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THE UNIMPORTANCE OF BEING "ELECTRONIC" OR – POPULAR MISCONCEPTIONS ABOUT "INTERNET CONTRACTING"?

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Existing e-commerce literature abounds with misconceptions regarding both technology and contract law. Long-standing legal concepts are adorned with "e-" or "cyber-" to appear more exciting. The traditional contractual regime is supplanted with new principles instead of being supplemented with technological considerations. It is one thing, to include technology in legal analyses, it is another to create separate, technology-specific categories. Particularly so when these categories are built around such concepts as "Internet" and "electronic." Separate categories justify the departure from traditional principles. Most, if not all, alleged "challenges" created by new communication scenarios fit within the existing legal framework, technological complexity and novelty of the Internet notwithstanding. Most "challenges" are also unrelated to the fact that transactions are concluded on websites or via email, i.e. they are not technology-specific. The new transacting environment frequently exacerbates pre-existing difficulties, but it does not necessarily create them. It is probably too late to abandon popular terminology. It is not too late, however, to recognize its limited implications.

1. INTRODUCTION

Although the novelty of the Internet has worn off, legal literature has yet to take a clearheaded look at the legal issues arising from transactions conducted with the intermediation of the Internet, popularly known as "e-commerce." Books and articles are still dominated by variations on the themes of "automation," "click-wraps," "browse-wraps" and the "instantaneousness" of email. The entire technological aspect of novel methods of communication is traditionally encapsulated in the terms "Internet" or "electronic." Both terms provide good excuses to re-open old debates or to portray old problems as new. Together with the term "cyberspace," they also seem to encourage the creation of distinct legal categories. Criticizing existing "e-commerce"-literature, this paper makes a call for greater attention to the basic principles of contract law – including its almost unlimited ability to accommodate new contracting scenarios. It challenges the popular approach that new communication technologies require a sub-division within contract law, which in turn justifies a revision of traditional legal paradigms. The assumption is made that no new categories or principles are necessary – at least from a contract law perspective.

To date, legal analysis has been plagued by unnecessary detail, e.g. persistent references to contracts being "electronic" or messages travelling in packets, while, at the same time, indulging into pointless generalizations – such as "Internet contracting." This paper criticizes both concepts as being of no analytical value. It attempts to point out the technological aspects of modern communications that are in fact relevant to the manner contracts are formed. The focus is on pure contract law. No attention is given to consumer protection, model laws (or conventions) on "electronic" contracting or the regulatory aspects of e-commerce. It is also not attempted to present a unifying theory regarding the adaptation of contract law to technological progress or correct every popular misconception regarding transactions concluded "on the Internet." The point made in this paper is simple: being "electronic" is irrelevant. So is the Internet. From a contract law perspective the Internet does not exist.

After some general considerations applicable to all contracts involving Internet-based methods of communication, the paper focuses on two popular lines of argumentation involving "electronic" contracting. The first relates to the speed of transmission and the effectiveness of an acceptance; the second pertains to the doctrinal discomfort caused by the simplicity of the click, the main method of communicating intention in web-transactions. The first topic demonstrates how a superficial understanding of the relevant technologies and an unsystematic approach to contract law affect legal analysis and prevents the achievement of a logically sound result. The second topic illustrates the propensity to depart from the principles of contract law and to devise technology-specific rules (and new nomenclature) once a technological factor is present. The discussion aims to expose the shortcomings in the popular arguments concerning the time of contract formation, the incorporation of terms and the expression of assent in e-commerce transactions.

2. POINT(S) OF DEPARTURE

The following paragraphs propose some general points of departure for any further analysis of "electronic contracting." The first step is to erase the mental division between the on-line and the off-line world and to abandon the category of "electronic contracts." Contracts are the product of communications.¹ Intention must be manifested, i.e. communicated, to produce a legal effect. Unquestionably, the Internet provides new means of communicating. It is not immediately apparent, however, why a novel way of communicating intention requires a new category within contract law. In the words of one author: "[a]n electronic contract is not a special type of contract, but a method of contracting. A special type of contract is identified by the subject matter of the contract rather than the manner in which the contract is formed."² New communication scenarios may challenge classic legal analysis due to an unprecedented combination of otherwise familiar features. Such challenge need not, however, be resolved by the creation of a new legal regime for "electronic" transactions. Although contract law forms the legal backbone of e-commerce, a new category of "electronic contracts" is not required. A separate category would justify the creation of idiosyncratic principles. Other terms, especially the popular "Cyberspace" or "cyber law" lead to a similar result – separate spaces require separate rules. Just because the Internet is involved in concluding a transaction, does not mean that such transaction is governed by an "Internet-specific" legal regime or that contract law applies "differently." In other words, "electronic contracts," "electronic offers" or "electronic acceptances" need not be carved out from the traditional legal regime and analyzed afresh as if they were a separate legal species. An "electronic contract" is just a contract. Neither "Internet nor "electronic" constitute valid starting points for an analysis of the contracting process.

¹ Stephen A. Smith, *ATYIAH'S INTRODUCTION TO THE LAW OF CONTRACT* (Clarendon Law Series, 6th edn Clarendon Press, Oxford 2005) 57, 182

² Donnie, L. Kidd, Jr. & William Daughtrey, Jr., 'Adapting Contract Law to Accommodate Electronic Contracts' (2000) 26 Rutgers Computer and Tech L J 215, 269

2.2 Establishing Relevance

The main problem faced by legal literature concerns the inability to discern which technologies (or technological features) are relevant for contract law. Not every technological factor translates into a legal challenge or affects legal analysis. The best example is "electronic." Seemingly, the use of this term in conjunction with any legal concept justifies (or requires?) a different approach to the underlying problem. What, then, does "electronic" mean? "Electronic" refers to (a) devices operating according to the principles of electronics, or (b) travel in the form of electrical impulses.³ Other definitions describe "electronic" as referring to the storage or transmission of information by electronic means; or as something carried out using electronic devices or computers.⁴ Apart from letters sent by post or courier, practically all communications at a distance are mediated by computers or involve the transmission of electrical impulses. All communications at a distance are therefore "electronic." Consequently, it can be doubted, whether "electronic contracting" is a useful concept and justifies distinct legal treatment. Contracts formed "at a distance" carry multiple legal problems, yet no-one ever attempted to group them into a separate category. The distance between the parties is always included in the analysis, without being a distinguishing factor. To further illustrate the irrelevance of being electronic and point to the technological factors that may be pertinent to contract law analysis, a more detailed look at the technical foundations of the Internet is necessary.

The Internet is unified by a set of protocols: the TCP/IP stack.⁵ In a nutshell, the TCP/IP stack consists of five layers: application, transport, network, data link and physical.⁶ Each layer deals with a different aspect of communication. TCP/IP protocols provide a wide range of functions: from application-specific, like email and web-browsing, down to low-level networking protocols like IP and TCP.⁷ Upper layer protocols are logically closer to the user and deal with more abstract data (e.g. words), lower layer protocols translate data into forms that can be physically transmitted (e.g. packets and electrical impulses).⁸ The physical underpinnings of the Internet are a combination of wired and wireless connections, with telephones sharing much of the same infrastructure. The term "electronic" pertains to the transmission of impulses at this lowest, physical layer. To claim that the characteristics of physical transmission affect contract law would imply the need to differentiate between intention communicated by fixed-line and mobile phones, between letters carried by railway or submarine. Such distinctions are needless to say, inadmissible. Questions regarding network infrastructure and transmission technologies are relegated to telecommunications law and the regulatory aspects of the Internet.⁹ Arguments based on the fact that email travels in packets¹⁰ or that messages are divided into "chunks" and travel fast because they take the form of electrical impulses, are misconceived. If we create the category of "electronic contracts", we should also create the category of contracts formed by letters transported by trains and delivered by blonde mailmen. Common sense (and doctrine!) dictate that both details are irrelevant. From a contract law perspective, all relevant technologies reside on the application layer, i.e. the layer closest

³ UNCITRAL Model Law on Electronic Commerce Art 2 and Guide to Enactment para 30.

