

**Submission to the
COPYRIGHT LAW REVIEW COMMITTEE**

**Review on
Copyright and Contract**

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This research project presents preliminary findings of a study conducted by Dr Adam Gatt as part of his Master of E-Business program at RMIT University.

TABLE OF CONTENTS

OVERVIEW	3
INTRODUCTION	4
ON-LINE AGREEMENTS.....	6
WHAT ARE THEY?	6
COPYRIGHT LAW PROTECTION!	9
RESTRICTIONS	10
ENFORCEABILITY	11
NEW LEGAL ISSUES	13
<i>Yahoo!</i>	18
<i>eBay</i>	19
<i>Mr Joseph Gutnick v. Dow Jones & Co Inc [2001] VSC 305</i>	20
<i>Macquarie Bank v Berg [1999] NSWSC 526 (2 June 1999)</i>	22
<i>R v. McLACHLAN [2000] VSC 215 (24 MAY, 2000)</i>	22
CLICK-WRAP SURVEY	24
FINDINGS	26
CONCLUSION.....	27
BIBLIOGRAPHY	30

Overview

The Copyright Law Review Committee is currently investigating the prevalence, effects and desirability of contracts that purport to override copyright exceptions granted under the *Copyright Act 1968* (Cth). In issue 6 of its Issues Statement (CLRC, 2001), this Committee seeks views as to whether there should be any limitations to the enforceability of wrap agreements. “For example, should wrap agreements be treated as a special category and subject to special rules as to validity and enforceability?”

Beginning with an examination of the background on the use of click-wrap agreements and why they are used, the writer has examined the practical issues that affect their enforceability. An integral part of this examination, includes basic research to determine consumer awareness, understanding and attitude to them. While this research is still in hand, this submission aims to provide preliminary findings that may be of interest to the Committee’s current terms of reference. These findings will be presented here against a background discussion on the use of online agreements and the legal issues surrounding their enforceability. Part of this submission is, at this point in time, confidential and will be marked accordingly.

Introduction

communications technologies, particularly the Internet, are having a profound impact on many aspects of our lives. As e-commerce expands globally the Internet is fast becoming an important channel for the sale and dissemination of a wide range of goods and services and especially copyrighted material such as, computer software, data and text, as well as digital images, photographs, music and multimedia. This is now happening almost effortlessly on a 24x7x52 global basis and as the bandwidth of the digital network continues to increase, the volume and quality of information being disseminated on it will increase significantly.

2. The impact of these changes on the global marketplace cannot be overestimated. In its April 1998 report on the emerging digital economy, the United States Department of Commerce noted that in 1994, three million people, most of them in the United States, used the Internet and its application to e-commerce was non-existent (Daley, 1998). By 1999, an estimated 250 million users accessed the Internet and approximately one quarter of them made purchases on-line from e-commerce sites, worth approximately \$110 billion (OECD, 2000). According to recent research, 6 percent of the world's 6 billion people are now on the Internet and about 400 million people use the Web daily (Reuters, 2001). In Australia, there are 3.9 million Internet subscribers (ABS Figures December, 2000). Some experts believe that one billion people may be connected to the Internet by 2005. The OECD estimates that e-commerce is growing at a rate of 200% per annum and is expected to be worth US\$330 billion by 2001-2 and US\$1 trillion by 2003-5.¹ In Australia, information from the National Office for the Information Economy estimated business-to-business (B2B) revenue in Australia for 2000 was US\$5 billion ranking eight over twenty surveyed countries and ahead of Korea, Taiwan, Sweden, Singapore and New Zealand (NOIE, 2000).
3. From this, it is clear that the growth in Internet usage is nothing short of spectacular. Its use to conduct business has exploded over recent years and is expected to continue to grow at an almost exponential rate. This will continue to provide considerable benefits to businesses in terms of easier, cheaper, better and much more effective ways

¹ See OECD website, <http://www.oecd.org/>

of doing business with consumers, as well as with suppliers, service providers and government agencies. When compared to traditional distribution methods, the Internet enables even the smallest of merchants to reach the same global market as giant conglomerates. For consumers, access to the global market provides considerable benefits in terms of improvements in transaction convenience, choice, range and price, and speed of product and service delivery. Consumers are also able to deal directly with suppliers instead of through intermediaries.

4. However, there are many factors that work against the realisation of these benefits and the realisation of the full potential that the digitally networked marketplace has to offer. For example, just as the sale and dissemination of copyrighted material in the new digital economy can take place almost effortlessly on a 24x7x52 global basis, so too can its unauthorized copying and large-scale distribution. There are also many discouraging legal issues and those surrounding conflict of laws are particularly discouraging. They are of particular relevance to, for example, software authors. These are in the main small businesses that would find it a great burden to be potentially liable in a multitude of jurisdictions all around the world. They would find it prohibitive to protect and defend their rights in some foreign jurisdiction and because of the lack of consistent and international standards of protection, there are issues regarding whether such rights are protected abroad.
5. Thus, while it provides ready access to a much larger market, because of the ease of copying and distributing digital information such as software programs and music, and because of the inadequate protection laws, many authors are discouraged and reluctant to embrace the Internet as a means of disseminating their copyrighted works while others attempt to enhance their intellectual property rights by various means (eg encryption). So that the full potential of the emerging digital economy can be realised, governments must therefore establish the right legal framework encompassing laws to govern cross-boarder e-commerce transactions. Copyright law can play an important role in this now fast changing business environment.

On-Line Agreements

What Are They?

6. It is against this background that on-line vendors have adopted the use of on-line agreements as a means of reinforcing their rights and to establish the transaction terms and conditions. Requiring each visitor to assent to the terms and conditions of the agreement in order to access the site, or download software, purchase a product or service, and so forth, enables the on-line vendor to alert site visitors that the material contained on the website, as well as any software downloaded from that site, is proprietary. These now very much ubiquitous agreements are an adaptation of the 'shrink-wrap' agreements as have been used since the early 1980s in the sale of packaged software and have come to be known as 'click-wrap' agreements; sometimes also referred to as "click-through", "click-and-accept" and "web-wrap" agreements.

