Chapter-6
Consumer Protection and Standard Form Contracting in Electronic Age

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The questions regarding the legality of e-contracts have been satisfactorily resolved, to a great extent, both on a national and international basis. This has been primarily discussed in Chapter-4. Electronic contracting is now in the second phase, where newer, or some would say older, issues have surfaced.\(^1\) The current issues are not necessarily unique to electronic commerce, but are critically important in the evolution of electronic market places. These issues concern a few significant areas. The first issue is concerning \textit{assent}, although it is clear that one can validly assent electronically. However, it is still not clear what substantive rules will govern the issues relating to \textit{assent in e-contracts}. In particular, the question relates to what rules apply to the characteristic modes of contract formation in an electronic environment (shrink-wrap, click-wrap, and browse-wrap). In that context, a key issue is \textit{to what extent would there be policing of the terms of the resulting agreement}.

A second set of correlated issues is concerned with the \textit{degree of consumer protection} which exists/ does not exist in an electronic environment. The third set of issues lays emphasis on the \textit{occurrence of error in the contracting process}. The fourth set of issues is in relation to the question: \textit{how does the law accommodate negotiable transfer documents that are paperless}?

\textbf{6.1 ASSENT IN ELECTRONIC CONTRACTING}

All the different types of e-contracts (shrink-wrap, click-wrap or web-wrap) have raised fundamental questions, in particular, about assent. The question is regarding what types of conduct constitute assent to terms and conditions. The question is also related to timing. There are issues as regards how to treat terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. There are also questions related to disclosure about whether there was assent, when was it manifested, is it only for terms about which the user had knowledge or awareness, or does it extend to terms and conditions which the user had not read or understood.\(^2\)

\(^2\) \textit{Ibid.}
There is a catena of conflicting cases often at variance in different jurisdictions with inconsistent regulatory overlay. That, time and again, makes it difficult for businesses to determine with certainty at the outset of the transaction whether the particular terms in any of these types of agreements would be enforceable. This is particularly the case in the United States, as shown in Table 6.1, with regard to terms, such as, dispute resolution clauses, forum selection clauses, and disclaimers of warranty and prohibitions on use of data. Some countries address these types of issues under the category of consumer protection. Directives in the European Union, for instance, govern what terms will be recognized in standard form contracts. Other countries, such as the United States, have originally addressed these kinds of issues under the notion of manifestation of assent, so that the result is great uncertainty.

Table 6.1

The Variety of Legal Decisions by Type of Electronic Contract issued in the United States of America

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<thead>
<tr>
<th>Type of Issue</th>
<th>Legal Citations</th>
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<tbody>
<tr>
<td>Dispute resolution clauses</td>
<td>• Comb v PayPal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002);</td>
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<td>• Forrest v Verizon Communications, Inc., 805 A.2d 1007 (DC 2002);</td>
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<td>• Hill v Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997);</td>
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<td>• In re RealNetworks, Inc., No. 00 C 1366, 2000 WL 631341 (ND Ill. May 8, 2000);</td>
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<td>• Klocek v Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000);</td>
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<td>• Lucira v Gateway, Inc., 734 NYS 2d 389 (Civ. Ct. 2001);</td>
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<tr>
<td></td>
<td>• Lischka v RealNetworks, Inc., Nos. 99 C 7274, 99 C 7380, 2000 WL 198424 (ND Ill. Feb. 11, 2000);</td>
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<tr>
<td></td>
<td>• Specht v Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002)</td>
</tr>
<tr>
<td>Forum selection clauses</td>
<td>• Am. Eyewear, Inc. v Peeper's Sunglasses &amp; Accessories, Inc., 106 F. Supp. 2d 895 (ND Texas 2000);</td>
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<tr>
<td></td>
<td>• Am. Online, Inc v Superior Court (In re Mendoza), 108 Cal. Rptr. 2d 699 (Cl. App. 2001);</td>
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<tr>
<td></td>
<td>• Barnett v Network Solutions, 38 S.W.3d 200 (Tex. Cl. App. 2001);</td>
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<tr>
<td></td>
<td>• Forrest v Verizon Communications, Inc., 805 A.2d 1007 (DC 2002);</td>
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4 Source: Amelia H. Boss, supra, n 1.
One reality of electronic communications is that people in a haste or urgency frequently push the ‘send’ button before they may actually intend. People have undoubtedly been in the position of inadvertently entering information into online forms that is incorrect in everything from spelling to quantity to item. Application of the common law of mistake to such situations is problematical.

The difficulty with the typical shrink-wrap contracts is that the terms are mostly not made available to the purchaser until after payment is made. The court has, however, through ProCD type of cases rationalized that although the buyer pays the purchase price, he does not complete acceptance of a contract until indicating assent to the license. The inability of the buyer to see the terms of the license before paying, although not before accepting, did not trouble the court because consumers often

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**Table:**

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<th>Disclaimers of warranty</th>
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<th>Prohibitions on use of data</th>
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cannot examine the contents of purchases in advance.\textsuperscript{5} The ruling of \textit{ProCD} has found favour in some United States’ courts and in some draft legislation that has not received widespread enactment.\textsuperscript{6} It is also true that some courts have refused to follow the reasoning given in \textit{ProCD} case.\textsuperscript{7} Academic literature on legal matters has also been critical of \textit{ProCD} decision and its reasoning.\textsuperscript{8}

Click wrap agreements are less controversial in comparison to the shrink-wrap agreement involved in \textit{ProCD} type cases. Since in click-wrap agreements, the clicking occurs online before or during the consummation of the transaction, rather than after payment (as was the case in \textit{ProCD}), therefore, the purchaser will arguably have the opportunity to see the terms of the contract before assenting and before parting with any money. This characteristic greatly reduces the possibility of disappointed expectations. Nevertheless, there remains the challenge of assuring that the user clearly and expressly manifests assent to the stated terms.

In browse-wrap, while an internet vendor gives the user the opportunity to look at the terms of the sale, but does not require the user to click on anything to indicate assent to these terms before paying for the product. For instance, the web site may contain a button saying ‘click here for legal terms’, which the purchaser may click or ignore. Courts, especially in the United States, have yet again split on the enforceability of browse-wrap agreements on the ground of absence of adequate assent being given.\textsuperscript{9}

\textsuperscript{5} The court explained, “Terms of use are no less a part of the ‘the product’ than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of the package’s contents, is how consumers are protected in a market economy.” \textit{ProCD, Inc. v Zeidenberg}, 86 F.3d 1447, 1449 (United States, 7th Circuit Court, 1996), p. 1453.

\textsuperscript{6} The Uniform Computer Information Transactions Act embodies the approach of \textit{ProCD}, but has been enacted in only two States.

\textsuperscript{7} See, \textit{Klocek v Gateway, Inc.}, 104 F. Supp. 2d 1332 (D. Kan. 2000). Although the manufacturer had included terms in the box with the computer, the manufacturer ‘did not communicate to plaintiff any unwillingness to proceed without plaintiff’s agreement to the’ license terms, thus terms not part of contract unless purchaser agreed.


\textsuperscript{9} Two contrasting cases on the point are: \textit{Specht v Netscape Communications Corp.}, 150 F. Supp.2d 583, 593-94 (SDNY 2001), aff’d 306 F.3d 17 (2d Cir 2002), on the one hand; and \textit{Pollstar v Gigmania, Ltd.}, 2000 WL 33266437, 6 (ED Cal. 2000); 170 F 2d 974 (ED Cal. 2000)—on the other.
Businesses engaged in electronic commerce yearn for assurance that terms important to their transactions are indeed binding and enforceable between the parties. That is to say, assurance about knowing that assent has been given to the terms.\(^{10}\) A group within the American Bar Association\(^{11}\) has come up with an analysis for insuring valid assent in such transactions, and suggests that a user validly and reliably assents to a browse-wrap agreement if four conditions are satisfied: (a) The user is provided with adequate notice of the existence of the proposed terms; (b) The user has a meaningful opportunity to review the terms; (c) The user is provided with adequate notice that taking a specified action (which may be use of the website) manifests assent to the terms; (d) The user takes the action specified in the latter notice.

