

Singapore Management University

## Institutional Knowledge at Singapore Management University

---

Research Collection Yong Pung How School Of  
Law

Yong Pung How School of Law

---

5-2014

### Terms of Use: Reflections on a Theme

Eliza MIK

Singapore Management University, elizamik@smu.edu.sg

Follow this and additional works at: [https://ink.library.smu.edu.sg/sol\\_research](https://ink.library.smu.edu.sg/sol_research)



Part of the [Contracts Commons](#), and the [Internet Law Commons](#)

---

#### Citation

MIK, Eliza. Terms of Use: Reflections on a Theme. (2014). *Asian Law Institute 11th Conference, 28-30 May 2014, Kuala Lumpur*.

Available at: [https://ink.library.smu.edu.sg/sol\\_research/1299](https://ink.library.smu.edu.sg/sol_research/1299)

This Conference Paper is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email [cherylds@smu.edu.sg](mailto:cherylds@smu.edu.sg).

## Terms of Use: Reflections on a Theme

Eliza Mik<sup>1</sup>

Singapore Management University

### Abstract

The paper presents multiple perspectives on the unpopular but omnipresent terms of use (or "ToUs"), i.e. terms and conditions contained in a link at the bottom of many websites. ToUs serve different functions: from governing the transaction taking place on a website, (e.g. contracts of sale) to the very act of browsing. Accordingly, every browsing experience has both a commercial and a legal tint. On a theoretical level ToUs raise concerns with regards to their validity as legally binding contracts as well as to their incorporation. Both formation and incorporation converge on the presence and quality of contractual intention. The latter underpins the freedom of contract - a concept frequently overlooked in endless discussions of "click-" and "browse-wrap" agreements. One must not be deceived by the paper's purely contractual perspective - problems of ToUs underlie many legal aspects of privacy and intellectual property. Our most important online relationships with providers like amazon, facebook or google are governed by ToUs that are frequently perceived as irrelevant, unimportant or simply unenforceable. Many traditional arguments raised "against" standard terms can be transposed onto online ToUs. Care must be taken not to imply that these arguments are new or unprecedented. What cannot be denied, however, is that the growing importance of ToUs online sheds new light on these "old" problems and forces a re-evaluation of some traditional positions in light of the technological possibility of ensuring a nearly seamless communication process: informing the website user that terms exist and ensuring their availability. At present, the problem has not been addressed in any of the Asian jurisdictions. Given the growing importance of online transactions in their national economies it is only a question of time when courts will have to confront ToUs in all their complexity.

### Introduction

They are everywhere, yet we pretend they do not exist. They govern our every move and our most intimate relationships online, yet we deny their validity. They make us surrender our private information and the copyright to our content, yet we assume (or hope?) that they do not. Terms of use ("ToU" or "terms") accompany every online transaction or, to be more precise, *interaction*. We do not "go on the Internet" to enjoy the technicalities of the TCP/IP protocol. We go on the Internet to do things: to read, to watch movies, to listen to music, to communicate with friends or simply to work. Most of these activities are (or purport to be?) subject to contract, regulated by a set of standard terms placed on the bottom of the webpage. We often refer to these terms as "hidden" behind a hyperlink although the hyperlink by its very nature renders them immediately available for our review. We prefer to believe, however, that such terms do not bind us and can thus be ignored. We also endlessly complain about companies like google and facebook: they "steal" our data and "misappropriate" our personal information by using it for targeted advertising. We prefer not to acknowledge the possibility that our use of the services and content provided by google & co may be subject to a contract, worse yet – that we may have agreed to the very things we are complaining about. ToUs abound in controversies

---

<sup>1</sup> Assistant Professor, Singapore Management University, School of Law; this paper has been presented at the 11<sup>th</sup> ASLI Conference, University of Malaya, Kuala Lumpur, 29 & 30 May 2014.

and misunderstandings. Their validity or enforceability as contracts is frequently questioned on the basis of popular sentiment – not legal principle.

Below, I reflect on some basic legal problems pertaining to ToUs from a contract law perspective. I steer clear from oversimplifications at the risk of sounding overly theoretical or doctrinal. Three general observations are necessary. First, we can no longer refer to the Internet and related legal issues as “new” or “revolutionary.” The Internet is no longer an emerging technology. It has become an integral part of everyday life. One generation grew up with (or *on*?) the Internet. Older generations are becoming more technology literate. Most of us can no longer plead ignorance of Internet-related issues, be it technological (“what is email?”) or legal (“I had no idea file sharing of copyright music is illegal!”). Second, we must acknowledge the differences between the offline environment (a.k.a. the “real world”) and the online world.<sup>2</sup> We must not, however, exaggerate these differences. We still intuitively assume that the “online world” or “cyberspace” is governed by no rules or at least by different rules. Separatist movements and the accompanying references to “cyberspace” are a thing of the past, though. In the words of one judge, the question is not whether traditional legal principles apply in cyberspace but - how do they apply?<sup>3</sup> The Internet is not an excuse to abandon basic concepts of contract law.<sup>4</sup> Third, when discussing the Internet, we are always in a transitional period. The Internet, its technologies, applications and business models are constantly evolving.<sup>5</sup> In the near future we might be looking at today’s legal problems and technical concepts with the same sentiment as we look at Pac-Man and floppy discs today. On the Internet, any novelty is temporary. ToUs underpin many different transactions and interactions. They intersect with broader issues of privacy, intellectual property and transactions in information, areas that are not only complex in their own right but also subject to constant developments. In particular, any legal controversies in the subject areas that are governed by ToUs will invariably affect our perception and arguments pertaining to ToUs. Consequently, like any other academic attempt in this area, the discussion faces the difficulty of drawing clear distinctions or constructing arguments that will remain relevant for more than 1 year. Despite this fluctuating legal and technological landscape, Asian jurisdictions are in a unique position of being able to learn from the mistakes made in both the EU and in the US. Singapore, which follows the English common law of contract, enjoys two benefits: the benefit of a system of principles that have proven extremely stable yet flexible in light of technological change and, the benefit of hindsight and the resulting ability to better appreciate of the legal problems involved in online transactions.

