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## Chapter 10 - Electronic Assent

Eliza Mik, *Singapore Management University*



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## CHAPTER 10 ELECTRONIC ASSENT

### INTRODUCTION

[10.1] This chapter deals with the expression of assent in an electronic environment. The previous two chapters focused on the contents of on-line contracts and the incorporation of terms. This chapter focuses on the existence of the contract. The question is not: what are the terms of the contract but is there a contract? Chapter 9 discussed notice and availability requirements, especially regarding the necessity to provide enhanced notice as to the term's existence whenever the contractual context is not obvious. The emphasis was on the side of the web-merchant, the discussion centered on hyperlinks. This chapter looks at the side of the user and focuses on methods of interacting with websites. When manifestations of intention take the form of websites, problems relate to the overabundance of displayed contents and the intricate relationships between the elements presented on-screen. When intention is manifested by clicks, the difficulties consist in establishing the legal effects, if any, of an act which is devoid of any inherent meaning.

The discussion links together some threads from previous chapters, such as the method of acceptance, the incorporation of terms, communication rules and - most importantly - the principle that contractual intention can be expressed in any manner and is evaluated objectively from the perspective of the addressee.

In all previous discussions the overreaching assumption was that the intention of the parties remained decisive - both for the time of contract formation and for the scope of the parties' obligations. This chapter examines intention from a different perspective: the focus is taken off the contents of a statement or the moment of its effectiveness and placed exclusively on the manner of expression. Just as Chapter 5 opposed the introduction of any special rules based on the fact that contractual intention was manifested by or on a website, this chapter opposes attempts to modify contract formation principles on the basis that assent is expressed with a click. It proves that contract law can seamlessly accommodate novel methods of manifesting intention.

## Roadmap

**[10.2]** The chapter briefly revisits the basic premises of contract formation, methods of manifesting intention and the relationship between the formation of a contract and the incorporation of terms, amongst others. Next, the chapter introduces the “click,” the main method of navigating websites and expressing assent in on-line transactions. The focus is on the value of the click as a communicative sign and on the objective approach to evaluating contractual intention.

Various “problems” allegedly posed by click are discussed. Accordingly, the chapter inquires whether clicks can serve as a method of manifesting intention and also whether clicks can constitute signatures.

Next, the discussion shifts to “accidental clicks” and the possibility to be bound despite a lack of intention. It is necessary to strike a balance between objectivity, or appearance of intention, and actual intention. The chapter also inquires whether contract formation principles require that all transactional websites be equipped with an “I agree” button. Normally, the problem is discussed under the heading “are browse-wrap agreements enforceable?” The relevant paragraphs revisit incorporation procedures and examine whether guidance can be obtained from US caselaw.

## INTENTION REVISITED

**[10.3]** Contract law presumes choice and voluntariness, the ability to determine whether to accept a set of obligations.<sup>1</sup> The cornerstone of agreement and, next to consideration, the main premise of contract formation is intention. Intention derives from outward expressions such as words and conduct.<sup>2</sup> Intention is always evaluated objectively from the perspective of a reasonable addressee. Despite the fact that intention may in some circumstances be overridden by appearance,<sup>3</sup> it remains an indispensable requirement.<sup>4</sup> Consequently, courts often face a dilemma of choosing between what the parties really intended and what they appeared to intend. Despite the fact that such terms as the “meeting of minds,” “agreement” or “promise” carry subjective and emotional undertones, contract law is concerned with identifying the circumstances in which parties are regarded as having reached agreement.<sup>5</sup>

## Offer, Acceptance and Intention

**[10.4]** “Offer” and “acceptance” are only tools of analysing intention, not prerequisites of agreement.<sup>6</sup> Accordingly, manifestations of intention need not fit into the offer and acceptance model.<sup>7</sup> Given the difficulties and artificiality of placing the labels of offer or acceptance on individual acts, “assent” can be regarded as a more neutral term relating to contractual intention in general. It can denote an offer or an acceptance.

