

# ELECTRONIC COMMERCE — CLICK-WRAP AGREEMENTS

## THE ENFORCEABILITY OF CLICK-WRAP AGREEMENTS

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This article examines the practical issues surrounding the use and enforceability of click-wrap agreements and presents preliminary findings of basic research to determine consumer awareness, understanding and attitudes to such agreements.

### 1. INTRODUCTION

There can be little doubt that the advancements in information and global communications technologies, particularly the Internet, are having a profound impact on many aspects of our lives. As e-commerce expands globally the Internet is fast becoming an important channel for the sale and dissemination of a wide range of goods and services, especially copyrighted material such as, computer software, data and text, as well as digital images, photographs, music and multimedia. This is now happening almost effortlessly on a twenty-four hours per day, seven-days per week and fifty-two weeks per year (24x7x52) global basis and as the bandwidth of the digital network continues to increase, the volume and quality of information being disseminated on it, as well as transmission speed, will increase significantly.

The impact of these changes on the global marketplace, and the speed at which it is happening, cannot be overestimated. In its April 1998 report on the emerging digital economy, the United States Department of Commerce noted that in 1994, three million people, most of them in the United States, used the Internet and its application to e-commerce was non-existent.<sup>2</sup> In 1996 there were almost 40 million users connected globally and by the end of 1997, this number had jumped to 96 million.<sup>3</sup> By 1999, an estimated 250 million users accessed the Internet and approximately one quarter of them made purchases online from e-commerce sites, worth approximately \$110 billion.<sup>4</sup> According to recent research, 6 % of the world's 6 billion people are now on the Internet and about 400 million people use the Web daily.<sup>5</sup> In Australia, there are 3.9 million<sup>6</sup> Internet subscribers with estimates that this will reach 11.3 million by 2005.<sup>7</sup> Some believe that one billion people may be connected to the Internet by 2005.<sup>8</sup> The OECD estimates that e-commerce is growing at a rate of 200 % per annum and is expected to be worth US\$330 billion by 2001-2 and US\$1 trillion by 2003-5.<sup>9</sup> In Western Europe, a survey by Jupiter Media Metrix has predicted that the number of online consumers will have grown from 120 million consumers in 2001 to 196 million in 2006 with e-commerce

revenues growing at a compound annual growth rate of 37 % to US\$64.5 billion.<sup>10</sup> Business-to-business (B2B) revenue in Australia for 2000 was estimated at US\$5 billion ranking eight over twenty surveyed countries and ahead of Korea, Taiwan, Sweden, Singapore and New Zealand.<sup>11</sup> Jupiter Media Metrix estimates that in Australia business-to-consumer (B2C) and B2B commerce will reach US\$2.5 billion and US\$42.3 billion respectively by 2005.<sup>12</sup>

Regardless of which estimates are used it is clear that the growth in Internet usage has been nothing short of, and is likely to continue to be phenomenal. Its use to conduct business has also exploded over recent years and is expected to continue to grow at an almost exponential rate. This will continue to provide considerable benefits to businesses in terms of easier, cheaper, better and much more effective ways of doing business with consumers, as well as with suppliers, service providers and government agencies. When compared to traditional marketing methods, the Internet enables even the smallest of merchants to reach the same global market as giant conglomerates. As stated by Miller:

For many small and medium sized enterprises (SMEs), the Internet and electronic commerce have lowered market entry barriers. They can now do business at a much lower cost, particularly internationally.<sup>13</sup>

For consumers, electronic access to the global market provides considerable benefits in terms of new products and services, improvements in transaction convenience, choice, range and price, as well as speed of product and service delivery. Consumers are also able to deal directly with suppliers instead of through intermediaries.

However, there are many factors that work against the realization of the benefits and full potential that the digitally networked marketplace has to offer. For example, just as the sale and dissemination of copyrighted material in the new digital economy can take place almost effortlessly on a 24x7x52 global basis, so too can its unauthorised copying and large-scale distribution. There are also many discouraging legal issues such as those surrounding conflict of laws and they are of particular relevance to the smaller e-businesses.

For example, while there is a fairly reasonable international copyright regime, software authors, many of whom are small businesses, would find it prohibitive to protect and defend their rights in some foreign jurisdiction and because of the lack of consistent and international standards of protection, there are issues regarding whether such rights are protected abroad. Thus, while the Internet provides ready access to a much larger market, because of the inadequate protection laws, many smaller businesses will be discouraged and reluctant to embrace it, leading to diminished choice and potentially higher prices.<sup>14</sup>

It is within this legal framework that many vendors have adopted the use of online agreements as a means of reinforcing their rights and to establish the transaction terms and conditions. Requiring each visitor to assent to the terms and conditions of the agreement in order to access the site or complete a transaction, enables the online vendor to alert site visitors that the material contained on the website, as well as any product (e.g. graphic image, photograph, sound recording or software) downloaded from that site, is proprietary and can only be used or copied in certain ways. But what are online agreements and what are the issues surrounding their use and enforceability? This article discusses these questions.

