

CONTRACTS GOVERNING THE USE OF WEBSITES

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With the progressive transformation of the Internet from a romanticised instrument of freedom and self-expression into a commercial platform for digital distribution, most websites must be recognised as access interfaces to a wide range of content and services. This paper examines the contracts purportedly governing the use of such content and services. It explores the difficulties of establishing legal intention in a context that is not unambiguously commercial or transactional and contrasts popular beliefs with the basic principles of contract law. It draws a clear distinction between contracts governing traditional e-commerce exchanges, such as buying books on Amazon.com, and contracts governing the very use of websites. In the latter instance, the website (*ie* the resources made available thereon) constitutes the subject matter of the transaction. Equal importance must be attributed to the fact that such contracts are formed on websites and to the fact that they govern their use. The website user will question the existence of a contract on the basis that he did not have an intention to be legally bound, or had no awareness that a transaction was taking place. The website operator will argue that, objectively, all prerequisites of a legally enforceable agreement have been met. The outcome of the discussion will, to a large extent, depend on whether the user's beliefs and expectations can be regarded as reasonable and on whether it is the user or the operator who deserves the protection of the objective theory of contract.

I. INTRODUCTION

“The marrow of contractual relationships should be the parties’ intention to create a legal relationship.”¹

This paper analyses the enforceability of contracts purporting to govern the use of websites or, to be more precise, the content and services available thereon. The average Internet user is familiar with contracts governing traditional e-commerce transactions, such as buying books online. The need to enter into a contractual relationship for the purpose of using online resources is, at least in popular opinion, a relatively novel practice. The resulting problems create an intricate interplay between seemingly settled legal concepts. Although the discussion touches upon the

* Assistant Professor, School of Law, Singapore Management University. I would like to express my gratitude for the patience and support of my colleagues: Associate Professor Yihan Goh, Professor Gerard McMeel, Professor David McLauchlan and Professor Michael Furnston. I must also thank the anonymous reviewer for his insightful comments.

¹ *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR (R) 594 at para 139 (HC) [*Digilandmall*]; see also Phang JA in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR (R) 332 at para 96 (CA) [*Gay Choon Ing*]. Most references to *Digilandmall* concern the High Court decision.

topic of standard term contracts, it focuses on a preliminary problem: the difficulty of establishing an intention to be legally bound. This difficulty derives from the fact that many online interactions occur ‘on’ websites lacking the traditional indicia of transactional environments. Conventionally, the legal challenges associated with online contracting concern the new ways in which intention is communicated. Additional challenges arise from the new contractual subject matter. Contract law, which has been shaped by the archetypical exchange of economic value in the form of goods, services and money,² must evolve to encompass exchanges in different forms of economic value. It may thus have to adapt to new methods of communicating agreement *and* to new forms of consideration. The scale of the problem must be appreciated—millions of purportedly contractual relationships are formed *and performed* on websites following a similar design pattern—a hyperlink is placed on the bottom of individual webpages, its activation displays the terms governing the particular interaction (the ‘legal link’). Going past the home page of the website, or continued browsing, (purportedly) results in a contractual relationship between the operator of the website and its user. The practice is employed by all major websites. The questions arise: “are such contracts enforceable?” or “is a contract formed between the operator and the user?” Can it be assumed that the average user intends to create a legal relationship with the operator (*eg*, Google or Amazon) when ‘just browsing’? The answer to these questions requires that equal importance be attributed to the fact that such contracts are formed on websites and to the fact that they govern website use. While every decision will depend on its specific facts, it is possible to advance some general arguments given the increasing standardisation of website designs and commercial practices. The present analysis is not, however, directed at establishing whether contract law continues to apply online. This is beyond dispute.³ Internet transactions are considered in “the usual manner.”⁴ In England and Wales, online transactions are evaluated in light of, amongst others, the *E-Commerce Directive*⁵ and the *Directive on Consumer Rights*,⁶ which frequently override principles of contract law. Unlike their English counterparts, Singapore Courts can apply the common law of contract in its purest form, unaffected by regulatory interference.

A. Roadmap and Preliminaries

After some preliminary observations, the discussion commences with a brief mention of click-wrap and browse-wrap agreements. Next, the main prerequisites of enforceability are explored: intention and consideration. Particular emphasis is placed on

² Lon L Fuller, “Consideration and Form” (1941) 41 Colum L Rev 799 at 818.

³ Andrew Phang & Yeo Tiong Min, “The Impact of Cyberspace on Contract Law” in Daniel Seng, ed, *The Impact of the Regulatory Framework on E-Commerce in Singapore* (Singapore: Singapore Academy of Law, 2002) 39 at para 4.

⁴ *Digilandmall*, *supra* note 1 at paras 91-93. For a discussion of the separation between ‘traditional’ and ‘electronic’ contracts see: Roger Brownsword, “The Shaping of our On-line Worlds: Getting the Regulatory Environment Right” (2012) 20 Int’l JL & IT 249 at 251, 252.

⁵ EC, *Commission Directive 2000/31/EC of 8 June 2000 on electronic commerce* [2000] OJ, L 178/1 [*E-Commerce Directive*].

⁶ EC, *Commission Directive 2011/83/EC of 25 October 2011 on consumer rights* [2011] OJ, L 304/64 [*Directive on Consumer Rights*].

the fact that any difficulties in establishing legal intention may affect the issue of consideration. The largest part of the discussion is, however, devoted to the objective theory of contract. Its application in the online environment encounters some unexpected difficulties. The parties' positions are diametrically opposed; the user will question the existence of a contract on the basis that he did not have an intention to be legally bound, or, no awareness that a transaction is taking place. The operator will argue that, objectively, all prerequisites of a legally enforceable agreement have been met. A difficult balancing exercise ensues: popular perceptions are contrasted with the basic principles of contract law, objective appearances are contrasted with 'reasonable expectations'. Lastly, the problem is approached from the perspective of the doctrine of unilateral mistake. For the sake of brevity, the word 'purported' is omitted from the word 'contract' although it is acknowledged that the very point of this analysis is to examine whether such 'contracts' are legally enforceable. Due to space constraints, this paper does not examine agreements governing the use of websites from a broader policy perspective. It is confined to the *contractual* aspects of their enforceability.

It is important to acknowledge the controversies these agreements create in such areas as copyright or property law. In many instances, website contracts aim to alter the default principles of these regimes or, implicitly challenge the traditional, statutorily sanctioned allocation of rights.⁷ In the US, website contracts constitute a permanent fixture in the 'cyberproperty debate', which concerns the existence of a general right to exclude others from accessing network resources.⁸ With the increasing commercialisation of the Internet, websites have become gateways, or access interfaces, to a wide range of content and services. In return for the right to use such content and services, website operators demand that users permit the harvesting of their personal information. User information, although traditionally discussed in the context of privacy regulations,⁹ is regarded as the *currency* of the Internet economy¹⁰ with a large number of online businesses built, almost exclusively, around its collection and utilisation.¹¹ Again, the role of private agreement in shaping rights to personal information (particularly, their alienability) is controversial.¹² Many agreements governing the use of websites may be found unenforceable (partially or in their entirety) because of their substance—not on the basis of the principles of contract law.

⁷ Andrew Murray, *Information Technology Law: The Law and Society*, 2d ed (Oxford: Oxford University Press, 2013) at 84; Jane K Winn, ed, *Consumer Protection in the Age of the 'Information Economy'* (Hampshire: Ashgate, 2006) at 3; Yochai Benkler, "An Unhurried View of Private Ordering in Information Transactions" (2000) 53 Vand L Rev 2063.

⁸ Mark A Lemley, "Terms of Use" (2006) 91 Minn L Rev 459; Michael A Carrier & Greg Lastowka, "Against Cyberproperty" (2007) 22 Berkeley Tech LJ 1485.

⁹ See Ian J Lloyd, *Information Technology Law*, 6th ed (Oxford: Oxford University Press, 2011) at 11, 12.

¹⁰ World Economic Forum, "Personal Data: The Emergence of a New Asset Class" (January 2011), online: World Economic Forum <http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf>.

¹¹ For a basic explanation see Richard Warner & Robert H Sloan, "Behavioral Advertising: From One-Sided Chicken to Informational Norms" (2012) 15 Vand J Ent L & Prac 49 at 57-60 [Warner & Sloan, "Behavioral Advertising"].

¹² Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford: Stanford University Press, 2010) at 1-20; Robert H Sloan & Richard Warner, "Beyond Notice and Choice: Privacy, Norms, and Consent" (2013) 14 Journal of High Technology Law 370.

Before proceeding, it is important to emphasise that this paper does not deal with websites that condition their use on the prior establishment of an account.¹³ In such instance, the sign-up process involves a more explicit presentation of terms, and on the user's part, the provision of specific information and the activation of additional graphical elements. Even 'traditional' e-commerce sites like Amazon.com or Singaporeair.com expressly distinguish between contracts concerning the sale of goods or services and contracts concerning the *use* of their website.¹⁴ While the actual purchase of goods or tickets requires an account, use of the website does not.

