Electronic Contracts:  
Where We’ve Come From, Where We Are, and Where We Should Be Going

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Introduction

The power and importance of contracts can hardly be overstated. Contracts constitute the legal foundation upon which business is transacted around the globe. A contract can be as informal as buying your morning coffee or as complex as a heavily negotiated multi-party, multinational corporate acquisition. It is also near to impossible to overstate the impact of the rise of the Internet and electronic commerce – the number of people online has surpassed 1.3 billion people, and of those, more than 85% have used the Internet to make a purchase.¹ My goal is to dig through some of the rubble created as the traditional world of contracts and the new frontier of e-commerce have collided.

A good starting point is to know what we’re looking for. I will begin with a short description of the essential elements of a contract and general contract law principles. For perspective on how the law of contracts has adapted in the face of modernization and technological advances, I will look to historical milestones such as industrialization and the use of different communication methods and technologies. Making our way to the present, I will provide a brief and selective survey of Canadian and U.S. case law dealing primarily with online contracting. A review of international and regional efforts and accomplishments in the areas of legislative harmonization, functional equivalency, and consumer protection will be discussed. Finally, I will offer some thoughts on what is needed to improve upon the practice of electronic contracting for the future.

Contracts 101

A simple definition of a contract can be stated as: A legally binding agreement involving two or more parties that sets forth what the parties will or will not do. The goal of contract law is to provide parties with a degree of certainty in their dealings with others.

While the specific requirements for various types of contract will vary across jurisdictions, generally speaking, under common law regimes, the successful formation of a contract requires:

(a) an unambiguous offer;
(b) an acceptance of that offer which is communicated to the offering party; and
(c) valuable consideration (a payment or a promise).

These elements are scrutinized by courts in view of several overarching contract law principles. The foremost of these is that there must be consensus ad idem, or a meeting of the minds, which is a common understanding in the formation of the contract. The reasoning is that parties should not be held to a contract that they were not even aware existed. Most jurisdictions will also forbid the enforcement of unfair, unconscionable or unreasonable contract clauses. The typical definition being: an oppressive term, a term taking unfair advantage of the other party. There are several additional principles that are based on the premise of the protection of weaker parties; for example, contracts may be unenforceable by virtue of one of the parties not having adequate legal capacity (e.g. minors, or people who do not have the requisite mental capacity) or on the basis that the contract was entered into under duress. Courts will also generally refuse to enforce contracts on the basis of illegality or for public policy reasons.

**Historical Perspective**

The law of contracts has developed over centuries and has had to transform in order to keep pace with economic, political and technological developments. One of the most significant 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 19th century, standard forms emerged in the form of railroad tickets, insurance contracts, lottery tickets and mail order sales contracts. Some legal scholars have denounced standard form contracts (also referred to as adhesion contracts), even going so far as to describe them as imposing a “new feudal order of their own making upon a vast host of vassals.” While others espouse a much more favourable view, as one writer states: “Standard form contracts facilitate business transactions. They economize time and effort and dispense with formal contract requirements that would impede business and raise the costs of products.” Less debatable is the fact that the imposition of standard terms contracts meant that the specific terms of the contract were certainly not negotiated and sometimes not even read or known at all. The question becomes, if contractual terms are not even read, how is it that there can be a clear meeting of the minds? By and large, the courts have adopted an objective theory of contracts to determine consent. The objective test was originally set out by Blackburn J. in *Smith v. Hughes*:

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

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1 John J.A. Burke, Standard Form Contracts available at http://www.lex2k.org/sfc/discussion.html (last viewed: March 9, 2008).
3 Supra, note 2.
6 (1871), L.R. Q.B. 597 at 607
expressed, if the parties are not ad idem, there is no contract, unless the 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. (Emphasis added)

Therefore, 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. The shift from a subjective test for consent to an objective was a significant development, particularly in view of Professor W. David Slawson’s remarks in 1971 that “Standard form contracts probably account for more that ninety-nine percent of all contracts now made.”

The timing of contract formation is another area where technological developments have had an impact on the law. Generally, a contract is formed upon communication of the acceptance to the offeror. An exception is the postal rule which holds that if the offer contemplates acceptance by post the acceptance is effective once posted, rather than when it is received. The rule was designed to remove uncertainty from the contract formation process by providing the offeree with confidence that an acceptance once posted will be effective, despite possible postal system delays. However, the principle that the acceptance takes place at the time of delivery as opposed to the time of receipt was rejected in series of cases relating to communication via telephone, telex and facsimile, as these were considered instantaneous forms of communication.