### 6.2 CONSUMER PROTECTION IN ELECTRONIC CONTRACTING

Electronic Commerce growth, over the past few decades, has been astonishing and will continue to grow at an impressive rate in the coming years. The business-to-consumer (B2C) and consumer-to-consumer (C2C) marketplaces are generally not considered satisfactorily reliable and secure by consumers. So as to realize the commercial potential of these marketplaces, consumers need to have confidence that the goods and services offered are fairly represented; that they will get the goods or services they pay for; that redress mechanisms are available; that their privacy is duly protected and that security mechanisms are in place to protect their personal information, transactions, credit cards or other mediums of payment. The internet has brought plentiful advantages and benefits compared to traditional forms of commerce, such as, the convenience to buy from home at anytime without geographical restrictions; make price and product comparison and have access to worldwide products at lower prices, and in general, make better and informed purchase decisions. On the other hand, along with these benefits and advantages, have also appeared significant and potential risks and threats that undercut consumers’

\(^{10}\) Any term could become the subject of disagreement between the vendor and the user, but the terms most commonly providing the impetus to challenge the validity of electronic standard form agreements are dispute resolution clauses, forum selection clauses, disclaimers of warranty, and prohibitions on the commercial use of the data or software available on the site.

confidence on the internet, such as, cross-border fraud and false and deceptive practices through misleading vehicles such as ‘spam’, ‘phishing’, ‘spyware’ and ‘identity theft’, etc.

The success of electronic commerce is, therefore, directly proportional to building an environment that is both, attractive to users, and safe for users. That, consecutively, requires a set of alliances: between private interests and governmental interests, as well as between business people, computer technology specialists, and lawyers. This is particularly true in the area of consumer protection.

6.2.1 Consumer Fraud Cases

Consumer fraud on the internet is a natural outgrowth of the recent explosion in the use of the internet to carry out consumer transactions and the number of people online. Following are some consumer fraud cases:

6.2.1.1 People v Lipsitz

In People v Lipsitz, a New York Court held that the defendant was subject to personal jurisdiction and liable for violating New York consumer protection laws, even though the defendant conducted its magazine subscription business globally over the internet. The complaint alleged that the defendants had engaged in fraudulent and deceptive trade practices on the internet by using and misusing e-mail under a variety of assumed names to sell magazine subscriptions that never arrived or were only delivered for a portion of the paid subscription period. In granting relief, the Court first ruled that it had personal jurisdiction over the defendant as the defendants were located in New York, did business in New York and the acts complained of occurred within the State, despite the fact that the magazine subscriptions were offered for sale to a far greater geographic basis. The Court subsequently analyzed the defendants’ conduct under traditional consumer protection law, and held that the conduct violated New York laws.

12 663 NYS 2d 468 (NY Sup Ct. June 23, 1997)
6.2.1.2  Minnesota v Granite Gate Resorts, Inc.\textsuperscript{13}

In \textit{Minnesota v Granite Gate Resorts, Inc.}, the Minnesota Attorney General brought suit under the state consumer protection statute asserting that the defendant, a Nevada resident, was liable for deceptive trade practices, false advertising and consumer fraud on the internet by advertising that gambling on the internet is legal even though the specific on-line gambling service associated with the defendant was not yet operational. While the decision is limited to the defendant's unsuccessful argument that, as a Nevada resident, he was not subject to personal jurisdiction by the Minnesota courts, it demonstrates the extent to which consumer protection laws are being used by the States to prosecute fraud—even prospective fraud—on the internet.

6.2.1.3  Juno Online Services, L.P. v Juno Lighting, Inc.\textsuperscript{14}

\textit{Juno Online Services, L.P. v Juno Lighting, Inc}, was a dispute over the use of the internet domain names, and the Court held that the mere registration of a domain name, without setting up a website or e-mail service, does not constitute 'trade or commerce' or amount to 'deception' as required under the Illinois consumer fraud and deceptive business practice statute.

The courts, in the above-discussed cases, not only considered traditional fraud principles in the context of promotions and 'commerce' on-line, but often raised issues concerning personal jurisdiction.

6.2.2  Consumer Protection Instruments in E-Contracting

At the United Nations level, the United Nations Conference on Trade and Development (UNCTAD) through its Information and Communication Technologies (ICT) and E-business Branch\textsuperscript{15} is responsible for conducting analytical work intended for policy makers and practitioners in the field of e-commerce, internet and ICT. This Branch has issued a number of publications and it organizes seminars and workshops to raise awareness and promote the exchange of experience among e-commerce practitioners and policy makers in developing countries. Among

\textsuperscript{13} 569 NW 2d 715(Mn App Ct 1997)
\textsuperscript{14} 979 F Supp 684 (ND Ill 1997)
significant documents on e-commerce issued by the UN Branch are: (1) Information Economy Report 2005 and (2) E-Commerce and Development Report 2004.

6.2.2.1 Organization for Economic Cooperation and Development (OECD)
The OECD through its Committee on Consumer Policy\(^{16}\) has been working principally with the industry, consumer and law enforcement agencies in order to develop principles and practices that ensure the effective protection of consumer online and against the growing problem of cross-border fraud and deceptive commercial practices on the Internet. The OECD has, among other instruments, issued the following important instruments: (1) Guidelines on Consumer Protection in the Context of Electronic Commerce (December 9, 1999), and (2) Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (June 11, 2003).

6.2.2.2 Asia Pacific Economic Cooperation (APEC)
The Electronic Commerce Steering Group (ECSG)\(^{17}\) of the Asia-Pacific Economic Cooperation (APEC), a government related group, has fashioned a set of online voluntary consumer protection principles, which reflect some of the principles of the OECD Consumer Protection Guidelines and other approaches and practices in the APEC region. The ECSG has issued the following documents pertinent to e-commerce consumer protection: (1) Voluntary Online Consumer Protection Principles (July 17, 2002), and (2) Approaches to Consumer Protection within the APEC Region (August 2002).

6.2.2.3 The European Commission (EC)
In May 2000, the EC launched an initiative entitled: 'E-Confidence Initiative' as a joint effort between businesses, consumers and government to reach an agreement on common requirements, a set of good practices and useful approaches to enlarge

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15 The website of the UN ICT and E-Business Branch is available at <http://r0.unctad.org/ecommerce/ecommerce_en/about_en.htm>.
16 The website of the OECD’s Committee on Consumer Policy is available at: <http://www.oecd.org/department/0,2688,en_2649_34267_1_1_1_1_1,00.html>.
17 The website of APEC’s ECSG is available at: <http://www.apec.org/apec/apec_groups/som_special_task_groups/electronic_commerce.html>.
6.2.2.4 International Consumer Protection and Enforcement Network (ICPEN)

In the field of international cooperation and law enforcement, the International Consumer Protection and Enforcement Network (ICPEN), previously known as the International Marketing Supervision Network (IMSN), is an inter-governmental membership organization consisting mainly of consumer protection and law enforcement authorities of more than 30 countries, most of which are members of the OECD. The mandate of the Network is to share information about cross-border commercial activities that may affect consumer interests, and to promote international cooperation among law enforcement agencies. ICPEN holds seminars, workshops, awareness campaigns and issue documents on consumer protection on a regular basis.

