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Microsoft Windows Vista: The Beginning or the End of End-User License Agreements as We Know Them Recent Development.

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RECENT DEVELOPMENT

MICROSOFT WINDOWS VISTA: THE BEGINNING OR THE END OF END-USER LICENSE AGREEMENTS AS WE KNOW THEM?

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I. INTRODUCTION

Right now, somewhere in Hometown, USA, someone is sitting down behind their computer to install the latest operating system released by Microsoft—Windows Vista™.[1] The user presses the eject button on their computer's CD/DVD drive and inserts the Microsoft Windows Vista install DVD.[2] A window pops up on the user's computer screen requesting their preferred language, time zone, and keyboard input.[3] After clicking "Next," the window changes and a large button appears: "Install Now."[4] Much of the same ensues until the user reaches a lengthy license agreement.[5] The user yawns and scrolls quickly through the agreement, which has over 4,000 words.[6] Anxious to get on with the rest of the installation and regain use of their computer, the user clicks "I Agree" and completes the installation.[7]

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1. Windows Vista Trademark Guidelines, http://www.microsoft.com/about/legal/intellectualproperty/trademarks/usage/windowsvista.mspx (last visited Dec. 5, 2007) ("Windows Vista is either a registered trademark or trademark of Microsoft Corporation in the United States and/or other countries.").

2. *See* Paul Thurrott, *Windows Vista Review Part 3: Installing Windows Vista*, PAUL THURROTT'S SUPERSITE FOR WINDOWS, Nov. 9, 2006, http://www.winsupersite.com/reviews/winvista_03.asp (providing a step-by-step review of the Microsoft Windows Vista operating system, complete with pictures). This article begins by explaining that Windows Vista is available only on DVD. *Id.*

3. *See id.* (providing a link to an image of the first screen shown during a Windows Vista installation containing questions regarding "the language, time and currency formats, and keyboard or input methods").

4. *See id.* (containing the following link to a picture of the Windows Vista "Install now" screen: http://www.winsupersite.com/images/reviews/winvista_rtm_install_05.jpg).

5. *See id.* ("Then, you agree to the EULA . . . .").

6. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (containing 4,319 words exclusive of the terms available for the Windows Vista Home Premium and Windows Vista Ultimate products). The average person reads somewhere between 200 and 250 words per minute. *See* Turboread.com, How Does Your Light Reading Speed Compare Below?, http://www.turboread.com/interpretation.htm (last visited Dec. 5, 2007) (stating that 200 to 250 words per minute is "[a]n average reading speed in which the vast majority of the world's readers are positioned for most of their lives"). As such, an average reader would take between seventeen and a quarter and twenty-one and a half minutes to read the Windows Vista EULA in its entirety. This figure does not even begin to take into account the fact that the EULA contains a great deal of legalese, which may not be easy for the average user to read.

7. *See* Larry Magid, *It Pays to Read License Agreements*, PC PITSTOP,

Since the release of the Windows Vista operating system in early 2007,[8] scenarios much like the one above have been occurring in homes throughout the world. Microsoft consumers, eager to position themselves on the cutting edge of technology, often do not realize they are entering into a contract with Microsoft when they install Windows Vista onto their computer.[9] Many of them probably also do not realize that they have not technically

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http://www.pcpitstop.com/spycheck/eula.asp (last visited Dec. 5, 2007) (using an offer of "financial compensation" to anyone who read a certain section of the license agreement with the intention of showing that people do not read license agreements). To provide evidence that users do not generally read EULAs, PC PitStop promulgated an EULA with one of its software products that offered "financial compensation" to anyone who read a certain section of the EULA if that person sent an e-mail to the website. *Id.* "After four months and more than 3,000 downloads, one person finally wrote in." *Id.* While PC PitStop acknowledges that this is not a very "scientific" study, it does prove the point that most people do not bother to read EULAs before clicking on the "I Agree" button. *Id.* Further proof that users do not read EULAs can be found in the Microsoft funded paper, *Noticing Notice: A Large-Scale Experiment on the Timing of Software License Agreements*. NATHANIEL S. GOOD ET AL., NOTICING NOTICE: A LARGE-SCALE EXPERIMENT ON THE TIMING OF SOFTWARE LICENSE AGREEMENTS 5 (2007), *available at* http://www.ischool.berkeley.edu/~jensg/research/paper/Grossklags07-CHI-noticing_notice.pdf. This paper contains a number of statistics including the fact that only 1.4% of users report "reading EULAs often and thoroughly when they encounter them." *Id.*

8. *See* Press Release, Microsoft PressPass, Microsoft Launches Windows Vista and Office 2007 to Consumers Worldwide (Jan. 29, 2007), http://www.microsoft.com/Presspass/press/2007/jan07/01-29VistaLaunchPR.mspx (announcing Microsoft's release of Windows Vista to the general public on January 30, 2007).

9. *See* NATHANIEL S. GOOD ET AL., NOTICING NOTICE: A LARGE-SCALE EXPERIMENT ON THE TIMING OF SOFTWARE LICENSE AGREEMENTS 1 (2007), *available at* http://www.ischool.berkeley.edu/~jensg/research/paper/Grossklags07-CHI-noticing_notice.pdf (noting that the "long and confusing" nature of many EULAs "prevent meaningful knowledge and consent"); *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) ("Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general . . . ."); Siebert v. Amateur Athletic Union of the U.S., Inc., 422 F. Supp. 2d 1033, 1039–40 (D. Minn. 2006) (finding that a "'click' represents assent to the contract"); Mortgage Plus, Inc. v. Docmagic, Inc., No. 03-2582-GTV-DJW, 2004 WL 2331918, at *4 (D. Kan. Aug. 23, 2004) (holding that a "license is a form of contract" and that "installation and use of the software with the license attached constituted acceptance of the license terms"). *ProCD* is the principle case on the enforceability of "money now terms later" type contracts. The holding of *ProCD* has been applied to so called "clickwrap" agreements as well. *See generally* Kevin W. Grierson, Annotation, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5TH 309 (2003) (discussing several cases which have adopted the holding of *ProCD*). Further, the Electronic Signatures in Global and National Commerce Act provides generally that "a contract . . . may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." Electronic Signatures in Global and National Commerce Act § 101, 15 U.S.C. § 7001(a)(2) (2000).

purchased the software itself.[10] Instead, they have purchased a license to use the software.[11] Further, even those who do have some idea that they are entering into a contract to license software probably do not realize that they may be clicking away valuable rights that they take for granted.[12]

Virtually every computer user enters into a contract every time they install software on their computer.[13] These contracts are known as End-user License Agreements (EULAs) and are often referred to as "clickwrap" or "shrinkwrap" agreements.[14] Even

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10. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 8, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) ("The software is licensed, not sold."); *see also* Adobe Sys. Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1091 (N.D. Cal. 2000) (stating that despite terms used in the industry such as purchase, sell, and buy, users purchase a license, rather than the software itself).

11. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 8, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) ("The software is licensed, not sold."); *see also Adobe Sys. Inc.*, 84 F. Supp. 2d at 1091 (determining that users do not purchase the software, but rather a license to it).

12. *See, e.g.*, APPLE® COMPUTER, INC., SOFTWARE LICENSE AGREEMENT FOR ITUNES § 9 (2007), http://images.apple.com/legal/sla/docs/itunes.pdf ("In no event shall Apple's total liability to you for all damages . . . exceed the amount of fifty dollars . . . ."); MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 25, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) ("You can recover from Microsoft and its suppliers only direct damages up to the amount you paid for the software."); *see also* M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 316 (Wash. 2000) (en banc) (upholding a limitation of damages clause in a "shrinkwrap" agreement).

13. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (enforcing a shrinkwrap agreement under contract law); Siebert v. Amateur Athletic Union of the U.S., Inc., 422 F. Supp. 2d 1033, 1039–40 (D. Minn. 2006) (holding that a software license agreement is a contract that is accepted upon clicking the box); Mortgage Plus, Inc. v. Docmagic, Inc., No. 03-2582-GTV-DJW, 2004 WL 2331918, at *4 (D. Kan. Aug. 23, 2004) (stating that a "license is a form of contract" and that "installation and use of the software" constitutes acceptance).