### ***Online shopping and transactions in information***

The importance of ToUs can only be appreciated against the backdrop of actual economic trends. The Internet economy is moving from simple retail exchanges to sophisticated transactions in information and services. Amazon.com is no longer just an online retailer of books and CDs but a provider of web services and cloud computing. The Internet is not just about communication anymore, but about distribution and access. In parallel, we observe a general commercialization of the

---

<sup>2</sup> See generally: J E Cohen, ‘Cyberspace as/and Space’ (2007) 107 Colum. L. Rev. 210, who discusses the division between the online world and the real world on conceptual level

<sup>3</sup> *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] SGHC 71 at 91 per V K Rajah JC

<sup>4</sup> See generally: Cheryl B Preston, Eli W McCann, Unwrapping shrinkwraps, clickwraps, and browserwraps: how the law went wrong from horse traders to the law of the horse (2012) 26 BYU J. Pub. L. 1

<sup>5</sup> Chris Reed, *Making Laws for Cyberspace* (OUP 2012)

web, a transition from a “free everything” approach to restricted access models. The complexity of this environment is reflected in the difficulty of finding the appropriate terminology. There are many labels we can give to the same legal phenomenon and there are many ways of looking at the same thing. ToUs can be referred to as “Terms of Service” or, in some contexts, as End User License Agreements. ToUs govern online shopping as well as software licensing. More importantly, they play an important role in the commodification of information.<sup>6</sup> As more value is placed both on the information made available by website and platform providers (“operators”) *and* on the information provided by users, ToUs become a convenient method of circumscribing the permissions granted by the former or surrendered by the latter. Transactions in information are generally associated with the importance of private agreement in the context of copyright law and digital rights management.<sup>7</sup> The degree to which certain rights can be created by contract remains controversial. What is beyond controversy, however, is that when the contractual subject matter is information, its value differs depending on what uses are permitted.<sup>8</sup> ToUs can thus be essential in shaping this subject matter.<sup>9</sup> Given the difficulty of differentiating between information and services, I assume that the former include the latter. After all, the term “information services” is gaining popularity. News websites are often regarded as services although they seem to perform the same function as traditional newspapers. The latter have never been perceived as services, even if we ignore the physical embodiment of paper and focus on the *provision* of information. Accordingly, “access” and “use” can be used interchangeably.

There is nothing new about terms governing a transaction, such as a sale of goods, or terms imposing communication rules, similar to those encountered in Electronic Data Interchange agreements.<sup>10</sup> There is also nothing new about some terms being unfair. The novelty lies in the subject matter and the resulting prevalence of ToUs. Once the website itself and the information provided thereon become the object of the transaction many online activities become subject to contract. Interactions morph into transactions. In parallel to the commercialization of the Internet we can speak of a “contractualization” of online relationships. ToUs seem to regulate every move online – as every move involves access or use of information. ToUs can contain different types of provisions: some govern the use of the website, others the specific transaction. The former may contain a number of Internet-specific provisions, such as the exclusion of liability for website errors<sup>11</sup> (e.g. the malfunctioning of the electronic agent deployed by the operator) as well as communication rules prescribing that, for example, by staying on the site the user accepts its terms.<sup>12</sup> The latter may contain more familiar provisions relating to classic sale of goods transactions, such as product warranties and conditions of delivery. This distinction is clearly made by amazon.com, which divides its terms into “conditions of sale and use.”<sup>13</sup> This

---

<sup>6</sup> See generally: A Ottolia, D Wielsch, Mapping the Information Environment: Legal Aspects of Modularization and Digitalization (2003-2004) 6 Yale J.L. & Tech 174

<sup>7</sup> Yochai Benkler, An Unhurried View of Private Ordering in Information Transactions, (2000) 53 (6) Vanderbilt Law Rev. 2063, at 2063

<sup>8</sup> 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

<sup>9</sup> Niva Elkin-Koren, Governing access to user-generated content: the changing nature of private ordering in digital networks [318-342] at 321, in *Governance, Regulations and Powers on the Internet*, ed., E Brousseau, M Marzouki, C Meadel, (2012) Cambridge University Press

<sup>10</sup> J B Ritter, J Y Gliniecki, ‘Electronic Communications and Legal Change: International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms’ (1993) 6 Harv J Law & Tech 263

<sup>11</sup> M Chissick, G Vesey, *The Perils of On-Line Contracting* (2000) 6 (5) CTLR 121-122

<sup>12</sup> See generally: S K Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements* (2003) 26 HMLR 499

<sup>13</sup> See: [www.amazon.co.uk/gp/help/customer/display.html/ref=footer\\_cou/275-6210360-5283240?ie=UTF8&nodeId=1040616](http://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_cou/275-6210360-5283240?ie=UTF8&nodeId=1040616)

distinction is absent when the website itself constitutes the object of the transaction. In other words, ToUs increasingly govern not just online shopping but the very use of websites. I intentionally avoid references to e-commerce, which seems increasingly difficult to define. Although historically the term denoted the use of the Internet to conduct business,<sup>14</sup> the concept of e-commerce may now have to be expanded to include online activity in general. In this unexpectedly broad context, access to information, or browsing, is seen as consent to a contract *and* to the ToUs displayed on the website.

### ***Formation and Incorporation***

Online activity is governed by a complex web of rules, which originate from legislatures, governmental agencies, international organizations and – from the transacting parties themselves.<sup>15</sup> ToUs can thus be regarded as a form of self-regulation or private ordering.<sup>16</sup> ToUs exist within a broader legal framework, the rules of which they must follow as a condition of enforceability.<sup>17</sup> ToUs must be distinguished from community norms. The latter are often perceived as reflecting the early spirit of Internet self-governance. Community norms are not, however, legally enforceable. It is only a valid contract that carries the protection of the state.<sup>18</sup> Unsurprisingly, the framework for online *commercial* activity is made of thousands of contracts. ToUs raise concerns regarding the formation (i.e. existence) of a contract, the incorporation of terms and the communication of intention (i.e. acceptance). Legal discussions often conflate questions regarding the quality of intention with questions pertaining to general validity. For present purposes it must be recalled that incorporation and formation are discrete concepts, discussed in separate chapters in textbooks on contract law. While this separation may appear artificial at times, each concept raises a set of different legal problems. In the context of ToUs, the distinction between the *formation* of a contract and the *incorporation* of terms into a contract must be maintained. Formation concerns the *existence* (validity, enforceability) of a contract. It involves the concepts of consideration and intention. Incorporation concerns the *contents* of an existing contract. This division is also reflected in the concepts of freedom *of* contract and freedom *to* contract.<sup>19</sup> Incorporation may, however, indirectly affect the contract's existence. Such will be the case when the terms that are to be incorporated prescribe the manner of expressing intention (e.g. “by staying on the site you agree to be bound by...”). Technically, if terms have not been communicated, which is a prerequisite of incorporation (at least theoretically) the other party does not know how to express intention. To complicate matters, the legal problems relating to formation and incorporation become dangerously intermingled when debating the validity or effectiveness of ToUs. At times then, they must be analyzed together.