6.3 ERRORS IN E-CONTRACTING AND THEIR SOLUTION

One reality of electronic communications is that people in rush often press the ‘send’ button before they may actually intend. Application of the common law of mistake to such situations may be problematic, for it would be a factual problem to determine who committed the error—the ‘sender’, or the ‘recipient’, or an ‘intermediary’. Further, the common law gives only limited relief in what are known as instances of unilateral mistake. Rescission is allowed only if the other party knew or had reason to know of the error or mistake. When dealing with an individual, it may be

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18 This network consists of 15 European Consumer Centres located in 13 Member States whose principal purpose is to serve as a network interface between the European Commission and European consumers, available at: <http://europa.eu.int/comm/consumers/index_en.htm>.

19 The website of ICPEN is available at. <http://www.icpen.org/).


21 ‘One cannot snap up an offer or bid knowing it was made in mistake.’ Tyra v Cheney, 152 NW 835, 835 (Minn. 1915) Under the RESTATEMENT (FIRST) OF CONTRACTS, § 503, a unilateral mistake was no grounds for voiding a contract, although if the other party knew of the mistake there may be grounds for avoidance under the notion of failure to disclose. Id. § 472 The Restatement (Second) liberalized this rule, recognizing the trend to give more protection in the case of unilateral
feasible to prove that the other party ‘knew or should have known’ of a mistake. However, with an automated information processing system designed to automatically process transmissions without review by any human being, the question that poses challenge is how does a party prove what the other party ‘knew or should have known’ when the mistake occurs while in electronic communication.

6.3.1 International Developments

6.3.1.1 Approaches Taken in the United States

The amplified possibility of error in an electronic environment has led to attempts in the United States to address such issues of error or mistake in new statutory language. Both the Uniform Electronic Transactions Act (UETA) and the Uniform Computer Information Transactions Act (UCITA) have included provisions that would allow some relief under the circumstances. The relief goes beyond that generally recognized by the common law, although each act differs in its formulation. Comments made about UCITA observe that such an approach avoids the complexity and uncertainty of relying solely on common law principles about mistakes in an automated world. Both statutes follow an analogous format and say that if an error has occurred in an electronic message, the aggrieved party (consumer or individual) may avoid the error if he or she promptly notifies the other person and takes reasonable measures to return the consideration received. The aggrieved party cannot take benefit of this right if there was a security system for protection of error in place, or if the aggrieved party benefited from (or used) the consideration supplied. Under both UETA and UCITA, the error rectification procedures apply only if the individual or consumer is engaged in an automated transaction; that is, where the transmissions are not reviewed by an individual at the other end in the

See, Ss. 20, 21 and 22 of the Indian Contract Act 1872
22 UETA § 10; UCITA § 214
23 Amelia H Boss, supra, n 1
ordinary course in forming a contract, performing under an existing contract or fulfilling an obligation required by the transaction.\textsuperscript{24} Hence, it focuses on individuals interacting with electronic agents, and not individuals interacting with individuals. The limitation is explained as follows, 'In a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the electronic agent of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous record.'\textsuperscript{25}

Assuming that the party is a covered party in a covered transaction with a covered error, there is no automatic right to circumvent the error. If an electronic error occurs, both Acts give the consumer or individual the ability to avoid the error only if certain requirements are met: first, the consumer or individual, promptly on learning of the error, must notify the other party of the error; in addition, the consumer must turn over to the other party or its designee, or destroy, all copies or consideration it has received; moreover, if the customer has already used or received the benefit of the information, this provision cannot be invoked.\textsuperscript{26} All things considered, the consumer must act promptly in a manner that returns the other party to the position that would have been true if the error had not occurred. The effect of this procedure is to stop a party from unwinding a transaction after the delivery of value and consideration which cannot be returned or destroyed.\textsuperscript{27} Restitution is, in general, required in order to undo a mistaken transaction. This defence builds on equity principles that permit a party to avoid the consequences of an error if that error causes no detrimental effect to another party, and does not give a benefit to the person committing the mistake.

\textsuperscript{24} UETA § 2 (2) (defining an automated transaction as 'a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction'); UCITA § 102 (a) (7) (a transaction in which a contract is formed in whole or part by electronic actions of one or both parties which are not previously reviewed by an individual in the ordinary course).

\textsuperscript{25} UETA § 10, comment 4

\textsuperscript{26} Amelia H Boss, \textit{supra}, n 1.

\textsuperscript{27} According to UCITA: 'Since there may be unavoidable detrimental effects on the party who received an erroneous message (e.g., costs of filling erroneous orders), courts must apply this rule with care. The basic assumption is that the defense works when there is no detrimental effect on the person who did not make the error, but that assumption is particularly suspect in cases where the nature of the information product makes for high costs to the provider or risk of fraud worked by the consumer.'
After return of the consideration, the other party is made whole again, and retains control over the consideration sent in error.

The error correction provisions do not apply (and there is no electronic error) if the electronic system with which the consumer is working provided a reasonable opportunity or method to rectify or avoid the error. For instance, the electronic agent may be programmed to provide a confirmation screen to the individual setting forth all the information the individual initially approved. In principle, this rule provides an incentive to establish error-correction procedures in automated contracting systems by eliminating any possibility of an electronic error defence or claim.

**6.3.1.2 UNIDROIT Principles of International Commercial Contracts**

Under the UNIDROIT Principles of International Commercial Contracts, a party can avoid a contract for a unilateral mistake if 'the other party had not at the time of avoidance acted in reliance on the contract.'

There is no limitation to individuals or consumers or to instances of electronic error or even to the use or non-use of security procedures. Although, this issue along with the issues of shrink/ click/ browse wrap and consumer protection may demonstrate how the so-called new issues affecting transactional activities on the internet are in fact the same issues that have existed all along, but with a greater need for definitive resolution.

A significant part of contract law is the law of assignment, and the ability of a party to a contract to assign or transfer rights under that contract to a third party. More often than not, the presence of a written paper or a tangible document as evidence of the rights to be transferred is a critical factor in determining what law applies to the transfer. The law provides specific rules governing transfer where a right to be repaid money under a contract is embodied in a negotiable note or the right to goods held by a third party under a contract of carriage (or a contract of storage) is embodied in a

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28 UNIDROIT Principles of International Commercial Contracts, Article 3 5(1). There are certain limitations. The mistake must be of "such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms..."; the party in error must not have been grossly negligent in making the mistake; and the risk of the mistake must not have been assumed by the party in error.

29 Amelia H Boss, *supra*, n 1.
negotiable document. Granting the transferee in possession of the written evidence of those rights sometimes gives even greater rights than the transferor had. In fact, in the United States, as elsewhere, negotiable instruments and negotiable documents are considered valuable commercial specialties allowing for the free transferability and alienability of rights in the commercial marketplace.

However, the influx of electronic technologies puts pressure on these concepts. In an electronic environment where paper is lacking, the issue is raised is how one can possess something that is intangible and subject to copying. A further question is how a transferee in an electronic environment can achieve the same degree of legal protection granted in a paper environment. This is one area where legislative changes in the United States, in both the UETA and E-Sign, went beyond just facilitating electronic commerce by validating use of electronic technologies.

Legislation attempted to evolve substantive new rules governing these electronic equivalents of traditional paper-based commercial specialties. It was essential to draft special rules about what constitutes the electronic equivalent of the negotiable paper promissory note or the negotiable paper document of title in order to create parity between electronic messages and their paper counterparts. The law also needed to offer a framework outlining the circumstances under which transferees might claim the same protections which their counterparts in the paper world afford.

The Uniform Electronic Transactions Act (UETA) met these needs under the concept of the transferable record.\textsuperscript{30} The UETA addresses the realms of paper falling into the category of negotiable instruments by providing legal support for the creation, transferability and enforceability of electronic equivalents of notes and documents against the issuer or obligor.\textsuperscript{31} The electronic equivalents of the paper notes or documents\textsuperscript{32} are transferable records and can be controlled by the holder, who in turn, may receive the legal benefits of a holder in due course and good faith purchaser status.