14. *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 22 n.4 (2d Cir. 2002) (describing a "clickwrap" agreement as one where a message appears on the user's computer screen that requires assent in order to continue); XPEL Techs. Corp. v. Md. Performance Works Ltd., No. SA-05-CA-0593-XR, 2006 WL 1851703, at *1 (W.D. Tex. May 19, 2006) ("By clicking on the 'I Accept' button, a 'clickwrap' agreement is formed."). The *Specht* court also explained that the term "clickwrap" is used as an analogy to "shrinkwrap" agreements. *Specht*, 306 F.3d at 22 n.4. Contrary to a clickwrap agreement, which is not seen until the user begins installation of the software, a shrinkwrap agreement is one printed on the shrinkwrap packaging containing the software. *See ProCD, Inc.*,

free software such as Apple® iTunes®,[15] the popular MP3 management software, requires the user to enter into an EULA.[16] These EULAs contain terms ranging from the simple—such as a disclaimer that the software is governed by copyright law,[17] to the complex—such as a limitation of damages to the purchase price of the software even in the event of negligence.[18] Some license agreements even contain seemingly absurd statements.[19] For example, the EULA for Apple iTunes contains a provision agreeing "not [to] use these products for any purposes prohibited by United States law, including, without limitation, the *development, design, manufacture or production of missiles, or nuclear, chemical or biological weapons*."[20] How this product *could* be used for "the development, design, manufacture or production of" such weapons is perplexing.

With so many users entering into EULAs every day, it is important to understand the legal implications of clicking "I Agree." Microsoft's Windows Vista operating system is an ideal case study of the legal effect of EULAs because of its widespread use and influence on the market. With more than 600 million

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86 F.3d at 1449 ("The 'shrinkwrap license' gets its name from the fact that retail software packages are covered in plastic or cellophane 'shrinkwrap,' and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package."). While software vendors prefer to use the term "end-user license," or EULA, shrinkwrap and clickwrap are more commonly used. *Id.*

15. Apple—Legal—Copyright and Trademark Guidelines, http://www.apple.com/legal/trademark/guidelinesfor3rdparties.html (last visited Dec. 5, 2007) ("[Apple and iTunes are] trademark[s] of Apple Inc., registered in the U.S. and other countries.").

16. APPLE COMPUTER, INC., SOFTWARE LICENSE AGREEMENT FOR ITUNES § 9 (2007), http://images.apple.com/legal/sla/docs/itunes.pdf.

17. *See, e.g.*, MICROSOFT CORPORATION, MICROSOFT WINDOWS XP HOME EDITION (RETAIL) END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE § 3 (2004), http://www.microsoft.com/windowsxp/home/eula.mspx (confirming that the software is protected by copyright laws).

18. *See, e.g.*, MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 25, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (limiting damages to the purchase price of the software even where the claim is for negligence).

19. *See* APPLE COMPUTER, INC., SOFTWARE LICENSE AGREEMENT FOR ITUNES § 10 (2007), http://images.apple.com/legal/sla/docs/itunes.pdf (including a clause that requires users of the software not to use it in the "development, design, manufacture or production of missiles, or nuclear, chemical or biological weapons").

20. APPLE COMPUTER, INC., SOFTWARE LICENSE AGREEMENT FOR ITUNES § 10 (2007), http://images.apple.com/legal/sla/docs/itunes.pdf (emphasis added).

Windows users worldwide,[21] Microsoft has an unparalleled influence on the business practices of the software industry, both as a market leader and as the developer of the operating system on which most desktop software runs. As such, the latest version of this operating system represents an ideal case study on the enforceability, pitfalls, and future of the EULA.

In analyzing the enforceability of the specific terms of the Windows Vista EULA, Washington law will be a primary source. This is because the Windows Vista EULA provides that "Washington state law governs the interpretation of this agreement."[22] While there may be some doubt as to the enforceability of the choice of law provision, this type of provision is generally enforceable.[23]

In order to properly address the specific issues raised by the Windows Vista EULA, certain background information is necessary. Therefore, this paper will begin by discussing the history and evolution of EULAs, both generally and as applied to Microsoft. This background overview will be followed by an analysis of the applicability of the Uniform Commercial Code (UCC) to software license agreements. Next, this paper will delve into the issue of unconscionability as it applies to EULAs, and specifically as it applies to the terms of the Windows Vista EULA. This paper will conclude with a discussion of the enforceability of the Windows Vista EULA.

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21. *See* Microsoft Watch, Microsoft: Expect 1 Billion-Plus Windows PCs by 2010 (July 12, 2004), http://www.microsoft-watch.com/content/operating_systems/microsoft_expect_1_billionplus_windows_pcs_by_2010.html (reporting Microsoft's assertion that "[t]here are 600 million Windows PCs today").

22. MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 23(a), http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007).

23. Some users have successfully challenged forum selection clauses in clickwrap agreements. *See, e.g.*, Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (finding unconscionability in a forum selection clause). It follows that a choice of law provision might be similarly vulnerable. As a general rule, however, choice of law provisions in contracts are enforceable. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

II. BACKGROUND

A. *License or Sale: Why License Software?*

Since the early days of software development, developers have been concerned about protecting their intellectual property rights.[24] Despite this concern, when the Copyright Office began accepting software applications in 1964, software developers were initially hesitant to utilize it.[25] This was because the unique characteristics of software made existing copyright law undesirable—namely, the first sale doctrine as established before 1990.[26] Under copyright law, a developer retained only the exclusive right to promulgate *copies* of the software.[27] As such, under the first sale doctrine, the law could be interpreted to allow a purchaser to install software and then lend or lease it to someone else who could also install it.[28] Such a practice could severely undermine copyright protection for software.[29]

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24. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 349 n.269 (1970) (stating that many software creators use trade secret protection to protect their programs). In the 1970s, software and hardware were often intertwined. *See id.* at 344 ("[Most] *systems* software is now, and should continue to be, created by hardware manufacturers and sold along with their hardware at a single price."). Breyer's article provides an interesting historical context behind software development. In 1970, when this article was written, it was not yet clear how great a role software would play in the future of technology. This article also shows that copyright protection was not initially very important to software developers. *See id.* (considering that only 200 software submissions were made when the Copyright Office began accepting computer programs for registration).

25. *See id.* (stating that the Copyright Office opened its doors to computer programs in 1964 but noting that only 200 applications were submitted at that time); *see also* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 96 n.7 (3d Cir. 1991) (discussing the difficulty in enforcing copyright protection of software when copying is so easy); Softman Prods. v. Adobe Sys. Inc., 171 F. Supp. 2d 1075, 1083 (C.D. Cal. 2001) (explaining the initial uncertainty surrounding the extent and effectiveness of copyright protection for software).

26. *See Step-Saver*, 939 F.2d at 96 n.7 (explaining that the first sale doctrine as it existed prior to the 1990 amendments allowed the owner of a copyrighted copy to sell or lease it without consent from the copyright holder).

27. 17 U.S.C. § 106 (2002).

28. *See Step-Saver*, 939 F.2d at 96 n.7 (explaining that under the first sale doctrine "one could purchase a copy of a computer program, and then lease it or lend it to another without infringing the copyright on the program").

29. *See id.* (describing how the first sale doctrine stood as a barrier to meaningful copyright protection for software developers).

EULAs arose as an innovative strategy by software developers to circumvent the first sale doctrine.[30] Characterizing the transaction between the software developer and the customer as a license allowed developers to implement their own restrictions on end-users, such as nontransferability of the license to use the software.[31] While there was some question as to whether it was possible to work around the federal copyright law with state contract law,[32] using licenses in this manner seemed better than relying solely on copyright law.

To address the issues presented by the first sale doctrine, Congress amended the Copyright Act in 1990.[33] The amendment eliminated the protection of the first sale doctrine as applied to the leasing and lending of software products.[34] This essentially assuaged the initial concerns of software developers.[35] Nevertheless, the use of EULAs persisted.[36]

EULAs are attractive to software developers because they can enhance profit while mitigating risk.[37] For example, a software distributor could require the purchase of a separate license for each computer on which the user intends to install the software.[38]

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30. *See id.* ("By characterizing the original transaction . . . as a license, rather than a sale, and by making the license personal and non-transferable, software producers hoped to avoid the reach of the first sale doctrine . . . .").

31. *See id.* (explaining how software developers could include terms such as nontransferability).

32. *See id.* (describing the concerns surrounding possible federal preemption).

33. *See Step-Saver*, 939 F.2d at 96 n.7 (citing Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5134 (codified at 17 U.S.C.A. § 109(b) (West Supp. 1991))) ("Congress recognized the problem, and, in 1990, amended the first sale doctrine as it applie[d] to computer programs . . . .").

34. *See id.* (explaining that the first sale doctrine no longer permitted the lending and leasing of copyrighted computer programs).