<sup>14</sup> K C Laudon, C G Traver *E-commerce 2014: Business, Technology, Society* (10<sup>th</sup> ed, Prentice Hall 2014)

<sup>15</sup> B Daffains, Jane K. Winn, The effects of electronic commerce technologies on business contracting behaviors [344- 366] at 347, in *Governance, Regulations and Powers on the Internet*, ed., E Brousseau, M Marzouki, C Meadel, (2012) Cambridge University Press

<sup>16</sup> Niva Elkin-Koren, Governing access to user-generated content: the changing nature of private ordering in digital networks [318-342]; on self-regulation generally see: Robert Baldwin, M. Cave, M. Lodge, *Understanding Regulation – Theory, Strategy, Practice* (2<sup>nd</sup> ed, OUP 2012) at 3

<sup>17</sup> Margaret Jane Radin & R Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace* (1998) 73 *Chicago-Kent Law Rev.* 1295, at 1296

<sup>18</sup> Jack Goldsmith, Tim Wu, *Who Controls the Internet? Illusions of a borderless world* (OUP 2006) 138

<sup>19</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848

### *Are ToUs contracts?*

Despite their omnipresence and importance, it is still frequently questioned whether ToUs are contracts. This question is synonymous with “are ToUs binding?” or “are they enforceable?” Users assume (or hope) that they are not; operators insist they are. The answer boils down to basics. A valid and enforceable contract requires consideration and intention. No formalities are required. Contract law is extremely flexible and “forward compatible” in the sense of being able to accommodate new methods of communicating intention as well as new forms of consideration. A quick look reveals that ToUs can be valid contracts, or – that there is nothing in the law of that would prevent a contract coming into existence in the circumstances typical to the presentation of ToUs. Consideration need not be adequate or measurable in monetary terms. It suffices that one party suffers a detriment or that the other obtains a benefit. These principles are easily transposed online: operators derive benefits from their users.<sup>20</sup> In return for viewing content or using a service, users “pay” (or suffer a detriment) by permitting (or enabling) the collection of their personal information. While most of the information is provided “free of charge,” the absence of payment is not synonymous with the absence of consideration. The latter may consist in the permission to study browsing behavior.<sup>21</sup> After all, the main resource in the Internet economy is personal information, which includes not only the sign-up information users voluntarily submit when setting up an account with e.g. facebook or google but also the information disclosed “involuntarily,” without intention or awareness. A problem seems to arise at this juncture: can consideration be provided unintentionally? Problems of consideration usually pertain to its adequacy or sufficiency in the eyes of the law. The question is “did a party provide consideration?” – not “did a party *intend* to provide consideration?” In a recent English case, it was emphasized that consideration need not be the output of a conscious thought process.<sup>22</sup> In the same context, however, the court emphasized that when the detriment is suffered there must be a belief that something will be received in return. Although consideration and intention are analyzed separately,<sup>23</sup> there is an inevitable overlap between the two. Users provide their personal information because they have been asked to do so as a condition of using the service or accessing the content. When users relinquish any rights to their content or personal information, they do so because they have agreed to it. Unexpectedly, the provision of information seems to be interrelated with intention, the second indispensable component of every contract. Surprisingly, the presence of consideration may thus depend on – or at least correlate with - the legal effect of the act purporting to be an expression of intention. Intention is evaluated objectively from the perspective of a reasonable addressee. On one hand, contract law presumes intention based on choice and voluntariness. On the other, contract law is concerned with identifying the circumstances in which parties are *regarded* as having reached agreement. Intention is therefore a product of context. It is also important to note that intention can be expressed in any manner. The parties can “conduct themselves in relation to each other that an implied contract” is to be inferred from their conduct.”<sup>24</sup> The acts of browsing or clicking can manifest intention

<sup>20</sup> Diane Rowland, Ute Kohl, Andrew Charlesworth, *Information Technology Law* (Routledge 4<sup>th</sup> ed. 2012) (“*Information Technology Law*”) at 254; for a description of various revenue models based on user activity see: Dave Chaffey, *E-Business & E-Commerce Management* (Prentice Hall London 2013) 76

<sup>21</sup> J K Winn, *Contracting Spyware by Contract* (2005) 20 Berkeley Tech L J 1345 at 1349, 1354; see also E-Commerce Directive Recital 18 and *Metropolitan International Schools Ltd v Designtecnica Corporation and Google UK and Google Inc* [2009] 1765 QB

<sup>22</sup> *Pitts v Jones* [2007] EWCA Civ 1301 at 18

<sup>23</sup> although historically, consideration was regarded as proof of intention, see: *Pillans v Van Mierop* (1765) 3 Burr. 1663

<sup>24</sup> Chitty on Contract, 31<sup>st</sup> ed (2013) Vol. I. para. 2-163

in the same way as handshakes, nods or signatures.<sup>25</sup> Legally, these acts are of equal value - a fact often forgotten by those who doubt the enforceability of online agreements. The popular concern that “just browsing” cannot be regarded as consent to a contract or the acceptance of its terms<sup>26</sup> is thus unjustified. ToUs can be treated at par with any other contract even if it is the website itself that constitutes the subject matter of the transaction and even if intention is expressed by a click.

The story does not end here, though. The fact that ToUs can be valid contracts, or that merely browsing a website can lead to a legally enforceable agreement, does not mean that they are devoid of other legal challenges. Some of these challenges are real; others seem to derive from a misapprehension of the basic principles of contract law and the simple, popular dislike of ToUs. This dislike often translates into arguments that ToUs *should not be binding*. Two points arise: first, we must not idealize traditional contracting and imply that offline practice requires a “meeting of minds” or “actual agreement.” Informed choice and the communication of intention or terms are abstract ideals, not strict requirements. The ability to negotiate is not a prerequisite of a valid agreement, neither is the existence of real choice whether to contract. Principle must be distinguished from practice. Second, we must abandon the romanticized view of Internet self-regulation, including its participatory character or “contractual self-determination.” Many of us remember the early cyberspace scholarship of Johnson and Post, who famously advocated a self-regulatory model for online activity as naturally deriving from the decentralized character of the Internet.<sup>27</sup> Similarly, the concept of private ordering assumes that each party *voluntarily* chooses to undertake the norms that will govern its behavior. Internet literature is permeated with notions of freedom, equality and opportunity. Again, the latter are abstract ideals, which derive from popular articles or populist slogans that are not necessarily supported by rational legal arguments. The Internet is nothing but a collection of protocols enabling a variety of communication methods. It has no inherent nature and does not embody any humanist values. Ideals must be distinguished from reality. Neither the real world nor the “online world” are as perfect as we tend to portray them when constructing arguments against the legal effectiveness of ToUs. The “exceptionality” of the Internet does not change the principles of contract law.