## 2. ONLINE AGREEMENTS - WHAT ARE THEY?

Online agreements are an adaptation of the 'shrink-wrap' agreements, which have been used since the early 1980s in the sale of packaged software. It is because of this that before discussing the use and enforceability of online agreements, it is useful to briefly discuss the use and enforceability of their shrink-wrap ancestors.

Shrink-wrap agreements were introduced specifically for the mass-market sale of packaged software. Prior to this, software vendors used the traditional method of contract formation to enter into licensing arrangements with each and every end user on an individual basis. Contracts took the form of written documents with their terms and conditions being negotiated before execution by both parties. With the mass-market acceptance of the PC, companies such as Apple and IBM found that it was virtually impossible, inefficient and very costly to enter into licensing arrangements with individual users. It is for these reasons that the 'shrink-wrap' licence concept originated; a mass-market software licence agreement (a standard form agreement) shipped with the product and not requiring both parties to sign.

Shrink-wrap agreements are thus clearly direct descendants of the more traditionally formed and executed software licence agreement. As well as licensing the use of their product, software vendors use shrink-wrap agreements as a means of reinforcing their proprietary rights and to provide protection beyond that afforded by whatever intellectual property rights exist in the works. For example, in limiting implied warranties, prohibiting reverse engineering, specifying governing law and forum for resolving disputes.

An appreciation of the legality and enforceability of shrink-wrap agreements can be gained by examining the limited available US, Canadian and Scottish case law.<sup>15</sup> In early cases, shrink-wrap agreements were held invalid on contract formation grounds.<sup>16</sup> It was held that shrink-wrap terms and

conditions are not enforceable because the contract is formed at the time of purchase and therefore, the courts considered the terms and conditions added after the formation of the contract void. However, in 1996, in *ProCD v Zeidenberg*<sup>17</sup> the enforceability of shrink-wrap agreements was upheld and since then it is now fairly well established that such agreements are enforceable provided that their terms are not unconscionable or in breach of statute or contract law and the user has right to reject terms upon opening the package and to receive a full refund.<sup>18</sup> The available case law indicates that a software vendor using shrink-wrap terms should ensure that they are available to the purchaser at the time of the purchase. Use of the product indicates acceptance of the shrink-wrap terms and conditions. However, once a purchase is made and the purchaser has a chance to examine and inspect the agreement, it must be possible to back out of the deal and get a refund.

Online agreements have come to be known as 'click-wrap' agreements<sup>19</sup> and their usage has paralleled the growth of the Internet itself, so much so that they are now very much ubiquitous. The term 'click-wrap' is derived from the fact that in the online context, acceptance occurs when the consumer assents to the terms and conditions by typing 'I Agree' or much more commonly, simply mouse-clicking an 'I Accept' or similar button or icon ('the Accept icon').<sup>20</sup> In this way, prior to the supply of its goods or services, the online vendor usually displays its terms and conditions pursuant to its offer and in order to proceed with the transaction the consumer or subscriber must assent to be bound by those terms and conditions by express conduct of clicking the Accept icon. Access to the site's information or download of the music, software or installation program as the case may be will not proceed until the user clicks the Accept icon. From a vendor's point of view therefore, a major advantage of click-wrap agreements is that the visitor is denied access to the material contained on the website and to any downloadable software, or product or service until he or she assents to the click-wrap terms and conditions.

In this way, click-wrap agreements are formed very differently from contracts that are created offline. For example, there is no opportunity for consumers to negotiate the terms and conditions of the contract. They are take-it-or-leave-it agreements. Furthermore, all this can be done without paper contracts or physical signatures and contract formation can take place without ever needing any physical contact with the consumer. Once the purchaser selects the Accept icon and thereby assents to be bound, the contract is said to be formed on the posted terms and the transaction is completed. In this way, in the click-wrap agreement context, the act of clicking the Accept icon is analogous to breaking the shrink-wrapping in the shrink-wrap agreement context. No paper record is generally created nor is the electronic or paper signature of the Internet user typically required. As in the shrink-wrap agreement, the click-wrap agreement purports to be a contract whereby the user agrees not to engage in certain activities that might otherwise be allowed under law.

As in the case of shrink-wrap agreements, given the volume of transactions taking place on the Internet, it is clearly impractical, if not impossible, and it would be significantly inefficient for a webseller to separately negotiate terms, bargain, and enter into agreements with each and every consumer on an

individual basis. For example, for America Online to have entered into separate agreements with each of its 25 million members<sup>21</sup> would simply be impractical. Apart from increasing the cost to the consumer, entering into an agreement with each and every consumer would delay the vendor's ability to provide its goods or services while at the same time the consumer would be delayed from taking advantage of them. Thus, click-wrap agreements, as standard form agreements, reduce transaction costs and this allows vendors to sell more products, to more consumers, and at cheaper prices.<sup>22</sup> Again all this can be done without paper contracts or physical signatures and contract formation can take place without ever needing any physical contact with the consumer.