The Early Days of Electronic Commerce

The introduction of the Internet and electronic contracting has revolutionized the way business is transacted around the world. Significant legal issues have arisen as a result of applying traditional legal principles to a “borderless” and “paperless” electronic environment. In examining the case law, I have grouped the cases according to those dealing with contract formation (offer and acceptance), specifically as they

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8 See Parker v. South Eastern Railway Co. (1877) 2 CPD 416; Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163.
apply to click wrap\textsuperscript{12} and browse wrap\textsuperscript{13} agreements; the timing of the contract formation (invitation to treat vs. offer); the content of the agreement (incorporation of terms by reference); and finally those cases dealing with the thorny question of where the contract is formed and governed (jurisdiction).

**Enforceability of Click Wrap Agreements**

Both Canadian and U.S. courts have generally upheld the validity of click wrap agreements. The leading case in Canada is *Rudder v. Microsoft*\textsuperscript{14}, where the court found that the forum selection clause, and the entire click wrap agreement containing this provision, was enforceable. The court rejected the plaintiff’s claim that since only a portion of the agreement was on the screen at any one time, the defendant had a duty to bring such a clause to the attention of the user, and stated: “…this is not materially different from a multi-page written document which requires a party to turn the page.” Here, the agreement included a provision that even if the applicants did not read the agreement before clicking the “I agree” button, they would still be bound to all the terms. The court held that such a click wrap agreement “must be afforded the sanctity that must be given to any agreement in writing.”

In the United States, the facts of the case *Caspi v. Microsoft Network L.L.C*\textsuperscript{15} were similar to those in *Rudder* – where a user was required to click their acceptance of the terms and conditions. The court held that the contract was binding, particularly due to the fact that the user could only proceed after he or she had a chance to review the membership agreement. The same reasoning was adopted by the court in *Forest v. Verizon Communications Inc.*\textsuperscript{16} The appellant customers argued that Verizon, “did not provide adequate notice of the [choice of law and forum selection] clause or its significance.” The clause, which was located at the end of the agreement, could only be seen if the user scrolled through the entire agreement where only a small part of the agreement was visible at any one time. However, at the beginning of the agreement, it stated “PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY”, and subscribers could click an “Accept” button below the scroll box. The court stated that “The general rule is that absent fraud or mistake, one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not.” The court made the important observation that “A contract is no less a contract simply because it is entered into via a computer.”

\textsuperscript{12} A “click-wrap” agreement is an online agreement that is accepted by the user by clicking an icon or checking a box with the message “I Agree,” “I Accept” or something similar. The term was coined as a replacement for “shrink wrap”, a written agreement which was included inside the cellophane packaging of a product. The validity of shrink wrap agreements was upheld in the case of ProCd, Inc v. Zeidenburg 86 F.3d 1447 (7th Cir. 1996). See also Compuserve Inc v. Paterson 89 F.3d 1257 (6th Cir. 1996), Hill v. Gateway 2000, Inc. 105 F.3d 1147 (7th Cir. 1997), Tony Brower et al. v. Gateway 2000, inc et al 1998 N.Y. App.Div.Lexis 8872. However, other cases have followed the reasoning of the court in Klocek v. Gateway, Inc. 104 F.Supp.2d 1332 (D. Kansas, 2000), where it was determined a standard shrink wrap license agreement included in the box containing a computer constituted additional terms (i.e., terms not previously agreed upon by the parties).

\textsuperscript{13} A “browse-wrap” agreement is one that is typically presented at the bottom of the website and where acceptance is based on “use” of the site.

\textsuperscript{14} (1999), 2 C.P.R. 4(th) 474 (Ont. S.C.J.).


\textsuperscript{16} 2002 D.C. App. LEXIS 509.
Enforceability of Browse Wrap Agreements

Both Canadian and U.S. courts have been somewhat less consistent in their enforcement of browse wrap agreements. The primary issue in these cases is whether the requisite consent can be implied by the conduct of the browser. In general, the courts have looked at the sufficiency of notice and whether consent is reasonable to imply on the basis of conduct.\(^{17}\)

*Kanitz v. Rogers Cable Inc.*\(^ {18}\) is a Canadian case dealing with a unilateral amendment of an online service agreement. The customers of the telecommunication company, Rogers, had agreed to a click wrap agreement which included a term allowing Rogers to change or amend the agreement at any time, providing that any such amendment would be posted on the Rogers website. Rogers subsequently amended the agreement to include the provision that all disputes would be settled by arbitration. The court in *Kanitz* concluded that the notice of the amendment was made in accordance with the terms of the agreement, and that the effect of the amending provision was to place an obligation on the user to check the website from time to time. The court accepted the proposition that the service subscribers’ continued use of the service after the posting of the notice and the amendments constituted the requisite consent and acceptance of the unilateral amendment.