⁴ Oxford English Dictionary

⁵ For general descriptions see: C Hunt, TCP/IP NETWORK ADMINISTRATION (3rd edn O'Reilly, 2002).

⁶ Henry H Perritt, Jr., DIGITAL COMMUNICATIONS LAW (Aspen Publishers 2010) para 1.02 [G].

⁷ Michael Froomkin, 'Habermas@discourse.net: Toward a Critical Theory of Cyberspace' (2003) 116 Harv L Rev 749 at 779.

⁸ Additional layers are singled out for analytical purposes, for example a user- or content-layer; see: Eric J. Feigin, 'Architecture of Consent: Internet Protocols and Their Legal Implications' (2004) 56 Stan L Rev 901, 904.

⁹ Lawrence B Solum, Minn Chung, 'The Layers Principle: Internet Architecture and the Law' (2004) 79 Notre Dame L Rev 815-88; Daniel Benoliel, 'Cyberspace Technological Standardization: An Institutional Theory Retrospective' (2003) 18 Berkeley Tech L J 1259-1336, 1276.

¹⁰ Valerie Watnick, 'The Electronic Formation of Contracts and the Common Law "Mailbox Rule"' (2004) 56 Baylor L Rev 175-203, 200.

to the user. Intention is manifested by email, websites or instant messengers.¹¹ Each individual application provides different communication possibilities, which are unrelated to the manner of physical transmission. Irrespective of whether the term "electronic" is interpreted as relating to the transfer of impulses or to the intermediation of computers, it is of no value in contractual analyses. Electricity does not convey meaning or intention. Emails and websites do.

Some reservations must also be expressed with regards to "Internet-contracting." It must be appreciated that the Internet is a general-purpose transmission infrastructure – not a communication method, medium, technology or place. "This Internet that everyone is talking about is, fundamentally, nothing more than a gigantic global machine designed to move zeroes and ones from one place to another."¹² To use the term "Internet" is to underestimate the variety of communication possibilities enabled thereby, the complexity of the technologies comprising it and the implications of its individual characteristics.¹³ As one author put it: "the whole Internet is rarely an appropriate level on which to generalize."¹⁴ It is possible to speak of "Internet contracting" only if one acknowledges the conceptual shortcut being taken. It is not the Internet that challenges the contracting process. It is only specific methods of communication (or their characteristics) that affect certain aspects of this process. The Internet itself is agnostic in relation to the communication processes it enables. A clear line must therefore be drawn between the individual, Internet-enabled communication services. One can speak of the "Internet Age" or of "Internet governance." It seems incorrect, however, to speak of "Internet contracting." While "being electronic" constitutes an irrelevant detail, the "Internet" is a pointless generalization.

2.3. Using Technology

Despite its general discomfort with technology, legal literature adopts a technology-centric instead of a user-centric approach. It is forgotten that technology is always mediated by social practice.¹⁵ How people use technology matters more than the technology itself. Accordingly, contract law need not reflect technology but only the social practices spawned thereby. The focus on how technology is used leads to another question: how technology-savvy is the reasonable man (i.e. user)? People who grew up "with" the Internet approach modern methods of communication differently than those who acquired Internet skills later in life.¹⁶ Some people eagerly await Firefox updates while tweeting from their blackberries. Others struggle to use an ATM due to its perplexing (in their belief) user interface. IT literacy affects the way people use communication technologies and the way they communicate in general. It also affects their expectations and the reasonableness of their actions. Given the two extremes (i.e. technophiles and technophobes), establishing what is "reasonable" in a given contracting scenario may be difficult. This problem is particularly pertinent in evaluating the legal consequences of the selection of browser types as well as the personalization of default system settings. More IT literate users will adjust browsers and email applications to their needs. As discussed below, this will affect their ability to view websites in their original, intended form as well as their ability to receive email.

¹¹ Douglas E Comer, *COMPUTER NETWORKS AND INTERNETS WITH INTERNET APPLICATIONS* (4th edn Prentice Hall, New Jersey 2004) 422.

¹² David G. Post, *IN SEARCH OF JEFFERSON'S MOOSE, NOTES ON THE STATE OF CYBERSPACE* (Oxford University Press 2009) 86.

¹³ David D. Clark, Marjory S. Blumenthal, 'The End-to-end Argument and Application Design: The Role of Trust' (2011) 63 Fed. Comm. L.J. 357.

¹⁴ Timothy Wu, 'Application-Centered Internet Analysis' (1999) 85 Va L Rev 1163-1204, 1164.

¹⁵ Joseph Sommer, 'Against Cyberlaw' (2000) 15 Berkeley Tech L J 1145, 1147.

¹⁶ Dan Tapscott, *THE DIGITAL ECONOMY: PROMISE AND PERIL IN THE AGE OF NETWORKED INTELLIGENCE* (New York 1996) 17.

3. SPEED AND EFFECTIVENESS

One of the core topics in "Internet-literature" concerns the time of contract formation, traditionally discussed in light of the speed with which transactions can be entered into. It is trite law that formation occurs when an acceptance becomes effective. Effectiveness is generally associated with the receipt of a message,¹⁷ whereas effectiveness on dispatch, referred to as the postal acceptance or mailbox rule, constitutes an exception applicable to acceptances sent by post.¹⁸ Are acceptances sent via Internet-based methods of communication governed by the principle or by the exception? To date, literature persistently focused on the alleged "instantaneousness" of such methods. "Instantaneousness," taken as a single factor, has inevitably lead to the conclusion that a particular method is governed by the principle.¹⁹ This approach derives from two leading cases, *Entores Ltd v Miles Far East Corporation*²⁰ and *Brinkibon v Stahag und Stahlwarenhandels-gesellschaft mbH*,²¹ which repeatedly refer to the term in the context of telex. Contrary to prevailing perceptions, these cases do not establish an absolute rule.²² According to Lord Wilberforce, the question whether acceptances become effective on dispatch or on receipt must be resolved "by reference to the intention of the parties, by sound business practice and ... by a judgment where the risks should lie."²³ The focus being placed on the acceleration of the contracting process, this last factor, the allocation of risk, is generally overlooked.

3.1 Instantaneousness

It is tempting to concentrate on the fact that "everything on the Internet happens fast" and subsume all Internet-based methods under the principle of receipt. Such uniform approach provides certainty and simplifies legal analysis.²⁴ At the same time, it ignores existing doctrine, which prescribes effectiveness on dispatch when certain factors are present, and disregards the differences between individual Internet-enabled methods of communication. More importantly, arguments relying exclusively on "instantaneousness" lead into a blind alley. If something is instantaneous there is, logically, no delay. The existence of some delay is, however, implicit in the qualifiers usually accompanying the term: "more or less,"²⁵ "almost"²⁶ or "substantially"²⁷ instantaneous. What, then, is the maximum tolerable delay? How many seconds or minutes should pass for the exception to become justifiable? The same question can be posed when the term is used without qualification: how fast is instantaneous? Any gradation creates uncertainty. Moreover: what are the two points between which speed is measured? This opens the debate whether, in case of email, it is the mail-server or the mail-client that should be taken into account.

