



FORMATION OF CLICK-WRAP AND BROWSE-WRAP CONTRACTS

Povilas Kamantauskas¹

Vytauto Didžiojo universitetas

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SUMMARY

In a time of rapid development of technologies, new forms of contracting online emerge. Two of these are analyzed in this paper: click-wrap agreements (where an offer is accepted by way of clicking on an icon “I agree”) and browse-wrap agreements (where the offeree supposedly accepts the offer by browsing on a website, while the terms to the contract are accessible through an inconspicuous hyperlink).

Click-wrap agreements are formed, they are accepted in a manner recognized as binding and the offeree knows the terms she assents to.

Browse-wrap agreements are generally not formed. Even though the action of browsing on a website could indicate assent, the offeree must know that the act of browsing will be construed as acceptance. But the offeree is generally not made aware of the terms to the contract and thus cannot assent to what she is not aware of. However, if the offeree is in fact aware of the terms to the contract and still knowingly performs the action of browsing, a contract is formed and the offeree is bound.

There are some doctrinal problems with an element of an offer the action of browsing on a website could indicate assent or recklessness by the offerors as well as offerees, leading to the conclusion that the action of clicking “I agree” does not really indicate the intent of the party who performs the act, to actually agree. There is no adequate answer to this problem presently.

To sum up, the enforceability of click-wrap contracts is settled in courts, it is a better way of contracting both for the offeror, who bears less risk than in cases of browse-wrap contracts, as well as the offeree, who is informed in a reasonable manner, that the actions she is about to take will be construed as acceptance.

¹ Povilas Kamantauskas 2014 metais Vytauto Didžiojo universiteto Teisės fakultete įgijo teisės magistro laipsnį.

KEYWORDS

E-commerce, click-wrap agreements, browse-wrap agreements, electronic agency, intent to be bound.

INTRODUCTION

Today contracts may be formed over the Internet. There are many methods available to form e-contracts. Two of these, most common in consumer transactions, are click-wrap and browse-wrap agreements², formation and enforcement of which is an issue of increasing relevance. The lower costs³ made possible by the use of internet and technology as well as the convenience of such transactions is made evident in the European Union by a considerable increase in enterprises that take part in electronic commerce (increase of 4 % since 2008)⁴. Even though statistics vary widely from country to country⁵, the turnover of electronic commerce is increasing⁶, as seen in Eurostat statistics.

E-commerce is a relatively young phenomenon. The legal issues raised by it are not yet settled, despite its economic importance. Most of the problems arise from the formation of contracts: it is difficult to apply the traditional approach of offer and acceptance when the parties to the contract do not interact directly one to the other. The difficulty of applying traditional concepts of contract law arise from specific ways the parties express their will to enter into the contract, these difficulties become evident in click-wrap and browse-wrap agreements.

The complex of actions called a click-wrap agreement is mostly used in software licensing (but not restricted to it). A party must perform a positive and conscious act in order to be able to proceed with the installation, such as clicking on an icon "I agree" (or alike). A browse-wrap agreement on the other hand is a complex of actions which consists of a party supposedly consenting to the contract simply by browsing on a

² Also known as clickwrap, click wrap, clickthrough, browsewrap and browse wrap agreements. Browse-wraps and click-wraps refer to a certain complex of actions that will be elaborated on in the following paragraph. Browse-wrap and click-wrap contracts are prevailing terms throughout the legal literature, and that is why they are used here. But these terms may be misleading, because words like "contracts" or "agreements" tend to indicate that contracts have actually been formed, this may not be the case. Unless expressly tolled to the contrary in the text, browse-wrap and click-wrap agreements should not be understood as giving rise to contractual obligations.

³ A. DAVIDSON, *The Law of Electronic Commerce* (Cambridge: Cambridge University Press, 2009) p.1.

⁴ <[http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:E-commerce_sales_and_purchases,_turnover_from_e-commerce,_by_size_class,_2008-2012,_EU-28_\(%25_enterprises,%25_total_turnover\)v1.png&filetimestamp=20131213124004](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:E-commerce_sales_and_purchases,_turnover_from_e-commerce,_by_size_class,_2008-2012,_EU-28_(%25_enterprises,%25_total_turnover)v1.png&filetimestamp=20131213124004)> [last visited on 2014 01 06].

⁵ <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/E-commerce_statistics> [last visited on 2014 01 06].

⁶ See footnote 2.

website. All the terms and conditions, the user supposedly ascends to, are most commonly posted on another website. One can study it by opening a hyperlink, but the hyperlinks are usually situated at the bottom of the page and are rarely conspicuous. Nor are the users made aware that their conduct will be treated as expressing intent to enter into a contract.

The aim of this paper is to analyze the issues of e-commerce and, more specifically, of click-wrap and browse-wrap agreements and the underlying legal concepts. The paper will focus on the law of the United States and Lithuania (including EU law) with some illustrations taken from other jurisdictions. However, the aim is to analyze the legal concepts, rather than the law of some specific jurisdiction. The following hypotheses were framed: 1. In click-wrap scenarios contracts are formed; 2. In browse-wrap scenarios the conditions for formation of a contract are usually absent.

The main tasks in testing these hypotheses focus (both in case of browse-wrap as well as click-wrap contracts) on the following issues:

1. Who makes the offer and who accepts?
2. Is electronic agency (formation of contracts by computers) a sound legal concept?
3. Is a contract formed through electronic means valid?
4. What conduct is understood as acceptance?
5. Is the conduct of a party to the contract sufficient to manifest intent to be bound?
6. Is a party to a contract given constructive notice of the terms to the contract?
7. Which form of contracting (click-wrap or browse-wrap) is better?

Methods that are used in this paper include comparative analysis and criticism of statutes and other forms of legislation, case law as well as scientific literature. Historical evaluation is also used.

All the translations of Lithuanian Statutory, regulatory and case law into English were made by the author.

1. ELECTRONIC AGENCY. THE APPLICABILITY OF AGENCY LAW TO COMPUTER AGENTS

1.1. Doctrinal problems

1.1.1. Electronic agents and their capacity

Let us begin with the role of computers (applications) in e-contracting. Are they mere instruments of communication or should they be understood as some kind of agent? This issue is referred to by legislation and legal scholars as electronic agency. In the

Uniform Electronic Transactions Act⁷ §2(6) of the United States, electronic agency is defined in the following way:

"§2(6) of the United States, electronic agency is defined in the following way: mere instruments of communication or should they be under electronic records or performances in whole or in part, without review or action by an individual."⁸

There are several attributes conferred on an electronic agent, it must be an automated and independent computer program⁹. Qualities like independent and automated may appear contradictory; I shall thus give an example to clarify: A is an application that manages orders at a retail company. It receives orders made by customers on a webpage, confirms them by sending an e-mail, monitors if the money has been transferred, then sends off the orders to a warehouse, housing the goods. These actions are wholly automated; the application has no discretion or will to decide which orders should be confirmed and which are to be ignored. At the same time the application has considerable autonomy: it does not need to obtain a confirmation from a human programmer before confirming any orders, nor before forwarding the list of goods ordered to the warehouse.

The term electronic agency is potentially confusing though. The law of agency (human agency to be more specific) is associated with some attributes that are only applicable to sentient beings. And this gives rise to a number of issues: how can there be a fiduciary relationship between a computer and its principal, how can the agent – principal relationship be established without the computer having legal personality etc.? But there is a reason for looking at this relationship as agency. People hire agents because they themselves do not have the knowledge, the skills or the time¹⁰ to do the tasks they rely on agents to do. Agents are generally skilled at what they do. Similarly, a computer has a considerably greater capacity to analyze tremendous amounts of data in short periods of time. Thus, a "service" provided by a computer is quite like one provided by a conventional agent.

Several models of electronic agency have been developed to cope with the problems discussed in the previous paragraph. One solution could be conferring legal personality on applications or computers themselves. How else could a conduct of a machine be considered as creating contractual obligations if the machine itself is not an actor in the eyes of the law? It may seem unorthodox, but this solution would not be unheard of, most jurisdictions recognize a wide variety of legal persons, including corporations or

⁷ This act is drafted by National Conference of Commissioners on Uniform State Laws, not the Congress. The latter does not have the authority to enact state level legislation, so the former, in an effort to unify state laws, drafts model laws.

⁸ United States Uniform Electronic Transactions Act (UETA) (1999) §2(6).

⁹ A more up to date term would be an application, which is a broader term, including not only computer programs but programs on portable devices as well ones available online. For this reason the term application will be used hereafter.

¹⁰ E. A. POSNER, "Agency Models in Law and Economics", John M. Olin Law & Economics Working Paper (No. 92, 2D Series).

international organizations¹¹, both of which are mere legal fictions with no consciousness to speak of.

There are less known examples of legal personality. According to maritime law, ships have legal personality. It is conferred for the purpose of protecting those with an interest in the ship's business or those who have been injured by it.¹² For example, a ship may be arrested if it injured a coastal state or if it has civil obligations that are not performed.¹³

But the examples of international organizations, corporations or ships are not easily applicable because these legal entities possess assets or are assets of considerable value themselves. Let us assume that computers have legal personality and may be sued for nonperformance of contractual obligations. They would be judgment-proof: computers (applications) have no assets to make amends, nor are they likely to be of considerable value themselves. The whole purpose of conferring legal personality on a computer (application) is to set a legal framework protecting people who reasonably rely on the actions of it.¹⁴ Since the legal separation of a computer (application) from its owner would only insulate the owner from contractual liability, leaving parties relying on the conduct of the computer (application) without remedy, the purpose of conferring legal personality on a computer (application) would be frustrated. Computers would thus fail to be a useful legal fiction, as opposed to corporations, ships etc.

To address the problem of accountability, there have been proposals to have mandatory insurance or registration of electronic agents.¹⁵ These solutions are inadequate though, because insurance would render electronic agents burdensome (since the insurance premiums would be paid by the principal), but would not offer any benefit over doing away with the concept of electronic agency altogether. At the same time, registration of electronic agents would prove unfeasible. What should be registered: the computer (hardware) or some application on it (software)? Either way, objects to be registered are easily moved, and unlike corporations, may be sold easily. Moreover, an application on a computer may be transferred from one device on to another, or be located on a portable device, where should it be registered then?

Another approach is the theory of moral entitlement. Insurance would render electronic agents burdensome (since the insurance premiums would be paid by the principal entitled to legal protection, and this is best secured through the conferral of legal personality¹⁶. This argument has been used in favor of whales having right to life. Insurance would render electronic agents burdensome (since the insurance premiums would be paid by the principal self-

¹¹ For example United Nations or the European Union.

¹² T. ALLEN, R. WIDDISON, "Can Computers make contracts?", *Harvard Journal of Law & Technology* (Volume 9, Number 1 Winter 1996), p. 42.

¹³ S. KATUOKA, *Tarptautinė Jūrų teisė* (Vilnius: Eugrimas, 1997), p 38.

¹⁴ S. KIS, *Contracts and Electronic Agents* (Master's thesis, University of Georgia School of Law, 2004) p. 30.

¹⁵ *Ibid.* p. 31.

¹⁶ See footnote 11, p 35.

consciousness does not emerge from biological processes should not disqualify it from legal personality¹⁷. This argument may come to be true one day, but now the sophistication of computer programming is far short of artificial intelligence. At the present time, our most advanced robots, some of which are built in Japan and also at MIT have the collective intelligence and wisdom of a ... lobotomized [and] mentally challenged cockroach¹⁸. The theory of moral entitlement is thus inapplicable at present.