In 2005, a Quebec court in *Aspencer1.com Inc v. Paysystems Corporation*\(^ {19}\) came to the opposite conclusion where the home page of Paysystems Corporation included a statement that:

> “Your continued use of MyPaysystems Services is subject to the current version of the MyPaysystems Agreement. This Agreement was last updated December 18 2003. Please click here to review.”

The court found that the plaintiff’s continued use of the website could not be interpreted as acceptance of the amendment to the agreement requiring arbitration.

In the United States, the court in *Register.com v. Verio, Inc.*\(^ {20}\), upheld the enforceability of the terms and conditions of a “WHO IS” database search web service, which stated “by submitting this query, you agree to abide by these terms.” The court noted that the terms of use in this case were clearly posted on Register.com’s website, and that the defendant’s conduct in performing a search inquiry constituted agreement to the terms.

In *Specht v. Netscape Communications Corp.*\(^ {21}\) the issue was similar to that in *Kanitz* as the court had to consider the enforceability of an arbitration clause in Netscape’s end-user licence agreement. At issue was whether or not the terms of the licence posted on Netscape’s website were binding on a user who downloaded the software., Users were asked to review and agree to the terms of the agreement (available via a hypertext link) prior to downloading and using the software; however, they could proceed to download the software without providing their express agreement.

\(^{17}\) Charles Morgan, “I Click, You Click, We all Click…But Do We Have a Contract?: A Case Comment on Aspencer1.com v. Paysystems” (2005) 4:2 Canadian Journal of Law and Technology 109–118. Available at: http://cjlt.dal.ca/vol4_no2/pdfarticles/morgan.pdf (last viewed March 9, 2008).

\(^{18}\) (2002), 58.O.R. (3d) 299 (Ont. Sup. Ct.).

\(^{19}\) [2005]. JQ no 1573.

\(^{20}\) 126 F. Supp. 2d 238 (S.D.N.Y. 2000); aff’d 2004 WL 103400 (2nd Cir. 2004).

\(^{21}\) 206 F.3d 17 (S.D. N.Y. 2001); aff’d 306 F.3d 17 (2nd Cir. 2002).
The court denied the enforceability of the arbitration clause and stated:

“We agree...that a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the licence terms before responding to the defendants’ invitation to download the free software, and that the defendants therefore did not provide reasonable notice of the licence terms.”

The court concluded that the bare act of downloading did not unambiguously manifest assent, therefore the terms were held to be unenforceable. 22

Is it an Invitation to Treat or an Offer?

Determining whether a particular representation is an offer or an invitation to treat will impact when a contract is formed. Sometimes, what may appear to be an offer, is actually only the precursor to an offer, otherwise known as an invitation to treat. Whereas an offer is a proposed set of terms which are capable of being accepted, an invitation to treat is a call for the other party to make an offer and enter into negotiations.23 An invitation to treat cannot become binding through acceptance. The display of goods for sale, either in a shop window or on the shelves in a store, is ordinarily considered to be an invitation to treat.24 When we impose these distinctions upon the world of the Internet, it has been suggested that the courts should look to the interactive and/or automated nature of a particular website. Advertisements on a non-interactive website are akin to conventional advertisement, where the implied intention of is to commence negotiations.25 However, if a website is interactive or automated, the advertisements on such a site may be considered to be an offer. One of the reasons for treating goods on display as an invitation to treat is that the store-keeper has to be able to negotiate and be able to turn down an offer when stock runs out. It would follow that the treatment of interactive websites should therefore depend on the nature of the product and whether there is an infinite supply. Interactive websites will also often include a click wrap agreement (clearly being positioned as an offer), but the argument is that the agreement and the advertisement fuses into one combined offer.26 It has been suggested that in the absence of any decided cases on the issue, the terms and conditions displayed on a website should specify whether an invitation to treat or an offer is being made.27

Incorporation of Terms

Contractual terms may comprise express terms, such as those embodied in a standard form pre-printed contract (or its electronic equivalent click wrap agreement); implied terms, which are incorporated on the basis of the circumstances, e.g. advertisements

22 See also Ticketmaster Corp. v. Tickets.com Inc. 2000 United States Dist. LEXIS 12987 (C.D. 2000); aff’d 248. F.2d 1173 (9th Cir. 2001).
23 Supra, note 10.
that are deemed to constitute an offer, or part of an offer, or terms that are incorpo-
rated by consumer protection legislation; and finally terms that are incorporated by
reference to another document.

