Chapter 8 - The Contents of On-line Contracts

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CHAPTER 8 THE CONTENTS OF ON-LINE CONTRACTS

THE CONTENTS OF A CONTRACT DEPEND PRIMARILY ON THE WORDS USED BY THE PARTIES IN ENTERING INTO THE CONTRACT.¹

INTRODUCTION

[8.1] This chapter deals with the process of ascertaining the contents of contracts formed in open electronic networks. The previous two chapters focused on the time of formation and involved an analysis of how messages are transmitted across networks. This chapter shifts the focus from how messages are transmitted to how contractual intention is presented. All preceding chapters relied on the assumption that the parties' intention remains decisive, this chapter aims at establishing what intention was manifested. The Internet-specific problems that arise in this regard can be reduced to one word: hypertext – a technology of organizing and displaying information.²

This chapter examines the implications of hypertext for the application of contract formation principles. Hypertext has never been the subject of academic debate from a contract law perspective. On-line contracts are usually discussed with regards to their electronic form and their alleged inability to meet formal requirements. Hypertext, in turn, is analysed mainly in relation to copyright, trademark infringement and unfair competition.³

As indicated in Chapter 1, this thesis distances itself from the concepts of media neutrality and functional equivalence. The provision of a functional equivalent of “writing” and the general declaration that electronic transactions are valid and enforceable do not facilitate on-line contracting and create a host of controversies. Contract formation principles implicitly assume a three-dimensional world of walls, doors and paper documents. It is one thing to state that intention can be manifested in any manner; it is

¹ Treitel p 191
² HTML has gone through four major standards and is currently in version 4.1. Related technologies are Dynamic HTML (“DHTML”) and Extensible HTML (“XHTML”), which enrich the original language with additional features, such as interactivity and dynamic content display. Technically, it would therefore be more correct to refer to all three languages. For the sake of brevity, this thesis uses HTML. It discusses additional features only where necessary. See generally: S M Schafer, Web Standards Programme’s Reference: HTML, CSS, JavaScript, Perl, Python and PHP, 2005 Indianapolis, p 7
³ See, e.g. Nimmer & Towle para 9.03
another to evaluate such intention when it is expressed in by means of an HTML file or a “click.” It is another thing altogether to apply contract formation principles in the two-dimensional environment created by the world-wide-web. Especially if some of those principles were built around the paper-paradigm.

As in the case of contracts formed by traditional means, it may be unclear what was actually promised. The validity and enforceability of on-line contracts seems of little value if it is unclear what can be enforced. Both in the real-world and on-line it must be established, “how much of what [the parties] have said or written has been caught up into the contract.” When ascertaining the contents of on-line contracts it must not only be determined which of the statements made by the parties have contractual force, but which of the communications passing between the parties should be included in the analysis. The question turns on establishing which of the contents displayed on-screen during the formation process become part of the contract.

Again, the role of the offer and acceptance model cannot be underestimated. First, the contents of a contract often depend on the moment of formation. As indicated in Chapter 5, the offer and acceptance model enables the determination of the beginning and the end of the contract formation process. Assuming that the parties have not embodied their agreement in a written document to the exclusion of any prior communications, their respective obligations derive from the statements made during this process. Subsequent conduct and words are principally irrelevant, as no terms can be introduced after acceptance. Second, as an offer must be certain and complete (i.e. capable of being accepted by a simple “yes”), establishing the existence of an offer is generally synonymous with establishing the contents of the contract. In on-line transactions the problem lies in determining what the other party consented to, what contents were encompassed by the acceptance.

The problems discussed in this chapter resemble those in Chapter 7, where the determination of the time of formation required that additional questions be answered after completing the traditional analysis. This chapter aims at ascertaining which of the contents presented on-screen constitute the “raw material” the contractual terms will emerge from. Additional questions arise before the traditional analysis can commence. As in Chapter 7, the discussion does not occur against a background of existing literature on Internet-based contracting. Consequently, there are few arguments to counter and few sources to draw from.

The on-line contract formation process “takes place” on the computer screen. Screen displays are generally built around the concept of windows. Windows are generated by various applications resident on the user’s computer. One of those applications is a browser, which displays content retrieved from the world-wide-web (“the web”). The web constitutes an information intensive environment combining graphics, text, audio and video, streaming and animation. A website may contain the description of the contractual subject matter, the (standard) terms, obligatory disclosures as well as advertising and marketing material. The proximity and dynamic nature of these elements may create cognitive difficulties. In the case of paper it is clear where the information ends and where it begins, the association between the pages is clearly delineated, their contents are stable. Paper pages do not change depending on who looks at them and do not bombard their readers with personalised messages, moving pictures and real-time information. Similarly, shop displays do not change during the duration of the visit and customers are rarely unaware that they walked from one shop into another. In the case of websites, the difficulty of distinguishing between the respective elements is compounded by the ease of transition to other parts of the same website and to external sites.

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4 Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd [1985] 2 NSWLR 309 at 337 per McHugh J A “[i]ntention to be bound is a jural act separate and distinct from the terms of [the] bargain.”

5 D E Allan, The Scope of the Contract, Affirmations and Promises Made in the Course of Contract Negotiations (1967) 41 ALJ 275

6 Treitel p 176
Neither the browser menu nor messages generated by local applications need to be taken into account when ascertaining the contents of the contract. They are mentioned only to emphasize the density of information displayed on the computer screen. At the same time, despite the physical limitations of the screen, websites are unlimited geographically: their contents can originate from various HTML files hosted on multiple web-servers. Furthermore, individual HTML files are often too large to be displayed in the browser window. Users visiting websites may find it difficult to fully appreciate the informational dimensions of the web’s multilayered structure. One window can display multiple files, one screen can display multiple windows.

Although this chapter covers a wide spectrum of legal and technical issues, the point made is simple: it is not the electronic form or the alleged lack of writing on the Internet that are the source of difficulties in applying contract formation principles on-line. It is HTML and its related technologies that:

- create confusion as to the source and the contents of a statement,
- render it difficult to objectively evaluate manifestations of intention,
- prevent the direct application of those contract formation principles, which are built around the concepts of “writing.”

Roadmap

[8.2] This chapter confronts some basic problems of applying contract formation principles in a hypertext environment. It provides the background for all further discussions relating to the incorporation of terms and the expression of assent. The most important technological aspects are described to present the difficulties created by HTML. The chapter proceeds to discuss how this technology affects traditional principles or the assumptions underlying their application.

The structure of this and the following chapters has been chosen with great difficulty and to many readers a different sequence may appear preferable. Following the traditional textbook order is particularly difficult as the principles of establishing of contractual contents are “scattered” over multiple chapters and cover such disparate topics as express terms, incorporation, rules of construction, formal requirements as well as the offer and acceptance model. It can also be doubted whether a “traditional” textbook sequence exists, as different books handle this topic in different ways. As a result, the “glue” that holds this chapter together is HTML and not a set of general principles of determining contractual contents. HTML is the reason this chapter needs to be written in the first place. If it was not for HTML there would be no world-wide-web and no e-commerce as we know it.

After some preliminary explanations, the chapter describes the basic principles of ascertaining the contents of a contract. It discusses the technical aspects of HTML and points to a number of practical problems created by this novel method of presenting and associating information. After formulating some questions relevant to contract law, it describes the existing legal approaches to HTML, the so-called linking cases, and some regulatory responses to the challenges created by the hypertext environment. It emphasizes the difficulties of evaluating intention in an environment where the manner a statement is manifested is often beyond the control of the person making such statement.

