



Print Request: Tagged Documents: 2
Time Of Request: Friday, November 02, 2007 15:11:55

Send To:
De Santis Michael
UNIVERSITY OF OTTAWA
57 LOUIS PASTEUR ST
ON

Terms: (juliet moringiello)

Source: The Business Lawyer
Client ID: somniloquist

Copyright (c) 2005 American Bar Association
The Business Lawyer

November, 2005

61 Bus. Law. 433

LENGTH: 7483 words

SECTION: SURVEY--CYBERSPACE LAW: SURVEY OF THE LAW OF CYBERSPACE:
INTERNET CONTRACTING CASES 2004-2005.

AUTHOR: Juliet M. Moringiello and William L Reynolds*

* **Juliet Moringiello** is a Professor of Law at Widener University School of Law. William Reynolds is the Jacob A. France Professor of Judicial Process at the University of Maryland School of Law. The authors would like to thank Elaine Ziff of Skadden Arps and Kathleen Porter of Robinson and Cole for their input. This Survey focuses on cases decided between January 1, 2004, and July 1, 2005. Our great thanks to our research assistants, Douglas Hoffman and Karl Geschwindt, for their invaluable assistance.

TEXT:

I. INTRODUCTION

Beginning in 1999, when the New Jersey Superior Court held in *Caspi v. Microsoft Network, L.L.C.* n1 that a forum selection clause in a click-wrap agreement could be enforced, courts have been faced with a small but steady stream of cases involving the enforceability of contracts entered into electronically. The years 2004 and 2005 were no exception, with one major browse-wrap case, a number of interesting click-wrap cases, and several notable international developments. In this Survey, we discuss the development of electronic contracting law over the past two years. n2

n1 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

n2 Surveys of earlier cases can be found in Christina L. Kunz, Maureen E Del Duca, Heather Thayer and Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401(2001) [hereinafter "Kunz, Click-Through"] and Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter and Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of*

Implied Assent in Electronic Form Agreements, 59 BUS. LAW 279 (2003) [hereinafter "Kunz, Browse-Wrap"].

In discussing electronic contracting, we focus on two types of terms delivered electronically: click-wrap terms and browse-wrap terms. When terms are offered in the click-wrap (also known as click-through) format, the offeree must indicate her assent by clicking an "I agree" icon before receiving the desired goods or services. n3 Browse-wrap (or click-free) agreements, on the other hand, do not ask for any explicit manifestation of assent and often provide that use (or browsing) of the website constitutes agreement to the terms. n4 Both of these types of agreements are covered by the Uniform Electronic Transactions Act ("UETA") and the Electronic Signatures in Global and National Commerce Act ("E-Sign"), each of which provides that a contract cannot be denied enforceability solely because it is signed electronically or is in electronic form. n5 Because both acts preserve the existing substantive law of contracts, courts faced with click- and browse-wrap terms must decide whether the elements of contract formation, specifically offer and acceptance, have been met.

n3 Kunz, *Click-Through*, *supra* note 2, at 401.

n4 Kunz, *Browse-Wrap*, *supra* note 2, at 279-80. For an example, see <http://www.quikbook.com/legal.html> ("By using the Site in any manner (for example, entering the Site, browsing and/or completing the registration process to set up "My Quikbook File") you are indicating your agreement to be bound by the following terms and conditions of service ("Terms and Conditions")" It is difficult, however, to find Quikbook's Terms and Conditions because they are hidden behind a link labeled "Our Lawyers Have Their Say").

n5 UETA § 7, 7A U.L.A. 211 (1999); E-Sign, 15 U.S.C. § 7001 (2000).

In the cases discussed in this study, we find it significant that each case, including two federal circuit court opinions, two federal district decisions (one each from the important Southern District of New York and the San Jose Division of the Central District in California), a trial court in Rhode Island, and a small claims court in New York City, discussed, seriously, whether the buyer had reasonable notice of the on-line terms restricting her rights. In none of the cases, however, did the court discuss whether those terms, assuming reasonable communication, were substantively fair. In other words, the question has apparently become one of procedure (whether notice was properly given) rather than one of substance (whether the terms were unfair in some sense). There is a strong lesson for lawyers here: Apparently, it's okay to hang the other side, as long as you've given it proper notice of your intent to do so.

The emerging consensus, in other words, seems to be that courts are unlikely to police the substance of the bargain as long as the *buyer* n6 was given a reasonable opportunity to learn what the terms of the agreement are. Moreover, the trend also seems to reinforce the notion that it is up to the *seller* to make sure that a reasonable effort to communicate those terms has been made.

n6 We use the term "Buyer" generally to refer to the offeree because most of the cases under review involve consumer agreements where the party seeking to enforce the terms is the seller. In commercial deals, of course, that party could equally as well be the buyer.