Apart from offer and acceptance, other methods of contract formation are the adoption of a contractual document by signature and conduct.<sup>8</sup> The fact that contracts can be inferred from conduct<sup>9</sup>

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<sup>1</sup> Carter on Contract [01-040]; *Australian Woolen Mills Pty Ltd v Commonwealth* (1954) 93 CLR 546 at 457

<sup>2</sup> Carter & Harland [205]

<sup>3</sup> J M Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation* (2000) 69 *Fordham L Rev* 427 at 435

<sup>4</sup> *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854; *Air Great Lakes Pty Ltd v KS Eastern (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 336

<sup>5</sup> Carter & Harland [201]

<sup>6</sup> Carter on Contract [01-001]

<sup>7</sup> *Hyatt Australia Ltd v LTCB Australia Ltd* [1996] 1 Qd R 260 at 264 per McPherson JA

<sup>8</sup> Carter on Contract [02-040]

reflects the principle that intention can be manifested in any manner. Conduct must, however, be able to objectively convey an intention to be bound. Silence is generally regarded as too equivocal to permit an inference of assent.<sup>10</sup>

### Incorporation and formation

**[10.5]** When discussing assent it is necessary to distinguish between the formation of a contract and the incorporation of terms. This distinction is dictated on three grounds:

First, a contract can be formed but certain terms may not become incorporated. There may be intention to contract, there may be no agreement as to its exact terms or the party seeking to impose its terms may fail to successfully incorporate them. In such cases, the law may fill the gaps by implying a set of terms.<sup>11</sup>

Second, assuming that the terms have been sufficiently brought to the other party's attention and made available, formation and incorporation occur in one act. There is one act of assent that brings the contract into existence and incorporates its terms.

Third, incorporation procedures can play a role in the formation of a contract as the terms may prescribe the method of acceptance or the manner of expressing assent.<sup>12</sup> If terms are not communicated, the other party does not know how to express assent. For example, if the offeree "accepts" by a method other than that requested, there may be no contract. The more unusual the requested expression of assent, or the greater the likelihood that such "assent" could be given accidentally or involuntarily, the greater the necessity to inform the other party what signs are regarded as denoting acquiescence. Consequently, the effectiveness of incorporation may affect the contract's very existence.

### THE CLICK

**[10.6]** The world-wide-web is popular because it is easy to use. This "user-friendliness" is a consequence of the of the Graphical User Interface, or "GUI." Before the GUI, the predominant method of interaction was the Command Line Interface ("CLI"), which required users to type in sets of instructions that had to be learnt in advance. The CLI left no room for ambiguity or misunderstandings: if users wanted to perform a specific action they had to input the correct command. With the shift to GUIs the interaction became more simple and intuitive. Simplicity came at the cost of a limited range and expressiveness of possible actions - usually taking the form of "clicks." Users can also fill out forms, i.e. provide textual input of pre-defined length.

Clicks are a method of initiating HTTP requests for HTML files and invoking responses from client and server-side applications.<sup>13</sup> Clicks activate various elements of the GUI: hyperlinks, icons, buttons, scroll down menus or scroll bars. Clicks can resemble picking goods from shelves, nodding one's head in response to verbal offers or placing signatures on documents – depending on what is clicked. Sequences of "clicks" do not lend themselves to easy analysis, as each click can carry a different meaning and be

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<sup>9</sup> *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666; *Emprinall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523

<sup>10</sup> *Carter & Harland* [111]

<sup>11</sup> *Nimmer & Towle* para 5.03 [1]

<sup>12</sup> See Chapter 9 [9.3]

<sup>13</sup> The protocol specifications differentiate between "clicks:" some methods, e.g. HEAD or GET are intended for information retrieval, others, e.g. POST, PUT and DELETE, submit data to be processed by the server or upload specific resources and should be displayed in a special way, making the user aware of possible consequences. See: RFC 2616, Hypertext Transfer Protocol –HTTP/1.1, R Fielding, et al, (1999)

executed for a different purpose. From the user's perspective, the required action is the same - irrespective whether he or she clicks a button labeled "I Agree," "Download" or simply moves forward within the website.