B. Click-Wraps and Browse-Wraps

The enforceability of contracts governing online transactions, including the use of websites, is usually analysed under the labels of 'click-wrap' and 'browse-wrap' agreements. Click-wraps relate to websites that require the activation of an 'I agree' button as a sign of agreement to the terms presented thereon.¹⁵ Some courts insist that users be directed to the terms or prompted to review them.¹⁶ The defining feature of click-wraps is the requirement of a positive action *other than use of the site* and the presence of a mechanism that renders the terms unavoidable. In browse-wraps, the terms are available on the bottom of the website via a hyperlink. As assent is given by using the website,¹⁷ it is often argued that browse-wraps do not require an express manifestation of agreement. As there is no self-display mechanism, it is also possible to continue browsing without viewing the terms.¹⁸ Absent evidence of actual *knowledge of or agreement to* the terms, the enforceability of browse-wrap agreements depends on whether a reasonably prudent user would be put on 'inquiry notice' of their existence.¹⁹ This in turn depends on the design of the website; in particular, the conspicuousness of the link.²⁰ Its presence at the bottom of the webpage is generally considered insufficient.²¹ To date, browse-wrap agreements have been

¹³ Eg, Straitstimes.com, which requires a subscription to have unlimited access to all content.

¹⁴ See eg, Amazon.com, which divides its terms into 'conditions of sale and use', online: Amazon <<http://www.amazon.co.uk/gp/help/customer>>; Singapore Airlines distinguishes between terms for the use of the website, the online booking as well as conditions of contract and conditions of carriage, online: Singapore Airlines <http://www.singaporeair.com/en_UK/terms-conditions>. For a discussion in a recent case see *Ryanair Ltd v Billigfluege.de GmbH/Ticket Point Reisebüro GmbH* [2015] IESC 11.

¹⁵ See generally Cheryl B Preston & Eli W McCann, "Unwrapping Shrinkwraps, Clickwraps and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse" (2012) 26 Brigham Young University Journal of Public Law 1 at 17.

¹⁶ *Specht v Netscape Communications Corporation*, 306 F (3d) 17 at 22, 23 (2nd Cir 2002) (applying California law); *Hines v Overstock.com*, 668 F Supp (2d) 362 at 367 (ED NY 2009), aff'd 380 F App 22 (2nd Cir 2010).

¹⁷ Nancy S Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford: Oxford University Press, 2013) at 41.

¹⁸ *Be In, Inc v Google Inc*, 2013 WL 5568706 at 6 (ND Cal).

¹⁹ *Register.com Inc v Verio Inc*, 356 F (3d) 393 (2nd Cir 2004) [*Register.com*]; *Ticketmaster Corp v Tickets.com, Inc*, 2003 WL 21406289 (CD Cal) [*Ticketmaster*]; *Van Tassell v United Marketing Group, LLC*, 795 F Supp (2d) 770 at 790 (ND Ill 2011).

²⁰ *In re Zappos.com Inc, Customer Data Security Breach Litigation*, 893 F Supp (2d) 1058 at 1064 (Nev 2012) [*Zappos*].

²¹ *Nguyen v Barnes & Noble, Inc*, 763 F (3d) 1171 (CD Cal 2012) [*Nguyen*]; cf *Cairo, Inc v Crossmedia Services, Inc*, 2005 WL 756610 at 2 (ND Cal), (every webpage contained a notice: "By continuing past

predominantly enforced in cases involving business users.²² The arguments made in many cases are, however, inconsistent²³ and frequently hinge on a single design feature—that of an additional click. US courts appear pre-occupied with categorising websites as browse-wraps or click-wraps instead of examining the intention of each transacting party. Some decisions seem driven by the substantive unfairness of certain terms or the need to supplement other legal regimes. Consequently, terms may be enforced as an indirect way of recognising the right to protect databases, which otherwise does not exist.²⁴ Conversely, enforcement may be refused as an indirect form of protecting consumers from unfavourable arbitration provisions.²⁵ Other decisions have been criticised for their distortion of contract doctrine in the name of promoting online commerce.²⁶ In sum, the outcomes of particular cases are frequently driven by reasons unrelated to contract law. As contract formation is rarely distinguished from the incorporation of terms, the question of ‘intention to create legal relations’ does not arise. Given the different legal landscape in which ‘wrap cases’ have been decided, they are of limited guidance.

II. PREREQUISITES OF ENFORCEABILITY

The question of whether contracts governing the use of websites are enforceable necessitates a return to first principles. Three general observations are necessary. *First*, references to ‘online-’ or ‘Internet contracts’ are avoided as such terminology implies the existence of a separate legal category with its own discrete rules. Once we assume that contract law continues to apply online we have to follow its principles without modification. A contract formed by means of an Internet-based technology does not become an ‘Internet contract’, just like a contract formed by an exchange of letters does not become a ‘postal contract’. Though admittedly, the analysis gains in complexity as the relevant principles become more difficult to apply to websites and clicks. *Second*, we must not idealise traditional contracting and demonise its online equivalent. When discussing contract law in the Internet context some scholars seem to imply that traditional transactions reflect the ‘meeting of minds’; the parties understand all legal consequences of their actions or that terms are negotiated. Such implications are incorrect. *Consensus ad idem* and *actual* agreement are abstract ideals, both offline and online. Many problems become exacerbated in the online environment, but are not necessarily new. The enhanced communication possibilities provided by the Internet rarely translate into actual negotiations.²⁷ Accordingly,

this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site”).

²² *Ticketmaster*, *supra* note 19; *cf Pollstar v Gigmania Ltd*, 170 F Supp (2d) 974 at 982 (ED Cal 2000).

²³ For a comparison of different interpretations of the same interface, see *Nguyen*, *supra* note 21 and *Fteja v Facebook*, 841 F Supp (2d) 829 at 838-840.

²⁴ *ProCD, Inc v Zeidenberg*, 86 F (3d) 1447 (7th Cir 1996).

²⁵ *Zappos*, *supra* note 20 at 1064.

²⁶ Robert A Hillman, “Rolling Contracts” (2002) 71 *Fordham L Rev* 743; Roger C Bern, ““Terms Later’ Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding” (2004) 12 *J L & Pol’y* 641; Jean Braucher, “Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice” (2000) 46 *Wayne L Rev* 1805.

²⁷ Bert-Jaap Koops, “Law, Technology and Shifting Power Relations” (2010) 25 *Berkeley Tech LJ* 973 at 1006.

practically all website contracts are standardised. Although standard form agreements have always raised controversies regarding their consensual nature,²⁸ they have been routinely enforced—despite not having been read, meaningfully accepted or even known of.²⁹ The critique of standard form contracts must be conceptually separated from broader problems of enforceability in the online environment. The latter concern the fact that terms are encountered in an unfamiliar context—not the fact that terms are imposed. *Third*, even the seemingly settled area of contract law abounds in controversies. There is, for example, still no academic consensus as to the nature or source of contractual obligations.³⁰ The present discussion does not join any of these debates although some of them may, indirectly, affect the analysis. In particular, different approaches to the meaning of objectivity, including the role of subjective intention in the formation of a contract, could tilt the argument in different directions. Proponents of promissory theories may reach different conclusions than supporters of transfer or reliance theories. While acknowledging the complexity of the theoretical issues involved, space limitations prevent a more in-depth exploration of their implications. In line with standard contractual doctrine it is assumed that every contract requires intention and consideration, and that intention is evaluated objectively from the perspective of a reasonable addressee.

A. Intention

Intention reflects the consensual basis of contract law. ‘Offer and acceptance’ are conventional means by which the intention of the promisor and the intention of the promisee are shown to coincide.³¹ It is often unnecessary to distinguish between intention and the offer and acceptance analysis as the former is conceptually incorporated within the latter.³² There can be, at least theoretically, no *unintentional* offers or acceptances. While the offer and acceptance analysis may sometimes appear artificial,³³ it proves indispensable in many instances, such as when the exact time or place of contact formation must be determined³⁴ as well as when it is necessary to infer a contract from conduct or lengthy negotiations.³⁵ When, however, the very existence of a contract is in question, the search is for intention *in general*.

²⁸ Margaret Jane Radin, *Boilerplate, The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013) at 17, who calls the problem of consent in boilerplate transactions “normative degradation”. Friedrich Kessler, “Contracts of Adhesion—Some Thoughts about Freedom of Contract” (1943) 43 Colum L Rev 629.

²⁹ Andrew Robertson, “The Limits of Voluntariness in Contract” (2005) 29 Melbourne UL Rev 179 at 197.

³⁰ For a review of competing theories, see Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 43, 106 [Smith, *Contract Theory*].

³¹ Melvin Aron Eisenberg, “Expression Rules in Contract Law and Problems of Offer and Acceptance” (1994) 82 Cal L Rev 1127.

³² Lee Pey Woan, “Intention to Create Legal Relations” in Andrew Phang Boon Leong, ed, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) 255 at 255.

³³ See Andrew Phang JA in *Gay Choon Ing*, *supra* note 1 at paras 61-63; *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd, The Eurymedon* [1975] AC 154 at 167 (HL).

³⁴ See *eg, Adams v Lindsell* (1818) 1 B & Ald 681 (KB), which established the ‘postal acceptance rule’.

³⁵ *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep 601 (QB) at 611 (Bingham J); *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209.