7. While in the shrink-wrap context, acceptance of the agreement terms and conditions occurs when the consumer removes the shrink-wrapped plastic wrapper, the term "click-wrap" is derived from the fact that in the on-line environment, acceptance occurs when the consumer types "I Agree" or much more commonly, simply mouse-clicks an "I Accept" or similar ("the Accept") button or icon. In this way, prior to the supply of its goods or services, the online vendor displays its terms and conditions pursuant to its offer and in order to proceed with the transaction and on to the next screen the consumer or subscriber must assent to be bound by those terms and conditions by express conduct of clicking the Accept button. The software's download or installation program will not proceed until the user clicks the Accept button. From a vendor's point of view therefore, a major advantage of click-wrap agreements is that the visitor is denied access to the material contained on the website and to any downloadable software, or product or service until he or she assents to the click-wrap terms and conditions.

8. In this way, click-wrap agreements are formed very differently from contracts that are created off-line, and are also different to their shrink-wrap ancestors. Once the purchaser selects the Accept button and thereby assents to be bound, the contract is formed on the posted terms and the transaction is consummated. In this way, in the click-wrap agreement context, the act of clicking the Accept button is analogous to breaking the shrink-wrapping in the shrink-wrap agreement context. No paper record

is generally created nor is the electronic or paper signature of the Internet user typically required. As in the shrink-wrap agreement, the click-wrap agreement purports to be a contract whereby the user agrees not to engage in certain activities that might otherwise be allowed under law.

9. Shrink-wrap agreements were introduced in the early 1980s specifically for the mass-market sale of packaged software. Prior to this, software vendors used the traditional method of contract formation to enter into licensing arrangements with each and every end user on an individual basis. Contracts were written documents with their terms and conditions being negotiated before execution by both parties. With the mass-market acceptance of the PC, companies such as Apple and IBM found that it was virtually impossible, inefficient and very costly to enter into licensing arrangements with each and every end user on an individual basis. It is specifically for these reasons that the "shrink-wrap" licence concept originated; a mass-market software licence agreement (a standard form agreement) shipped with the product and not requiring both parties to sign. Shrink-wrap agreements are clearly direct descendents of the more traditionally formed and executed software licence agreement.

10. Similarly, given the volume of transactions taking place on the Internet, it is clearly impractical to have separately negotiated agreements with each and every consumer on an individual basis. It would be significantly inefficient, if not impossible, for a webseller to negotiate terms and bargain with each site visitor; America Online, for example, has 25 million members (FTC, 2000 p.209). Additional to necessarily adding to the consumer's cost, entering into an agreement with each and every consumer would delay the vendor's ability in providing its goods or services and the consumer would be delayed from taking advantage of them. Thus, click-wrap agreements, as standard form agreements, reduce transaction costs and this allows authors to sell more product, to more consumers, at cheaper prices. In the context of copyrighted works such as software, as at the time of providing the original product, click-wrap agreements can also be used with future product enhancements, revisions and maintenance updates. With click-wrap agreements all this can be done without paper contracts or physical signatures and contract formation can take place without ever needing any physical contact with the consumer.

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

12. The comprehensiveness of an on-line agreement is often determined by balancing the potential legal exposure created by site activities and content, against the potentially intimidating impression that a long and complex agreement will make on the user. For example, relatively straightforward sites that provide information about a company, but have little user interactivity, may only require a short disclaimer about the information content. On the other hand, sites which host e-commerce, chat, email, or message boards or provide sensitive data, such as financial information and services, will more than likely use a more extensive online agreement. However, while one would expect this to be the case, many e-commerce sites do not require the online purchaser with the opportunity to preview the terms and conditions at the time of transacting. The Barnes & Noble on-line bookstore is one such example. Here a visitor can purchase books without actually ever seeing or reading the terms and conditions.² This may be a commercial decision to keep things simple and a desire to just operate like a physical bookstore would; with no flashing of terms and conditions in consumers’ faces at the cash registers. Another example of this is when registering with the New York Times. Here a prospective subscriber can mouse click the Register

² See website <http://www.barnesnoble.com/>, 22/6/01

button without actually having scrolled through or read the terms and conditions of use contained within the Subscriber Agreement which is separately accessed by way of a hyperlink.³

Copyright Law Protection!

13. In the case of copyrighted works such as software, given that such material is protected by copyright law, one might ask why would an author need a separate shrink-wrap or click-wrap agreement (which for convenience can be jointly referred to as “wrap agreements”). While copyright law protects the author’s intellectual property rights, the publisher would be exposed in a number of other areas if it relied solely on copyright law. For example, copyright law does not enable software vendors to limit or disclaim implied warranties, remedies and liability nor does it impose other limitations on the transaction, such as limitations on the software, prohibitions on reverse engineering and governing law and forum for resolving disputes. Accordingly, wrap agreements are used to provide protection beyond that afforded by whatever intellectual property rights exist in the works. A wrap agreement can be used to:

- prohibit decompilation and reverse engineering of the software (although under the European Union Software Directive (EU, 1991) one cannot block assignments of software or prohibit reverse engineering);
- limit uses (eg not to conduct service bureau for benefit of third parties etc);
- potentially limit remedies and damages, which might be awarded in a lawsuit against the publisher. A click-wrap agreement enables a vendor to attempt to absolve itself from or limit the potential liability associated with content on the site. This includes any losses associated with the use of such content, any errors or problems with respect to software downloaded, or products/services purchased from the site (see *Mortenson Co. Inc. v. Timberline Software Corp.*);
- exclude consequential damages;
- provide for notice of and a right to cure any breach;
- specify choice of dispute resolution;
- specify governing law and forum;
- extract representations from the user (eg as to nationality or age);
- provide for contingencies through a force majeure clause; and

³ See website <http://www.nytimes.com/auth/login?URI=http://email.nytimes.com/>, 18/6/01

- create clear evidence of binding consents or waivers.