¹⁷ *Shelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep 249; *Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929; *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161.

¹⁸ *Re London and Northern Bank: Ex parte Jones* [1900] 1 Ch 220; *In re Imperial Land Co of Marseilles, Townsend's Case* (1871) LR 13 Eq 148.

¹⁹ See e.g.: Jack Beatson and others, *ANSON'S LAW OF CONTRACT* (29th edn OUP, Oxford 2010) 46.

²⁰ [1955] 2 QB 327 "Entores."

²¹ [1983] 2 AC 34 "Brinkibon."

²² *Brinkibon* at 42; Brian Coote, 'The Instantaneous Transmission of Acceptances' (1971) 4 NZULR 331.

²³ *Brinkibon* at 42.

²⁴ Tana Pistorius, 'From Snail-Mail to email – a South African Perspective on the Web of Conflicting Rules on the Time of e-contracting' (2006) CILSA vol 39(2), 212.

²⁵ John W. Carter, *CARTER ON CONTRACT*, vol 1, (Butterworths Lexis Nexis, Sydney 2002) [03-360] [03-390]

²⁶ *Entores* at 328.

²⁷ Restatement (Second) of Contracts para 68 (1981).

Problems of delay aside - it remains unclear what must be instantaneous. In *Brinkibon* and *Entores*, the term is used indiscriminately and refers to the communication process, the method and the devices used by the parties.²⁸ This is an important, yet commonly ignored, distinction. Arguments tying instantaneousness to communication methods or devices disregard the fact that a single interaction may combine multiple devices and methods.²⁹ Voice calls originate on computers and terminate on phones; email and instant messengers are exchanged via mobile phones. Has the contract been formed via email or by phone? Is it the method or the device that is decisive? Is it the sender's or the recipient's side that should be taken into account? With a growing trend for convergence devices combine multiple functionalities, computers are used as phones, mobile phones have the capabilities of computers.³⁰ What category does a textual exchange conducted via blackberries fall under?

3.2 Reliability

The suggestion that the choice between the principle and the exception may be a question of risk allocation, points to another differentiating factor: reliability. The term underlies most of the traditional justifications of the mailbox rule, including the argument that once a letter is properly posted, the sender has done all he can to ensure receipt. As the post is reliable and the likelihood of failed receipt is extremely low,³¹ the exception governs situations where communication risks are minimal.³² Unlike the post, however, the Internet is an inherently unreliable transport infrastructure.³³ This unreliability is not only a function of the Internet's "best-efforts-based" transmission but of the frequent lack of full interoperability between networks and between individual applications. Both problems are particularly visible in email. Despite its ubiquity, the Internet does not (yet) have the uniformity of the post or the telephone network.³⁴ It remains a decentralized heterogeneous network of networks with each component network retaining some discrete characteristics.³⁵ Routing between networks often requires conversions between the 'idiosyncrasies of the two original networks.'³⁶ As these conversions are not always successful, emails are frequently lost or delivered in unreadable form.³⁷ Additionally, "proper" dispatch and successful transmission do not guarantee that a message can be read because one email system may not be able to process messages composed on a different system.³⁸ Even if both systems function without error, the addressee's email application may be unable to correctly display messages composed on the sender's application. When both parties use popular, up-to-date email systems, the risk of illegibility or failed receipt is difficult to allocate. Another factor affecting the reliability of email relates to the protective measures designed to counteract viruses and spam. Legitimate messages often fall victim to conservative security settings on the addressee's side. Traditionally, if failed receipt is attributable to the

²⁸ *Entores* at 327 per Lord Denning; *Brinkibon* at 41, 42 per Lord Wilberforce.

²⁹ *Express Airways v Port Augusta Air Services* [1980] QdR 543; *Leach Nominees Pty Ltd v Walter Wright Pty Ltd* [1986] WAR 244 at 431.

³⁰ Y Benkler, *THE WEALTH OF NETWORKS* (Yale University Press, 2006) 408.

³¹ *Household Fire and Carriage Accident Insurance Co v Grant* (1879) LR 4 Ex D 216, 223.

³² Simon Gardner, 'Trashing with Trollope: A Deconstruction of the Postal Rules in Contract' (1992) 12 *Oxford J of Legal Stud* 170-194, 184; Ian R Macneil, 'Time of Acceptance: Too Many Problems for a Single Rule' (1964) 112 *U Penn LR* 947, 958; *Morrison v Thelke* 155 So 2d 889 (Fla App D2 1963); *Kemp v Wanklyn* (1894) 1 *QB* 583 at 585; *Bowman v Durham Holdings Pty Ltd* (1973) 131 *CLR* 8, 13.

³³ Kenneth C. Laudon, Carol G. Traver, *E-COMMERCE 2010 BUSINESS. TECHNOLOGY. SOCIETY.* (6th edn Pearson Education, 2010) 3-35; Jonathan Zittrain, *THE FUTURE OF THE INTERNET* (Yale University Press 2008) 33.

³⁴ Graham Smith, *INTERNET LAW AND REGULATION* (4th edn, Sweet & Maxwell, 2007) 10-090.

³⁵ Rober Braden, ed. Request For Comments ("RFC") no 1122, 'Requirements for Internet Hosts – Communication Layers' (1989); all RFCs are available at <http://tools.ietf.org/html>.

³⁶ J. Glenn Brookshear, *COMPUTER SCIENCE, AN OVERVIEW* (8th edn Pearson Addison Wesley, Boston 2004) 138.

³⁷ For a detailed description see: G. Vaudreuil, RFC 3463 'Enhanced Mail System Status Codes' (2003).

³⁸ The problem is practically non-existent in instant messengers, as both parties must use the same system.

addressee, the latter is estopped from denying receipt or receipt is "deemed."³⁹ There may be instances, however, where legitimate messages are rejected by the addressee's system, yet it may be difficult to insist on estoppel or deemed receipt. This will be the case when the addressee's security measures are reasonable in light of the prevailing security practices.⁴⁰ Given that any evaluation of "reasonableness" occurs after a legitimate message has been rejected, there will be uncertainty as to whether there is receipt and whether a contract exists.

It seems correct to generalize that the choice between the principle and the exception is crucial not because of the length of delay between dispatch and receipt but because of the increased risk of failed receipt.⁴¹ The less reliable the communication method, the less justification for the application of the mailbox rule. The latter unfairly prejudices the addressee (i.e. offeror) as – in the case of failed receipt - he would not know when and whether acceptance took place and remain in this state indefinitely. At the same time, the sender would have commenced performance in the justified belief that a contract exists. Accordingly, effectiveness on dispatch combined with a high risk of non-delivery creates a state of uncertainty for both parties. It appears that an unreliable method would therefore require subsumption under the principle. The latter, however, derives from the perfect communication scenario of face-to-face dealings and is not designed to allocate communication risks. After all, in face-to-face dealings such risks are generally non-existent. Moreover, effectiveness on receipt combined with an increased risk of non-delivery creates the need to confirm such receipt to protect the sender (i.e. offeree). Otherwise the sender does not know whether his acceptance was received and cannot commence performance. In other words, if a non-reliable method is governed by the principle, receipt must be confirmed. This, however, leads to the very situation the exception was designed to avoid: circular communications.⁴²

3.3 Communication Process

Arguments based on instantaneity or reliability seem inconclusive. The starting point of any discussion regarding the effectiveness of acceptances conveyed via Internet-based methods should be an analysis of the communication process. This simplified approach is not only technology neutral (assuming technology neutrality is a desirable feature) but also leads back to the classic division: parties contract either face-to-face or at a distance. Some analytical difficulties may, however, result from the inherent ambiguity of the term "communication," which relates both to the imparting of information and to its transmission.⁴³ Originally made by Coote, the distinction emphasizes that instantaneous transmission is never decisive by itself: it must be established whether the parties are also placed in instantaneous communication with each other.⁴⁴ Only face-to-face dealings guarantee instantaneous communication in the sense of conveying information from sender to addressee. The interaction is bi-directional⁴⁵ and real-time,⁴⁶ communication failures are detected and rectified immediately. Accordingly, the principle can apply whenever the interaction resembles face-to-face dealings, whereas the exception can only be considered where it does not.