In this Survey, we discuss how various courts have addressed the issue of assent in electronic contracts. In Part II, we discuss American developments, and in Part III, we cover international ones.

II. AMERICAN DEVELOPMENTS

A. BROWSE-WRAP

The most significant pronouncement on the enforceability of browse-wrap terms in the past two years came from the Second Circuit in *Register.com, Inc. v. Verio, Inc.* n7 Register.com is a domain name registrar that also offers web-hosting services. Verio, a competitor in the web-hosting business, sent daily automated queries into Register.com's WHOIS database n8 so that it could solicit business from new domain name registrants. Every time that Verio did so, terms of use were presented with the result of the query. The terms of use prohibited the use of the information to "support the transmission of mass unsolicited, commercial advertising or solicitation via e-mail." n9 Verio, by using this information to send marketing solicitations by e-mail to new registrants, breached these terms and conditions.

n7 356 F.3d 393 (2d Cir. 2004).

n8 Domain name registrars such as Register.com are required to maintain basic data concerning their registrants. Those data are publicly available on the WHOIS database. ICANN Registrar Accreditation Agreement, II (F), *available at* <http://www.icann.org/registrars/ra-agreement-10nov99.htm#IIF> (last visited Nov. 22, 2005).

n9 *Register.com*, 356 F.3d at 396.

When Register.com sued Verio for breach of contract, Verio claimed that it was not bound by the online terms and conditions because it had never assented to those terms; Verio grounded that argument on the fact that it was not required to click an icon to signal its agreement with the terms and conditions. The District Court for the Southern District of New York, with little reasoning but clearly bothered by Verio's behavior, ruled in favor of Register.com despite the fact that Verio was not required to click on an icon to show that it agreed with Register.com's terms. n10 The District Court opinion did not explain how the terms were presented, glossing over the fact that the terms were presented *with the results* of each WHOIS query, and held that because the terms were "clearly posted" on Register.com's website, Verio manifested its assent to the terms every time it submitted a WHOIS query. n11 After the District Court opinion in *Register.com*, the Second Circuit, in *Specht v. Netscape Communications Corp.*, ruled that a consumer was not bound by a forum selection clause in a browse-wrap software license because the consumer was not required to click to agree to Netscape's terms and had no reason to know that the terms existed, due to the fact that the link to the terms was below the website's "fold." n12

n10 *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

n11 *Id.* at 248.

n12 306 F.3d 17, 35 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.").

Although the Second Circuit's opinion in *Register.com* might seem at first to be a departure from, and an easing of, its holding in *Specht*, it is in fact a reaffirmation of *Specht*'s core holding that an offeree, in order to be bound by online terms, must have notice of those terms at the time the contract is formed. In a cleverly written opinion, Judge Leval analogized Verio to a repeat visitor to a farm stand. Such a visitor, on his first visit to the farm stand, might take an apple from a bin and take a bite out of it before seeing a sign stating a price for each apple. The visitor might be excused from paying for the apple on that first visit because he did not receive the terms until after he took the apple. On subsequent visits, however, the visitor would be on notice that the farm stand expected payment for each apple. Similarly Verio might not have been bound to the online terms and conditions had it been a one time, or even a sporadic visitor to Register.com's website, but because it sent numerous daily queries to the website, the court deemed it to have notice of the terms. n13 Verio's constant visits to Register.com's website significantly distinguished its case from that in *Specht*: while the consumers in *Specht* might not have had any reason to know that Netscape's terms and conditions existed, Verio was presented with Register.com's terms every time it accessed the website.

n13 *Register.com*, 356 F.3d at 401-02.

The court in *Register.com* recognized that Internet commerce has not changed fundamental contract principles. In doing so, the court noted that a contract can be formed electronically without a click to agree, just as a contract can be formed off-line without an explicit verbal or written agreement. n14 According to *Register.com*, browse-wrap terms can be enforced as contracts so long as the offeree has notice of the terms, and a repeat user of a website n15 will be deemed to have notice of a website's terms after his first visit.

n14 *Id.* at 403 (relying on RESTATEMENT (SECOND) OF CONTRACTS § 69 (1)(a), which states that "silence and inaction operate as an acceptance where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation").

n15 The court does not define what would constitute a "repeat user," although it is clear from the opinion that someone like Verio who uses the website often is such a user.