Restrictions

14. While wrap agreements are being used to provide protection beyond that provided by copyright law and may include provisions to disclaim implied warranties and limit liability, as in the case of traditional contracts, when dealing with consumers an on-line vendor cannot exclude all liabilities. For example, as Australian consumers purchasing goods and services from Australian based sellers are protected by the Trade Practices Act 1974 (TPA) and its amendments, on-line vendors must ensure that the terms and conditions of their on-line agreements comply with this Act. Part V of the TPA contains consumer protection provisions, including the prohibition of misleading and deceptive conduct in trade or commerce (s.52). A contract might also be illegal and contravene the TPA's restrictive trade practices provisions where it is contrary to public policy (eg contracts in unreasonable restraint of trade). In jurisdictions outside Australia, there is frequently similar consumer protection legislation in place. For instance, New Zealand's Fair Trading Act 1986 and Consumer Guarantees Act 1993.

15. In the case of software, certain additional limitations or exclusions may be illegal. In Australia, for example, Section 47H of the Copyright Act 1968 (Cth) expressly provides that a contract which excludes or limits the exceptions provided by ss. 47B(3), 47C (making a backup copy), 47D (making interoperable products), 47E (error correction) and 47F (security testing) has no effect. Other jurisdictions have similar provisions that are modelled on Article 9 of the European Commission Directive on Computer Programs which provides, in part: 'Any contractual provisions contrary to Article 6 [decompilation] or to the exceptions provided in Article 5(2) [back-up copying] and (3) [observation and study] shall be null and void.'⁴

⁴ See website, http://www.europa.eu.int/eur-lex/en/lif/dat/1991/en_391L0250.html, 10/5/01

Enforceability

14. Despite the widespread use of click-wrap agreements, questions arise as to whether they are valid contracts and if so, whether they are enforceable. Firstly, there is no fundamental principle prohibiting the formation of a binding on-line contract. There has been a number of US cases in which courts have upheld the principle of on-line contracting and more importantly, that a valid and binding contract can be created with a mere click of a mouse (*Hotmail v Van Money Pie*, *Caspi v Microsoft Network*, *CompuServe Inc. v Patterson*, and more recently *Specht et al. v. Netscape Communications Corp.*).

15. As so eloquently noted by U.S. District Court Judge, Alvin Hellerstein in his findings in the *Specht et al. v. Netscape Communications Corp.* case, “promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench common law England; so it was under common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across invisible ether of the Internet. Formality is not a requisite, any sign, symbol or action, or even wilful inaction, as long as it is unequivocally referable to the promise, may create a contract.” Therefore, subject to statutory requirements, it is likely that Australian courts will recognise that clicking on a web page constitutes valid acceptance, and that an enforceable contract has been created. As long as there is no other way a consumer can benefit from the fruits of the offer, for example by by-passing the need to mouse-click the Accept button (*Ticketmaster Corp., et al. v. Tickets.com, Inc., 1095502 (W.D. Wash., Dec. 1, 1999)*), then the consumer’s enjoyment of the goods or service on offer is in itself acknowledgement of acceptance of the terms and conditions of the offer.

16. In order to determine the enforceability of click-wrap agreements, examination of the literature and the available case law (while limited), does provide some insight. From this, while presently no case in Australia directly addresses either shrink-wrap or click-wrap agreements, an examination of existing US, Canadian and Scottish case law indicates that click-wrap agreements have been found to be enforceable by various courts. Therefore, despite the lack of Australian case law, it is likely that click-wrap

agreements that observe basic contract principles, would be found by Australian courts to be enforceable.

US case law:

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

Canadian case law:

Rudder v. Microsoft Corp., Ontario Superior Ct., 47 C.C.L.T. (2d) 168. (Oct. 8, 1999)

Scottish case law:

Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd (1995) FSR (1996) 367).

17. Save for some specific requirements of particular laws, there is nothing inherently less (or more) enforceable about an agreement that is entered into over the Internet. While there is no fundamental principle prohibiting the formation of a binding on-line contract, the basics of contract law apply to contracts formed on the Internet the same as to any other contract (Pattison, 2000 p.4). However, just as all non-electronic contracts are not necessarily enforceable, the fact that a particular click-wrap agreement is found to be enforceable doesn't necessarily mean that all such

agreements are enforceable. As with any other contract, click-wrap agreements are still subject to standard contract defences. Contracting parties must still turn to ordinary contract law principles to determine the enforceability of particular agreements.

18. As noted by Walter Effros (1999), Professor of Law, Washington College of Law, American University, easily lost in the blizzard of technological advancement are the basic principles of commercial law and intellectual property law. Though the law as to the enforceability of click-wrap agreements is somewhat clearer than it used to be, as not many cases with relevant issues have come up in the courts, in order to ensure their validity and enhance their enforceability, it is important that vendors make sure that their click-wrap contracts abide by regular contract law.