1. The 'electronic form'

Some uncertainty may, *prima facie*, concern the electronic form of online interactions. Intention can, however, be manifested in any manner, including conduct (but possibly excluding silence or inactivity).³⁶ No formalities are required to conclude an enforceable agreement. Nothing in the law of contract prohibits expressing intention by means of websites or emails.³⁷ Clicks, which are the main method of interacting with websites, can produce the same legal effect as handshakes, nods or signatures.³⁸ Continued browsing, being a deliberate act, can hardly be equated with inactivity or silence. It must be acknowledged, however, that due to their limited expressiveness, clicks do not belong to the same category as such culturally entrenched communicative signs like handshakes, nods or signatures and are not universally perceived as capable of producing legal consequences. Although intention can be expressed in any manner, it will be easier to evaluate in the case of websites than in the case of clicks. *Whether* a particular click constitutes an expression of legal intention and *what* intention it expresses will always depend on the context in which it occurs. And it is context, not the electronic form, which creates the first set of challenges.

2. The problem with 'context'

When establishing the presence of an 'intention to create legal relations' courts examine the context in which a particular interaction took place. It is presumed that agreements made in a familial or social context are not intended to be legally binding³⁹ whereas agreements made in a business or commercial context are intended to be legally binding.⁴⁰ Each of these presumptions is a rebuttable presumption of fact. In both cases, however, the presumption is strong.⁴¹ Given the importance of intention, it might come as a surprise that there is virtually no case law explaining what creates a commercial or social context. Admittedly, in the majority of circumstances the context is obvious, so the question does not arise. Social settings usually concern divorcing spouses and family disputes,⁴² whereas commercial settings concern business entities questioning the legally binding character of specific statements or documents.⁴³ Courts focus on the relationship between the parties or on the professional character of the interaction. It is thus inherently difficult to establish an

³⁶ *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at para 68 (CA); *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics* [2011] 2 SLR 63 at para 47 (CA); HG Beale, *Chitty on Contracts*, 31st ed (London: Sweet & Maxwell, 2012) at para 2-163 [*Chitty*].

³⁷ Section 11(1) of the *Electronic Transactions Act* (Cap 88, 2011 Rev Ed Sing) [*ETA*] states that "For the avoidance of doubt, it is declared that in the context of the formation of contracts, an offer and the acceptance of an offer may be expressed by means of electronic communications" [emphasis added]. See also *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR (R) 651 at para 85 (HC) (Judith Prakash J).

³⁸ Robert A Hillman & Jeffrey J Rachlinski, "Standard-Form Contracting in the Electronic Age" (2002) 77 NYUL Rev 429 at 481.

³⁹ *Balfour v Balfour* [1919] 2 KB 571 (CA) [*Balfour*].

⁴⁰ *Gay Choon Ing*, *supra* note 1 at para 72.

⁴¹ *Edwards v Skyways Ltd* [1964] 1 All ER 494 at 500 (QB) (Megaw J); *Gould v Gould* [1970] 1 QB 275 (CA).

⁴² *Balfour*, *supra* note 39; *Jones v Padavatton* [1969] 2 All ER 616 (CA).

⁴³ *Rose and Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB 261 (CA), *rev'd* [1925] AC 445 (HL); *Kleinwort Benson Ltd v Malaysian Mining Corporation Bhd* [1989] 1 All ER 785 (CA).

intention to create legal relations, that is, invoke one of the presumptions, when the context is ambiguous. Such is the case in many online interactions. While websites like Amazon.com are unequivocally transactional, websites like Google.com or CNN.com are difficult to categorise. As the latter two websites are operated by public companies aimed at generating profit, it is impossible to speak of a wholly social context. Yet, the typical indicia of a transactional environment are missing: there is no price indication, no virtual shopping basket, no ordering function and no input of payment data. As the occurrence of an exchange is not immediately apparent it is difficult to describe the context as commercial and presume the existence of intention. It must be emphasised that ‘intention to create legal relations’ can be regarded as a *formalistic* precondition of enforceability or as a *substantive* component of the offer and acceptance model.⁴⁴ In the first instance, the question is not whether the parties intend to be legally bound, but whether a particular agreement should be enforced. The question is one of public policy, not reality of consent.⁴⁵ Consequently, there is no genuine inquiry into intention but only a general reluctance to interfere with family and social arrangements.⁴⁶ Such inquiry occurs in the second instance, when intention is analysed within the offer and acceptance model. It is only then that the objective theory of contract enters the analysis and the courts inquire as to *what* was intended. In both instances, however, the role of context must be appreciated; in the first instance, it serves to determine the existence of intention, in the second, it determines the meaning of statements.⁴⁷

B. Consideration

The difficulty of establishing *legal* intention is largely attributable to the ambiguity of the context of most online interactions. This ambiguity is, in turn, related to the new type of transaction; in return for access to content and services, users permit the collection and utilisation of their personal information. This leads to the second prerequisite of enforceability: consideration.⁴⁸ Consideration, often described as ‘something provided in exchange’, is a legal construct invented to distinguish between those promises which are enforceable from those which are not. Consideration need not be adequate, only sufficient in the eyes of the law.⁴⁹ One party suffers a detriment *or* the other obtains a benefit. The focus is on reciprocity, not on

⁴⁴ Edwin Peel, ed, *Treitel: The Law of Contract*, 12th ed (London: Sweet & Maxwell, 2007) at para 1-008 [Treitel]. See also Gerard McMeel, “Contractual Intention: The Smoke Ball Strikes Back” (1997) 113 Law Q Rev 47 at 49: “[M]ost of the cases which explicitly discuss ‘intent to create legal relations’ have nothing to do with contractual intention. Rather they concern the exclusion from the contractual adjudication process of disputes for which the (mainly commercial) doctrines of contract law are inappropriate.”

⁴⁵ Mindy Chen-Wishart, “Consideration and Serious Intention” (2009) Sing JLS 434 at 444 [Chen-Wishart (2009)].

⁴⁶ Stephen Hadley, “Keeping Contract in its Place—*Balfour v Balfour* and the Enforceability of Informal Agreements” (1985) 5 Oxford J Leg Stud 391.

⁴⁷ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 (HL); in Singapore, the contextual approach to the interpretation of contracts has been affirmed in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR (R) 1029 (CA).

⁴⁸ *Gay Choon Ing*, *supra* note 1 at para 64.

⁴⁹ *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 (HL).

equivalence of value. *Prima facie*, these principles seem easily transposable to an online environment; users benefit by accessing websites, operators benefit by collecting user information.⁵⁰ Alternatively, it can be said that users suffer a detriment by surrendering their information. The frequent references to ‘free’ online content or services are misleading as they incorrectly imply that no consideration is required or that no exchange is taking place.

Despite the prevalent practice of *paying* for goods and services, there is no requirement in contract law that one party must provide consideration in the form of money. Just as clicks can express intention, information can constitute consideration. We could proceed with our analysis, having accepted the relative ease of finding consideration in website contracts. Such conclusion is, unfortunately, premature. Although textbooks on contract law analyse consideration and intention separately, the two concepts are inherently interwoven.⁵¹ It has been suggested that intention, offer, acceptance and consideration are not distinct constituents of a contract, but merely different ways of looking at the same thing.⁵² It is also generally accepted that if intention is present, the finding of consideration will not be problematic,⁵³ especially in commercial transactions.⁵⁴ The close relationship between intention and consideration has even led to theories that one can be substituted for the other or that there is no need for both.⁵⁵ Consequently, any difficulties in establishing intention may affect the presence of consideration. Although the question whether consideration should be provided *intentionally* is never posed, any inquiry into consideration assumes the presence of a promise, which by definition must be intentional.⁵⁶ In executory contracts, the mutual promises constitute consideration for each other.⁵⁷ Theories that question the separate requirements of intention and consideration assume that when one is present, so is the other. In particular, it is emphasised that the presence of a bargain may render superfluous any additional proof of intention and consideration.⁵⁸ As consideration is inherently tied to the concept of reciprocity,⁵⁹ its existence may

⁵⁰ Diane Rowland, Ute Kohl & Andrew Charlesworth, *Information Technology Law*, 4th ed (London: Routledge, 2012) at 254; for a description of various revenue models based on user information see Dave Chaffey, *Digital Business and E-Commerce Management*, 6th ed (London: Pearson, 2015) at 58.

⁵¹ Historically, consideration was regarded as proof of intention: see *Pillans v Van Mierop* (1765) 3 Burr 1663; J Unger, “Intent to Create Legal Relations, Mutuality and Consideration” (1956) 19 Mod L Rev 96.

⁵² Michael Furmston, ed, *Butterworths Common Law Series, The Law of Contract*, 4th ed (London: LexisNexis, 2010) at paras 2.4, 2.6.

⁵³ *The Aramis* [1989] 1 Lloyd’s Rep 213 at 225 (CA) (Bingham LJ); *Tilson v Alstom Transport* [2010] EWCA Civ 1308; *Ajar-Tec Ltd v Stack* [2012] EWCA Civ 543; Warren Swain, “Contract as Promise: The Role of Promising in the Law of Contract. An Historical Account” (2013) 17 Ed L Rev 1 at 19, 20.