³⁹ *Tenax Steamship Co Ltd v Owners of the Motor Vessel 'Brinmes' (The Brinmes)* (1974) 3 All ER 88, 113; *Car and Universal Finance Co Ltd v Caldwell* (1965) 1 QB 525; see also: Simone Hill, 'Flogging A Dead Horse – The Postal Acceptance Rule and Email' (2001) JCL, vol 17, 157.

⁴⁰ Warwick Ford, Michael S. Baum, *SECURE ELECTRONIC COMMERCE* (2nd edn Prentice Hall PTR, New Jersey 2001) 144.

⁴¹ The delivery of an unintelligible message is equated with failed delivery.

⁴² *Adams v Lindsell* (1818) B & Ald 681 at 683.

⁴³ Oxford English Dictionary

⁴⁴ Brian Coote, above at note 3 at 342; see also: *Schelde Delta Shipping BV v Astarte Shipping Ltd (The 'Pamela')* [1995] 2 Lloyd's Rep 249.

⁴⁵ Restatement (Second) Contracts, Par 64.

⁴⁶ Michael S. Baum, Henry H. Perritt, Jr, *ELECTRONIC CONTRACTING, PUBLISHING AND EDI LAW* (Wiley Law Pub, New York 1991) 321.

Arguments focusing on the process of information exchange must also disregard the communication methods or devices used by the parties. After all, the same device (or method) can be used in different ways. Interactions over the phone resemble face-to-face dealings⁴⁷ when both parties are present and simultaneously use the device. This resemblance disappears, however, when addressees are not present and messages are left on answering machines.⁴⁸ Actual communication is delayed because the addressee accesses the message later.⁴⁹ This argument can be extended to email and instant messengers ("IM"). Technically, email is a non-instantaneous, delayed access, one-way method of communication.⁵⁰ Two-way communication can, however, be replicated when both parties attend their computers and continually poll their mail-servers. To ensure immediate detection of communication failures – a feature inherent in face-to-face interactions - the receiving system should automatically (i.e. without the deliberate participation of the addressee) and immediately generate confirmations or failure notifications. Such generation, however, presupposes certain technical capabilities of the addressee's email system, which may not be present.⁵¹ In other words, unlike in face-to-face interactions, the detection of failed receipt may depend on the co-operation of the addressee. A full re-creation of the two-way quality may therefore not be possible. In contrast, IM interactions are synchronous and real-time. The non-delivery of a message is immediately apparent, communication (i.e. conveyance of information) is instantaneous and two-way.⁵² Despite technical differences, either method can be used in ways resembling the other: email can be used to exchange messages in real-time when both parties are present; IM can be used for delayed communications when messages are sent and stored for later delivery.

The discussion would be incomplete without mentioning the trend to integrate real-time communication services (such as IM, telephony and video conferencing) with non-real-time messaging (such as email). These so-called "unified communications" are tailored to the communication status of the addressee,⁵³ i.e. his availability on the network (on-line, off-line, roaming) and actual willingness to communicate (available, busy, do not disturb). As Internet-based methods of communication can be used on portable devices, the contracting parties are no longer tied to their desktop computers and can use Internet-based real-time communications irrespective of their location. Senders can also easily determine the addressee's communication status (willingness to exchange information in real-time) and chose the method appropriate to such status. To illustrate: an email is suitable if the addressee is offline or does not want to be disturbed, an instant message or a voice call - when the addressee is on-line and available. Complications arise when the addressee, despite his on-line status, chooses not to communicate at a given moment and stores the message for later retrieval. In such instance, apart from the obvious inability to equate such scenario with face-to-face interactions, it must be assumed that the associated storage risks should be borne by the addressee. It must, however, also be assumed that the party who chose or imposed the communication method should prima facie bear the risks inherent in its operation. Consequently, the combination of the two factors (i.e. who chose/imposed the method and who chose to delay communication in what could otherwise be a real-time interaction) requires a detailed evaluation as to whether a particular risk originated on the sender's or on the addressee's side. The analysis must

⁴⁷ *Aviet v Smith & Searle Pty Ltd* (1956) 73 WN (NSW) 274; *Express Airways v Port Augusta Air Services* [1980] Qd R 543; *W A Dewhurst & Co Pty Ltd v Cawrse* [1960] VR 278.

⁴⁸ Hans B. Thomsen, Bernard S. Wheble, *TRADING WITH EDI, THE LEGAL ISSUES* (IBC Financial Books, London 1989) 133; see also: *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428 at 1431.

⁴⁹ Raymond Nimmer, *Electronic Contracting: Legal Issues* (1996) 14 J Marshall J Computer & Info L 211 at 223.

⁵⁰ B Wright, Jane Kaufman Winn, *THE LAW OF ELECTRONIC COMMERCE* (3rd edn Aspen Law & Business, Gaithersburg 1999) par 2.02; Andrew Terret, Ian Monaghan, 'The Internet-An Introduction For Lawyers' in Lillian Edwards, Charlotte Waelde (eds), *LAW & THE INTERNET* (OUP Oxford 2000) 25.

⁵¹ See Clark, Blumenthal, *op cit* n 13, 364; K. Moore RFC 3461 'Simple Mail Transfer Protocol (SMTP) Service Extension for Delivery Status Notifications (DSNs)' (2003).

⁵² Charles P. Morrison, 'Instant Messaging for Business: Legal Complications in Communication' (2004) 24 J L & Com 141, 142-143.

⁵³ M Day, et al. RFC 2778 'A Model for Presence and Instant Messaging' (2000)

include multiple variables pertaining not only to the speed of communication or the allocation of risk but also the characteristics of the communication process in casu. Simplistic generalizations are no longer possible. It must be remembered that instantaneous transmission constitutes a pre-requisite of real-time communications, but not a decisive feature in establishing the time of formation. Instantaneous transmission does not guarantee that a given interaction resembles face-to-face dealings, it does not reduce communication risk or enable the immediate detection of communication failures.

4. ASSENT AND INCORPORATION OF TERMS

The expression of assent and the incorporation of terms in web-based transactions illustrate how analytical hurdles created by the novel communication technologies are bypassed by reverting to technology-based solutions, new nomenclature and a distortion of contractual principles. Admittedly, it is difficult not to become overwhelmed by the novelty of the contracting environment: the entire shopping experience is compressed and confined to the computer screen, traditional actions, such as entering a shop and selecting goods from shelves, are replaced with clicks. It is the simplicity of the latter that not only accelerates the contracting process but often "hides" the very fact of contracting. At the outset, some broad observations are necessary.

First, most web-based transactions rely on standardized terms. The latter are traditionally discussed in relation to what conditions are unfair and what requirements must be met for terms to become incorporated. As issues regarding substantial fairness are not specific to the Internet, the focus of this analysis remains on the process of incorporation. Given that the ability to negotiate is not a prerequisite of agreement, it must be recognized that problems of standardization - including that of informed consent - are not created by modern communication technologies. At common law, standard contracts are binding although they have not been read, specifically assented to or even known of.⁵⁴ It is acknowledged however, that web-based transactions exacerbate certain analytical difficulties relating to the expression of assent and the incorporation of terms.