\textsuperscript{30} UETA § 16(a); ESIGN, 15 U.S. C. § 7021(a) (1).

\textsuperscript{31} Amelia H Boss, \textit{supra}, n 1.

\textsuperscript{32} UETA creates the concept of 'transferable records' for promissory notes and paper documents of title, not for cheques.

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In the US, the electronic equivalent of a paper promissory note (or document of title) has been established and, in fact, that has been accomplished when the defining characteristics of negotiability for an electronic record were adapted, as well as the rules for negotiation and transfer, by changing the rigid rules of negotiability that have developed over the centuries.33

On a broader scale, however, the growth of electronic commerce and the demand for new-fangled methods of protecting transferees’ rights online raise questions about the continued relevance of a body of law based on the ‘out-dated’ technology of paper.

6.4 INCORPORATION OF TERMS

The terms of any contract, whether it is formed in virtual world or paper-world, will be those agreed upon by the parties at the time the contract is concluded. This was clearly illustrated in the celebrated case of *Thornton v Shoe lane Parking* where Lord Denning treated the issue of a ticket by an automated ticket machine as the point at which the contract was formed, ruling that the terms of issue printed on the ticket could not form part of the contract. This approach may be seen as a development of the rule in the so called ticket cases, particularly *Parker v South Eastern Railway Co.*, where terms printed on tickets or receipts have been held only to be validly incorporated into the contract if the terms have been brought to the other party’s notice before the contract is concluded.

Two distinct issues determine which terms have been agreed by the parties. The first is: when is the contract concluded—this is because extra terms cannot be introduced into the contract subsequent to its formation. At the point of time the contract is concluded, the parties have consensus, and any attempt to introduce further terms after this point creates dissensus unless, of course, all parties agree to the new term (in effect, agreeing a new contract).35 All contractual terms to an e-contract contract

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33 Amelia H Boss, *supra*, n 1.
34 (1877) 2 CPD 416.
must be introduced prior to the final acceptance being sent (in contracts through e-mail), and all terms must be introduced before the acceptance is received by the offeror (in click-wrap type of contracts). The second issue is the identification of what terms have been incorporated into the contract. By and large, all the terms of contracts fall into three categories: 'Express Terms', 'Terms Incorporated by Reference' and 'Implied Terms'.

6.4.1 Incorporating Express Terms

The incorporation of express terms into e-contracts should not present much difficulty. Since such terms are clearly set out in the transmission of information between parties, therefore they can be easily identified. There are, though, two problematic issues regarding express terms which parties should always bear in mind while negotiating an e-contract. The first is that parties must take care to identify the document or documents which are intended to constitute the contract. This will be more common with e-mail contracts than with click wrap contracts due to the potential for prolonged exchanges between the parties at the negotiation stage. The second prospective problem of express terms is their interpretation by the courts in the event of a dispute. Contracting parties should attempt to limit, to the extent possible, any inconsistencies or ambiguities in their contractual terms. In the event of any disagreement between the parties on the terms of the contract, the court will apply the established rules of contractual interpretation.

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36 Ibid.

37 Web site operators making use of click-wrap contracts have to ensure that automated response systems only accept terms which they find acceptable. Thus, if I were to operate a site selling steel at £100 per tonne, I would need to ensure that the automated response system on my server was programmed in such a way as to ensure it would not accept a communication saying, 'I wish to order 100 tonnes of steel at $100 per tonne'. The results of such an automated acceptance would be to create a contract on these new terms. This can easily be remedied by giving the response system a checksum against which it checks any offers received. This example is cited in Andrew D Murray, ibid.

6.4.2 Incorporating Terms by Reference

The structure of the Web, with its interconnected, hyperlinked pages, lends itself to incorporation by reference.\(^{39}\) As a result, terms incorporated by reference are common in relation to click-wrap, e-mail, and some other e-contracts. The terms that the contracting party wishes to incorporate are set out in a separate document and are included into the final contract by a reference to this separate document somewhere in the contractual documentation. Generally in click-wrap and web-wrap contracts, this separate document is a separate web page held on the same server as the click wrap contract. This is more often than not known as the terms and conditions page and is accessible via a hypertext link embedded in the main click-wrap/ web-wrap agreement page. Though the issue is that, to be effectively incorporated, the terms must not only be clear and unambiguous, they must also clearly have been intended to form a part of the contract. This means that the party relying upon these incorporated terms must take all reasonable steps to bring them to the attention of the other party prior to the contract formation and in such a manner as to make it clear that these terms are intended to be contractual terms.\(^{40}\)

The question is: what does this mean with reference to click-wrap contracts? It is suggested that as web-advertisements are *prima facie* advertisements, not contractual documents, customers will not expect to find contractual terms and conditions contained therein.\(^{41}\) The website operator will have to draw these terms clearly to the customer’s attention and will have to do so before the contract is concluded.\(^{42}\) The design of the website must be such that any term to be incorporated by reference is referred to prior to the ‘Submit’ or ‘I Accept’ button because once the submission button is clicked the transaction will be processed in a matter of seconds with the customer receiving his confirmation (the acceptance) before he has an opportunity to scroll further down the page. Further, the terms and conditions must be clearly

\(^{39}\) Andrew D Murray, *supra*, n 35.

\(^{40}\) Thus, the courts have always held that where ‘contractual’ terms are found in places where the customer would not expect to find them they do not form part of the contract. See, *Chapelton v Barry UDC* [1940] 1 KB 532, *Taylor v Hutchison* (1886) 14 R 4 (advertising leaflet).

\(^{41}\) Andrew D Murray, *supra*, n 35

\(^{42}\) Some terms will require a greater degree of highlighting than others. Exclusionary terms, for instance, will require a greater degree of highlighting and explicitness than others. See Denning LJ in *Spurling v Bradshaw* [1956] 2 All ER 121, 125F, ‘Some clauses which I have seen to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient’
Effectively to incorporate any external terms and conditions the site operator must offer a clearly marked and prominent link to the specific terms and conditions it wishes to incorporate into the contract before the customer can enter into the contract. The site operator should ensure that the terms and conditions have been incorporated into the contract by requiring the customers to indicate that they have knowledge of, and have accepted, these terms and conditions before processing their order. This can easily be done by requiring the customers to check a box on the order form or by placing the order form on a separate page which requires the customer to click an acknowledgement as the link to the order page. Web-advertiser should take these steps, as simply offering a link to a terms and conditions page may prove insufficient as people become used to modern technology and begin to ignore parts of pages of no interest to them, scrolling immediately down to the order form/button. If the customer has acknowledged that he is aware of the terms and conditions, then, those terms and conditions will be incorporated into the contract even if the customer has not read them.

6.4.3 Implied Terms

As with contracts concluded in actual reality there are occasions where terms are implied into contracts concluded in virtual reality. As implied terms usually come about apart from the contract formation process, the fact that a contract has been concluded in cyberspace will be of no impact to the rules on formation of contract.\footnote{Ibid.} Implied terms may be implied by fact, such as, terms required to give a contract 'business efficacy', and terms implied on the basis of 'custom or usage'.\footnote{See, William Morton & Co v Muir Bros & Co, 1907 SC 1211.} Furthermore, terms may be implied by the common law such as the implied term of seaworthiness implied into contracts for the carriage of goods by sea,\footnote{See, Steel v State Line Steamship Co, (1877) 3 App.Cas. 72} and the implied rule of non-derogation from grant\footnote{See, Barr v Lions Ltd, 1956 SC 59}. As the introduction of these terms is uniform, no matter how the contract was negotiated and concluded, the use of different modes or approaches to conclude e-contracts will not affect the established
rules and reference has to be made to traditional contract texts for further guidance on implied terms.\textsuperscript{48}

In the paper-based world of contracts, the judiciary generally upholds the practice of incorporating terms by reference where the party relying upon such terms has notified the other party of the terms and such terms are reasonably accessible to the other party. The online world is particularly well-suited to the practice of incorporating terms by reference as it is quick and easy to insert hyperlinks into text.\textsuperscript{49} The Supreme Court of Canada recently contemplated the validity of introducing terms via hyperlink in the case of \textit{Dell Computer Corp. v Union des consommateurs}.\textsuperscript{50} In upholding the legality and authenticity of this practice, the Court emphasized that the terms and conditions must be ‘reasonably accessible’ and was of the opinion that a hyperlinked document meets that standard.