### Can Clicks express assent?

**[10.7]** The answer to this question is simple: clicks can serve as a method of manifesting intention - they can be acceptances, offers, signs of promise and agreement. Consequently, clicks can express assent. To hold otherwise is to annihilate e-commerce. No one questions the validity or enforceability of contracts formed on Amazon.com – despite the fact that from the user's side intention is expressed by placing a pointer (conventionally a small black arrow that transforms into a little hand) on a graphical element and pressing the left button on a mouse. The theoretical justification is that intention can be manifested in any manner and that contracts can be inferred from conduct. Clicks can constitute an element in the circumstances that contract law regards as giving rise to agreement. An additional justification derives from all model laws and regulations: an act cannot be denied legal effect solely on the ground that it is in electronic form.<sup>14</sup> Furthermore, all technologies are equal.<sup>15</sup> Clicks are placed at par with websites, emails and paper documents. Assent can be expressed by typing "I AGREE" in an email, an instant message, posting on a website – or clicking a button with these words.

The discussion does not end here, however. The fact that assent can be expressed by clicks raises a number of problems. The latter derive from the limited expressiveness and simplicity of this method of communication.

### Can Clicks be Signatures?

**[10.8]** Generally, where a contract is reduced to writing but not signed there must be evidence independent of the agreement to prove assent.<sup>16</sup> Although signatures are rarely a prerequisite of validity or enforceability,<sup>17</sup> they constitute proof of assent. If there is a signature, there is assent, without need for further proof. Can clicks be signatures? The following sections are mainly a theoretical exercise, as contract formation rarely requires a signature. To some extent, they illustrate the misplaced focus on early "Internet law" literature and model regulations, which often seem to imply that on-line contracting requires the creation of functional equivalents of signatures.

Just as intention can be expressed in almost any manner, signatures can take many forms, ranging from handwritten names to "Xs."<sup>18</sup> The legal effect of a signature is not contingent on its form but the intention with which it is made.<sup>19</sup> The specific intention and therefore their legal effect depend on the context or on the nature of the document signed.<sup>20</sup> Traditional signatures express assent only if executed with the required intention. Given the liberal "form requirements," a signature could take the form of a click – provided the click occurred with the intention to sign.

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<sup>14</sup> See Chapter 1 [1.11] and Chapter 5 [5.12]

<sup>15</sup> See Chapter 1 [1.8]

<sup>16</sup> *Parker v South Eastern Railway Co* (1877) 2 CPD 416

<sup>17</sup> Signatures as a formal requirement are distinguished from signatures as expressions of assent.

<sup>18</sup> Report para 2.7.30

<sup>19</sup> H K Towle, *E-Signatures – Basics of the US Structure* (2001) 38 Hous L Rev 921 at 923; J K Winn, *Open Systems, Free Markets, and Regulation of Internet Commerce* (1998) 72 Tul L Rev 1177 at 1181

<sup>20</sup> Chapter 9 [9.26]; see also: T J Smedinghoff, *Creating Enforceable Electronic Transactions* (2001) 649 PLI/Pat 85 at 100

The fact that clicks can be signatures is, however, of little value. Their legal effect turns on the intention of the “clicker:” the click can be made with the intention to assent or with the intention to sign. In the latter circumstance, the effect of such “click-signature” would - again - depend on the intention of its maker. It is easier to prove that a click was performed with the intention to assent than to prove that it was performed with an intention to sign and assent. The object of analysis is the same: not the act itself but the context in which it was made. Clicks and signatures are equally valid communicative signs and their legal effect depends entirely on the surrounding circumstances. The only difference between them is that signatures are generally perceived as expressions of intention and raise a presumption of assent. Proving that a click expressed assent or constituted a signature boil down to proving the intention of their maker.