The reasoning in *Register.com* had an immediate impact, as it was followed by the trial judge in *Cairo, Inc. v. Crossmedia Services, Inc.*,ⁿ¹⁶ another case involving repeated and automated visits to a website. The website at issue in *Cairo* displayed, on every page, the following notice: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site." The user could view the site's Terms of Use in their entirety by clicking on the words "Terms of Use," which were displayed in blue and underlined. The court noted that such a format was a common way to notify Internet users to the existence of a hyperlink.ⁿ¹⁷ The court in *Cairo* held that repeated and automated use of a website can form the basis of imputing knowledge to the visitor of the terms on which the website's services are offered.ⁿ¹⁸ Although *Register.com* and *Cairo* solve one problem, they do leave open an important question: When does a one-time or close-to-one-time website visitor have the requisite notice of browse-wrap terms?

n16 No. C. 04-04825 JW, 2005 WL 756610 (N.D. Cal. Apr. 1, 2005).

n17 *Id.* at *2.

n18 *Id.* at *5.

The Superior Court of Rhode Island, in *Defontes v. Dell Computers Corporation*,ⁿ¹⁹ made a brief pronouncement about the enforceability of browse-wrap terms. In that case, the plaintiffs argued that they were not bound by an arbitration clause in Dell's Terms and Conditions. The terms were available to the plaintiffs in both shrink-wrap and browse-wrap format. The court held that the browse-wrap presentation could not bind the plaintiffs because the terms could be viewed by clicking on a hyperlink "inconspicuously located at the bottom of the webpage." Relying on *Specht*, the court held that this presentation was not sufficient to put the plaintiffs on notice of the terms and conditions.ⁿ²⁰ In other words, it is not enough that the terms can be found somewhere; the terms also must be presented in such a way that they can be found by the reasonable user.

n19 No. Civ. A. PC 03-2636, 2004 WL 253560 (R.I. Jan. 29, 2004).

n20 The court also held that Dell's shrink-wrap argument failed; buyers had not been told in the material that had been shrink-wrapped that they could reject the terms by returning the product.

One last statement on browse-wrap terms that should *not* be relied on is found in *In re Northwest Airlines Privacy Litigation*.ⁿ²¹ That case involved a privacy policy, which the plaintiffs claimed imposed contractual obligations on Northwest Airlines. The court relied in part on the rule that general statements of policy are not usually found to be contractual, but went on to say that because the plaintiffs never actually read the policy, they could not be deemed to have assented to it.ⁿ²² Such a statement is clearly inconsistent with hornbook contract law, as was demonstrated in a recent shrink-wrap case, *Schafer v. AT & T Wireless Services, Inc.*ⁿ²³ The court there held that a contract need not be read for its terms to be effective; as long as a buyer knows of the existence of the terms,

and that her use of the products constitutes acceptance of them, the buyer is then bound by the terms.

n21 No. Civ. 04-126 (PAM/JSM), 2004 WL 1278459 (D. Minn. June 6, 2004).

n22 *Id.* at *6.

n23 No. Civ. 04-4149-JLF, 2005 WL 850459, at *4-5 (S.D. Ill. Apr. 1, 2005).

Although none of the browse-wrap cases discussed above explain the circumstances under which a first-time visitor to a website will be bound to online terms, two recent shrink-wrap cases, one decided by the Supreme Judicial Court of Maine and the other by the Supreme Court of Oklahoma, reinforce the fact that an opportunity to review the terms is an essential element of assent. The two cases, *Stenzel v. Dell, Inc.* n24 and *Rogers v. Dell Computer Corp.*, n25 both involved an arbitration agreement found in Dell's Terms and Conditions agreement; the two courts, however, came to different conclusions as to whether the terms and conditions were included in the agreement to purchase the computers.

n24 870 A. 2d 133 (Me. 2005).

n25 No. 99,991, 2005 WL 1519233 (Ok. June 28, 2005) (Dell Computer Corp. was renamed Dell, Inc. after this action was brought.).