Next, the chapter examines the concepts of “writing” and “documents” in the on-line environment. While this thesis is about formation, not formalities, discussing the contents of on-line contracts forces an analysis whether on-line communications can be regarded as “writing.” The relationship between “writing” and “document” is examined, as well as the definitions of “writing” proposed by the model laws. Does “writing,” as it exists on the Internet, enable the application of those contract formation principles that presume that writing is inscribed on a tangible carrier?

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7 Compare Carter & Harland with Cheshire, Fifoot & Furmston and Willmont, Christensen & Butler. The latter two contain separate chapters on content.
The chapter concludes with a broad “impact assessment” - the identification of those principles, which are directly affected by hypertext.

This chapter focuses on web-based transactions; email and instant messengers are discussed only marginally. The legal problems related to email and instant messengers predominantly pertain to the manner messages are transmitted, whereas problems of presentation mainly concern websites. It also returns to the terminology introduced in Chapter 5, the parties are called “web-merchant” and “user.”

Preliminary Considerations

[8.3] To set the stage for all subsequent discussions a number of explanations seem in place.

First, to some readers the existence of a separate chapter on the contents of on-line contracts may seem unjustified. The choice was between writing one long chapter, covering a multitude of legal and technical issues, or separating these issues at the expense of some artificiality. Only the second solution seemed to account for the fact that different aspects of the process of ascertaining contractual obligations raise different questions. Determining the contents of on-line contracts relates to the challenges created by hypertext, or the world-wide-web in general. The problems lie in the distribution of contents over multiple files and the dynamic and interactive character of some files. The challenges lie in establishing the source and scope of the statements made during the formation procedure. Despite a certain overlap, the process of incorporating terms raises separate questions, mainly relating to the concepts of “notice,” “availability” and “signature.”

Second, the problems described in this chapter are not novel as the concept of referencing predates the Internet. In the real world the solutions to these problems are generally straightforward and intuitive. Not so in the on-line environment. It is always possible to devise analogies or conceive of a real-world situation that resembles an on-line phenomenon. Such analogies would, however, be stretched and artificial. Most importantly, in the real-world certain situations are highly unlikely or exceptional, whereas their occurrence in the on-line environment is the rule, not the exception. Instead of looking for on-line functional equivalents of real-world concepts or devising new analogies, it is better to acknowledge the differences and focus on the practical application of contract formation principles in a world made-up of HTML files. As one author put it: “[t]here are no analogous systems in the world of brick and mortar.”

Third, the contents of a contract emerge from the statements made during the contract formation process. Some of them become terms, others are irrelevant from a contractual perspective. The term “statement” includes any “representation of fact or opinion whether made in words or otherwise” and can take the form of text, audio or graphical elements capable of conveying meaning. For all practical purposes, “statement” is synonymous with “manifestation of intention.” “Statement” must be, however, distinguished from “contents of the statement.” If the website is regarded as a “statement,” then it is logical to inquire about its contents. If the website is regarded as containing multiple statements from different sources (as is often the case), it preferable to ask what statements were made on the website and examine the contents of each respective statement. The choice between the two questions depends on what is regarded as the basic unit of analysis: the website, the webpage, the screen, the browser window or the HTML file hosted on the web-server. The problem is less prominent in the case of email or instant messengers, where information takes the form of discernible messages coming from one source. The problem re-emerges when an email or instant message contains a hyperlink. The confusion regarding the basic unit of analysis introduces a terminological difficulty: should the discussion centre on websites or webpages?

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8 See Chapter 9
9 Nimmer & Towlle para 9.01
10 J D Heydon, Cross on Evidence, 7th Australian ed, Sydney 2004 [35245]
GENERAL PRINCIPLES

[8.4] The following sections describe the basic rules of ascertaining the contents of a contract. As most principles remain unaffected by the on-line environment it is not necessary to recite whole portions of textbooks.

The guiding principle is that the obligations assumed by the parties derive from the statements made during formation. Alternatively, such statements may be embodied in a contractual document. Intention can be manifested in any manner and is evaluated objectively from the perspective of the addressee. Traditionally, a number of distinctions are made to structure the analysis of the contractual obligations of the parties.

Express and Implied Terms

[8.5] Contracts consist of express and implied terms. Express terms derive from the statements made during the contract formation process or from the document(s) the parties have adopted as contractual or as evidencing their agreement. Implied terms become part of the contract by operation of law, by custom or usage or by the intention of the parties. This chapter deals with express terms as it is assumed that the principles relating to the implication of terms remain unaffected by the on-line environment.\(^{11}\) Furthermore, implied terms supplement the express terms only after the contract has been formed and it is found that the latter do not cover all relevant issues.

Terms and representations

[8.6] Not all statements made during the formation process become part of the contract. Statements may be “mere puffs,” “representations” or “terms.” The distinction depends on the intention of their maker. Only terms become part of the contract. Consequently, damages for breach of contract are only available if the given statement is a “term.”\(^{12}\) “Non-promissory” statements may create liability for negligent misrepresentation, promissory estoppel or under the Trade Practices Act 1974 (Cth) but not to an action for breach of contract.\(^{13}\)

A statement becomes a “term” if its maker must be regarded as having guaranteed its truth,\(^ {14} \) whereas a “representation” is a statement of fact that induces the addressee to enter into a contract but lacks contractual intention.\(^ {15} \) “Puffs” and “representations” do not give raise to contractual obligations as they are regarded as non-promissory. While “puffs” are not intended to be taken seriously,\(^ {16} \) the distinction between “terms” and “representations” raises numerous difficulties. Certain factors are traditionally taken into account to facilitate this distinction, such as: the time the statement is made, its contents, the existence of a written memorandum and whether the statement has been included in the memorandum as well as the respective positions of the parties. None of these factors is by itself decisive.

“Terms” in the sense of “promissory statements” are distinguished from “terms” as in “standard terms,” i.e. a list of express terms governing the transaction.\(^ {17} \) All “standard terms” are terms (assuming valid incorporation), but not all terms are “standard terms.” To add confusion, not all “terms” are strictly

\(^{11}\) On-line contracts may be subject to different implied terms depending on the law of the country where acceptance took place.

\(^{12}\) Carter on Contract [10-030]

\(^{13}\) JLR Davis ed, Contract: General Principles, Sydney 2006 [7.4.160]

\(^{14}\) Carter on Contract [10-040]

\(^{15}\) Carter on Contract [10-030]

\(^{16}\) See, e.g.: Byers v Dorotea Pty Ltd (1986) 69 ALR 715

\(^{17}\) See also Carter on Contract [10-020]
promissory but may serve to define or qualify the promissory terms of the contract. Such is the case with conditions precedent or definitional clauses.\textsuperscript{18}

**Identification, Incorporation and Construction**

[8.7] The determination of the contents of a contract can be divided into multiple interrelated stages: the identification, incorporation and construction of terms. Identification consists in evaluating, which statements constitute terms and which are representations. The identification of terms is closely related to incorporation, although the latter term specifically relates to various procedures of including a set of (usually) standard terms into the contract. Identification encompasses the process of analysing whether the terms (or a specific term) have been successfully incorporated. Internet-specific problems concerning incorporation are discussed in the following chapter.

