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Presentation: *Contracts in a Digital Age:*
My Teenaged Tech Advisors Rescue Dad

Twelfth International Conference on Contracts
Southwestern Law School
24-25 February 2017

Contracting in a digital age isn't just a change in time or place, it is in many respects potentially a change in orientation. Confronting that change initially involved improvising an assimilation of e-contracting into our unstated assumptions about the way contracts are created and the way they are performed, but some adjustment in the framework has been necessary as e-contracting has flourished. It has now been 25 years since the Third Circuit decided *Step-Saver Data Systems, Inc. v. Wyse Technology*, subjecting box top terms to those assumptions, and 20 years since the Seventh Circuit decided *ProCD, Inc. v. Zeidenberg*, distinguishing *Step-Saver* and embracing shrink wrap terms, leading the way to the easy application of click wrap terms. As we have moved from telex to facsimile, to e-mail, to texting, to direct communication between computers, and so on to as yet unknown methods – new technology almost always creates new challenges for contract law. My paper calls for the recognition of new analysis and adaptable principles for electronic contracting on its own terms, but without abandoning the objectives underlying contract law.

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http://lawprofessors.typepad.com/contractsprof_blog/2017/03/michael-malloy-pacific-mcgeorge-kcon-scholarship-spotlight.html

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Contracts in a Digital Age – KCON XII

- **Potentially, a change in orientation**
- **How contracts are created and performed**
- **Adjusting the framework as e-contracting flourishes**

Contracts in a Digital Age – KCON XII

- ***Step-Saver Data Systems, Inc. v. Wyse Technology* (3d Cir. 1991)**
- ***ProCD, Inc. v. Zeidenberg* (7th Cir. 1996)**
- ***Hancock v. American Tel. and Tel. Co., Inc.* (10th Cir. 2012)**

Contracts in a Digital Age – KCON XII

- ***Formation through digital means***
- ***Basic problem of application***
- ***Electronic communication as medium of acceptance***
 - UETA
 - ESIGN Commerce Act
 - UCC and other state contract law principles

Contracts in a Digital Age – KCON XII

- ***Identifying and enforcing terms***
- ***Impact of UCC 2-207 and corresponding common law principles***
 - *Step-Saver*
 - *ProcCD*
 - *Hill v. Gateway 2000, Inc.* (7th Cir. 1997)

Contracts in a Digital Age – KCON XII

- ***Market realities***
 - *Specht v. Netscape Communications Corp.* (2d Cir. 2002)
 - *i.Lan Systems, Inc. v. Netscout Service Level Corp.* (D.Mass. 2002)

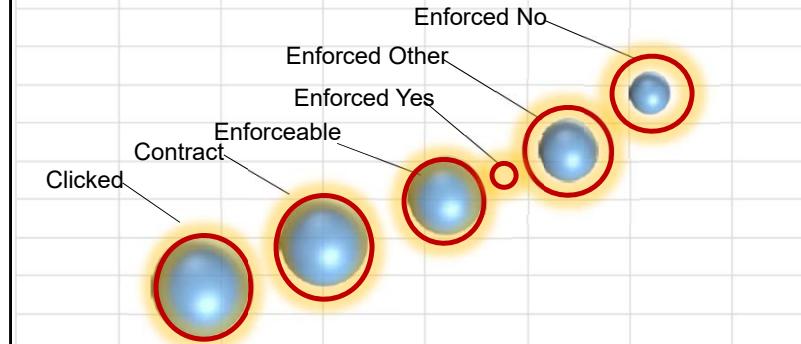
Contracts in a Digital Age – KCON XII

i.Lan Systems, Inc., 183 F.Supp.2d 328, 329

Has this happened to you? You plunk down a pretty penny for the latest and greatest software, speed back to your computer, tear open the box, shove the CD-ROM into the computer, click on “install” and, after scrolling past a **license agreement which would take at least fifteen minutes to read**, find yourself staring at the following dialog box: “I agree.” Do you click on the box? You probably do not agree in your heart of hearts, but you click anyway, not about to let some **pesky legalese** delay the moment for which you’ve been waiting. Is that “clickwrap” license agreement enforceable? Yes, at least in the case described below.

■ Usages of trade online

- Empirical research indicates that click wrap terms are not taken seriously**
- Alternate means of dispute resolution are prevalent in the online context**
- Contract law as a means of policing the bargain is being displaced by regulatory law**



Legality Recognition – Digital survey – Dec 2016

■ Conclusions

- **Reconciling Theory and Practice**
- **Closing the generational gap**
- **The alternative – not just “pesky” but fusty and irrelevant contract principles**
- **From *formation* solutions, to *term* solutions, and finally, to *fair dealing* / *unconscionability* solutions**