An electronic agreement can be drafted in a similar manner in which a normal hard copy agreement is drafted. By and large, an e-contract also incorporates the general clauses like any other contract (paper-based offline contract), such as ‘rights, duties and obligations’, \textsuperscript{51} ‘warranties and indemnities’, \textsuperscript{52} ‘termination’, \textsuperscript{53} ‘remedy’, \textsuperscript{54} ‘arbitration’, \textsuperscript{55} ‘merger’, \textsuperscript{56} ‘confidentiality provision’, if any, ‘limitations on


\textsuperscript{49} Andrew D Murray, \textit{supra}, n 35.

\textsuperscript{50} 2007 SCC (Supreme Court of Canada) 34.

\textsuperscript{51} The rights, duties and obligations clause of a contract is a detailed description which provides for the rights, duties and obligations of the parties to it, such as the commencement and the deadlines for the performance, relevant price/cost, relevant quantities, payment terms, taxes, interest, etc.

\textsuperscript{52} A warranty is a legal promise about the authenticity of certain facts. Warranties are generally concerned with the matters, such as, ownership or possession of the subject matter of the contract, right to sell or assign the subject matter of the contract, etc. In general, a warranty provision is accompanied by an indemnity in which the warranting party promises that if the warranty is breached, he (the warranting party) will pay the other party’s costs arising from the breach.

\textsuperscript{53} Termination clause makes sure that under certain circumstances (breach of contract, etc), either or both the parties would have right to terminate the contract. It also ensures the manner of serving notice of the termination right, and whether or not the party committing breach be given an opportunity to cure the breach before the exercise of termination right by the other party.

\textsuperscript{54} Remedy clause describes the rights of the non-breaching party in the event of breach committed by the other party.

\textsuperscript{55} Arbitration clause specifies that the disputes arising under the contract should be settled through arbitration and not by way of legal litigation in the court. It, normally, provides for the name of the organization that would conduct the arbitration, the place where the arbitration is to be held, and also the method of appointing/selecting arbitrators.

\textsuperscript{56} Merger clause affirms that the written document contains the entire understanding of the parties. The object of this clause is to ensure that evidence outside the written document would not be
liability’, ‘governing law’, ‘jurisdiction of courts’ (venue of law suits involving the contract), etc.

6.5 STANDARD FORM CONTRACTS IN E-CONTRACTING

The law of contracts has developed over centuries and has had to transform so as to keep pace with economic, political and technological developments. One of the most noteworthy shifts came with the industrial revolution and the creation of mass markets—instead of individual parties bargaining for their positions, mass production lead to businesses using pre-printed standard form contracts. As early as the 19\textsuperscript{th} century, standard forms emerged in the form of railroad tickets, insurance contracts, lottery tickets and mail order sales contracts.\textsuperscript{57} Indeed, standard form contracts assist business transactions. They scrimp and save time and effort and dispense with formal contract requirements that would impede business and raise the costs of products. The imposition of standard terms contract means that the specific terms of the contract are positively not negotiated and sometimes not even read or known at all. The question which, in such a situation, arises is that if contractual terms are not even read, how is it that there can be a clear meeting of the minds? On the whole, the courts have adopted an objective theory of contracts to determine consent. The objective test was set out by Blackburn J. in \textit{Smith v Hughes}.\textsuperscript{58}

I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the

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\textsuperscript{57} John JA Burke, ‘Standard Form Contracts’ available at <http://www.lex2k.org/sfc/discussion.html>.

\textsuperscript{58} (1871), LR QB 597 at 607.
circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke* (2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119). If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

Thus, an essential part of the test to determine agreement and *consensus ad idem* is whether the reasonable person would have concluded that the parties had entered into the contract. This reasoning was subsequently adopted in a series of 'ticket cases' where conditions printed on the ticket were enforced if there was a general expectation of reasonable contractual terms and the parties seeking to rely upon the terms had taken reasonable steps to bring those terms to the attention of the other side.59

The information technology, especially the internet, is turning the course of contracting on its head. With increasing alacrity, people are mouse-clicking their way into enforceable standard-form contracts on the internet ('browse-wrap' contracts) while installing software ('click-wrap' contracts).60 The emergence of this new contracting medium has created numerous claims of the inadequacy of existing contract law to govern standard-form contracts made at the speed of light.

E-commerce, like conventional commerce, depends upon brand recognition and loyalty, clever marketing strategies, and consumer contracts that carefully allocate the risks and liabilities in agreements between those who provide goods and services and those who consume them.61 Notably, electronic contracts, like transactions in the

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59 See *Parker v South Eastern Railway Co.* (1877) 2 CPD 416; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.
61 See Debora Vrana, *California Dealin' Financing the State's Emerging Companies Buy.com, Palm Inc. IPOs to Highlight 1st Quarter*, LOS ANGELES TIMES, Jan 3, 2000, at C1, available at 2000 WL 2197202
paper world, remain dominated by standard-form contract terms. Consumer advocates agonize that the electronic media presents new methods for businesses to take advantage of consumers. On the other hand, businesses engaged in e-commerce insist that courts must relax existing legal protections so as to nourish this new form of business.

Competition in the new economy is fierce, as companies worry that the early entrants into the world of e-commerce will establish the standards and customs of the business, thereby freezing out competition. Consequently, new companies have struggled to gain market share, often with a complete indifference to revenue and profits.

Significant impediments still confront e-commerce. The companies of the new economy lack experience with the new medium and sometimes lack any business experience at all. To address these problems, e-commerce companies invest heavily in novel marketing techniques made available by the internet. The internet design companies consult not only traditional marketing gurus, but also cognitive psychologists and anthropologists in an effort to maximize the number of site visitors and to induce these visitors to engage in the desired responses.

E-consumers also need to be vigilant and guarded about conducting business on the internet. The internet also makes it easy for a fly-by-night operation to convey the

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63 See, Deflated Dreams; Series: After the Bubble Burst, ST. PETERSBURG TIMES, Feb. 11, 2001, at 1H, available at 2001 WL 6961522 (noting that "the Internet is still evolving as a crucial force in our lives and in the economy. 'If you were a dot-com, what mattered most was being the 'first mover in your space' to grab market share.'").
64 See, Matt Richtel, Layoffs Don't Faze Dot-Com Workers More jobs Still Available in Online Companies, CLEVELAND PLAIN DEALER, July 2, 2000, at 1E, available at 2001 WL 5154648 ("[T]he challenge these days for a number of ecommerce companies is simply to keep from going broke.").
impression that it is actually a respectable firm; a fancy website can just as easily represent a one-person operation as a Fortune 500 company.68

Besides the above hurdles, technological impediments to e-commerce also continue. Concerns about privacy and security on the internet also frighten, and hence, prevent some consumers. Efforts to protect users’ privacy and security can even backfire, as internet users suffer from ‘password overload’ (failing to remember all of their passwords for various sites).69 These concerns, as well as the possibility that many people treat the internet primarily as amusement, information-gathering for real world transactions, or window shopping, explain why searches over the internet occur far more often than completed transactions.70 Some companies report that about three-quarters of their electronic customers withdraw from purchasing at the last moment— at the time of selecting delivery options.71

As the above-stated problems reveal, consumers in the new economy are different somewhat from those in the old economy. E-consumers necessarily have the understanding and means to own and operate new technologies, and they must also trust these new technologies.72

The e-commerce environment also affords the e-consumer with novel defences against exploitation or fraud. The speed with which information travels on the internet makes it relatively easy for wary e-consumers to monitor a business’s reputation.73 Consumers, in the paper world, simply guess at a business’s reputation, conceivably based on the memories of news reports, comments by friends and colleagues about the business, or product reviews by consumer magazines. On the contrary, the e-consumer can find such information with a few mouse clicks.