### ***A question of incorporation?***

We must also look at ToUs from the perspective of incorporation. Traditionally, once the existence of a contract is not in doubt, the next step is the determination of its contents. This frequently involves an inquiry as to what terms have become incorporated into the contract. English courts adopt a less liberal approach to incorporation whenever the other party is a consumer thereby indirectly counterbalancing the negative effects of standardization or the unfairness of specific terms. The fairness of a term can thus impact on the effectiveness of its incorporation. It may be easier to declare that a particular provision has not been incorporated than establishing that it is unfair or unreasonable.<sup>28</sup> English courts have developed multiple methods of analyzing incorporation. Terms can become part of the contract: by signature, by reasonable notice, under the principles established in the ticket cases, by reference or by sufficient course of dealing. Although there are significant differences

<sup>25</sup> R A Hillman, J J Rachlinski, *Standard-Form Contracting in the Electronic Age* (2002) 77 NYULR 429 at 463

<sup>26</sup> M A Lemley, ‘Terms of Use’ (2006) 91 Minn L Rev 459 at 460; L Lessig ‘The Law of the Horse: What Cyberlaw Might Teach Us’ (1999) 113 Harv L Rev 501, 519

<sup>27</sup> David R Johnson and David Post, *Law and Borders – The Raise of Law in Cyberspace* (1996) 48 Stan. L. Rev. 1367 at 1388

<sup>28</sup> *Interfoto Picture Library Ltd vs Stiletto Visual Programmes Ltd* [1987] EWCA Civ 6

between these methods, they share some important characteristics. The underlying principle is that the party who is not seeking to deal on its terms, has the right to know the proposed terms of the contract before assenting to it. And so, if a document is signed, the signatory is bound, regardless whether he has read the document.<sup>29</sup> A misrepresentation of the effect or the contents of the document may prevent incorporation.<sup>30</sup> Despite the broad understanding of the term “signature,” the classic cases deal with handwritten signatures on documents that were evidently *contractual*. The point here, however, is not to debate what constitutes a signature in online transactions.<sup>31</sup> The point is that signatures, whether traditional or “electronic” have a certain legal effect only if they are placed on a *contractual* document. In other words, the nature of the document distinguishes a signature that results in incorporation from a signature that does not. When it comes to incorporation by notice, it is accepted that such notice must be reasonable in light of the accompanying circumstances.<sup>32</sup> More notice is required for particularly onerous provisions.<sup>33</sup> The sufficiency of notice is evaluated objectively, with the reasonable addressee in mind. People are expected to know that certain contracts are generally governed by terms.<sup>34</sup> In “ticket cases” courts often engage in hair-splitting analyses regarding the exact moment the ticket is provided. Successful incorporation largely hinges on the time of delivery.<sup>35</sup> More importantly, the nature of the document (i.e. the ticket) must be obvious.<sup>36</sup> It must be reasonable to expect terms, or at least writing, on the ticket. We could extrapolate from these principles that the less obvious the transactional context (or, the more unexpected terms) the more notice should be provided. While websites are neither tickets nor documents, we can assume that in certain circumstances it is reasonable to expect terms “on” them. With regards to incorporation by reference, it is acknowledged that the full text of the terms may be difficult to present in the contractual document or at the time of transacting. Reference can be made to the standard terms of one party. The party seeking to incorporate terms must specifically point to the document containing such or to the place where they can be found. Successful incorporation may depend on the wording of the reference<sup>37</sup> and/or the construction of the incorporating document.<sup>38</sup> Courts have tolerated references to terms available in remote locations, such as references on tickets made to terms in offices.<sup>39</sup> Such “tolerance” illustrates the often fictional character of the “*communication* of terms.” It must be re-emphasized that the objective approach requires *appearances* of intention. A contract comes into being even if one party subjectively believed that he would not be bound until a formal document was prepared.<sup>40</sup> Websites can be designed to take advantage of the objective theory of contract, without actually informing the other party of the terms. We can speak of a risk of “exploitation” of the objective approach or of “creative compliance.” Operators can reduce the likelihood of the terms’ review by providing minimal yet sufficient notice or making it cumbersome to obtain them. Similarly, in the real world,

<sup>29</sup> *L’Estrange v F Graucob Ltd* [1934] 2 KB 394; *Parker v South Eastern Railway Co* (1877) 2 CPD 416

<sup>30</sup> *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805

<sup>31</sup> For a discussion of this subject see: Elizabeth McDonald ‘Incorporation of Terms in Website Contracting – Clicking ‘I Agree’ (2013) JCL 27, 198

<sup>32</sup> *Chapelton v Barry Urban District Council* [1940] 1 KB 532; *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379;

<sup>33</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433

<sup>34</sup> *Cockerton v Naviera Aznar, SA* [1960] 2 Lloyd’s Rep 450

<sup>35</sup> *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169

<sup>36</sup> *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837; see also: *Atiyah* p 186

<sup>37</sup> *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd’s Rep 160

<sup>38</sup> *Hong Kong Borneo Services Co Ltd v Pilcher* [1992] 2 Lloyd’s Rep 593

<sup>39</sup> *Hollingworth v Southern Ferries Ltd (“The Eagle”)* [1977] 2 Lloyd’s Rep 70

<sup>40</sup> *Tweddel v Henderson* [1975] 1 W.L.R. 1496; *Storer v Manchester City Council* [1974] 1 W.L.R. 1403, 1408



courts have tolerated terms contained in small print or “made available” only upon request. Operators can always claim that had the user paid more attention to what was displayed on-screen, he would have noticed the link to the terms. The question is: why would the user pay attention?

*A question of context?*

As indicated above, terms must be presumed in a contractual setting or when the document provided is objectively contractual. Once their existence is brought to attention (in however minimal way possible), the party is expected to make inquiries regarding their actual content. If, however, it is not apparent that a transaction is taking place, there is no reason to assume that a contract is required or that terms exist. It must be clarified that the parties need not perceive the situation as contractual or contemplate the *full legal* implications of their actions, e.g. that taking goods to the check-out will result in a contract of sale and terms will be implied by statute.<sup>41</sup> While *all* legal consequences of a particular act need not be envisaged or intended, contracts are rarely entered into involuntarily or accidentally. In the real world, transactions occur in a familiar environment, contracts come into being in a specific context. An intention to create legal relations can only be presumed in a commercial or at least transactional setting<sup>42</sup>