⁵⁴ *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 at para 29 (HC).

⁵⁵ CJ Hamson “The Reform of Consideration” (1938) 54 Law Q Rev 233; Unger, *supra* note 51; *White v Jones* [1995] 2 AC 207 at 262 (HL) (Lord Goff); Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford: Hart Publishing, 1998) at 197; *Gay Choon Ing*, *supra* note 1 at para 92; see also Andrew Boon Leong Phang, “Consideration at the Crossroads” (1991) 107 Law Q Rev 21; *cf* Chen-Wishart (2009), *supra* note 45.

⁵⁶ Brian Coote, *Contract as Assumption: Essays on a Theme* (Oxford: Hart Publishing, 2010) at 25; originally published in Brian Coote, “The Essence of Contract” (1988) 3 Journal of Contract Law 91-112, 183-204.

⁵⁷ *Digilandmall*, *supra* note 1 at para 139.

⁵⁸ BA Hepple, “Intention to Create Legal Relations” (1970) 28 Cambridge LJ 122 at 127, 128.

⁵⁹ Peter Benson, “The Idea of Consideration” (2011) 61 UTLJ 241.

be problematic if the bargain aspect of an interaction is unclear. A recent English case emphasised that consideration need not be the output of a conscious thought process. The court stated, however, that when the detriment is suffered there must be a *belief that something will be received in return*.⁶⁰ There must be an understanding that an exchange is taking place. Such understanding is, however, generally absent when users conduct a Google search or visit news websites. Users are not transacting but ‘just Googling something’ or ‘browsing the news’. Most users remain oblivious to the fact that they are benefiting from sophisticated technologies, or content, that took years to develop and cost millions of dollars to maintain.⁶¹ Most users also do not realise that they are paying with their information. This lack of transactional awareness is attributable to the popular assumption that online resources are ‘free’, *ie* access is unrestricted and gratuitous. The technical accessibility of website content and services is equated with an absence of usage limitations *and* the need for reciprocity. The perception of unrestricted availability may derive from the very source of the web’s popularity: its ease of use and informal character. This perception is further reinforced by the lack of monetary payment. The indication of a price has, after all, a signalling function. Historically, most of the information on the web was available without charge or contractual restrictions. For a long time, the web has been synonymous with free expression, openness and peer production, not with commercial exploitation. Unsurprisingly, most users do not perceive their online interactions as *transactions*. They would contend that because online resources are free, there is no need to provide something in return. As there is no exchange, there is no legal intention and therefore no contract. It is, however, questionable whether the enforceability of a contract can hinge solely on a purported lack of transactional awareness, which in turn relies on popular perception. We must proceed to a discussion of the objective theory of contract, with a particular emphasis on the *reasonableness* of the user and his expectations.

III. AN OBJECTIVE EVALUATION OF INTENTION

As the requirement of intention reflects the philosophical underpinnings of contract law, particularly its focus on autonomy and self-determination, the very notion of unintended contracts seems untenable. The practical reality, however, differs. Contract law relies on appearances; identifying the circumstances in which the parties are *regarded* as having reached agreement.⁶² Commercial certainty requires a detachment from the actual *subjective* state of mind of individual participants. Intention is evaluated objectively, from the perspective of a reasonable addressee.⁶³ Alternatively, it can be said that a statement is construed “in the sense in which it would

⁶⁰ *Pitts v Jones* [2007] EWCA Civ 1301 at para 18.

⁶¹ For example, Google’s research and development expenses in 2015 amounted to US\$12.282 billion, as of 31 December 2015, source: Bloomberg LP.

⁶² *Gay Choon Ing, supra* note 1 at para 56; Richard Craswell, “Offer, Acceptance, and Efficient Reliance” (1996) 48 *Stan L Rev* 481 at 482.

⁶³ *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 915 (HL) (Lord Diplock); see also JM Perillo, “The Origins of the Objective Theory of Contract Formation and Interpretation” (2000) 69 *Fordham L Rev* 427; Phang & Goh speak of “promisee objectivity” in Andrew Phang Boon Leong & Goh Yihan, “Offer and Acceptance” in Andrew Phang Boon Leong, ed, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012), at paras 03.012, 03.013 [Phang & Goh].

reasonably be understood” by its addressee.⁶⁴ By judging intention from words and behaviour, the objective approach protects the reliance and expectations of those to whom such words and behaviour are directed.⁶⁵ Driven to its extreme, the need to protect reliance may trump the need for consent⁶⁶ or even the basic premise that contractual obligations are voluntarily assumed.⁶⁷ It is acknowledged that contracts can be formed against the wishes of one of the parties, the price of certainty being measured “in terms of the small number of parties who find themselves bound to transactions which they did not intend.”⁶⁸ If it is only *appearances* of intention that matter, then our previous concerns regarding the presence of contractual intention may seem of limited relevance. Some questions arise though. What if the number of such ‘unintended transactions’ is not small? What if most Internet users do not intend to contract when accessing websites? More importantly, which of the parties, the user or the operator, seems more deserving of the protection of the objective theory of contract? We must also remember that, as emphasised in *Digilandmall*, the objective theory of contract cannot assist an addressee of a statement if he knew that it does not represent the true intention of its maker.⁶⁹ In other words, despite objective appearances, the maker of a statement will not be bound if the addressee knows that the maker does not *subjectively* intend to be bound.⁷⁰ The objective theory of contract is overridden not so much by subjective intention but by *knowledge* of subjective intention. In the present discussion, the operators’ intention is beyond doubt. They want to contract on the terms provided by the legal link and harvest user information in return for the right to use the content and/or services made available on their websites. Most users, however, will deny any contractual intent—or even any awareness that a transaction is taking place.

A. Reliance on Appearances

Both the statements of the user and the statements of the operator must be evaluated objectively. The first complications concern certain assumptions underpinning the objective theory of contract. The latter protects persons reasonably relying on appearances, not persons *creating* appearances. It assumes, however, that each person controls and is therefore responsible for the statements (*ie* appearances) he makes. The straightforward distinction between those who create and those who

⁶⁴ *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2002] 2 SLR (R) 407 at para 40 (CA) [*Tribune Investment*].

⁶⁵ Robertson, *supra* note 29 at 203; Coote, *supra* note 56 at 22.

⁶⁶ Randy E Barnett, “A Consent Theory of Contract” (1986) 86 Colum L Rev 269 at 306.

⁶⁷ Robertson, *supra* note 29 at 204.

⁶⁸ William Howarth, “A Note on the Objective of Objectivity in Contract” (1987) 103 Law Q Rev 527 at 531.

⁶⁹ *Digilandmall*, *supra* note 1 at para 105; see also Lord Phillips of Worth Matravers in *Shogun Finance Ltd v Hudson* [2003] 3 WLR 1371 at para 123 (HL), referring to *Hartog v Colin & Shields* [1939] 3 All ER 566; *Smith v Hughes* (1871) LR 6 QB 597 at 610. See also *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR (R) 440 at para 30 (CA); *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR (R) 798 at para 15 (CA).

⁷⁰ *Treitel*, *supra* note 44 at para 02-003; JP Vorster, “A Comment on the Meaning of Objectivity in Contract” (1987) 103 Law Q Rev 274 at 287; JR Spencer, “Signature, Consent, and the Rule in *L’Estrange v Graucob*” (1973) 32 Cambridge LJ 104 at 106, 107; PS Atiyah, “The Hannah Blumenthal and Classical Contract Law” (1986) 102 Law Q Rev 363 at 364.

rely on appearances often collapses in online transactions. The operator's statement takes the form of his website. The user makes a statement by browsing the website. Arguably, however, the appearances are created by operators, not by users. It can be stated, without much exaggeration, that operators design both their statements and—to a large extent—those of the users. Operators create the content, structure, sequence and permissible range of interactions on websites. User input is limited to activating hyperlinks, checking boxes and, sometimes, filling out fields. The form and contents of statements 'made by' users are predetermined by operators. Users respond to websites in a controlled manner, with little room for personalised input. The statements of a user can only 'mirror' the statements of the operator, the meaning of a click only derive from the context created by the website. No intention to create legal relations can be inferred from the user's actions if no such intention is apparent from the website. It seems artificial to regard the operator as the 'addressee' of a user's statement if he dictates its content and the context in which it is made. The original function of the objective theory of contract, *ie* protecting reliance on a statement, loses its justification.⁷¹ Consequently, although in the majority of circumstances it is the *user's* intention that is in question, the analysis should focus not on the statement of the user but on that of the operator: the website itself. Does the website indicate that the operator intends to be legally bound? Is it objectively apparent that a transaction is taking place or does the website create an appearance of unrestricted availability of its content? To reiterate: references to commercial certainty based on protecting the addressee's reliance must be approached with caution as it may be the addressee who controls—or at least largely predetermines—the statements he receives. The analysis would be simplified if it was possible to establish that a particular website constituted an offer, that is, evinced the operator's intention to be bound by a simple 'yes.' The user's actions, including continued browsing, could be interpreted as an acceptance. The separate inquiry into the presence of contractual intention would be superfluous. Problems of consideration would not arise because acceptance would constitute a counter-promise. It is, however, generally difficult to determine whether a particular website constitutes an offer or only an invitation to treat. The existence of an offer depends on the contents of a statement, not on its form. Although the interpretation of certain kinds of expressions appears standardised,⁷² care must be taken not to generalise. Many websites can be compared to shop displays, mail-order catalogues or to traditional advertising,⁷³ each of which is routinely regarded as a non-binding invitation to treat. The fact that a given website can be subsumed under either category does not, however, preclude it from being binding as both advertisements and shop displays can constitute offers if they are sufficiently

⁷¹ Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 2d ed (Oxford: Oxford University Press, 2011) at para 3.09 [McMeel, *Construction of Contracts*].

