

UCC § 2-207 and Consumer Contracts

Should anything about UCC § 2-207 and the “Battle of the Forms” change when the agreement is between a business and its consumer? Consider the cases below:

ProCD, Inc. v. Zeidenberg

86 F.3d 1447 (7th Cir. 1996)

EASTERBROOK, Circuit Judge.

Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not [because] they are not contracts because the licenses are inside the box rather than printed on the outside.... 908 F. Supp. 640 (W.D. Wis. 1996). [W]e disagree with the district judge’s conclusion.... Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). See Paul J. Heald, *The Vices of Originality*, 1991 Sup.Ct. Rev. 143, 160–68. ProCD sells a version of the database, called SelectPhone (trademark), on CD-ROM discs. (CD-ROM means “compact disc—read only memory.” The “shrinkwrap license” gets its name from the fact that retail software packages are covered in plastic or cellophane “shrinkwrap,” and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer “end user license,” but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users’ criteria (such as “find all people named Tatum in Tennessee, plus all firms with ‘Door Systems’ in the corporate name”). The resulting lists (or, as ProCD prefers, “listings”) can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone (trademark) cost more than \$10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and SIC codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately \$150 for the set of five discs) while selling information to the trade for a higher price....

If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially over \$150. The ensuing reduction in sales would harm consumers who value the information at, say, \$200. They get consumer surplus of \$50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

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

Instead of tinkering with the product and letting users sort themselves—for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price—ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed

in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone (trademark) database. The corporation makes the database available on the Internet to anyone willing to pay its price—which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone (trademark) packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase. 908 F. Supp. at 654.

II

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between “contracts” and “licenses” ... is a subject for another day. See *Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846 F. Supp. 208 (E.D.N.Y. 1994). Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an “offer,” which the customer “accepts” by paying the asking price and leaving the store with the goods. *Peeters v. State*, 154 Wis. 111, 142 N.W. 181 (1913). In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good—but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. But why would

Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

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

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By

Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information—but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

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

According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. § 402.201 corresponds to UCC § 2–201, and other citations are easy to derive.) One of the court's reasons—that by proposing as part of the draft Article 2B a new UCC § 2–2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see 908 F. Supp. at 655–56—depends on a faulty inference. To propose a change in a law's *text* is not necessarily to propose a change in the law's *effect*. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction—although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268–70 (5th Cir. 1988); *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F.Supp. 759 (D. Ariz. 1993). As their titles suggest, these are not consumer transactions. Step-Saver is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails.... Our case has only one form; UCC § 2–207 is irrelevant.

Vault holds that Louisiana's special shrinkwrap-license statute is preempted by federal law, a question to which we return. And *Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

What then does the current version of the UCC have to say? We think that the place to start is § 2–204(1): “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying “you owe us an extra \$10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

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

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be “conspicuous.” UCC § 2–316(2), incorporating UCC § 1–201(10). Promises to make firm offers, or to negate oral modifications, must be “separately signed.” UCC §§ 2–205, 2–209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as

inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*. Zeidenberg has not located any Wisconsin case—for that matter, any case in any state—holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone (trademark) must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for \$100 rather than \$150—although any of these changes would be welcomed by the customer, if all other things were held constant—so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of “the product” than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy. *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir.1996). ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers’ favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off....

Reversed and Remanded.

Notes and Questions

1. Why does the court in ProCD conclude that § 2-207 does not apply? Is that the correct outcome?
2. Is the silence of Zeidenberg, the buyer, in the face of ProCD’s licenses, sufficient to accept the disclosed terms? If not, what is the basis for concluding that he assented to the terms.
3. The type of formation recognized in ProCD – where the deferred terms found inside the package are reviewed and the terms are accepted via use – is sometimes referred to as a “rolling contract.” One argument in favor of enforcing rolling contracts like the licenses at issue in ProCD is that although customers are unlikely to read them, if customers nonetheless expect rolling terms and are presented with an opportunity to read and contemplate them before finally accepting them— ideally “in the quiet of their

own homes” – then those terms should be enforced. *See* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 756 (2002).