35. *See id.* ("This amendment renders the need to characterize the original transaction as a license largely anachronistic.").

36. *See* Softman Prods. v. Adobe Sys. Inc., 171 F. Supp. 2d 1075, 1083 (C.D. Cal. 2001) ("'[L]icensing' continued after federal courts interpreted the Copyright Act to provide substantial protection for computer programs . . . .").

37. *See* Christian H. Nadan, *Software Licensing in the 21st Century: Are Software "Licenses" Really Sales, and How Will the Software Industry Respond?*, 32 AIPLA Q.J. 555, 559 (2004) (suggesting that licensing enables software developers to obtain the highest price from corporations while limiting any liability for software failure).

38. *See, e.g.*, MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 2(a), http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (stating that a user "may install one copy of the software on the licensed device").

Further, since bugs in the software could expose the developer to a potentially large amount of liability, EULAs are advantageous in their apparent ability to limit or eliminate this risk.[39]

The continued evolution of software and the EULAs that so often accompany it has led to the current environment wherein users are required to consent to long and complex clickwrap agreements in order to use virtually any software product.[40] Additionally, mass production of software has essentially led to one-size-fits-all EULAs with no room for negotiation.[41] Further, the nature of software distribution is such that users are often not presented with the EULA terms until after they have already purchased the software.[42] While most EULAs provide that the user can return the software if they do not assent to the terms of the EULA, this is often impractical.[43] As such, the software industry has essentially become one where software developers and distributors can unilaterally impose one-sided terms on end-users with little or no room for negotiation.

B. ProCD, Inc. v. Zeidenberg: *The Enforceability of "Money Now, Terms Later" Agreements*

Of course, the key to EULA adoption is not what they can be written to do, but whether or not they are enforceable. Regardless, despite these concerns over enforceability, shrinkwrap agreements were widely used in the early 1990s. These shrinkwrap licenses, printed on the outside of software packaging, stated that they became effective as soon as the cellophane wrapper covering

39. *See* Christian H. Nadan, *Software Licensing in the 21st Century: Are Software "Licenses" Really Sales, and How Will the Software Industry Respond?*, 32 AIPLA Q.J. 555, 586 (2004) ("Licensing supports the software developer's goal of limiting liability, whether the software developer deals directly with the end-user or employs tiered distribution channels.").

40. *See generally* Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495 (2004) (discussing the spread of EULAs and the ever increasing scope of their terms).

41. *See* Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (noting that a contract is adhesive when the user has no option but to accept or reject it).

42. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450–51 (7th Cir. 1996) (discussing software sales where the license agreements are not available until after purchase).

43. *See id.* at 1451 (noting the importance of the right to return the software if the user does not agree to the terms).

the software was opened.[44] Often, the terms did not become available for the consumer to review until after they had purchased the software.[45] The uncertainty as to the enforceability of these agreements waned significantly in 1996 when the Seventh Circuit decided *ProCD, Inc. v. Zeidenberg*.[46]

ProCD was a company that had designed a database that utilized "compiled information from more than 3,000 telephone directories."[47] Production of the database "cost more than $10 million to compile and [was] expensive to keep current."[48] Further, the contents of the database had subjectively different values for different types of users.[49] While individual consumers might have been willing to pay a few hundred dollars for the database, the value was much higher for corporate clients.[50] Recognizing the disparate value of its product to different types of purchasers, ProCD did what many in other industries do—attempted to engage in market segmentation.[51]

In order to effectively segment its market, ProCD "turned to the institution of contract."[52] Every consumer version of the ProCD software had a disclaimer on the outside of the packaging stating that it was subject to the restrictions stated on the license inside the box.[53] The license was also "encoded on the CD-ROM disks," "printed in the [user] manual," and displayed "on [the] user's screen every time the software" was used.[54] The terms of this license explicitly stated that the "use of the application program and listings" were limited to non-commercial purposes.[55]

Despite the license agreement, defendant, Matthew Zeidenberg, purchased a consumer version of the ProCD software and used it

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44. *See id.* at 1449 (describing shrinkwrap agreements as those that become effective upon removal of the shrinkwrap from a software package).

45. *See id.* at 1451–52 (noting that "[n]otice on the outside, terms on the inside" is a common way of providing the terms of EULAs to the user).

46. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding that shrinkwrap licenses are enforceable).

47. *Id.* at 1449.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See ProCD, Inc.*, 86 F.3d at 1449–50 (describing the practices of many other industries such as airlines and movie production companies).

52. *Id.* at 1450.

53. *Id.*

54. *Id.*

55. *Id.*

to form his business, Silken Mountain Web Services, Inc.[56] The purpose of Zeidenberg's business was to resell the information contained within the ProCD database.[57] Zeidenberg made this information available at a price much less than ProCD charged its commercial customers.[58]

Zeidenberg argued that he was not bound by the terms contained in the license agreement because he was not aware of them at the time he entered into the contract with ProCD.[59] He argued that "placing the package of software on the shelf [was] an 'offer,' which the customer 'accept[ed]' by paying the asking price and leaving the store with the goods."[60] While the argument seemed facially plausible, the court was quick to note that Zeidenberg had overlooked the fact that there was notice on the outside of the box stating that use of the software was subject to the license contained inside the box.[61]

As such, the court held that "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable ... may be a means of doing business valuable to buyers and sellers alike."[62] In so holding, the *ProCD* court noted "money now, terms later" types of contracts are quite common outside the realm of shrinkwrap license agreements.[63] "One *could* arrange things so that [consumers sign these] promise[s] before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch [sales] by phone or electronic data service."[64] Noting that software is more and more often delivered

56. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996).

57. *Id.*

58. *Id.*

59. *See id.* (discussing hidden terms of a contract versus those terms "which refer to other terms").

60. *Id.*

61. *ProCD, Inc.*, 86 F.3d at 1450.

62. *Id.*

63. *Id.* at 1451–52. Judge Easterbrook discussed many situations where "the exchange of money precedes the communication of detailed terms." *Id.* The court noted that when a ticket is purchased the customer often gets a price quote, makes a reservation, and pays only to receive a ticket containing additional terms that will apply unless the reservation is cancelled. *Id.* at 1451 (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)). *Carnival Cruise Lines*, of course, is the principle case on the enforceability of boilerplate forum selection clauses presented after sale. *Carnival Cruise Lines*, 499 U.S. at 593–94.

64. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996).

via the Internet, the court recognized that a holding prohibiting such sales to be made subject to terms delivered after the sale would "return transactions to the horse-and-buggy age."[65] Consequently, the court held that shrinkwrap agreements are enforceable.[66]

Over ten years later, *ProCD* has been widely followed and its principles have been extended to apply to clickwrap agreements as well.[67] It is clear from the tone of the *ProCD* court that Judge Easterbrook felt that the only way to embrace technological growth was to enforce this type of contract.[68] Since *ProCD* was decided in 1996, courts have continually sided with software developers regarding EULA terms and enforceability.[69] This has

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65. *Id.* at 1452.

66. *Id.* at 1449.

67. *See, e.g.*, Meridian Project Sys., Inc. v. Hardin Constr. Co., 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (embracing the *ProCD* holding); Mortgage Plus, Inc. v. Docmagic, Inc., No. 03-2582-GTV-DJW, 2004 WL 2331918, at *4 (D. Kan. Aug. 23, 2004) (citing *ProCD* as dispositive on the enforceability of clickwrap agreements); Moore v. Microsoft Corp., 293 A.D.2d 587, 587 (N.Y. App. Div. 2002) (citing *ProCD* and holding a clickwrap disclaimer of warranties valid and binding); Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756, 781–82 (N.D. Tex. 2006) (using the holding in *ProCD* as support for the enforceability of a clickwrap agreement); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000) (en banc) (adopting the holding in *ProCD* and applying it to a clickwrap agreement). *But see* Kloecek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1339–41 (D. Kan. 2000) (criticizing *ProCD* and refusing to enforce a clickwrap agreement on UCC section 2-207 grounds).

68. *See ProCD*, 86 F.3d at 1451–52 (explaining the nature of the software industry and concluding that the only way to prevent a return to the "horse-and-buggy age" was to enforce shrinkwrap agreements).