Identification and incorporation precede the process of construction, the determination of the meaning of the terms. The construction of terms and the tripartite division into “conditions,” “warranties” and “intermediate terms” do not relate to the process of formation and are therefore omitted from this analysis.

**Identifying the words**

[8.8] Intention always refers to expressed intention, “to be ascertained by the words used.”\textsuperscript{19} As contractual intention can be manifested in any manner, contracts can be made in writing, orally, inferred from conduct or be partly in writing and partly oral.\textsuperscript{20} While written documents are generally not a prerequisite of validity or enforceability, they facilitate the process of ascertaining the obligations of the parties.\textsuperscript{21} Documents confine the scope of the writing, the words that must be taken into account when determining the terms of the contract. The identification of terms may, however, be complex even if contracts are in writing. When the terms are in one or more documents,\textsuperscript{22} the problem lies in ascertaining which documents should be read together.\textsuperscript{23} It may also be difficult to establish the “contractual document,” whether it embodies the whole agreement and, if not, which additional statements must be taken into account. When the contract is in writing the so-called “parol evidence rule” precludes the admission of any external evidence to clarify the meaning of the words used in the written document. The parol evidence rule relates to the construction of terms, not their identification\textsuperscript{24} and need not be included in the analysis. In sum, although the embodiment of the contract in a written document may facilitate the establishment of the relevant words, there are many instances where the contents of the contract must be “pieced” together from multiple sources, such as notices, tickets, purchase orders and brochures.\textsuperscript{25}

The identification of the relevant words becomes more important in on-line transactions, where users cannot physically inspect the contractual subject matter.\textsuperscript{26} Many on-line transactions can be characterized as sales of goods “by description.” Websites describe goods by means of graphical

\textsuperscript{18} Tricontinental Corp Ltd v HDFI Ltd (1990) 21 NSWLR 689 (CA)

\textsuperscript{19} Goldsborough Mort & Co Ltd v Carter (1914) 19 CLR 429 at 447; see also: E Peden, J W Carter, Incorporation of Terms by Signature: L’Estrange Rules! (2005) 21 JCL 1 at 9

\textsuperscript{20} Carter on Contract [09-001]

\textsuperscript{21} Treitel p 176

\textsuperscript{22} Treitel p 191

\textsuperscript{23} Carter & Harland [515]

\textsuperscript{24} Carter on Contract [13-010]

\textsuperscript{25} Chissick & Kelman p 66; JLR Davis, above at note 13 [7.2.300]

\textsuperscript{26} M Morgan-Taylor, Ch Willet, The Quality Obligation and Online Market Places (2005) 21 JCL 155
representations and text.\textsuperscript{27} Contracts for the sale of goods by description contain an implied term that the goods correspond with the description.\textsuperscript{28} The required degree of correspondence depends on the type of contract.\textsuperscript{29} To establish correspondence, the relevant words must first be identified.\textsuperscript{30} As the parol evidence rule does not apply to the identification of the contractual subject matter, even when a contract is embodied in a written document external evidence may be brought forward to establish what the parties contracted for.

In sum, irrespective of whether a contract is made in writing or orally, the first step in ascertaining the obligations of the parties consists in identifying the words that describe such obligations. The “raw material” from which the terms will emerge may be scattered among multiple documents. The on-line environment aggravates existing difficulties by providing an overabundance of such “raw material” and rendering it difficult to identify the relevant words.

**HTML AND HYPERLINKS**

\textbf{[8.9]} The following paragraphs describe the technology which constitutes the main source of difficulties. Its different aspects become relevant at different stages in the discussion: the interconnected character of HTML files creates problems in determining the scope and source of a statement; the dynamic and interactive character of some web-pages raises questions regarding the existence of “writing” and “documents” on-line. The need to incorporate HTML into legal analyses derives from the fact that e-commerce relies primarily on web-based transactions.

**The Technology**

\textbf{[8.10]} The web is a collection of interconnected HTML files hosted on thousands of web-servers. Individual web-pages are the output of HTML files, transmitted from the web-server via HTTP and rendered by web-browsers on the user’s computer. The source of interconnection and the main characteristic of the web are so-called hyperlinks (or “links”), a mechanism of connecting two files or two parts of the same file. Any file placed on the web can be linked to without the need to request permission.\textsuperscript{31} HTML files generally consist of plain ASCII text that contains so-called tags, instructions how to display the contents of a file. Hyperlinks are embedded within the text of the HTML file and consist of an address of another file, usually in the form of a uniform resource locator (“URL”).\textsuperscript{32} Upon activation, the hyperlink displays the contents of the file. Hyperlinks are fundamental to the operation of the web.

Hyperlinks take the form of “text, logos, buttons, banners, modules, and fixed or rotating links. The most common form of links is a highlighted word or picture that can be selected by the user and results in the immediate view of another file.”\textsuperscript{33} While the convention for expressing a hyperlink is blue

\textsuperscript{27} D McBurnie, E Levinson, Contract: Sales of Goods over the Internet, Published as Special Report 1 of the Series E-commerce: the Implications for the Law, Sydney 2001, p 35
\textsuperscript{28} e.g. Sale of Goods Act (NSW) Section 16; Sale of Goods Act (Qld) Section 13; Trade Practices Act 1974 (Cth), Section 70.
\textsuperscript{29} Reardon Smith Line Ltd v Hansen-Tangen [1976] 1 WLR 989 at 998 per Lord Wilberforce
\textsuperscript{30} Wallis v Pratt [1911] AC 394; Elder Smith Goldsbrough Mort Ltd v McBride [1976] 2 NSWLR 631; Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441
\textsuperscript{32} S M Schafer, above at note 2 p 4
\textsuperscript{33} Nimmer&Towle para 9.02
underlined text, links can also be hidden in the form of graphic elements. Hyperlinks can be positioned on the side, bottom or top menu-bar or embedded within the text. There are outbound links, which connect to another page, and inbound links, which are links from a different page to the viewed page. Web-merchants control the links they place on their website, but have no control over links that connect to their website. Web-merchants also have no control over how users enter their website: a user can type in the URL in the browser window, or access it from another page, via a hyperlink. In the second scenario, users may bypass the homepage and access the site via a so-called deep link.\(^{34}\)

Hyperlinks enable a seamless transition from one page to another.\(^{35}\) The new page may be displayed in the same window and replace the web-page that contained the link, or open in a separate window, retaining the original page. Another type are frames, which divide the browser window into multiple, independently scrollable areas with content from different sources.\(^{36}\) The third type are inline images that enable graphics to be displayed in the same window even though they originate from a different page. In the case of frames and inline images, content from different sources appears on the same webpage. In both instances the URL is that of the original page, not that of the page containing the foreign content.\(^{37}\) Only an inspection of the HTML code can reveal the different source of the content.

The challenges created by hypertext relate to the discrepancies between how contractual intention is manifested on the client- and on the server-side the as well as to the distribution of contractual contents over multiple HTML files. The following sections examine these two sets of problems. The impact of hypertext on the existence of “writing” and “documents” is discussed separately.