4. Randy Barnett proposes the following hypothetical about late-arriving terms. “Suppose I say to my dearest friend, ‘Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you.’ Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later?” Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 636 (2002).
5. Courts sometimes refer to terms inside a sealed box as “shrinkwrap” terms (because the customer must tear the shrinkwrap on the package to get at them). As we saw in the module on acceptance, terms that are presented on a website via a clickable box are called “clickwrap” terms. Judge Easterbrook didn’t use the term, but he described the delivery of the clickwrap terms: “the license [splashed] on the screen” beyond which the software would not let Zeidenberg “proceed without indicating acceptance.”
6. Tess Wilkinson-Ryan conducted an experiment where respondents were presented with terms that disfavored customers in one of three scenarios: 1) a standard contract where terms were presented prior to purchase; 2) a rolling contract situation where terms in a separate document were incorporated by reference into a hotel Guest Binder or a rental car agency’s “Welcome” folder; 3) the terms were in an unreferenced Guest Binder in each hotel room or on the rental agency’s website. Respondents treated rolling contracts terms as equally fair and enforceable with standard contract terms and concluded that the customer effectively received the same notice in the standard and rolling contract contexts. But a separate study asking respondents to compare a standard and rolling contract in a gym membership context rated the standard contract as far better for customers than the rolling contract.

Do these results suggest that rolling contract terms should generally be enforced as written?

7. Restatement of the Law of Consumer Contracts § 2(b), states that:

When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract if the business demonstrates that:

- (1) before manifesting assent to the transaction, the consumer received reasonable notice regarding the existence of the standard contract term intended to be provided later and to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that the failure to terminate would result in the adoption of the standard contract term;
- (2) after manifesting assent to the transaction, the consumer received reasonable opportunity to review the standard contract term; and
- (3) after the standard contract term was made available for review, the consumer received reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and did not exercise that power.

Illustration 26 to § 2 provides an example transaction:

A consumer visits a store to purchase a product. At the register, a posted sign states that additional terms apply to the transaction and can be obtained on-site at the customer-service desk. If the service desk is nearby and readily accessible without undue delay or hardship, and if the store allows the consumer to terminate the transaction after receiving the additional terms, and reasonably notifies the consumer of the right to terminate, then the additional terms are adopted under subsection (b). If, however, the additional terms are not readily available upon the consumer's request, or if the consumer is not allowed to reasonably terminate the transaction after payment, or is allowed to terminate but not reasonably notified about the right to terminate, the additional terms are not adopted as part of the consumer contract.

In light of this provision, would you conclude that Zeidenberg received “conspicuous” notice of the additional terms?

The Restatement of Consumer Contracts was adopted in 2024. At this stage, it is too early to know whether courts will adopt its standards in general, or with respect to rolling contracts in particular.

Hill v. Gateway 2000, Inc.
105 F.3d 1147 (7th Cir. 1997)

EASTERBROOK, Circuit J.

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?

One of the terms in the box containing a Gateway 2000 system was an arbitration clause. Rich and Enza Hill, the customers, kept the computer more than 30 days before complaining about its components and performance. They filed suit in federal court arguing, among other things, that the product's shortcomings make Gateway a racketeer (mail and wire fraud are said to be the predicate offenses), leading to treble damages under RICO for the Hills and a class of all other purchasers. Gateway asked the district court to enforce the arbitration clause; the judge refused, writing that "[t]he present record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice of the arbitration clause." Gateway took an immediate appeal, as is its right. 9 U.S.C. § 16(a)(1)(A).

The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L. Ed. 2d 902 (1996), holds that this provision of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome. *Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 547 (7th Cir. 1996); *Chicago Pacific Corp. v. Canada Life Assurance Co.*, 850 F.2d 334 (7th Cir. 1988). Terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L. Ed. 2d 622 (1991), enforces a forum-selection clause that was included

among three pages of terms attached to a cruise ship ticket. ProCD and Carnival Cruise Lines exemplify the many commercial transactions in which people pay for products with terms to follow; ProCD discusses others. 86 F.3d at 1451–52. The district court concluded in ProCD that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract could be formed, it is not the only way: “A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.” *Id.* at 1452. Gateway shipped computers with the same sort of accept-or-return offer ProCD made to users of its software. ProCD relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that might be pertinent; ProCD therefore applies to this dispute.