Model regulations state that electronic signatures can have the same effect as traditional signatures and can fulfil the formal requirement of a signature.<sup>21</sup> Electronic signatures can take any form: the legal effect does not depend on the method or technology used – clicks and digital signatures bear equal value.<sup>22</sup> Practically all model regulations require, however, that electronic signatures not only express the signer’s approval<sup>23</sup> but also identify the signer (a requirement absent in the real world and difficult to fulfil in a networked environment).<sup>24</sup> Model regulations admit that traditional signatures perform a variety of functions and that their legal effect depends on what was signed.<sup>25</sup> The legal effect of an electronic signature always depends on the context created by the web-interface.

Similarly, the value of digital signatures as methods of manifesting intention does not depend on the underlying technology but solely on the manner the digital signature application is activated.<sup>26</sup> Appending a digital signature to a document can take the form of typing in a PIN, placing a thumbprint on a reader or – clicking a “SIGN” icon. Digital signatures may be used for multiple purposes – not necessarily expressing assent. Again, the legal effect of a digital signature depends on the intention with which it was made.

According to model regulations, a click constitutes a signature if it was made with the requisite intention and identifies the signatory. Either way, one ends up examining the website on which an act was performed or the interface of the relevant application. Proving that a click was made with an intention to sign is, however, more cumbersome than proving that a click was made with an intention to assent. In the former scenario, intention relates to the fact of signing and assenting. Ultimately, it must be remembered that clicks are nothing but methods of initiating HTTP requests from web-servers. They can, however, have the same legal effect as handwritten signatures. The question whether they can constitute signatures is therefore generally irrelevant.

### Intention and Objectivity – “Accidental Clicks”

**[10.9]** Even if clicks can validly express assent and, provided certain requirements are met, constitute functional equivalents of signatures or have the same legal effects as signatures, they are a novel communicative sign and lack the “expressiveness” or psychological impact of certain real-world actions. Many behaviours are universally perceived as expressions of assent. In the real world, parties negotiate in

<sup>21</sup> MLEC Art 7, MLES Art 6, ETA Section 10, UETA Section 9, CUECIC Art 9; See also: J M Moringello, Signals, Assent and Internet Contracting (2005) 57 Rutgers L Rev 1307 at 1324

<sup>22</sup> MLES Guide to Enactment para 82

<sup>23</sup> MLEC Art 7, MLES Art 6, ETA Section 10, UETA Section 9, CUECIC Art 9; see also Electronic Transactions Bill 1999, Explanatory Memorandum, p 28, 29

<sup>24</sup> see Chapter 4 at [4.5]

<sup>25</sup> MLES Guide to Enactment para 29; Report paras 2.7.27-2.7.33

<sup>26</sup> It must be assumed that the complexity of the technology impact on the reliability of identification.

a familiar environment, “against a background of commercial or local usage whose implications they have tacitly assumed.”<sup>27</sup> In contrast, clicks are detached from trade usages and devoid of any inherent meaning.

The imagery of a well-designed website, such as amazon.com must be abandoned. Web-merchants often take advantage of the impatience of click-happy web-surfers<sup>28</sup> and design web-interfaces to “trick” them into transactions. The problem was touched upon in the previous chapter, where incorporation procedures were used to “introduce terms through the back door.”<sup>29</sup> Objectively, sufficient notice is given and terms are available behind hyperlinks. The minimal requirements are met, yet the website is not designed to inform that terms exist or a contract is being formed. As a result, users activate an element of the GUI that was designed to carry a particular meaning, such as agreeing to a set of terms, without actually intending to agree to any terms, in fact - without realizing that a transaction is taking place. Although the user clicked the “I agree” button and a hyperlink provided the terms, he or she pleads ignorance of any transaction – he or she intended to click a button but did not intend any legal effects. Is there a contract? Who should prevail: the user or the web-merchant?