**Objective evaluation of Intention**

[8.11] Intention is evaluated objectively from the perspective of the addressee. This fundamental rule assumes that what the maker of the statement says or writes is what the addressee hears or reads. The person manifesting intention can ensure that the expressed intention mirrors the person’s actual intention and prevent any misunderstandings by appropriately choosing the words or editing the contents of a written statement. This simple assumption cannot be made when manifestations of intention take the form of web-pages. The problems presented in this paragraph resemble those discussed in Chapter 7, where the contents of an email may not be displayed or be displayed differently due to incompatibilities between the email applications of the contracting parties.\(^{38}\) The main difference to the Chapter 7 scenarios lies in the fact that the contents viewed by the user are not necessarily illegible or garbled, but presented differently than intended. In both instances, the content sent differs from the content received. This is caused by the fact that electronic communications are not just transmitted but also processed. Such processing usually occurs on the side of the addressee. Chapter 3 mentioned that web-merchants deploying electronic agents are liable for all output generated by such agents, even if such output is the result of an incorrect operation. In sum, the web-merchant is liable for whatever contents are displayed

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\(^{34}\) Ticketmaster Corp v Microsoft Corp No 97-3055 DDP (CD Cal filed Apr 28, 1997); Ticketmaster Corp v Tickets.com 2000 WL 525390 (CD Cal); see also: K Bodard, B de Vuyst, G Meyer, Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions [2004] MurUELJ 2

\(^{35}\) M Sableman, Link Law Revisited: Internet Linking Law at Five Years (2001) 16 Berkeley Tech LJ 1273 at 1276, 1277


\(^{38}\) See Chapter 7 [7.12]
on his or her website. The problem lies in the fact that web-merchants generally cannot control how websites are displayed to the users.  

Generally, the author controls the layout and contents of the document, the shop owner controls the display of the goods, the speaker tailors the language and the tone of his or her voice to the needs of the addressee. Not so in the web environment. Setting up a website consists in placing an HTML file on a web-server. HTML files contain text that represents the content of a document and instructions that specify a document’s structure. The manner the content is presented (and sometimes whether it is presented at all) depends on how a specific browser interprets these instructions. Each browser displays HTML files differently. Not every feature that works well in Internet Explorer will render satisfactorily in Mozilla’s Firefox. Ensuring a consistent look on the client-side is one of the great challenges of developing websites. Browsers are available in many versions and for many different operating systems. Each new version adds features that increase cross-platform compatibility problems. In sum, while the HTML file hosted on the web-server remains the same, every user accessing such file may see something different. No realistic real-world analogy comes to mind.

To complicate matters further, websites may also display unsolicited third party content. While intrusive advertising techniques in the form of pop-up windows are unlikely to create confusion as to the source of the displayed content, they interfere with the flow of information and may obscure legal notices or disclaimers. Neither the owner of a website nor the user control the appearance of such adds, although technically they are generated by software on the user’s side. Even if a website is carefully designed to display in a particular way, users may not see what the web-merchant intended them to see.

### Source and Scope of Statements

[8.12] Apart from difficulties in retaining control of how a statement is presented to the addressee, hyperlinks create confusion as to the scope and the source of the statement. Not everything said and done during the contract formation process becomes a term; not everything printed in a mail-order catalogue or prospectus becomes part of the contract. In the latter two instances, it is clear where the document begins and where it ends, i.e. which contents must be taken into account when commencing the analysis. It is

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39 “…your page is at the mercy of the software and hardware configuration of each individual user. A page that looks great on you machine may look radically different, or perhaps even ghastly, when viewed on another user’s setup. This is partly due to the browser’s functionality and the individual user’s preferences (font size, colors, etc.) but the display device itself also plays a large part in the success of the page’s design.” J Niederst, Web Design in a Nutshell, 2nd ed., safari online version, part 1, p 1

40 Additional requirements are the registration of a domain name, which serves as an address pointing to the specific HTML file(s).

41 Deitel, Deitel & Goldberg p 83


43 Deitel, Deitel & Goldberg p 14

44 The discussion of this problem continues in Chapter 9

45 See generally: J E Yung, Virtual Spaces Formed by Literary Works: Should Copyright or Property Rights (or Neither) Protect the Functional Integrity and Display of a Web Site? (2004) 99 Nw U L Rev 495

46 Washingtonpost.Newsweek Interactive Co v Gator Corp 2002 WL 31356645 (ED Va July 16, 2002) (No Civ A02-909-A), where on-line advertiser, The Gator Corporation, was enjoined from “[c]ausing its pop-up advertisements to be displayed on any Web site owned by or affiliated with the Plaintiffs” and from “[a]ltering or modifying, or causing any other entity to alter and modify, any part of a any [sic] Web site owned or affiliated with the Plaintiffs, in any way, including its appearance or how it is displayed…”; in U-Haul International Inc v WhenU.com Inc 279 F Supp 2d 723 (ED Va 2002) the court ignored the negative impact pop-ups have on web-sites because WhenU prominently displayed its brand on the pop-up windows and therefore was distinguishable from the original website. See also: K M Beystehner, See Ya Later, Gator: Assessing Whether Placing Pop-up Advertisements on another Company’s Website Violates Trademark Law (2003) 11 J Intell Prop L 87
also clear who makes the statement. In on-line transactions it is difficult to establish which contents should be analysed in the first place. In fact, it may become difficult to state what the contents of a given website are.

Does the content behind every link need to be taken into account when evaluating the intention of the web-merchant? Are web-merchants responsible for the contents of the websites they link to? If an email contains a link to the homepage of a website, should the content behind the link be analysed as if it was displayed inside the email? If so, is it also necessary to examine the content behind the links contained on the website? In sum: when file A contains a hyperlink to file B, should they be read together? If B contains a hyperlink to C, should C also be included in the analysis?

The above problems are not the result of HTML alone, but HTML deployed in a networked environment. If multiple interconnected HTML files were placed on a CD-ROM, the number of files to be examined would be finite. In the case of the web, the number of inter-connected files is virtually unlimited. This is not to say that determining the contents of an on-line contract requires the examination of every web-page that links to or is linked from the website in question. This is to say, however, that rules must be established as to which web-pages should be read together, i.e. how to interpret references made by means of hyperlinks. In many circumstances paper documents are read together if they expressly or impliedly refer to each other. Whether certain documents should be placed side-by-side is a matter of construction and involves in the identification of those words “which are capable of being construed as referring to another document.” The concept of “referencing” is therefore not new, but its application in an environment made of interconnected HTML files encounters difficulties due to the number of references and the sheer amount of material being referenced. A real world analogy is discerning contractual contents from various documents, where all the documents cross-refer or are physically attached to each other, with pages being continually added from unknown sources. The construction of the referring document would be rendered somewhat difficult. As further discussed below, hyperlinks are more than a simple reference.

A minimal level of perceptiveness on the side of addressees must be expected and that addressees should not regard two graphically distinct web-pages as coming from one source just because they are “separated” by a single click. At the same time, the cognitive difficulties created by web-technologies must be appreciated, especially regarding the lack of spatial distance between graphical and textual elements, the information overload and the ease of transition between files.

The following sections review how hyperlinks have been treated by courts and regulators.

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47 Carter & Harland [516]
48 Thomson v McInnes (1911) 12 CLR 562 at 569
49 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 915, 932
50 for an illustration of the difficulties of construing references see: Riverwood International Australia Pty Ltd v McCormick [2000] FCA 889
The Linking cases

[8.13] A number of cases have dealt with the implications of hypertext for copyright, trademark infringement and unfair competition. Their common thread is the difficulty in determining the relationship between two or more hyperlinked web-pages. The question “when does B become part of A” often takes the form of “when is the person who linked from A to B liable for the contents of B” or “when can a person be confused whether A and B come from the same source.” Despite different formulations, the problem is the same.