Plaintiffs ask us to limit ProCD to software, but where’s the sense in that? ProCD is about the law of contract, not the law of software. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway’s had to read the four-page statement of terms before taking the buyer’s credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers’ assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came with an operating system, without which it was useful only as a boat anchor. See *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 761 (7th Cir. 1996). Gateway also included many application programs. So the Hills’ effort to limit ProCD to software would not avail them factually, even if it were sound legally—which it is not.

For their second sally, the Hills contend that ProCD should be limited to executory contracts (to licenses in particular), and therefore does not apply because both parties' performance of this contract was complete when the box arrived at their home. This is legally and factually wrong: legally because the question at hand concerns the formation of the contract rather than its performance, and factually because both contracts were incompletely performed. ProCD did not depend on the fact that the seller characterized the transaction as a license rather than as a contract; we treated it as a contract for the sale of goods and reserved the question whether for other purposes a "license" characterization might be preferable. 86 F.3d at 1450. All debates about characterization to one side, the transaction in ProCD was no more executory than the one here: Zeidenberg paid for the software and walked out of the store with a box under his arm, so if arrival of the box with the product ends the time for revelation of contractual terms, then the time ended in ProCD before Zeidenberg opened the box. But of course ProCD had not completed performance with delivery of the box, and neither had Gateway. One element of the transaction was the warranty, which obliges sellers to fix defects in their products. The Hills have invoked Gateway's warranty and are not satisfied with its response, so they are not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box. What is more, both ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides. Gateway offers "lifetime service" and has a round-the-clock telephone hotline to fulfil this promise. Some vendors spend more money helping customers use their products than on developing and manufacturing them. The document in Gateway's box includes promises of future performance that some consumers value highly; these promises bind Gateway just as the arbitration clause binds the Hills.

Next the Hills insist that ProCD is irrelevant because Zeidenberg was a "merchant" and they are not. Section 2-207(2) of the UCC, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless ...". Plaintiffs tell us that ProCD came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in ProCD, which concluded that, when there is only one form, "sec. 2-207 is irrelevant." 86 F.3d at 1452. The question in ProCD was not whether terms were added to a contract after its formation, but how and when the contract was formed—in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after

the customer has had a chance to inspect both the item and the terms. ProCD answers “yes,” for merchants and consumers alike. Yet again, for what little it is worth we observe that the Hills misunderstand the setting of ProCD. A “merchant” under the UCC “means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction”, § 2–104(1). Zeidenberg bought the product at a retail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD’s database on the Internet for anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD’s software displayed a notice that additional terms were within, while the box containing Gateway’s computer did not. The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway’s box, by contrast, is just a shipping carton; it is not on display anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case—could it exceed the shipping charges?—is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include some important terms, and they did not seek to discover these in advance. Gateway’s ads state that their products come with limited warranties and lifetime support. How limited was the warranty—30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson–Moss Warranty Act requires firms to distribute their warranty terms on request, 15 U.S.C. § 2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product’s delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway’s offer, including the arbitration clause.

... The decision of the district court is vacated, and this case is remanded with instructions to compel the Hills to submit their dispute to arbitration.

Klocek v. Gateway, Inc.

104 F. Supp. 2d 1332 (District of Kansas 2000)

VRATIL, District Judge.

William S. Klocek brings suit against Gateway, Inc. ... on claims arising from purchases of a Gateway computer For reasons stated below, the Court overrules Gateway's motion to dismiss....

Plaintiff brings individual and class action claims against Gateway, alleging that it induced him and other consumers to purchase computers and special support packages by making false promises of technical support. *Complaint*, ¶¶ 3 and 4. Individually, plaintiff also claims breach of contract and breach of warranty, in that Gateway breached certain warranties that its computer would be compatible with standard peripherals and standard internet services. *Complaint*, ¶¶ 2, 5, and 6.