A lot of scholarship has been devoted to “click-wrap” and “browse-wrap” agreements, which symbolize online contracts of adhesion. “Click-wraps” include an additional element that must be activated before the transaction is completed (e.g. an ‘I agree’ tick-box), whereas “browse-wraps” lack such element. In the majority of circumstances, ToUs fall under the “browse-wrap” category. We need not, however, continue the debate whether an additional click is a condition of enforceability. Theoretically, it is not. Contract formation and the incorporation of terms occur in one act. Acceptance, or any other final manifestation of intention, concludes the contract together with its terms. The theory behind “clickwraps” is misconceived. The formation of a contract or the incorporation of terms does not hinge on the number of clicks or additional graphical elements that must be activated. The problem boils down to notifying the user that a transaction is taking place. If the existence of a contract is not in question, the notification should pertain to the existence of terms. Complications may arise if terms prescribe communication rules,<sup>43</sup> e.g. remaining on the site constitutes assent to the terms *and* to the contract. The fact that the user knows (or should know) *about* the terms *and* proceeds within the site indicates an objective intention to contract.<sup>44</sup> The legal consequence of remaining on the site must be brought to the user's attention. By definition, interacting with graphical user interfaces such as the world-wide-web, involves clicking. The legal effect of a click, if any, depends on the objective evaluation of context in which it occurred. The transactional context is immediately apparent whenever there is a commercial exchange, i.e. ordering goods from amazon.com or downloading music from iTunes. Problems arise when the transactional context is transparent, when the user is unaware that an exchange is occurring. It is not necessarily reasonable to expect terms. In such instance, a click can neither express intention to be contractually bound nor the

---

<sup>41</sup> e.g. Sale of Goods Act 1979

<sup>42</sup> M J Madison, *Rights of Access and the Shape of the Internet* (2003) 44 B C L Rev 433 at 457

<sup>43</sup> *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)

<sup>44</sup> M J Radin, *Online Standardization and the Integration of Text and Machine* (2002) 70 Fordham L Rev 1125 at 1126

acceptance of terms. A click for navigational purposes does not differ from a click expressing intention or obtain a benefit.<sup>45</sup> We cannot agree, however, a click interpreted to indicate contractual intention is different from a click made to obtain a benefit.<sup>46</sup> Taking “something” constitutes assent to whatever terms accompany this “something.” In cases like *Specht v Netscape Communications*,<sup>47</sup> where the user downloaded software, the differentiation between incorporation and formation becomes important. We can download software and not be aware that there are terms governing its use (e.g. due to insufficient notice). We cannot, however, claim that we had no awareness of a transaction. It is becoming increasingly difficult to argue that something can be taken without an expectation that something must be given in return or that it is subject to contractual restrictions. Much will depend on the *type* of information being accessed or the type of benefit being obtained. Here, we must distinguish between music, movies or software on one side, and “pure information” on the other.

One reason many users may not perceive the context as transactional (and hence not expect terms) is the continuing expectation of “free everything.” Historically most of the information on the Internet was available without charge and without restrictions. It could thus be claimed that users generally do not expect that access to information is governed by terms or that it may result in or require a contract. Absent an expectation of a transaction, there can be no reasonable expectation of terms. Users expect unrestricted access to any content that is made available on websites or platforms. After all, the popular rhetoric is that “information wants to be free.” On one hand then, there is a sense of entitlement to free content. On the other, it becomes increasingly difficult to claim ignorance of the following: (a) it is expensive to create high quality content; (b) content is frequently the object of intellectual property protections or other restrictions (c) it is *very* expensive to keep content available. The copyrights of content owners are widely ignored and infringed. The fact that companies like facebook and google maintain server farms and maintain additional connectivity to shorten access times is conveniently forgotten. Moreover, if users claim (or assume) that information should be free and access to it should be unrestricted – why do they complain if *their* information is being used? We either recognize information as an asset or we reject the very concept of information carrying value. The “I had no idea this information is restricted”-argument is untenable. And with it: “I had no idea that I am bound by the terms on the bottom of the webpage!” We can endlessly debate what creates a transactional context. We must, however, realize that we cannot built arguments based on users’ “wishful thinking.” Users cannot ignore the ToUs on the ground that they assumed (or hoped) they are not binding. 10 years ago it might have been difficult to speak of general usages of trade or reasonable expectations. Presently, websites are being designed along similar lines. Conventions have developed as to how content is presented. Many websites follow a similar pattern of providing a link to the ToUs at the bottom of the page. Such link not only serves as notice of terms but also guarantees their immediate

---

<sup>45</sup> See e.g. *Federal Trade Comm v The Crescent Publishing Group Inc* 129 F Supp 2d311 (SDNY 2001), where the fact that progressing within the site will result in charging the user’s credit card was not made obvious.

<sup>46</sup> In *Specht v Netscape Communications* 306 F 3d 17 (2<sup>nd</sup> Cir 2002) the court held that clicking “Download” did not indicate assent in the same way that clicking “I Assent” does, downloading being “hardly an unambiguous indication of assent.” The primary purpose of downloading was obtaining a product, whereas “clicking on an icon stating ‘I assent’ has no meaning or purpose other than to indicate such assent.”

<sup>47</sup> In *Specht v Netscape Communications* 306 F 3d 17

availability.<sup>48</sup> Can this presentation of ToUs be considered manipulative? Can the link be regarded as “hidden”? In this context, we could also debate the adequacy of notice, in terms of its “conspicuousness” and its ability to “survive” different browser versions. We must be clear, however, what notice should pertain to: the existence of terms, the existence of access restrictions or simply the fact *that a contract is being made*? Can it be said that the very presence of the ToUs creates a transactional context? Or, without even debating whether terms create context, can users plead ignorance of something that is known to be there? We enter a vicious circle: what makes the context transactional? Terms cannot be expected absent such context, yet they are always there. Because ToUs are on the bottom of almost every website, users should expect them. The repeated use of a website could thus lead to an incorporation by course of dealing.<sup>49</sup> It must be admitted, however, that the logic behind this argument is somewhat unconventional in the sense of diverging from the basic principles of contract law. Traditionally, users should expect terms when a transaction is taking place. Here, users are expected to know that a transaction is taking place because terms exist! Given that it is inherently difficult to decide whether the transactional context is a prerequisite of (an expectation of) terms or whether terms are a prerequisite of a transactional context, the question seems to be one of contractual subject matter. Ultimately, it is the latter that creates the context and should shape user expectations accordingly. Needless to say, problems inherent in the lack of transactional context are minimized when operators condition access to their content on the prior establishment of an account. The latter involves not only an agreement to terms, but also the provision of payment information and other personal details. Given that the latter acts are deliberate, it is highly unlikely for accounts to be created unintentionally. This stands in contrast to terms that purport to bind a user who is “only” browsing.