A brief point must be made regarding the scope of required intention: having entered a shop, people do not necessarily perceive the situation as contractual and do not realize the full legal implications of their behaviour, for example that taking goods to the register will result in a contract of sale and that terms will be implied by relevant legislation. It is beyond doubt, however, that they are in a shop and that a purchase may be contemplated. Similarly, the implications of signing a document, raising one’s hand at an auction or placing goods at the counter are generally known. While all legal consequences of a particular act may not be envisaged or intended, transactions are rarely entered into involuntarily or documents signed accidentally.

The same cannot be said about websites. Not every website is commercial and not every user surfs the web with a “purchase” in mind. “[C]onsumers have little or no background expectations against which to measure their assent experience.”<sup>30</sup> Unlike in the real world, where the shopping experience differs only minimally between shops, each web-site can have a different transacting procedure and use different communicative signs. Due to the ease of transition between websites, the fact of “entering a shop” may pass unnoticed. What started out as a search for information about a particular singer may lead directly to an on-line shop offering his tracks for download. Absent a commercial or transactional setting, intention to create legal relations cannot be presumed.<sup>31</sup>

The objective test requires that if a person manifests intention to induce another party to act upon it in forming a contract “he will be estopped from denying that the intention he manifested was his real intention.”<sup>32</sup> The objective test does not, however, apply in favour of a person who knows the truth.<sup>33</sup> It is the web-merchant who created the appearance of intention, not the user who clicked through a number of screens. The web-merchant cannot take advantage of such appearances if he or she has no belief that the other party intended to contract.<sup>34</sup> Assent may be denied if it is the addressee’s fault that the person allegedly manifesting assent appeared to agree to something he or she did not intend to assent.<sup>35</sup> Assent can also be denied if the person allegedly expressing assent did not intend to assent at all.

<sup>27</sup> Cheshire, Fifoot and Furmston p 133

<sup>28</sup> R A Hillman, J J Rachlinski, *Standard-Form Contracting in the Electronic Age* (2002) 77 NYULR 429 at 480

<sup>29</sup> See Chapter 9 at [9.3]

<sup>30</sup> M J Madison, *Rights of Access and the Shape of the Internet* (2003) 44 B C L Rev 433 at 457

<sup>31</sup> Carter & Harland [403]

<sup>32</sup> J P Benjamin, *A Treatise on the Law of Sale of Personal Property*, London 1868, p 357-358; see also *Smith v Hughes* (1871) LR 6 QB 597

<sup>33</sup> Carter on Contract [01-080]; Treitel p 9

<sup>34</sup> Carter & Harland [111]

<sup>35</sup> *Scriven v Hindley* [1913] 3 K B 564

Transposing the problem to the offer and acceptance model, acceptance must occur with knowledge of the offer and with the intention to accept.<sup>36</sup> Generally, the accidental performance of the required act cannot form a contract.<sup>37</sup> If an offeror stipulates a mode of acceptance that could result in mistaken acceptance, the occurrence of the stipulated act need not result in formation.<sup>38</sup>

Although the full legal implications of an act need not be realized, users must understand what they are doing<sup>39</sup> and have a choice not to do it - the click must be voluntary and intentional.<sup>40</sup> A click serving navigational purposes must be distinguishable from a click serving to express intention or obtain a benefit. Its consequences must be obvious.<sup>41</sup> In some situations it may be difficult to determine whether a particular click was intended as an act of assent or “only” as a method of obtaining a benefit, such as downloading software. The latter act could constitute assent to a transaction, similar to the act of selecting goods at a supermarket. If, however, the user does not know that a transaction is taking place, the click cannot express assent.

US doctrine speaks of a “reason to know” that an act will indicate assent to the other party.<sup>42</sup> Again, absent a clear transactional context it may be difficult to establish whether a reason to know exists. The legal effect of a click, if any, will always depend on the objective evaluation of context in which it occurred.<sup>43</sup>

It must be remembered that contract law treats certain circumstances as giving rise to agreement – absence of subjective intention notwithstanding. Users should not be able to deny assent if they should have known what they were doing, web-merchants should not be able to take advantage of appearances they themselves created. Everything depends on the context: users may not perceive the situation as transactional when browsing a website, yet, the latter may contain terms regulating the use of the information posted thereon. As indicated in Chapter 9, whenever the context is not clearly transactional, web-merchant must meet enhanced notice requirements: the notice not only alerts to the terms but creates the transactional context.

