decisions, but we think them sound. Rights "equivalent to any of the exclusive rights within the general scope of copyright" are rights established by law--rights that restrict the options of persons who are strangers to the author. Copyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission; silence means a ban on copying. A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights." Someone who found a copy of SelectPhone on the street would not be affected by the shrinkwrap license--though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program.

Think for a moment about trade secrets. One common trade secret is a customer list. After Feist, a simple alphabetical list of a firm's customers, with address and telephone numbers, could not be protected by copyright. Yet Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), holds that contracts about trade secrets may be enforced--precisely because they do not affect strangers' ability to discover and use the information independently. If the amendment of sec. 301(a) in 1976 overruled Kewanee and abolished consensual protection of those trade secrets that cannot be copyrighted, no one has noticed--though abolition is a logical consequence of the district court's approach. Think, too, about everyday transactions in intellectual property. A customer visits a video store and rents a copy of Night of the Lepus. The customer's contract with the store limits use of the tape to home viewing and requires its return in two days. May the customer keep the tape, on the ground that sec. 301(a) makes the promise unenforceable? …. [S]ome applications of the law of contract could interfere with the attainment of national

objectives and therefore come within the domain of sec. 301(a). But general enforcement of shrinkwrap licenses of the kind before us does not create such interference.

… Everyone remains free to copy and disseminate all 3,000 telephone books that have been incorporated into ProCD's database. Anyone can add sic codes and zip codes. ProCD's rivals have done so. Enforcement of the shrink wrap license may even make information more readily available, by reducing the price ProCD charges to consumer buyers. To the extent licenses facilitate distribution of object code while concealing the source code (the point of a clause forbidding disassembly), they serve the same procompetitive functions as does the law of trade secrets. Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d 174, 180 (7th Cir. 1991). Licenses may have other benefits for consumers: many licenses permit users to make extra copies, to use the software on multiple computers, even to incorporate the software into the user's products. But whether a particular license is generous or restrictive, a simple two-party contract is not "equivalent to any of the exclusive rights within the general scope of copyright" and therefore may be enforced.

REVERSED AND REMANDED

Specht v. Netscape Comm. Corp., 306 F.3d 17 (2d. Cir. 2002)

SOTOMAYOR, Circuit Judge:

This is an appeal from a judgment of the Southern District of New York denying a motion by defendants-appellants Netscape Communications Corporation and its corporate parent, America Online, Inc. (collectively, "defendants" or "Netscape"), to compel arbitration and to stay court proceedings. In order to resolve the central question of arbitrability presented here, we must address issues of contract formation in cyberspace. Principally, we are asked to determine whether plaintiffs-appellees ("plaintiffs"), by acting upon defendants' invitation to download free software made available on defendants' webpage, agreed to be bound by the software's license terms (which included the arbitration clause at issue), even though plaintiffs could not have learned of the existence of those terms unless, prior to executing the download, they had scrolled down the webpage to a screen located below the download button. We agree with the district court that a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants' invitation to download the free software, and that defendants therefore did not provide reasonable notice of the license terms. In consequence, plaintiffs' bare act of downloading the software did not unambiguously manifest assent to the arbitration provision contained in the license terms….

We therefore affirm the district court's denial of defendants' motion to compel arbitration and to stay court proceedings.

BACKGROUND

I. Facts

In three related putative class actions,[1] plaintiffs alleged that, unknown to them, their use of SmartDownload transmitted to defendants private information about plaintiffs' downloading of files from the Internet, thereby effecting an electronic surveillance of their online activities in violation of two federal statutes, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

…

In the time period relevant to this litigation, Netscape offered on its website various software programs, including Communicator and SmartDownload, which visitors to the site were invited to obtain free of charge. It is undisputed that five of the six named plaintiffs… downloaded Communicator from the Netscape website…. no clickwrap presentation accompanied the [download of SmartDownload]. Instead, once plaintiffs … had clicked on the "Download" button located at or near the bottom of their screen, and the downloading of SmartDownload was complete, these plaintiffs encountered no further information about the plug-in program or the existence of license terms governing

its use.[9] The sole reference to SmartDownload's license terms on the "SmartDownload Communicator" webpage was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen.