Social reality could be an argument as well: when an entity is considered by the society as having separate legal existence, the title of legal personality ought to be conferred on it¹⁹, for example, a corporation. For this argument to succeed, electronic agents must be perceived as having independent legal significance, forming contracts on their own, rather than as mere automaton of their owners. There is insufficient ground to affirm this presently.²⁰

To sum up on the issue of whether computers (applications) have legal personality, there is presently no satisfactory doctrinal solution. Fortunately, there is no need for one; no benefit would then be gained by it, since the electronic agents can be seen as making contracts under the veil of its principal's capacity, similarly to slaves contracting under slaveholder's capacity in Roman law.²¹

1.1.2. The relationship of electronic agents, their principals and third parties

The law of agency regulates two types of relationships: one between the principal and the agent, the other between the agent and third parties.²² The relationship between the principal and the agent requires not only the obligations common to a commercial relationship (accountability, integrity, good will etc.) but also obliges the agent to be loyal, to foster mutual trust, confidence, and respect for the principal's interests.²³ Agency is a fiduciary relationship requiring the agent to act with care, fairness and to cooperate with the principal.²⁴ However, duties of an agent are abstract concepts and require consciousness, which is not available to computers. In addition to that, such duties are inapplicable to electronic agency, because they are imposed to protect the principal from misconduct of the agent. While in case of electronic agency, the principal (the programmer) has the ultimate power over the computer. An application will perform just as much and just as well as it was programmed to by the principal (the programmer), no

¹⁷ *Ibid.*

¹⁸ M. KAKU, „The Future of Quantum Computing“ <<http://bigthink.com/videos/the-future-of-quantum-computing-2>>, [last visited on 2014 01 28].

¹⁹ See footnote 11, p. 36.

²⁰ See footnote 13, p. 29.

²¹ I. NEKROŠIUS, V. NEKROŠIUS, S. VĖLYVIS, *Romėnų teisė* (Vilnius: Justitia, 2007), p. 66.

²² See footnote 22; Restatement (Second) of Agency (1958) §13.

²³ V. MIKELĖNAS, G. BARTKUS, V. MIZARAS, Š. KESERAUSKAS, *Lietuvos Respublikos Civilinio kodekso komentaras. Antroji knyga Asmenys* (Vilnius: Justitia, 2002), p.256.

²⁴ *Ibid.*

less, no more. There is no need for some additional protection to the principal as if the programming was insufficient.

Thus, the law of agency addressing the relationship between agents and principals is tailored to suit relationships between human beings, or, to put it more abstractly, conscious beings, capable of understanding the duties of an agent to its principal. An attempt to apply the traditional law of agency to a relationship between a human principal and an electronic agent would most likely fail.

Let us now move to the issue of the relationship between agents and third parties as well as the power of agents to create rights and duties for the principal. In Lithuania there are several ways by which an agent can create duties for the principal. Firstly, there is the actual authority²⁵ when the agent acts within the bounds of her authority. Secondly, there is apparent authority²⁶, when it is reasonable for the third party to believe, that the agent is acting within the bounds of her authority (for example, a cashier at a supermarket). This may easily be applicable to electronic agents.

An agent must disclose the fact of him being an agent.²⁷ I was unable to find a single online shop giving buyers the required notification, that they are about to form a contract through an electronic agent. This is hardly a problem though; anybody able to buy goods online will most likely understand the fact that they are dealing with an electronic agent, rather than a human or a corporation (the principal) without any additional notification.

The law of the USA on actual²⁸ and apparent²⁹ authority is alike. However, there are other theories in the law of the USA that could be applicable in addition to those present in the Lithuanian law. One of these is estoppel: anybody able to buy goods online will most likely understand the fact that the principal could have intervened to prevent the confusion over authority³⁰. In case of electronic agency there would probably be all elements of estoppel: (1) act of the principal creating appearance of authority in an agent (for example the establishment of an e-shop web page); (2) reasonable good faith reliance on the appearance of authority in the agent on the part of consumer and (3) detriment to the consumer caused by her reliance.³¹

Finally, there is the solution of doing away with the law of agency all together, and holding computers to be mere instrument of communication, similarly to a telephone, an e-mail or mail. It does seem reasonable: a computer (application) only transmits information given to it by the owner (or generated according to the programming given by the owner), so there is no need for a superfluous theory of agency, just as an offer sent by mail is not considered to be given by some mail-box or post-office agent.

²⁵ Lietuvos Respublikos civilinis kodeksas (2000 07 18, Nr. VIII-1864), article 2.133 part 1.

²⁶ *Ibid.* article 2.133 part 9.

²⁷ *Ibid.* part 1.

²⁸ Restatement (Second) of Agency §26.

²⁹ *Ibid.* §27.

³⁰ E. RASMUSEN, *Agency law and contract formation* (May 26, 2003).

³¹ *Minskoff Equities v. American Express*, 98 F.3d 703, 1996 U.S. App. 27441, 30 U.C.C. Rep. Serv. 2d (Callaghan) 999.

To sum up on the applicability of traditional agency law to the creation of electronic agency relationship, significant parts of it are also made to fit for human agency, especially the part governing the relationship between principals and agents. This makes the rest of the law of agency hardly if at all applicable. Fortunately, that applicability is unnecessary because a computer (an application) can be seen in the eyes of the law as mere means of communication. This solution seems most reasonable and equitable one of all the theories discussed above. No wonder that it was the way chosen by legislators in many countries, leaving the term "electronic agency" in their laws only as a useful name, even if it is somewhat confusing. Electronic agency has barely anything in common with the traditional law of agency.

1.2. Legislative solutions

Even though there are a lot of problems with the concept of electronic agency, there are at the same time very simple legislative guidelines, intended to deal with them. Let us begin with Lithuanian law. In an effort to harmonize Lithuanian law with the law of EU (Directive on electronic commerce³²) a Statute on Information Society Services³³ was adopted. Article 11 part 1 of the statute provides:

"was adopted. Article 11 part 1 of the statute provides: (an offer) as well as assent to it (acceptance) is attributed to a party if the party made the act itself, via an agent or employing the help of an automated system, programmed by or on behalf of the party."³⁴

Thus, contracts concluded through electronic agents are valid and enforceable in Lithuania.

The same rules apply in the USA. The Unified Electronic Transactions Act (hereafter also referred to as UETA) provides that: made the act itself, via an agent or employing the help of an automated system, provided if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements."³⁵

The Electronic Signatures in Global and National Commerce Act (hereafter also referred to as E-SIGN) must also be discussed because it is a federal law and has binding effect, as opposed to UETA, which may be influential but is still just recommendatory as a state level legislation. E-SIGN is mostly similar to UETA, but has some additional provisions. Section 101 (h) of the E-SIGN provides that:

"(h) of the E-SIGN provides that: the Electronic Signatures in Global and National Commerce Act (hereafter also referred to as E-SIGN) must also be discussed because it is a federal law and has binding effect, as opposed to UETA, which made delivery involved the action of one or more

³² Directive 2000/31/EC.

³³ Lietuvos Respublikos informacinės visuomenės paslaugų įstatymas, *Žin.* (2006 05 25, Nr. 65-2380).

³⁴ *Ibid.* article 11 part 1.

³⁵ Uniform Electronic Transactions Act (UETA) (1999), § 14(1).

electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound."³⁶

Uniform computer Transactions Act (hereafter referred to as UCITA) is another, more detailed and more controversial (it was only adopted by two states so far)³⁷ model law. It is the lack of consumer protection that makes UCITA controversial, but the act also contains provisions on electronic agency. UCITA does away with the law of agency and attributes the actions of an electronic agent to its owner.³⁸

To sum up, even though the law on electronic agency is not yet settled, especially on the finer points, contracts made online and by electronic agents are valid.

Finally, the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Electronic Commerce is worthy of mention too, it was not only one of the first laws³⁹ regulating electronic commerce but also very influential (legislation based on UNCITRAL Model Law on Electronic Commerce was adopted in more than 50 countries worldwide).⁴⁰ Article 5 of it provides that but also very influential (legislation based on UNCITRAL Model Law on Electronic Commerce was adopted in more than 50 countries worldwide).wsagency and attributes the actions of an electronic agent to its owner.mme electronic agents: "[d]ata messages that are generated automatically by computers without direct human intervention are intended to be covered by ["originator" of a data message]"⁴¹

In summary, even though all the issues of electronic agency are not yet solved, (and perhaps even ignored), the bottom line is that in spite of all the doctrinal problems, e-contracting is a reality dealt with at least to some extent by legislation. Contracts concluded by electronic means (including electronic agency) are valid and cannot be refused enforcement solely on the grounds that they have been concluded online or by electronic agents. "A contract is no less a contract simply because it is entered into via a computer"⁴².

2. FORMATION OF CONTRACT

2.1. American law

2.1.1. Click-wrap agreements

³⁶ Electronic Commerce in Global and National Commerce Act (E-SIGN) (2000), § 101 (h).

³⁷ S. ESPOSITO, Uniform Computer Information Transactions Act (UCITA): Guide to Web Resources; <<http://www.law.arizona.edu/Library/research/guides/ucita.cfm?page=research>> [last visited on 2014 01 20].

³⁸ The Uniform Computer Information Transactions Act (UCITA) (1999), §213.

³⁹ Law was adopted in 1996.

⁴⁰ <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html> [last visited on 2014 01 20].

⁴¹ Article-by-article remarks to the UNCITRAL Model Law on Electronic Commerce, remark 35.

⁴² *Forrest v. Verizon Communications Inc.*, 805 A.2d 1007 (D.C. App. 2002).

2.1.1.1. Offer

The most important issue in determining whether a click-wrap contract was formed is the presence of meeting of minds. The concept of offer and acceptance is prevalent in determining the presence of meeting of minds in many jurisdictions, including the USA.

Firstly, it is necessary to determine the applicable law. There are two possibilities: the common law and the UCC, the former is used for sales of services, while the latter determining the presence.⁴³ The object of click-wrap agreements is not usually such that would give rise to confusion in determining whether it is a good or a service (for example an agreement where the contractor would fix an engine using parts she herself supplied). In most cases the object of the contract will clearly be some kind of good: a piece of clothing or some domestic appliance. There is one notable exception though: if A contracts B to provide a computer application, is it a contract for goods or services? Case law provides an answer; if B only licensed the use of the application, while retaining the rights of ownership, the transaction is considered to be a service. While if B transferred the title to the program (or design of a website), such a contract would, for the purposes of article 2 of the UCC, be considered a good.⁴⁴

It is important to determine the applicable law because offers are treated differently under common law and the UCC. §2-206 of the UCC provides:

1) Unless otherwise unambiguously indicated by the language or circumstances

...

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance...

Thus, the UCC creates a presumption that the buyer (rather than the vendor) makes the offer. However, this is only a presumption, one that can be rebutted. In *ProCD, Inc., v. Zeitenberg*⁴⁵ the court discussed the enforceability of a shrinkwrap contract⁴⁶. The issue before the court was what constituted an offer, who and how accepted. Judge Easterbrook reasoned that the presumption of a buyer making the offer should not be applied and that "[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose

⁴³*Princess Cruises, Inc. v. General Electric Co.* United States Court of Appeals 143 F.3d 828 (4th Cir. 1998).

⁴⁴*Conwell v. Gray Loon Outdoor Marketing Group, Inc.* 906 N.E.2d 805, 811 (Ind 2009).

⁴⁵*ProCD, Inc., v. Zeitenberg* United States Court of Appeals 86 F.3d 1447 (7th Cir. 1996).

⁴⁶ A shrinkwrap contract is a contract in which the buyer accepts the offer by way of not sending back the goods in some specified period of time after "buying" them and having the opportunity to inspect the goods as well as review the license agreement contained in the packaging with the goods. This unusual formation of contract is due to the additional terms that cannot be put on the outside of the packaging or in any other practicable way made available to the buyer due to their extensiveness. The terms are thus put inside the packaging, which is then shrink-wrapped (hence the name) and a notice is made on the outside of the packaging that additional terms are inside. This way the buyer may read the terms at her leisure and, if the terms would be unacceptable, send the goods back at the expense of the seller and for a refund.

limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance⁴⁷.