One plaintiff in *Stenzel* ordered his computer over the telephone and the other ordered his through Dell's website. The court analyzed both purchases together, however, and found that the plaintiffs had agreed to the Terms and Conditions because they had been given at least three opportunities to review them: on Dell's website, n26 on the order acknowledgment form that Dell sent after receiving the orders, and on the agreement that was included with the computers. n27 The agreement began with a boldface notice imploring the reader to read the document carefully because it contained "very important information about . . . rights and obligations, . . . [and] a dispute resolution clause." n28 The agreement also provided that acceptance of the terms and conditions would occur upon acceptance of the computer *unless* the customer returned the computer within a stated time. Relying on *ProCD, Inc. v. Zeidenberg*, n29 the court found that because the plaintiffs had had the opportunity to review the terms before deciding to accept or reject the computers, they were bound by the arbitration clause. n30 The lesson for counsel here is that the more opportunities the seller gives the buyer to learn terms, the better off is the seller when litigation ensues.

n26 When ordering a computer over Dell's website, a buyer must check a box to agree with Dell's Terms and Conditions, which the buyer can access by clicking on a link next to the box. One can find this by visiting <http://www.dell.com> and starting the ordering process.

n27 *Stenzel*, 870 A.2d at 138.

n28 *Id.*

n29 86 F.3d 1447 (7th Cir. 1996).

n30 *Stenzel*, 870 A.2d at 140.

The court in *Rogers*, faced with the same Dell Terms and Conditions, was not so quick to enforce them, remanding the case for further findings about the ordering process. *Rogers* focused on the timing question; because there were no facts in the record about the ordering process, the court could neither identify the moment when the contract was formed nor determine whether the Terms and Conditions were incorporated into the contract. Because it focuses on the *timing* of notice, the *Rogers* opinion contains some important guidance for Internet sellers.

The court started its analysis by explaining the Uniform Commercial Code ("U.C.C.") default rule that an offer to buy goods is construed as inviting acceptance by a prompt promise to ship. n31 Under section 2-206 of the U.C.C., the arbitration clause could have become part of the contract if the circumstances of the ordering process, including the language used by Dell, indicated that the contract would not be formed until after the buyers received the terms and conditions of sale, *or* if the clause had been incorporated into the contract at the time that the buyers placed their orders. n32 If neither of those two conditions was satisfied in the ordering process, the court stated that section 2-207 would then apply, as the terms and conditions would constitute a written confirmation of a verbal agreement. Under section 2-207, the terms and conditions would be considered proposals for addition to the contract, and the buyer would not be bound absent express agreement to the inclusion of those terms in the contract. Again, because the record contained *no* information about the ordering process, not even information about whether the computers were ordered over the Internet or by phone, the court could not determine whether the arbitration provision was binding. n33

n31 *Rogers*, 2005 WL 1519233, at *6 (citing U.C.C. § 2-206).

n32 *Id.*

n33 *Id.* at *6-7.

The lesson for Internet vendors from these cases is that "notice is key." While a repeat user of a website will be deemed, under *Register.com*, to have assented to browse-wrap terms, in cases involving sporadic or first-time users, it is imperative that Internet users receive clear notice of terms at the beginning of their relationship with the website in question.

B. CLICK-WRAP

The past two years have seen several click-wrap decisions, all agreeing that when a website user is asked to click an icon to assent to terms, she is bound by those terms when she does so. The cases present a fairly broad range of click-wrap formats.

The plaintiff in *Novak v. Overture Services, Inc.* n34 challenged a forum selection clause in Google's "Terms and Conditions of Use for Google Groups." During the registration process for access to Google's discussion groups, the plaintiff was required to click a button to signify his agreement with the terms. Adjacent to the "I agree" button was a scroll box in which ten lines of the terms were visible at a time. The plaintiff argued that because only ten lines of the contract were visible at any time, he did not have an adequate opportunity to read the forum selection clause (which was located 300 lines into the contract), and thus the contract was unenforceable. The court rejected the plaintiff's contention and found that he had had an adequate opportunity to read the contract for three reasons: the contract was only seven and a half pages long, it was written in an easy to read font, and the plaintiff had an unlimited amount of time to read the terms. n35 In other words, the buyer must be given a reasonable opportunity to learn the terms, but the buyer still can be required to exert some effort to learn what the terms of the agreement are.

n34 309 F. Supp. 2d 446 (E.D.N.Y. 2004).

n35 *Id.* at 451.

In *Mortgage Plus, Inc. v. DocMagic, Inc.*, n36 the District Court for the District of Kansas held a click-wrap software license to be enforceable where the licensee was required to click a "yes" button to signify her assent to the license agreement as a prerequisite to installing the software. n37 *Mortgage Plus* is important for three reasons. First, it adds to the great weight of authority to the same effect. Second, it effectively limits the authority of *Klocek v. Gateway, Inc.*, n38 an earlier decision by the same court. The *Mortgage Plus* court distinguished *Klocek* by making clear that the buyer in the earlier case had not been made aware that acceptance of the licensing agreement was a condition to acceptance of the ordered computer, and that the *Klocek* buyer had not been required to affirmatively assent by clicking the "yes" button. n39 Finally, *Mortgage Plus* contains a useful discussion of assent by a third party to the agreement, along with consideration of the question of ratification. n40

n36 No. 03-2582-GTV-DJW, 2004 WL 2331918 (D. Kan. Aug. 23, 2004).

n37 *Id.* at *5.

n38 104 F. Supp. 2d 1332 (D. Kan. 2000). *Klocek*, a shrink-wrap case, involved terms that were provided inside a computer box.

n39 *Mortgage Plus*, 2004 WL 2331918, at *5.

n40 *Id.* at *5-6.