16. As previously mentioned, while under traditional contract law contract formation usually takes place after the parties have bargained over the terms and conditions of the agreement, as in the case of shrink-wrap agreements, in click-wrap agreements there is no bargaining between the parties. They are essentially standard form, "take it or leave it" agreements. Therefore, while a click-wrap agreement might be a valid contract, it may nevertheless be unenforceable if its terms are unfair and give an undue advantage to the drafting party. Of course, any form of agreement is subject to the same qualification, however the fact that there is no opportunity for negotiation of the terms of the offer makes this concern even more acute in the case of on-line agreements. However, click-wrap agreements seem even fairer in comparison to shrink-wrap agreements as in the former the user typically has the ability to review the agreement before agreeing to it. Therefore, concerns about the unfairness of click-wrap agreements, can to some extent be addressed by the webseller demonstrating that it has made a reasonable effort to bring the contract terms to the attention of the customer prior to its acceptance. In this way, the clicking requirement would seem to address this concern as it is totally in the hands of the consumer when he or she clicks to assent to the terms and conditions.

New Legal Issues

19. While the fundamental issues surrounding the use of click-wrap agreements are not largely different to those in the non-electronic contracting environment, given their "paperless" nature, and the ability to conduct business across jurisdictional boundaries,

they do add to the issues and complexities and there are therefore, certain issues that need to be taken into account when contracting online. The notion of entering a contract by clicking your mouse rather than by written signature challenges the traditional concepts of contract formation and raises new legal issues surrounding offer and acceptance, written signatures and original documents, admissibility of electronic evidence, the need to identify the parties in the contract, the need to be certain that a transaction took place (non-repudiation) and authentication, that the message was not modified (integrity of electronic communications).

20. However, given the borderless nature of the Internet, the main concerns surrounding the use of on-line agreements relate to jurisdictional issues that affect their enforceability. "Buy something in a shop, and you are clearly bound by the laws of the country where the shop is physically situated. But make a purchase from the same shop over the Internet from a foreign country, and it is not at all clear whose laws apply" as currently, there is no definitive statement as to which country's laws apply to contracts conducted over the Internet (Economist, 2001).

21. What law applies to on-line contracts is one of the most crucial issues and under the existing legal framework, websellers may unknowingly contravene the laws of one geographic jurisdiction yet comply with the laws of another. One example of what happens when an Internet retailer's sales policies are law-abiding in one country but illegal in another involves the lifetime guarantee offered by the American clothing company Land's End. After legal suits, the company can now offer its guarantee to German consumers, but because of other German laws, they cannot advertise it on their site (Herring, 2000).

22. As the Internet creates a jurisdiction that transcends countries' borders, a so-called "cyber-jurisdiction", the implications of the jurisdictional issue are profound and the question of jurisdiction is by far the biggest single issue regarding e-Commerce today (Kahin and Nesson, 1997). Unless the law by which on-line agreements will be governed is known then the true nature of the agreement will not be known and left as it is, the current legal framework would require each e-business to engage a lawyer in any market it happens to sell into.

23. Dodd and Hernandez (1998, p.29) point out that personal jurisdiction (the power of a court over a defendant) has long been conceived of in geographic terms and dependent upon actual physical presence in a jurisdiction or doing business in that jurisdiction. These authors go on to say (p.34) that “the international jurisdictional standards are in disarray.....We will not see how international Internet jurisdictional issues will be governed until a court enters a judgement in one country against a web site host located in another country.” They go on to recommend that “given the uncertainty of jurisdictional cases, parties should contractually choose a forum.”
24. Garnett (1998) believes that conventions prescribing universally applicable rules for e-commerce may be too optimistic so he argues that we should strive at least for a universal “choice of law” rule and says that as a bare minimum, that might at least provide some small degree of certainty for those attempting to make responsible business decisions.
25. Noeding (1998, p.86) indicates that if both parties are domiciled in Europe then this issue is straightforward as the jurisdiction matters will be governed by the Brussels Convention 1968 to which all EU Member States are now party and which was implemented in the United Kingdom through the Civil Jurisdiction and Judgements Act 1982. This author goes on to say that “in contrast to the situation arising out of contracts between traders, a consumer can choose whether to sue in his domicile court or in a court of the country where the defendant is domiciled. He himself can only be sued in the country where he is domiciled and not even a jurisdiction clause can deprive him of his rights.” The legal situation is more complicated in the context of a licence wherein no sale is taking place in the contracts. As far as the determination of the applicable law is concerned, Noeding (p.87) indicates that in Europe, one needs to look at the EC Convention on the Law Applicable to Contractual Obligations 1980, more commonly know as the Rome Convention, implemented into the laws of the UK in 1990 by the Contracts (Applicable Law) Act 1990. “The parties are free to choose a legal system that will govern their contract....Both American and UK law are based on the principle that the parties are generally free to choose the law governing their contract. Nevertheless there are restrictions to this freedom to choose the law of the contract. Since the Rome Convention applies whether British courts are the forum, then the limits on freedom of choice are those specified by the Rome Convention. The American law imposes two restrictions. First of all, the chosen law must have a

substantial relationship to either party or transaction. Where there is an American supplier, this requirement will certainly be fulfilled. Secondly, the chosen law will not be applied by American courts if it is contrary to a fundamental policy of the legal system which would apply in absence of a choice of law clause, provided the particular state has a greater interest than the chosen state to determine the relevant issue.”

26. Gallagher (2000, p.102) agrees that if the contract specifies the governing law and jurisdiction then the position should be clear and if the contract is silent on these then the principles of private international law come into play to determine the proper law of the contract. He goes on to say that unfortunately this is easier said than done and while some help is provided by the 1982 Brussels Convention, as these provisions are EU-specific, they are of limited application and moreover, they do not deal with the issue of applicable law. While the common law rules governing this area of law have been substantially reformulated as a result of the Rome Convention (Gallagher p.102 and Noeding p.87), there are many instances that reveal the inadequacy of the present legal position. As a result, some have even called for a comprehensive overhaul of the existing legislation and have put forward proposals ranging from the international unification of choice of law rules (Garnett, 1998) to the creation of an independent Internet jurisdiction being a jurisdiction in its own right where disputes would be dealt with by a special court or arbitral body (Gallagher, p.103). As this whole area is a minefield, Gallagher (p.103), like Dodd and Hernandez (1998), suggests that it is far better to avoid such problems by ensuring that e-commerce contracts specify both governing law and jurisdiction.
27. As noted by Parkinson (2001, p.4), the Chairman of the United States Federal Trade Commission (FTC), Robert Pitofsky (2000), proposed three approaches to jurisdiction and choice of law issues for consumer transactions. “The "country-of-destination" approach, in place in most developed countries, generally allows consumers to rely on core protections available where they reside. The proposed "country-of-origin" rule would subject companies only to the laws, courts, and law enforcers in their own country. The contractual or "prescribed-by-seller" approach -- also supported by many country-of-origin proponents -- would allow merchants to prescribe the applicable law and jurisdiction in their contracts with consumers. For example, a merchant's Web site disclosure of the governing law would bind the customers of that site.”