### *A look afar: US/EU*

Despite substantial differences in legal technique and tradition, civil and common law jurisdictions display many similarities in the regulation of online activity. In both types of jurisdictions, such activity is predominantly governed by contract.<sup>50</sup> Consequently, the main difference between them lies in the manner contract law is applied to online transactions and in the way top-down regulatory instruments influence such application. It can be generalized that in the U.S. it is the courts who test the adequacy of transactional interfaces in light of the applicable principles of law, while in Europe it is regulatory agencies who prescribe certain rules and supervise their implementation. The UK lies in-between those two approaches. Although it is a common law jurisdiction, it must implement EU directives by means of subsidiary regulatory instruments.

In the US, most developments in the area of online contracting derive from judicial decisions, which often focus on the enforceability of arbitration or forum selection

---

<sup>48</sup> See, e.g. UNCTRAL Model Law on Electronic Commerce Art 5bis, “Incorporation by reference”: Information shall not be denied legal effect, validity and enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.

<sup>49</sup> *Spurling v Bradshaw* [1956] 2 All ER 121

<sup>50</sup> Andrew Murray, *Information Technology Law* 2010 Oxford University Press (“*Murray*”) p 413; P. B. Hugenholtz, Code as Code, or The End of Intellectual Property as We Know It” (1999) *Maastricht Journal of European and Comparative Law*, 6(3), 308-318; Lee Bygrave, Contract vs. Statute in Internet Governance, in *Research Handbook on Governance of the Internet*, Ian Brown, ed., Edgar Elgar, Cheltenham (2013) at 172

clauses.<sup>51</sup> Consequently, the decisions analyzing the effectiveness of various contract formation interfaces or the enforceability of standardized terms have a procedural tint. US cases and literature rarely distinguish between incorporation and formation. The focus is usually on the incorporation of individual terms, which are analyzed in terms of *enforceability*.<sup>52</sup> As only terms that have been incorporated are enforceable, the difference in terminology can be disregarded. Incorporation procedures are generally discussed in relation to the “manifestation of assent,” “reason to know” and “opportunity to review.” The terms easily translate into the English law concepts. In certain circumstances users are deemed to know that terms are present – be it due to adequate notice or a clearly transactional context. Unfortunately, many US decisions are best described as “of limited utility” due to their distortion of contractual principles. This distortion is popularly justified by the need to promote e-commerce or transactions in technology. In one of the most prominent cases, *ProCD v Zeidenberg*, Judge Easterbrook emphasized that the master of the offer can prescribe acceptance in any manner and that intention can be expressed in any manner.<sup>53</sup> *ProCD* concerned the enforceability of terms disclosed *after* an event that would commonly be regarded as the moment of formation: the exchange of money and goods.<sup>54</sup> The case separated notice of terms from their availability and went against the basic idea that parties must agree on all the terms of the contract. Unfortunately, *ProCD* was followed in numerous cases.<sup>55</sup> What subsequent courts seem to remember about *ProCD* is the economic necessity of enforcing online contracts to protect a technology market even if traditional contract doctrine is sacrificed in the process. According to Winn, electronic contracting cases exemplify “legal realism”: “judges will manipulate the doctrine to achieve the outcomes they consider fair or practical.”<sup>56</sup> Such practices, however, have been heavily criticized in US scholarship,<sup>57</sup> especially in terms of their compliance with the UCC.<sup>58</sup> The approach to US case law must therefore be cautious and selective as not correctly implementing the contractual principles in the online environment. The general rule remains that the offeree can only accept what was offered and that terms must be available before acceptance. Alternatively, if we want to depart from the artificial offer and acceptance model, we can simply state that no terms can be introduced after the act concluding the contract formation process. Introducing terms after such act constitutes an attempt to modify an existing contract.

In the EU, including England, judicial decisions have become a less significant source of legal developments in the area of e-commerce due to the increased role of regulatory agencies and the application of consumer protection laws to online transactions. European consumer protection legislation created a thicket of rules that must be complied with by an operator in order to engage in any commercial activity online. Accordingly, it became necessary to create a separate code to navigate the

---

<sup>51</sup> Jane Winn, The impact of EU unfair contract terms law on U.S. business-to-consumer internet merchants (2006) 62 Bus. Law. 209 at 213

<sup>52</sup> see e.g. *Moore v Microsoft Corp* 293 AD 2d 587 (2nd Dep’t 2002)

<sup>53</sup> *ProCD, Inc v Zeidenberg*, 86 F 3d 1447 at 1452

<sup>54</sup> Earlier shrink-wrap cases precluded the enforcement of terms disclosed after the purchaser obtained the software, see: *Step-Saver Data Systems Inc v Wyse Technology* 939 F 2d 91 (3d Cir 1991)

<sup>55</sup> *Hill v Gateway 2000 Inc* 105 F 3d 1147 (7<sup>th</sup> Cir 1997); *Bower v Gateway 2000 Inc* 676 NYS 2d 569 (NYAD 1998);

<sup>56</sup> Jane Winn, Brian Bix ‘Diverging Perspectives on Electronic Contracting in the U.S. and EU (2006) 54 Cleve. St. L.Rev. 175 at 179

<sup>57</sup> W H Lawrence, *Rolling Contracts Rolling Over Contract Law* (2004) 41 San Diego L Rev 1099; R A Hillman, *Rolling Contracts* (2002) 71 Fordham L Rev 743

<sup>58</sup> for a detailed critique see: R 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; J Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice* (2002) 46 Wayne L Rev 1805;

regulatory instruments purportedly serving to promote e-commerce.<sup>59</sup> The most significant differences between EU and U.S. consumer contract law applicable to ToUs are attributable to the Electronic Commerce Directive (“ECD”)<sup>60</sup> and the Distance Selling Directive (“DSD”).<sup>61</sup> The ECD regulates so-called “information society service providers,” a term including Internet service providers as well as online merchants and advertisers. Seemingly, the term encompasses anyone who makes commercial communications over the Internet or provides Internet connectivity. Although the ECD purports to govern “information society services,” it seems inherently unsuitable to regulate transactions in information and to TOUs governing its use. According to the ECD, operators must provide minimum information (e.g., name, place of establishment, e-mail address) to users. Prior to the formation of a contract, operators must explain the steps required to enter into a contract, as well as inform users whether the contract is accessible after formation. In addition, operators must provide effective means of identifying and correcting errors in the formation process. While the ECD can be praised for requiring an explanation of the contracting sequence, it must be noted that such explanation may be contained within the very terms governing the transaction in which case it will only be as effective as the communication of the terms itself. More importantly, as new commercial models have already “overtaken” those that dominated at the time the directive was drafted, its provisions may have a wider reach than originally intended. The aforementioned broad definition of “information society services” and the liberal interpretation of “remuneration” imply that the mere use of a website may be governed by the ECD.<sup>62</sup> Technically, *any* request for information or the use of a service provided on a website constitutes an order and triggers the application of Art 10, which prescribes the provision of certain information.<sup>63</sup> Similarly, the DSD requires complete disclosure of the terms of the contract prior to its formation. The information must be provided in writing or another durable medium accessible to the consumer. If the disclosures were made in the correct form and at the correct time, the consumer's right to cancel an order must be exercised within seven days of receipt of the goods purchased. If the disclosures were not made, the right to cancel may be exercised until seven days after receipt of the written disclosures. Both the ECD and the DSD focus on the provision of information. More information is equated with more protection to the user. In practice, this translates into a more content-heavy transacting interface and possibly – longer ToUs. While this in itself appears questionable, the more surprising requirements pertain to the provision of such information - including the ToUs - in a manner allowing subsequent storage and reproduction.<sup>64</sup> The latter concepts are extremely difficult to replicate online. To aggravate matters, the European Court of Justice recently held that certain information was not disclosed because it was provided via a hyperlink.<sup>65</sup> As the