This decision fell under criticism by scholars⁴⁸ because Judge Easterbrook was at best not explicit or perhaps even failed to explain why the vendor rather than the buyer should be the offeror, contrary to the UCC. Some case law also opposes to the approach of the 7th Circuit in ProCD as well. In *Klocek v. Gateway Inc.* court objected: ailed to explain why the vendor rather than the buyer should be the offeror, contrary to the UCC. Someoffer..." In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree⁴⁹.

Judge Easterbrook may not have been explicit in determining why the offer came from the vendor rather than the purchaser, but there is sound legal reasoning in this approach. The UCC provides that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances"⁵⁰. The Restatement of Contracts defines nce in any manner and by any medium reasonable in the circumstances"the purchaser, but there is sound legal reasoning in this approach. The UCC provides that "an offer to make a e purchaser is ⁵¹. An essential requisite to an offer as well as any other act of the party entering into a contract is intent to be bound. The test is objective: whether a reasonable person would construe an act by the party as giving an indication of her willingness to enter into a contract.⁵² Thus, an offer may be given by anybody; there is nothing inherent to it that would make it impossible to manifest an intention to be bound for a vendor. The important issue is whether an act by a party may be construed as readily inviting acceptance and manifesting intent to be bound, as observed by a reasonable person. By who the act was performed is a question of secondary importance. To sum up, §2-206 of the UCC gives a presumption of the buyer giving the offer, but the presumption is a rebuttable one, and shrinkwrap as well as click-wrap contracts are exactly the cases where the presumption should be rebutted.

In case of click-wrap contracts, it is the vendor that gives an opportunity to readily accept the terms of the contract. The vendor splashes the terms of the license on the computer screen, as judge Easterbrook put it.

Click-wraps are contracts of adhesion, so the purchaser has no real opportunity to negotiate. Thus the purchaser has no reasonable means of communicating anything other than her assent; there is no way for the purchaser to add any terms to the contract, no way to make a counteroffer. The contract is concluded upon the clicking of "I agree" (or alike)

⁴⁷ See footnote 44.

⁴⁸ W. H. LAWRENCE, "Rolling Contracts Rolling Over Contract Law", *San Diego Law Review* (41 San Diego L. Rev. 1099, Summer, 2004).

⁴⁹ *Klocek v. Gateway Inc.*, United States District Court, D. Kansas. 104 F.Supp.2d 1332 (2000).

⁵⁰ UCC §2-206 (1) (a) (2002).

⁵¹ Restatement (Second) of Contracts (1981), §24.

⁵² *Ray v. William G. Eurice & Bros., Inc.* Maryland Court of Appeals 201 Md. 115, 93 A.2d 272 (1952).

by the purchaser. There is no other legally significant conduct by the purchaser (unlike in the shrinkwrap contracts, where the buyer could send back the goods, if she decided not to accept them) beyond the clicking of "I agree". So if any contract is formed at all, if any offer is accepted, it must be the offer of the vendor. No other legally significant acts are performed by the parties to a click-wrap agreement.

The extensiveness of the licensing agreements is usually great. They contain, among other clauses, terms like proprietary rights, security, privacy, return policies, warranties, limitations of liability, choice of law and choice of forum clauses⁵³, not to mention the object of the transaction. The extent and specificity of the agreements support the conclusion that the proposal given by the vendor is indeed an offer.

In addition to that, even the act of the purchaser indicates acceptance, rather than some other legally significant action. When the buyer assents, she must click on an icon or tick a box, which mostly says "I agree", "I ascend", "Yes" or alike. Today the law does not require some specific and formal set of words, a spell, which would only be binding if uttered with precision. Any act that would be construed as giving indication of assent by a reasonable person will do.⁵⁴ But it cannot be overlooked that the conduct of the buyer, the words attributed to her indicate acceptance, as opposed to an offer: the boxes do not say, nor do the icons indicate "I offer You, the Vendor, to sell me X, prompt shipment of goods ordered shall be construed as acceptance".

Common law has no presumption of an offer coming from the buyer. But the reasoning supporting the conclusion of the offer coming from the vendor still applies. To sum up, whether it is the common law or the UCC that is to be applied, in click-wrap contracts the vendor offers and the buyer accepts.

2.1.1.2. Acceptance

Now let us move to the issue of how the offer is accepted. Restatement (Second) of Contracts defines acceptance of an offer in the following way: "[a]cceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer"⁵⁵. The UCC also indicates what should be considered as acceptance: "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances"⁵⁶.

What should be understood as acceptance in the context of a click-wrap contract? This question is an easy one, the vendor leaves very little choice as far as legally binding acts are concerned, under the circumstances, the manner of acceptance required

⁵³ R. J.MANN, T. SIEBENEICHER, "Just one click: the reality of internet retail contracting", *Columbia Law Review* (Vol 108:984) p. 999.

⁵⁴ See discussion on intent to be bound above.

⁵⁵ See footnote 50, § 50 (1).

⁵⁶ UCC §2-206 (1) (a) (2002).

(indicated) by the offeror is clicking "I agree". In *I.Lan Systems, Inc. v. Netscout Service Level Corp.*⁵⁷ the court reasoned:

"the court reasoned: too as acceptance in the context of a click-wrap contract? This question is an easy one, the vendor leaves very litclickwrap license agreement, where the assent is explicit. To be sure, shrinkwrap and clickwrap license agreements share the defect of any standardized contract – they are susceptible to the inclusion of terms that border on the unconscionable – but that is not the issue in this case. The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the

Court holds they are. In short, i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating "I agree"⁵⁸.

This reasoning is very much supported by case law.⁵⁹ Even if the court would ultimately refuse to enforce some provisions of a click-wrap contract, formation of it is never a problem, clicking kwrap license agreement, wherean offer.

2.1.1.3. Constructive notice of the terms to the contract

Let us now move to the issue of the content of the contract. The mere fact that acceptance has been manifested does not mean that all of the terms that one of the parties may have had in mind become part of the contract. A contract may not necessarily be integrated (the whole contract may not be put down on paper or some other form in one document with all the provisions of it contained therein). A party to a contract could very well have some terms in mind which she did not verbalize or communicate to the other party in a reasonable manner due to corruption of information during transmission, perhaps by mistake or forgetfulness. In that case, the uncommunicated terms to the contract are not part of an offer, and cannot be accepted even if the offer itself would be accepted.⁶⁰

In case of click-wrap contract litigation the argument of lack of constructive notice⁶¹ of some term or another is common. The parties that do not want some provisions to the contract enforced argue that they were unaware and improperly notified of it. These and similar arguments fail. The offeror does not have to notify the offeree of every single term

⁵⁷*I.Lan Systems, Inc. v. Netscout Service Level Corp.* 183 F.Supp.2d 328, Civ. Act. No. 00-11489-WGY, 2002 US Dist. Lexis 209 (D. Mass., January 2, 2002).

⁵⁸ *Ibid.*

⁵⁹See footnotes: 41, 64, 87, 69; *In re RealNetworks, Inc.*, No. 00-c-1366, 2000 U.S. Dist. LEXIS 6584, at 2, 15-17, 2000 WL 631341, (N.D.Ill. May 11, 2000); *Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q.2d 1020, 1025 (N.D.Cal. 1998).

⁶⁰ See footnote 41.

⁶¹ Concept of constructive notice is as follows: the offeree has a duty to read all terms she agrees to, but only if the offeree is made aware of the existence of said terms.

to the contract for the contract to be concluded, but rather the existence of the contract itself.

Several non e-commerce cases are relevant. In *Carnival Cruise Lines v. Shute*⁶² the facts were simple: Shute, a passenger, was injured onboard a cruise ship and pursued indemnification. The ticket she bought contained a several page long contract written in fine print, with a forum selection clause, according to which Greek courts were the chosen forum. Shute argued that she was not aware of the forum selection clause and thus it did not become part of the contract. The court held to the contrary, because the plaintiff could have read the fine print before she accepted if she wanted to. Thus, Shute cannot avoid enforcement of some specific provision just because she did not read it.⁶³

In *ProCD*⁶⁴ the court found that notice of existence of additional terms on the outside of the box was sufficient to bind the purchaser. If a mere notice of the existence of the contract is sufficient, then parties to a clickwrap agreement are very well informed of the existence of the contract. If one clicks "I agree" she must be aware that there is something that she agrees to.

In *Caspi et al. v. Microsoft Networks LLC*⁶⁵ the court upheld a forum selection clause where the subscriber must review various screens, one of which included a membership agreement in a scrollable window situated next to icons "I Agree" and "I Don't Agree". No charges were incurred before the subscriber had an opportunity and time to review and assent to it. The process of subscription could not be concluded until the subscriber clicked "I Agree". The court reasoned:

"the court upheld a forum selection clause where the subscriber must review various screens, one of which included a membership agreement in a scrollable window situated next to icons "I Agree" and "I Don't Agree". Noor mode of presentation... was proffered unfairly, or with a design to conceal or de-emphasize its provisions... Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose... would be served by permitting them to disavow particular provisions or the contracts as a whole."⁶⁶

In *Forrest, v. Verizon Communications*⁶⁷ the facts were very similar to *Caspi*. The court held a forum selection clause to have become part of the contract:

"the facts were very similar to *Caspi*. The court is not in capital letters; otherwise its type size and appearance are consistent with the agreement as a whole.

We agree with the trial court that appellant was provided adequate notice of the forum selection clause. "The general rule is that absent fraud or mistake, one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or

⁶² *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct.1522, 113 L.Ed.2d 622 (1991).

⁶³ *Ibid.*

⁶⁴ See footnote 44. Facts of the case were discussed already, see second paragraph on page 17.

⁶⁵ *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118, 732 A.2d 528, 530, 532-33 (App.Div. 1999).

⁶⁶ *Ibid.*

⁶⁷ See footnote 41.

not"... We are not persuaded that notice would have been sufficient only if the clause was in all capital letters or was placed in the section entitled "Limitations of Liability and Remedies" rather than "General Provisions" Neither is the use of a "scroll box" in the electronic version that displays only part of the Agreement at any one time inimical to the provision of adequate notice."⁶⁸

Nor does it matter if the agreement would not be visible in its entirety at any time, but rather would have to be scrolled down, with only parts of it to be seen at any particular time:

"or does it matter if the agreement would not be visible in its entirety at any time, but rather would have to be scrolled down, with only parts of it to be seen at any particular timicate assent if the user agreed to the terms.

That the user would have to scroll through the text box of the Agreement to read it in its entirety does not defeat notice because there was sufficient notice of the Agreement itself and clicking "Yes" constituted assent to all of the terms. The preamble, which was immediately visible, also made clear that assent to the terms was binding. The Agreement was presented in readable 12-point font. It was only seven paragraphs long — not so long so as to render scrolling down to view all of the terms inconvenient or impossible. A printer-friendly, full-screen version was made readily available. The user had ample time to review the document"⁶⁹.

The main point to emphasize is not the way the agreement itself is provided to the purchaser. It may be in a scrollable box, in some print friendly format or given via a hyperlink⁷⁰, in an e-mail⁷¹ or in some other accessible form. The essential aspect on the issue of constructive notice is that a user cannot proceed with the installation (subscription, purchase etc.) until she will click "I agree" to the terms of the contract. Attention of the offeree is thereby drawn to the existence of a contract. Furthermore, offerees have the time and opportunity to read the contract if only they want it, because they do not incur any charges before clicking "I agree" (before accepting).