28. While the prescribed-by-seller approach and the rule-of-origin system addressed the key business concerns of the need for a predictable regulatory environment and reduced compliance costs, Pitofsky rejected these approaches in favour of the "country-of-destination" approach:

"I think, however, the prescribed-by-seller and rule-of-origin systems raise significant consumer protection concerns that risk undermining consumer confidence in e-commerce.

- *Both approaches could create incentives for businesses to operate from or contractually impose the law of jurisdictions with lax consumer protections. The result could be a "race to the bottom."*
- *Under both approaches, consumers could be required to travel to remote forums to seek redress pursuant to unfamiliar legal systems, possibly entailing travel and legal costs that dwarf the damages sought; as a result, consumers effectively will be denied any meaningful opportunity for redress.*
- *Even if a Web site disclosed to consumers which country's laws and courts governed a transaction, it is unclear whether most consumers could make informed choices about complex international law issues.*

If these approaches were applied to public law enforcement, companies would be subject only to authorities of the jurisdiction where they operate or they have selected in the contract, regardless of where their customers might be. Governments with the greatest stake in protecting their citizens from foreign wrongdoers would have to rely on other governments to carry out that responsibility."

29. Also, as noted by Parkinson (2001, p.4), in October 1999 the Hague Conference On Private International Law adopted a Preliminary Draft Convention On Jurisdiction And Foreign Judgments In Civil And Commercial Matters that in consumer contracts provides that agreement as to the jurisdiction for settling a dispute will only be effective in 2 situations:

- *if the agreement is entered into after the dispute has arisen, or*
- *to the extent only that it allows the consumer to bring proceedings in another court (i.e. the choice of court provision does not restrict the consumer's ability to bring proceedings in its home state).*

30. The above discussion clearly indicates that while (with some qualification) there is some consensus that if the contract specifies the governing law and jurisdiction then

these should hold, opinions vary in terms of what should transpire if the contract is silent on governing law and jurisdiction. This reveals the inadequacy of the present legal position and can only lead to uncertainty in the minds of all concerned. The following cases further illustrate the complex issues regarding the jurisdiction of national courts over global Internet matters:

Yahoo!

31. Last year, LICRA, the French human rights organization brought action in a French court to stop Yahoo's online auctions of Nazi memorabilia as, in France, showing, broadcasting or wearing nazi propaganda (except in historical expo, movies and plays) is a criminal offence. In its November 2000 ruling, with major implications for the Internet, the French court ordered Yahoo! to block French citizens' access to its online auctions of Nazi-related goods and ordered Yahoo! to implement a series of filters which enabled blocking by IP address, keywords and facilitated self-identification of geographic location (LICRA, 2000). As a result of this decision, Yahoo! had to install the system within three months or face a fine of 100,000 francs (\$13,000) for each day that the site remains unfiltered. No doubt recognising that the French court could effectively enforce its judgement against its assets in France, in response to the court order, rather than attempt to filter its sites for users in different countries Yahoo! removed Nazi items from all of its sites.

32. However, concerned that the French judgement might be transportable to the U.S. and so enforceable there, earlier this year, Yahoo! asked a federal court in California to declare the French judgement void and unenforceable in the U.S. (Yahoo!, 2000). Yahoo! Argued that the Nazi materials on its U.S. based website were not subject to French jurisdiction. LICRA responded by seeking a declaration from the U.S. court that it did not have jurisdiction over LICRA. If the French judgement were to be transportable to the U.S. and so enforceable there, it would have far reaching implications for the Internet. However, a federal judge dismissed LICRA's application to throw out the case. The ruling clears the way for the U.S. court to consider the key question of transportability of a foreign judgement to the U.S. and is thus a very significant case. If the U.S. court rules in favour of Yahoo! this may lead companies to transfer their business operations to more lightly regulated countries (like the U.S.) where foreign court judgements will not be recognised. Additionally, if LICRA were a

commercial organisation that had assets in the U.S., the U.S. court might rule that it should discontinue its proceedings in France and, if it failed to do so, face sanctions.

33. This is significant in that we would end up with one country's courts interfering in another's proceedings legitimately started under the foreign court's laws and is an example of where a foreign country asserts jurisdiction over a person or company on the basis that the person or the company operates a website which is accessible from or is directed at that foreign country.
34. Yahoo! is not the only firm to be taken to task by residents of a foreign land over online material. Amazon stopped selling Hitler's "Mein Kampf" in Germany after complaints from the German government, which has strict laws against the dissemination of hate material (Enos, 2000).

eBay

35. On 26 August, 1999 a person identifying him or herself as "hchero" offered an item for sale on the online auction house eBay. The bidding started at \$25,000 and within a week it reached \$5.7m before eBay pulled the plug. But why? The item being auctioned was a human kidney (Harmon, 1999). The seller, from Florida, wrote "Fully functional kidney for sale. You can choose either kidney. Buyer pays all transplant and medical costs. Of course only one for sale, as I need the other one to live. Serious bids only."
36. To buy or sell human organs is a felony under US Federal Law and trading in illegal goods is a violation of eBay's rules. However, as Harmon (1999) points out, whether or not the offer was real, the incident underscores the ease with which the Internet enables transactions of any kind, regardless of social custom or law. While this type of transaction may be illegal in most civilized jurisdictions it may not be in others and this would similarly apply to other goods such human sperm and eggs, and firearms and military weapons (e.g. missiles), in whole or in part. The fact that there were seven bids for the kidney in the five or so days indicates that there may be buyers prepared to enter into this type of illegal transaction. Shortly after the original kidney was removed from the auction site, more than 75 kidneys and several babies were

posted for sale on the Internet auction site (UNOS, 1999). If this took place through the Internet on some site not hosted in the US it might raise jurisdictional questions.