69. *See* Nazaruk v. eBay, Inc., No. 2:06CV242DAK, 2006 WL 2666429, at *4 (D. Utah Sept. 14, 2006) (enforcing a forum selection clause contained in a clickwrap agreement); Bar-Ayal v. Time Warner Cable, Inc., No. 03 CV 9905(KMW), 2006 WL 2990032, at *16 (S.D.N.Y. Oct. 16, 2006) (upholding an arbitration provision promulgated in a clickwrap agreement); Siebert v. Amateur Athletic Union of the U.S., Inc., 422 F. Supp. 2d 1033, 1040 (D. Minn. 2006) (noting that most courts uphold forum selection and arbitration clauses contained in clickwrap agreements); Salco Distribs., LLC v. iCode, Inc., No. 8:05CV642T27TGW, 2006 WL 449156, at *4 (M.D. Fla. Feb. 22, 2006) (finding a forum selection clause in a shrinkwrap agreement to be enforceable); Hugger-Mugger, L.L.C., v. Netsuite, Inc., No. 2:04-CV-592TC, 2005 WL 2206128, at *6 (D. Utah Sept. 12, 2005) (enforcing a forum selection clause contained in a clickwrap agreement); Motise v. Amer. Online, Inc., 346 F. Supp. 2d 563, 566 (S.D.N.Y. 2004) (enforcing a forum selection clause contained within a clickwrap agreement); *Mortgage Plus*, 2004 WL 2331918, at *8 (enforcing a forum selection clause contained in a clickwrap license agreement); Hughes v. McMenamon, 204 F. Supp. 2d 178, 181 (D. Mass. 2002) (upholding a forum selection clause contained in a clickwrap agreement); 1-A Equip. Co. v. Icode, Inc., No. 1460, 2003 WL 549913, at *3 (Mass. App. Div. Feb. 21, 2003) (upholding a forum selection clause found in a clickwrap agreement); *Moore*, 293 A.D.2d at 587 (finding the plaintiffs' claims

led to a pro-EULA environment where critics have argued that the rights of consumers are continually limited in favor of the rights of software developers and distributors.[70]

C. *From Windows 98 to Windows Vista: The Evolution of the Microsoft EULA*

When courts consistently enforce pro-developer EULA terms, it stands to reason that developers will keep adding more and more terms that are beneficial to them. Microsoft is no exception to this rule; consequently, the Windows EULA has expanded throughout the years. One court noted that the Windows 98 license agreement was "merely a reiteration that in return for using Microsoft's copyrighted intellectual property; the user [would not] infringe on Microsoft's copyright."[71] Indeed, many of the provisions of the Windows 98 EULA were practically a direct restatement of existing copyright law.[72] Since Windows 98, the length of the Microsoft EULAs has slowly crawled from about 2,300 words to over 4,000 words.[73] The relative complexity of the documents has

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against Microsoft to be "barred by the clear disclaimers, waivers of liability, and limitations of remedies contained in the EULA"); *M.A. Mortenson Co.*, 998 P.2d at 315–16 (rejecting claims of unconscionability and enforcing a liability limiting clause in a clickwrap agreement). *See generally* Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 496 (2004) (taking a firm stance that courts have done a disservice to the public by broadly enforcing EULAs).

70. *See generally* Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 496–97 (2004) (discussing the expansion of EULA terms and taking a firm stance that such terms do the public a disservice).

71. *In re* Pomerantz, No. 00CV0143, 2001 WL 514352, at *3 (Colo. Dist. Ct. Jan. 29, 2001).

72. *See* MICROSOFT CORPORATION, MICROSOFT WINDOWS 98 SECOND EDITION END-USER LICENSE AGREEMENT FOR MICROSOFT DESKTOP OPERATING SYSTEMS § 4 (1998), http://proprietary.clendons.co.nz/licenses/eula/windows98se-eula.htm (last visited Dec. 5, 2007) (explaining Microsoft's copyright rights).

73. *Compare* MICROSOFT CORPORATION, MICROSOFT WINDOWS 98 SECOND EDITION END-USER LICENSE AGREEMENT FOR MICROSOFT DESKTOP OPERATING SYSTEMS, http://proprietary.clendons.co.nz/licenses/eula/windows98se-eula.htm (last visited Dec. 5, 2007) (containing roughly 2,300 words), *with* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (containing over 4,000 words). As a reference, the text of the Analysis section of this paper is only slightly over 2,500 words.

increased accordingly. This represents more than just a reflection of technological innovations since the release of Windows 98, as the Windows XP EULA already had the opportunity to address new technologies such as digital rights management.[74] Rather than a mere update of its predecessors, the Windows Vista EULA has been largely rewritten and contains several terms that radically expand Microsoft's control over how their software is used—among these is the validation clause.[75] Ostensibly, the purpose of this clause is to require periodic validation of the user's license rights under the software.[76] The clause somewhat confusingly stipulates that "[t]he software will from time to time validate the software, update or require download of the validation feature of the software."[77] The Windows Vista EULA explains that "[v]alidation verifies that the software has been activated and is properly licensed" and "permits [the user] to use certain features of the software or to obtain additional benefits."[78] While performing a validation check is not necessarily new to Windows Vista, the consequences of refusing or failing to perform such a check are newly harsh. Notably, if "the software is found not to be properly licensed, the functionality of the software may be affected."[79] One example of that effect is a "need to reactivate the software."[80] Taking into consideration the fact that failure to

74. *See* MICROSOFT CORPORATION, MICROSOFT WINDOWS XP HOME EDITION (RETAIL) END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE § 2.1 (2004), http://www.microsoft.com/windowsxp/home/eula.mspx (including a digital rights management clause).

75. *Compare* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 5, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (containing a validation clause), *with* MICROSOFT CORPORATION, MICROSOFT WINDOWS XP HOME EDITION (RETAIL) END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE (2004), http://www.microsoft.com/windowsxp/home/eula.mspx (containing no validation clause).

76. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 5, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) ("Validation verifies that the software has been activated and is properly licensed.").

77. *Id.*

78. *Id.*

79. *Id.*

80. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 5(c), http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d40

activate may result in an inability to use the software altogether, this requirement seems to be rather burdensome.[81]

While it might seem that the validation clause only affects those who are violating the software license to begin with, this is not necessarily true. For example, installation of various hardware drivers and popular programs (such as PC-Cillin™ Anti-Virus and Trend Micro™ Internet Security)[82] has already been found to cause the user's system to enter "reduced functionality mode" if no action is taken.[83] In this mode, files are no longer accessible and the only program that continues to work is Internet Explorer.[84] While revalidation or repeated activation may seem simple enough for a user holding a valid license, that apparent simplicity does not take into account numerous practical barriers such as having to locate and enter the validation code. Nor is the reactivation process itself foolproof—Microsoft has admitted that some hardware drivers and programs, such as Intuit® QuickBooks®,[85] can corrupt the reactivation process itself making the system unable to recognize a *valid* activation code and necessitating time consuming phone activation.[86] This could be devastating for commercial Microsoft users such as attorneys who often need access to their files in order to meet judicially imposed

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5c074.pdf (last visited Dec. 5, 2007).

81. *See id.* § 4 (providing that failure to activate the software will eliminate the user's ability to continue to use it).

82. Legal Notice—Trend Micro USA, http://us.trendmicro.com/us/about/company/legalnotice/ (last visited Dec. 5, 2007) ("PC-Cillin, Trend Micro, [and others] . . . are trademarks of Trend Micro.").

83. *See* Posting of Ed Bott to ZDNet.com, http://blogs.zdnet.com/Bott/?p=220 (Feb. 26, 2007, 6:41 EST) (describing certain programs that cripple a user's computer through no fault of their own) (on file with the *St. Mary's Law Journal*).

84. *See* Posting of Ed Bott to ZDNet.com, http://blogs.zdnet.com/Bott/?p=148 (Oct. 4, 2006, 7:49 EST) (explaining that "Reduced Functionality Mode" results in severely limited computer functionality) (on file with the *St. Mary's Law Journal*).

85. Intuit—Trademark Information and Restrictions, http://www.intuit.com/trademark/index.jhtml (last visited Dec. 5, 2007) ("Intuit and QuickBooks are trademarks and service marks of Intuit, Inc., registered in the United States and other countries.").