While shrink-wrap agreements are generally used for tangible products such as computer software on diskette or CD and packaged with a user manual, in the online context, click-wrap agreements are being used much more widely. The acceptance of the click-wrap terms and conditions is often a pre-requisite to accessing a website or a portion of it as well as electronic content stored on online databases and information based websites. They are being used to stipulate the terms and conditions of usage and/or participation in a host of online banking, securities trading, auction and gambling sites, online discussion forums, newsgroups, chat rooms and message boards, as well as Internet access, email, news and information services. As well as being used to inform users of the rules and regulations of usage, click-wrap agreements are also being used by online vendors to provide users with timely advice and warnings about the possible content on the site trying to be accessed such as in the case of un-moderated chat rooms, message boards and discussion forums as well as sites with adult content. Additionally, while many use the term 'click-wrap' to designate those contracts formed entirely in an online environment, it can also be used to refer to those agreements incorporated into software installation systems and visible during the installation process on a local PC.<sup>23</sup>

The comprehensiveness of an online agreement is often determined by balancing the potential legal exposure created by site activities and content, against the potentially intimidating impression that a long and complex agreement will make on the user. For example, relatively straightforward sites that provide information about a company, but have little user interactivity, may only require a short disclaimer about the information content. On the other hand, sites which host e-commerce, chat, email, or message boards or provide sensitive data, such as financial information and services, will more than likely use a more extensive online agreement. However, there are no general rules here and while one would expect this to be the case, many e-commerce sites do not provide the online purchaser with the opportunity to preview the terms and conditions at the time of transacting. The Barnes & Noble online bookstore is one such example. Here a visitor can purchase books without actually ever seeing or reading the terms and conditions.<sup>24</sup> This may be a commercial decision to keep things simple and a desire to just operate like a physical bookstore with no flashing of terms and conditions in consumers' faces at the cash registers. Another example of this is when registering with the New York Times.<sup>25</sup> Here a prospective subscriber can mouse click the Register button without actually having scrolled through or read the terms and conditions of use contained within the Subscriber Agreement which is separately accessed by way of a hyperlink.<sup>26</sup>

### 3. LEGALITY AND ENFORCEABILITY

Despite the now widespread use of click-wrap agreements, questions arise as to whether they are legally valid contracts and, if so, whether they are enforceable. Before discussing this issue a brief discussion follows on the law of contracts and what makes a valid enforceable contract.

A contract is essentially an agreement between two or more parties (e.g. people or organizations) with an intent to create a legal relation. Under English law, in order for a contract to be valid and enforceable the following six elements must exist:<sup>27</sup>

- an intention to create legal relations,
- an offer and acceptance of that offer,
- valuable consideration,
- legal capacity to enter an agreement,
- genuine consent to the agreement, and
- legality of objects.

Therefore, the parties with an interest in the contract must *intend to be bound* by it and acting in the absence of mistake, fraud, misrepresentation or other vitiating factors.<sup>28</sup> The contract can only bind the parties who agree to the terms, and not third parties. The parties to a contract must manifest their intention to create a legally binding contract by words or conduct and this is done through *an offer and acceptance of that offer*; "wherein one party proposes (offers) by words or conduct and the other agrees (accepts) by words or conduct".<sup>29</sup> There must also be *valuable consideration* (usually the payment of money). The parties entering into a contract must also have a *legal capacity* to enter into that contract and thus cannot be minors, mentally incapable, or intoxicated. In this way, the contracting parties must understand that they are entering into a contract and must have authority to act. Otherwise, the contract will either be void, or more often, voidable. There must be *genuine consent* and therefore, one party cannot use force to force another party into a contract and regarding consent, the parties must understand what they are consenting to. *Legality of objects* here means that the agreement must have a legal purpose and thus "the object of a contract cannot be criminal, tortious, or otherwise against public policy".<sup>30</sup>

Apart from some specific requirements of particular laws as in the case of wills, consumer credit, guarantees, mortgages and the transfer of land, there is no fundamental principle requiring contracts to be in writing or signed and thus while it has become a generally accepted business practice to form contracts by way of a signed written document, they may be formed orally or by conduct and may just as well be formed electronically by email, electronic data exchange, or through a website, or by a combination of these. However, there is no fundamental principle prohibiting the formation of a legally binding contract over the Internet and there is nothing inherently less or more enforceable about such contracts. The basics of contract law apply to online contracts the same as to any other contract.<sup>31</sup> Furthermore, just as all non-electronic contracts are not necessarily enforceable, the fact that a particular click-wrap agreement is found to be enforceable does not necessarily mean that all such agreements are enforceable. Contracting parties must still look at ordinary contract law principles to determine the enforceability of particular agreements.

