Chapter 29. Pro CD v. Zeidenberg

29.0.0. Case: *Pro CD v. Zeidenberg*

The following is one of the most talked-about cases in licensing, contract formation, and the applicability of the UCC.

ProCD, Inc. v. Zeidenberg

U.S. Court of Appeals for the Seventh Circuit
1996

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). Argued May 23, 1996. Decided June 20, 1996. Before COFFEY, FLAUM and EASTERBROOK. EASTERBROOK, J., wrote the opinion.

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. 908 F. Supp. 640 (W.D. Wis. 1996). The parties and numerous amici curiae have briefed many other issues, but these are the only two that matter--and we 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). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database....

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.... 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. Zeidenberg has purchased two additional SelectPhone packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to -- and cannot be bound by -- terms that were secret at the time of purchase. 908 F. Supp. at 654.

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 does argue, 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. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). 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.... 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 may 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 Byte-Pusher 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....

What then does the current version of the UCC have to say? We think that the place to start is § 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....

REVERSED AND REMANDED.

29.0.1 Questions and notes regarding *ProCD v. Zeidenberg*

1. Although UCC § 2-204(2) permits formation of a contract "even though the moment of its making is undetermined," the timing of the formation of the contract in the *Pro CD* case was an important issue. The district court ruled that the placement of the software program on the store shelf was an offer, and the contract was formed when Mr. Zeidenberg accepted the offer by paying the purchase price to the sales clerk. 908 F. Supp. 640, 652 (W.D. Wis. 1996). At that point in time, the court reasoned, Mr. Zeidenberg had neither read nor considered the terms contained in the license enclosed in the box; he could not possibly have assented to them; and thus those terms were not a part of the contract. *Id.* at 654-55. Does the appellate court agree that Mr. Zeidenberg accepted the offer (and a contract was formed) when he paid the purchase price? What constituted acceptance, according to the appellate court?

2. The type of contract involved in this case has been referred to as a "terms later," "rolling," or "layered" contract. Can you recall a purchase that you have recently made in which you became aware of additional terms after you ordered and paid for a good? When you ordered or paid for the good, were you aware that additional terms would be coming? Did you actually read the terms once they did arrive? Did you have the opportunity to return the good if the terms were, in fact, unacceptable to you? If there had not been notice on the outside of the box that additional terms were contained within the box, or if Mr. Zeidenberg had not been provided the option to return the software after reading those terms, would the court have reached a different result? What if there had been notice on the box and the option to return, but Mr. Zeidenberg had simply neglected to read the terms after he opened the box and for that reason was unaware of the limitations imposed?