Validity of Webwrap Contracts 1998

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The Validity of Webwrap Contracts

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I INTRODUCTION

The validity and enforceability of Web-Wrap Agreements, which are also known as on-line Click-Wrap Agreements [1] , is one of a host of new legal issues that has arisen as a result of the growth in the area of Electronic Commerce. An important related question is whether there is a need for legislation to regulate the use of Web-Wrap Agreements in Canada.

A Web-Wrap Agreement sets forth contractual terms in an on-line environment and is a form of Standard Form Agreement since one party drafts the terms of the agreement without consultation or negotiation of such terms with the other party or parties. A Web-Wrap Agreement usually appears as a dialogue box [2] on a Customer's screen when the Customer attempts to download software or order goods or services on-line. The dialogue box contains the terms and conditions of the license or sale which the Consumer is instructed to review before assenting thereto by clicking a button at the bottom of the dialogue box.

This paper considers the need for legislation to regulate the use of Web-Wrap Agreements in Canada as a consequence of our review of the issues arising with respect to the legal validity and enforceability of Web-Wrap Agreements. This paper is drafted from the perspective of the laws of Ontario but the comments herein should be equally applicable to all jurisdictions within Canada.

II THE VALIDITY AND ENFORCEABILITY OF WEB-WRAP AGREEMENTS

Wrap-Wrap, Shrink-Wrap and Standard Form Agreements

The central legal issues with respect to Web-Wrap Agreements are: (i) whether they are valid contracts and, if so, (ii) whether they are, in all instances, enforceable.

In Canada, there are no cases or statutes which deal specifically with Web-Wrap Agreements. There are, however, cases that comment on the validity and enforceability of

Standard Form Agreements [3] and, in particular, Shrink-Wrap Agreements [4] , as well as statutes that apply to certain consumer- related transactions, that provide some guidance as to the likely treatment of Web-Wrap Agreements by Canadian courts.

Web-Wrap Agreements are most often compared to Shrink-Wrap Agreements since the requirement of clicking on the "I accept" or "I confirm" button(s) in a Web-Wrap Agreement scenario is similar to the requirement in a Shrink-Wrap Agreement that the Customer break the seal to the envelope containing the software media. In both cases, the Customer is required to perform a physical act to indicate assent to the contractual terms. In fact, it has become common practice for software vendors to present a licensee with, in addition to a Shrink-Wrap Agreement, a Click-Wrap Agreement prior to the launch of the software for the first time. There is, however, a notable distinction between Web- Wrap Agreements and Shrink-Wrap Agreements in that the latter tend to be used exclusively in the licensing of software, while the former are also used for other transactions such as the purchase of goods and services.

Formation of Contract

In order for a contract to be valid and enforceable, there must exist: (i) an offer which expresses a party's willingness to enter into a binding agreement with another , (ii) acceptance of the offer by the other party or parties , and (iii) subsequent consideration. [5] Web-Wrap Agreements satisfy the offer and consideration requirements as well as any other form of agreement, however, it is not clear whether clicking a button ("Clicking") satisfies the acceptance requirement. [6]

Acceptance can be evidenced in writing, verbally, or by conduct. In the case of Web-Wrap Agreements, there is no option to indicate written or verbal assent. Therefore, the question is whether the act of Clicking is conduct which sufficiently binds the Customer to the vendor/licensor's offer in a manner which constitutes acceptance of such offer.

There are a number of Canadian cases which suggest that the acceptance requirement may be satisfied without written or verbal assent provided the offeror has made a reasonable attempt to bring the terms of the agreement to the attention of the Customer and/or the Customer has had a reasonable opportunity to read such terms. In the context of this paper, we define this attempt to notify the Customer as "inferred acceptance" on the part of the Customer. For example, in *Gillette* v. *Rea* (1909), 1 O.W.N. 448 (Ch.), an Ontario appeals court held that a manufacturer's license notice to customers attached to a package of patented razors was valid. In contrast, in *North American Systemshops Ltd.* v. *King et al.* (1989), 68 Alta L.R. (2d) 145, the Alberta Queen's Bench held that where a software vendor placed a license agreement inside a sealed box, the agreement was unenforceable since the vendor had not used any of the "simple, cheap, or obvious methods" to notify the Customer that there were restrictions imposed on the use of the licensed software prior to Customer's removal of the shrink-wrap.

The notion of inferred acceptance has also been supported in other Standard Form Agreement cases such as parking ticket stub cases. For example, in *Parker v. South Eastern Rwy Co.* (1877), 2 C.P.D. 416, the court held that a parking ticket stub which limited the

liability of the lot owner was enforceable since the documentation provided to the customer was recognizable as the type that would contain contractual terms. In *Thornton* v. *Shoe Lane Parking Ltd.* [1971] 2 W.L.R. 585 (C.A.), a court of appeal held that parking ticket stubs were enforceable provided the party seeking to rely on the document has taken reasonable steps to bring the terms of the agreement to the other's attention.