While web-mERCHANTS cannot be held responsible for all content they link to and while hyperlinks only identify the location of specific content and are not the content themselves, some cases suggest that there may be little difference between directly posting content on a website and linking to such content. Technically, the content linked to does not become part of the HTML file containing the link and does not involve its inclusion into the web-page containing the link. Being a method of associating two files or two parts of the same file, hyperlinks by themselves do not carry meaning. Only the content of the linking document or the language of the link does. It must be acknowledged that although a hyperlink is only an address of the information, it “has the functional capacity to bring the content of the linked web page to the user’s computer screen.”

A famous case stated that hyperlinks serve as a tool of transferring users from one webpage to another, analogous to a library card index but faster and more efficient. Comparing a hyperlink to a simple reference fails to appreciate the cognitive difficulties of differentiating between interconnected documents. In the words of one author:

If linkages were considered in the context of traditional scholarly footnoting, a claim that reference to other materials confuses readers as to the origins of the referenced material seems absurd. Indeed, the traditional purpose of such references is to make clear the origins of the material drawn upon in the preparation of the referencing document. To be sure, in non-hypertext referencing, the time required for manual location and retrieval of the referenced material, as well as the physical space between the referencing material and the referenced material, makes clear that they are separate documents—in a hypertext environment, such temporal and physical spaces between the documents collapse. Additionally, in non-hypertext referencing, the information displayed in the reference itself differentiates referencing and referenced material, because complete reference and location information are necessary to enable the

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51 Nimmer & Towle para 9.04
52 See e.g., the first and most famous case regarding hyperlinking, Shetland Times v Shetland News 1997 S L T 669 (Sess Cas 1996), where the court recognized the potential for confusion as to the source of the statement.
54 E A Cavazos, Z F Miles, Copyright on the WWW: Linking and Liability (1997) 4 Rich J L & Tech 3
55 Intellectual Reserve, Inc v Utah Lighthouse Ministry Inc 75 F Supp 2d 1290 (D Utah 1999); Universal Studios Inc v Reimerdes 111 F Supp 2d 294 (SDNY 2000). See also MLEC Art 5 bis (“Incorporation by Reference”) and Comment 46-1, which imply that hyperlinking to information may have the same legal effect as providing the text in full in the data message.
56 Ticketmaster Corp v Tickets.com 2000 WL 525390 (CD Cal)
57 In the words of T Berners-Lee: “[I]f one writes ‘see Fred’s web pages (link) which are way cool’ that is clearly some kind of endorsement. If one writes ‘We go into this in more detail on our sales brochure (link)’ there is an implication of common authorship. If one writes ‘Fred’s message (link) was written out of malice and is a downright lie’ one is denigrating (possibly libelously) the linked document. So the content of hypertext documents carry meaning often about the linked document, and one should be responsible about (sic) this. In fact, clarifying the status of the linked documents is often helpful to the reader.” Above at note 13, p 2
58 Universal City Studios Inc v Corley, 272 F 3d 429 (2nd Cir 2001); see also: M A Lemley, Place and Cyberspace (2003) 91 Cal L Rev 521 at 525
59 Ticketmaster Corp v Tickets.com 2000 WL 525390 1344 (CD Cal) at 1346
reader to locate the referenced materials. In a hypertext environment, however, the reference may be embedded behind a single word, a number or an icon, which may not convey the distinct origins of the referenced work.60

In sum, describing hyperlinks as “simple” references does not take into account the ease and speed of bringing the referred contents to the screen of the user. Hyperlinks may navigate the visitor to a completely different website, giving little or no warning that he or she has exited the first website. Users may view a picture of “an item available for sale by clicking on a graphic image of the item. That item may be for sale at the current site or at another site.”61 It may be unclear that a product is no longer displayed by the original site. The transfer can be imperceptible, especially when the contents of the second site are framed by the transferring site and the link bypasses the home-page. The ease of transition between different websites may create confusion as to whose contents are displayed on-screen. This is rarely the case in the real-world where the “transfer” from one shop to another requires physical effort and cannot pass unnoticed. Similarly, the pages of paper documents are clearly distinct and separate.

Specific Regulatory Approaches

[8.14] Numerous regulatory bodies have recognized that presenting information in a hypertext environment raises problems when, for example, providing obligatory disclosures in the marketing of financial products. The following sections review specific regulatory approaches to adapting paper-based requirements to the characteristics of the web. The presented solutions derive from heavily regulated fields of commerce and are therefore tilted towards consumer and investor protection. Their limited applicability notwithstanding, they illustrate how to prevent confusion as to the source of a statement. They create liability for third party content on the basis of visual associations: the scope of a statement made on a website may extend to the contents of a website being linked to.

The Envelope Theory

[8.15] The North American Securities and Exchange Commission (“SEC”) stated that federal securities laws apply in the same manner to websites as to any other statements made by or attributable to an issuer.62 While it is logical to assume that issuers are responsible for whatever statements they make, they may also be liable for statements made by third parties on the basis of the design of their websites. Hyperlinks may imply an association or adoption of the other document, so that two websites are regarded as forming part of the same document or that one incorporates the other by reference. In line with the envelope theory, documents in close proximity on the same web-site menu or linked to each other are considered delivered together, as if they were in the same paper envelope.63 When a prospectus is posted on the website the envelope theory causes everything on the site to become part of that prospectus.

Similarly, hyperlinks embedded within documents to be delivered under federal securities laws, cause the linked information to be part of a document.64 Issuers must assume responsibility for the linked information “as if it were part of the document.”65 In contrast, inbound links to a prospectus result in both documents being delivered together but the external document does not form part of the prospectus. The

60 D L Burk, Proprietary Right in Hypertext Linkages (1998) 2 JILT at 10
61 Nimmer & Towle para 9.02
63 SEC Interpretation p 7
64 SEC Interpretation p 4
65 SEC Interpretation p 24
SEC also provides a non-exhaustive list of factors relevant in deciding whether an issuer has adopted, i.e. is accountable, for information on a third-party website.66

Shared Electronic Space

[8.16] The Office of the Comptroller of the Currency introduced a rule designed to reduce the risk of customer confusion as to who is providing a particular product or service in those instances where banks share co-branded websites with subsidiaries, affiliates or other third parties.67 As “access to the third party is through the bank’s website, customers are likely to associate the bank with the third party.”68 This is particularly important if the third party provides financial products and it is unclear whether the deposits are federally insured.

Banks sharing electronic space are required to take reasonable steps to clearly and conspicuously distinguish between products and services offered by the bank and those offered by a third-party. “Reasonable steps” depend upon the specific product and context, and include page formatting, the “look and feel” of the website and other audio or visual clues.

Links to promotional material

[8.17] The Australian Securities and Investment Commission’s (“ASIC”) Policy Statement 10769 deals with the preparation and distribution of electronic prospectuses. ASIC permits links from the prospectus to external documents only if no reasonable person is likely to confuse the linked document with the electronic prospectus. A paper prospectus must be a single bound document and be distinguishable from any accompanying advertising material. In the electronic environment, there is greater risk of confusion whether the information is of promotional character or part of the prospectus.70 Issuers should not link from the electronic prospectus directly to promotional material. The latter must be published in a way that a reasonable person would be unlikely to confuse it with the prospectus,71 e.g. by using separate files and including prominent statements in both documents indicating whether the information constitutes part of the prospectus. The policy statement also prohibits any form of customisation or dynamic adaptation of content: the same information must be available to all users.72

The envelope theory focuses on the delivery aspects of electronic documents, the shared electronic space theory recognizes the spatial confusion absent in real-life shops and ASIC’s policy statement aims to prevent misunderstandings as to the scope of the document. They all recognize that two separate files may be treated as one due to the fact that one links to the other. Apart from providing rules of “construction” specifically adapted to hypertext, they appear to create on-line functional equivalents of doors, walls, envelopes and – paper documents. They all aim to electronically replicate the spatial confinement provided by the aforementioned real-world concepts. Such “replication” counterbalances the distributed character of the presented contents as well as the ease of transition between them. It must be clear where the statement begins and where it ends, where one web-site/web-shop is exited and where another one is entered. It must also be obvious who makes the statement.