In the paper based world of contracts, courts have generally upheld the practice of
incorporating terms by reference where the party relying upon such terms has noti-
fied 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. The
Supreme Court of Canada recently contemplated the validity of introducing terms
via hyperlink in the case of Dell Computer Corp. v. Union des consommateurs. In
upholding the validity of this practice the court emphasized that the terms and condi-
tions must be “reasonably accessible” and was of the opinion that a hyperlinked
document meets that standard.

Jurisdiction

Imposing the traditional common law principles of jurisdiction to the borderless
world of Internet transactions has proved to be extremely challenging for the courts
and has resulted in the application of a myriad of different tests and principles. It has
been the subject of much scholarly debate, as one author comments:

As long as the laws of each jurisdiction differ in material ways from that of others,
questions will continue to arise in interpretation and enforcement where there is any
crossborder element of an electronic transaction.

One of the overarching principles courts in both Canada and the U.S. have looked to
on questions of jurisdiction is that of reasonableness with regard to the circum-
stances. In Canada, the courts have framed this as a “substantial connection” test,
whereby connecting factors such as the location of the content provider, the host
server, the intermediaries and the end user, are considered in the overall analysis. In
the U.S., the reasonableness requirement is captured in the “minimum contact” or
“purposeful availment” test. The principle being that a defendant cannot be brought
before a court of a particular state unless that person has: minimum contacts . . . such
that maintenance of the suit does not offend “traditional notions of fair play and
substantial justice.” In Sayeedi v. Walser a U.S. trial court refused to exercise

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28 [find cite]
29 Supra, note 10.
30 2007 SCC 34.
http://www.michaelgeist.ca/content/view/2141/135/ (last viewed: March 9, 2008).
32 Karen Mills “Effective Formation of Contracts by Electronic Means: Do We Need a Uniform Regulatory
Regime?” Paper to be presented at World Summit on Information Technology in Tunis, 15 – 18 November,
2005, and to be published in compendium book prepared by Centre for International Legal Studies. Available at
33 Michael Geist, “Is There a There There? Towards Greater Certainty for Internet Jurisdiction” (2001) 16
Berkeley Technology Law Journal 1345–1406. Available at http://aix1.uottawa.ca/~geist/geistjurisdiction-
us.pdf (last viewed: March 9, 2008).
35 Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,
jurisdiction over an eBay transaction between two individuals on the basis that one
sale, “without more, does not constitute sufficient purposeful availment to satisfy
the minimum contacts necessary to justify summoning across state lines, to a New York
court, the seller of an allegedly non-conforming good.”

Another approach to determining jurisdiction was outlined in the U.S. case of
Zippo Manufacturing v. Zippo Dot Com.\(^{38}\) The court applied a passive vs. active test
to the question of jurisdiction which involved a “sliding scale analysis” measuring
the nature and quality of the commercial activity of the defendant on the Internet. To
attract jurisdiction, the Zippo test requires an interactive website and commercial
activity.\(^{39}\) The passive vs. active approach has been criticized for discouraging inter-
activity in a time when websites are in fact becoming more interactive.\(^{40}\)

More recently, courts have looked towards effects or targeting tests,\(^{41}\) determining
jurisdiction on the basis of the actual impact of the action in the locality.\(^{42}\) The prin-
ciple was set out in the pre Internet case of Calder v. Jones\(^{43}\): the fact that the action
had an effect in the other jurisdiction was factored into the equation in order to deter-
mine whether jurisdiction existed in that forum. Under this “effects test,” jurisdiction
is determined by analyzing the effects intentionally caused within the forum by a
party’s online conduct outside the forum.\(^{44}\)

The Legislative Landscape

A way that governments consciously attempt to avoid problems of diversity of jurisdic-
tion is to harmonize the law applicable across jurisdictions, so that it will not matter
whose law applies or what forum will apply it.\(^{45}\)

Adopting unified legislative standards is an important means by which governments
can increase legal certainty and commercial predictability for parties contracting in
an electronic environment. The past ten to fifteen years have seen some considerable
accomplishments in terms of developing such standards at both international and
regional levels.