Gateway asserts that plaintiff must arbitrate his claims under Gateway's Standard Terms and Conditions Agreement ("Standard Terms"). Whenever it sells a computer, Gateway includes a copy of the Standard Terms in the box which contains the computer battery power cables and instruction manuals. At the top of the first page, the Standard Terms include the following notice:

NOTE TO THE CUSTOMER:

This document contains Gateway 2000's Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond five (5) days after the date of delivery, you accept these Terms and Conditions.

The notice is in emphasized type and is located inside a printed box which sets it apart from other provisions of the document. The Standard Terms are four pages long and contain 16 numbered paragraphs. Paragraph 10 provides the following arbitration clause:

DISPUTE RESOLUTION. Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of

Commerce. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.

Gateway urges the Court to dismiss plaintiff's claims under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA ensures that written arbitration agreements in maritime transactions and transactions involving interstate commerce are "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Federal policy favors arbitration agreements and requires that we "rigorously enforce" them. *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L. Ed. 2d 185 (1987) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L. Ed. 2d 158 (1985)); *Moses*, 460 U.S. at 24, 103 S. Ct. 927. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses*, 460 U.S. at 24–25, 103 S. Ct. 927.

FAA Section 3 states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.... [T]he Court concludes that dismissal is appropriate if plaintiff's claims are arbitrable....

Before granting a stay or dismissing a case pending arbitration, the Court must determine that the parties have a written agreement to arbitrate. See 9 U.S.C. §§ 3 and 4; *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir.1997). When deciding whether the parties have agreed to arbitrate, the Court applies ordinary state law principles that govern the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The existence of an arbitration agreement "is simply a matter of contract between the parties; [arbitration] is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Avedon*, 126 F.3d at 1283 (quoting *Kaplan*, 514 U.S. at 943–945, 115 S. Ct. 1920). If the parties dispute making an arbitration agreement,

a jury trial on the existence of an agreement is warranted if the record reveals genuine issues of material fact regarding the parties' agreement. See *Avedon*, 126 F.3d at 1283.

[In considering whether Kansas or Missouri law is applicable, the Court] discerns no material difference between the applicable substantive law in Kansas and Missouri...

The Uniform Commercial Code ("UCC") governs the parties' transaction under both Kansas and Missouri law....

State courts in Kansas and Missouri apparently have not decided whether terms received with a product become part of the parties' agreement. Authority from other courts is split. Compare *Step-Saver*, 939 F.2d 91 (printed terms on computer software package not part of agreement); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D.Ariz. 1993) (license agreement shipped with computer software not part of agreement); and *U.S. Surgical Corp. v. Orris, Inc.*, 5 F.Supp.2d 1201 (D.Kan. 1998) (single use restriction on product package not binding agreement); with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808, 118 S.Ct. 47, 139 L.Ed.2d 13 (1997) (arbitration provision shipped with computer binding on buyer); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996) (shrinkwrap license binding on buyer);⁶ and *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash.2d 568, 998 P.2d 305 (2000) (following *Hill* and *ProCD* on license agreement supplied with software). It appears that at least in part, the cases turn on whether the court finds that the parties formed their contract before or after the vendor communicated its terms to the purchaser. Compare *Step-Saver*, 939 F.2d at 98 (parties' conduct in shipping, receiving and paying for product demonstrates existence of contract; box top license constitutes proposal for additional terms under § 2-207 which requires express agreement by purchaser); *Arizona Retail*, 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest by shipping goods to buyer; license agreement constitutes proposal to modify agreement under § 2-209 which requires express assent by buyer); and *Orris*, 5 F. Supp. 2d at 1206 (sales contract concluded when vendor received consumer orders; single-use language on product's label was proposed modification under § 2-209 which requires express assent by purchaser); with *ProCD*, 86 F.3d at 1452 (under § 2-204 vendor, as master of offer, may propose limitations on kind of conduct that constitutes acceptance; § 2-207 does not apply in case with only one form); *Hill*, 105 F.3d at 1148-49 (same); and *Mortenson*, 998 P.2d at 311-314 (where vendor and purchaser utilized license agreement in prior course of dealing, shrinkwrap license agreement constituted issue of contract formation under § 2-204, not contract alteration under § 2-207).