Second, terms - and therefore the process of their incorporation - gain particular importance in web-based transactions. Generally, two types of terms are present: one governing the use of the website ("terms of use"),⁵⁵ the other - the commercial transaction itself. The former describe the rights of the website owner and prescribe the communicative signs governing the behavior thereon. It must be remembered that not every website sells tangible goods. The site itself (i.e. the content or service provided thereon) may constitute the object of the transaction. In such instance the terms create and shape the contractual subject matter,⁵⁶ which is otherwise governed by unclear default rules. Both types of terms play an important role in the controversial debate regarding the relationship between property and contract law.⁵⁷

Third, the web seems to provide a perfect information environment facilitating the actual communication of terms and the resulting informed consent. Users can freely compare products of competing sellers and have the opportunity to read terms in the comfort of their homes.⁵⁸ This idealized

⁵⁴ Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 *Melb U L Rev* 186, 197.

⁵⁵ Mark A. Lemley, *Terms of Use* (2006) 91 *Minn L Rev* 459 at 460; Lawrence Lessig *The Law of the Horse: What Cyberlaw Might Teach Us* (1999) 113 *Harv L Rev* 501 at 519.

⁵⁶ Frank H. Easterbrook, *Cyberspace and the Law of the Horse* (1996) *U Chi Legal F* 207 at 214; R Nimmer, 'Through the Looking Glass: What Courts and UCITA Say about the Scope of Contract Law in the Information' Age (2000) 38 *Duq L Rev* 255.

⁵⁷ *eBay v Bidder's Edge* (N.D. Cal. 2000) 100 *F. Supp.2d* 1058.

⁵⁸ Robert A. Hillman, Ibrahim Barakat, 'Warranties and Disclaimers in the Electronic Age' (2008-2009) 11 *Yale J L & Tech* 1 at 263; Bert-Jaaps Koop, 'Law, Technology and Shifting Power Relations' (2010) 25 *Berkeley Tech. L.J.* 973 at 1012-1013

picture must, however, be approached with caution. The fact that terms are available does not mean that they will be read. More importantly, the information density of the web must be evaluated against the limited information processing ability of an average user.⁵⁹ More information does not necessarily improve the quality of assent. It may result in information overload and further reduce the likelihood of users reviewing – or even noticing – the terms. Accordingly, web-based transactions abound with disputes whether terms have become incorporated, i.e. assented to⁶⁰ or whether a contract came into being.

The sequence of analysis derives from the somewhat intricate relationship between assent,⁶¹ formation and incorporation. The point of departure is the principle that intention can be expressed in any manner. Accordingly, assent can be inferred from conduct. It must also be noted that contract formation generally does not require any formalities. Signatures are therefore not a prerequisite of enforceability. Despite the latter statement, the existence of a signature triggers a specific line of analysis. Such is the case with incorporation procedures, i.e. the steps necessary for terms to become part of a contract, which can be broadly divided into those with and those without a signature. If a document is signed, the signatory is bound regardless whether he has read or understood the terms contained therein.⁶² Another prerequisite of incorporation is notice.⁶³ "Notice" is common to all methods, except for incorporation by signature.⁶⁴ Notice must be reasonable.⁶⁵ More notice is required in the case of particularly onerous provisions.⁶⁶ In web-based transactions both "notice" and "signature," as well as the implicit requirement that terms be available, encounter technology-specific challenges.

4.1 User Dependence

The main challenge faced by website operators is user-dependence, i.e. limited control over how websites are viewed by their users. This problem precedes any analysis whether a website is an offer or an invitation to treat. It concerns the antecedent question of what was stated on the website. The objective theory of contract dictates that intention be evaluated from the addressee's perspective. It assumes that a statement looks identical on the side of its maker and on the side of the addressee. Websites derive from HTML files, which are hosted on web-servers. The HTML file containing the website code must be interpreted and displayed by browser software, which is located on the user's computer. Depending on the browser type and version, a website may display a different arrangement of the same content, or – in extreme situations – not display certain content at all.⁶⁷ Accordingly, the user may not see the statement in its intended form. What the user sees (i.e. how the website is displayed to him) depends on two factors: first, his choice of web-browser, and second, what type of browser the website was developed for. A website coded for Internet Explorer ("IE") may not show the same content if viewed on Firefox or Safari.⁶⁸ Operators must decide whether to develop their website (a) in accordance with relevant standards⁶⁹ or (b)

⁵⁹ Melvin A. Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 Stan L Rev 211.

⁶⁰ Graham Smith, *op cit* n 34 above, 10-099.

⁶¹ Given the difficulty of labeling individual acts as offers or acceptances, "assent" is a neutral term describing contractual intention in general.

⁶² *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Parker v South Eastern Railway Co* (1877) 2 CPD 416; *McCutcheon v MacBrayne* [1964] 1 WLR 125 at 134 per Lord Devlin.

⁶³ Malcolm Clarke, 'Notice of Contractual Terms' (1976) 35 CLJ 69, 72.

⁶⁴ Elisabeth Peden, John W. Carter, 'Incorporation of Terms by Signature: L'Estrange Rules!' (2005) 21 JCL 1 at 15.

⁶⁵ *Chapelton v Barry Urban District Council* [1940] 1 KB 532; *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379; *Hood v Anchor Line* [1918] AC 837 at 844.

⁶⁶ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

⁶⁷ David I Bainbridge, *INTRODUCTION TO INFORMATION TECHNOLOGY LAW* (6th edn Pearson Education 2009) 319

⁶⁸ A popular phenomenon are statements: "This site is best viewed with Internet Explorer."

⁶⁹ These standards encompass technical specifications describing different aspects of the world-wide-web, e.g. the accessibility and usability of websites. Web standards include recommendations by the W3C, Internet Standards and Requests for Comment

for viewing with the browser with the largest market share. For years IE has been the most popular browser while being notorious for its non-compliance with web development standards. More IT literate users generally opt for browsers other than IE. Neither the operator, who codes his website to cater to the biggest audience, nor the tech-savvy user, who uses a standard compliant and secure but less popular browser, is acting unreasonably.

To complicate matters, most web-pages have multiple points of access. Users may skip the homepage and access the transactional part directly,⁷⁰ possibly bypassing hyperlinks to terms or notices. This has little precedent in the real world, where shops have one entry point and a number of fixed, unavoidable elements. Given the inherent non-linearity of websites, navigation sequences are unpredictable rendering it difficult to ensure the correct timing of notice, i.e. before or at the time of contract formation.⁷¹ User-dependence also affects the deployment of technologies, which appear tailor-made for incorporation purposes. Pop-up windows, suited to automatically display terms or notices, are perceived as intrusive and distracting. Users often install pop-up blockers to prevent their appearance. Scripts, which can literally create the "red hand pointing to words printed in red ink"⁷² and ensure notice of onerous terms, are frequently disabled. As pop-up windows usually carry advertising and scripts raise serious security concerns, users cannot be accused of acting unreasonably by preventing their appearance. Consequently, apart from the general problem of not being able to control how their statements appear to the addressee, website operators face the risk that notices (or terms) strategically positioned to be viewed during the formation process are (a) not displayed or (b) less conspicuous than intended. These technical problems translate into a legal question: who should bear the risk of "incorrect" display? Can one speak of "incorrect" display when neither the maker of the statement nor its addressee can be "blamed" for the choice of browser or for blocking a particular technological feature? While cases and articles abound with practical guidelines regarding the positioning and color of hyperlinks leading to terms,⁷³ even the most conspicuous hyperlink may not "survive" the addressee's browser. What constituted a "reasonable" notice from the operator's perspective, may be barely visible on the side of the user; terms that were easily available for one user, may be difficult to find for another.