⁷² Eisenberg, *supra* note 31 at 1129; Treitel, *supra* note 44 at para 2-007.

⁷³ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 at 407 (CA); *Lacis v Cashmarts* [1969] 2 QB 400 (Divisional Court). See also *ETA*, *supra* note 37, s 14, which establishes the default rule that a proposal to conclude a contract made through electronic communications which is not addressed to one or more specific parties but is generally accessible to parties making use of information systems (including proposals that make use of interactive applications for the placement of orders through such systems) is deemed to be an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

certain and complete to allow the inference of intention.⁷⁴ Given the automation of the interaction and the restricted range of user input, many websites are comparable to vending machines. The latter are generally regarded as offers.⁷⁵ The resemblance to vending machines is particularly strong when the performance of the contract, *ie* the delivery of digital content or services, occurs online. In such instance, the protective function of invitations is not required as the risk of over-acceptance is generally absent. It could be argued that websites like Google or CNN.com constitute offers. The completeness of their contents evinces an intention to be bound. The contractual subject matter is certain: search services and the provision of news, respectively. In the case of Google, users select the search term, in the case of CNN.com, users select the content of interest. Nothing else needs to *or can be* added. The transaction is immediately executed. From a strictly legal perspective, the contents and certainty of many websites indicate an intention to be bound. Still, from the perspective of the average user, an analysis in terms of offers and invitations may seem more natural in the case of websites selling books, tickets or hotel rooms. In this sense, the existence of an offer may be as difficult to determine as the presence of a commercial context. It is worth noting that the binding character of websites is often expressly excluded in the terms of use, leading to a situation where the offer is made by the user and the operator's acceptance takes the form of the actual provision of the service or content. As the contents of most statements are dictated or controlled by operators, no substantive difference flows from this reversal of roles.

B. *The User's Perspective*

It must be conceded that operators cannot rely on self-created appearances. The fact that operators control the online interaction does not, however, absolve users from exercising a certain amount of diligence when browsing the web. We must remember that the objective theory protects only *reasonable* addressees—and the user is, after all, an addressee of the operator's statement, *ie* the website. We must also remember that users access websites for specific purposes and are presented with certain content. If we regard the user as a reasonable addressee of the operator's statement, we must analyse his intention from multiple angles. The discussion must include three interrelated factors: (a) the indispensable level of understanding of one's actions; (b) the omnipresence of 'legal links'; and (c) the 'reasonableness' of user expectations. Although presented under separate headings, all converge on the question: "Under what circumstances is the user able to *successfully* claim that he had no intention to be legally bound?" Alternatively, the question can be phrased as: "When should a click, or continued browsing, be *regarded as* an expression of intention?"

1. *Intention and 'Understanding'*

Arguably, legal intention presupposes a certain level of understanding of the implications of one's actions. The fact that an act was intentional does not, however,

⁷⁴ *Digilandmall*, *supra* note 1 at para 94; *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 262 (CA); *Parker v Clark* [1960] 1 All ER 93; *Lefkowitz v Great Minneapolis Surplus Store*, 86 NW (2d) 689 (Minn 1957); *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225 (HL).

⁷⁵ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169 (CA) [*Thornton*].

mean that its legal consequences were intended.⁷⁶ This distinction becomes relevant when a single click can create a contractual relationship and when the very existence of a contract could hinge on the user's contention that he did *not* intend any consequences. We must inquire about the minimal threshold of intention that can sustain an enforceable agreement, objective theory notwithstanding. *What* exactly must be intended? As contractual obligations must be *voluntarily assumed*,⁷⁷ intention cannot be separated from the concept of voluntariness, which, in turn, implies an understanding of what one is doing. Although the problem exists in simultaneous exchanges, it seems more pertinent to executory contracts, where the parties' obligations are to be performed over an extended period of time. Unsurprisingly, academic views diverge as to the indispensable *degree* of understanding. Robertson, who discusses voluntariness predominantly in the context of standardised contracts, contends that an obligation can only be regarded as voluntarily assumed if it is "meaningfully understood".⁷⁸ Coote, whose theory on the nature of contractual obligations rests upon the very concept of 'assumption', emphasises that the parties need not "turn their minds beforehand to every incident of the intended relationship." It is possible to intend an act the *full* legal consequences of which are unknown.⁷⁹ Chen-Wishart, who analyses intention in the context of mistake,⁸⁰ states that the conduct purportedly constituting consent must be intentional, accompanied by knowledge that it will count as contracting and a "minimum threshold of accuracy as to the gist of the contract."⁸¹ If one has made a fundamental mistake as to the very nature of the obligation undertaken, the consent is not sufficiently meaningful to justify enforceability.⁸² While this approach does not require a thorough comprehension of the obligation being undertaken, it requires that a person knows that he is assuming *some* obligation. Similarly, Smith states that one can misunderstand the content of an obligation but not the fact of undertaking an obligation.⁸³ The latter two approaches reflect the view that contracts cannot be entered into by mistake and that actual, *subjective* intention matters when establishing the existence of a contract. To date, however, these views have found limited support.⁸⁴ The relationship between contractual intention and the indispensable level of understanding of one's actions could be discussed *ad infinitum*. Different conclusions will be reached depending on whether we insist on the presence of subjective intention (which is an isolated view) and whether we lean towards reliance or towards promissory theories. In principle, parties are bound by their outward behaviour.⁸⁵ From a practical perspective,

⁷⁶ For a detailed discussion see: Elizabeth MacDonald, "When is a Contract Formed by the Browse-wrap Process?" (2011) 19 Intl JL & IT 285 at 300.

⁷⁷ *Chitty*, *supra* note 36 at paras 1-027-1-029; Burrows, *supra* note 55 at 13; Coote, *supra* note 56 at 43, 45, 50; Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981).

⁷⁸ Robertson, *supra* note 29 at 181.

⁷⁹ Coote, *supra* note 56 at 45.

⁸⁰ Mindy Chen-Wishart, "Contractual Mistake, Intention in Formation and Vitiating: the Oxymoron of *Smith v Hughes*" in Jason W Neyers, Richard Bronaugh & Stephen GA Pitel, eds, *Exploring Contract Law* (Oxford: Hart Publishing, 2009) at 341.

⁸¹ *Ibid* at 365.

⁸² *Ibid*.

⁸³ Smith, *Contract Theory*, *supra* note 30 at 61.

⁸⁴ *Ibid* for a detailed discussion at 61, 173, 174.

⁸⁵ McMeel, *Construction of Contracts*, *supra* note 71 at para 3.13.

assuming that one of the main functions of contract law is to facilitate exchanges or enable bargains, an intention to be legally bound must *at least* encompass an intention to transact.⁸⁶ While not all potential legal consequences of an act need to be contemplated, an understanding or awareness that an exchange is taking place must be regarded as indispensable. Anything more would impose an unrealistic threshold, which is not reflected in commercial practice. Anything less would contradict the basic principle that contractual obligations are assumed. Taking everyday commercial practice as a point of reference, it becomes apparent that contract law does not require that parties intend the legal consequences of their actions. Mapping abstract legal principles onto actual behaviour is artificial and difficult. Contract law looks at outward appearances and, *post factum*, places certain labels on certain acts. If the parties *seem* to engage in transacting behaviour then contract law will *infer* that both parties had the requisite legal intention. A person purchasing a coffee does not understand that the exchange of money for the beverage creates an enforceable agreement. A contract is formed despite such indifference to or absence of legal intention. It seems to suffice that the person intends to buy a coffee; *ie* the *act* that will give rise to legal consequences, not the consequences themselves. As long as a person intends to transact, establishing the presence of legal intention should not be a problem. It is, however, overly simplistic to state that it suffices to intend to click without realising the possible legal implications. Instead, we should disregard the click (and its deceiving simplicity) and focus on the fact that the user *intends to benefit* from the website resources. In this context, is the user's purported lack of transactional awareness justified in light of what he sees on the website?

2. The 'Legal Link'

This stage of our analysis requires an examination of the website content. All popular websites conventionally display a hyperlink in their lower portions, which, upon activation, displays the terms of the transaction (the aforementioned 'legal link'). The nearly pervasive presence of legal links forces us to inquire about their significance. This in turn requires an analysis of the process of incorporating terms. Formation and incorporation are discrete concepts; formation concerns the *existence* of a contract, incorporation concerns the *contents* of an existing contract. Problems of incorporation are relevant for two reasons. First, in some instances, successful incorporation may affect formation, *ie* the formation of a contract may depend on the communication of terms. Such is the case when terms prescribe the manner of expressing intention or acceptance, *eg*, "by staying on the site you agree to be bound by our terms."⁸⁷ Technically, if the terms have not been communicated, the other party does not know how to assent. Analysed in terms of offer and acceptance, an offeror is the master of the offer and dictates the manner of acceptance. As the offer can only be accepted in the prescribed manner, acceptance requires *knowledge* of the offer.⁸⁸ Second, enforceability requires certainty and completeness. An agreement that is not sufficiently certain is presumed not to be intended to be legally binding.⁸⁹

⁸⁶ Coote, *supra* note 56 at 39.