86. *See* Microsoft Corp., Help and Support, http://support.microsoft.com/kb/931573 (last visited Dec. 5, 2007) (explaining how valid codes might not be recognized in certain situations). Ironically, this has done little to stop real software pirates—it took three hours for one group of such individuals to develop an illegal method for circumventing Windows Vista validation. *See* Softpedia, 3 Hours to Come Up with a Crack for Vista Validation Update, http://news.softpedia.com/news/3-Hours-to-Come-Up-With-a-Crack-for-Vista-Validation-Update-42645.shtml (last visited Dec. 5, 2007) (describing how software pirates came up with a crack to the Windows Vista validation process in only three hours).

deadlines. Additionally, compensation for such loss of productivity could be subject to Microsoft's limitation of damages clause.[87]

In addition to the validation clause, there are many other new clauses in the Windows Vista EULA.[88] Some clauses seem to be required boilerplate notices from providers of third party technology.[89] Two other major new clauses in the Windows Vista EULA relate to "potentially unwanted software"[90] and "Internet-based services."[91] The clause relating to "potentially unwanted software" deals with a new Windows Vista feature, Windows Defender.[92] Windows Defender "search[es] [the user's] computer for 'spyware,' 'adware' and other software deemed harmful by Microsoft."[93] The notice is included to inform users that under the default settings any "potentially unwanted software rated 'high' or 'severe'" will automatically be removed.[94] The clause goes on to explain that "it is possible that [the user] will also remove or disable software that is not potentially unwanted software."[95]

The other new section of the Windows Vista EULA is the "Internet-based services" clause.[96] This clause describes the

87. MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 25, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007).

88. *Compare id.* §§ 6, 7, 17, 18 (containing "Potentially Unwanted Software," "Internet-Based Services," "Notice About the MPEG-4 Visual Standard," and "Notice About the VC-1 Visual Standard" clauses), *with* MICROSOFT CORPORATION, MICROSOFT WINDOWS XP HOME EDITION (RETAIL) END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE (2004), http://www.microsoft.com/windowsxp/home/eula.mspx (containing no such clauses).

89. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC §§ 17, 18, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (containing two clauses required by "MPEG LA, L.L.C.").

90. *Id.* § 6.

91. *Id.* § 7.

92. *Id.* § 6.

93. *Id.*

94. MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 6, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007).

95. *Id.*

96. *Id.* § 7.

various Internet-based services provided with the Windows Vista operating system.[97] Most of this clause describes the various services and explains how to disable the portions of them that automatically connect to the Internet.[98] Included in this section is a clause that is not new, the "Windows Media Digital Rights Management" (WMDRM) clause.[99] This clause informs users that Microsoft may disable their ability to use certain copyrighted files (such as downloaded music) if they do not appear to have proper rights to that content or refuse to upgrade the WMDRM.[100] Moreover, Windows Vista makes it possible for Microsoft to remotely disable or cripple audio and video drivers on computers that contain no illegal content and have not been compromised by intruders, for the sole reason that the security on that software driver has been cracked by somebody, somewhere. The only fix to this will be for the consumer either to buy new computer components or wait for the manufacturer of the compromised component to release an updated driver where this security hole is fixed.[101]

Conversely, a few seemingly important clauses from the Windows XP EULA are remarkably absent from the Windows Vista EULA.[102] The termination clause, securing Microsoft's right to terminate the EULA if they believe that a user is not complying with its terms and conditions, is not included in the

97. *Id.*

98. *Id.*

99. MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 7, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007).

100. *Id.*

101. *See* Peter Gutmann, *A Cost Analysis of Windows Vista Content Protection*, June 12, 2007, http://www.cs.auckland.ac.nz/~pgut001/pubs/vista_cost.html#functionality (describing how the technology included with WMDRM can operate to remove user access to legitimately owned materials).

102. *Compare* MICROSOFT CORPORATION, MICROSOFT WINDOWS XP HOME EDITION (RETAIL) END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE §§ 14, 21 (2004), http://www.microsoft.com/windowsxp/home/eula.mspx (containing a termination clause and a severability clause), *with* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (containing neither a termination nor a severability clause).

Windows Vista EULA.[103] It is arguable that Microsoft does not lose this right by failing to explicitly provide for it in the contract.[104] Regardless, it seems imprudent for the Windows Vista EULA to not claim this right directly.

Another clause that is not provided in the Windows Vista EULA that was included in the Windows XP EULA is a standard severability clause.[105] At the very least, a severability clause provides strong evidence that the parties to a contract intend for the separate provisions to be independently enforceable.[106] By leaving out the severability clause, Microsoft runs the risk of having its entire agreement thrown out if any given provision is adjudicated to be unenforceable.[107] The implications of the absence of this clause will be discussed in more detail below.

III. ANALYSIS

A. *Good or Service: What Law Applies to EULAs?*

At the threshold of almost every EULA case is the question of what law governs.[108] Depending on what jurisdiction is

103. *Compare* MICROSOFT CORPORATION, MICROSOFT WINDOWS XP HOME EDITION (RETAIL) END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE § 14 (2004), http://www.microsoft.com/windowsxp/home/eula.mspx (including a termination clause), *with* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (containing no termination clause).

104. *See generally* RICHARD A. LORD, WILLISTON ON CONTRACTS § 43:5 (4th ed. 2006) (explaining that a party to a contract may have a right to terminate the agreement if the other party materially breaches).

105. *Compare* MICROSOFT CORPORATION, MICROSOFT WINDOWS XP HOME EDITION (RETAIL) END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE § 21 (2004), http://www.microsoft.com/windowsxp/home/eula.mspx (including a severability clause), *with* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (including no severability clause).

106. *See, e.g.*, Culinary Workers & Bartenders Union No. 596 Health & Welfare Trust v. Gateway Café, Inc., 588 P.2d 1334, 1345 (Wash. 1979) (en banc) (severing invalid clauses where the agreement contained a severability clause).

107. *See, e.g.*, TED A. DONNER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS § 22:5 (2006) (warning that certain clauses "jeopardize[] the enforceability of a given contract in its entirety").

108. *See, e.g.*, Arbitron, Inc. v. Tralyn Broad., Inc., 400 F.3d 130, 138 (2d Cir. 2005)

considering the case, software issues may fall into any one of three different bodies of law—the UCC, common law, or the Uniform Computer Information Transaction Act (UCITA).[109] A determination as to whether the UCC applies hinges on whether courts categorize software as a good or a service.[110] According to section 2-105 of the UCC, goods are "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."[111] For a majority of courts, this definition is broad enough to encompass computer software.[112] Other courts, however, distinguish software based on the fact that it is not tangible, is predominately a service (i.e., the intellectual effort that goes into writing the program), or is licensed rather than sold.[113] Finally, two jurisdictions—Maryland and Virginia—have adopted the UCITA, a uniform law that covers both software and EULAs.[114]

Whether the UCC, UCITA, or common law applies to the Windows Vista EULA likely depends on the determination of Washington courts.[115] While Washington has applied the UCC to

(questioning what body of law applies to software license agreements); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 n.13 (2d Cir. 2002) (determining what law "applies to the licensing of software that is downloadable from the Internet"); Mortgage Plus, Inc. v. Docmagic, Inc., No. 03-2582-GTV-DJW, 2004 WL 2331918, at *3 (D. Kan. Aug. 23, 2004) (addressing whether to apply the UCC or common law to a dispute over a clickwrap agreement); i.LAN Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 331–32 (D. Mass. 2002) (deciding what body of law to apply to a clickwrap agreement); Wachter Mgmt. Co. v. Dexter & Chaney, Inc., 144 P.3d 747, 750 (Kan. 2006) (holding, after a brief analysis, that "[c]omputer software is considered to be goods subject to the UCC").

109. *See i.LAN Sys., Inc.*, 183 F. Supp. 2d at 331–32 (discussing the three different bodies of law potentially applicable to software licenses, the UCC, UCITA, and common law).

110. *See Mortgage Plus, Inc.*, 2004 WL 2331918, at *4 (determining that the software in question was not a good and applying common law).

111. U.C.C. § 2-105 (2003).

112. *See, e.g., i.LAN Sys., Inc.*, 183 F. Supp. 2d at 331–32 (applying the UCC to a clickwrap agreement). Incidentally, the *i.LAN* court was unsure whether the UCC was the best choice of a body of law to govern software license agreements. *Id.* Noting that "software licenses exist in a legislative void," the court explained that they would "not overlook Article 2 simply because its provisions are imperfect in today's world." *Id.* at 332.

113. *See, e.g., Mortgage Plus, Inc.*, 2004 WL 2331918, at *3–4 (determining that the software in question was not a good and applying common law).

114. *See i.LAN Sys., Inc.*, 183 F. Supp. 2d at 332 (discussing the UCITA and how it has been adopted in Virginia and Maryland).

115. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 23(a), http://download.microsoft.com/documents/

one software case, it did so because the parties agreed that the UCC was applicable, not after a thorough analysis of the issue.[116] As such, whether or not the UCC applies to the Windows Vista EULA remains to be decided. It is clear, however, that the UCITA does not apply because the Washington Legislature has not adopted it.[117]

B. *Adjudicating Fairness: Defining and Determining Unconscionability*

1. Unconscionability in General

For the purposes of determining unconscionability, whether or not the UCC is applicable is largely academic.[118] A comparison of the relevant law—UCC section 2-302 and common law as represented by the Restatement (Second) of Contracts section 208—reveals no substantive difference.[119] In fact, "[b]oth of them do little more than recognize the power of the court to refuse enforcement of an unconscionable contract in whole or in part."[120] Neither the UCC nor the Restatement articulates "what

useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) ("Washington state law governs the interpretation of this agreement and applies to claims for breach of it, regardless of conflict of law principles.").

116. *See* M.A. Mortenson Co., v. Timberline Software Corp., 998 P.2d 305, 310 (Wash. 2000) (en banc) (applying the UCC to a software licensing agreement because the parties agreed to its application).

117. *See i.LAN Sys., Inc.*, 183 F. Supp. 2d at 332 (explaining that the UCITA has only been adopted in Virginia and Maryland).

118. *See* BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS CASES, DISCUSSION, AND PROBLEMS 382 (2003) (explaining that the UCC and common law, as represented by the Restatement (Second) of Contracts, are very similar in the area of unconscionability); *see also* Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 858 P.2d 245, 256 (Wash. 1993) (en banc) (noting that unconscionability is largely similar between the UCC and common law by stating that certain aspects of the UCC doctrine are "applicable beyond the Uniform Commercial Code context"). Whether and to what extent application of the UCC could affect the warranty provision of the Windows Vista EULA and any possible UCC section 2-207 battle of the forms arguments are beyond the scope of this comment.

119. *Compare* U.C.C. § 2-302 (2003) (stating that a court may refuse to enforce or limit a contract that it finds to be unconscionable), *with* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (promulgating that a determination of unconscionability made by a court warrants either a refusal of enforcement or a limitation of the enforceability of the unconscionable term).

120. BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS CASES, DISCUSSION, AND

standards must be applied to decide if a contract is unconscionable."[121]

Besides identifying the court's right to find a term unconscionable, both the UCC and the Restatement also make it clear that unconscionability is a matter left to the judge, not the jury.[122] It appears that there are two primary reasons for this distinction.[123] "One is traditional: Unconscionability derives from equity, and courts of equity do not have juries. The other is practical: Because unconscionability is such a fluid doctrine, the determination of unconscionability is best left to the judge, who has the training to apply it more dispassionately."[124]

Still, the lack of any real definition of unconscionability in either the Restatement or the UCC is troubling to the consumer, business, or their counsel in determining the risks and benefits of the contract into which they are entering. One popular contracts casebook suggests that "unconscionability by its nature defies precise definition" because "[i]t relies on a discretionary judgment by the court, to be exercised in light of all the circumstances of the case."[125] While looking at the main text of the UCC or the Restatement does not seem to reveal any substantive explanation of the standards for unconscionability, the comments to these sections do provide additional information and guidance.[126]

Along with similar primary text, the Restatement section 208

PROBLEMS 382–83 (2003).

121. *Id.* at 383.

122. *See id.* ("[B]oth identify the court, rather than the jury, as the arbiter of unconscionability.").

123. *Id.* ("There are two reasons why the determination of unconscionability is left to the judge.").

124. *Id.*

125. BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS CASES, DISCUSSION, AND PROBLEMS 383 (2003); *see also* Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975) (en banc), *overruled on other grounds by* Nelson v. McGoldrick, 896 P.2d 1258 (Wash. 1995) (en banc) ("[I]t is extremely difficult to articulate an operational definition of unconscionability . . . ."); Elizabeth K. Stanley, *Parties' Defenses to Binding Arbitration Agreements in the Health Care Field & the Operation of the McCarran-Ferguson Act*, 38 ST. MARY'S L.J. 591, 623 (2007) ("[U]nconscionability does not have an exact legal definition because instead of being a concept, unconscionability is a determination that should be made after consideration of a multiplicity of factors.").

126. *See* U.C.C. § 2-302 cmt. 1 (2003) (providing additional information as to what constitutes unconscionability); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) (offering additional guidance for determining unconscionability).

and UCC section 2-302 have similar comments.[127] In one instance, the comment to Restatement section 208 actually quotes the comment from UCC section 2-302.[128] Both comments clearly explain that one of the purposes of unconscionability is to provide an avenue for judges to exercise their discretion as to seemingly unfair contract terms without resorting to "adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract."[129]

The fluid concept of unconscionability is given slightly more depth by the comments as well.[130] For example, the first comment to the Restatement section 208 provides that "[t]he determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect."[131] A later comment goes on to describe situations where unconscionability may be found, such as when there is "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party."[132] The comment to UCC section 2-302 is slightly less forthcoming, providing that "[t]he basic test is whether, in the light of the general commercial background and

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127. *Compare* U.C.C. § 2-302 cmt. 1 (2003) (explaining that the section is primarily provided to allow a legitimate context in which judges may exercise their discretion and providing that the test for unconscionability is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract"), *with* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) (providing that this section is included to allow a venue for judges to legitimately exercise their discretion and providing factors such as "weakness in the contracting process" to be considered in determining the conscionability of a contract).

128. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) (quoting U.C.C. § 2-302 cmt. 1 (1977)).

129. U.C.C. § 2-302 cmt. 1 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) (quoting U.C.C. § 2-302 cmt. 1 (1977)).

130. *See* U.C.C. § 2-302 cmt. 1 (2003) (defining unconscionability as a determination of "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract"); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmts. a, d (1981) (providing "[f]actors which may contribute to a finding of unconscionability in the bargaining process" such as "belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract" and others).

131. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981).

132. *Id.* § 208 cmt. d.

the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[133]

2. Unconscionability Under Washington Law

Under Washington law, there are two types of unconscionability, procedural and substantive.[134] Procedural unconscionability looks at "impropriety during the process of forming a contract" and deals primarily with whether there was a "lack of 'meaningful choice.'"[135] Substantive unconscionability, on the other hand, deals with situations "where a clause or term in the contract is alleged to be one-sided or overly harsh."[136]

As opposed to the majority of jurisdictions where a showing of both procedural and substantive unconscionability is required before invalidation of a contract provision can take place, Washington law seems only to require a finding of one or the other.[137] *Zuver v. Airtouch Communications, Inc.*,[138] a recent case decided by the Supreme Court of Washington, explained that while a "majority of courts . . . require proof of both substantive

133. U.C.C. § 2-302 cmt. 1 (2003).

134. *See* Adler v. Fred Lind Manor, 103 P.3d 773, 781 (Wash. 2004) (en banc) ("In Washington, [courts] have recognized two categories of unconscionability, substantive and procedural."); Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 759 (Wash. 2004) (en banc) (describing the law of Washington as containing "two categories of unconscionability"); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 314 (Wash. 2000) (en banc) ("Washington recognizes two types of unconscionability—substantive and procedural . . . ."); Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (en banc) (recognizing "[t]wo classifications of unconscionability"); Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 858 P.2d 245, 256 (Wash. 1993) (en banc) ("[C]ases interpreting the doctrine appear to fall within two classifications: (1) substantive unconscionability; and (2) procedural unconscionability."); Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975) (en banc) (stating that there are "two classifications" in which Washington unconscionability clauses fall), *overruled on other grounds by* Nelson v. McGoldrick, 896 P.2d 1258 (Wash. 1995) (en banc).

135. *Yakima County*, 858 P.2d at 256.

136. *Id.*

137. *See, e.g.*, *Adler*, 103 P.3d at 782 (holding that "substantive unconscionability alone can support a finding of unconscionability" but declining to consider whether procedural unconscionability alone can "support a claim of unconscionability"); *Zuver*, 103 P.3d at 760 n.4 ("A federal district court applying Washington law, as well as the Court of Appeals, [had] interpreted [Washington] decisions to mean that a party challenging a contract may allege either substantive or procedural unconscionability.").

138. Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753 (Wash. 2004) (en banc).

and procedural unconscionability," Washington law has been interpreted "to mean that a party challenging a contract may allege either substantive *or* procedural unconscionability."[139] This interpretation has not yet been wholly affirmed by the Supreme Court of Washington.[140] In *Zuver*, the court held that the parties did not raise the issue of whether both types of unconscionability are required and thus did not reach a determination.[141] However, *Adler v. Fred Lind Manor*,[142] a case decided on the same day, held that "substantive unconscionability alone can support a finding of unconscionability," but declined to consider whether procedural unconscionability "alone [would] support a claim of unconscionability."[143] As such, while it seems that a showing of either procedural or substantive unconscionability is sufficient for a general finding of unconscionability, the law of Washington is not entirely settled in this area.