4.2 Assent and signatures

While signatures are not a prerequisite of a valid contract, they are inherently tied to the question whether a proposed set of terms has become incorporated. Theoretically, incorporation depends on whether the terms have been assented to. Assent need not be express but can be implied from the fact that a party knew that terms were present after receiving notice of their existence. Alternatively, assent to the terms will be presumed if the contractual document (containing or referring to the terms) has been signed. As indicated earlier, intention can be manifested in any manner. Accordingly, intention can be expressed with a click, which – technically – is a method of requesting HTML files and invoking responses from client- and server-side applications.⁷⁴ While it is indisputable that clicks can serve to manifest assent, there is no consensus whether they can constitute signatures. One approach denies such possibility,⁷⁵ another -

published by the IETF, as well as Standards published by ISO (amongst others); the current standards regulate the coding of, amongst others, the following languages: HTML 4.0, XML 1.0, XHTML 1.0, see: www.webstandards.org and www.w3c.org (last visited 30 June, 2011).

⁷⁰ *Specht v Netscape Communications* 306 F 3d 17 at 24.

⁷¹ *Olley v Marlborough Court Ltd* [1949] 1 KB 532.

⁷² *Spurling Ltd v Bradshaw* [1956] 1 WLR 461 at 466.

⁷³ *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000); *Caspi v Microsoft Network LLC* 723 A 2d 528 (N J Super CAD 1999); Ronald J. Mann, Travis Siebeneucher, 'Just One Click: The Reality of Internet Retail Contracting' (2008) 108 Colum L Rev 984 at 991, 1003.

⁷⁴ R Fielding, et al, RFC 2616 'Hypertext Transfer Protocol – HTTP/1.1' (1999)

⁷⁵ Michael Chissick, Alistair Kelmann, *ELECTRONIC COMMERCE: LAW AND PRACTICE* (3rd edn Sweet & Maxwell, London 2003) 97.

focusing on a signature's function rather than its form - accepts it.⁷⁶ It must be emphasized that the legal effect of a signature is not contingent on its form but on the intention with which it is made.⁷⁷ Such intention derives from the context⁷⁸ or the nature of the document signed.⁷⁹ The question whether a click can constitute a signature seems therefore of limited importance: the analytical steps required to prove that a click was performed with intention to assent are identical to those required to prove that it constituted a signature. In both circumstances, the analysis focuses on the context in which the click or the signature occurred. The legal effect remains the same – agreeing to contract on the terms provided. At the same time, it appears that when assent is expressed by means of a signature then, theoretically, no notice is required, as the incorporation of terms automatically follows the signature. Incorporation by signature is, however, premised on the fact that the signed document is of contractual character. This opens the debate whether a website can be a document and/or what makes a website "contractual." Ultimately, any discussion about the legal effect of a click or the existence of a signature inexorably leads back to an examination of the factual background in which they were made. The ability of clicks to function as signatures (or their functional equivalents) is, however, of unquestionable value where there is a formal requirement to be met.

4.3 Accidental Assent

Irrespective of the above, traditional handwritten signatures are not only more expressive than clicks but also generally perceived as signs of assent. A signature binds a signatory because he knows he is signing.⁸⁰ In the real world, parties interact "against a background of commercial or local usage whose implications they have tacitly assumed."⁸¹ In contrast, clicks are detached from such usages and devoid of any inherent meaning. One is more likely to hesitate before signing than before clicking. After all, clicks are primarily a method of navigating hypertext environments – not forming contracts. As indicated earlier, their legal effect, if any, can only derive from the context in which they are made. With this in mind, it must be observed that not every website is commercial in character and not every user surfs the web to purchase something.⁸² Given the ease of transition between websites, the changeover from a commercial into a non-commercial environment may not be readily apparent. In the brick-and-mortar world one is rarely "teleported" from a library into a bookshop. In the web environment, a person browsing recipes can easily "step into" an on-line bookshop. The latter is only a click away. The problem, however, lies not just in the ease of switching from a non-commercial into a commercial context. The problem lies in the fact that the mere use of a website (i.e. continued browsing) may be subject to terms. Historically, information on the Internet was available gratuitously and without restrictions. Most users do not expect terms to govern the browsing of websites, not to mention that browsing by itself may result in – or require - the formation of a contract.

This leads to another complication: taking advantage of the impatience of click-happy web-surfers, websites are frequently designed to minimize the likelihood of terms being reviewed.⁸³ Users proceed on the site without realizing that by doing so they agree to e.g. the collection of personal data or

⁷⁶ UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions*, December 2001, par 3.36-3.40.

⁷⁷ Holly K. Towle, 'E-Signatures – Basics of the US Structure' (2001) 38 *Hous L Rev* 921 at 923; J K Winn, 'Open Systems, Free Markets, and Regulation of Internet Commerce' (1998) 72 *Tul L Rev* 1177 at 1181.

⁷⁸ *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661 at 666-667 per Tagdell JA.

⁷⁹ *Joseph Grogan v Robin Meredith Plant Hire and Triact Civil Engineering Ltd* (1996) 15 Tr LR 317.

⁸⁰ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Roe v Naylor* (No1) [1917] 1 KB 712 at 716.

⁸¹ Michael Furmston, *CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT* (15th edn OUP, 2007) 133.

⁸² Michael J. Madison, 'Rights of Access and the Shape of the Internet' (2003) 44 *B C L Rev* 433 at 457.

⁸³ Robert A. Hillman, Jeffrey J. Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *NYULR* 429 at 480; James R. Maxeiner, 'Standard-terms Contracting in the Global Electronic Age: European Alternatives' (2003) *Yale J Int'l L* 109 at 115, 119.

the installation of spyware.⁸⁴ Is there a contract? On one hand, the objective test does not apply in favor of a person who knows the truth.⁸⁵ It could be claimed that it is the website operator - not the user - who created the appearance of intention. On the other, while the concept of "unintended" or "accidental" assent appears self-contradictory, it must be acknowledged that objectively notice was given and terms were available. Maybe it was the user, who over-zealously proceeded within the site without paying attention to any communications made thereon? After all, when a person voluntarily performs an act that conveys an intention to enter into a contract, the act itself is more important than the intention.⁸⁶ Also, the absence of payment (e.g. provision of credit card details) does not mean that there is no contract. The user's consideration may consist in the permission to study his browsing behavior.⁸⁷ Although the website operator designed the transacting interface and possibly subjected the user to some manipulations, the user must nonetheless be regarded as having assumed the risks inherent in the new medium. Absent coercion and misrepresentation regarding the effect or purpose of a click, the user should be bound. It is one thing to "trick" users into a transaction, it is yet another to take advantage of their inattentiveness. This situation provides an opportunity to revisit the question what intention should relate to: the performance of an act ("clicking") or the assumption of a contractual obligation? In practice, however, the question may not be whether the user intended to assent but whether he intended to contract. Parties often transact without being aware of the contractual character of the situation or the specific legal consequences of their acts. Assumedly, intention relates to the entering into a transaction in general, not necessarily to the formation of a contract or the agreement to specific terms. The same assumption should be made in web-based transactions.