---

<sup>59</sup> Code of EU Online Rights, 2012

<sup>60</sup> Directive 2000/31/EC on Certain Legal Aspects of Information Services, in particular Electronic Commerce in the Internal Market

<sup>61</sup> Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts; transposed into national law as Consumer Protection (Distance Selling) Regulations, 2000, S.I. 2000/2334; updated by Consumer Protection (Distance Selling) (Amendment) Regulations, 2005, S.I. 2005/689, (U.K.); see generally: Jane Winn, The impact of EU unfair contract terms law on U.S. business-to-consumer internet merchants (2006) 62 Bus. Law. 209

<sup>62</sup> See: ECD Recital 18, which extends “information society services” to “services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data.”

<sup>63</sup> Notably, Art 10 requires a description of the different technical steps required to conclude the contract as well as the availability of contractual terms in a manner permitting storage and reproduction.

<sup>64</sup> ECD Art 10(3)

<sup>65</sup> *Content Services Ltd v. Bundesarbeitskammer* Case C-49/11, July 2012; see also: C Goanta, Information Duties in the Internet Era: Case Note on *Content Services v. Bundesarbeitskammer* (2013) 2 European Review of Private Law, 643-660

website could be modified it was not “available on a lasting basis.”<sup>66</sup> Moreover, the website to which the link connected did not permit storage and reproduction in an unchanged form.<sup>67</sup> The mere possibility of printing or storing the page by the user was considered irrelevant as in such instance, the durable medium was “generated by the user and not the vendor.”<sup>68</sup> Surprisingly then, in the EU, the legal effectiveness of ToUs may depend on the ability to provide them in a durable form. Their availability behind a hyperlink is considered insufficient.

### **A technological approach...**

Above I have discussed the legal principles pertaining to the recognition of ToUs as valid contracts. All problems seem to derive from the novelty of the context in which online transactions take place as well as from the changed subject matter of these transactions. We can look at ToUs from yet another, much broader perspective and we can debate the legal principles involved not in terms of their applicability (as this cannot be questioned) but in terms of how they *should* be applied in online transactions. We must take a step back first. It cannot be questioned that the Internet economy empowers consumers and opens new markets to smaller businesses. Both enjoy more choice with regards to potential contracting partners. Both can freely and inexpensively communicate their terms and preferences. Neither phenomenon, however, leads to equality between the transacting parties or the ability to negotiate terms.<sup>69</sup> ToUs are standardized and unilaterally imposed. Users and operators do not ‘meet in cyberspace’ to arrive at mutually beneficial arrangements. Operators provide terms on a take-it-or-leave-it basis. The resulting problems are not new. Mass-market agreements have always raised questions in relation to what terms are unfair (content control) and what requirements must be met for terms to become incorporated (inclusion control). Standardized agreements have always created controversies as to whether we can still analyze them in terms of “promises” and “agreements.” We must, however, remember that despite such academic doubts standard contracts are binding although they have not been read, understood or even known of.<sup>70</sup> Issues pertaining to substantive fairness of standard terms are not Internet-specific.<sup>71</sup> What is specific to the online environment concerns procedural aspects. Problems of standard form contracting become enriched by additional elements: one party not only imposes terms but also designs the contracting interface or the entire transacting environment. While operators have little control over how users view or navigate their websites,<sup>72</sup> they also have novel ways of manipulating user behavior.<sup>73</sup> The “technological management”<sup>74</sup> of the user easily translates into technological manipulation. In addition, we must acknowledge the cognitive distortions of transacting interfaces and the potential for disorientation. Unlike the traditional “transacting interfaces” of counters and shop displays, users are dealing in a two-dimensional and non-linear environment that may lack familiar clues. We must mention the sheer information overload. It is frequently forgotten that providing more information need not

---

<sup>66</sup> *id* at 24

<sup>67</sup> Opinion of Advocate General Mengozzi, delivered 6 March 2012, referring to case C-49/11, at 42

<sup>68</sup> *id* at 43

<sup>69</sup> Bert-Jaap Koops, Law, Technology and Shifting Power Relations (2010) 25 Berkeley Tech. L.J. 973 at 1006

<sup>70</sup> Andrew Robertson, ‘The Limits of Voluntariness in Contract’ (2005) 29 Melb U L Rev 186, 197.

<sup>71</sup> Robert A. Hillman, Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire? (2006) 104 Mich. L. Rev. 837 (2006)

<sup>72</sup> *Specht v Netscape Communications* 306 F 3d 17 at 24

<sup>73</sup> R A Hillman, J J Rachlinski, *Standard Form Contracting in the Electronic Age* (2002) 77 NYULR 429 at 479

<sup>74</sup> Roger Brownsword, The Shaping of our on-line worlds: getting the regulatory environment right (2012) 20 IJLIT vol 4, 249 at 253

necessarily create informed customers.<sup>75</sup> Although users can read the terms at their leisure,<sup>76</sup> they often display a sense of urgency and impatiently click through numerous screens. Immediate gratification overrides informational needs. The information density of the online environment must therefore be evaluated against the limited information processing ability of an average user.<sup>77</sup> More information provided online may further reduce the likelihood of reviewing the terms. Hillman argues that users are accustomed to the speed of the Internet and are thus even less likely to evaluate the fine print.<sup>78</sup> Preston & McCann emphasize the general acceleration of the online transacting process that derives from the lack of formalities and physical clues.<sup>79</sup> This further reduces the awareness that a user may have had in traditional contracting settings. The problem is not information deficit but *attention* deficit.