The prevailing culture of not actually reading any contracts online (it will be discussed separately) does not have any bearing on the enforceability of the contracts. The offeree has a duty to read whatever she signs⁷², it does not matter if the offeree is an unsophisticated consumer or a veteran lawyer⁷³. Whether or not the contract was read, the manifestation of assent is sufficient to bind the offeree.

Nor does it matter if the information that the offeree has accepted the offer was communicated to the offeror. For example, A makes a piece of software freely available online. Once B downloads the software, further actions are performed offline. Upon

⁶⁸ *Ibid.*

⁶⁹ *Feldman v. Google, Inc.*, 2007 WL 966011 (E.D. Pa. March 29, 2007).

⁷⁰ *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157 (D. Cal. 2003).

⁷¹ *Kilgallen v. Network Solutions, Inc.*, 99 F.Supp.2d 125, 129-30 (D.Mass.2000).

⁷² *Ibid.*; see footnotes 51, 70.

⁷³ *Groff v. America Online, Inc.* File No. C.A. No. PC 97-0331, 1998 W L 307001 (R.I. Superior Ct., May 27, 1998).

opening the application B will be offered a license agreement, without agreeing to it (clicking t matter if the information that the offeree has accepted the offer was communicated to the offeror. For example, A makes a piece of software freely available online. Once nce of the benefit of the services is a promise to pay for them, if at the time of accepting the benefit the offeree has a reasonable opportunity to reject it and knows that compensation is expected"⁷⁴, this reasoning is supported by the Restatement⁷⁵. So if B clicks "I agree", B is bound by the license agreement, whether or not A is aware of the acceptance.

To sum up, click-wrap contracts are formed and their enforceability is well settled⁷⁶.

2.1.2. Browse-wrap agreements⁷⁷

Browse-wrap agreements are different from click-wrap agreements in one legally significant way: they are made by browsing a website rather than clicking on an icon. Or, in legal terms, they require no affirmative action on the part of the offeree to manifest assent to the contract, other than the actions the offeree would have taken anyway, whether or not she intended to assent to any contract thereby. Significance of it is that there is no explicit assent to a contract, making the argument for the validity of the contract less strong, but not fatal to it; no, the fatal issue is that by failing to ask for explicit assent to the contract the offeror fails to draw the attention of the offeree to the existence of a contract (additional terms). The offeree cannot accept terms of an offer that she is not aware of (the issue of constructive notice).

Some parts of the discussion about click-wrap agreements are applicable to browse-wrap agreements. There are a lot of significant similarities between offers given in click-wrap and browse-wrap agreements: both are given online, both are assented to online, in a manner suggested or given by the offeror. For all intents and purposes of deciding who gives the offer and who accepts, cases of browse-wrap and click-wrap contracts are identical.⁷⁸

Differences begin when we consider the communication of acceptance. Browse-wrap contracts are not assented to explicitly, but implicit assent does not mean there is no assent at all.⁷⁹ The UCC provides that we consider the commcontract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances⁸⁰. The Restatement of Contracts provides that "[t]he conduct of a party is not effective as

⁷⁴ *Jones v. Brisbin*, 41 Wash.2d 167, 172, 247 P.2d 891 (1952).

⁷⁵ See footnote 50, § 69(1)(a).

⁷⁶ P. B. CUNNINGHAM, E. C. WITKOW, "Click with Caution: Liability for Breach of Click-Wrap and Browse-Wrap Agreements", *The Computer & Internet Lawyer* (Volume 23, Number 6, June 2006) p. 1.

⁷⁷ See footnote 1.

⁷⁸ See the discussion on who offers and who accepts in section 2.1.1. Click-wrap agreements.

⁷⁹ *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 06-CV-0891-B, 2007 WL 367*367 4823761 at *4 (N.D.Tex. Sept. 12, 2007).

⁸⁰ UCC §2-206 (1) (a) (2002).

a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents"⁸¹. Thus, under the UCC as well as common law, acceptance by conduct (browsing) may certainly be sufficient to bind a party to a contract. Courts support this kind of reasoning: in most cases browse-wrap agreements are not formed because there is no meeting of minds, but when the parties are actually aware of the terms to the contract, the courts hold acceptance by conduct of browsing on a website sufficient.⁸²

Let us move to the issue of constructive notice. Browse-wrap agreements, as well as click-wrap contracts or any other contracts must have the essential elements, including the meeting of minds.⁸³ The fact that browse-wrap agreements are made via the internet does not matter.⁸⁴ The important question is if there actually was knowledge on the part of the offeree of the means of assent (browsing) given by the offeree.

In *Specht v. Netscape Communications*⁸⁵ the plaintiffs installed an internet browser developed by Netscape. They were subsequently encouraged to install SmartDownload, a plug-in program. There was no click-wrap agreement made concerning the plug-in program; the license agreement was provided on a website, but the plaintiffs were not encouraged to visit it, nor even made aware of it. They could have scrolled down to the bottom of the page to find the license agreement, but the installation process was not contingent on it. The license agreement included an arbitration clause. The court reasoned on its validity:

[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware...

Arbitration agreements are no exception to the requirement of manifestation of assent...

We disagree with the proposition that a reasonably prudent offeree in plaintiffs' position would necessarily have known or learned of the existence of the SmartDownload license agreement prior to acting ... "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." ... But courts are quick to add: "An exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term.

...

We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or

⁸¹ See footnote 50, §24.

⁸² See footnotes: 83, 92.

⁸³ *Express Indus. & Terminal Corp. v. N.Y. Dep't. Transp.*, 93 N.Y.2d 584, 589, 693 N.Y.S.2d 857, 715 N.E.2d 1050 (N.Y.1999).

⁸⁴ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir.2004).

⁸⁵ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 20 (2d Cir.2002).

require unambiguous manifestation of assent to those terms. ... [t]he fact that, plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms...

We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms... Internet users may have, as defendants put it, "as much time as they need"... but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. When products are "free" and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, [there is no constructive notice].⁸⁶

Specht (even though it is not the first case on the issue of browse-wrap agreements) has become important and the legal reasoning given there was widely adopted by other courts.⁸⁷

In *Pollstar v. Gigmania*⁸⁸ the plaintiff created an online database that could be downloaded by visitors of the site. The defendant downloaded the information and made it available on its website. The plaintiff alleged that the use of the data obtained from their website is subject to a license agreement and sued. The court found that the visitors of the website were not adequately alerted that the use of the information was subject to a license agreement. The notice was in small gray print against a gray background. The text was not underlined, confusing the visitors in making them think it was not a hyperlink, contrary to a common internet practice and also to the usage of hyperlinks on the same page.⁸⁹

However, it was noted that nline database that could be downloaded validity and unenforceability of the browse wrap license agreement at this time⁹⁰. It is a question of fact whether an offeree knew all the terms to the contract (contained on a separate webpage). The offeree may very well be bound to the contract if she was aware of the terms by any means, perhaps the offeree actually scrolled to the bottom of the page and saw an icon "Terms and conditions" without her attention being drawn to the notice by the offeror.

In *Register.com v. Verio*⁹¹ the plaintiff (Register.com) issued domain names and also provided information about the issued domain names to the public on demand. Verio was a website developer that regularly demanded and obtained information of newly

⁸⁶ *Ibid.*

⁸⁷ *Motise v. America Online, Inc.*, 346 F.Supp.2d 563, 564-65 (S.D.N.Y.2004); see footnote 94;*Hines v. Overstock com, Inc.* 668 F. Supp. 2d 362 (E.D.N.Y 2009); *A.V., et al. v. IParadigms, LLC.* Civ. Act. No. 07-0293 (E.D. Va., March 11, 2008).

⁸⁸ *Pollstar v. Gigmania Ltd., No. CIV-F-00-5671, 2000 WL 33266437 (E.D.Cal. Oct.17, 2000).*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See footnote 83.

registered domain names from Register.com. The process through which information was obtained was one of submitting queries, which Verio did multiple times on a daily basis, employing the help of an automated software robot. Verio then used the information obtained from Register.com to solicit new customers. A legend appeared after each query prohibiting the use of obtained information for mass solicitation. Register.com contacted Verio and demanded that solicitation would cease, Verio did not fully comply. The court reasoned:

Verio contends that it ... never became contractually bound ... because, in the case of each query Verio made, the legend [with the terms and conditions] did not appear until after Verio had submitted the query and received the WHOIS data... in no instance did it receive legally enforceable notice of the conditions Register intended to impose. ...

Verio's argument might well be persuasive if its queries ... had been sporadic and infrequent ... that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register's conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms...

Verio acknowledges that it continued drawing the data from Register's computers with full knowledge that Register offered access subject to these restrictions. Verio is [not] free to take Register's data without being bound by the terms on which Register offers it, [if after submitting one query Verio becomes aware of the terms and nonetheless uses the data obtained by numerous subsequent queries, without any regards to the terms]⁹²

Thus, if the offeree actually knew of all the terms to the contract by any means, including the terms the offeror did not provide a constructive notice of, the offeree cannot avoid enforcement of some provision merely because the knowledge of the terms to the contract was not a result of the offeror's efforts. This rule is applicable to browse-wrap agreements too.

In *Ticketmaster Corp. v. Tickets.com, Inc.*⁹³ both companies were in the business of selling tickets. For some time Tickets.com posted information of events that the company itself did not sell tickets to, in which case a hyperlink would be provided to the interior website of a broker who did sell tickets to that event. Tickets.com employed a computer program called a "spider" or "crawler" that would extract relevant factual information (date, time, location of the event, price of the ticket etc.) from Ticket master's website, information would later be made available on Tickets.com website. Such use of information was subject to a browse-wrap license agreement, which prohibited commercial use of the information obtained thereby. The court reasoned:

The contract aspect of the case derives from a notice placed on the home page of the TM [Tickets Master] web site which states that anyone going beyond that point into the

⁹² *Ibid.*

⁹³ *Ticketmaster Corp. v. Tickets.com, Inc.* 2000 U.S. Dist. Lexis 4553 (C.D. Ca., March 27, 2000).

interior web pages of the web site accepts certain conditions, which include [... a prohibition to use the information] for commercial purposes... TM has placed in a prominent place on the home page the warning that proceeding further binds the user to the conditions of use. As one TX [tickets.com] executive put it, it could not be missed... evidence [has been provided] that TX was fully familiar with the conditions TM claimed to impose on users... Thus, there is sufficient evidence to defeat summary judgment on the contract theory if knowledge of the asserted conditions of use was had by TX, who nevertheless continued to send its spider into the TM interior web pages, and if it is legally concluded that doing so can lead to a binding contract.⁹⁴

The court did not conclude that there was a contract, but rather denied summary judgment on the grounds that Tickets.com may have been aware of the terms prohibiting commercial use of the information; thus, there was a question of fact to be decided. The license agreement may not be denied enforcement, as a matter of law, merely because it was presented in a form of a browse-wrap agreement. Such a rule is applicable to cases of sales of goods as well. In *Hubbert v. Dell*⁹⁵ terms to a browse-wrap agreement were held to be adequately communicated to the offeree when the notice of the terms appeared on several screens in a blue contrasting text, because, under the standard given by the UCC⁹⁶, a reasonable person would have noticed it.

Browse-wrap agreements are also more likely to be enforced against a sophisticated business entity. In *Margae Inc. v. Clear Link Technologies, LLC*⁹⁷ parties agreed that the terms to the contract could be changed at any time by posting them on a website. Court found the modifications valid because the party trying to escape them was a business entity and it had reason to visit the website regularly.