A Small Claims Court in New York, in *Scarcella v. America Online*, n41 took an interesting path in refusing to enforce a choice of forum clause. The America Online subscription process at

issue in that case required the subscriber to check a box indicating his assent to the Member Agreement. The plaintiff claimed that it would be unreasonable to enforce the forum selection clause found in that Agreement because the sign-up process involved viewing 91 computer screens, two of which asked for consent to the Member Agreement. The court found, however, that the plaintiff had in fact assented to the terms, relying on the traditional contract rule that a person who signs a contract is deemed to know the contents of that contract and to have assented to its terms. n42 The court treated the computer screens as factually equivalent to sheets of paper, stating that a refusal to treat paper and electronic contracts as equivalent would "threaten the viability of the Internet as a medium of commerce." n43 After finding assent, the court ultimately declined to enforce the clause, citing public policy found in the statutory small claims court scheme. n44

n41 798 N.Y.S.2d 348, 2004 WL 2093429 (N.Y. City Civ. Ct. 2004).

n42 *Id.*, 2004 WL 2093429, at *2-3.

n43 *Id.*, 2004 WL 2093429, at *2.

n44 *Id.*, 2004 WL 2093429, at *4.

Finally, there is *Motise v. America Online, Inc.*, n45 the only recent reported case to find that the website's notice of terms was ineffective. In *Motise*, plaintiff, a family member of an AOL subscriber, had argued that he was not bound by AOL's terms of use because he was neither presented with the terms of use nor asked to agree to them when he signed on to the AOL website. AOL defended by arguing that all of its members and users are bound by AOL's terms of use, and in its defense relied on cases such as *ProCD*. The court found AOL's reliance on *ProCD* to be misplaced, however, because AOL never argued that the plaintiff was given notice of the terms of use, notice that is required by *ProCD*. Relying on *Specht v. Netscape*, the court stressed that website users must be given notice of terms of use in order to be bound by them. n46 Nevertheless, the court enforced the terms of use against the plaintiff for reasons that are discussed in the next section.

n45 346 F. Supp. 2d 563 (S.D.N.Y. 2004).

n46 *Id.* at 565. Note that the court misread *Specht* as requiring that the terms themselves appear on the screen, "in view of the user, for the user to be on notice of them." *Id.*

C. MISCELLANEOUS INTERNET CONTRACTING ISSUES

Three cases raised five subsidiary issues worth commenting on. These issues involved the question of whether paper and cyber analysis should be the same, whether software contracts are governed by the U.C.C., the impact of derivative notice, ratification, and the burdens of production and proof on Internet transaction issues.

1. Are Paper and Electronic Contracts the Same?

A case involving modifications to an employee handbook raises some questions about the factual equivalence of paper and electronic communications, questions that cannot be ignored by lawyers involved in Internet contracting disputes. In *Campbell v. General Dynamics Government Systems Corp.*,ⁿ⁴⁷ the defendant corporation sent its workers modifications to an employee handbook by a mass e-mail. The e-mail neither required an acknowledgement of receipt by the employee nor some showing that he had understood its terms. Although the e-mail contained hyperlinks enabling the employee to learn critical information (especially that future disputes would be arbitrated) the employer's e-mail system did not record whether the employee in fact clicked on the link.

ⁿ⁴⁷ 407 F. 3d 546 (1st Cir. 2005).

After a dispute arose, the employee sought to enforce the arbitration argument. The district court agreed with the employee that "a mass e-mail message, without more, fails to constitute the minimal level of notice" required.ⁿ⁴⁸ The First Circuit reversed, in an opinion written by Judge Selya in his inimitable style.ⁿ⁴⁹

ⁿ⁴⁸ *Campbell v. Gen'l Dynamics Gov't Sys.*, 321 F. Supp. 2d 142, 149 (D. Mass 2004).

ⁿ⁴⁹ *E.g., Campbell*, 407 F.3d at 550-51: "The order striking the company's affirmative defense is, however, a horse of a different hue."