66 SEC Interpretation pp 9, 10: E.g. context: what is said about the link or what is implied by the context in which it is placed; risk of confusion: information on a third-party website should be accessible only after presenting a disclaimer or intermediate screen indicating that the visitor is leaving the issuer’s website, presentation: the prominence the link may imply adoption.


68 OCC Bulletin 2001-31, p 7


70 PS 107.85

71 PS 107.86

72 PS 107.70
WRITING AND DOCUMENTS

[8.18] “Writing” and “documents” are usually discussed in the context of formal requirements. This chapter does not examine the fulfilment of formal requirements on-line, as the latter “have nothing to do with the contents of an agreement.”[73] “Writing” as formal requirement is distinguished from “writing” as a method of manifesting intention, or - as one commentator put it - informal writing.[74]

If formal requirements are left aside and if most contracts are formed without any formalities, why mention “writing” at all? The reason “writing” must be included in the discussion is that its existence implicitly underlies the application of many contract formation principles and triggers different mechanisms of construction and analysis. As an example, the parol evidence rule does not presume a formal written document but “writing” in general.[75] When the contract is reduced to writing there is also a rebuttable presumption that the writing includes all its terms.[76] Principles pertaining to the incorporation of terms presume the existence of tickets, documents and signatures, all of which are related to “writing.” Furthermore, even if a contract is formed orally or inferred from conduct, its terms may be “in writing.”[77] In other words, formal requirements aside, numerous contract formation principles are associated with written manifestations of intention. Are websites, emails and instant messengers “writing”? If so, is it possible to apply the traditional contract formation principles to such “writing”?

The existence of “writing” and “documents”

[8.19] Communications over open electronic networks are predominantly based on text. The words “I accept” can be placed in the body of an email, on a website, on a button or typed into a web-form. No distinction should be made between a statement typed by the author and a statement that was pre-made as the difference would lie solely in the input method.[78] The question remains whether the text in emails, web-forms and websites constitute “writing.” If so, are there documents? The answers to these questions depend on the definition of the two concepts.

General Approach

[8.20] While “writing” generally does not include notions of permanence or tangibility[79] it often presupposes the existence of a document, which delineates its scope. Although an acceptance could easily be “written” with smoke in the sky, legal principles built around the concept of “writing” assume a minimal degree of durability. Accordingly, the terms “writing” and “document” are often used interchangeably, a popular expression is “written document.” Documents do not, however, consist of writing but are made of physical substances, such as paper, and are intuitively associated with tangibility.[80] The definition of document has expanded to allow for technological advances and includes anything “in which, or on which” information is stored or recorded.[81] As a result, the concept of

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[73] Treitel p 176
[74] Law of Contract para 2.246
[75] State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 NSWLR 170 at 191
[77] Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The “Anemone”) (1987) 1 Lloyd’s Rep 546
[78] See also: Aiyyah p 73
[79] But see: UCC Section 1-201 (46), which defines “writing” to include “printing, typewriting or any other reduction to tangible form.”
[81] Victor Chandler International Ltd v Customs and Excise Commissioners and Another (2000) 1 WLR 1296; see also: Acts Interpretation Act (CTH) 1901, Section 25, which defines “document” as (a) any paper or other material on
“document” appears somewhat blurred. Absence of a strict legal definition notwithstanding, its main characteristic is that it contains or embodies certain content.

Analyses of “on-line writing” traditionally focus on the fleeting nature of electronic files and their imperceptibility without the intermediation of a computer. This chapter does not join the discussion on whether electrical impulses constitute writing. The answer to this question is simple: electronic impulses are not writing — just as ink is not synonymous with the words written in ink. According to current definitions, however, the text displayed on the computer screen is. As long as the text is perceivable — there is writing. Without any analysis, the Federal Court of Australia stated that contracts formed on websites are in writing. In sum, the general approach is liberal: perceptible text is synonymous with writing.

Model Approach

[8.21] A different approach is taken by model regulations. The latter generally associate “writing” with accessibility for subsequent reference. Questions of integrity and permanence are relegated to the provisions dealing with record retention and originals. As the length of such “accessibility” is not prescribed, both the HTML file on the web-server and the webpage displayed on the screen technically constitute “writing.” To explain the point: once downloaded and displayed, web-pages may remain on-screen for as long as the user does not close the browser window or load another page into the same window. Electricity supply permitting, the web-page remains available. Downloading creates a transient copy in the computer’s RAM and a copy in the browser’s cache. Depending on whether the webpage is

which there is writing; … and (c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device”; S Odgers, Uniform Evidence Law, 7th ed, 2006 Sydney [1.2.5060]

83 See: Victor Chandler International Ltd v Customs and Excise Commissioners and Another [2000] 1 WLR 1296, where Chadwick LJ stated that the transmission of electronic impulses is “nothing more or less than the transmission of electronic impulses,” at 1309
84 Acts Interpretation Act 1901 (Cth) Section 25 states that “writing,” “includes any mode of representing and reproducing words…. in a visible form.” See also: Howley v Whipple 48 N H 487 (1869): “it makes no difference whether that operator writes the offer or the acceptance … with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.”
86 eBay International AG v Creative Festival Entertainment Pty Limited [2006] FCA 1768 at 48,49
87 See MLEC Art 6; CUECIC Art 9 (2), ETA Section 9; UETA Section 7
88 See, e.g. MLEC, Art 8, Art 10; see also: ETA Section 11 (“Production of Document”).
90 Pages may also remain minimized in the browser menu or behind a tab. In both instances, although they are not directly displayed on-screen, they remain available for immediate retrieval with a single click.
91 The status of transient copies is traditionally discussed in relation to copyright infringement, see: MAI Systems Corp v Peak Computer Inc 991 F 2d 511 (9th Cir 1993).
92 For an explanation of the differences from a legal perspective see: J Band, J Marcinko, A New Perspective on Temporary Copies: The Fourth Circuit’s Opinion in Costar v Loopnet (2005) Stan Tech L Rev 1 at 3; for a technical explanation see: Deitel, Deitel & Goldberg p 669
retained in the RAM, the cache or saved on the hard-drive of the computer, the length of such availability differs. As HTML files on the web-server are, by definition, accessible for subsequent reference, the writing requirement is met both on the client and on the server side of the transaction. Similarly, both email and instant messages are stored in at least one place on the network: email can be downloaded to the client machine or accessed on the mail-server, instant messenger applications save chats automatically or provide the option to do so.

Taking into account their text-based character as well as the fact of their inherent storage on the network, most on-line communications can be regarded as “writing.” This is the position under the model regulations. It must be remembered, however, that the primary purpose of these regulations is to enable the fulfillment of formal or regulatory requirements by on-line communications. The actual legal effect or the “usability” of the functional equivalents of “writing” for contract formation are beyond their scope.