⁸⁷ See *eg*, Register.com, *supra* note 19.

⁸⁸ Phang & Goh, *supra* note 63 at para 03.138.

⁸⁹ Gay Choon Ing, *supra* note 1 at para 47.

Terms describe the transaction: what rights are granted by operators to users and what rights are granted by users to operators. In many instances, without the terms, the agreement would fail for want of certainty and completeness as it may be difficult to imply terms in fact or find suitable statutory provisions due to the new type of transactional subject matter. In sum, while the enforceability of contracts governing the use of websites presents a broader problem than the question whether the terms behind a 'legal link' have become incorporated, the two issues overlap. Logically, assent to the terms indicates assent to the contract.⁹⁰

All methods of incorporation require that terms be communicated before the act concluding contract formation. *But*, the party seeking to incorporate terms need not (a) impart actual knowledge of their content or force the other party to read them, (b) physically provide the terms or ensure their immediate availability. It is their *existence*, not their contents that must be communicated. Once the other party knows *of* the terms, it is her choice to request and read them. In cases concerning incorporation by signature, the signatory is bound, regardless whether he has read the document.⁹¹ Despite the broad understanding of the term 'signature', most cases deal with handwritten signatures on documents that are evidently contractual. We need not, however, debate what constitutes a signature in online transactions.⁹² The point is that signatures, whether traditional or electronic, incorporate terms only if placed on a *contractual* document. The legal effect of a signature derives from the nature of the document being signed and from the intention with which it is made. Consequently, if signatures cannot incorporate terms if not placed on contractual documents, then clicks cannot express contractual intention if made on websites that do not appear transactional. Of particular importance to our problem is incorporation by notice. For terms to become incorporated, notice of their existence must be reasonable in light of the surrounding circumstances.⁹³ Although incorporation concerns terms in general, more notice is required with regards to onerous or unusual terms.⁹⁴ It is also acknowledged that it may not be reasonable to expect terms on certain types of documents.⁹⁵ Lastly, as it may be impracticable to provide terms in the contractual document or at the time of transacting, incorporation can occur by reference to other documents or locations.⁹⁶ To date, courts have tolerated references to terms available in remote locations, recognising the difficulties of *providing* or

⁹⁰ The possibility of applying legal analysis pertaining to the incorporation of terms to the formation of a contract has been expressly recognised in *Century 21 Canada Limited Partnership v Rogers Communications Inc*, 2011 BCSC 1196, 338 DLR (4th) 32 [*Century 21*].

⁹¹ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 at 134 (HL) (Lord Devlin).

⁹² See *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 (CA) for a discussion on whether the requirements of s 6(d) of the *Civil Law Act* (Cap 43, 1999 Rev Ed Sing) can be fulfilled by electronic means of communication; MacDonald, *supra* note 76 at 198.

⁹³ *Chapelton v Barry Urban District Council* [1940] 1 KB 532 (CA); *Hood v Anchor Line* [1918] AC 837 at 844 (HL) [*Hood*].

⁹⁴ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA); *Spurling v Bradshaw* [1956] 2 All ER 121 (CA).

⁹⁵ *Hood*, *supra* note 93; *Parker v The South Eastern Railway Co* (1877) 2 CPD 416 (CA) [*South Eastern Railway*].

⁹⁶ *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep 160 (QB); *Hong Kong Borneo Services Co Ltd v Pilcher* [1992] 2 Lloyd's Rep 593 (QB).

reading terms at the point of sale, *eg*, in parking lots,⁹⁷ ferry terminals⁹⁸ or railway stations.⁹⁹ Incorporation procedures have been tailored to the practical constraints of traditional transacting environments. Online, however, these constraints disappear; the legal link provides a direct reference and ensures that terms remain available throughout the interaction. More importantly, the link is visible from the moment the user enters the website. For present purposes, the Google website can be regarded as a test example. It provides a minimalist interface: a search bar and a number of links, including one labelled 'Terms', against a white background. Google's website ranks very low in complexity of content and structure but high in usability and communication effectiveness.¹⁰⁰ Many websites are on the other end of the extreme; the interface is cluttered and the discovery of terms involves a sequence of non-intuitive steps. The cognitive distortions inherent in artificial interfaces may be aggravated by distracting or malicious design.¹⁰¹ While acknowledging the multitude of possible configurations (and the accompanying range of legal problems), it is useful to simplify the analysis with the following assumptions: (a) the link remains visible in lower part of the screen and displays the terms upon its activation; and (b) its wording is unambiguous, *eg*, 'Terms of Use' or 'Legal Terms'. Both assumptions reflect prevalent practice. It is also assumed that every user understands that "more information is available by clicking on a blue hyperlink"¹⁰² and that on the smaller screens of mobile devices the legal link features more prominently. The question remains: how does the visibility of the link and the availability of terms affect the user's argument that he did not have *any* legal intention? It is possible to build opposing arguments.

The first argument contends that the legal link does not signal the occurrence of a transaction or that continued browsing is subject to contract. An intention to be legally bound, on the side of either the operator or the user, cannot be inferred from its presence. While it is reasonable to expect terms when a transaction is taking place, it is not necessarily reasonable to conclude that a transaction is taking place whenever terms are present. Notice of terms constitutes a prerequisite of incorporation when the fact of contracting is beyond doubt. Moreover, the availability of terms does not solve the problem of intention. Intention is predominantly a product of context not information.¹⁰³ Absent transactional awareness, users will not understand the relevance of the link. The first argument attributes no significance to its persistent visibility and to the fact that terms can be read at the user's convenience. It accepts the user's contention: "I saw the link but I disregarded it because I thought it was irrelevant." The second argument centres on the visibility of the legal link and the ease with which a user can inform itself as to its relevance, *ie* retrieve its contents. It is conceded that according to the principles of contract law it is the type of document or the transactional context that create an expectation of terms—not the other way

⁹⁷ *Thornton*, *supra* note 75.

⁹⁸ *Hollingsworth v Southern Ferries Ltd (The "Eagle")* [1977] 2 Lloyd's Rep 70 (QB); *The Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379 (HCA).

⁹⁹ *South Eastern Railway*, *supra* note 95.

¹⁰⁰ Robert Mai *et al*, "The Shifting Range of Optimal Web Site Complexity" (2014) 28 *Journal of Interactive Marketing* 101.

¹⁰¹ Woodrow Hartzog, "Website Design as Contract" (2011) 60 *Am U L Rev* 1635 at 1688.

¹⁰² *Hubbert v Dell Corporation*, 835 NE (2d) 113 at 121 (Ill App Ct 2005).

¹⁰³ Omri Ben-Shahar, "Regulation Through Boilerplate: An Apologia" (2014) 112 *Mich L Rev* 883 at 891.

around. It can be argued, however, that expectations become irrelevant when the presence of terms is not in question. If the website displays terms, it is reasonable to assume that they are somehow relevant, *eg*, that continued use of the website might be subject to contract. The user's contention that he disregarded the link because he did not comprehend its legal significance is rejected. The user makes a deliberate decision not to inform herself and thus assumes the risk of any adverse consequences. The latter are easily prevented by minimal inquisitiveness. The second argument assumes that the legal link puts a user on notice. The effortlessness with which terms can be reviewed compensates for any residual doubts a user might have as to their relevance. Even Radin, an ardent opponent of standard terms, acknowledges that if the user knows (or should know) *about* the terms *and* proceeds within the site, such action objectively indicates their acceptance.¹⁰⁴ To clarify: the second argument does not contend that the mere presence of terms ensures their enforceability. It only contends that legal links are omnipresent and that it may be difficult to deny knowledge of their existence, especially with repeated use of one website or similar websites. The pervasiveness of a practice does not determine its legal effect. It may, however, *as a matter of fact* preclude the claim that one was unaware of the practice. The main weakness of the first argument lies in that it denies that the presence of terms has any legal implications and, effectively, absolves the user from any inquisitiveness; the main weakness of the second argument lies in the inference of contractual intention from the mere notice of terms.