That sums up the statutory law and the case law. But scholars also have their opinion on the issue. Christina L. Kunz proposes the following criteria in presence of which a browse-wrap contract should be enforced:

1. The user is provided with adequate notice of the existence of the proposed terms.
2. The user has a meaningful opportunity to review the terms.
3. The user is provided with adequate notice that taking a specified action manifests assent to the terms.
4. The user takes the action specified in the latter notice.⁹⁸

Robert L. Oakley took another approach, he adopted principles developed by Americans for Fair Electronic Commerce Transactions (AFFECT) as criteria for enforceable electronic transactions (including browse-wrap agreements), which consist not only of procedural, but also substantive requirements:

⁹⁴ *Ibid.*

⁹⁵ *Hubbert v. Dell Corp.*, 359 Ill.App.3d 976, 296 Ill.Dec. 258, 835 N.E.2d 113, 121-22.

⁹⁶ UCC §2-401 (2000).

⁹⁷ *Margae, Inc. v. Clear Link Technologies, LLC*, No. 2:07-CV-00916-TC, 2008 WL 2465450, at 2 (D. Utah 2008).

⁹⁸ C. L. KUNZ, "Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements", *The Business Lawyer* (Vol. 59, No. 1, November 2003) p. 311-312.

1. Customers are entitled to readily find, review and understand proposed terms when they shop;

2. Customers are entitled to actively accept proposed terms before they make the deal;
...⁹⁹

However, the criteria given above are merely suggestive of possible future developments, and have not yet become part of statutory or case law.

To sum up on the issue of formation of a browse-wrap agreement, generally they are not formed, because a hyperlink to another webpage, containing the terms to the agreement, that the offeree may or may not have seen, is not sufficient to give constructive notice, consequently those terms do not become part of the contract¹⁰⁰, as lacking the meeting of minds. However this description is in need of a qualification: if the offeree is aware of the terms to the agreement by any means, those terms do become part of the contract.

2.1.3 Defenses

Click-wrap and browse-wrap agreements are, just as any other type of contracts, susceptible to defenses. However, courts have found no feature of click-wrap or browse-wrap agreements, inherent to their formation that would render the contracts unenforceable due to procedural unconscionability¹⁰¹, even if specific provisions of such contracts may still be voided as substantively unconscionable.

2.2. Lithuanian law

Lithuanian law on the subject of click-wrap and browse-wrap contract formation is not very developed; there are several statutes and regulatory laws, but very little case law. However, the governing statutory law in Lithuanian is hardly any different from the American law, so even in the relative absence of decided cases, the outcomes of possible future disputes are still predictable, provided the courts take into consideration the case law of countries having similar statutory provisions.

The Statute on Information Society Services provides that the said services shall be provided in accordance with principles of nondiscrimination of electronic form and neutrality of technology¹⁰². These principles are defined as follows:

⁹⁹ R. L. OAKLEY, "Fairness in E-contracting Minimum Standards for Non-Negotiated Contracts", *Houston Law Review* (Vol. 42, 2005-2006) p.1102-1105.

¹⁰⁰ A contract may be concluded after all, it is common for an electronic transaction to be a combination of click-wrap and browse-wrap agreements. For example, most of the terms to the contract are given in a click-wrap (which is a valid contract), but terms of delivery are given in a browse-wrap agreement. Consequently a contract is concluded, but terms given in the browse-wrap agreement do not become part of it. If all the terms were given in a browse-wrap agreement, there would be no contract.

¹⁰¹ *In re RealNetworks, Inc.*, No. 00-c-1366, 2000 U.S. Dist. LEXIS 6584, at 2, 15-17, 2000 WL 631341, (N.D.Ill. May 11, 2000); see footnote 68.

¹⁰² See footnote 32, article 3 part 1.

" These principles are defined as follows: provides that the said services shall be provided in accordance with principles of nondiscrimination of electronic form and neutrality of technology

3. Principle of neutrality of technology shall be understood as obliging the interpretation of laws in a manner that would neither promote nor discourage the use of any specific technology..."¹⁰³

In addition to that, the Lithuanian Civil Code equates information transmitted through electronic means with one given in a written form.¹⁰⁴ Thus, there is no doubt that contracts may not be deprived of their validity merely because they were formed online.

The Lithuanian Civil Code defines offer in the following way: A proposal to form a contract shall be deemed an offer if it is sufficiently definite and indicates the intention of the offeror to be bound..."¹⁰⁵. An acceptance is defined as: sha statement made by the offeree or any other conduct thereof indicating assent to the offer ...c"¹⁰⁶. The Lithuanian Civil Code has a subjective theory of contract interpretation: "[i]n interpreting a contract, the real intentions of the parties shall primarily be sought, not limiting the interpretation of the contract to the literal meaning of its wording"¹⁰⁷. However, subjective interpretation of the contract is only relevant when a contract is actually formed. Standard for judging conduct of the parties during the formation of contracts is objective, because a party forms a contract by way of expression of its will:

" However, subjective interpretation of the contract is only relevant when a contract is actually formed. Standard

...

6. A bilateral contract shall be considered a contract requiring the will of two parties to be formed."¹⁰⁸

1. The will of a person may be expressed verbally, in writing, by action or in any other manner.

2. The will of a person may be implied from to the circumstances of formation of contract.a"¹⁰⁹

Lithuanian law does not have a presumption that the buyer makes the offer. On this issue article 10 of the Statute on Information Society Services may be confusing, it provides that: "[t]he provider of the service ... upon the order given by the receiver of the service, must promptly give a confirmation to the receiver of the service"¹¹⁰. A systemic method of interpretation would lead to the conclusion that this provision was intended to give additional protection to the receiver of the service, rather than regulate offer and

¹⁰³ *Ibid.*, article 3.

¹⁰⁴ See footnote 24., article 1.73 part 2.

¹⁰⁵ *Ibid.*, article 6.167 part 1.

¹⁰⁶ *Ibid.*, article 6.173 part 1.d

¹⁰⁷ *Ibid.*, article 6.193 part. 1.

¹⁰⁸ *Ibid.*, article 1.63.

¹⁰⁹ *Ibid.*, article 1.64.

¹¹⁰ See footnote 32, article 10 part 1.

acceptance, because the requirement for prompt confirmation of an offer is given in article 10 of the Statute on Information Society Services, rather than article 11 which governs offer and acceptance.

The Statute on Information Society Services defines the information society services as services given through electronic communications or at a distance, usually for remuneration at the request of the receiver of the services.¹¹¹ The term services do include sales of goods.¹¹²

Notwithstanding some differences in wording, Lithuanian law governing the formation of contracts is essentially the same as in the USA, therefore the discussion in section 2.1.1. "Click-wrap agreements" on the issues of who makes the offer, who and how accepts is applicable to Lithuanian law.

Hence, click-wrap contracts are formed in Lithuania. There are additional requirements that offer and acceptance must meet though. In *E. D. v. UAB „SKYTECH.LT“*¹¹³, *E. D. (plaintiff)* bought computer parts from UAB . There are additional requirements that offer and acceptance must meet though. In *E. D. v. UAB „SKYTECH.LT“* litigation. The issue before the court was whether the plaintiff was properly (in writing) made aware of all the information required under article 6.366 part 6 of the Lithuanian Civil Code, because, the consumer (if he was properly informed) may only rescind the contract no later than 7 days after the formation of it, while the plaintiff only expressed his intention to rescind the sale 25 days after the conclusion of the contract. The court reasoned:

" *E. D. (plaintiff)* bought computer parts from UAB . There are additional requirements that offer and acceptance must meet though. In *E. D. v. UAB „SKYTECH.LT“* litigation. The issue before the court was whether the plaintiff was properly (in writing) made aware of all the information required under article 6.366 part 6 of the Civil Code if the information sent using electronic means is protected from altering and is identifiable as having come from the other party to the contract, by way of identifying the electronic signature of the sender (article 6.192 part 2 of the Civil Code, Republic of Lithuania Statute on electronic signature, article 8 part 1). Under current statutory law, information provided by the defendant on its website may not be equated with information given in a written (paper) form. The fact that the plaintiff ticked a box saying he agrees with the terms of the sale and information at issue in this case on the website of the defendant is not sufficient proof, because the said information may be changed afterwards. It follows then that by ticking the box the plaintiff only agreed to the terms of the contract, and did not indicate that he was made aware of the information required by article 6.366 part 6 of the Civil Code."¹¹⁴

¹¹¹ *Ibid.*, article 2 part 10.

¹¹² Lietuvos Respublikos Vyriausybės Nutarimas, Dėl Lietuvos Respublikos Informacinės visuomenės paslaugų įstatymo koncepcijos patvirtinimo, Žin. (2004 m. spalio 11 d. Nr. 1276) p. 2.

¹¹³ *E. D. v. UAB „SKYTECH.LT“*, Panevėžio apygardos teismas (2012-11-22, Nr. 2A-686-544/2012).

¹¹⁴ *Ibid.*

Other case law (even if very few) supports the conclusion that click-wrap contracts are formed. In *J. M v UAB* „ther case law (even if very f¹¹⁵ a contract concluded via the internet was found to be formed, even if subsequently rescinded. In *UAB „SEB VB lizingas“ v. UAB „Gendra“*, *UAB „Antima ir Ko“*¹¹⁶ the court found a contract formed through electronic means to be admissible evidence.

In *UAB urt* found a contract formed¹¹⁷ the court found that parties made a contract when E.R.Z. (defendant) confirmed his registration by way of transferring 0.01 Lt to *UAB „Bobutės paskola“* bank account, because such an action was held to be manifestation of assent according to the contract provisions given by *UAB „Bobutės paskola“* (plaintiff).¹¹⁸ Plaintiff gave the defendant a loan of 500 Lt. Court reasoned on the issue of formation of contract:

“Plaintiff gave the defendant a loan of 500 Lt. Court reasoned on the issue of formation of contract: ay of transferring 0.01 Lt to *UAB „Bobutės paskola“* bank account, because such an actions became binding... Defendant performed acts, that were required to conclude the registration [on the plaintiff’s database]... Furthermore, the defendant received the funds, loaned to him according to the contract, yet tock no actions to return the funds received without cause [since there was no contract, as defendant claims]. Defendant accepted the funds and thereby confirmed the contract.”¹¹⁹

There are some additional requirements, intended to protect consumers in Lithuanian statutory law¹²⁰ as well as regulatory law¹²¹ requiring the vendor to give specific information of the consumer (the god being sold etc.). However, these requirements do not affect the formation of contract, only give the consumer additional rights, such as unilateral rescission, hence, they have no bearing on the issue of formation of contract.

There are defenses under Lithuanian law, but mere fact that a contract was a click-wrap does not mean any of them are applicable. In consumer transactions, a court must be active and ex-officio check the compliance of contractual terms to requirements of

¹¹⁵ *J. M v. UAB „Skaitos kompiuterių servisas“*, Klaipėdos apygardos teismas (2010-06-22, Nr. 2A-445-460/2010).

¹¹⁶ *UAB „SEB VB lizingas“ v. UAB „Gendra“ ir UAB „Antima ir Ko“*, Lietuvos apeliacinis teismas (2007-05-29, Nr. 2A–231/2007).

¹¹⁷ *UAB „Bobutės paskola“ v. E. R. Z.*, Kauno apygardos teismas (2013-09-26, Nr. 2A-1514-173/2013).

¹¹⁸ The fact that E.R.Z. was required to perform a positive act (transfer of a nominal sum) other than clicking “I agree” is not legally significant for the purposes of this discussion.

¹¹⁹ See footnote 116.

¹²⁰ See footnote 24, articles 6.366, 6.367.