It is also tempting to analogize the problems of clicks "accidentally" expressing assent to non est factum. The lack of familiarity with the meaning of a click is comparable to the absence of awareness of the legal consequences of a signature. In non est factum cases, however, the person signing knew that he was signing. The lack of knowledge related to the nature or effect of the document being signed.⁸⁸ In the current scenario, the lack of knowledge relates to the legal effect or meaning of the click. In non est factum cases, the signatory was not aware what he was signing, not that he was signing. What can, however, be analogized is the fact that in non est factum the person seeking to disown the signed document must prove that he signed without negligence.⁸⁹ A similar argument can be raised where a user seeks to withdraw from a transaction on the ground that he did not intend to express assent by one of his clicks. The absence of carelessness would derive from the fact that the user had no reason to suspect that he is about to enter into a contract. Indirectly, this approach leads back to an objective evaluation of the content of the website in question, i.e. the context in which the click occurred.

4.4 Enhancing the click

The limited expressiveness of clicks and the perceived risk of "accidental assent" have given rise to theories requiring an additional act of assent or enhancing the act itself.⁹⁰ Allegedly, the mere act of

⁸⁴ Peter A. Alces, 'Guerilla Terms' (2007) 56 Emory L J 1511 at 1554.

⁸⁵ *Scriven v Hindley* [1913] 3 K B 564.

⁸⁶ Randy Barnett, 'A Consent Theory of Contract' (1986) 86 Colum Law Rev 269 at 299.

⁸⁷ Jane Kaufmann Winn, 'Contracting Spyware by Contract' (2005) 20 Berkeley Tech L J 1345 at 1349, 1354.

⁸⁸ *Saunders v Anglia Building Society* [1971] AC 1004; *Muskham Finance Ltd v Howard* [1963] 1 QB 904; *Petelin v Cullen* (1975) 132 CLR 355.

⁸⁹ Michael Furmston ed., *THE LAW OF CONTRACT* (4th ed. Butterworths Common Law Series, Lexis Nexis Butterworths 2010) 1022, 1023.

⁹⁰ Anthony M. Balloon, 'From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions' (2001) 50 Emory L J 905 at 933; William J Condon, 'Electronic Assent to On-line Contracts: Do Courts Consistently Enforce Clickwrap Agreements?' (2003/2004) 16 Regent U L Rev 433.

remaining on the site (or downloading software) cannot denote assent. As such acts are ambiguous, a button labeled "I agree" (or similar) is required. Assent must take the form of an explicit act, separate from the expression of desire to obtain a benefit.⁹¹ These theories derive from a series of US cases differentiating between so-called "click-wrap" and "browse-wrap" agreements.⁹² This terminology (including its perceived legal implications) has trickled into non-US literature, becoming a permanent part of the legal landscape of e-commerce.⁹³ In click-wrap agreements, an "I agree" button must be activated in order to proceed. There is also a technically pre-determined contracting sequence: the button cannot be activated or the service cannot be used unless the terms are displayed (e.g. self-display). Clicking the button signifies assent. In contrast, browse-wrap agreements do not contain a separate button and terms are usually accessible through a hyperlink. It is commonly stated that browse-wrap agreements do not invite an unambiguous manifestation of assent as the terms are not unavoidable and no distinct act of assent is required. Browse-wrap agreements are therefore regarded as unenforceable.⁹⁴

In the US, the analysis of click- and browse-wrap agreements does not focus on the incorporation of terms but on their enforceability. The difference between these two approaches is substantial. Logically, only terms that have been incorporated are enforceable. The leading US case states that absent express assent, the terms are unenforceable and there is no contract.⁹⁵ The classic English law approach differs in this regard, explicitly distinguishing the formation of a contract from the incorporation of terms. Even if incorporation was unsuccessful – there may still be a contract, with any resulting gaps filled in by implication. Moreover, assuming that the proposed terms have been brought to the other party's attention or the contractual document is signed, formation and incorporation occur in one act. Although general intention to be bound is distinguishable from assent to specific terms,⁹⁶ there is no requirement for a separate act of assent or for assent to be express. The success of an incorporation procedure may, however, directly affect contract formation. This will be the case when the proposed terms prescribe the manner of assenting.⁹⁷ If such terms are not actually communicated, the other party does not know how to assent or - which act will be interpreted to constitute assent. Transposing this statement onto the offer and acceptance model, the offeror - as the master of the offer - can prescribe any manner of acceptance, including clicks. Acceptance must occur with knowledge of the offer – particularly when the latter dictates the method of acceptance.

Apart from implying that a separate or express act of assent is needed, "click-wrap" proponents seem to discard any method of making terms available that requires minimal user activity. Unquestionably, terms that self-display are more likely to come to attention than terms, which must be retrieved via hyperlink. There is no principle of contract law, however, that terms be unavoidable. Availability suffices. Once users are aware that terms exist, they can be expected to undertake an effort to find them, e.g. by activating a hyperlink. The temporal or spatial separation of notice from availability, justifiable in the real world on practical grounds, resembles the placing of terms behind multiple hyperlinks. Notably, even "traditional" incorporation procedures implicitly permit some manipulations: terms may be presented in

⁹¹ *Specht v Netscape Communications* 306 F 3d 17 (2nd Cir 2002).

⁹² Ian C. Ballon, *E-COMMERCE AND INTERNET LAW: A LEGAL TREATISE WITH FORMS* (2nd edn, Westlaw 2010) 627.

⁹³ See e.g. Alan Davidson, *THE LAW OF ELECTRONIC COMMERCE* (Cambridge University Press, 2009) 66; Graham Smith, *op cit n 34* above, 10-100.

⁹⁴ Melissa Robertson, 'Is Assent Still a Prerequisite for Contract Formation in Today's E-Economy?' (2003) *Wash L Rev* 286.

⁹⁵ *Specht v Netscape Communications* 306 F 3d 17 (2nd Cir 2002); for detailed critique see: Richard C. Bern, "'Terms Later' Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding" (2004) 12 *J L & Pol'y* 641; Jean Braucher, 'Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice' (2002) 46 *Wayne L Rev* 1805.

⁹⁶ Joshua Fairfield, 'The Cost of Consent: Optimal Standardization in the Law of Contract' (2009) 58 *Emory L J* 1401 at 1424.

⁹⁷ Graham Smith, *op cit n 34* above, 10-006.

small black print on brown paper⁹⁸ or cross-referenced between multiple documents and locations.⁹⁹ The incorporating party can reduce the likelihood of their review by providing minimal yet sufficient notice or making it cumbersome to obtain them.¹⁰⁰ The popular bias against browse-wraps is best explained by the fact that in many cases the link to the terms was inconspicuous and their existence was not obvious.¹⁰¹ The problem was one of inadequate notice and absence of a clear, transactional context. As a result, the user had no awareness that he was entering into a contract, not to mention that the transaction was governed by terms.

Click-wrap proponents should also be reminded that clicking an "I agree" button does not, by itself, create awareness of the contractual situation or evince assent.¹⁰² If the legal effect of the click ("I agree to what?") is not communicated prior to the click, the click may be made without the requisite contractual intention. It is therefore not a question of enhancing or duplicating the act of assent but of notifying the user about the existence of terms.¹⁰³ More importantly, the user must know that he is entering into a contract. There is no justification based on contractual principles for an "additional" or "enhanced" act of assent: the formation of a contract or the incorporation of terms in web-based transactions do not hinge on the existence of an "I Agree" button. Downloading can be executed in order to obtain the product and to express assent. Remaining on the website or activating a button constitute equally valid expressions of assent. In both instances, assent takes the form of a "click," in both instances, its meaning derives from the context or the terms. The click must be performed with a reason to know that it will be objectively interpreted to constitute agreement. The fact that the user knows about the terms and proceeds with the transaction indicates their acceptance.¹⁰⁴ An emerging convention is to provide a "legal link" on the bottom of every page as a permanent menu option. Although Specht specifically stated that the presence of a scrollbar does not create an obligation to scroll down,¹⁰⁵ it is increasingly difficult to claim ignorance of such links that are present on the bottom of practically all e-commerce websites. Specht should therefore be confined to early "Internet law."