Neither argument can *in itself* determine the outcome of the discussion. Both converge on the question whether the link constitutes sufficient notice of the legal consequences attached to the continued use of the website; that is: whether the user can deny any transactional awareness while knowing of the existence of the legal link. It is uncontroversial that notice must be reasonable in light of the surrounding circumstances and that enhanced notice requirements accompany particularly onerous provisions. It could be argued that the ambiguous context of many online interactions requires that users be *specifically* notified that proceeding within the website is subject to contract. The less clear the transactional context, the more notice would be required. As is pointed out by MacDonald: what constitutes reasonable notice for the purposes of incorporation may not suffice for the purposes of formation.¹⁰⁵ Some support for an enhanced notice, *ie* the introduction of an additional element apart from the legal link, can also be derived from contract law, albeit through an indirect route. The absence of transactional awareness is largely attributable to the lack of monetary consideration. Payment, as opposed to a passive acquiescence to the collection of one's information, signals that an exchange is taking place. Consideration itself is often regarded as performing the same cautionary function as formalities. It is argued that formality could replace consideration,¹⁰⁶ or that nominal consideration could be regarded as a formality indicating legal intention if the presence of a bargain was otherwise unclear.¹⁰⁷ Coote observed that consideration has supplanted

¹⁰⁴ Margaret Jane Radin, "Online Standardization and the Integration of Text and Machine" (2002) 70 Fordham L Rev 1125 at 1126.

¹⁰⁵ MacDonald, *supra* note 76 at 295, 300.

¹⁰⁶ Swain, *supra* note 53 at 4.

¹⁰⁷ Chen-Wishart (2009), *supra* note 45 at 438; see also *Merritt v Merritt* [1970] 2 All ER 760 (CA); *Haggard v De Placido* [1972] 2 All ER 1029 (QB).

form or other “ceremonies” as a way of differentiating contract formation from other actions.¹⁰⁸ The informal character of online interactions could thus be interpreted as increasing the need for signals and ceremonies. The point is not, however, to add nominal consideration, as consideration is already present, or re-introduce formalities into contract law. The point is to alert users that an exchange is taking place. Enhanced notice would thus replicate the cautionary, or ‘ceremonial’, function of consideration.¹⁰⁹ The problem with the proposition, however, is that creates a principle *specific* to Internet transactions. This contradicts the legal position in Singapore. It was “axiomatic” that normal contractual principles continue to apply online.¹¹⁰ The *Digilandmall* Court acknowledged, however, that “not all principles will or can apply in the same manner that they apply to traditional paper-based and oral contracts.”¹¹¹ Arguably, we are not introducing a new principle but only changing the application of an existing one or adapting the concept of ‘reasonableness’ to the new circumstances. Neither approach, however, ensures legal certainty. The difference between creating new rules and applying old rules differently is elusive. It is also unclear which principles can be applied differently and which are immutable. An additional difficulty lies in defining ‘online transactions’. What would be the primary criterion of differentiation: the manner of communication or the novel contractual subject matter? These questions alone require careful analysis. Lastly, it is unclear what form enhanced notice should take. There are few technical options: pop-up windows, interstitial webpages or persistent page elements resembling cookie notification bars, popular in EU jurisdictions. All of them would require users to (at least briefly) view whatever text is presented on them and require some action to proceed within the website, effectively creating a regime resembling US ‘click-wrap’ agreements. The introduction of enhanced notice requirements can only be debated on the assumption that the legal link does not constitute a *reasonable* notice that a transaction is taking place or alert a *reasonable* user that the continued use of the website is subject to contract. It will always remain controversial what constitutes reasonable notice and what standard of behaviour is expected from the reasonable user. To a large extent both factors will depend on his expectations.

3. Reasonable Expectations

It is uncontroversial that the objective theory protects *reasonable* addressees. It is equally uncontroversial that the law only protects the “reasonable expectations of honest men”.¹¹² Without indulging in unnecessary semantics, it can be assumed that ‘reasonable expectations’ correlate, to a large extent, with the knowledge that must be possessed by a reasonable Internet user and, ultimately, affect his ability to claim that he had no legal intention or, at least, no transactional awareness. When establishing

¹⁰⁸ Coote, *supra* note 56 at 41.

¹⁰⁹ Juliet M Moringiello, “Signals, Assent and Internet Contracting” (2005) 57 Rutgers L Rev 1307 at 1316.

¹¹⁰ *Digilandmall*, *supra* note 1 at para 102.

¹¹¹ *Ibid* at para 91.

¹¹² Lord Steyn in Johan Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997) 113 Law Q Rev 433 at 434; *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd’s Rep 25 at 27 (CA); Yong Pung How CJ in *Tribune Investment*, *supra* note 64 at para 40: “[T]he function of the court is to try as far as practical experience allows, to ensure that the *reasonable* expectations of *honest men* are not disappointed” [my emphasis].

what expectations are reasonable, the main difficulty lies in mapping the assumptions and knowledge based on our real life experiences onto the online environment. Users are expected to know that digital content, such as movies or music, is protected by copyright and must not be downloaded illegally. Are they, however, expected to know that website content and services are expensive to create and, accordingly, expect to pay for their use? Or are they permitted to claim ignorance of these facts and, again, rely on a purported lack of transactional awareness despite the unquestionable presence of legal terms? In a recent case concerning the enforceability of website contracts, Justice R Punnnett stated:

The manner in which the web has developed with freely available access may differentiate a user's expectations of the web from the user of a service such as a bus, train or aircraft. While the expectation of a user may be that access is free and without restrictions, the Internet and its use is an evolving entity. As such, expectations change as does the sophistication of the user. In addition, it is not the users' expectation that is determinative. What they assume to be the case does not take precedence over the existence of an offer, notice of that offer and the act of acceptance. An erroneous expectation, even with legal advice, does not prevail.¹¹³

It must be conceded that many websites do not appear unequivocally transactional. Arguably then, the legal link may not constitute sufficient notice that continued browsing is subject to contract. At the same time, it must be acknowledged that users access websites for a specific purpose: to *use* the content and services made available thereon. When discussing the minimal understanding of the legal implications of one's actions, it was tentatively established that users must *at the very least* comprehend that an exchange is taking place. While we may question the user's *legal* intention to enter into a contract, we cannot question the reason he accesses websites. The act of browsing must be seen as a means to an end; to obtain a benefit. Is it, however, reasonable to expect that services or content can be used without giving anything in return? The user's denial of contractual intention rests on his purported lack of transactional awareness. The latter is, however, attributable to his expectations that website resources are 'free' and unrestricted. As indicated, part of the problem in establishing reasonable expectation lies in the difficulty of transposing offline expectations onto the online environment. Arguably, it is reasonable to expect that if an activity is not governed by contract offline then it should not be governed by contract online. This argument, however, relies on the untested assumption that each online activity has an offline equivalent that is 'contract free'. It also disregards the presence of intermediating technologies.¹¹⁴ Websites are accessed to shop, bank, work, watch movies, listen to music or socialise. Some of these activities resemble or supplement existing practices; others have no real-world equivalent. Caution must be exercised when comparing an online activity to its purported offline counterpart. If there is nothing to compare it to, it becomes difficult to argue that some activity was, until the emergence of the web, free of contract. *There may not be any similar activity.* We continue to meet friends for lunch and gossip in hallways.

¹¹³ *Century 21*, *supra* note 90 at para 77.

¹¹⁴ Hartzog, *supra* note 101 at 1650.

In both instances our interactions are not governed by contract. The Internet does not change anything in this regard. We do, however, also use novel technologies for our social and professional interactions as well as for our entertainment needs. The fact that real life social interactions do not require a contract is irrelevant if Facebook and Twitter are qualitatively different and involve the use of third party services and a multitude of technologies. Similarly, we have always been *contracting to buy* newspapers, music and movie tickets. Contractual relationships have accompanied the consumption of most media. Why then, should users not expect to contract for identical content if it is delivered online?

C. A Detour into Unilateral Mistake

A user may claim that he was mistaken as to the fact that his continued use of the website would result in a contract. Cases on unilateral mistake traditionally concern the contractual subject matter, the terms of the transaction or the identity of the other party¹¹⁵—not the fact of entering into a contract. Unilateral mistake is also frequently discussed as part of the offer and acceptance model,¹¹⁶ with the mistaken assumption or manifestation of intention effectively preventing *consensus ad idem*. While the role of subjective intention in contract formation remains controversial, the role of *knowledge* of subjective intention is relatively clear.¹¹⁷ For present purposes, it is worthwhile to revisit the reasoning in *Digilandmall*. Although the case concerns a mistake as to terms, not a mistake as to the fact of contracting, it explores the interrelationship between the objective theory of contract and the knowledge that must be imputed to a reasonable Internet user. This knowledge in turn assists in evaluating the reasonableness of the user—and his expectations. The case emphasises the necessity to analyse not only the statement but also the state of mind of its addressee; *ie* the party seeking the protection of the objective theory. *Digilandmall* concerned the display of incorrect, absurdly low prices on a website selling electronic equipment. The incorrect pricing was due to the error of an employee who uploaded a training template to a live website. Unsurprisingly, many orders were placed for a specific type of printer, which was advertised far below its market value, *ie* \$66 instead of \$3,854. According to the objective theory, the sellers who owned the website would have been obliged to sell the printers at the erroneous prices. After discovering the error, the sellers informed those who placed orders that they would not be fulfilling them. A number of disgruntled customers sued to enforce the purported contracts at the incorrect prices. After restating the need for certainty inherent in the objective theory of contract, the High Court focused on the state of mind of the plaintiffs (*ie* the addressees of the erroneous statement). The Court described their opportunistic attitude, educational background and IT literacy. Some importance was also attributed to their honesty.¹¹⁸ The most controversial issue was, however, the “knowledge possessed and/or belief entertained by each of

¹¹⁵ *Smith v Hughes*, *supra* note 69 at 607.