In 1996, the United Nations Commission on International Trade Law (UNCITRAL)
adopted the Model Law on Electronic Commerce, which was followed by
the Model Law on Electronic Signatures in 2001 and the Convention on the Use of
Electronic Communications in International Contract in 2005 (collectively the “UN

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\(^{39}\) This reasoning was accepted by the Canadian court in Braintech Inc. v. Kostiuk, (1999), 171 D.L.R. (4th) 46
(CA).
\(^{40}\) Supra, note 33.
\(^{41}\) see Information Corporation v. American Infometrics (D. Md. April 2001); Panavision International v.
Toeppen (1998), 141 F.3d 1316 (9th Cir); Easthaven Ltd. v. Nutrisystem.com Inc.(2001) 55 OR 3d 334 (Ontario
Superior Court of Justice).
\(^{42}\) Mary Paterson, “Following the Right Lead: Gutnick and the Dance of Internet Jurisdiction” (March 2004)
3(1) Can. J. Law &. Tech. 49.
\(^{44}\) Julia Alpert Gladstone “Determining Jurisdiction in Cyberspace: The “Zippo” Test or the “Effects” Test?”
Bryant College, Smithfield, Rhode Island, USA available at http://www.informingscience.org/
\(^{45}\) John D. Gregory “Internet Jurisdiction: Where Are We Now?” Presentation to the Toronto Computer
Lawyers’ Group November 24, 2005, available at www.tclg.org/meetings/2005_nov.ppt (last viewed: March 9,
2008).
The goal of the UN Initiatives has been to provide national legislatures with a set of internationally recognized rules to remove legal obstacles and create a more certain legal environment for electronic commerce. The UN Initiatives adopt a “functional equivalence” approach by setting out principles so that electronic communications are given technological neutrality. For example, when there is a legal requirement to present information in writing, this will be satisfied by an electronic document if the information contained in the document is “accessible so as to be usable for subsequent reference.” The UN Initiatives also provide electronic standards to meet signature requirements, originality requirements, time and place of communications, and the use of automated systems for contract formation.

The UNCITRAL Model Laws then formed the basis upon which Canada, the U.S, and other countries drafted their own electronic commerce legislation or model law templates. In Canada, the Uniform Law Conference of Canada adopted the Uniform Electronic Commerce Act (UECA), which provinces then used as a model for their own e-commerce statutes. In the United States, the Uniform Electronic Transaction Act (UETA) became the model for similar state laws. The U.S. federal government also enacted the Electronic Signatures in Global and National Commerce Act (known as “E-SIGN”) in 2000. E-SIGN was designed to provide for an equivalency of electronic signatures and electronic records to their ink and paper counterparts. The European Union (EU) adopted the Directive on Electronic Commerce in May 2000, which gave member states 18 months to implement it into their national laws.

With the rise of online business-to-consumer (B2C) sales, many regions have also enacted consumer protection legislation that specifically targets online sales transactions. In Canada, the Internet Sales Contract Harmonization Template of 2001 contained recommendations relating to: (a) a merchant’s duty to inform consumers and (b) the formation and execution of on-line contracts. The template has now formed the basis of new consumer protection provisions in 7 out of 10 provinces.

The EU has been particularly active in the enactment and enforcement of online consumer protection measures. Many countries within the EU have passed legislation dealing with unfair contract terms (applying to both offline and online contracts). The premise of these enactments is that general contract law does not sufficiently address the imbalance of power between consumers and businesses and

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50 Supra, note 46.
53 See UK’s Unfair Contract Terms Act (1977) (c.50) and the EU Unfair Contract Terms Council Directive 93/13, 1993 O.J. (L95) 29 (EEC),
that consumers need to be protected from unfair situations. In addition, the EU adopted the Distance Selling Directive in 1997 and the Electronic Commerce Directive in 2000, both with the objective of enhancing consumer confidence in online transactions.

Significantly absent from this list are U.S. consumer protection laws directed at Internet sales. In keeping with its free market, laissez-faire politics, the U.S. has chosen to minimize the consumer protection requirements, preferring to allow market forces to drive business. The advantage of this approach is that lower levels of consumer protection have opened the door to more rapid growth and greater innovation in online retail marketing.

**Thoughts for the future**

These differences in regulatory approaches are important to bear in mind when one considers future international developments in the law of electronic contracting. Bridging the gap between protectionist versus free market ideals is neither politically attainable nor desirable in light of the benefits each end of the spectrum has to offer.