Examination of the literature and the available US,<sup>32</sup> Canadian<sup>33</sup> and Scottish<sup>34</sup> case law on click-wrap agreements, while limited, indicates that the courts have upheld the principle of

online contracting and that a legally valid and binding contract can be created with a mere click of a mouse.<sup>35</sup> Courts have held that clicking the I Agree icon is effectively 'signing' a click-wrap agreement and hence binds the consumer to the terms and conditions of that agreement even if the consumer claims to not have seen, read or consciously agreed to the terms.<sup>36</sup> Hence, the clicking of the 'I Agree' icon to the terms of a click-wrap agreement is a significant factor that supports the enforceability of those terms.

From this therefore, despite the lack of available case law, it is likely that Australian courts will recognize that clicking on a web page constitutes valid acceptance. However, once the click-wrap legality issue has been decided upon, then the ordinary principles of contract law will come into play and just as with any other contract, these requirements must be met in order that the click-wrap agreements are enforceable. Click-wrap agreements that observe basic contract principles are likely to be found to be enforceable.

As previously mentioned, while under traditional contract law contract formation usually takes place after the parties have bargained over the terms and conditions of the agreement, in click-wrap agreements, and more than likely in shrink-wrap agreements, there is no bargaining between the parties. They are essentially standard form, take-it-or-leave-it agreements. Therefore, while a click-wrap agreement might be a valid contract, it may nevertheless be unenforceable if its terms are unfair or have not been brought to the attention of the buyer or site visitor at the time the contract is formed.<sup>37</sup> A web-seller must address this concern by ensuring that the click-wrap's terms are brought to the customer's attention prior to acceptance. The clicking requirement would seem to address this concern as it is totally in the hands of the consumer when he or she clicks to assent to the terms and conditions.

Because of the limited number of cases that have come up in the courts involving click-wrap agreements, in order to ensure their validity and enhance their enforceability, it is important that vendors make sure that their click-wrap contracts abide by traditional contract law as outlined at the beginning of this section. As noted by Walter Effros, Professor of Law, Washington College of Law, American University, "often lost in this blizzard of technological and marketing advice are the basic principles of commercial law and intellectual property law."<sup>38</sup>

#### 4. ONLINE SURVEY — OBJECTIVES AND METHODOLOGY

Anecdotal evidence suggests that consumers do not read online agreements. When describing click-wrap agreements Grossman and Hift write "I know that I skipped the step about anybody actually reading the contract first because I know that few people do."<sup>39</sup> In May 2001, the writer commenced a pilot study to investigate this and to specifically determine consumer awareness, attitude and understanding of these agreements and their enforceability. An online survey was considered to be the most efficient way of undertaking this basic consumer research; after all, the consumers that are of interest in this research are online users and, as such, highly likely to have already come across click-wrap agreements.

A website was created and the survey, formulated into an online questionnaire comprised of a list of six simple yes/no

type questions was made available to all site visitors. To assess if there was any areas of bias in the responses, participants were invited to specify their country location, industry or profession from 41 different industry/profession categories, and their age in either less than 18, 18 to 35, 36 to 60 and 60+ age group categories.<sup>40</sup> Provision was also made to allow respondents to provide additional comments. An option allowed participants to nominate whether they were interested in receiving a summary of the results of the survey and if so, provisions were made to allow participants to enter their name and email address details. When participants selected the Submit button their answers to the survey were electronically transmitted to an RMIT University server and stored in text files for later processing and analysis.

The following approach was used to seed participation in the survey:

- An invitation letter and follow-up email was sent to all RMIT University enrolled research students;
- Similarly, an invitation to participate was emailed to all students currently enrolled in RMIT's Master of eBusiness (MeB) course;
- An invitation to participate was also posted on the MeB students' discussion forum;
- Individual emails were sent to likely interested participants;
- In order to attract as many participants from the global online community: (a) the survey site was registered with a number of search engines; (b) messages were posted on a number of online forums, community websites, discussion groups and lists (e.g. USENET, LAWZONE,<sup>41</sup> IRISH-LAW<sup>42</sup> and NETLAWYERS<sup>43</sup>), as well as included in online newsletters;
- Through the European Law Students' Association (ELSA) International in Brussels, details on the survey were sent to students and recent graduates interested in law and international issues across Europe.<sup>44</sup>

#### 5. FINDINGS

The survey website was launched on 28 May, 2001 and responses were collected until 4 September, 2001. Because of the online survey methodology approach adopted it is not known precisely how many potential participants saw the invitation to participate. However, in that time period the website had 1007 visitors and attracted a total of 524 participants (a response rate of 52%). Of these, 502 questionnaires were deemed usable and the remaining 22 cannot be used because they are incomplete. Hence, a total sample size of 502 respondents was obtained.