3. Application of the Washington Unconscionability Standard to the Windows Vista EULA

In light of Washington's rather lenient standards of unconscionability, it appears that the Windows Vista EULA may not withstand a legal challenge. First, it seems that the entirety of the Windows Vista EULA is unconscionable under the procedural unconscionability standards set forth by the Supreme Court of Washington. Substantive unconscionability, on the other hand, is likely to support only a finding of unconscionability as to certain clauses of the Windows Vista EULA. However, as further explained below, a finding of unconscionability in even one term of the Windows Vista EULA may be enough to hold the entire agreement unconscionable.

In determining whether an agreement is procedurally unconscionable, Washington law requires consideration of "all [of]

139. *Id.* at 760 n.4 (second emphasis added).

140. *See Adler*, 103 P.3d at 782 (confirming that "substantive unconscionability alone can support a finding of unconscionability" but declining to consider whether procedural unconscionability alone can also "support a claim of unconscionability" because the facts of the case did not raise the issue).

141. *See Zuver*, 103 P.3d at 760 n.4 (declining to address whether substantive or procedural unconscionability alone can support a finding of unconscionability).

142. Adler v. Fred Lind Manor, 103 P.3d 773 (Wash. 2004) (en banc).

143. *Id.* at 782.

the circumstances surrounding the transaction."[144] As explained above, Washington courts describe procedural unconscionability as a "lack of 'meaningful choice.'"[145] Whether the parties had a meaningful choice is determined by consideration of a number of factors such as the "'manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print.'"[146] Further, the characterization of a contract as adhesive, while not conclusive, lends support to a finding of unconscionability.[147]

Applying these principles to the Windows Vista EULA, it seems apparent that it is procedurally unconscionable. First, the Windows Vista EULA is a contract of adhesion. This is true because it is a "standard form printed contract" that was prepared wholly by Microsoft and provided to the user on a "take it or leave it" basis with "no true equality of bargaining power" between Microsoft and the end-user.[148] Washington law provides that any contract meeting the above requirements is adhesive.[149] As stated above, when a contract is one of adhesion it is evidence of procedural unconscionability.[150] Further, in addressing

144. Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (en banc).

145. Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 858 P.2d 245, 256 (Wash. 1993) (en banc).

146. Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975) (en banc), *overruled on other grounds by* Nelson v. McGoldrick, 896 P.2d 1258 (Wash. 1995) (en banc) (quoting Williams v. Walker-Thomas Furniture, 350 F.2d 445, 449 (D.C. Cir. 1965)).

147. *See* Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 760 (Wash. 2004) (en banc) (explaining that "the fact that an agreement is an adhesion contract does not necessarily render it unconscionable" but does provide evidence as to its unconscionability); *Yakima County*, 858 P.2d at 257 (stating that "the characterization of a contract as an adhesion contract" is relevant when "looking for procedural unconscionability").

148. *See Yakima County*, 858 P.2d at 257 (providing a three-part test for "determining whether a contract is an adhesion contract," including: "(1) whether the contract is a standard form printed contract, (2) whether it was 'prepared by one party and submitted to the other on a "take it or leave it" basis[,]'[] and (3) whether there was 'no true equality of bargaining power' between the parties") (quoting Standard Oil Co. v. Perkins, 347 F.2d 379, 383 n.5 (9th Cir. 1965)).

149. *See* Adler v. Fred Lind Manor, 103 P.3d 773, 782–83 (Wash. 2004) (en banc) (holding an agreement to be adhesive where the *Yakima* requirements were met); *Zuver*, 103 P.3d at 760 (determining that an agreement was adhesive when it met the three requirements promulgated in *Yakima*).

150. *See Zuver*, 103 P.3d at 760 (explaining that "the fact that an agreement is an adhesion contract does not necessarily render it unconscionable" but does provide evidence as to its unconscionability); *Yakima County*, 858 P.2d at 257 (holding that "the characterization of a contract as an adhesion contract" is relevant when "looking for

procedural unconscionability, courts consider how much time a party had to consider the contract when determining whether a reasonable opportunity was presented for them to understand the terms.[151] On the face of the matter it may seem that a user has unlimited time to review the Windows Vista EULA before clicking "I Agree." Realistic pressures, however, such as a computer user's need to use their computer, limit the amount of time the user will spend reviewing the EULA. Further, as discussed above, users do not typically read or understand EULAs.[152] Finally, several Washington cases considering procedural unconscionability have hinged on whether the allegedly unconscionable terms were buried in a "maze of fine print."[153] It appears that the terms of the Windows Vista EULA are buried in a maze of fine print. When a contract is over 4,000 words, it seems impossible for some terms *not* to be buried somewhere in the confusing maze of legalese. Due to the above considerations, it seems apparent that a court impartially applying this Washington precedent would have no choice but to find the Windows Vista EULA procedurally unconscionable.

Unlike procedural unconscionability, substantive unconscionability deals with terms that are unfair in and of themselves.[154]

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procedural unconscionability").

151. *See Adler*, 103 P.3d at 783 (refusing to find procedural unconscionability where the plaintiff "pondered the arbitration agreement for a week"); *Zuver*, 103 P.3d at 761 (considering the fact that the plaintiff had "ample opportunity to contact counsel or even [the defendant] with any concerns or questions [the plaintiff] might have had about the terms of the agreement" in denying a claim of procedural unconscionability).

152. *See* NATHANIEL S. GOOD ET AL., NOTICING NOTICE: A LARGE-SCALE EXPERIMENT ON THE TIMING OF SOFTWARE LICENSE AGREEMENTS 1, 5 (2007), *available at* http://www.ischool.berkeley.edu/~jensg/research/paper/Grossklags07-CHI-noticing_notice.pdf (finding, in a study funded by Microsoft, that only 1.4% of users report "reading EULAs often and thoroughly when they encounter them" and noting that the "long and confusing" nature of many EULAs "prevent[s] meaningful knowledge and consent").

153. *See, e.g.*, *Adler*, 103 P.3d at 784 (noting that "the important terms were not hidden in a 'maze of fine print'" but rather were contained in a "short half page agreement"); *Zuver*, 103 P.3d at 761 (deciding that the "important terms ... were not hidden in a 'maze of fine print'" where "the agreement itself was only one page long").

154. *See Adler*, 103 P.3d at 781 (describing substantive unconscionability as those "cases where a clause or term in the contract is alleged to be one-sided or overly harsh"); *Zuver*, 103 P.3d at 759 (explaining that substantive unconscionability occurs when terms of a contract are "one-sided or overly harsh"); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 314 (Wash. 2000) (en banc) (noting that substantive unconscionability involves harsh and one-sided terms); Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash.

Substantive unconscionability is found in "cases where a clause or term in the contract is alleged to be one-sided or overly harsh."[155] Phrases such as "'[s]hocking to the conscience[,]' 'monstrously harsh[,]' and 'exceedingly calloused'" have been used to describe substantively unconscionable terms.[156] In practice, terms that "blatantly and excessively favor[] [one party] in that [they] allow[] [that party] alone . . . significant legal recourse" have been found to be substantively unconscionable.[157] Accordingly, the terms in the Windows Vista EULA that "blatantly and excessively" favor Microsoft should be found to be substantively unconscionable.[158]

One such term is the "Limitation On and Exclusion of Damages" clause.[159] This clause provides that the user "can recover from Microsoft and its suppliers only direct damages up to the amount . . . paid for the software."[160] It does not similarly limit Microsoft's potential recovery from a user or users in breach of the EULA.[161] This is significant because it arguably creates a situation where the effect of a clause is so "one-sided or overly harsh" that it is substantively unconscionable.[162] In *Zuver*, the Supreme Court of Washington considered a similar clause that barred the plaintiff "from collecting any punitive or exemplary damages . . . but permit[ed] [the defendant] to claim these damages."[163] The court found the clause to be

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1995) (en banc) (recognizing that substantive unconscionability occurs when contract terms are "one-sided or overly harsh"); *Yakima County*, 858 P.2d at 256 (explaining that substantive unconscionability deals with the fairness of the term itself); Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975) (en banc) ("Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh . . . ."), *overruled on other grounds by* Nelson v. McGoldrick, 896 P.2d 1258 (Wash. 1995) (en banc).

155. *Schroeder*, 544 P.2d at 23.