¹²¹ Lietuvos Respublikos Ūkio ministro įsakymas Dėl daiktų pardavimo ir paslaugų teikimo, kai sutartys sudaromos naudojant ryšio priemones, taisyklių patvirtinimo, Žin. (2001 m. rugpjūčio 17 d. Nr. 258);

Informacinės visuomenės plėtros komiteto prie susisiekimo ministerijos direktoriaus įsakymas Dėl Informacijos teikimo vartotojams gairių ūkio subjektams, prekiaujantiems internetu, patvirtinimo, Žin. (2013-10-04, Nr. T-121).

consumer protection in article 6.188 of the Lithuanian Civil Code.¹²² In cases of click-wrap contracts, no violations were found¹²³, thus it can be inferred that no defenses under article 6.188 apply.¹²⁴ Whether other defenses such as mistake, noncompliance with imperative statutory requirements etc. are applicable cannot be definitively given in the absence of case law, but it would be hardly plausible that a click-wrap contract could be voidable merely because of means for its formation in view of principle of nondiscrimination of electronic form.

Browse-wrap agreements are probably not formed however. In the absence of case law, the arguments hereafter are not yet tested in courts, but there is some statutory law supporting such a conclusion. The Statute on Information Society Services indicates that: "rowse-wrap agreements are probably not formed however. In the absence of case law, the arguments hereafter are not yet tested in courts, but there is some stpon performance of which the contract if formed"¹²⁵. In case of a eements are probably not formed however. In the absence of case law, the arguments hereafter are not yet tested in courts, but there is some stpon performance of which the contract if formed"are clearly not met.

Furthermore, Lithuanian Civil Code has additional requirements for contracts with standard terms: hereafter are not yet tested in courts, but there is some stpon performance of which the contract if formed"are clearly not met. ociety to familiarize with the said terms"¹²⁶. Rules developed in non-e-contracting cases apply here. A party to a contract is held to be given adequate opportunity to familiarize with standard terms only if the terms are incorporated into the contract itself or given as an appendix to it; the terms must be given to the party to the contract before or upon the time of the conclusion of the contract.¹²⁷ The party which drafted the contract must prove these criteria were met¹²⁸, which would be a very difficult task in case of a browse-wrap agreement. Thus, the terms to a contract given in a form of a browse-wrap do not become part of the contract. However, it is not clear whether the terms to a browse-wrap would bind a party if it was actually aware of them.

In summary, even though Lithuanian case law is not developed on the subject of formation of click-wrap and browse-wrap agreements, it is most likely to develop in the direction of American case law, because the relevant statutory law is the same, especially if the Lithuanian Judges will be aware of the American case law. Thus, under Lithuanian law click-wrap agreements are formed; browse-wrap agreements are most likely not formed.

¹²² See footnote 24, article 6.228⁴ part 9.

¹²³ See footnote 116; see footnote 112.

¹²⁴ See footnotes: 114, 115, 115.

¹²⁵ See footnote 32, article 9 part 1.

¹²⁶ See footnote 24, article 6.185.

¹²⁷ *I. J. v. UADB „Baltikums draudimas“*, Lietuvos Aukščiausiasis Teismas (2006-09-25, Nr. 3K-3-516/2006); *Z.R. v. UAB „Lietuvos žemės ūkio banko draudimas“*, Lietuvos Aukščiausiasis Teismas (2002-11-25, Nr. 3K-3-1425/2002).

¹²⁸ *Ibid.*

2.3 Doctrinal problems with the lack of intent to be bound.

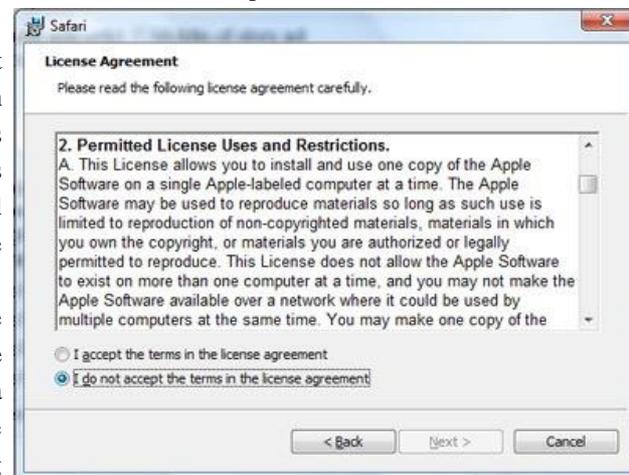
The culture of not reading contracts online

There are several elements to an offer; the relevant one in this discussion is intent to be bound. Presently, case law supports the conclusion that clicking evant one in this discussion is intent to be bound. Presently, wse-wrap agreements,not be sound if the culture of not reading contracts online is taken into account. Clicking "I agree" is more likely to show willingness to continue or, more realistically, get it over with the installation (subscription, purchase etc.) rather than intent to be bound. It must be admitted that I was unable to find any legal authority that would support any arguments provided hereafter, it is just an attempt to apply traditional rules of offer and acceptance to the reality of internet contracting.

Since browse-wrap agreements are generally not formed due to lack of constructive notice, the discussion on the act of acceptance is irrelevant. However, if the offeree is aware of the terms to the contract, for the purposes of this discussion it does not matter if the acceptance is manifested by clicking an icon or by some other means specified by the offeror (browsing).

Whether or not intent to be bound is present in some particular act is judged objectively, would an action be considered as indicating assent from a standpoint of a reasonable person.¹²⁹ But a reasonable person must be aware of developments in the society, including the prevailing trends of behavior online. It would be difficult to argue that businesses are unaware that their clients rarely, if at all, read the contracts, since not reading them has even become a part of popular culture.¹³⁰

Let us examine some of the more interesting clauses of license agreements (quite a few of us most likely have already agreed to) that show how little attention and effort businesses as well as consumers give to transactions online. Safari, an internet browser, developed by Apple, had a license agreement prohibiting its use on devices developed by any company other than Apple itself.¹³¹ In 2008 Apple came out with a new version of Safari 3.1 designed for Windows operating system.¹³² But the license agreement was not



Example 1. License agreement of Safari for Windows.

Source:

http://www.theregister.co.uk/2008/03/26/apple_safari_eula_paradox/

¹²⁹ See footnote 24, article 1.64 parts 1 and 2; see footnote 51.

¹³⁰ The television series "Family guy" S12E03.

¹³¹ C. METZ, „Apple forbids Windows users from installing Safari for Windows”, <http://www.theregister.co.uk/2008/03/26/apple_safari_eula_paradox/>, [last visited on 2014 02 23].

¹³² *Ibid.*

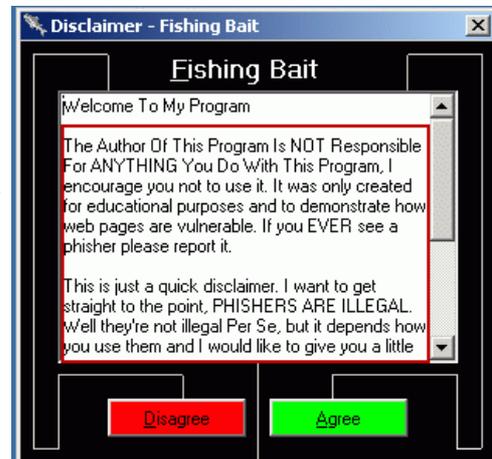
changed to fit the new application, i.e. the license of Safari for Windows prohibited the use of it on Windows (see example 1). It took six months for someone to notice this discrepancy; in addition to that, it was not even Apple that did it, but rather a British blogger.¹³³

The following clause is still in use. Apple requires the users of iTunes, an application for managing media library (mostly music) and Quicktime a media player "not to use these products for still in use. Apple requires the users of iTunes, an application for managing media library (mostly music) a¹³⁴.

It is hard to understand how a license agreement by Apple is on a par of foolishness with some marginal hacker, who discourages the use of his own program for example. The author of the program for phishing (obtaining confidential user information from a webpage illegally, possibly for the use of credit card fraud), named Fishing Bait, disclaims any responsibility, and even discourages the use of the program itself urging to report known instances of its use to law enforcement authorities (see example 2).¹³⁵

Other license agreements are extremely abusive. MiWi, a wireless protocol developed by Microchip Technology, has an Audit clause, giving Authorized representatives of Microchip the right to inspect the premises and records of the licensee at any time, "announced or unannounced, and in its sole and absolute discretion"¹³⁶. Or let us take Google, for example, which requires its users to hip the right to inspect the premises and records of the licensee d non-exclusive license to reproduce, adapt, modify, translate, publish, publicly perform, publicly display and distribute any Content which you [the licensee] submit, post or display on or through, the Services"¹³⁷. This clause is applicable to all Google services, including Google Chrome, a web browser. Thus, according to the license agreement, Google could post online identification codes and passwords of electronic banking systems of its licensees if they were using Chrome.

In 2005 PC Pitstop, a US corporation added a clause to its licensing agreement promising additional consideration "which may include financial compensation"¹³⁸ for anyone who installed one of their products, actually read the agreement and would contact the vendor via e-mail asking for the additional consideration. According to PC



Example 2. License agreement for Fishing Bait. Source:
<http://www.davescomputertips.com/eula-do-you-read-them/>

¹³³ *Ibid.*

¹³⁴ <<http://www.apple.com/legal/internet-services/itunes/us/terms.html>>, [last visited on 2014 02 25].

¹³⁵ A. WADE, „EULA – Do You Read Them?“, <<http://www.davescomputertips.com/eula-do-you-read-them/>>, [last visited on 2014 02 25].

¹³⁶ <<http://www.powercastco.com/forms/microchip-miwi-software-license-agreement.html>>, [last visited on 2014 02 25].

¹³⁷ <<http://tools.google.com/dlpage/res/webmmf/en/eula.html>>, [last visited on 2014 02 25].

¹³⁸ "It Pays To Read License Agreements", <<http://techtalk.pcpitstop.com/2012/06/12/it-pays-to-read-license-agreements-7-years-later/>>, [last visited on 2014 02 23].

Pitstop, after 3000 downloads in a period of four months, one person contacted PC Pitstop inquiring what the additional consideration was (and received a \$1000).¹³⁹

This is not a comprehensive study of consumer behavior and their intent to be bound; such a study would be beyond the scope of this paper. But the popularity of some programs given above (Safari or Google Chrome), license agreements of which are such that no reasonable person would consciously agree to, strongly indicates that a substantial part, or in case of PC Pitstop ~99.967%, of those who agree to, do not actually read the license agreements. The culture of not reading contracts online is noticed in some scientific papers too.¹⁴⁰

The recklessness with online contracts is not limited to the offerees. The offerors (businesses) are just as irresponsible. In addition to all the strange examples given above of questionable enforceability license agreements one may look at a study of 500 largest US internet retailers in 2007¹⁴¹. It found that with online contracts is not limited to the offerees. The offerors (businesses) are just¹⁴² due to lack of constructive notice and substantive unenforceability of some contractual terms. Thus, businesses do not consider internet contracting important enough to hire qualified council that could draft their contracts and advise on the way of posing them to the consumers in a manner that would secure enforceable contracts.

It appears that clicking give notice and substantive unean assent by the offeree. This reasoning could arguably be called a non sequitur due to the leap from not reading contracts to lack of intent to be bound. However, I would argue that not reading contracts online is evidence (even if indirect) of lack of intent to be bound. In addition to that, even if it was conceded that upon the drawing attention of the offeree to the full text of the agreement (by not allowing to proceed with the installation, if the icon "I agree" is not clicked) the offeree has a duty to read whatever she assents to, does not solve the problem. The standard for judgment of any action performed by the offeree is still objective, it would be questionable to maintain that sophisticated business entities are ignorant of the behavior of consumers and their lack of understanding what they bind themselves to.

I cannot imagine presently a court disregarding all the case law as well as legislation (making online contracting enforceable)¹⁴³ and finding a click-wrap agreement not formed. But one can find cases in legal history where certain actions lost their legal significance after some time. I could give a few examples: Mancipation in Roman law, a public ceremony of weighing small pieces of copper in exchange for which some good

¹³⁹ *Ibid.*

¹⁴⁰ C. L. KUNZ, "Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements", *The Business Lawyer* (Vol. 59, No. 1, November 2003), p. 290.