The preceding cases indicate that valid acceptance need not be evidenced in writing, verbally or by a physical act on the part of the Customer provided the offeror has made a reasonable attempt to bring the terms of the agreement to the attention of the Customer and/or the Customer has had a reasonable opportunity to read such terms . Since Web-Wrap Agreements are designed so that the Customer must acknowledge: (i) awareness of the existence of applicable terms and conditions, and (ii) that the Customer has had an opportunity to consider such terms and conditions prior to completion of the transaction , it would appear that Web-Wrap Agreements more than meet the acceptance requirements established for other Standard Form Agreements. Therefore, subject to statutory requirements, it is likely that Canadian courts will recognize that Clicking on a Web-Wrap constitutes valid acceptance.

Enforceability

Assuming that a Web-Wrap Agreement is valid, it may nevertheless be unenforceable if the terms of a contract are unfair and give an undue advantage to the drafting party. While any form of agreement is subject to the same qualification, the fact that there is no opportunity for negotiation of the terms of the offer makes this concern more acute in the case in all Standard Form Agreements including Web-Wrap Agreements. In *Slator v. Nolan* (1876), 11 I.R. Eq. 367, a court of equity held that a transaction resting upon one party's taking undue advantage of another was unenforceable. This principle has been restated in more recent cases such as *W.W. Distributors & Co. Ltd. v. Thorsteinson* (1960), 26 D.L.R. (2d) 365 (Man. C.A.), in which the Manitoba Court of Appeals determined that a salesman had induced a party into signing a contract while denying the party the opportunity to review the contract which contained oppressive conditions. As a result the contract was held to be unenforceable.

The concept of fairness of contractual terms was addressed in relation to a Shrink-Wrap Agreement in a recent American decision, *ProCD v. Zeidenberg* (1996), 86 F.3d 1447 ("*ProCD*"). In this case, the United States Court of Appeals for the Seventh Circuit held that a statement on a software box that the product was subject to restrictions set out in an enclosed license was enforceable, in part because the terms of the Shrink-Wrap were not out of the ordinary. The *ProCD* case is noteworthy in that the license terms were also presented to the licensee in the form of a Click-Wrap Agreement. It is arguable that the court's recognition of the enforceability of the Shrink-Wrap Agreement was also a comment on the enforceability of the Click-Wrap Agreement.

Based on the above cases, it appears that the concern about the unfairness of Standard Form Agreements can largely be addressed by the vendor/licensor demonstrating that it has made a reasonable effort to bring the terms of the contract to the attention of the Customer

prior to the Customer's inferred acceptance thereof. In the case of Web-Wrap Agreements, the Clicking requirement would seem to address this concern. As for terms of a Web-Wrap Agreement which are unconscionable or contrary to any other common law principle, such terms would be unenforceable regardless of whether contained within a Web-Wrap Agreement or any other form of agreement.

Consumer Protection Legislation

A review of Canadian case law suggests that Web-Wrap Agreements should generally be viewed as satisfying the common law criteria for validity and enforceability. However, under the Ontario *Consumer Protection Act* (R.S.O. 1990, Chap. C.31)[7] ("CPA"), certain forms of Web-Wrap Agreements used in consumer transactions may be held unenforceable on the ground that the agreement has not been "signed" by the parties. For example, Section 19 of the CPA states that executory contracts [8] are not binding on a buyer (a "Buyer") other than a person who buys in the course of carrying on business or an association of individuals, a partnership or corporation unless the contract is in writing and is signed by the parties, and a duplicate original copy thereof is in the possession of each of the parties thereto. Therefore, the downloading of software pursuant to a Web- Wrap Agreement should be binding on a Buyer if it is deemed a license agreement and therefore beyond the scope of the definition of an executory contract, or if it is deemed a sale of software, provided the license fee is paid at the time of the transaction and there are no other service obligations on the licensor.[9] In contrast, the future delivery of a good or service pursuant to a telephone order or a Web-Wrap Agreement may not be binding on a Buyer, regardless of whether payment was made in full at the time of the submission of the order.

The business reality may be that on-line vendors are prepared to accept the risk that Web-Wrap Agreements and telephone orders may not be binding on a Buyer provided they have received payment for the purchased goods or services prior to delivery or performance of same. If a Buyer changes his or her mind with respect to the purchase or is otherwise dissatisfied with the good or service, the vendor may refund the purchase price. Nevertheless, it is likely that a vendor in a consumer-related executory contract scenario (eg. a sale of software subject to resale and distribution restrictions or provisions relating to the ownership of the intellectual property associated with the software) may not wish to deliver a copy of the software to a customer, irrespective of the fact that payment for the software has been made, knowing that the customer may not be bound by the use of software restrictions in the agreement. It is these types of transactions that require legislators to re-evaluate the objectives of statutes such as the CPA [10]

Consumer protection legislation exists in each province of Canada yet it is notable that Ontario consumer related statutes other than the CPA have recently been amended to eliminate in writing and signature requirements. For example, an amendment to the *Statute of Frauds* (R.S.O. 1990, Chap. S.19), in 1984, repealed Section 4 thereof which was an in writing and signature requirement for contracts performed within one year from the date of execution thereof. [11] These recent statutory developments illustrate the willingness of legislators to amend existing statutes to better conform to changing business needs and

practices. Therefore, some of the statutory hurdles facing the use of Web-Wrap Agreements have already been or are in the process of being eliminated.