Gateway urges the Court to follow the Seventh Circuit decision in *Hill*. That case involved the shipment of a Gateway computer with terms similar to the Standard Terms in this case, except that Gateway gave the customer 30 days—instead of 5 days—to return the computer. In enforcing the arbitration clause, the Seventh Circuit relied on its decision in *ProCD*, where it enforced a software license which was contained inside a product box. See *Hill*, 105 F.3d at 1148–50. In *ProCD*, the Seventh Circuit noted that the exchange of money frequently precedes the communication of detailed terms in a commercial transaction. See *ProCD*, 86 F.3d at 1451. Citing UCC § 2–204, the court reasoned that by including the license with the software, the vendor proposed a contract that the buyer could accept by using the software after having an opportunity to read the license.⁸ *ProCD*, 86 F.3d at 1452. Specifically, the court stated:

A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.

ProCD, 86 F.3d at 1452.

The *Hill* court followed the *ProCD* analysis, noting that “[p]ractical considerations support allowing vendors to enclose the full legal terms with their products.” *Hill*, 105 F.3d at 1149.⁹

The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD*. In each case the Seventh Circuit concluded without support that

⁸ Section 2–204 provides: “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract.” K.S.A. § 84–2–204; V.A.M.S. § 400.2–204.

⁹ Legal commentators have criticized the reasoning of the Seventh Circuit in this regard. See, e.g., Jean R. Sternlight, Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers, Fla. Bar J., Nov. 1997, at 8, 10–12 (outcome in Gateway is questionable on federal statutory, common law and constitutional grounds and as a matter of contract law and is unwise as a matter of policy because it unreasonably shifts to consumers search cost of ascertaining existence of arbitration clause and return cost to avoid such clause); Thomas J. McCarthy et al., Survey: Uniform Commercial Code, 53 Bus. Law. 1461, 1465–66 (Seventh Circuit finding that UCC § 2–207 did not apply is inconsistent with official comment); Batya Goodman, Honey, I Shrink–Wrapped the Consumer: the Shrinkwrap Agreement as an Adhesion Contract, 21 Cardozo L.Rev. 319, 344–352 (Seventh Circuit failed to consider principles of adhesion contracts); Jeremy Senderowicz, Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers’ Informed Consent to Arbitration Clauses in Form Contracts, 32 Colum. J.L. & Soc. Probs. 275, 296–299 (judiciary (in multiple decisions, including *Hill*) has ignored issue of consumer consent to an arbitration clause). Nonetheless, several courts have followed the Seventh Circuit decisions in *Hill* and *ProCD*. See, e.g., *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash. 2d 568, 998 P.2d 305 (license agreement supplied with software); *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, Case No. 98C–09–064–RRC (Del.Super. Sept. 3, 1999) (warranty disclaimer included inside computer Zip drive packaging); *Westendorf v. Gateway 2000, Inc.*, 2000 WL 307369, Case No. 16913 (Del. Ch. March 16, 2000) (arbitration provision shipped with computer); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (same); *Lery v. Gateway 2000, Inc.*, 1997 WL 823611, 33 UCC Rep. Serv.2d 1060 (N.Y. Sup. Oct. 31, 1997) (same).

UCC § 2–207 was irrelevant because the cases involved only one written form. See *ProCD*, 86 F.3d at 1452 (citing no authority); *Hill*, 105 F.3d at 1150 (citing *ProCD*). This conclusion is not supported by the statute or by Kansas or Missouri law. Disputes under § 2–207 often arise in the context of a “battle of forms,” see, e.g., *Diatom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir. 1984), but nothing in its language precludes application in a case which involves only one form. The statute provides:

Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract [if the contract is not between merchants]....