Applicability of principles based on the existence of “writing”

[8.22] This overabundance of “writing” in the on-line environment is an unexpected side-effect of enabling legislation and the breadth of its general definitions, which - apart from perceivability - do not require any degree of tangibility. Due to the liberal definition of “document,” the HTML file hosted on the web-server and possibly the screen of the computer can also be regarded as “documents.” Does the HTML file, however, constitute a memorandum, is the website a contract “evidenced in writing” or “in writing”? Does everything that appears on the computer screen raise the presumption that it is a term, just because the screen may be regarded as writing? Despite the fact that most of the text appearing on-line appears to meet the definition of “writing” and/or “document” it is questionable whether such “documents” and “writing” enable the application of those contract formation principles that are built around the original concepts. The reasons are manifold.

Intention and content

[8.23] When a contract is made “in writing” or is “evidenced in writing” it has contractual effect because the parties intend so. The parties adopt a particular document as embodying or evidencing their agreement. The existence of “writing” as a matter of contract law must be regarded as a question of intention. Furthermore, “writing” is generally discussed not in relation to its form, but the information conveyed thereby. Written notes or memoranda must contain all the terms of the contract or at least the essential terms. While the information conveyed by the writing seems more important than the writing itself, circular reasoning must be avoided: it is not the content that turns the text into writing.

The existence of writing for contract formation purposes also depends on who created that writing. To illustrate: if someone makes a video recording of two parties reaching agreement by means of writing in the sky, such recording does not constitute “writing” or a “written document” from a contract law perspective, although it meets the requirements of both definitions. Although the concepts of “writing,” “document” and “record” indicate basically anything distinct from the memories of the contracting parties, it can be tentatively assumed that in most instances the term “record” is more appropriate to describe the text in emails, websites and server-logs. It indicates the occurrence of certain events without necessarily implying their legal effects. The fixation of contractual statements is a question of evidence – not a premise of their legal effect. Just because a word has been recorded and is therefore available for subsequent reference does not mean that it is “in writing.”

93 See generally: Electronic Transactions Bill 1999, Explanatory Memorandum, pp 22, 23
94 D W McLauchlan, Parol Evidence and Contract Formation (2005) 121 LQR 9 at 11
95 Carter & Harland [513]
96 Sinclair Scott & Co Ltd v Naughton (1929) 43 CLR 310 at 318; JLR Davis, above at note 13 [7.2.340]
97 Harvey v Edwards Dunlop v Co Ltd (1927) 39 CLR 302 at 307
Form and Stability

[8.24] “Writing” is traditionally associated with “document,” it assumes a minimal permanence and stability of its contents. For example, the MLEC prescribes the functional equivalent of “writing” but focuses on paper-based writing and associates this equivalent with functions commonly performed by paper documents. It enables messages to “enjoy the same level of recognition as corresponding paper documents.” Before the emergence of computer-based communications, the carrier of the “writing” was rarely, if ever, the subject of analysis. Even the output of electronic transmission generally took the form of paper. In the case of on-line transactions, one deals with screen-to-screen communications. This lack of a tangible carrier has implications not only for the existence of “writing” but for the information conveyed thereby and therefore its legal effect.

On-line equivalents of written documents may display different contents depending on who and when looks at them. To illustrate the point: the contents of a simple HTML file are static, each time the file is requested the same contents are downloaded. In the case of dynamic documents, a fresh document is created by an application run by the web-server for each request. Its contents “vary from one request to another” despite the fact that the URL in the browser window remains the same. As indicated in Chapter 3, websites can display the output of the operation of a complex structure of e-commerce servers and databases. In the case of active documents, the contents of a website are determined by scripts run on the client-side. The contents of some web-pages can be generated differently for each user or depend on specific variable events (e.g. time, exchange rates, stock indices). From a contract law perspective, it is irrelevant whether such “content generation” is the result of server-side or client-side scripting. The problem is also not one of integrity, which relates to the preservation of contents and protection from alteration by third parties. The problem lies in the fact that dynamic and active web-pages are designed to change in accordance with pre-set parameters. It is pointless to speak of “accessibility for subsequent reference” if each reference returns different content.

The ETA also requires that “writing” be capable of retention. Such retention logically assumes that the content originally viewed is the content that is retained for future reference. Technically, preserving the original content may be difficult. Furthermore, different saving techniques preserve different contents. A web-page printed on Friday morning may have different contents than the same
Even the retention of applications, which generate the contents of websites may not enable the return of the contents viewed during the formation process, as they may be generated in response to external input.

Under the model regulations, only static web-pages meet the requirements for writing. The distinction depends exclusively on the language in which the website was coded. It must be remembered that even in case of dynamic and active content generation, the underlying HTML file on the web-server remains unchanged. Only static websites and the HTML files on the web-server meet the writing requirement as defined by the MLEC and ETA, as only in those instances the same contents remain available for subsequent reference. Even in the case of static websites, however, each subsequent reference may return different content depending on the browser used to view the website.

Last but not least, even if it is assumed that some websites are “writing”, the scope of such writing is not clear. While the legal effect of a statement depends on its contents, not on its form, the form often determines the scope of the contents without being a formal requirement. The legal effect of a statement is difficult to determine if it is unclear which word must be taken into account. It remains to be decided whether the HTML file or the web-page include the web-pages it links to. This problem practically does not occur in the real world, where “writing” is usually accompanied by a “document,” i.e. it is confined and stable. To illustrate the difficulties of applying contract formation principles to the functional equivalents of “writing” created by the MLEC and the ETA one can ask: could the parol evidence rule be applied to construe the meaning of on-line contracts? The certainty, which the parol evidence rule is supposed to provide, assumes the confinement of contractual contents by the “four corners” of the document. What are the four corners of a website? The rule cannot exist without an element that limits the writing and contains the words. Similarly, how would the concept of integration be applied? Integration presumes that the written document embodies all terms of the contract.

With the disassociation of “writing” from tangible carriers it becomes difficult to apply principles that were built on the assumption that writing is contained in a paper document. Even if some on-line communications fulfil the definitions of “writing” or “document,” such functional equivalents of “written documents” do not facilitate the determination of the contents of on-line contracts. Absent spatial confinement, it is unclear which words should be taken into account when embarking on the process of establishing the terms. The answer to the question whether websites, emails and “clicks” constitute “writing” seems largely irrelevant as even if they do, they do not enable the direct application of those contract formation principles, which presume tangible embodiments of writing.

**IMPACT STATEMENT**

[8.25] The previous paragraph described the inability to confidently state whether on-line communications constitute “writing.” Existing approaches to hypertext demonstrate the need to examine the wording of hypertext references, the context they are made in as well as the interlinked contents themselves. While this may not seem like be a grand departure from existing principles of referencing documents, it must be remembered that hyperlinks are more than a simple reference. In some circumstances, the contents being linked to may be treated at par with the contents containing the hyperlink.

The following paragraphs explain the modified sequence of analysis when ascertaining the contents of on-line contracts and summarize the additional considerations to be taken into account when

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110 Law of Contract para 3.4
distinguishing between terms and representations. The objective theory of contract and the basic unit of analysis are also briefly mentioned.

Modified sequence of analysis

[8.26] There are several additional questions to be answered when ascertaining the contents of on-line contracts. The traditional inquiry “which statements become terms?” must be preceded with “what statements were made” or, depending on the unit of analysis adopted, “what were the contents of these statements” as well as “which statements are attributable to the other party?”