It is against this background that we must ask: shouldn't contract law be applied more stringently to online interactions to compensate for the aforementioned factors? More importantly, should we demand the *exact* implementation of legal principles now that technology gives us the ability to do so? For example, the mechanism of incorporating terms by reference is characterized by real-life impracticalities. Most doctrinal compromises and legal fictions are based on the factual inability to implement contractual principles. What if the inability disappears? Technology can create *underinformed* and *overwhelmed* users, but it can also facilitate on-line contracting.<sup>80</sup> Given the technological capabilities available to operators, there are no practical justifications for tolerating the delayed provision of terms or "creative compliance" with notice or disclosure requirements or for any other manipulation of contractual theory to circumvent the communication of terms before formation. There is little room for legal fictions given the importance of terms and the fact that they contain: (a) usage or access restrictions, which may otherwise remain imperceptible and unknown,<sup>81</sup> and (b) communication rules prescribing how to express assent. There is also an increased interdependence between law and technology. Technology can improve the achievement of regulatory purposes and the application of legal principles.<sup>82</sup> Technology can be used to protect rights and to facilitate the enforcement of certain prohibitions, based on statute or on private agreement. The design of the interface can encourage or discourage communication.<sup>83</sup> Technology can also be used to better apply the law. In the second instance, we are not talking about protection or enhancement of the law or legal principles, as is the case with digital rights management technologies and copyright, but of taking avail of the capabilities of technology to better apply the principles of contract law. Consequently, the online environment enables operators to follow the law verbatim, to ensure actual communication of terms and to provide reasonable notice. These possibilities are

---

<sup>75</sup> M Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?* (2000) 16 Ga St U L Rev 741 at 775, 780

<sup>76</sup> *Novak v Overture Services Inc* 309 F Supp 2d 446 (EDNY 2004), where the court stressed that the plaintiff had an opportunity to read the terms and conditions with no time limitation, at 452;

<sup>77</sup> See generally: Eliza Mik, 'Some technological Implications of Ascertaining the Contents of Contracts in Web-based Transactions' (2011) 27 CLSR 368

<sup>78</sup> Robert A. Hillman, 'Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?' 104 Mich. L. Rev. 837 (2006); Melvin A. Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 Stan L Rev 211

<sup>79</sup> Preston & McCann 27, 28

<sup>80</sup> J 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

<sup>81</sup> Michael J Madison, *Rights of Access and the Shape of the Internet* (2003) 44 B C L Rev 433, at 437

<sup>82</sup> Roger Brownsword, *The Shaping*, at 260

<sup>83</sup> Karen Yeung, "Towards an Understanding of Regulation by Design" in *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (Hart Publishing, Oxford 2008) at 94

often not present in the real world. If judges were to require an actual *presentation* (not even communication) of terms as a pre-condition of incorporation, commerce would come to a halt. In the world of brick-and-mortar shops, the contracting process encounters many factual constraints. These constraints are, however, absent online. While it is difficult to prescribe specific technological requirements as to how transacting interfaces should be designed to alert the user that (a) a transaction is taking place and/or (b) that such transaction is governed by terms, it can be required as a matter of principle that operators use whatever technology they have available to improve communication with users. At the same time, it must not be forgotten that even if users are alerted to the transaction and even if an opportunity to read the terms is provided, most users will ignore it. Similarly, if websites are coded to self-display ToUs in pop-up windows, users will complain about their intrusiveness and revert to pop-up blockers. Judges, regulators and operators may have to resign themselves to the fact that irrespective of the technology used and irrespective of the amount of information provided users will not read it. Operators should not, however, be allowed to “hide behind” the objective theory of contract and use it to their advantage. When evaluating the online interface provided by the operator courts must make allowance for the cognitive challenges faced by users. At the same time, courts must not allow users to plead ignorance of the facts that terms exist and that not everything on the Internet is “for free.” Subjective feelings of entitlement should be as irrelevant in contract law as they are in intellectual property law.

### ***Final Reflections***

The horse has left the barn: we cannot deny or downplay the fact that a link to ToUs is present at the bottom of most websites. Leaving aside questions of substantive fairness, ToUs are available and, depending on the size of the screen, visible. It is difficult to plead ignorance of their existence. While the omnipresence of ToUs need not translate into their binding legal character, it prevents users from arguing ignorance. Such arguments are inevitably circular: “we had not idea that a transaction is taking place because we assumed the content is available without restrictions and without charge and therefore we did not expect terms.” We could also endlessly debate whether the mere presence of ToUs can be regarded as an alert that a transaction is taking place. We could also argue that the mere fact that a contract has been formed does not necessarily imply that the ToUs have become incorporated. At the same time, however, if we acknowledge the existence of a contract, we must also acknowledge the presence of contractual intention and with it – an expectation of terms. These debates will, inevitably, lead us into a blind alley. The problem is not one of formation or incorporation. The problem is the changing nature of the web and the business models that have evolved online. Although amazon’s business model differs from that of google, both form part of a complex ecosystem where personal information is becoming the currency of exchange and where increasing value is placed on “pure information” that is otherwise not protected by intellectual property rights. We must therefore ask: did the user have a choice not to visit the website or use the information? Was there any reason the user could objectively expect the information to be provided *without* any restrictions? More importantly, did the operator deploy any technologies to increase or decrease the likelihood of communicating the terms or deflect the users attention from the fact that his continued browsing is subject to contract? It is too late to declare ToUs ineffective or to introduce additional regulatory requirements for their validity. The only method of addressing the legal challenges created thereby is through a conservative



interpretation and application of contract law principles. In parallel, operators and users alike must use the available technologies of presenting and communicating content to their advantage. It must not be forgotten that commercial certainty requires objectivity, a detachment from the state of mind of individual participants and from their individual beliefs.

It seems unnecessary to propose a distinct “Asian approach” to ToUs. The approach to US cases must be extremely cautious, as US courts often seem overly concerned with the promotion of online transactions at the expense of the user *and* the basic principles of contract law. The EU approach, however, seems equally inadequate as contract law is becoming distorted by excessive consumer protections. More information is not necessarily better.<sup>84</sup> It can be doubted that more information has a protective effect, creates transparency or informed users. Singapore has the luxury of being able to follow the English law of contract in its original form, without any regulatory “adornments.” The aim is not to protect doctrinal purity or preserve contract law in its classic state. There must be cogent reasons to depart from its principles. Such reasons do not seem to exist in online transactions in relation to ToUs. The classic principles of contract law, if applied verbatim, can not only accommodate new technology and the challenges of the online environment but also provide protections for its users. At the same time, operators can enjoy the certainty that derives from a consistent application of traditional principles. There is also no need for doctrinal compromises based on real-life constraints. Online technologies enable operators to create better informed users and improve the communication of terms and quality of contractual intention.

---

<sup>84</sup> Evgeny Morozov, *To Save Everything Click Here*, 2013, Allen Lane, London at 86