That court did not share the "skepticism" towards e-mail found by the trial court: "we easily can envision circumstances in which a straightforward e-mail, explicitly delineating an arbitration agreement, would be appropriate."ⁿ⁵⁰ The court added that the E-SIGN statuteⁿ⁵¹ "likely precludes any flat rule that a contract to arbitrate is unenforceable. . . ." ⁿ⁵² This approval of e-mail as an appropriate vehicle for communicating important information to an employee is, of course, very important, and one that corporate counsel will come to appreciate. It is of equal importance that the court did not distinguish between the content of paper and electronic contracts, even though it recognized that the manner in which those terms might be reasonably presented might differ, depending on which format is used.ⁿ⁵³

ⁿ⁵⁰ *Campbell*, 407 F.3d at 555.

ⁿ⁵¹ 15 U.S.C. §§ 7001-7031 (2000).

ⁿ⁵² *Campbell*, 407 F. 3d at 556.

ⁿ⁵³ This, of course, was also the approach taken in *Scarcella*, the New York Small Claims Court decision discussed in the previous subsection.

But there remains a small problem. The e-mail must be "enough to put a reasonable employer on inquiry notice of an alteration to the contractual aspects of the employment relationship."ⁿ⁵⁴

This, the message at issue failed to do, as the court makes painfully clear. n55 On the other hand, if the e-mail had made clear the possibility of a "significant alteration" to the employment agreement, then it is likely that the court would have found the arbitration agreement enforceable.

n54 *Campbell*, 407 F.3d at 555.

n55 The reader can almost hear the exasperation in Judge Bruce M. Selya's language: "To be blunt, the e-mail announcement undersold the significance of the policy and omitted the critical fact that it contained a mandatory arbitration agreement." *Id.* at 558.

Thus, *Campbell* holds that E-SIGN and economic efficiency permit mass e-mails to carry important information. The sender just has to make the communication a reasonable attempt to convey that important information.

2. Common Law or U.C.C.?

An important but as yet unsolved issue involving software contracts is whether they involve the sale of "goods" and, therefore, fall under Article 2 of the U.C.C.; or, whether the common law of contracts applies (after all, an item of software is not your traditional "good"--defined by the UCC as anything that is "moveable at the time of identification to the contract of sale.") n56

n56 U.C.C. § 2-105 (2002) (prior to amendment in 2003).

The appeal of the UCC is readily apparent. It has a number of helpful terms. For example, section 2-204(3) permits a court to find a contract if the parties act if they have one, and if the court has a sufficient basis for providing a remedy; in addition, section 2-207 provides a good bit of assistance in the dreaded "Battle of the Forms." This was the position taken by Judge Easterbrook in his influential opinion in *ProCD*. n57 Another explanation is that the UCC represents a consensus of the best thinking in the area, n58 or that it is as close to "uniform" law as might be.

n57 86 F.3d 1447 (7th Cir. 1996).

n58 *See, e.g., I. Lan Sys., Inc. v. Netscout Serv. Level Corp.* 183 F. Supp. 2d 329, 332 (D. Mass. 2002).

We will not get into those serious theological questions here. We do note, however, that in *Mortgage Plus, Inc. v. Doc Magic Inc.* n59 a federal trial court held to the contrary. The dispute involved an agreement to provide software to be used in loan preparation services. The court found that the software defendant provided in preparing documents for plaintiff "is worthless without the actual loan preparation services; thus the software is wholly incidental to the agreement." n60 In other words, the crux of the agreement lay in preparing documents (a service), not in preparing the underlying software. Thus, even if the software were a "good"--something the court found doubtful, the purpose of the contract was to provide a service, and, therefore, it should be examined under the common law of contracts.

n59 *See Mortgage Plus*, *supra* note 36.

n60 *Id.* 2004 WL 2331918, at *3.

In short, the UCC or common law question for cyber-contracts may be back in play. n61

n61 Of course the failure of UCITA "(Uniform Computer Information Transactions Act)" (adopted only in Maryland (2000) and Virginia (2000)), plays a large role here. For better or worse, the failure of UCITA means that there no longer is an attempt to provide a statutory solution to control software contracts. In any event, we believe that *Motise* represents the best result: let the judges develop the law in the context of individual cases, a task that common-law courts have done more than adequately for many centuries.

3. Derivative Rights

In the *Motise* case, discussed earlier, n62 the court went to some pains to show that the plaintiff user had not received adequate notice of AOL's restrictions on use. Nevertheless, the court finally held that the claim must fail; the plaintiff was using his step-father's computer, and his step-father had read (or had had an adequate opportunity to read) the terms restricting the user. Hence, the plaintiff's claim failed because he (the step-son) had received derivative notice of the restrictions imposed by AOL.

n62 *See supra* text accompanying notes 45-46.