Had plaintiffs scrolled down instead of acting on defendants' invitation to click on the "Download" button, they would have encountered the following invitation: "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software." Plaintiffs Gibson, Gruber, Kelly, and Weindorf averred in their affidavits that they never saw this reference to the SmartDownload license agreement when they clicked on the "Download" button. They also testified during depositions that they saw no reference to license terms when they clicked to download SmartDownload, although under questioning by defendants' counsel, some plaintiffs added that they could not "remember" or be "sure" whether the screen shots of the SmartDownload page attached to their affidavits reflected precisely what they had seen on their computer screens when they downloaded SmartDownload.[10]

In sum, plaintiffs Gibson, Gruber, Kelly, and Weindorf allege that the process of obtaining SmartDownload contrasted sharply with that of obtaining Communicator. Having selected SmartDownload, they were required neither to express unambiguous assent to that program's license agreement nor even to view the license terms or become aware of their existence before proceeding with the invited download of the free plug-in program. Moreover, once these plaintiffs had initiated the download, the existence of SmartDownload's license terms was not mentioned while the software was running or at any later point in plaintiffs' experience of the product.

Even for a user who, unlike plaintiffs, did happen to scroll down past the download button, SmartDownload's license terms would not have been immediately displayed in the manner of Communicator's clickwrapped terms. Instead, if such a user had seen the notice of SmartDownload's terms and then clicked on the underlined invitation to review and agree to the terms, a hypertext link would have taken the user to a separate webpage entitled "License & Support Agreements." The first paragraph on this page read, in pertinent part:

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The use of each Netscape software product is governed by a license
agreement. You must read and agree to the license agreement terms
BEFORE acquiring a product. Please click on the appropriate link below
to review the current license agreement for the product of interest to
you before acquisition. For products available for download, you must
read and agree to the license agreement terms BEFORE you install the
software. If you do not agree to the license terms, do not download,
install or use the software.
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Below this paragraph appeared a list of license agreements, the first of which was "License Agreement for Netscape Navigator and Netscape Communicator Product Family (Netscape Navigator, Netscape Communicator and Netscape SmartDownload)." If the user clicked on that link, he or she would be taken to yet another webpage that contained the full text of a license agreement that was identical in every respect to the Communicator license agreement except that it stated that its "terms apply to Netscape

Communicator, Netscape Navigator, and Netscape SmartDownload." The license agreement granted the user a nonexclusive license to use and reproduce the software, subject to certain terms:

```
BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE
COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE
(THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT
("LICENSEE") IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO
THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS
AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND
LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.
```

Among the license terms was a provision requiring virtually all disputes relating to the agreement to be submitted to arbitration:

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Unless otherwise agreed in writing, all disputes relating to this
Agreement (excepting any dispute relating to intellectual property
rights) shall be subject to final and binding arbitration in Santa
Clara County, California, under the auspices of JAMS/EndDispute, with
the losing party paying all costs of arbitration.
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…

DISCUSSION

…It is well settled that a court may not compel arbitration until it has resolved "the question of the very existence" of the contract embodying the arbitration clause. *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 676 (2d Cir. 1972). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (quotation marks omitted). Unless the parties clearly provide otherwise, "the question of arbitrability-whether a[n] . . . agreement creates a duty for the parties to arbitrate the particular grievance-is undeniably an issue for judicial determination." *Id.* at 649.

The district court properly concluded that in deciding whether parties agreed to arbitrate a certain matter, a court should generally apply state- law principles to the issue of contract formation…

III. Whether the User Plaintiffs Had Reasonable Notice of and Manifested Assent to the SmartDownload License Agreement

Whether governed by the common law or by Article 2 of the Uniform Commercial Code ("UCC"), a transaction, in order to be a contract, requires a manifestation of agreement between the parties. *See Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 350 (Cal. Ct. App. 1972) ("[C]onsent to, or acceptance of, the arbitration provision [is] necessary to create an agreement to arbitrate."); *see also* Cal. Com. Code § 2204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").[13]

Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract. *Binder v. Aetna Life Ins. Co.*, 89 Cal. Rptr. 2d 540, 551 (Cal. Ct. App. 1999); *cf.* Restatement (Second) of Contracts § 19(2) (1981) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."). Although an onlooker observing the disputed transactions in this case would have seen each of the user plaintiffs click on the SmartDownload "Download" button, *see Cedars Sinai Med. Ctr. v. Mid-West Nat'l Life Ins. Co.*, 118 F. Supp. 2d 1002, 1008 (C.D. Cal. 2000) ("In California, a party's intent to contract is judged objectively, by the party's outward manifestation of consent."), a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms, *see Windsor Mills*, 101 Cal. Rptr. at 351 ("[W]hen the offeree does not know that a proposal has been made to him this objective standard does not apply."). California's common law is clear that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." *Id.*; *see also Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Cal. Ct. App. 2001) (same).