¹⁴¹ R. J. MANN, T. SIEBENEICHER, "Just One Click: The Reality of Internet Retail Contracting", *The University of Texas School of Law Law and Economics Research Paper* (No. 104, May 2007).

¹⁴² *Ibid.* p. 4.

¹⁴³ UETA (1999); UNCITRAL Model Law on Electronic Commerce (1996), Directive 2000/31/EC (E-commerce directive), See footnote 32.

was given¹⁴⁴; conclusion of contract upon a handshake¹⁴⁵ or transfer of ownership in land upon the handing over of a hat and gloves¹⁴⁶ which were required under Lex Alamannorum (a VII century Germanic law). The depicted acts have lost their legal significance in some time. Perhaps, in some indefinite period of time a click on an icon "I agree" will do so too.

Again, this is not a comprehensive study, but rather an attempt to draw attention to possible doctrinal problems. The reality of online contracting is not one of arms-length negotiations; the fact that courts mostly apply the same rules for both does not prove the viability of such an approach.¹⁴⁷ It ignores an inconsistency: only an act performed with intent to be bound may actually bind a party to contractual obligations, but actions that are held by courts to be indicative of assent are not fully understood as such by the society. Whatever the solution to this problem would be, consciousness raising (that a click does actually bind the clicker to contractual obligations) or holding the action of clicking "I agree" insufficient to form a contract due to lack of intent to be bound, it must be dealt with.

CONCLUSIONS AND SUGGESTIONS

In conclusion, the hypotheses framed in the introduction have proven to be correct. In click-wrap scenarios contracts are formed. In browse-wrap scenarios contracts are generally not formed.

Electronic agency is not a sound legal concept if understood as a type of agency. A better approach is to attribute actions made by electronic agents directly to their principals. Contracts formed through other electronic means are valid.

Click-wrap contracts are formed, since they are assented to in a manner, which is binding, by clicking to attribute actions made by electronic agents directly to their principals. (of) what terms she assents to in the offer, given by the vendor (licensor etc.).

In browse-wrap situations, contracts are generally not formed, because the offeree is not aware of the terms to the contract. However, if she is aware of the terms, the contract is formed.

E-contracting involves a great deal of recklessness. Thus the presence of intent to be bound, an element of acceptance, in the action of clicking aware of the terms, the contract is formed. (of) what terms she assents to in the offer,

In summary, the enforceability of click-wrap contracts (doctrinal problems notwithstanding) is well settled. It is a better way of contracting, both for the offeror, who

¹⁴⁴ See footnote 20, p 133.

¹⁴⁵ M. MAKSIMAITIS, *Užsienio teisės istorija*, (Vilnius: Justitia, 2002), p 68.

¹⁴⁶ *Ibid.*

¹⁴⁷ One court actually mentioned this in its discussion: "transactional circumstances [of an electronic, browse-wrap agreement] cannot be fully analogized to those in the paper world of arm's-length bargaining". This quotation should not be overemphasized though, it is somewhat out of context here, for full text: see footnote 84.

bears little risk, and the offeree, who is informed in a reasonable manner, that she is entering into a contract. Thus, when e-commerce has become indispensable, and when some theoretical problems are not likely to take precedence over economic considerations, the best available type of contracting should be used, to give at least some certainty to contractual relationship. Hence, the click-wrap contract should be used.

BIBLIOGRAPHY

Statutory law and other forms of legislation

USA

1. Restatement (Second) of Agency (1958);
2. Restatement (Second) of Contracts (1981);
3. Uniform Electronic Transactions Act (UETA) (1999);
4. Electronic Commerce in Global and National Commerce Act (E-SIGN) (2000);
5. The Uniform Computer Information Transactions Act (UCITA) (1999);
6. Uniform Commercial Code (2000, 2002);
7. United States Uniform Electronic Transactions Act (UETA) (1999).

Lithuanian

1. Lietuvos Respublikos informacinės visuomenės paslaugų įstatymas, *Žin.* (2006 05 25, Nr. 65-2380);
2. Lietuvos Respublikos civilinis kodeksas, *Žin.* (2000 07 18, Nr. VIII-1864);
3. Lietuvos Respublikos Vyriausybės Nutarimas Dėl Lietuvos Respublikos Informacinės visuomenės paslaugų įstatymo koncepcijos patvirtinimo, *Žin.* (2004 m. spalio 11 d. Nr. 1276);
4. Lietuvos Respublikos Ūkio ministro įsakymas Dėl daiktų pardavimo ir paslaugų teikimo, kai sutartys sudaromos naudojant ryšio priemones, taisyklių patvirtinimo, *Žin.* (2001 m. rugpjūčio 17 d. Nr. 258);
5. Informacinės visuomenės plėtros komiteto prie susisiekimo ministerijos direktoriaus įsakymas Dėl Informacijos teikimo vartotojams gairių ūkio subjektams, prekiaujantiems internetu, patvirtinimo, *Žin.* (2013-10-04, Nr. T-121);

UN

United Nations Commission on International Trade Law Model Law on Electronic Commerce (1996) (UNCITRAL Model Law on Electronic Commerce).

EU

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

Case law

USA

1. *A.V., et al. v. IParadigms, LLC*. Civ. Act. No. 07-0293 (E.D. Va., March 11, 2008).
2. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct.1522, 113 L.Ed.2d 622 (1991).
3. *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118, 122, 125-27, 732 A.2d 528 (App.Div. 1999).
4. *Conwell v. Gray Loon Outdoor Marketing Group, Inc.* 906 N.E.2d 805, 811 (Ind 2009).
5. *Express Indus. & Terminal Corp. v. N.Y. Dep't. Transp.*, 93 N.Y.2d 584, 589, 693 N.Y.S.2d 857, 715 N.E.2d 1050 (N.Y.1999).
6. *Feldman v. Google, Inc.*, 2007 WL 966011 (E.D. Pa. March 29, 2007).
7. *Forrest v. Verizon Communications Inc.*, 805 A.2d 1007 (D.C. App. 2002).
8. *Groff v. America Online, Inc.* File No. C.A. No. PC 97-0331, 1998 W L 307001 (R.I. Superior Ct., May 27, 1998).
9. *Hines v. Overstock com, Inc.* 668 F. Supp. 2d 362 (E.D.N.Y 2009).
10. *Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q.2d 1020, 1025 (N.D.Cal. 1998).
11. *Hubbert v. Dell Corp.*, 359 Ill.App.3d 976, 296 Ill.Dec. 258, 835 N.E.2d 113, 121-22 (Ill.App.Ct.2005).
12. *In re RealNetworks, Inc.*, No. 00-c-1366, 2000 U.S. Dist. LEXIS 6584, at 2, 15-17, 2000 WL 631341, (N.D.Ill. May 11, 2000).
13. *I.Lan Systems, Inc. v. Netscout Service Level Corp.* 183 F.Supp.2d 328, Civ. Act. No. 00-11489-WGY, 2002 US Dist. Lexis 209 (D. Mass., January 2, 2002).
14. *Jones v. Brisbin*, 41 Wash.2d 167, 172, 247 P.2d 891 (1952).
15. *Kilgallen v. Network Solutions, Inc.*, 99 F.Supp.2d 125, 129-30 (D.Mass.2000).
16. *Klocek v. Gateway Inc.*, United States District Court, D. Kansas. 104 F.Supp.2d 1332 (2000).
17. *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157 (D. Cal. 2003).
18. *Margae, Inc. v. Clear Link Technologies, LLC*, No. 2:07-CV-00916-TC, 2008 WL 2465450, at 2 (D. Utah 2008).
19. *Minskoff Equities v. American Express*, 98 F.3d 703, 1996 U.S. App. 27441, 30 U.C.C. Rep. Serv. 2d (Callaghan) 999;
20. *Motise v. America Online, Inc.*, 346 F.Supp.2d 563, 564-65 (S.D.N.Y.2004).
21. *Pollstar v. Gigmania Ltd.*, No. CIV-F-00-5671, 2000 WL 33266437 (E.D.Cal. Oct.17, 2000).
22. *Princess Cruises, Inc. v. General Electric Co.*, United States Court of Appeals 143 F.3d 828 (4th Cir. 1998).

23. *ProCD, Inc., v. Zeitenberg*, United States Court of Appeals 86 F.3d 1447 (7th Cir. 1996).
24. *Ray v. William G. Eurice & Bros., Inc.*, Maryland Court of Appeals 201 Md. 115, 93 A.2d 272 (1952).
25. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir.2004).
26. *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 06-CV-0891-B, 2007 WL 367*367 4823761 at *4 (N.D.Tex. Sept. 12, 2007).
27. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 20 (2d Cir.2002).
28. *Ticketmaster Corp. v. Tickets.com, Inc.* 2000 U.S. Dist. Lexis 4553 (C.D. Ca., March 27, 2000).

Lithuanian

1. *E. D. v. UAB „SKYTECH.LT“*, Panevėžio apygardos teismas (2012-11-22, Nr. 2A-686-544/2012).
2. *J. M v UAB „Skaitos kompiuterių servisas“*, Klaipėdos apygardos teismas (Nr. 2A-445-460/2010, 2010-06-22).
3. *UAB „SEB VB lizingas“ v. UAB „Gendra“ ir UAB „Antima ir Ko“*, Lietuvos apeliacinis teismas (2007-05-29, Nr. 2A– 231/2007).
4. *UAB „Bobutės paskola“ v. E. R. Z.*, Kauno apygardos teismas (2013-09-26, Nr. 2A-1514-173/2013).
5. *I. J. v. UADB „Baltikums draudimas“*, Lietuvos Aukščiausiasis Teismas (2006-09-25, Nr. 3K-3-516/2006).
6. *Z.R. v. UAB „Lietuvos žemės ūkio banko draudimas“*, Lietuvos Aukščiausiasis Teismas (2002-11-25, Nr. 3K-3-1425/2002).

Papers and other (unpublished) scientific works

1. ALLEN T., WIDDISON R., "Can Computers make contracts?", Harvard Journal of Law & Technology (Volume 9, Number I Winter 1996).
2. KIS S., Contracts and Electronic Agents (Master's thesis, University of Georgia School of Law, 2004).
3. POSNER E. A., "Agency Models in Law and Economics", JOHN M. OLIN LAW & ECONOMICS WORKING PAPER (NO. 92, 2D SERIES).
4. RASMUSEN E., Agency law and contract formation (May 26, 2003).
5. LAWRENCE W. H., "Rolling Contracts Rolling Over Contract Law", San Diego Law Review (41 San Diego L. Rev. 1099, Summer, 2004).
6. MANN R. J., SIEBENEICHER T., "Just one click: the reality of internet retail contracting", Columbia Law Review (Vol 108:984).
7. CUNNINGHAM P. B., WITKOW E. C., "Click with Caution: Liability for Breach of Click-Wrap and Browse-Wrap Agreements", The Computer & Internet Lawyer (Volume 23, Number 6, June 2006).

8. KUNZ C. L., "Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements", *The Business Lawyer* (Vol. 59, No. 1, November 2003).
9. OAKLEY R. L., "Fairness in E-contracting Minimum Standards for Non-Negotiated Contracts", *Houston Law Review* (Vol. 42, 2005-2006).
10. MANN R.J., & SIEBENEICHER T., "Just One Click: The Reality of Internet Retail Contracting", *The University of Texas School of Law Law and Economics Research Paper* (No. 104, May 2007).