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71 See Alan T. Saracevic, The All-Important Last Mile to Your Front Door, Delivery Companies Strive to Improve Fulfilment Services, ‘San Francisco Examiner’, March 7, 2000 at D8;
72 Hillman, Robert A & Rachlinski, Jeffrey J., supra, n 60
Because the e-consumers are relatively young and because they often use the internet to save time, they might be a little too eager to complete their transactions. The internet, fun to use and explore, might encourage this sense of impatience. E-consumers also might (at least in their initial experiences with e-commerce) treat the mouse-click that completes an electronic transaction too frivolously. To cut a long story short, the e-consumer might be somewhat ‘click happy’.

Although e-commerce has had this effect on some commodities, wide dispersions in prices can be found in e-commerce. In some cases, the disparities are greater on the internet than in the real world. These results signify that e-consumers have yet to exploit the full benefits of the electronic environment. Despite the apparent benefits of the internet for consumers, the studies reveal that businesses still have many opportunities to exploit consumers’ lack of information about goods and services.

### 6.5.1 Electronic Boilerplate

Even though e-commerce incorporates a host of innovations, the standard-form contracts still dominate. Electronic boilerplate has thrived along with e-commerce—whether they are entering into contracts for goods or services over the internet or installing software, e-consumers encounter a host of standard terms presented in electronic form. As with their paper-world counterparts, e-consumers face an unavoidable set of realities when confronted by standard-form language. E-businesses present standard terms in a distinct take-it-or-leave-it manner. The terms are also long, detailed, full of legal jargon, about remote risks, and one-sided. They

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74 Patricia Wallace, *The Psychology Of The Internet* (Cambridge University Press, UK, 1999). (Drawing on research in the social sciences, communications, business, and other fields, Patricia Wallace analyses how the online environment can influence the way we behave, sometimes for the better, sometimes not. Further, the author also argues that the internet environment induces impatience and frustration...).
75 Hillman, Robert A & Rachlinski , Jeffrey J., *supra*, n 60.
77 See, id.
78 Hillman, Robert A & Rachlinski , Jeffrey J., *supra*, n 60.
79 Following examples have been cited in Hillman, Robert A. and Rachlinski, Jeffrey J., *ibid*

For example, GoHip, an internet web site, has recently been in the news because its free software came with some unusual Terms and Conditions that allowed GoHip to modify a user’s web browser homepage, e-mail signature file, and start-up files in Windows (all for the purposes of promoting GoHip products). Dave Peyton, *Proceed Cautiously When*
incorporate the typical litany of terms that are sometimes unenforceable in the paper world, such as arbitration provisions and remedy limitations, etc. As with his paper-world counterpart, the e-consumer knows (or quickly recognizes) that reading through the boilerplate is not likely to be of any benefit. Instead, he possibly casually believes there is little risk to agreeing to standard terms. Similarly, just like the paper word, in reality, many or most e-consumers may still have ample rational reasons (such as, lack of bargaining power, commonality of terms within an industry) not to read and cognitive weaknesses that impede reading (information overload). Whilst the internet has maintained dispersion of both quality and price for many commodities, it might also have produced dispersion in the contract terms e-businesses offer.

E-commerce brings several new realities to standard-form contracting. Since companies engaged in e-commerce are highly sensitive about their reputations, they might be extremely careful about the content of their boilerplate, or at least might refrain from enforcing some of it. They also realize that with a few mouse clicks, disgruntled e-consumers can broadcast their dissatisfaction to thousands of potential customers. These companies also want to be distinguished themselves from the unreliable internet businesses that are using the internet to take advantage of e-consumers.

\[\text{Downloaded From GoHip, CHI. TRIB., October 23, 2000, at 7, available at 2000WL 3724398. Another surprising term was, until recently, included with all MNS Hotmail accounts, which gave Microsoft proprietary rights over any information sent using a Hotmail account. See My E-mail Ate My Copyright, SUNDAY BUSINESS POST, April 29, 2001, available at 2001 WL 8742766. In one survey, 40 per cent of Internet users felt they had less legal protection with Internet purchases. High Street Internet Brands Inspire Trust, TRAVEL TRADE GAZETTE UK & IRELAND, August 7, 2000, at 5, available at 2000 WL 22583952.} \]

Amazon.com’s “Conditions of Use” covers events that sometimes occur, such as loss of a product during shipment, and liability arising from fraudulent use of an Amazon.com account (both risks fall upon the user) Amazon.com, “Conditions of Use” at Risk of Loss, Your Account, www.amazon.com/exec/obidos/tg/browse/-/508088/102-7991463-0176109 (Last visited July 25, 2001).

Businesses that use the internet also can collect a tremendous amount of data on their potential customers. Customers, likely to click on the 'terms and conditions' links on websites, could be identified in advance and offered different terms. Internet businesses can also collect data on which presentation methods attract or repel consumers from connecting to the boilerplate and scrolling through it. This information can facilitate internet businesses to manipulate the presentation method of the standard terms so as to reduce the number of consumers who actually follow the links to the standard-form language.

These generalizations about e-commerce illustrate the new ways in which consumers confront standard terms. The harried traveller who faces a complex form after waiting in a long line at the car-rental counter has been replaced by the impatient college student buying virus-protection software, to be delivered via the internet.

6.5.2 Comparison between Electronic Standard Form Contract and Paper Standard Form Contract

In view of the benefits of standard-form contracting to both businesses and consumers, it should not be surprising that e-businesses use them as frequently as their paper-world counterparts. Electronic boilerplate can efficiently allocate contractual risks just as simply as paper boilerplate. The application of electronic boilerplate might, in fact, be crucial to e-commerce inasmuch as negotiating the terms of a contract would likely require interrupting the electronic transaction and interjecting a human agent to conduct the negotiation for the business. This

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83 Hillman, Robert A & Rachlinski, Jeffrey J, supra, n 60.

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interruption would eliminate a critical efficiency associated with electronic contracting—namely, that it does not require businesses to use human agents.\textsuperscript{85}

At the same time, the novelty of e-commerce hints that many of the benefits associated with paper boilerplate have not, as yet, been realized. Many new companies are run by their technology-oriented founders who have no real expertise with the kinds of contractual efficiencies that more established business persons might understand.\textsuperscript{86} E-commerce itself is so novel that many companies engaged in e-commerce are unlikely to have identified the efficient allocation of contractual risks between consumers and businesses. Moreover, the standard terms used by companies selling electronic goods and services might be untested in the courts.