Assent can be inferred from adequate notice.¹⁰⁶ Accordingly, it is not assent that needs enhancement but the notice that terms exist and that a contract is being formed. Such notice not only informs about the existence of terms, but creates the contractual context. This approach does not entail a new principle of contract law but the adaptation of the "reasonableness" of the notice to the idiosyncrasies of web-based transactions. When evaluating such "reasonableness" provision should be made for the information overload,¹⁰⁷ the perceptive restrictions of the web-interface¹⁰⁸ and the fact that e-commerce business models are often based on the number of times the site is viewed, which results in a

⁹⁸ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

⁹⁹ *McCutcheon v David MacBrayne, Ltd* (1964) WL 19517 (HL); *Hollingsworth v Southern Ferries Ltd ("The Eagle")* [1977] 2 Lloyd's Rep 70; *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep 160.

¹⁰⁰ See: Steven A. Smith op cit n 1 above, 188, who stresses that notice, which is sufficient in law, may in fact be fictitious.

¹⁰¹ *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000); *Ticketmaster Corp v Tickets.com Inc* 2000 WL 525390 (CD Cal 2000).

¹⁰² Emily Wilson, 'Douglas v. Talk America: Making the Case for Proper Notice' (2009) 45 Idaho L Rev 479 at 483.

¹⁰³ *Register.com Inc v Verio Inc* 356 F 3d 393 (2nd Cir 2004); *Hubbert v Dell Corp*, 835 NE2d 113 (Ill 2005); *Cairo Inc v Crossmedia Services, Inc*, 2005 WL 756610 (NDCA 2005); *Ticketmaster Corp v Tickets.com, Inc* WL 21406289, 2003 US Dist Lexis 6483 (2003).

¹⁰⁴ Margaret J. Radin, 'Online Standardization and the Integration of Text and Machine' (2002) 70 Fordham L Rev 1125, 1126.

¹⁰⁵ *Specht v Netscape Communications* 306 F 3d 17 at 32.

¹⁰⁶ *Douglas v. U.S. Dist. Court (Douglas ID, 495 F. 3d 1062, 1065 (9th Cir. 2007) at 1066.*

¹⁰⁷ J Palfrey, U Gasser, BORN DIGITAL, UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (Basic Books 2008) 185.

¹⁰⁸ Jean Braucher, 'Rent-Seeking in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online' (2001) Wis L Rev 527 at 531, 539.

battle to attract and retain attention.¹⁰⁹ The latter factors can easily pass unnoticed. If the context is not objectively transactional, terms will not be anticipated and a click cannot denote assent and/or have an incorporating effect as no contractual intention can be inferred. Although the full legal implications of an act need not be realized, the user must know that he is entering a contract. Once a person knows that he is contracting, he is expected to know that the transaction is governed by terms. Knowledge of the terms is therefore more important than the form of assent. Enhancing the click may, however, be warranted when it aims to replicate the functions of a signature for the purpose of meeting formal requirements. Laws establishing formalities seek to alert signatories to the potential consequences of their acts. Accordingly, the ceremonial or protective functions of signatures may require that assent involve a more complex action.¹¹⁰ Absent formal requirements, however, no enhancement or duplication are necessary.

A strict adherence to the objective theory of contract often produces undesirable results, such as holding a party to the appearances of a promise, which the party was not subjectively intending to make. Such undesirable results may appear more pronounced in web-based transactions. Problems of not knowing that terms exist or not reading them are, however, not new. Many of the arguments questioning the validity of browse-wraps or click-wraps could be raised against any contract in which standardized terms are not immediately available.

CONCLUSIONS:

Legal literature dealing with "electronic-" or "Internet-contracting" often overlooks the basic rule that intention can be expressed in any manner and that it is evaluated objectively. Existing e-commerce literature is the product of numerous misconceptions regarding both technology¹¹¹ and - surprisingly - contract law. Most, if not all, alleged "challenges" created by novel technologies fit within the existing legal framework, technological complexity and novelty of the Internet notwithstanding. Most "challenges" are also unrelated to the fact that transactions are concluded on websites or via email, i.e. they are not technology-specific. The new transacting environment frequently exacerbates pre-existing difficulties, but it does not necessarily create them.

It is true that "[w]hat was a valid application of the principles in Parker's day and in Hood's day may not be a valid application today."¹¹² This does not imply, however, that new, technology-specific principles are necessary or that legal problems need technological solutions. Legal analysis must reflect technological change without succumbing to the temptation to create new categories.

Unquestionably, the presence of technological factors renders such analysis more difficult. The problem lies in selecting which technologies or technological factors are relevant. Arguments must not be constructed on the basis of an arbitrary selection of characteristics, which are either layer-specific or apply to all Internet-based communications. Packets and electrical impulses have no impact on the contracting process. Both terms - "electronic" and "Internet" - must be discarded from analyses of contract law. The most important features of modern communication technologies must be recognized: the fact that they rely on a network and the fact that the network is heterogeneous. It is the lack of full interoperability between networks and the frequent incompatibility between applications that is a source of legal problems. One must recall the complications caused by user dependence in the provision of notice in web-based

¹⁰⁹ Simon Jones, 'Forming Electronic Contract in the United Kingdom' (2000) 11 ICCLR 301-308, 301; Yochai Benkler, *op cit* n 30 above, 170.

¹¹⁰ Henry H Perritt, Jr., *DIGITAL COMMUNICATIONS LAW* (Aspen Publishers, 2010) 9-36, 9.06[A].

¹¹¹ Frank H. Easterbrook, 'Cyberspace and the Law of the Horse' (1996) U Chi Legal F 207.

¹¹² *Hollingworth v Southern Ferries Ltd* ("The Eagle") [1977] 2 Lloyd's Rep 70 at 78.

transactions and the difficulties in ensuring receipt of email messages caused by incompatible mailing systems and conservative security settings.

It is not the instantaneous character of modern communications, but the combination of speed of transmission with uncertainty of delivery and the introduction of presence protocols, that force a re-thinking of traditional analytical approaches. It is a mistake to tie legal principles to instantaneousness alone or to equate instantaneousness with face-to-face dealings. The first step in any analysis should always be whether a given communication process displays the characteristics of face-to-face interactions. Only then can the principle of receipt be contemplated.

There is no need to duplicate or enhance the act of assent solely on the ground that a contract is formed via a web-interface. Clicks are as valid a method of expressing intention as handshakes and signatures. The dangers of the novel environment must, however, be acknowledged: the contractual character of an act may not be obvious, the communicative signs are new. The transaction occurs in an information-rich but context-poor environment. It is the notice of the terms' existence that must be enhanced, not the act of assent. Terms need not be unavoidable. They must, however, be brought to the attention of the other party – especially if they prescribe the form of assent. The failure to incorporate terms may therefore be synonymous with the failure to form a contract. Remaining on the website can denote assent - provided that the user knows that his continued browsing is subject to terms. It is therefore not a question of incorporating an additional click in the transacting procedure but of increasing the general transparency of the contracting process.

It seemed easier to create a new category than to enrich the traditional analysis with technological considerations.