

I'll be presenting a brief of the case ProCD Incorporated v Matthew Zeidenberg and Silken Mountain Web Services from the year 1996. The jurisdiction is the US state of Wisconsin. It's a pretty important case in the US in the area of the sale of goods over the Internet. You could even say it's a landmark case.

First, I'll tell you the facts of the case and then something about the stages of litigation and the holdings of the courts. Finally, I'll explain the reasoning of the courts.

Here are the facts: the plaintiff, ProCD, produced the CD-ROM product Select Phone. It's a listing of over 95 million telephone

numbers and addresses, combined with search and retrieval software. The defendant, Mr Zeidenberg, purchased copies of Select Phone, but decided to ignore the licence. He formed Silken Mountain Web Services Incorporated to resell the information in the Select Phone database. He copied the telephone listings from the CD-ROM onto his computer, created a software search engine and uploaded the data onto his website. The site was very successful.

ProCD sued, alleging breach of the express terms of the shrink-wrap licence agreement, among other things. The main issue raised by the case is whether a shrink-wrap licence constitutes an enforceable sales contract.

So, what's the procedural history of the case? The first instance, the District Court, decided in favour of the defendant. It held that because the terms of the licence agreement were inside the box instead of printed on the outside, Zeidenberg had no opportunity to disagree with or negotiate them when he paid for the product at a store.

Then the case went to appeal. The Court of Appeals reversed the District Court decision in favour of the vendor, ProCD. It remanded the case back to the District Court to determine damages and other legal relief. In its decision, the Appeals Court noted that the Select Phone box contained a clear statement that use of the product was subject to the licence terms contained inside.

What was the reasoning of the court? The Appeals Court made comparisons to other types of transactions where money is also exchanged before the detailed terms and conditions are communicated to the consumer. One example the court gave was buying airline tickets. When an airline ticket is purchased, the consumer reserves a seat, pays and gets a ticket, in that order. The ticket contains elaborate terms, which the traveller can reject by cancelling the reservation. To use the ticket is to accept the terms.

The Court also noted that the Uniform Commercial Code provides that a vendor may invite acceptance of an offer by conduct. The vendor may also put limitations on the kind of conduct that constitutes acceptance. A buyer may accept that offer by performing the acts the vendor will treat as acceptance. And that, concluded the Court, is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the licence at leisure. This Zeidenberg did. He had no choice, because the software displayed the licence on the screen: it wouldn't let him proceed without indicating acceptance. Zeidenberg also had the opportunity to reject the contract if he found the terms unacceptable by simply returning the software. Instead, he decided to use it. So, the court reasoned, he was bound by its terms.