Books

1. DAVIDSON A., *The Law of Electronic Commerce* (Cambridge: Cambridge University Press, 2009).
2. KATUOKA, S. *Tarptautinė Jūrų teisė* (Vilnius: Eugrimas, 1997).
4. MIKELĖNAS V., BARTKUS G., MIZARAS V., KESERAUSKAS Š., *Lietuvos Respublikos Civilinio kodekso komentaras. Antroji knyga Asmenys* (Vilnius: Justitia, 2002).
5. NEKROŠIUS I., NEKROŠIUS V., VĖLYVIS S., *Romėnų teisė* (Vilnius: Justitia, 2007).
6. MAKSIMAITIS M., *Užsienio teisės istorija*, (Vilnius: Justitia, 2002).

Internet and media sources

1. [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:E-commerce_sales_and_purchases,_turnover_from_e-commerce,_by_size_class,_2008-2012,_EU-28_\(%25_enterprises,%25_total_turnover\)v1.png&filetimestamp=20131213124004](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:E-commerce_sales_and_purchases,_turnover_from_e-commerce,_by_size_class,_2008-2012,_EU-28_(%25_enterprises,%25_total_turnover)v1.png&filetimestamp=20131213124004).
2. http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/E-commerce_statistics.
3. ESPOSITO S., *Uniform Computer Information Transactions Act (UCITA): Guide to Web Resources*; <<http://www.law.arizona.edu/Library/research/guides/ucita.cfm?page=research>>.
4. http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html.
5. <http://techtalk.pcpitstop.com/2012/06/12/it-pays-to-read-license-agreements-7-years-later>.
6. METZ C., „Apple forbids Windows users from installing Safari for Windows”, <http://www.theregister.co.uk/2008/03/26/apple_safari_eula_paradox/>.
7. <http://www.apple.com/legal/internet-services/itunes/us/terms.html>.
8. WADE A., „EULA – Do You Read Them?”, <<http://www.davescomputertips.com/eula-do-you-read-them/>>.
9. <http://www.powercastco.com/forms/microchip-miwi-software-license-agreement.html>.
10. <http://tools.google.com/dlpage/res/webmmf/en/eula.html>.

11. "It Pays To Read License Agreements", <<http://techtalk.pcpitstop.com/2012/06/12/it-pays-to-read-license-agreements-7-years-later/>>

Other

1. Article-by-article remarks to the UNCITRAL Model Law on Electronic Commerce.
2. Interview of Michio Kaku, <<http://bigthink.com/videos/the-future-of-quantum-computing-2>>
3. The television series s/the-future-of-quan

SANTRAUKA

Besivystant technologijoms keičiasi ir sutarčių sudarymo būdai: dėl mažesnių kaštų ir patogumo populiarėja sutartys elektroninėje erdvėje. Prie to turi būti pritaikytas ir teisinis reguliavimas, todėl šiame straipsnyje aptariamos dvi sąlyginai naujos sutarčių sudarymo formos. Viena jų – spragtelėjimu sudaroma sutartis (angl. – click-wrap agreement), kai monitoriaus ekrane tiesiog spragtelima ant ikonos „Sutinku“ ar pan. O situacija, kai sutartis turėtų būti sudaroma naršymu (angl. – browse-wrap agreement) – kiek sudėtingesnė, čia akceptantas turėtų išreikšti savo sutikimą vien naršydamas internetinėje svetainėje, tačiau informaciją, apie tai, jog naršymas bus laikomas sutikimu, galima rasti tik spragtelėjus ant saito (angl. – hyperlink), kuris neretai būna nepastebimas, pateiktas puslapio apačioje, akceptantas apie jį (o kartu ir apie sutarties sąlygas, akceptavimo būdą) nėra informuojamas, ir dažnai nežino.

Šiame straipsnyje spragtelėjimu ir naršymu sudaromos sutartys analizuojamos kaip abstrakčios teisės koncepcijos, aptiriamas jų pagrindumas, tinkamumas. Lietuvos ir Jungtinių Amerikos Valstijų nacionalinės teisės sprendimai tiriami lyginamuoju metodu.

Pirmiausia privalu išsiaiškinti ar galima sudaryti sandorius elektroninėmis (ne tik ryšio) priemonėmis. Nors elektroninėmis ryšio priemonėmis perduodama informacija prilyginama rašytiniams dokumentams (taigi, taip sudaromos sutartys be jokios abejonės galioja), spragtelėjimu ar naršymu sudaromų sutarčių atveju, ši teisinė taisyklė nepakankama, nes pardavėjo (žmogaus, turinčio veiksnumą ir teisnumą) įsikišimas dažnai būna labai ribotas, o didžiąją dalį veiksmų už jį atlieka kompiuteris ar kita automatizuota sistema. Dėl to teisės moksle kilo įdomi diskusija apie elektroninį atstovavimą (angl. – electronic agency). Tradicinė atstovavimo teisė reguliuoja teisinius santykius tarp sąmoningų subjektų, todėl yra nepritaikoma elektroniniams atstovams. Ypač problemiškas normų, reguliuojančių santykius tarp atstovo ir atstovaujamojo taikymas, nes elektroninis atstovas net techniškai negali piktnaudžiauti savo teisėmis ar atlikti savo pareigų netinkamai: elektroninis atstovas (automatizuota sistema) atlieka būtent tuos veiksmus, kuriuos buvo užprogramuotas (pagamintas) atlikti, būtent taip, kaip buvo užprogramuotas

(pagamintas) atlikti. Taip pat nėra aišku, kaip elektroniniai atstovai gali būti įgaliojami, kaip jie gali sudaryti sutartis, neturėdami teisinio subjektiškumo (nei teismo, nei veiksnio). Tačiau, įstatymų leidybos priemonėmis dalis šių problemų yra išspręstos: elektroninių atstovų veiksmai pripažįstami saistančiais subjektais, kurių vardu jie buvo atlikti, o elektroninio atstovavimo sąvoka naudojama tik kaip patogus būdas apibūdinti santykius tarp kompiuterio (programos) ir jo savininko, bet ši sąvoka neturėtų būti suprantama, kaip tradicinės atstovavimo teisės porūšis.

Veiksmai kuriais sudaroma sutartis (tiek spragtelėjimas, tiek naršymas) gali būti tinkami išreikšti valių ir susaistyti jų davėją. Pardavėjas (licencijuotojas ar kt.) laikytinas oferentu o jo pateikiamos sutarties sąlygos – oferta, nes šios sąlygos dažniausiai būna konkrečios ir išsamios, todėl laikytinos pakankamai apibūdintomis ir išreiškiančiomis oferento valių. Ar akceptantas iš tiesų perskaito ir susipažįsta su ofertos sąlygomis, neturi reikšmės sutarties sudarymui, kadangi akceptantas turi pareigą elgtis protingai bei atsakingai. Jei akceptantas išreiškia savo valių (būti saistomam sutarties, su kuria nesusipažino tik dėl savo kaltės) sutartis vis vien laikoma tinkamai sudaryta, kadangi, nesusipažindamas su sutarties sąlygomis, akceptantas prisiėmė jos sudarymo riziką. Šioje pastraipoje aptartos problemos ir jų sprendimo būdai taikytini tiek pagal Lietuvos, tiek JAV teisę.

Tai, jog oferentas gali ir nežinoti, konkretaus laiko, kada jo oferta buvo akceptuota (pavyzdžiui, akceptantas parsisiunčia programą iš interneto, tačiau ikoną „Sutinku“ paspaudžia tik ją įdiegdamas, jau atsijungus nuo interneto, todėl informacija apie akceptavimą nepasiekia oferento) neturi įtakos sutarties sudarymui, ji laikoma tinkamai sudaryta.

Situacijose, kai sutartis turėtų būti sudaroma naršant internetinėje svetainėje, jokių sutartinių santykių neatsiranda, nes oferentas nesusipažindina akceptanto su ofertos sąlygomis ar net ofertos buvimu. Akceptantas, nežinodamas apie ofertą, ar dalies ofertos sąlygų, negali savo veiksmais jos (ar dalies nežinomų ofertos sąlygų) tinkamai akceptuoti. Bet jei akceptantas žinotų apie ofertą, tie patys veiksmai (naršymas) būtų laikomi tinkamu akceptu. Tai patvirtina bylos, kai akceptantas realiai žinojo, apie ofertos sąlygas, tuomet naršymas internetiniame puslapyje buvo laikomas akceptu, o sutartys laikytos sudarytomis. Šios išvados daromos pagal bylas spręstas JAV. Kol kas Lietuvoje nėra suformuotos teismų praktikos, tačiau, galima prognozuoti, jog Lietuvos teismų praktika bus formuojama tokia pat linkme kaip JAV, o ypač jei teisėjai Lietuvoje žinos apie sprendimus priimtus Jungtinėse Amerikos Valstijose, nes šiame straipsnyje analizuojamų problemų apimtyje, dabartinis sutarčių sudarymo teisinis reguliavimas Lietuvoje yra analogiškas JAV teisei.

Šiuo metu nėra bylų, kuriose būtų nuspręsta, jog spragtelėjimu sudaromos sutartys turi defektų, leidžiančių pripažinti jas negaliojančiomis vien dėl sudarymo formos, bet atskiros sutarčių sąlygos dėl savo materialaus turinio gali būti pripažintos negaliojančiomis. Mažai tikėtina, kad ateityje spragtelėjimu sudaromos sutartys galėtų būti pripažintos turinčios defektų, dėl kurių taptų taikytiniais teisės institutai dėl sutarčių gynybos, nes tiek Lietuvoje, tiek Jungtinėse Amerikos Valstijose galioja teisės aktai, draudžiantys paneigti sandorio teisinę galią vien todėl, kad minėtas sandoris sudarytas elektroninėmis ryšio priemonėmis.

Ketinimas būti saistomam yra vienas svarbiausių aspektų, vertinant asmens veiksmus ir sprendžiant ar jie laikytini teisiškai įpareigojančiais sutartiniuose santykiuose. Sutarčių sudarymas elektroninėje erdvėje dažnai lydimas didelio nerūpestingumo, būdingo tiek oferentams, tiek akceptantams: sutartys akceptantų neskaitomos, o neretai yra nesudaromos ar negalioja ir dėl oferento kaltės (sutarties sąlygų prieštaravimo imperatyvioms įstatymų normoms ar kitų trūkumų). Tai kelia abejonių, ar iš tiesų spragtelėjimas ant ikonos „Sutinku“ išreiškia pakankamą akceptanto sutikimą ir valią būti saistomam, kadangi nesant valios būti saistomam (akcepto elemento) negalimas ir sutarties sudarymas. Kol kas ši problema nėra išdiskutuota teisinėje literatūroje, nepavyko rasti ir tinkamo jos sprendimo.

Taigi, sutartys sudaromos spragtelėjimu yra sudaromos tinkamai ir galioja, yra pakankamai teismų praktikos patikimai daryti šią išvadą. Lyginant su sutartimis sudaromomis naršant, sutartys sudaromos spragtelint yra geresnis būdas sudaryti sutartis tiek oferentui, tiek akceptantui, nes akceptantas yra tinkamai informuojamas apie visas sutarties sąlygas ir tikrai žino, kad jo veiksmai sukurs teises ir pareigas civiliniuose teisiniuose santykiuose, o oferentas gali kliautis, jog sutartis bus įgyvendinta ir (esant reikalui) ginama teismuose. Todėl dabar, kai elektroninėje erdvėje sudaromos sutartys tapo nebepakeičiamai svarbiomis, ir mažai tikėtina, kad teoretinės problemos teisėje (dėl valios būti saistomam spragtelint ikoną „Sutinku“ ar pan.) būtų vertinamos labiau nei ekonominė nauda, reikėtų bent jau kuo plačiau naudoti patikimesnę sutarčių sudarymo formą – sutartis, sudaromas spragtelint.

REIKŠMINIAI ŽODŽIAI

Elektroninė komercija, spragtelėjimu sudaromos sutartys, naršymu sudaromos sutartys, elektroninis atstovavimas, ketinimas būti saistomu.