Arbitration agreements are no exception to the requirement of manifestation of assent. "This principle of knowing consent applies with particular force to provisions for arbitration." *Windsor Mills*, 101 Cal. Rptr. at 351. Clarity and conspicuousness of arbitration terms are important in securing informed assent. "If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." *Commercial Factors Corp. v. Kurtzman Bros.*, 280 P.2d 146, 147-48 (Cal. Dist. Ct. App. 1955) (internal quotation marks omitted). Thus, California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.

A.The Reasonably Prudent Offeree of Downloadable Software

Defendants argue that plaintiffs must be held to a standard of reasonable prudence and that, because notice of the existence of SmartDownload license terms was on the next scrollable screen, plaintiffs were on "inquiry notice" of those terms.[14] We disagree with the proposition that a reasonably prudent offeree in plaintiffs' position would necessarily have known or learned of the existence of the SmartDownload license agreement prior to acting, so that plaintiffs may be held to have assented to that agreement with constructive notice of its terms. *See* Cal. Civ. Code § 1589 ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."). It is true that "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." *Marin Storage & Trucking*, 107 Cal. Rptr. 2d at 651. But courts are quick to add: "An exception to this general rule exists when the writing does not appear to be a

contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term." *Id.*; *cf. Cory v. Golden State Bank*, 157 Cal. Rptr. 538, 541 (Cal. Ct. App. 1979) ("[T]he provision in question is effectively hidden from the view of money order purchasers until after the transactions are completed. . . . Under these circumstances, it must be concluded that the Bank's money order purchasers are not chargeable with either actual or constructive notice of the service charge provision, and therefore cannot be deemed to have consented to the provision as part of their transaction with the Bank.").

…[R]eceipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Cal. Civ. Code § 19. These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to "Download Now!". What plaintiffs saw when they were being invited by defendants to download this fast, free plug-in called SmartDownload was a screen containing praise for the product and, at the very bottom of the screen, a "Download" button. Defendants argue that under the principles set forth in the cases cited above, a "fair and prudent person using ordinary care" would have been on inquiry notice of SmartDownload's license terms. *Shacket*, 651 F. Supp. at 690.

We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms. Thus, plaintiffs' "apparent manifestation of . . . consent" was to terms "contained in a document whose contractual nature [was] not obvious." *Windsor Mills*, 101 Cal. Rptr. at 351. Moreover, the fact that, given the position of the scroll bar on their computer screens, plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms. In their deposition testimony, plaintiffs variously stated that they used the scroll bar "[o]nly if there is something that I feel I need to see that is on-that is off the page," or that the elevated position of the scroll bar suggested the presence of "mere[] formalities, standard lower banner links" or "that the page is bigger than what I can see." Plaintiffs testified, and defendants did not refute, that plaintiffs were in fact unaware that defendants intended to attach license terms to the use of SmartDownload.

We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.[15] The SmartDownload webpage screen was "printed in such a manner that it tended to conceal the fact that it was an express acceptance of

[Netscape's] rules and regulations." *Larrus*, 266 P.2d at 147. Internet users may have, as defendants put it, "as much time as they need[]" to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. When products are "free" and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's-length bargaining. In the next two sections, we discuss case law and other legal authorities that have addressed the circumstances of computer sales, software licensing, and online transacting. Those authorities tend strongly to support our conclusion that plaintiffs did not manifest assent to SmartDownload's license terms.

…For the foregoing reasons, we affirm the district court's denial of defendants' motion to compel arbitration and to stay court proceedings.

GNU GENERAL PUBLIC LICENSE

Version 2, June 1991

Preamble

The licenses for most software are designed to take away your freedom to share and change it. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change free software--to make sure the software is free for all its users. This General Public License applies to most of the Free Software Foundation's software and to any other program whose authors commit to using it. (Some other Free Software Foundation software is covered by the GNU Library General Public License instead.) You can apply it to your programs, too.

When we speak of free software, we are referring to freedom, not price. Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for this service if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free programs; and that you know you can do these things.

To protect your rights, we need to make restrictions that forbid anyone to deny you these rights or to ask you to surrender the rights. These restrictions translate to certain responsibilities for you if you distribute copies of the software, or if you modify it.