The following summarizes the geographic location, industry and age spread of the survey sample:

- The sample size comprised 502 respondents from 39 different countries and 35 of the 41 different industries/professions described in the survey;
- 38% of the respondents were from IT, Internet and E-commerce related fields while
- 18% were from the legal profession, and
- 7.2% were from education, training and library;
- Of the remainder, 9.6% did not specify their industry or profession while the remaining 27% were spread across 31 different industries/professions;
- While 6% of the total respondents did not indicate their age, 1% or 5 respondents were less than 18 years old, 43%

were aged 18 to 35 and 48% were 36 to 60 years of age. The remaining 2% or 12 respondents were over 60 years of age. This geographic location, industry and age spread of the respondents gives a high degree of confidence there is no reason to suspect undue bias in the response. The following summarizes the findings from this pilot study:<sup>45</sup>

- 39% of the respondents felt that click-wrap agreements were not important;
- 50% of the respondents said that they sometimes read online agreements and 40% never read them; Thus, only 10% of the respondents always read the online agreements that they encountered; Well over half of the respondents (64%) always click the Accept button and most of the others (35%) some times Accept;
- More than half of the respondents (55%) didn't believe that they were entering into a legally binding and enforceable contract even after clicking I Accept;
- Most (79%) never ever kept a copy of any click-wrap agreement that they entered into;
- The majority of respondents (90%) indicated that they never completely read shrink-wrap agreements; 38% of the total respondents came from the IT/Internet/E-commerce industries;
- Half of the respondents (50%) left their name and email address details and requested a copy of the summary of findings of the survey.

## 6. IMPLICATIONS OF FINDINGS<sup>46</sup>

From these findings, given that well over half the respondents (64%) always accept online agreements and most of the others (35%) sometimes accept them, it is clear that consumers seem to have become very much aware and understand the concept of click-wrap agreements when subscribing to an online service or starting a download. However, what is also clear from the results of the pilot research survey is that most consumers (90% of survey respondents) never or at best only sometimes read these agreements.

While the findings that most consumers never read but accept online agreements in some ways are not surprising and seem to fit well with anecdotal evidence, the finding that most consumers do not believe that they are entering into a legally binding contract after clicking the 'I Accept' icon of these agreements is a serious concern. Given that the courts have upheld the principle of online contracting and that a legally valid and binding contract can be created with a mere click of a mouse, these findings suggests that a large proportion of Internet users are unaware that they may be legally bound by the terms of these agreements even if they have not read or consciously agreed to them. Furthermore, the finding that most consumers don't read click-wrap agreements makes the clear and unequivocal meeting of the minds as a prerequisite to valid contract formation, at least in the online world, troubling.

As ignorance of the law is no excuse (*ignorantia juris hand excusat*), most Internet users it seems, are in danger of contracting on terms and conditions that may not be in their best interest and that they might otherwise not agree to. These consumers will not be aware of when they are agreeing to terms and conditions over and above those used for specifying the terms and conditions of use of a website and those used to

protect and enhance intellectual property rights. For example, they will be unaware if and when they are agreeing to the use of Spyware<sup>47</sup> to track their online activities and the collection, compromise, use and/or sale of their personal information and/or consumer profile data.<sup>48</sup> From a consumer point of view, this aspect of contracting in the online world must be a concern. Website owners and vendors might also exploit this to their advantage in reinforcing their rights and in establishing the transaction terms and conditions.

The fact that half of the respondents chose to optionally leave their name and email address details and requested a copy of the summary of findings of the survey, suggests that there is a strong interest for more knowledge on the issues raised by this research. This perhaps indicates an opportunity for the many different groups involved including legislators, enforcement agencies, consumer associations, education institutions and even perhaps e-businesses to provide consumers with more information about the issues surrounding the use of click-wrap agreements. This may well offer a competitive opportunity to some online vendors.

## 7. CONCLUSION

The courts have upheld the principle of online contracting and that a legally valid and binding contract can be created by mouse-clicking the 'I Accept' icon. Courts have held this conduct as effectively 'signing' a click-wrap agreement, binding the consumer to the terms and conditions of the agreement even if the consumer claims to not have seen, read or consciously agreed to the terms.

This article presents results of preliminary research undertaken to determine consumer awareness, attitude and understanding of click-wrap agreements. While this research is still in progress, the findings of the preliminary survey of a diverse group of 502 participants clearly indicates that there is a serious lack of understanding and awareness on the part of consumers regarding their legal position when participating in the new economy. This may well become a serious problem in the future.

Internet consumers need to be aware of what a simple mouse-click could mean; they could be agreeing to a whole host of terms that may not be in their best interest. Accordingly, given that courts will likely find click-wrap agreements enforceable, consumers must be more conscious of what they are agreeing to and it behoves a site visitor to slow down and pay attention to the details of the terms and conditions of click-wrap agreements when subscribing to an online service or starting a download.

The author however also believes that both government and industry must understand consumers' concerns regarding their legal position when participating in the new economy and have an obligation to educate them regarding their rights and responsibilities. With the finding that there seems to be a strong interest for more information on the issues raised by this research, perhaps legislators, consumer groups (e.g. the Australian Consumers' Association), Internet Service Providers, legal organisations and educational institutions, as well as national competition and consumer organisations (e.g. the Australian Competition and Consumer Commission (ACCC)) can play a bigger role in addressing this need.<sup>49</sup> This may become increasingly important given that click-wrap agreements are now very much ubiquitous

and with the expected continued significant growth in electronic commerce, their usage will continue to increase and in time, it is also likely that they will be increasingly used for a wide variety of other contractual relationships, particularly in commercial contexts such as employment arrangements,<sup>50</sup> and purchasing of insurance and other services.

