

Contracts

Professor Grimmelmann

Internet Law

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Class 17

Where we are

- Part I: Public Law
- Part II: Private Law
 - Control over Computers
 - Domain Names
 - Copyright
 - Innovation
 - Case Studies

Black letter

ProCD v. Zeidenberg

- ProCD sells telephone books on CD-ROM
 - (1) Zeidenberg pays \$150 to a retailer
 - (2) Zeidenberg gets the box
 - (3) The box says “detailed terms inside”
 - (4) Zeidenberg opens the box
 - (5) The terms say “no commercial use”
 - (6) Zeidenberg makes a commercial use

ProCD: more setup

- It's our old friend Judge Easterbrook
- As a matter purely of copyright law, Zeidenberg's actions are completely legal
 - That's why this is a contract law case
- Zeidenberg attacks offer and acceptance
 - Can you think of any other contract-law doctrines he could have tried?

ProCD: first-year contract doctrine

- What was the offer?
- What was the acceptance?
- What are the key factual elements?
 - “Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable.”
 - All three are necessary. Why?

Specht v. Netscape

- Netscape's SmartDownload speeds up downloading of large files
- It also phones home and tells Netscape what files you're downloading
- Plaintiffs bring ECPA and CFAA claims
- Netscape claims that the SmartDownload license agreement requires arbitration
- Why does Netscape prefer arbitration?

Specht: the alleged contract

- To get SmartDownload, you click on a hyperlink to start the download
- Further down on that page it says “please review” on a hyperlink
- Click on that, and then click on the SmartDownload license from a list; *then* you can see the arbitration clause
- Why doesn't the license's statement that use constitutes consent suffice?

Specht: contract-law analysis

- *In one word*, why is there no contract?
- ProCD emphasized notice, terms, and a right to return
 - Which, if any, of these is missing here?
- What's the factual difference between the presentation of the contract here and in *ProCD*?

Caspi v. MSN

- MSN increases subscription fees and requires you to opt out if you don't like it
 - Slimy, and of questionable legality
 - But MSN has a forum selection clause
- Is this shrinkwrap, clickwrap, or browsewrap?
- Compare and contrast arbitration and forum selection

E-contract black-letter takeaway

- Shrinkwrap and clickwrap are enforceable; browsewrap generally isn't
- Sometimes you can prove the defendant had actual notice of the terms, but best practice requires explicit clickthrough
- Be careful with changes to terms
- Forum selection is usually okay
 - Arbitration is harder to get enforced

Between the lines

Facts and fictions in e-contracts

- Did Zeidenberg subjectively intend to accept ProCD's proposed terms? Did Specht intend to accept? Caspi?
- Did Zeidenberg have a fair chance to choose whether to accept ProCD's proposed terms? Did Specht have a fair chance? Caspi?
- What's the doctrinal connection between these two sets of questions?

Step one: acceptance is fictional

- Zeidenberg *didn't* want to accept ProCD's terms. So why is he still bound by them?
- What if Zeidenberg says "I don't accept your terms" as he opens the box?
- What if I say "By using the subway, you agree to pay me \$100 for a banana?"
- The real question: what actions is a reasonable offeror entitled to treat as constituting acceptance?

Step two: notice replaces acceptance

- These cases all hinge on notice. Why?
 - Cynical answer: it's easier to measure
 - Policy answer: it lets us evaluate whether the proposed deal is fair
 - Doctrinal answer: notice is a necessary condition for meaningful acceptance, and in the cases at bar, it looks like a sufficient one

Step three: notice is fictional

- Do you read license agreements on software you install? On web sites?
- For that matter, do you read the fine print in your student loans? In your lease? On cereal boxes?
- The ideal of the fully-informed license-reading consumer is ridiculous
- So why go through this exercise?

One last contractual point

- Do the plaintiffs really want these contracts struck down completely?
- Without a contract, Specht is a copyright infringer (modulo a fair use or implied license theory)
- Given the copyright hammer, the plaintiffs want reformation, not rescision
 - We'll see that tension again later

Some hypotheses to ponder

- ProCD got its directories by shipping phone books to China for transcription
 - What if the books were shrinkwrapped?
- Southwest's website prohibits having someone else check in for you. Binding?
- VeriSign's SiteFinder would pop up if you typed in a nonexistent domain. Are its disclaimers of liability binding?

Next time

Typosquatters and gripe sites