When a person rushes into the supermarket and fails to note a sign placed on the door that the owner reserves the right to inspect bags as a condition of entry, this note may still be considered as sufficiently brought to the person’s attention and therefore legally effective. When a user impatiently clicks through multiple screens without paying any attention to their contents, he or she risks missing important legal information, such as notices. If one of those screens warns the user that the next click will be deemed an expression of assent to the terms of the website and if such screen can be regarded as reasonably bringing the terms to the user’s attention, the latter will be taken to have communicated assent by remaining on the website. In other words, the next click – theoretically performed for navigational purposes – may constitute assent. The enhanced notice requirements imposed on the merchant must be accompanied by the user’s obligation to slow down and read what is displayed. If the notice is prominent and the transactional context is clear, the user cannot deny the legal effect of his or her click on the ground that he or she was “just clicking through” and did not see the notice.<sup>44</sup>

<sup>36</sup> Carter on Contract [02-080], Treitel pp 18, 36

<sup>37</sup> Carter on Contract [03-270]

<sup>38</sup> Cheshire & Fifoot [3.43] citing *Magnum Photo Supplies Ltd v Viko New Zealand Ltd* [1999] 1 NZLR 395

<sup>39</sup> R A Hillman, J J Rachlinski, above at note 28 at 463

<sup>40</sup> R Nimmer, *Contract Law in Electronic Commerce* (2000) 587 PLI/Pat 1127 at 1155

<sup>41</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>42</sup> Nimmer & Towle para 5.03[1]

<sup>43</sup> R Nimmer, above at note 40 at 1157

<sup>44</sup> See also Chapter 3 [3.27] for a discussion of CUECIC Art 14 “Error in electronic communication”



A final point before proceeding: as clicks can (theoretically) constitute the functional equivalents of signatures, it may be tempting to apply the non est factum doctrine (i.e. the doctrine pertaining to documents mistakenly signed)<sup>45</sup> to instances of accidental clicks. Such temptation can be justified by comparing the lack of familiarity with the meaning of a click to illiteracy – many users do not understand the “language” of the web-interface. In non est factum cases, however, the person signing knew that he or she was signing. The lack of knowledge related to the nature or effect of a document.<sup>46</sup> In the current scenario, the person clicking is not aware that one click in a sequence of clicks constitutes assent. Absent intention there can be no signature, absent signature there can be no non est factum.

### The Additional Click

**[10.10]** The limited expressiveness of clicks and the (alleged) risk of “accidental contract formation” gave rise to theories requiring an additional act of assent or enhancing the act itself.<sup>47</sup> Allegedly, remaining on the site or downloading software are insufficient to express agreement. As the aforementioned acts are too ambiguous to constitute assent, a separate button labeled “I agree” (or similar) is required. There must be an additional act, separate from the expression of desire to obtain the product or service.<sup>48</sup>

“Additional assent” theories derive from a series of US cases differentiating between so-called “click-wrap” and “browse-wrap” agreements. Click-wrap agreements are descendants of shrink-wrap licenses. The latter originate from the practice of packaging software in cellophane-covered boxes. The outside of the package often states that breaking the seal constitutes assent to the license terms; alternatively, the package contains a notice that terms are inside therefore retaining the software constitutes assent.<sup>49</sup>

In click-wrap licenses, breaking the cellophane seal is substituted with clicking a button, which must be activated in order to proceed. Clicking the button constitutes a manifestation of assent. Furthermore, the button cannot be activated or, alternatively, the service cannot be used unless the terms are viewed. Browse-wrap agreements do not contain a separate “I agree” button and terms are usually accessible through a hyperlink. Allegedly, browse-wrap agreements do not invite any outward and unambiguous manifestation of assent: the terms are not unavoidable and no separate act of assent is required. Therefore, browse-wrap agreements are not enforceable.<sup>50</sup>