Although hardly an exceptional holding as a matter of general agency law, it has special importance in cyber-law. If the *Motise* court had held otherwise, it would be very easy, indeed, for an unscrupulous user to avoid any limitations placed on her use of another's computer. On the other hand, one wonders what the court might have held if the step-father had agreed, for example, to tithe his income to AOL. Would that have bound the child as well? Derivative responsibility might satisfy procedural concerns, but, in the end, the court always will have to consider the substantive nature of the restriction as well.

4. Ratification

The defendant in *Mortgage Plus* argued that its repeat exposure to Doc Magic's terms in response to its automated queries could not be considered an acceptance because the Mortgage Plus employee who monitored the communication was not authorized to accept contracts on its behalf. The court rejected this argument out of hand on the theory that a party "cannot sit back and wait to see if it will benefit or suffer from [its] agent's acts." n63 That holding may not be of significance for consumers, but it could be of real importance to commercial players in cyberspace who will no longer be able to use the defense of ignorance.

n63 *Mortgage Plus*, 2004 WL 2331918, at *6.

5. Burdens

Among the most important issues to any litigator are the questions of which party bears the burdens of production and proof. Although none of the decisions under review discuss those questions expressly they all assume implicitly that those burdens fall on the seller, at least initially. n64 That is a very important assumption, for the allocation of burdens often determines the outcome of litigation. Placing the burden on sellers to prove that certain terms are part of the deal is by no means a radical idea; after all, the party seeking to rely on the terms of a contract should have to show the existence of a contract. Allocating the burden to the vendor, however, also reflects judicial concerns with fairness of notice- the seller, having the burden, will have to make a prima facie showing that the buyer had a reasonable opportunity to learn those terms.

n64 *Campbell* is one of the few exceptions. The court there did discuss burdens in relation to cases involving the specialized problem of "agreement" under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000), holding that the employer had a "relatively light burden." *Campbell*, 407 E 3d at 556.

6. Substance

Most of the consumer cases discussed in this paper involved challenges to arbitration and/or forum selection clauses. The assault in those cases came in two forms: Either the clause in question was not part of the contract because there had been no effective assent, or the clause was unconscionable. With the exception of the Small Claims Court judgment in *Scarcella* (which actually was decided on "public policy"), unconscionability proved no more help to the consumer than did arguments based on lack of assent. Proper notice remains the key.

III. INTERNATIONAL DEVELOPMENTS

In this section we discuss developments in the European Union, as well as the Hague Convention on Choice of Court Agreements. The European Union developments are of particular significance to parties involved in consumer transactions, and the Hague Convention applies only to non-consumer transactions.

The European approach to standard-form terms differs greatly from the American approach. Whereas American courts will look to the contracting process to determine whether the offeree received adequate notice of contract provisions and will uphold those provisions if adequate notice was given, European courts will look to the actual substance of those clauses and invalidate them if they are "unfair." In at least two cases in the past year and a half, French courts have ruled that numerous clauses in the standard terms of Internet service providers ("ISPs") were unfair. n65 American companies doing business with consumers in the European Union must take these decisions into account when drafting their online contracts.

n65 *Union Federale des Consommateurs Que Choisir v. Tiscali*, 10 ELEC. COMMERCE & L. REP. (BNA) 385 (T.G.I. Paris, April 6, 2005); *Union Federale des Consommateurs Que Choisir v. AOL*, T.G.I. Nanterre. June 6, 2004, J.C.P. 2005, II, 10022, note Pages.

The authority to invalidate unfair contract clauses comes from the European Union Unfair Terms Directive, n66 which has been implemented in all of the EU Member States. n67 The Directive applies to all standard-form contracts between sellers or suppliers and consumers. n68 For the purposes of the Directive, a "consumer" is "any natural person who is acting for purposes which are outside of his business, trade or profession." n69 Under the Directive, a standard-form term is "unfair," and thus invalid, if it "causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." n70

n66 Council Directive 93/13/EEC, 1993 O.J. (L 95) 29.

n67 "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Treaty Establishing the European Community, Nov. 10, 1997, art. 249, O.J. (C 340) 3, 108 (1997).

n68 The scope of the Directive encompasses more than just standard-form terms in that it applies to contractual terms that have not been "individually negotiated." A term is considered not individually negotiated "where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract." Council Directive 93/13/EEC, *supra* note 66, art. 3(2).

n69 *Id.* art. 2(b).

n70 *Id.* art. 3(1). For more information on the Unfair Terms Directive, see James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 131-42 (2003); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C.J. INT'L L. & COM. REG. 357, 363-66 (2002).