While consumers seem to have accepted the concept of online agreements, the findings of this research raises the question as to why the majority of consumers don't read these agreements. As in the case of many of the survey respondents, the reason for many consumers may well be that they do not believe that they are entering into a valid, legally binding and enforceable contract when they click the 'I Accept' icon irrespective of whether or not you have or have

not read the entire agreement. Based on the findings of this preliminary study, and in an attempt at explaining why there is a high degree of misunderstanding and uncertainty about click-wrap agreements, in March 2002 the author commenced a more comprehensive research project and commissioned a new online survey to explore the issues in greater depth.<sup>51</sup> It is hoped that this continuing research will provide a better understanding as to why most consumers don't read online agreements and to see if any recommendations can be drawn from this. This further research may be of particular interest to legislators, consumer associations, contract drafters and website owners.

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## FOOTNOTES

<sup>1</sup> This article presents preliminary findings based on research conducted by Adam Gatt as part of his Master of E-Business program at RMIT University. Adam holds B.Eng., M.Admin. and Ph.D. degrees.

<sup>2</sup> Daley W.M., *The Emerging Digital Economy*, The United States Department of Commerce <<http://www.ecommerce.gov/emerging.htm>>, 1998 (last accessed, May 2001)

<sup>3</sup> Miller, H. N., (1999), Information Technology Association of America (ITAA) submission in response to the December 16, 1998 Federal Register Notice requesting public comment on the public workshop on U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace March 26, 1999, <<http://www.ftc.gov/bcp/icpw/comments/itaa.htm>>, (last accessed, April 2002). See also Building Trust for Users and Consumers, OECD 1998, p.20, <[http://ottawaoecdconference.com/english/announcements/ecom1\\_4.pdf](http://ottawaoecdconference.com/english/announcements/ecom1_4.pdf)>, (last accessed, June 2002).

<sup>4</sup> See OECD website, <<http://www.oecd.org/>>, (last accessed, April 2002).

<sup>5</sup> Reuters, Study: *Web fails to impress most people*, <<http://news.cnet.com/news/0-1005-200-6279142.html>> (last accessed, June 5, 2001)

<sup>6</sup> Australian Bureau of Statistics figures December, 2000

<sup>7</sup> Jupiter Media Metrix, Inc., Australia: Online Projections, Vision Report Vol.2, December 21, 2001.

<sup>8</sup> Miller, loc.cit.

<sup>9</sup> See OECD website, <<http://www.oecd.org/>>, (last accessed, April 2002).

<sup>10</sup> Jupiter Media Metrix, Inc., European Consumer Commerce Forecasts, 2000-2006, Vision Report Vol.2, October 26, 2001. See also Schumacher, H.J., *Let's Talk Europe - What's new in Europe?*, BusinessWorld, May 24, 2000 and <[http://www.jmm.com/xp/jmm/press/2000/pr\\_090700.xml](http://www.jmm.com/xp/jmm/press/2000/pr_090700.xml)>.

<sup>11</sup> See: *The Current State of Play, National Office for the Information Economy*, Nov 2000, <[www.noie.gov.au](http://www.noie.gov.au)>, (last accessed, April 2002)

<sup>12</sup> Jupiter Media Metrix, Inc., Australia: Online Projections, Vision Report Vol.2, December 21, 2001.

<sup>13</sup> Miller, loc.cit.

<sup>14</sup> Kye, C., EU E-Commerce Policy Development, [2001] 17 CLSR 2 at pp.25-26.

<sup>15</sup> Available US, Canadian and Scottish case law involving shrink-wrap agreements include **Vault v Quaid Software Ltd.**, 847 F.2d 255 (5th Cir. 1988), **Step-Saver Data Systems v Wyse Technology** 939 F.2d 91, 98-100 (3d Cir. 1991), **Arizona Retail Sys. Inc. v Software Link Inc.** 831 F.Supp. 759 (D. Ariz. 1993), **Beta Computers (Europe) Ltd v Adobe**

**Systems (Europe) Ltd** (1995) FSR (1996) 367, **ProCD, Inc. v Zeidenberg**, 86 F.3d 1447 (7th Cir. 20 June 1996) (Easterbrook, J.), **Hill v Gateway** 2000 Inc., 105 F.3d 1147 (7th Cir. Jan. 6, 1997) (Easterbrook, J.), **Levy v Gateway** 2000, Inc., 33 UCC Rep. Serv. 2d 1060, 1997 WL 823611 (N.Y. Sup.), **Brower v Gateway** 2000, Inc., 676 N.Y.S.2d 569 (NY AD August 13, 1998), **Green Book Int'l Corp. v Inunity Corp.**, 2 F.Supp. 112 (D. Mass. 1998), **M. A. Mortenson Company, Inc. v Timberline Software Corp. & Softworks Data Systems**, Supreme Court of the State of Washington, 5/4/2000, **Management Computer Controls, Inc. v Charles Perry Const., Inc.**, 39 UCC Rep Serv 2d 1162 (Fla.App. 1999) and **Rinaldi v Iomega Corporation**, 1999 WL 1442014 (Del. Super.).