Mr Joseph Gutnick v. Dow Jones & Co Inc [2001] VSC 305

37. Similar to the Yahoo! case mentioned above, in this hearing before the Victorian Supreme Court, Mr Joseph Gutnick, a well-known Australian businessman, is suing Dow Jones & Co Inc., a US corporation over an arguably defamatory article published in its weekly American business magazine Barron's and on an Internet site hosted by the Wall Street Journal (AFR, 2001). The article, entitled "Unholy Gains," claims that embattled Melbourne mining entrepreneur, religious figure and philanthropist, Mr Gutnick had been involved in questionable financial dealings including money laundering, share manipulation and fraud. In the article, which purports to be a warning to US investors that Mr Gutnick has a questionable record in financial matters, it is claimed, among other things, that he had used religious charities to promote stocks. Mr Gutnick denies the allegations and alleges that the article is defamatory and is suing specifically over the Internet version of the article that he says was published in Victoria.

38. The hearing before Hedigan J., did not seek to establish the truth of the article but rather, to determine in which country the trial will be held. Mr Gutnick's lawyers argue that publication occurred when it was downloaded in Victoria and that the defamation case should be heard in Australia. They argued that the article's appearance on the Internet enabled it to be accessed by people in Victoria, thereby defaming him where he is best known. Counsel for Dow Jones, Geoffrey Robertson, QC, argued that "publication occurs when the material is pulled from the server in New Jersey and that any downloading of the journal which may have occurred in Victoria was the result of independent actions for which it [the publisher] cannot be properly held responsible" (AFR, 2001).⁵ He said the matter rested largely on the question of whether Internet material is published in the country of origin or the country where it is read and told the court that the action should be heard in the United States. He argued that the matter should not be heard in a Victorian court because the publication of the article did not take place in Victoria but in New Jersey, where the site server for the Internet magazine was located. He also argued that the story's source was an American

⁵ The argument being that publication on the Internet occurred at the point where the material was uploaded onto a Web server.

publication that dealt with American issues and was meant to be read largely by American readers. Mr Robertson said the matter also depended on the definition of "publication" in terms of the Internet. He said it would have to be decided whether information on the world-wide web was published in the country of its origin or whether it wasn't published at all.

39. From a publisher's point of view, it is entirely understandable that it may prove too great a burden to be potentially liable in a multitude of jurisdictions all around the world. No doubt Dow Jones wants the matter heard in America because defamation laws there are significantly different from those in Australia, because of the First Amendment right to freedom of speech, because public figures are fair game to a large extent and because it's Dow Jones' home turf.
40. There are arguments both ways but either way, the case shows again the difficulties that the Internet raises in respect to jurisdictional issues and, in particular, the conflict between currently existing national laws and the borderless nature of the Internet. "So complex are these difficulties that there is a strong body of opinion that says the net will be allowed to continue to develop in its own anarchistic way simply because it is impossible to get agreement, by means of a treaty, across those 300-plus jurisdictions on any forms of controls at all. And even if you did, how would a decision in one jurisdiction be enforced in another?" (Day, 2001).
41. Justice John Hedigan handed down his decision on 28 August and ruled that publication of the alleged defamatory story occurred after the reader used a password and downloaded it off Dow Jones' server and hence, publication took place where it was read and not where it was stored. In his judgement, Hedigan J. found that "the State of Victoria is both the appropriate forum and convenient forum for the disposition of the litigation commenced by the plaintiff..... the most significant of the features favouring a Victorian jurisdiction is that the proceeding has been commenced by a Victorian resident conducting his business and social affairs in this State in respect of a defamatory publication published in this State, suing only upon publication in this State and disclaiming any form of damages in any other place."

42. While the defendant, Dow Jones, is likely to appeal this decision, and while it clearly indicates that Australian courts would not decline to exercise jurisdiction if an Australian resident, complaining of material published on the Internet, wished to protect his or her reputation here, does it mean that an on-line publisher is potentially liable, and hence may need to defend itself in a multitude of jurisdictions all around the world?

Macquarie Bank v Berg [1999] NSWSC 526 (2 June 1999)

43. The *Macquarie Bank v Berg* case considered the issue of jurisdiction related to the Internet activity of a defendant. In this case, a commercial relationship between the Macquarie Bank and Berg, previously employed as a consultant by the bank, broke down and litigation ensued. Macquarie Bank and one of its executives claimed that they had been defamed by the contents of *macquariebankontrial.com*, a website alleged to have been created by Berg, and sought an injunction to stop the publication of the defamatory material. Berg had re-located to the US and the acts that he is alleged to have engaged in were probably done from there. He did not return to NSW when the defamation proceedings were brought against him. Justice Caroline Simpson refused to grant the injunction, essentially on the grounds that the Internet's global reach was such that the injunction would restrain the publication of the material anywhere in the world. A NSW court can't try to extend its laws to an unknown number of jurisdictions in cyberspace, which is what an order applying to the Internet amounts to. Justice Simpson commented that "it would exceed the proper limits of the use of the injunctive power of the [NSW] court". The injunction would effectively restrain publication of the material anywhere in the world. This would mean that the law of NSW would be imposed worldwide. The judge explained that an injunction to restrain defamation in NSW is designed to ensure compliance with NSW law and is designed to protect the rights of people as defined by the law of NSW but is not intended to operate in other jurisdictions, which would be offensive to the sovereignty of other jurisdictions.