There is a difference between the questions: “what statements were made?” and “which of those statements are attributable to the other party?” To illustrate the point: when a notice is displayed at the point of sale, legal analysis normally concerns its sufficiency or reasonableness for incorporation purposes. Its existence is not in question, neither is the fact that it was made by the other party. In the case of web-based transactions it may not be obvious who placed the notice as there may be confusion as to the source of the displayed information. An analogy would be audio statements regarding extended warranty periods coming from loudspeakers in David Jones. Customers would logically assume that all announcements are made by David Jones and would not suspect that the loudspeakers were secretly placed in the store by Meyer, David Jones’ main competitor. Any analogy appears stretched and unlikely to occur, whereas problems of discerning the source of a statement on-line are quite common. Logically, a party should only be liable for the statements made by him or her during the formation process. A party may, however, be held liable for statements made by others on the basis of a visual association created by a hyperlink.

The question “what statements were made” concerns the distributed and dynamic nature of the contents displayed within the browser window as well as the difficulties of capturing such contents. The question “what statements are attributable to the other party” concerns the seamless transition between websites, the display of third party content within the original content of the website and third-part interference, which render it difficult to determine the source of a statement.

Terms and representations

[8.27] The differentiation between terms and representations encounters a number of Internet-specific problems. Traditional distinguishing factors must be supplemented with additional considerations.

First, the proximity of the statement to the moment of formation increases the likelihood that it was intended as a term. Taking into account the more “condensed” character of the on-line transacting process, which often consists of sequences of clicks in response to the contents presented on websites, it can be assumed that an abundance of factual information designed to induce the user to click the final “I Agree” button is presented within a small space, within a short time. The existence of animo contrahendi in an information intensive environment requires a more careful analysis of the respective statements. It can be assumed that all statements are made close to the moment of contract formation.

Second, the position of the maker of the statement may turn it into a “term.” Evaluating the knowledge and expertise of the other party, presumes that it is possible to identify the other party (i.e. determine the source of a statement). It may not, however, be clear that a particular statement is made on a different website, by a different entity. The identity of a web-merchant may also be an important feature of the goods or services sold on the website. 

111 Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 WLR 623
112 Leaf v International Galleries [1950] 2 KB 86 at 89; Ellul v Oakes (1972) 3 SASR 377
113 M Sableman, Business on the Internet, Part II: Liability Issues (1997) 53 J Mo B 223 at 224
Third, the evaluation of the content of the statement\(^{114}\) must take into account the manner of its presentation and the way it interacts with the user.\(^{115}\) Most importantly, as indicated above, the contents of the statement may be difficult to determine due its undefined scope.

Fourth, if there is a memorandum, the fact that a statement has not been recorded speaks against its inclusion as a term.\(^{116}\) The inclusion of a statement in a written record of the contract creates a presumption that it was intended as a term.\(^{117}\) The existence of written memoranda or, in fact, any written evidence, raises the question whether websites, and the interactions occurring thereon, can be regarded as “in writing.” Absent a clear answer, it can be assumed that this factor must be omitted from the analysis altogether. Alternatively, the analysis must start with determining whether a particular website is “in writing.”

**Objective evaluation of intention**

[8.28] Despite the potential discrepancies between the manifestation of intention made by the web-merchant and the manifestation presented to its addressee, it must be assumed that in accordance with the objective theory of contract the addressee’s side must prevail. Accordingly, the HTML file on the web-server is not taken into account when determining the intention of the web-merchant. Such intention is evaluated exclusively on the basis of what the addressee saw on his or her computer screen, i.e. the processed version of the HTML file. While only this approach reflects the traditional principles of contract law, its limitations must be recognized.

It must be acknowledged that web-merchants have effectively no control over the way their statements are displayed. The only way they can protect themselves from “unexpected” or “incomplete” manifestations and fully convey their contractual intention (especially with regards to obligatory disclosures) is by providing static websites specifically designed for older web-browsers. The deployment of advanced web-technologies risk the alienation of many users. Alternatively, web-merchants can provide multiple versions of the same site for different browsers. This solution is, however, only available to more affluent companies.

On one hand, only the addressee’s side is taken into account when evaluating the intention of the web-merchant and the latter must allow for the fact that not every addressee uses the most recent version of the most popular browser type. On the other hand, it must be taken into account that browser software is available for free and therefore each Internet user could, theoretically, upgrade his or her browser and view the website the way it was designed to be viewed. Then again, users may be limited in their ability to install new browser versions in shared environments, such as within a corporate network. While web-merchants bear ultimate responsibility for the displayed contents, it must always be examined whether the user’s browser is outdated, whether a user has fallen so far behind in upgrading his or her software that the use of the specific browser version cannot be regarded as reasonable. While web-merchants cannot bear the risks of outdated or malfunctioning software at end-user level, users cannot be expected to immediately upgrade their browsers whenever a new version becomes available.

**Basic Unit of Analysis**

[8.29] Assuming that the original expression of the web-merchant is irrelevant and that the user need not examine the source code of the HTML file on the web-server, certain concessions must be made to the web-merchant. The latter cannot be held liable for all contents displayed on the screen. In other words,

\(^{114}\) Couchman v Hill [1947] KB 554; Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41
\(^{116}\) Oscar Chess Ltd v Williams [1957] 1 WLR 370 at 376
\(^{117}\) Carter on Contract [10-050]
while the HTML file cannot be regarded as the basic unit of analysis of the statements made during the contract formation process, neither can the screen. The later may display information which is entirely unrelated to the visited website and may not even originate from the Internet. A desktop cluttered with multiple windows from different applications should not interfere with the evaluation of contractual intention. As in the real-world analogy of untidy desks, it is the user’s risk to lose track of the relationships between documents scattered in front of him.

Persons venturing onto the Internet must adapt their cognitive abilities to the idiosyncrasies of the web-interface. While they cannot be required to examine the source code of web-pages, they can be expected to monitor the URL appearing in the browser window, i.e. they should be aware that they are leaving a particular web-site or web-page. It remains unclear whether the basic unit of analysis should be a web-page or a web-site. A web-site is, after all nothing but a collection of web-pages appearing under a common URL. As users never see the whole web-site, only individual web-pages, they may remain unaware of the informational dimensions of the web-site. Unlike in the case of real-world shops or paper documents, the user does not know the extent of the information provided. There is also a higher risk of becoming disoriented and lost.

**Industry practices**

[8.30] In light of the persisting uncertainties regarding the existence of writing and the discrepancies between how web-pages are displayed by different browser versions and types, the market has responded with a number of adaptive mechanisms designed to overcome such. It is relatively common for websites to contain information regarding the fact that they have been designed for a specific browser version, e.g. “optimised for viewing in IE v 6.0.”

It is also increasingly popular for website terms of use to include specific disclaimers for third party content that is linked to. Such disclaimers expressly provide that the “owner” of a particular website is not liable for any content presented on websites being linked to or displayed within its contents by means of inbound linking technologies.118

Last but not least, an increasing number of websites provides “printable versions” of its contents. Such versions usually provide a stripped down version of the original web-page, without the dynamic and interactive elements. These static versions can be easily saved and printed, retaining their contents intact for subsequent reference.

The following two chapters continue the examination of the process of establishing the contents of on-line contracts.

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118 see, e.g. americanexpress.com.au