156. *Nelson*, 896 P.2d at 1262.

157. *Zuver*, 103 P.3d at 767.

158. *See id.* (finding provision substantively unconscionable where its terms "blatantly and excessively" favored one side).

159. MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 25, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007).

160. *Id.*

161. *Id.*

162. Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975) (en banc), *overruled on other grounds by* Nelson v. McGoldrick, 896 P.2d 1258 (Wash. 1995) (en banc).

163. *Zuver*, 103 P.3d at 767.

unconscionable.[164]

The result in *Zuver*, however, does not seem to accord with *M.A. Mortenson Co. v. Timberline Software Corp.*[165] The *Mortenson* case involved a shrinkwrap agreement that contained a limitation of remedies and liability clause similar to the one contained in the Windows Vista EULA.[166] In upholding the term, the court considered the commercial nature of the contract and the fact that the damage-causing defects were not known at the time of contracting.[167] The court determined that "when examined at the time the contract was formed, [the consequential damages clause] does not shock the conscience."[168] The court stated that the clause was nothing more than an allocation of unknown risk.[169] While a similar argument could be made in favor of the Windows Vista EULA's limitation on damages, it seems that the fact that it is a consumer contract, rather than a commercial contract between two business entities, is a significant distinction that bears application of the *Zuver* rather than the *Mortenson* standard.

It seems that both the WMDRM and validation clauses contained in the Windows Vista EULA and discussed above could be found substantively unconscionable for the same reasons. Both clauses significantly favor Microsoft, allowing it to remove access to certain content, features, or in the extreme case, the entire operating system.[170] These clauses provide no benefit whatsoever to the user and are provided to protect Microsoft and third party copyright owners from music and software pirates.[171]

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164. *Id.*

165. *Compare* Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 767 (Wash. 2004) (en banc) (holding a clause limiting damages to be unconscionable), *with* M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 315 (Wash. 2000) (en banc) (holding a similar clause limiting damages to be conscionable).

166. *See M.A. Mortenson Co.*, 998 P.2d at 308–09 (limiting liability to purchase price of programs).

167. *Id.* at 314–15.

168. *Id.* at 315.

169. *Id.*

170. MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC §§ 4, 5, 7, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007).

171. *See id.* (promulgating both a "Validation" clause and a "Windows Media Digital Rights Management" clause that provide only disservice to the software user); *see also* Microsoft Corporation, Genuine Microsoft Software, The Windows Genuine Advantage,

Unfortunately, in doing so, these features may limit or eliminate user access to legitimately owned files.[172] Such a one-sided clause is surely unconscionable under the standards discussed above.

C. *The Practical Effect of the Absence of a Severability Clause: Could the Validity of the Entire Windows Vista EULA Hinge on the Unconscionability of One Term?*

When a court invalidates any individual contract clause, the validity of the entire contract comes into question.[173] The inclusion of a severability clause in the contract, however, is evidence that the "parties agreed that the clauses of their agreement are severable."[174] When such a clause is included, "should any part [of the agreement] be declared invalid, the remaining portions of the agreement are not necessarily invalid."[175] Consequently, when attorneys draft contracts containing questionable clauses, such as in the Windows Vista EULA, they "must question whether they are jeopardizing the enforceability of [the contract] in its entirety by including such clauses."[176] As such, "it has become increasingly important for drafters to include severability clauses."[177] Indeed, in the *Zuver* case discussed above, the court pointed out that "[c]ourts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties."[178] Thus, the court held

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http://www.microsoft.com/genuine/ProgramInfo.aspx?displaylang=en&sGuid=99ec69c5-dd2a-42bb-ae4c-7255e0335524 (last visited Dec. 5, 2007) (explaining the "benefits" of validation such as the confidence and peace of mind that the user's software is authentic). Clearly, the user would not need confidence or peace of mind if the alternative to validation were not computer disability.

172. *See* MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 4, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007) (providing that if the user does not activate the software they will not be able to use it).

173. *See, e.g.*, TED A. DONNER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS § 22:5 (2006) (warning that certain clauses "jeopardize[] the enforceability of a given contract in its entirety").

174. Culinary Workers & Bartenders Union No. 596 Health & Welfare Trust v. Gateway Café, Inc., 588 P.2d 1334, 1345 (Wash. 1979) (en banc).

175. *Id.*

176. TED A. DONNER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS § 22:5 (2006).

177. *Id.*

178. Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 768 (Wash. 2004) (en banc).

that "when parties have agreed to a severability clause . . . , courts often strike [only] the offending unconscionable provision[]."[179]

While it is possible that the absence of a severability clause is not a death knell for an entire contract when one term is found to be unconscionable, choosing not to include a severability clause is certainly a risky proposition when a company wishes to preserve the individual terms of the contract.[180] As such, by not including a general severability clause, one wonders if Microsoft has intentionally chosen to risk the affectivity of its entire EULA in the event that any term is determined to be unconscionable. While this may seem like an imprudent decision on Microsoft's part, it may actually be shrewd.

"Before adding a boilerplate severability clause, the drafter should ask whether he or she actually wants the contract to survive a finding that any of its clauses are invalid. There may be certain clauses whose invalidity *should* render the contract itself invalid."[181] For example, a license agreement which allows for severability of some terms but continuity of the others could result in a situation where the user retains a valid license but many of the limitations protecting the licensor are no longer in place.[182] Instead, Microsoft may prefer for the entire agreement, including the licensee's right to use the software, to be void.[183] Further, after several terms used in the Windows Vista EULA, Microsoft provides that "some states do not allow [this term], so the above limitation or exclusion may not apply to you."[184] Providing such a disclaimer may effectively provide severability for the terms

179. *Id.*

180. *See, e.g.*, TED A. DONNER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS § 22:5 (2006) (warning that certain clauses "jeopardize[] the enforceability of a given contract in its entirety").

181. STEVEN Z. SZCZEPANSKI, ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS § 3:63 (2007) (emphasis added).

182. *See id.* (warning that "[b]efore adding a boilerplate severability clause, the drafter should ask whether he or she actually wants the contract to survive" because "certain clauses . . . should render the contract itself invalid").

183. *See id.* (cautioning that inclusion of a severability clause could lead to a licensee retaining a license while the licensor can no longer exercise an important clause of the contract).

184. MICROSOFT CORPORATION, MICROSOFT SOFTWARE LICENSE TERMS WINDOWS VISTA HOME BASIC § 25, http://download.microsoft.com/documents/useterms/Windows%20Vista_Home%20Basic_English_2cd69850-7680-4987-8b1e-59a3d405c074.pdf (last visited Dec. 5, 2007).

disclaimed.[185] Regardless of the reasons, the decision by Microsoft not to include a severability clause could very well prevent the entire Windows Vista EULA from being enforced if any of the terms are adjudicated to be unconscionable.

It is possible that Microsoft's motivation for not including a severability clause is their newfound ability to lock a user out of their computer at will. Previously, under the Windows XP operating system, if a user succeeded in finding a term of the EULA to be unconscionable, Microsoft would have wanted the contract to continue because it had no practical way of preventing the user from continuing to use the Windows software. Now that Microsoft can remotely lock users out of their computers, if the entire contract is void, the user has no way to access their computer. This allows Microsoft to hold the ultimate trump card.

IV. CONCLUSION

Though EULAs have drawn criticism from consumer advocates,[186] the explosive growth of the modern software industry would not have been possible without them, especially before 1990 when the first sale doctrine threatened to hobble copyright protection for the entire industry. Today EULAs have evolved far beyond their original intent and permit software vendors unprecedented control over the user's desktop. With the worldwide Windows user base projected to reach one billion by the year 2010, the uncertainty surrounding the Windows Vista EULA has the potential to have an economic impact far beyond the software industry; thus, its enforceability is a crucial issue. It falls to the courts and the legislature to strike a balance between the rights of consumers, the rights of businesses that depend on computers, and the intellectual property rights of software developers. It is not the intention of this paper to recommend policy or speculate on ethical implications; however, it is hard to avoid the conclusion that if the Windows Vista EULA is upheld in

185. *See* STEVEN Z. SZCZEPANSKI, ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS § 3:63 (2007) (suggesting that it may be effective for contracts to contain severability clauses that apply to specific clauses in specific jurisdictions).

186. *See, e.g.*, Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELECTRONIC FRONTIER FOUNDATION, Feb. 2005, http://www.eff.org/wp/eula.php (speaking out against common EULA terms).

its entirety, other software developers will follow suit. If they do, it seems unlikely that the overall impact on the remainder of the economy will be desirable.