Robert Hillman and Jeffrey Rachlinski, in their article, ‘Standard-Form Contracting in the Electronic Age’ organize some considerations, maintaining the distinction between rational, social, cognitive forces, and business strategies that can undermine the discipline that the market imposes on businesses, in the following tabulated form:

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
\textbf{Factor Type} & \textbf{Description of Factor} & \textbf{Difference in Electronic Contracts} \\
\hline
Rational Factors & Language hard to understand & = Equally true in electronic commerce \\
\hline
Rational Factors & Fine or other difficult print; terms hard to find & + New ways of disguising terms possible \\
\hline
Rational Factors & Limited time: Consumer usually receives form when hurried & + Consumer usually enters into contract at home; e-consumers tend to be impatient \\
\hline
Rational Factors & Agents lacks negotiating authority & + No contact with an agent whatsoever \\
\hline
\end{tabular}
\caption{Factors Affecting Judicial Enforcement of Paper and Electronic Standard-Form Contract Terms\textsuperscript{87}}
\end{table}

\textsuperscript{85} Hillman, Robert A & Rachlinski, Jeffrey J., supra, n 60.
\textsuperscript{87} Taken from: Hillman, Robert A & Rachlinski, Jeffrey J., supra, n 60.
Rational Factors | Boilerplate covers unlikely events | Equally true in electronic commerce
--- | --- | ---
Rational Factors | Competitors all use same language | More diversity of terms (at present); also easier to compare terms
Rational Factors | Consumers assume courts will not enforce unjust terms | Equally true in electronic commerce
Social Factors | Reading terms wastes others' time | User is in home; no other users or agent
Social Factors | Reading signals lack of trust | No agent to signal to; meaning of a mouse-click
Social Factors | Agent has established a relationship with consumer | No agent to trust
Social Factors | Agent uses subtle social pressures to deter user from reading boilerplate | No agent; but research can reduce the number of consumers who read terms
Cognitive Factors | Consumers satisfaction | Same is true in e-commerce
Cognitive Factors | Consumers focus on a few terms | Same is true in e-commerce
Cognitive Factors | Consumers want to ignore terms | Same is true in e-commerce
Cognitive Factors | Consumers are overconfident | Same is true in e-commerce
Additional Business Strategies | Segregating consumers | Easier to segregate in e-commerce
Additional Business Strategies | Reputation | Consumers can find information more easily

* "-" indicates that there is less reason to be concerned about business abuse and market failure in e-commerce than in the conventional commerce; "+" indicates that there is more reason to be concerned; "=" indicates that there is equal concern.

### 6.5.3 Role of Law

Quite a few cases have formed judicial opinions on the enforceability of standard terms in electronic contracting. So far, courts have analyzed these terms using contract doctrine developed in the paper world without significant revision. Standard forms are not a problem, evidently, if a sufficient number of consumers read their forms and market pressure motivates businesses to draft fair, reasonable terms. Moreover, notwithstanding the apparent wide-scale failure of e-consumers to read
standard forms of well-known vendors, to read terms governing average-priced transactions, and to read particular terms, such as dispute resolution and choice of forum, analysts have argued that a small number of readers in such contexts may be sufficient surrogates in competitive markets to discipline businesses. However, there is some reason to believe that a concern for reputation and lively competition for a market share should deter the e-businesses from drafting exploitive terms. Indeed, the internet may amplify this effect because of the relative ease in which consumers and watchdog groups can spread information about the nature of the terms. Additionally, e-businesses want to distinguish themselves from the multitude of disreputable firms that, because of ease of entry, populate the internet.

The question is: what is the role of law if market pressure cannot alone keep businesses in line, especially in everyday internet transactions? Judicial regulation of terms through doctrines, such as unconscionability, reasonable expectations, etc ensures that drafters do not overstep the reasonable bounds of their delegation.

With a view to increase the numbers of readers of standard forms or, at least, to increase the opportunity to read, and, concomitantly, to decrease the instances of market failure, and also to lend credence to autonomy reasons for enforcing e-standard forms, Robert A Hillman in his article, ‘On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications’, puts forth following suggestions:

1. **Continue the current legal direction**: The standard forms are here to stay because they reduce the drafter’s cost of contracting by standardizing risks and eliminating bargaining costs. Further, drafters best can determine an efficient allocation of risk because of their expertise and experience, and can pass along some of these savings to consumers. Existing contract law, as applied to both the paper and e-worlds, recognizes the value of standard forms and also the potential for market failures.

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Up till now, courts assessing on-line standard forms have paid special attention to the mode of presentation of terms.\textsuperscript{90} It is plausible that, as consumers increase their level of e-standard form contracting, their reading of terms also will increase.

2. Adopt more specific rules about what constitutes an agreement to terms: Contract law could adopt stricter standards for what constitutes an agreement to e-standard terms. One little extreme approach would be to require the e-consumers clicking at the end of each term. A midway approach would be to require clicking next to terms that consumers apparently do not generally read, such as forum selection and dispute resolution terms, especially since those terms have been controversial and contentious. A further approach would be to require bold or highlighted text for particular subject matter. This strategy presupposes that consumers can find the terms in the first place, and consequently would be effective only if adopted in conjunction with one of the other forms of mandatory presentation of terms.

3. Require e-businesses to make terms available on-line on their websites: This suggestion would give prospective e-consumers even more time to contemplate and compare terms and would increase the legitimacy of the idea that e-consumers who have made a purchase have given their ‘assent’ to the terms.

\textsuperscript{90} In a ‘browse-wrap’ contract, an e-consumer must ‘browse’ through the website to find the optional hyperlink that would take him to the terms, so that he could find himself bound (according to the standard form) without ever seeing the terms. Some courts have held that browse-wrap does not sufficiently call terms to the consumer’s attention [See for e.g., \textit{Specht v Netscape Communications Corp.}, 306 F.3d 17, 30 (2d Cir 2002) ("Where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.").]. On the other hand, courts uniformly have held enforceable “click-wrap” agreements, for a party must click “I agree” to the terms presented on the screen before completing the transaction [For example, \textit{Barnett v Network Solutions, Inc.}, 38 S.W.3d 200, 204 (Tex. Ct. App 2001) ("Parties to a written contract have the obligation to read what they sign; and, absent actual or constructive fraud . . . they are not excused from the consequences attendant upon a failure to read the contract. The same rule applies to contracts which appear in an electronic format."); \textit{Caspi v Microsoft Network}, 323 NJ Super 118 (NJ Super. Ct. App. Div. 1999)]. Certainly, a court may find unenforceable a click-wrap term that is buried in fine print or incomprehensible.
Even if website disclosure does not increase consumer reading and shopping, it still might motivate businesses to write fair terms. Exposure by watchdog groups, which can monitor websites and spread the word about unreasonable terms electronically, may worry businesses.

If website disclosure does not discipline businesses, the strategy may possibly backfire. All the terms on the website proposal may venture to insulate businesses from claims of procedural unconscionability and thereby create a safe haven for their creation of suspect terms.

4. Cooling off period: The e-consumers, in general, fail to read most often because they are in a hurry, not because of real time constraints, but the reason for their plight may be impatience.

Numerous state consumer protection laws prescribe a `cooling off` period after door to door sales, in which consumers can rescind their purchases because they fail to exercise restraint in that context too. Taking a lesson from these statutes, contract law could grant consumers the right, for a limited period of time, to rescind e-standard form transactions for a full refund.

There are significant problems with such a proposal, however. The lack of finality of transactions could make the internet contracting prohibitively expensive for e-businesses and for little gain. Consumers are as unlikely to read the terms after their purchase as before. In addition, in the case of goods, if the cooling off period extends beyond delivery, consumers are unlikely to find the time or make the effort to return them. On the other hand, all this means is that the consumer believes the net benefit of returning the goods is less than the net benefit of accommodating to the adverse terms.

In fact, a prescribed cooling off period may backfire too. Many e-companies already offer 30 or 90 day return policies, but such policies may encourage consumers to forgo reading on the theory that they can always return the product later.
5. Adopt substantive mandatory rules for problematic terms, such as forum selection and choice of law: As regards the terms relating to breakdowns in performance, such as dispute resolution and forum selection clauses, in everyday transactions, most of the e-consumers do read and shop. Many of the rational and cognitive reasons for failing to read especially apply to such terms. Instead of attempting to create new incentives for consumers to read these terms, contract law could adopt rules delineating the limits of their acceptability.91

Substantive regulation of any kind, will certainly, run into various objections, including freedom of contract, the fallibility of third-party regulation, and the costs of administration.