R v. McLachlan [2000] VSC 215 (24 May, 2000)

44. In the *R v McLachlan* case, Victorian Justice Hampel aborted a murder trial because information about the accused was published on CrimeNet's website which publishes publicly available information about criminals online. The jury was discharged, and considerable public debate occurred in relation to this kind of online activity, which

led Rod Hulls, the Victorian Attorney General, to threaten CrimeNet's operators with contempt of court charges and to demand that the site be shut down. In response, Crimenet's operator threatened to move his site offshore. In the end, no further action was taken against the site, which had over 150,000 hits on its first day and is still in operation today with.

45. The above cases clearly illustrate the complex issues regarding the jurisdiction of national courts over global Internet matters and it is for such reasons that click-wrap mass-market agreements will usually include a jurisdiction and choice of law provision. Selecting the choice of law that will apply to a contract dispute provides certainty to business relationships. However, many argue that this is unfair given that click-wrap agreements are non-negotiable agreements and that one could be forced to sue in some totally unsuitable or unconnected location such as China or Iran. However, courts would look at this under a standard of reasonableness and fairness and would be capable of invalidating those agreements that are designed simply to prevent someone from suing and that have no reason or commercial basis. If a party has no reason to select a particular jurisdiction and the effect of its selection is unjust, then the selection should be found invalid (Ring, 2001). If, on the other hand, the agreement is silent, then a court will examine the facts relating to the formulation of the contract to determine if a choice of jurisdiction can be applied and in the absence of an express or implied choice of jurisdiction, then the court will apply the system of law with which the contract has the closest and most real connection.
46. Some argue that as well as being unfair, forum clauses in mass-market agreements are unenforceable. However, the courts have looked at this and have recognized that they are reasonable (*Carnival Cruise Lines, Inc.*, 111 S.Ct. 1522, 1527 499 US 585 (1991)). The jurisdiction clause in the *Carnival Cruise Lines* case allowed a cruise ship company to avoid the risk of being sued at any and all ports of call. Although the passenger did not have the ability to negotiate the term, the Supreme Court said that "nevertheless, including a reasonable forum clause in such a form well may be permissible for several reasons. Because it is not unlikely that a mishap in a cruise could subject a cruise line to litigation in several different fora, the line has a special interest in limiting such fora. Moreover, a clause establishing [the forum] has the salutary effect of dispelling confusion as to where suits may be brought...."

Furthermore, it is likely that passengers purchasing tickets containing a forum clause ... benefit in the form of reduced fares reflecting the savings that the cruise line enjoys...." And now the same considerations are present and commonplace on the Internet: in *Caspi v. The Microsoft Network* for example, the appellate court decision enforced a "click-wrap" choice of forum clause in the MSN membership agreement for online services, holding that the clause did not violate any public policy.

Click-Wrap Survey

47. Internet users have become familiar with screens flashing legal terms and requiring the clicking of an "I Accept" button before software is downloaded, goods can be ordered, services procured, or information is accessed. However, the writer is currently undertaking research to determine consumer attitude, understanding and awareness of these agreements and their enforceability. An on-line survey was considered to be the most efficient way of undertaking this basic consumer research; after all, the consumers that are of interest in this research are on-line users and, as such, highly likely to have already come across click-wrap agreements.

48. A website was created (<http://seven.bf.rmit.edu.au/~adam>) and on this site, the survey, formulated into an on-line form comprised of a list of six simple yes/no type questions (see overleaf), is now available to all site visitors. To assess if there is any bias in the responses, participants are invited to specify their country location, industry or profession from 41 different industry/profession categories, and their age in either less than 18, 18 to 35, 36 to 60 and 60+ age group categories. Provision is also made to allow respondents to provide any additional comments. An option allows participants to nominate whether they are interested in receiving a summary of the results of the survey and if so, provisions are made to allow participants to enter their name and email address details. When participants select the Submit button their answers to the survey are electronically transmitted to a server and stored in a database for final processing and analysis.

Click-Wrap Agreement Survey

1. From either party's point of view do you believe that click-wrap agreement(s) are important?
 - Yes, they are important, or
 - No, they're not important.
2. Regarding the terms and conditions within click-wrap agreement(s) do you:
 - always read them,
 - sometimes read them, or
 - never read them.
3. Regarding the acceptance of the terms and conditions by way of the I ACCEPT or I AGREE button, do you:
 - always accept them,
 - sometimes accept them, or
 - never accept them.
4. Do you believe that when you click the I ACCEPT or I AGREE button that a valid, legally binding and enforceable contract has been created irrespective of whether or not you have or have not read the entire agreement?
 - Yes, or
 - No.
5. Have you ever kept a copy of any click-wrap agreement that you have entered into (e.g. by printing or cutting-and-pasting)?
 - Yes, or
 - No.
6. We've all seen "shrink-wrap" agreements (agreements attached to off-the-shelf software products such as spreadsheet software or word processors). Have you ever read the terms and conditions in their entirety?
 - Yes, or
 - No.
7. If you are interested in receiving a summary of the results of this survey then enter your name and email address in the fields below (please see the Privacy Statement).