<sup>16</sup> For example, **Step-Saver Data Systems v Wyse Technology** loc.cit and **Arizona Retail Sys. Inc. v Software Link Inc.** loc.cit.

<sup>17</sup> **ProCD, Inc. v Zeidenberg**, loc.cit

<sup>18</sup> See **Step-Saver Data Systems v Wyse Technology** loc.cit., **Arizona Retail Sys. Inc. v Software Link Inc.** loc.cit., **ProCD, Inc. v Zeidenberg**, loc.cit. and **Hill v Gateway**, loc.cit.

<sup>19</sup> Sometimes also referred to as 'click-through', 'click-and-accept' and 'web-wrap' agreements.

<sup>20</sup> With shrink-wrap agreements, acceptance of the terms and conditions occurs when the consumer removes the shrink-wrapped plastic wrapper.

<sup>21</sup> See US Federal Trade Commission, *Warranty Protection for High-Tech Products and Services*, Federal Trade Commission, Transcript of Symposium held on 26-27 October, 2000, p.209. Available at: <<http://www.ftc.gov/bcp/workshops/warranty/index.html>>, (last accessed, April 2002).

<sup>22</sup> In the context of copyrighted works such as software, as well as at the time of providing the original product, click-wrap agreements can be used with future product enhancements, revisions and maintenance updates.

<sup>23</sup> Common examples of these include the WinZip file compression and extraction system and Adobe's Acrobat Reader.

<sup>24</sup> See Barnes and Noble website, <<http://www.barnesandnoble.com/>>, (last accessed, April 2002).

<sup>25</sup> See New York Times website, <<http://www.nytimes.com/auth/login?URI=http://email.nytimes.com/>>, (last accessed, April 2002).

<sup>26</sup> From a review of the available case law, given that in such examples consumers are not given the opportunity to read and agree to the terms and conditions of the online agreement prior to transacting, while being valid agreements it is unlikely that they will be enforceable.

<sup>27</sup> E-Business Law lecture notes, Professor Margaret Jackson, April 2001.

<sup>28</sup> Sometimes referred to as a meeting of the minds.

<sup>29</sup> Ferrera G.R., Lichtenstein S.D., Reder M.E.K., August R. and Schiano W.T., *Cyberlaw: Text and Cases*, 2001, South-Western College Publishing, p.93.

<sup>30</sup> *ibid.*

<sup>31</sup> Pattison M., *Contracting Online and 'Clickwrap' Agreements*, July 27, 2000, p.4 (unpublished).

<sup>32</sup> For US case law see: **CompuServe Inc. v Patterson**, 89 F3d 1257 (6th Cir. 1996), **ProCD, Inc. v Zeidenberg**, 86 F3d 1447 (7th Cir. 20 June 1996) (Easterbrook, J.), **Hill v Gateway 2000 Inc.**, 105 F3d 1147 (7th Cir. Jan. 6, 1997) (Easterbrook, J.), **Brower v Gateway 2000, Inc.**, 676 N.Y.S.2d 569 (NY AD August 13, 1998), **Green Book Int'l Corp. v Inunity Corp.**, 2 F Supp. 112 (D. Mass. 1998), **Hotmail Corp. v Van Money Pie, Inc.**, 47 USPQ.2d 1020 (N.D. Cal. April 20, 1998), **Groff v America Online, Inc.**, File No. C.A. No. PC 97-0331, 1998 W L 307001 (R.I. Superior Ct., May 27, 1998), **M.A. Mortenson Co., Inc. v Timberline Software Corp.**, 970 P.2d 803 (Wash. App. 1999), **Management Computer Controls, Inc. v. Charles Perry Const., Inc.**, 39 UCC Rep Serv 2d 1162 (Fla. App. 1999), **Steven J. Caspi v The Microsoft Network, L.L.C.** et. al., 1999 WL 462175 (N.J. App Div.) July 2 1999, **Register.com, Inc. v Verio, Inc.**, (S.D.N.Y. December 12, 2000) (Jones, J.), **Specht et al. v Netscape Communications Corp. and America Online Inc.**, 00 Civ. 4871 (AKH) (July 3, 2001), and **iLan Systems, Inc. v Netscout Service Level Corp.**, Civ. Act. No. 00-11489-WGY (D. Mass., January 2, 2002).

<sup>33</sup> See **Rudder v Microsoft Corp.**, Ontario Superior Ct., 47 C.C.L.T. (2d) 168. (Oct. 8, 1999)

<sup>34</sup> See **Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd** (1995) FSR (1996) 367.