The French ISP cases are just two examples of how European courts treat standard terms, and they are useful because they illustrate the types of terms that a court is likely to invalidate. In *Union Federale des Consommateurs Que Choisir v. AOL*, a French consumer organization requested the invalidation of 36 clauses in two versions of AOL's Internet service agreement. The court agreed with the consumer group that 31 of the clauses were unfair or illegal. Among the invalidated clauses were those that allowed AOL to transmit the subscriber's personal information to third parties without the subscriber's prior consent and to modify the subscriber's method of payment, as well as those purporting to limit AOL's liability for service interruptions and for defects in AOL's software. n71 In *Union Federale des Consommateurs Que Choisir v. Tiscali*, the court invalidated 24 clauses in an ISP agreement. The clauses deemed unfair in that case included clauses that: limited the ISP's liability for poor service; required a minimum 12-month commitment, payable only by direct deposit; gave Tiscali the right to unilaterally modify the terms of use; and gave Tiscali the right to end

service without explanation. n72 In addition to invalidating the clauses, the court required Tiscali to pay 30,000 Euros to UFC Que Choisir.

n71 Union Federale des Consommateurs Que Choisir v. AOL, T.G.I. Nanterre. June 6, 2004, J.C.P. 2005, II, 10022, note Fages.

n72 Union Federale des Consommateurs Que Choisir v. Tiscali, 10 ELEC. COMMERCE & L. REP. (BNA) 385 (T.G.I. Paris, April 6, 2005).

Another piece of European legislation that governs the terms of contracts and that has special significance in the world of Internet contracting is the 1997 European Union Directive on the Protection of Consumers in Respect of Distance Contracts. n73 This Directive, like the Unfair Terms Directive, applies to contracts between suppliers and consumers, but it is limited to those contracts which are concluded by means of "distance communication," defined as "any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties." n74 The Directive requires that suppliers in distance contracts provide the buyer with certain information "in good time" prior to the conclusion of such distance contract. n75 The required information includes the price of the goods and of delivery and the payment and delivery arrangements. n76 In addition, the supplier must inform the buyer that he has a "right of withdrawal," under which the consumer has seven days after receiving confirmation of the contract terms to withdraw from the contract. n77

n73 Council Directive 97/7/EC, 1997 O.J. (L 144) 19. Implementation of the Directive by the Member States may lead to some differences in approach and detail. The wise attorney will be careful.

n74 *Id.* art. 2(4).

n75 *Id.* art. 4.

n76 *Id.*

n77 *Id.* art. 6.

Given the ease of contracting with persons in other countries over the Internet, it is important that American companies take these European developments into account when developing their click-wrap and browse-wrap contracts.

Finally, the recently signed Hague Convention on Choice of Court Agreements provides rules for the enforcement of choice of forum clauses in signatory countries. Click-wrap agreements are included within the coverage of the Convention. n78 The Convention, however, expressly does not apply to consumer agreements. n79 Drafters of consumer cyberspace contracts, therefore, will find

that the validity of choice of forum clauses will depend on the local law of the forum. As just seen, European courts will be unlikely to uphold those agreements.

n78 The Convention is *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98. Some industries had argued that the Convention should apply only to negotiated agreements. *See U.S. Businesses Want Clickwrap Contracts Explicitly Excluded from Hague Convention*, 10 ELEC. COMMERCE & L. REP. (BNA) 501 (2005). The final version of the Convention is not so limited.

n79 The Convention defines a "consumer" as "a natural person acting primarily for personal, family or household purposes ..." Convention on Choice of Court Agreements, Art. 2.1.a).

IV. CONCLUSION

In all of the American cases we have discussed, the courts examine, in a not perfunctory fashion, whether this buyer has had a reasonable opportunity to learn what the terms of the deal are. Lessons for counsel are clear: To avoid litigation on questions of assent, the seller should place the terms above "the fold," should not encourage the buyer to "skip" the terms or tell the buyer that a click on "Yes" shows that she agrees with the Terms, and should require the buyer to enter that click showing that she has gone through the Terms and Conditions. On the other hand, even if those conditions are not present, repeat players, at least commercial ones, will be bound by their implicit knowledge of the seller's terms of sale. Finally, the EU will remain even more protective of consumers than our own courts.

---- End of Request ----

Print Request: Tagged Documents: 2

Time Of Request: Friday, November 02, 2007 15:11:55