III CONCLUSION - IS LEGISLATION REQUIRED?

Based on a review of the above noted case law, it would appear that Canadian courts have sufficient precedent to support a conclusion that Web-Wrap Agreements are valid and enforceable methods of contracting. As such, legislation is not required. However, consumer protection legislation which requires executory contracts to incorporate a signature element may present an obstacle to the enforceability of certain consumer related Web-Wrap Agreements in Ontario and other provinces with similar legislation.

The discussion in this paper with respect to the validity and enforceability of Web-Wrap Agreements has focused on consumer related agreements in Ontario. It is noteworthy, however, that these types of contracts are just an example of the possible applications of the Web-Wrap form of agreement. In time, it is likely that other types of contracts, particularly in commercial contexts, such as employment arrangements, real estate transactions, purchasing of insurance and financial lending, may be drafted in the form of a Web-Wrap Agreement. As Web-Wrap Agreements are increasingly used for a variety of contractual relationships, they will eventually become part of the normal course of dealing[12] . Therefore, from a legislative perspective, the best approach may be to adapt existing statutes, consumer related or otherwise, to remove barriers to the use of electronic means of contracting and thereby establish greater certainty with respect to the validity and enforceability of such agreements.

Footnote: 1 1 Although Web-Wrap Agreements and Click-Wrap Agreements are both employed in an electronic medium; technically, Web-Wrap Agreements are viewed as a subset of Click-Wrap Agreements since Click-Wrap Agreements are not necessarily presented to a potential Customer in an on-line environment while Web-Wrap Agreements are by definition. The focus of this paper is on Web-Wrap Agreements, however, most of the comments herein are equally applicable to Click-Wrap Agreements.

Footnote: 2 2 A dialogue box is a small window that overlays the document the user is currently viewing. Typically, a user must single-click a button within the dialogue box to close it and regain access to the original page.

Footnote: 3 3 A Standard Form Agreement is any type of contract drafted by one party, in which there is no opportunity for negotiation of the terms by the other party or parties thereto; eg. airline tickets, car rental agreements, and parking ticket stubs.

Footnote: 4 4 Shrink-Wrap Agreements come in different forms. A message may be included on a software box that indicates that the license terms are to be found insider the package, or a card detailing the license terms may be shrink- wrapped to the outside of the package. In both cases, the purpose is to ensure that the Customer is provided with an opportunity to review and indicate acceptance of the terms of the license prior to gaining access to the software. Once a Consumer "breaks the seal" of the wrapper, or first uses the software, as the case may be, the Customer is deemed to have read and assented to the terms of the Shrink-Wrap Agreement.

Footnote: 5 5 The essence of consideration is that it creates some benefit to the party promising or some negative impact, prejudice or inconvenience to the party to whom the promise is made (*Robertson v. Robertson* (1933), 6 M.P.R. 370 at 389 (N.B.C.A.)). Consideration may include some act, or promise of an act, which is incapable of being given a monetary value.

Footnote: 6 6 An offer is distinguished from an invitation to treat, which is a statement or conduct inviting a recipient to make an offer or to further negotiate. An invitation to treat merely indicates a general commercial intent and is not legally binding. In the context of Web-Wrap Agreements, it may not always be the Customer which is required to accept an offer by the vendor/licensor. If the vendor/licensee invites the Customer to make an offer, the critical issue becomes whether the Clicking constitutes a valid offer by the Customer as opposed to acceptance of an offer.

Footnote: 7 7 Similar consumer protection statutes in other province of Canada.

Footnote: 8 8 Section 1 of the CPA sets out the definition of an executory contract as, "a contract between a buyer and a seller for the purchase and sale of goods or services in respect of which delivery of the goods or performance of the services or payment in full of the consideration is not made at the time the contract is entered into."

Footnote: 9 9 The issue of whether software is licensed or sold has been judicially considered particularly in tax related cases where the characterization of software may result in different tax treatment of the product. In general, shrink- wrapped software is viewed as a good while customized software is viewed as licensed software.

Footnote: 10 10 We understand that the Ministry of Consumer and Corporate Relations plans to review the statutory provisions relating to executory contracts.

Footnote: 11 11 A similar amendment was made to the *Sale of Goods Act* (R.S.O. 1990, Chap. S.1) ("SGA") in 1994. Section 5 of the SGA, which stated that contracts for the sale of goods that have a value of CDN$40 or more would not be enforceable unless the purchaser had accepted at least part of the goods and had actually received them, or had given some consideration or part payment in order to bind the agreement, or unless the purchaser had made and signed a note or memorandum of the agreement. It is noteworthy that in Alberta, Newfoundland, Nova Scotia and Prince Edward Island provisions similar to Section 5 of the SGA continue to be in force.

Footnote: 12 12 The normal course of dealing can be understood to be the set of standard business practices, including forms of contracts, that are generally employed.

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