So where does that leave us? I suggest that the best course of action is to consider legislative reform with a formalistic approach, in keeping with the UN Initiatives. Specifically, by focusing on the manner of disclosure of B2C online contract terms it is possible to achieve a desirable substantive result: the return to consensus ad idem.

It is common knowledge that in today’s click wrap world, consumers rarely (if ever) actually read online terms and conditions, or for that matter print or save them for subsequent reference. Courts have nevertheless continued to apply the objective test for standard form contracts on the premise that a “reasonable person” ought to have read the online terms. This interpretation of traditional contract law in the online contract environment is somewhat misguided. It completely disregards actual practices and the pace at which online transactions are concluded. Unlike the ticket cases of yesteryear, consumers purchasing online are generally alone at their computer, and often their only interaction with the business is via an automated agent. In this scenario, the consumer is not prone or even able to ask questions, like an individual purchasing a railway ticket. Also, unlike the paper based standard forms, online consumers are much less likely to actually print or retain the terms for future reference (despite having the ability to do so). This said, there are significant advantages to the Internet economy which translate to monetary savings for consumers, ease of comparative shopping, and the inherent convenience of online purchasing. New legislative initiatives need to continue to foster and accommodate an electronic world that is growing at an exponential rate.

The fundamental problem lies with the imposition of an objective standard of acceptance in a context where the vast majority of people are not being “reasonable” and reading click wrap or browse wrap terms. Which begs the question, if 99% of people are not doing something, is it really justifiable to hold the remaining 1% as the standard of what is considered reasonable? According to Justice Oliver Wendell Holmes, the reasonable-person standard originated from the necessity that life in an organized society mandated “a certain average of conduct,” saying that “a sacrifice

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55 Ibid.
of individual peculiarities going beyond a certain point, is necessary to the general welfare.” I agree with one legal scholar who writes: “the law should demand that citizens conform their behavior to some actual conduct in society.”

Helping the Real Reasonable Internet Browser

One solution would be to create a standard layout for abridged B2C Internet contract terms, somewhat akin to food labeling requirements which set out a table of nutritional information on the packaging of all food products. The summary would be made available at the same time, place and form as the full contract terms, but would be a quick readable version of the full terms. This would increase the likelihood (and reasonableness) of consumers being aware of the agreement they were entering into and would help us get closer to the original concept of consensus ad idem. By focusing on disclosure we can impose a universal structure that benefits both ends of the free market/protectionist spectrum. From the free market perspective we are enabling consumers to base their choices on actual knowledge of their bargain, and from the protectionist standpoint, increased disclosure promotes consumer awareness of less favourable contract terms.

It is important that the form of the contract summary be universal in nature, so that consumers could gain familiarity with the format and quickly find the information they are looking for. As I have become accustomed to the nutritional information tables, and know where to look to see the saturated fat content, so too, would a standard layout benefit consumers by always listing the terms in the same order. With a quick glance, a consumer would be able to determine whether they were receiving the benefit of any return rights, or whether they would be bound to future payment obligations. The summary could be hyperlinked to the full terms where they could get more information if interested. A good example of a summary format is the Microsoft.com privacy policy, which highlights important points from the policy with hyperlinks to the full terms.

The determination of which elements of B2C contract terms are most deserving of disclosure would best be left to an international body such as UNCITRAL, though I would propose a table that would include at a minimum the following information:

- Description and quantity of the product or service
- Price
- Total payable (including all taxes, surcharges, etc.)
- Return or rescission rights
- Length of the contract
- Future payment obligations

Whether additional categories of information ought be included would have to be weighed against the counterbalancing interest that the document be succinct enough to be actually read by consumers. Another caveat is that enabling legislation would need to provide businesses with the comfort that the provision of the summary would not have a negative impact on the enforceability of the full contract terms. The legis-

56 Oliver Wendell Holmes Jr., The Common Law (Boston: Little, Brown & Co., 1881) at 108.
58 Available at http://privacy.microsoft.com/
lation should also make it clear that the summary would need to be in plain language, understandable to an ordinary consumer.

**Conclusion**

When we consider how the law of contracts has evolved over time to keep pace with modern economic realities, it is important that we don’t take previous legal developments, such as the objective theory of acceptance, for granted. Previously sound principles may need to be reevaluated and adapted to ensure that we are upholding the fundamental goals of contract law. While the Internet and electronic environment has posed challenges to traditional contracts law, these developments can also be viewed as an opportunities to improve the law and get closer to fundamental contracting principles, such as *consensum ad idem*.

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