K.S.A. § 84–2–207; V.A.M.S. § 400.2–207. By its terms, § 2–207 applies to an acceptance or written confirmation. It states nothing which requires another form before the provision becomes effective. In fact, the official comment to the section specifically provides that §§ 2–207(1) and (2) apply “where an agreement has been reached orally ... and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed.” Official Comment 1 of UCC § 2–207. Kansas and Missouri courts have followed this analysis. See *Southwest Engineering Co. v. Martin Tractor Co.*, 205 Kan. 684, 695, 473 P.2d 18, 26 (1970) (stating in dicta that § 2–207 applies where open offer is accepted by expression of acceptance in writing or where oral agreement is later confirmed in writing); *Central Bag Co. v. W. Scott and Co.*, 647 S.W.2d 828, 830 (Mo.App.1983) (§§ 2–207(1) and (2) govern cases where one or both parties send written confirmation after oral contract). Thus, the Court concludes that Kansas and Missouri courts would apply § 2–207 to the facts in this case. Accord *Avedon*, 126 F.3d at 1283 (parties agree that § 2–207 controls whether arbitration clause in sales confirmation is part of contract).

In addition, the Seventh Circuit provided no explanation for its conclusion that “the vendor is the master of the offer.” See *ProCD*, 86 F.3d at 1452 (citing nothing in support of proposition); *Hill*, 105 F.3d at 1149 (citing *ProCD*). In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree. See *Brown Mach., Div. of John Brown, Inc. v. Hercules, Inc.*, 770 S.W.2d 416, 419 (Mo. App. 1989) (as general rule orders are considered

offers to purchase); *Rich Prods. Corp. v. Kemutec Inc.*, 66 F.Supp.2d 937, 956 (E.D. Wis. 1999) (generally price quotation is invitation to make offer and purchase order is offer). While it is possible for the vendor to be the offeror, see *Brown Machine*, 770 S.W.2d at 419 (price quote can amount to offer if it reasonably appears from quote that assent to quote is all that is needed to ripen offer into contract), Gateway provides no factual evidence which would support such a finding in this case. The Court therefore assumes for purposes of the motion to dismiss that plaintiff offered to purchase the computer (either in person or through catalog order) and that Gateway accepted plaintiff's offer (either by completing the sales transaction in person or by agreeing to ship and/or shipping the computer to plaintiff)....¹¹

Under § 2–207, the Standard Terms constitute either an expression of acceptance or written confirmation. As an expression of acceptance, the Standard Terms would constitute a counter-offer only if Gateway expressly made its acceptance conditional on plaintiff's assent to the additional or different terms. K.S.A. § 84–2–207(1); V.A.M.S. § 400.2–207(1). “[T]he conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract.” *Brown Machine*, 770 S.W.2d at 420.¹² Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff's acceptance of the Standard Terms. Moreover, the

¹¹ UCC § 2–206(b) provides that “an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment ...” The official comment states that “[e]ither shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment.” UCC § 2–206, Official Comment 2.

¹² Courts are split on the standard for a conditional acceptance under § 2–207. See *Daitom*, 741 F.2d at 1576 (finding that Pennsylvania would most likely adopt “better” view that offeree must explicitly communicate unwillingness to proceed with transaction unless additional terms in response are accepted by offeror). On one extreme of the spectrum, courts hold that the offeree's response stating a materially different term solely to the disadvantage of the offeror constitutes a conditional acceptance. See *Daitom*, 741 F.2d at 1569 (citing *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962)). At the other end of the spectrum, courts hold that the conditional nature of the acceptance should be so clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed without the additional or different terms. See *Daitom*, 741 F.2d at 1569 (citing *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972)). The middle approach requires that the response predicate acceptance on clarification, addition or modification. See *Daitom*, 741 F.2d at 1569 (citing *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968)). The First Circuit has since overruled its decision in *Roto-Lith*, see *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, and the Court finds that neither Kansas nor Missouri would apply the standard set forth therein. See *Boese-Hilburn Co. v. Dean Machinery Co.*, 616 S.W.2d 520, (Mo. App. 1981) (rejecting *Roto-Lith* standard); *Owens-Corning Fiberglas Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533, 538 (D. Kan. 1982) (acceptance is not counteroffer under Kansas law unless it is made conditional on assent to additional or different terms (citing *Roto-Lith* as comparison)); *Daitom*, 741 F.2d at 1569 (finding that *Dorton* is “better” view). Because Gateway does not satisfy the standard for conditional acceptance under either of the remaining standards (*Dorton* or *Construction Aggregates*), the Court does not decide which of the remaining two standards would apply in Kansas and/or Missouri.

mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the Standard Terms. See, e.g., *Arizona Retail*, 831 F. Supp. at 765 (conditional acceptance analysis rarely appropriate where contract formed by performance but goods arrive with conditions attached); *Leighton Indus., Inc. v. Callier Steel Pipe & Tube, Inc.*, 1991 WL 18413, *6, Case No. 89-C-8235 (N.D.Ill. Feb. 6, 1991) (applying Missouri law) (preprinted forms insufficient to notify offeror of conditional nature of acceptance, particularly where form arrives after delivery of goods).

Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties' agreement unless plaintiff expressly agreed to them. See K.S.A. § 84-2-207, Kansas Comment 2 (if either party is not a merchant, additional terms are proposals for addition to the contract that do not become part of the contract unless the original offeror expressly agrees). Gateway argues that plaintiff demonstrated acceptance of the arbitration provision by keeping the computer more than five days after the date of delivery. Although the Standard Terms purport to work that result, Gateway has not presented evidence that plaintiff expressly agreed to those Standard Terms. Gateway states only that it enclosed the Standard Terms inside the computer box for plaintiff to read afterwards. It provides no evidence that it informed plaintiff of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement.¹⁴ See *Step-Saver*, 939 F.2d at 99 (during negotiations leading to purchase, vendor never mentioned box-top license or obtained buyer's express assent thereto). The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms. Accord *Brown Machine*, 770 S.W.2d at 421 (express assent cannot be presumed by silence or mere failure to object). Thus, because Gateway has not provided evidence sufficient to support a finding under Kansas or Missouri law that plaintiff agreed to the arbitration provision contained in Gateway's Standard Terms, the Court overrules Gateway's motion to dismiss.

IT IS THEREFORE ORDERED that the *Motion to Dismiss* (Doc. # 6) which defendant Gateway filed November 22, 1999 be and hereby is **OVERRULED**.

¹⁴ The Court is mindful of the practical considerations which are involved in commercial transactions, but it is not unreasonable for a vendor to clearly communicate to a buyer—at the time of sale—either the complete terms of the sale or the fact that the vendor will propose additional terms as a condition of sale, if that be the case.

Notes and Questions

1. Judge Easterbrook sees *Hill* as consistent with the idea that parties might reasonably prefer to organize their transactions so that they receive the product first and consider the terms later at their leisure. Judge Vratil in *Klocek* sees this organization as inconsistent with UCC § 2-207. Which approach is more faithful to the statutory text of § 2-207? Which approach is better for sellers? Which is better for consumers? Why?
2. Judge Easterbrook's rulings on enforceable boilerplate in *Hill* have not been universally beloved. One recent article lamented them as "influential and profoundly flawed decisions" that "illustrate how far courts will go to permit commercial actors to control the contracting dynamic as between businesses and consumers." Leah A. Plunkett & Michael S. Lewis, *Education Contracts of Adhesion in the Covid-19 Pandemic*, 2021 U. ILL. L. REV. ONLINE 1, 17 (2021). The authors favorably compare the following case, *Kauders v. Uber*, as one that "resist[s] the pull of these decisions and reaffirm[s] the doctrine of assent in consumer contracts." Can you defend *Hill*?
3. If, as Judge Vratil indicates, "the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms," would keeping the computer for longer (say, 30 days) demonstrate assent? Is this case distinguishable from cases where courts find silence and retention of seller's goods constitutes assent to a contract?