¹¹⁶ For a detailed discussion see Stephen A Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed (Oxford: Oxford University Press, 2005) at 76, 77; *Treitel*, *supra* note 44 at para 8-045.

¹¹⁷ See generally McMeel, *supra* note 71 at paras 3.12-3.38.

¹¹⁸ *Digilandmall*, *supra* note 1 at paras 142-144.

the plaintiffs.”¹¹⁹ When seeking to establish what the plaintiffs knew or should have known, the High Court emphasised that they had “readily accessible means from the very same computer screen”¹²⁰ to ascertain the seller’s true intention. It must be emphasised that the Court did not seek to import subjective elements into the discussion. Quite the opposite; the question was whether the belief that the seller was willing to contract on extremely low prices was reasonable in light of what was or should have been known. The knowledge of the plaintiffs was evaluated against an *objective* standard. Transposing this reasoning to our analysis, it can be assumed that the principle that “a man is taken to have known what would have been obvious to a reasonable person in the light of the surrounding circumstances”¹²¹ applies to both users and operators. Users must not resort to the objective approach if their belief in the unrestricted availability of website resources does not correspond with what they know *or should know*. At the same time, we must acknowledge the difference between the situation in *Digilandmall*, where a statement containing an *obvious* error cannot justify a belief in its accuracy and a situation where a belief that website content and services are ‘free’ is based on a statement that can be considered ambiguous and/or the addressee’s subjective assumptions. In the former instance, the addressee *knows* that the statement does not represent the subjective intention of its maker. In the latter, such intention may not be obvious but the addressee makes no effort to ascertain it. He assumes that no exchange is necessary and that there is no contract. In both instances the addressee cannot be considered reasonable in light of what he should have known. The Court stated that although carelessness did not prevent a party from invoking the doctrine of mistake, knowledge of certain facts had to be imputed if it appeared that by exercising reasonable care the true facts ought to be known.¹²² The Court of Appeal confined the holding of the High Court to *actual* knowledge of the mistake, but emphasised that knowledge had to be proven like any other fact. Phrases such as “must have known” were evidential factors used in finding that the non-mistaken party did in fact know of the mistake.¹²³ Furthermore, the Court of Appeal equated actual knowledge with “wilful blindness” and debated the type of circumstances under which a person should make an inquiry.¹²⁴ Following *Digilandmall*, it could be argued that a reasonable user would notice the legal link *and* examine its relevance. His assumption that the website resources are available without the need for reciprocity would be irrelevant if it did not correspond with what he knew or should have known. It could, however, also be debated whether operators know (or believe) that most users do not intend to contract or are browsing the website on the mistaken assumption that its resources are available without restrictions. The answer will depend on an objective interpretation of the user’s behaviour on the website. The test, in relation to “whether a

¹¹⁹ *Ibid* at para 11; see also Andrew Phang, “Contract Formation and Mistake in Cyberspace” (2005) 21 *Journal of Contract Law* 197 at 202; Lee Pey Woan, “Unilateral Mistake in Law and Equity—*Solle v Butcher* Reinstated” (2006) 22 *Journal of Contract Law* 81.

¹²⁰ *Digilandmall*, *supra* note 1 at para 146.

¹²¹ *Ibid* at para 112.

¹²² *Ibid* at para 146.

¹²³ *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR (R) 502 at para 35 (CA) [*Digilandmall (CA)*]; see also *Centrovincial Estates PLC v Merchant Investors Assurance Co Ltd* [1983] Com LR 158 (CA).

¹²⁴ *Digilandmall (CA)*, *supra* note 123 at para 42.

person ought to have realised that a mistake had been made, was not what the actual intentions of each party were but what each party was entitled to conclude from the attitude of the other.”¹²⁵ Operators must share the understanding of a reasonable man. If a user so conducts himself that “a reasonable man would believe that he was assenting to the terms proposed”¹²⁶ the user will be bound. As indicated, the evaluation of the user’s behaviour will depend on the significance attributed to the presence of terms (*ie* legal link) and the type of content or services made available on the website. Is it reasonable for a user to expect that they are provided without restrictions?

IV. FINAL OBSERVATIONS

Contracts governing the use of website resources will continue to create controversies. Although the legal principles that are relevant to their enforceability seem well-established and uncontroversial, their practical application in the online environment is far from straightforward. The objective theory of contract must allow for the fact that the person seeking its protection, the website operator, may be the one who created the appearances of agreement. At the same time, despite objective appearances the website user may seek to escape liability on the basis that he did not have the requisite intention to be legally bound. His denial of intention will rest, almost exclusively, on an alleged absence of transactional awareness deriving from an expectation that website resources are free. Moreover, as the principles of contract formation become intertwined with the principles concerning the incorporation of terms, it becomes necessary to determine whether—or to what extent—concepts of from incorporation can be transposed to formation scenarios. This question is particularly pertinent in the context of notice: can the concept of enhanced notice concerning onerous terms be extended to alert the user that a contract is being formed? The outcome of any discussion cannot be based on a single argument, but must involve a careful consideration of multiple factors including the legal implications, if any, of the presence of the legal link and the importance of user expectations. The conclusion will largely depend on what is considered *reasonable* notice and what level of inquisitiveness or what state of knowledge is expected from a *reasonable* Internet user. Needless to say, defining a ‘reasonable user’ is impossible in the abstract. The point of reference will vary depending on the jurisdiction. In countries such as Singapore, which rank high in broadband penetration and IT literacy, users may be held to a higher standard—both with regard to their presumed knowledge and the reasonableness of their expectations. Arguably, if we were to strictly follow the principles of contract law, the legal link might suffice. If, however, we were to allow for the (relative) novelty of the online transaction environment, we might require something more prominent or engaging than the legal link. It is difficult, however, to derive such requirement from the principles of contract law. Each website must be evaluated *in casu*, in light of the specific manner the terms have been presented and in light of the reasonableness of the user’s expectations that the resources in question should be ‘for free’. Admittedly, most users do not perceive online interactions as

¹²⁵ *OT Africa Line Ltd v Vickers plc* [1996] CLC 722 at 726.

¹²⁶ *Smith v Hughes*, *supra* note 69 at 607.

transactions and do not understand the commercial value of their information. They continue to associate online contracting with companies like Amazon and eBay, not with reading the news or performing Google searches. They also associate contracting with the payment of money, and not with “pay-with-data exchanges”.¹²⁷ Are such assumptions and perceptions of continued relevance in 2016? We tend to refer to all Internet-related phenomena as ‘novel’, frequently forgetting that the Internet and the web have been part of social and commercial life for more than two decades. There is nothing legally objectionable with operators requiring users (a) to abide by certain rules as a precondition of using their services or accessing their content, and (b) to provide something in return. In sum, if we access websites to obtain specific content or services, it seems reasonable that such content or services are made conditional on the formation of a contract. Expectations based on offline experiences may not be reasonable if a particular online activity does not have an equivalent in real life or if, despite some resemblance, it is qualitatively different. On a broader level, it also seems unreasonable to expect that a benefit can be obtained gratuitously.

It must be noted that at the time of writing, website access restrictions such as pay-walls and accounts are becoming increasingly popular. Operators face the difficult task of balancing user-friendliness with the need to protect their content and *lawfully* extract user information. While legal links seem to be most user-friendly and friction-less approach to contract formation, they are surrounded by legal uncertainty. Although neither the actual communication of terms nor an express act of consent (such as an additional click) are required by contract law, access restrictions such as accounts usually involve more complex procedures that remedy any remaining legal doubts and clearly convey that the use of given website is subject to a set of terms that prescribe not only the permitted range of activities but also indicate the need to provide something in return. Paradoxically, the very procedures that are designed to communicate that a transaction is taking place constitute a source of frequent frustration. Users are forced to remember multiple log-in details, such as passwords. Moreover, all access restrictions slow down the browsing process. There is an inevitable trade-off between user-friendliness and the unequivocal communication that continued browsing is conditional on the formation of a contract. As outlined above, most arguments concerning the enforceability of website contracts converge on the fact that Internet users do not *expect* browsing to be governed by contract. Because users do not expect to pay for access (with their personal information or otherwise), they do not see the context as commercial, they do not analyse the website in terms of offers or invitations to treat and claim a total lack of transactional awareness. A denial of contractual intention must, however, be based on something more than an expectation that online resources are gratuitous. Our conclusions must be based on an objective assessment of what the operator makes available on his website, including the visibility of the legal link, and the manner in which the users interacts with the website. While *unreasonable* expectations cannot dictate legal outcomes, appearances can. Ultimately, any discussion of the enforceability of contracts governing the use of websites must be supplemented with an analysis of broader policy considerations. As indicated at the outset, the substantive provisions of contracts purporting to govern the use and access to online resource often create intersections

¹²⁷ Warner & Sloan, “Behavioral Advertising”, *supra* note 11 at 55.

with other areas of law such as intellectual property and privacy protection regimes. In such instances, material issues from those areas may override the principles of contract law. The question “are such contracts enforceable?” is replaced with the inquiry “should they be enforceable?” Unfortunately, this inquiry must be reserved for a separate paper.

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