<sup>35</sup> See **Hotmail v Van Money Pie, Inc.**, 47 USPQ.2d 1020 (N.D. Cal. April 20, 1998), C 98-20064 JW United States District Court, N.D. California, April 16, 1998. A summary of the case from the Harvard Law School's Berkman Center for Internet & Society can be found at <<http://eon.law.harvard.edu/h2o/property/alternatives/hotmailsumm.html>>, (last accessed, April 2002), **Caspi v Microsoft Network, CompuServe Incorporated v Richard S Patterson and Flashpoint Development**, Transcript 1996 FED App. 0228P (6th Circuit, July 22, 1996) No. 95-3452 and more recently **Specht, C. et al. v. Netscape Communications Corp. and America Online Inc.**, 00 Civ. 4871 (AKH) (July 3, 2001). In his findings, U.S. District Court Judge, Alvin Hellerstein wrote "Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench common law England; so it was under common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across invisible ether of the Internet. Formality is not a requisite, any sign, symbol or action, or even wilful inaction, as long as it is unequivocally referable to the promise, may create a contract". See also **iLan Systems, Inc. v Netscout Service Level Corp.**, Civ. Act. No. 00-11489-WGY (D. Mass., January 2, 2002).

<sup>36</sup> See **Hotmail Corp. v Van Money Pie, Groff v America Online and Caspi v Microsoft Network**.

<sup>37</sup> However, click-wrap agreements seem even fairer in comparison to shrink-wrap agreements as the user typically has the ability to review the agreement before agreeing to it.

<sup>38</sup> Effross, W.A., *A Web Site Checklist: Consider 'Click-Wrap' Pages, Linkage Disclaimers, and Forum Policies*, Legal Times 1 Mar, 1999, p.S34, <<http://www.wcl.american.edu/pub/faculty/effross/legatimesweb22.html>>, (last accessed, April 2002).

<sup>39</sup> Grossman, M. and Hift, A., *Contracting Via the Click*, see

GigaLaw.com website at: <<http://www.gigalaw.com/articles/2000-all/grossman-2000-02a-all.html>>, (last accessed, June 2002).

<sup>40</sup> Drop-down menus were used to enable participants to simply select their country location, industry or profession and age from standard menu options.

<sup>41</sup> See the LAWZONE website, <<http://www.lawzone.co.uk>>.

<sup>42</sup> See the IRISH-LAW website, <<http://www.irish-law.org>>.

<sup>43</sup> See the NET-LAWYERS website, <<http://www.net-lawyers.org>>.

<sup>44</sup> See European Law Students' Association (ELSA) website, <<http://www.elsa-online.org/>>.

<sup>45</sup> Of the total respondents, 18% were from the legal profession. The findings shown are for the 411 respondents from outside the legal profession.

<sup>46</sup> The conclusions drawn and presented here are limited to and based on the pilot study of 502 respondents.

<sup>47</sup> Spyware is the term used to describe software programs used by some Internet businesses to track website usage so that they learn more about consumer tastes and preferences. The Spyware transmits information back to the website owner transparently and as this could be written somewhere in the agreement that while accepted hasn't been read, many site visitors don't know that this will happen. For example, Spyware might indicate how many times you visit a site and the time of days you like doing so. If Spyware was in an MP3 player, the MP3 player might transmit back to the site owner the number of times the product is used, what songs the user like to play, which sites he or she downloaded MP3's from, etc. These profiles might end up in a database and used by the Spyware's author for marketing purposes, or sold to other companies for a profit. This may well be the business model used by some software developers. Instead of payment for the use of their copyrighted material, income might be derived from the sale of the marketing data collected. You get to download the software off the Internet for a very low price (as in the case of shareware) or even perhaps freely (as in the case of freeware) but you pay by way of your privacy as what you don't realise is that also bundled with what you download is a hidden component, the Spyware that ends up being secretly installed on your hard disk.

<sup>48</sup> Additional to personal information voluntarily submitted by a website visitor other information often collected and stored includes generic browser and Internet-related information such as which browser the consumer is using, which search engine and what specific search terms brought the consumer to the site and which specific pages the consumer visits on the site. Of course, much of this information can be extracted from a website's log file however, capturing this when the consumer is contracting or transacting ties that information to the individual and further builds on the profile data collected and stored.

<sup>49</sup> Australian Competition and Consumer Commission (ACCC), *The Global Enforcement Challenge*, Australian Government Publishing Service, August 1997 (available at <<http://www.accc.gov.au>>, (last accessed, April 2002).

<sup>50</sup> In Australia click-wrap agreements are already being used in relation to employment. Stevens Resources for example use a click-wrap agreement as part of their online Resume application form. See:

<[http://www.stevensresources.com.au/Send\\_Resume/body\\_send\\_resume.html](http://www.stevensresources.com.au/Send_Resume/body_send_resume.html)> (last accessed May, 2002). See also the Champion Fordland Dealership Application Form at <<http://www.championfordland.com/html/employment.asp>> (last accessed May, 2002).

<sup>51</sup> See survey website, <<http://seven.bf.rmit.edu.au/clickwrap>>.