To sum up, even if market failures pervade e-commerce, government regulation may constitute a net loss.92

6.6 CONCLUSION

Contractual terms may consist of express terms, such as those embodied in a standard form pre-printed contract (or its electronic equivalent agreements); implied terms, which are incorporated on the basis of the circumstances, e.g. advertisements that are deemed to constitute an offer, or part of an offer, or terms that are incorporated by consumer protection legislation; and finally, the terms that are incorporated by reference to another document.

The rise of ‘terms of use’ has drawn a great deal of attention because of the mass-market nature of the resulting agreements. Terms of use are drafted keeping consumers or other small end users in mind. Commentators have blitzed the impact of this new form of contract on consumers. But in the long run, terms of use may

91 For example, Principles of the Law of Software Contracts, Preliminary Draft No. 1, American Law Institute (2004), adopts the following rule with respect to choice of law:

The parties to a consumer contract may by agreement select the law of a state or foreign jurisdiction to govern their rights and duties with respect to an issue in contract if their transaction bears a reasonable relationship to the selected state or foreign jurisdiction.

have their most significant impact not on consumers, but on businesses. The law has paid some attention to the impact of terms of use on consumers: virtually all of the courts that have refused to enforce a browse-wrap license have done so to protect consumers. Conversely, virtually all the courts that have enforced browse-wrap licenses have done so against a commercial entity, generally one that competes with the drafter of the license. Further, those courts that have enforced shrink-wrap and click-wrap licenses against consumers have protected consumers against certain clauses considered unreasonable.

The problems ‘terms of use’ pose originate from a combination of factors: judicial willingness to weaken or even eliminate the notion of assent when presented with a form that purports to be a contract, and the ease with which technology allows companies (and perhaps even individuals) to present forms that purport to be contracts. All contracts need not be look like the prototypical model of sophisticated parties bargaining over terms. But as the notion moves further and further from that model, it introduces problems into contract law analysis, because the principles of contract law fit less and less well with the things we call contracts. At some point it makes little sense to talk of parties agreeing at all, and people need to fall back on substantive law to govern disputed conduct.

94 See, e.g., Campbell v Gen. Dynamics Gov’t Sys. Corp., 407 F.3d 546, 556–57 (1st Cir. 2005) (noting that an employer could not make a policy a provision of an employment agreement merely by posting it on the employee intranet); Waters v Earthlink, Inc., 91 F.App’x 697, 698 (1st Cir. 2003) (refusing to enforce an arbitration clause posted on a Web site in the absence of proof the consumer had seen the clause); Specht v Netscape Commc’ns Corp., 306 F.3d 17, 35–38 (2d Cir. 2002) (refusing to enforce browse-wrap against consumers). One partial exception to this statement is Dyer v Northwest Airlines, 334 F. Supp. 2d 1196, 1199–1200 (D.N.D. 2004), which held that a privacy policy posted on a Web site was not enforceable as a contract against the posting company. It is worth noting that in Dyer the plaintiffs brought a consumer class action suit and could not demonstrate even that their members had accessed the site in question. Cited in Mark A Lemley, ‘Terms of Use’, ibid.
96 For example, courts have been unwilling to enforce onerous arbitration and choice of forum clauses against consumers, even when the consumer agreed to a standard form imposing such requirements. And the Uniform Computer Information Transactions Act (UCITA) forbids the use of electronic self-help in mass market transactions, even if the parties agree otherwise. UNIF COMPUTER INFO TRANSACTIONS ACT § 816 (2001)
Electronic contracting has experienced a sea change in the last decade. Shifting from the world of paper contracting to electronic contracting presents something of a mixed bag for courts and lawmakers concerned about standard forms. The internet has created new procedures, and so obviously, should affect how courts assess the procedural aspects of unconscionability. By and large, the electronic environment enhances consumers’ abilities to investigate products and businesses, thereby making it easier for consumers to protect themselves from exploitation.

However, it is also true that several new features of the electronic environment suggest novel means by which businesses using standard forms might exploit consumers. Also, many important factors, including all of the cognitive considerations, suggest that courts maintain the same level of vigilance about electronic standard-form contracting that they have applied to the paper world.

Notwithstanding the rational benefits to the consumer of the electronic world, and the elimination of social pressures, in the main, e-consumers are as unlikely to investigate and to understand the importance of the standard terms as their paper-world counterparts. Therefore, courts must continue to be concerned that consumers will unwittingly enter into standard-form agreements that are primarily exploitative rather than mutually beneficial.

All the same, for lawmakers the issue of the enforceability of electronic standard terms will not go away. It is believed that e-consumers, in general, fail to use the extra time and resources provided by the electronic environment to understand and weigh the importance of standard terms. At most, consumers use this time to comparison shop over prices, quality of the goods or services, and perhaps businesses’ reputations.

The internet contracting is not essentially different from the paper world. Consequently, major changes in the approach of contract law are not imperative. The

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97 Hillman, Robert A & Rachlinski, Jeffrey J , supra, n 60.
98 Ibid.
99 Ibid. They (authors) also believe that any incentives to avoid unfair terms based on reputational concerns that businesses might face are likely to be fleeting.
era of e-standard form contracting does not require a major overhaul of contract law, and hence, does not necessitate a fundamental change of mind. Standard-form transactions thus remain within the sphere of contract, which itself serves the symbolic purpose of substantiating society’s freedom.\textsuperscript{100} However, it does suggest the need for lawmakers to refine their approaches to take into account new opportunities for both businesses and consumers to enhance their positions in the e-world.

Although the electronic environment is in fact a novel advance in the history of consumerism, existing contract law is up to the challenge. The influences that affect the judicial approach to the enforcement of standard terms in the paper world also inclined to affect the electronic world or have close parallels in the electronic world. The fundamental economics of the two kinds of commerce are identical. In both the paper and the electronic worlds, businesses choose between adopting a set of boilerplate terms that are mutually beneficial or exploitative.\textsuperscript{101} In both worlds, these business houses know more than consumers about the contractual risks, thereby creating an opportunity to exploit consumers. At the same time, in both worlds, consumers can defend themselves by investigating these terms or by making their purchasing decision based on a business’s reputation.

E-commerce brings novel weapons and defences to both businesses and consumers, but the basic structure remains intact. Courts in both worlds should either trust the market and enforce the standard terms, or decide that the market has failed and refuse to enforce them. Therefore, the careful judicial balancing of caution at interfering with contracts and of concern about exploitation that courts have developed in the paper world applies equally well to the electronic world. Furthermore, at present, the relative balance of suspicion and deference with which courts approach paper boilerplate is probably the same balance with which they should approach electronic

\textsuperscript{100} See, James J. White, ‘Contracting Under Amended’ 2-207, 2004 \textit{Wis L. Rev.} 723 (2004). ‘Perhaps we would have a more just society if relations between consumer and merchants appeared more honest, even if there is no change in consumer behaviour or consumer transactions.’ William C. Whitford, ‘The Functions of Disclosure Regulation in Consumer Transactions’, 1973 \textit{Wis L. Rev.} 400, 404, 439.

\textsuperscript{101} Hillman, Robert A & Rachlinski, Jeffrey J, supra, n 60.
boilerplate. Some may even argue that the electronic environment gives consumers more opportunity to protect themselves. Yet, the cognitive perspective that consumers tend to adopt with respect to contractual risks makes it unlikely that many will take advantage of these new tools. In the same way, it can very well be argued that the electronic environment gives businesses new opportunities to exploit consumers.

102 Ibid.

103 Ibid.