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<sup>45</sup> The Law of Contract [4.111]

<sup>46</sup> *Saunders v Anglia Building Society* [1971] AC 1004; *Muskham Finance Ltd v Howard* [1963] 1 QB 904; *Carter on Contract* [22-500] *Petelin v Cullen* (1975) 132 CLR 355; see also: *The Law of Contract* para [4.112]

<sup>47</sup> See generally: A M Balloon, *From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions* (2001) 50 Emory L J 905 at 933; W J Condon, *Electronic Assent to On-line Contracts: Do Courts Consistently Enforce Clickwrap Agreements?* (2003/2004) 16 Regent U L Rev 433; Ch L Kunz et al, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent* (2001) 57 Bus Law 401

<sup>48</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>49</sup> *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7<sup>th</sup> Cir 1996)

<sup>50</sup> M Robertson, *Is Assent Still a Prerequisite for Contract Formation in Today’s E-Conomy?* (2003) *Wash L Rev* 286; L Wilhelmi, *Ensuring Enforceability: How Online Businesses Can Best Protect Themselves from Consumer Litigation* (2002) 86 Marq L Rev 181; J Femminella, *Online Terms and Conditions Agreements: Bound by the Web* (2003) 17 St John’s J Legal Comment 87 at 101; Sh Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements* (2003) 26 HMLR 499 at 549

Some US cases and literature suggest that for on-line contracts to be enforceable the website must require an additional act of assent, preferably in the form of an “I agree” button, and the terms of the contract must be unavoidable. US cases do not always explicitly distinguish between formation and incorporation, the problem is usually discussed in terms of enforceability. There also seems to be a closer relationship between assent and the incorporation of terms – assent cannot be manifested absent notice and opportunity to review. Some cases if decided in Australia may have led to the result that a contract was formed but its terms did not become incorporated. For the purposes of this chapter, the only point of interest is whether under Australian law assent must be explicit or enhanced and whether terms must be unavoidable.

Proponents if click-wraps appear to discard any method of presentation, which requires minimal user activity. Unquestionably, terms that self-display are more likely to come to a user’s attention than terms “hidden” at the bottom of the page. There is no principle of contract law, however, that requires that terms be unavoidable.<sup>51</sup> A prominent hyperlink is equally effective as a self-display mechanism. Availability suffices. The bias against browse-wraps can be explained by the fact that in many browse-wrap cases the link to the terms was inconspicuous and their existence was not obvious.<sup>52</sup> The problem was one of inadequate notice and lack of a clear transactional context, not unavoidability or lack of assent.

Allegedly, clicking the “I agree” button creates awareness of the contractual situation. Following this line of reasoning, the more acts must be performed, the clearer their meaning and legal effect. If, however, the legal effect of the click is not communicated prior to the click, users may activate the “I agree” button without contractual intention. It is not a question of enhancing or duplicating the manner of assent but of notifying the user about the existence of terms, which prescribe the act of assent.<sup>53</sup> The latter may provide that remaining on the site, or using the service, constitutes assent to the terms and to the contract. While clicks are unquestionably less explicit than signatures or handshakes, it is the less explicit transactional context or the failure to communicate terms that is the main concern – not the form of assent.