For example, if you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights.

We protect your rights with two steps: (1) copyright the software, and (2) offer you this license which gives you legal permission to copy, distribute and/or modify the software.

Also, for each author's protection and ours, we want to make certain that everyone understands that there is no warranty for this free software. If the software is modified by someone else and passed on, we want its recipients to know that what they have is not the original, so that any problems introduced by others will not reflect on the original authors' reputations.

Finally, any free program is threatened constantly by software patents. We wish to avoid the danger that redistributors of a free program will individually obtain patent licenses, in

effect making the program proprietary. To prevent this, we have made it clear that any patent must be licensed for everyone's free use or not licensed at all.

The precise terms and conditions for copying, distribution and modification follow.

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Activities other than copying, distribution and modification are not covered by this License; they are outside its scope. The act of running the Program is not restricted, and the output from the Program is covered only if its contents constitute a work based on the Program (independent of having been made by running the Program). Whether that is true depends on what the Program does.

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You may charge a fee for the physical act of transferring a copy, and you may at your option offer warranty protection in exchange for a fee.

2. You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work under the terms of Section 1 above, provided that you also meet all of these conditions:

> **a)** You must cause the modified files to carry prominent notices stating that you changed the files and the date of any change.
> **b)** You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.
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telling the user how to view a copy of this License. (Exception: if the Program itself is interactive but does not normally print such an announcement, your work based on the Program is not required to print an announcement.)

These requirements apply to the modified work as a whole. If identifiable sections of that work are not derived from the Program, and can be reasonably considered independent and separate works in themselves, then this License, and its terms, do not apply to those sections when you distribute them as separate works. But when you distribute the same sections as part of a whole which is a work based on the Program, the distribution of the whole must be on the terms of this License, whose permissions for other licensees extend to the entire whole, and thus to each and every part regardless of who wrote it.

Thus, it is not the intent of this section to claim rights or contest your rights to work written entirely by you; rather, the intent is to exercise the right to control the distribution of derivative or collective works based on the Program.

In addition, mere aggregation of another work not based on the Program with the Program (or with a work based on the Program) on a volume of a storage or distribution medium does not bring the other work under the scope of this License.

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> **b)** Accompany it with a written offer, valid for at least three years, to give any third party, for a charge no more than your cost of physically performing source distribution, a complete machine-readable copy of the corresponding source code, to be distributed under the terms of Sections 1 and 2 above on a medium customarily used for software interchange; or,
> **c)** Accompany it with the information you received as to the offer to distribute corresponding source code. (This alternative is allowed only for noncommercial distribution and only if you received the program in object code or executable form with such an offer, in accord with Subsection b above.)

The source code for a work means the preferred form of the work for making modifications to it. For an executable work, complete source code means all the source code for all modules it contains, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable. However, as a special exception, the source code distributed need not include anything that is normally distributed (in either source or binary form) with the major components (compiler, kernel, and so on) of the operating system on which the executable runs, unless that component itself accompanies the executable.

If distribution of executable or object code is made by offering access to copy from a designated place, then offering equivalent access to copy the source code from the same place counts as distribution of the source code, even though third parties are not compelled to copy the source along with the object code.

4. You may not copy, modify, sublicense, or distribute the Program except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or distribute the Program is void, and will automatically terminate your rights under this License. However, parties who have received copies, or rights, from you under this License will not have their licenses terminated so long as such parties remain in full compliance.

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7. If, as a consequence of a court judgment or allegation of patent infringement or for any other reason (not limited to patent issues), conditions are imposed on you (whether by court order, agreement or otherwise) that contradict the conditions of this License, they do not excuse you from the conditions of this License. If you cannot distribute so as to satisfy simultaneously your obligations under this License and any other pertinent obligations, then as a consequence you may not distribute the Program at all. For example, if a patent license would not permit royalty-free redistribution of the Program by all those who receive copies directly or indirectly through you, then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program.

If any portion of this section is held invalid or unenforceable under any particular circumstance, the balance of the section is intended to apply and the section as a whole is intended to apply in other circumstances.

It is not the purpose of this section to induce you to infringe any patents or other property right claims or to contest validity of any such claims; this section has the sole purpose of protecting the integrity of the free software distribution system, which is implemented by public license practices. Many people have made generous contributions to the wide range of software distributed through that system in reliance on consistent application of

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