First Name:

Surname:

E-mail Address:

8. To see if there is any bias to responses from different industry, country or age categories please use the following combo boxes to select your industry or profession, country and enter your age in years

Industry:

Profession:

Age Group:

Submit Survey

Reset Responses

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

- an invitation letter and follow-up email was sent to all RMIT University enrolled research students;
- an invitation to participate was emailed to all students currently enrolled in RMIT's Master of eBusiness (MeB) course;
- an invitation to participate was also posted on the MeB students' discussion forum;
- individual emails were sent to likely interested participants;
- to attract as many participants from the online global community:
 - (a) the survey site was registered with a number of search engines;
 - (b) messages were posted on a number of on-line forums, community websites, discussion groups and lists (e.g. USENET, LAWZONE⁶, IRISH-LAW⁷ and NET-LAWYERS⁸), as well as included in on-line newsletters;
- Through the European Law Students' Association (ELSA) International in Brussels, details on the survey were sent to students and recent graduates interested in law and international issues across Europe.⁹

Findings

50. The survey website, first published on 21st May, 2001 has to date had 890 visitors and attracted 502 participants from 32 different countries. The following is a summary of the findings to date:

- Very few of the respondents always read on-line agreements;
- Most never read the agreements and felt that click-wrap agreements were not important;
- Well over half the respondents always click the Accept button and most of the others some times Accept;
- Close to half of the respondents didn't believe that they were entering into a legally binding contract even after clicking I Accept;
- Most never ever kept a copy of any click-wrap agreement entered into;

⁶ See the LAWZONE website, <http://www.lawzone.co.uk>

⁷ See the IRISH-LAW website, <http://www.irish-law.org>

⁸ See the NET-LAWYERS website, <http://www.net-lawyers.org>

⁹ See European Law Students' Association website, <http://www.elsa-online.org/>

- The majority of respondents said that they have never ever read a shrink-wrap agreement;
- 38% of the respondents came from the IT/Internet/E-commerce industries;
- 23% of the respondents came from the legal profession, and
- More than half of the respondents left their name and email address and requested a copy of the summary of findings of the survey.

Conclusion

51. While the development of e-commerce on a global scale has meant that trading internationally has become increasingly easier and businesses, both big and small, are able to trade almost seamlessly across geographical boundaries, in a number of areas the law has lagged behind the rapid advancements being made in information and global communications technologies, particularly the Internet. As the Queensland Attorney General said in his second reading speech on the Queensland Electronic Transactions (Queensland) Bill in November, 2000 “Governments and businesses are discovering that old solutions do not work with new problems. The new solution for nations such as Australia is to provide a legal framework under which government and business can use e-commerce but based on public confidence that the legal protections they expect in the bricks and mortar world will be there.”¹⁰

52. Whereas the contract law framework underlying e-commerce has not changed from traditional contract law, the unique features inherent in electronic contracting, such as the ‘no signature’ and ‘not in writing’ issues, together with the jurisdictional difficulties of the “borderless” Internet, undoubtedly add to the issues and complexities involved and challenge the traditional rules of contract formation. What is clear, is that because of the borderless nature of the Internet, the implications of the jurisdictional issue are profound and that the question of jurisdiction is by far the biggest single issue regarding e-commerce today. It is also clear that currently, the law relating to jurisdiction is unsettled and to a large extent, existing legal systems are inadequate at dealing with such issues. The law therefore needs to be updated and where necessary, new laws enacted so as to

¹⁰ Queensland Parliament Hansard, <http://parlinfo.parliament.qld.gov.au/hansard.htm>, 16/5/01

provide the necessary legal framework under which the full benefits of the new digital economy can be realised.

53. At a national level, this is where new laws such as the Electronic Transactions Act, 1999 (Cth) and Electronic Transactions (Victoria) Act 2000 will have an impact. The protection of copyright owners' rights, balanced against the needs of consumers trading on-line also requires further consideration. Copyright law must respond to the needs of the emerging digital economy and can play a much greater role.
54. At an international level, while "there are no easy answers to the range of legal challenges in the global electronic marketplace, developing an international framework that both protects consumers and is fair and predictable for business is key to the long-term growth of e-commerce" (Pitofsky, 2000). It is for these reasons that the international community is developing new enforcement mechanisms that are effectively trans-border Courts. One example of this is found in the World Intellectual Property Organization (WIPO).¹¹ There are a number of other international initiatives addressing the global e-commerce issue such as the Hague Convention on Jurisdiction and Foreign Judgments.¹²
55. This submission also presented results of research undertaken to determine consumer attitude, awareness and understanding of click-wrap agreements. While this research is still in progress, preliminary findings clearly indicate that there is a serious lack of understanding and awareness on the part of consumers regarding their legal position when participating in the new economy. Most never read the on-line agreements and the majority of these are very much unaware that they are entering into a legally binding contract after clicking I Accept. Most are guilty of just clicking to subscribe to a service or start a download but it behoves a site visitor to slow down and pay attention to the details of the site's online terms and conditions.

¹¹ See World Intellectual Property Organization (WIPO) website, <http://www.wipo.int/>, 16/6/01

¹² The Hague Convention on Jurisdiction and Foreign Judgments, http://www.economist.com/agenda/displayStory.cfm?story_id=645750, 1/7/01

56. Click-wrap agreements are now being widely used and in time, it is likely that they will be increasingly used for a variety of other contractual relationships, particularly in commercial contexts, such as employment arrangements, real estate transactions, purchasing of insurance and financial lending. Therefore, together with the lack of negotiation of terms, the research findings that most consumers don't read the agreements, makes the unequivocal meeting of the minds as a prerequisite to valid contract formation, at least in the online world, troubling. This may well become a serious problem in the future.
57. Internet consumers need to be aware of what a simple mouse button click could mean; they could be agreeing to a whole host of terms that may not be in their best interest. Accordingly, given that courts will likely find click-wrap agreements enforceable, consumers must be more conscious of what they are agreeing to. Perhaps consumer groups, Internet Service Providers, legal organizations and schools, as well as the Australian Competition and Consumer Commission (ACCC) have a major role to play in addressing this serious problem.

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