Just as there is no legal requirement that terms be unavoidable, there is no legal justification based on contractual principles for an “additional” act of assent: on-line contract formation does not hinge on the existence of an “I Agree” button.<sup>54</sup> The act of downloading can be executed in order to obtain the product and express assent. Remaining on the website and clicking and “I agree” button constitute equally valid manifestations of intention. In both instances, assent takes the form of a “click,” in both instances, its meaning derives from the context or the terms. The click must be performed with a reason to know that it will be objectively interpreted to mean something other than navigation.<sup>55</sup> Terms need not be read, viewed or understood. It must be clear, however, that contract formation is taking place. The fact that the user knows about the terms and proceeds with the transaction indicates that he or she accepts them.<sup>56</sup>

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<sup>51</sup> See Chapter 9 [9.25]

<sup>52</sup> In *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000) the notice was in small gray text on a light gray background and provided a link to the terms, the link was not underlined; in *Specht v Netscape Communications* 306 F 3d 17, the link to the terms was placed on the bottom of the page and required scrolling. See also: *Ticketmaster Corp v Tickets.com Inc* 2000 WL 525390 (CD Cal 2000) assent was held inadequate as the hyperlink to the terms was not prominent.

<sup>53</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); see also: M E 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

<sup>54</sup> *Nimmer & Towle* para 5.03 [4][a]

<sup>55</sup> D Davidson, *Click and Commit: What Terms are Users Bound to When they Enter Web Sites?* (2000) 26 Wm Mitchell L Rev 1171

<sup>56</sup> M J Radin, *Online Standardization and the Integration of Text and Machine* (2002) 70 Fordham L Rev 1125 at 1126

Assent must be informed - not only in the sense that a person must know what he or she is assenting to but how to express assent.<sup>57</sup>

The topic of "clicks" cannot, however, be abandoned without admitting that in some circumstances an enhancement of the click is warranted. Such will be the case when a click aims to replicate the functions of a signature for the purpose of meeting a formal requirement. Laws establishing formalities seek to alert the signatory to the potential consequences of his or her acts.<sup>58</sup> Signatures often perform a cautionary function.<sup>59</sup> The fulfilment of the ceremonial or protective functions of signatures may require that assent be explicit and involve a more complex action, such as typing in a code.<sup>60</sup> Similar requirements may be dictated on consumer protection grounds.

## Conclusion

**[10.11]** There is no need to duplicate the act of assent or require that it be explicit solely on the ground that transactions are taken on-line. Intention can be expressed by any method of interacting with the GUI. The legal effect of such method will always derive from the surrounding context. Clicks are as valid a method of expressing intention as emails and websites. There is no need to create novel rules for online contracting. At the same time, the dangers of the novel transacting environment must be acknowledged: the transactional context may not be obvious, be it due to the ease of transition between websites or the novelty of on-line business models. It is a question of enhancing the notice of the terms' existence, not one of enhancing the act of assent. Terms need not be unavoidable. They must, however, be brought to the attention of the other party – especially if they prescribe the form of assent. In the latter instance, the failure to incorporate terms may be synonymous with the failure to form a contract: if the web-site user did not see the terms, it can be assumed that he or she also did not know that one click in a sequence of clicks will be taken to constitute assent. Remaining on the website can constitute as valid an expression of assent as a signature provided that the user knows that his or her continued browsing is subject to a set of terms. The validity - or existence - of assent is closely related to the effectiveness of the incorporation procedure.

Due to the objective evaluation of intention, users may not be able to deny that one of their clicks constituted assent to an agreement. While web-merchants must not take advantage of appearances they themselves created, users must exercise more caution when browsing the web, especially if the context is transactional.

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<sup>57</sup> See e.g., E-commerce Directive Art 10 (2) that "Member states shall provide in their legislation that the different steps to be followed for concluding a contract electronically shall be set out in such a way as to ensure that parties can give their full and informed consent."

<sup>58</sup> See V Gautrais, *The Colour of E-consent* (2003-2004) 1 UOTTL T J 189 who stresses that while a click can constitute a valid expression of assent, "it is wrong to accept it without addressing the medium's particular features," at 200 and suggests that assent should be "explicit." at 210

<sup>59</sup> J M Moringello, *Signals, Assent and Internet Contracting* (2005) 57 Rutgers L Rev 1307 at 1316

<sup>60</sup> such requirement may also result from the provisions of model regulations which require that functional equivalents of signatures deploy reliable methods of identification and of expressing intention.