The Colour of E-consent*

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INTRODUCTION

THE COMMON PRINCIPLE, "the contract is the law of the parties,"[1] is frequently invoked as the basis of contractual relationships. This widespread yet controversial notion is also at the core of a passionate debate on the role of individual will as a pillar of contract law.[2] It furthermore allows us to establish a link, on the one hand, with the increasingly contested opposition between formalism and consensualism[3] and, on the other hand, with the growing number of boundaries to which contract law is subject. The public essence of contracts[4] is taking more and more space. This fact, in the author's opinion, is all the more important in the electronic context where some type of formalism should fill the material void previously occupied by the physical attributes[5] of paper. In the field of contract law while a paper document can be likened to an "act," an electronic agreement

1. For example, art. 1434 of the *Civil Code of Québec* (C.C.Q.) states that a "contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law." The equivalent disposition of the *French Civil Code*, art. 1134 C.C.F, is perhaps an even better example: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi." On this notion, see for example, Jean Pineau, Danielle Burman & Serge Gaudet, *Théorie des obligations*, 3rd ed. (Montreal: Les Éditions Thémis, 1996) at 422ff.
2. For example, see Ian R. Macneil, "The Many Futures of Contracts" (1974) 47 S. Cal. L. Rev. 691; Grant Gilmore, *The Death of the Contract* (Columbus, Ohio: Ohio State University Press, 1974).
3. Jacques Flour, "Quelques remarques sur l'évolution du formalisme" in *Le droit privé français au milieu du vingtième siècle—Études offertes à Georges Ripert*, t. 1 (Paris: L.G.D.J., 1950) at 93–114; Élise Charpentier, "Un paradoxe de la théorie du contrat: l'opposition formalisme/consensualisme" (2002) 43:2 C. de D. 275.
4. Louis Josserand, "Les dernières étapes du dirigisme contractuel: le contrat forcé et le contrat legal (contrat dit de *salaire différé*)" (1940) Dalloz 5.
5. Vincent Gautrais, *Le contrat électronique international* (Louvian-la-Neuve, Belgique: Bruylant-Academia, 2001) at 96ff.

more closely resembles a "process."[6] Without discriminating against either paper- or electronic-form contracts, it is necessary to consider the differences between them, in order to determine whether the differences between old and new media are relevant to contract law.

The end-users, whether consumers or, more generally, contracting parties, need to know whether they are agreeing to something, what they are agreeing to, and where they stand when and if they enter into online contractual relationships. One need only review some of the recent amusing examples offered by the internet. For instance, the unwitting eBay user who buys without realizing he is doing so,[7] the individual who buys a "Playstation" without knowing that only the Playstation box was for sale,[8] a purchaser who rapidly scans an electronic contract that places key clauses regarding payment in the fine print,[9] or finally the purchaser who faces a contract of such an excessive length that a layperson cannot reasonably comprehend it.[10] These examples illustrate the relative adolescence of the legal framework for electronic contracts. This immaturity is as adverse for the seller who writes the electronic contracts as it is for the consumers[11] because it creates uncertainty for both parties.

Rather than invoke a theoretical reconsideration of contracts, something the author has pursued elsewhere,[12] this paper addresses some concrete situations and offers guidelines to ensure that e-consent can be legally and efficiently expressed.

This paper begins with a brief outline of the distinctive features of electronic transactions. This will allow us to establish whether these features may be reconciled with both the theoretical legal precepts and the legislative framework which recently have been added to the law. The goal is to ensure that modes of electronic consent, notably the "click," are "just and useful"[13] and to enable this

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6. Ethan Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995) at 129: "Paper contracts bind parties to an act. The electronic contract binds parties to a process." See also Ethan Katsh, *The Electronic Media and the Transformation of Law* (New York/Oxford: Oxford University Press, 1989) at 92:

   > Moving information electronically does not simply transport data faster and over greater distances than other media but transforms it in the process. Most of the time, the transformation is imperceptible to the receiver. When compared with print, however, the process is less trustworthy and open to some doubt. The process of breakdown and restoration always has the possibility of intentional or accidental misuse. Digitalization thus has two equal potentials: to copy and communicate the original in a highly accurate manner; to distort reality so profoundly but imperceptibly that the receiver of the communication cannot know whether the copy as received is the same as the original or, if different, different to what degree from the original.

7. A 13 year old boy bought 3 million dollars' worth of goods through the eBay website, just by clicking on several online auctions. See Jane Hughes, "Teen on eBay spending spree" *BBC News* (30 April 1999) <http://news.bbc.co.uk/1/hi/world/americas/331940.stm>.
8. An auction on eBay reached 300 dollars even though the box and not the console was for sale. The seller had written "sell playstation box at…."
9. For example, a Madagascar case concerned an adult website where the client "signed" a contract with a buried clause stipulating that their local internet connection would be changed to a long distance connection. Even if the clause expressly mentioned this "payment form", 50,000 people in North America were "cheated" since they did not read the clause in question. Glenn R. Simpson, "FTC Uses Software to Pull Plug on Alleged Global Porn Swindle" *Wall Street Journal* (6 October 2000) <http://www.karlloren.com/Diabetes/p80.htm>.
10. See Part 1.1. below.
11. Lydia J. Wilhelmi, "Ensuring enforceability: how online businesses can best protect themselves from consumer litigation" (2002) 86 Marq. L. Rev. 181.
12. Gautrais, *supra* note 5.
13. Jacques Ghestin, "L'utile et le juste dans les contrats" (1981) 26 Archives de philosophie du droit 35.

technology to function both from a business and from a legal perspective. The paper will therefore be situated between "descriptivisme et constructivisme."[14]

This paper sets out the features of the expression of online consent, as well as the manner in which it is given. It does not aim to discuss the content of online contracts.[15] It is all the more important to address the issue of e-consent given the unsettled nature of electronic contracting and the international variation in practices.

Consent, a well-known legal precept, can be considered one of the pillars of contract law, if not its core concept. Yet, within this broad notion, certain new issues associated with the emergence of electronic communications seem to arise. Questions regarding the nature of offer and acceptance,[16] the place where the contract is formed,[17] and the question of whether one's will can be expressed in an automated manner,[18] among others, should be addressed.[19] I have chosen to concentrate here on two questions that seem to have received little attention. Part 1 discusses the different ways we read electronic and paper documents, while Part 2 focuses on the way we manifest intent.

I will therefore not address all of the problems associated with adhesion contracts, since their validity, from a legal perspective, is no longer in question.[20] In fact, these contracts are widespread, especially in the electronic-commerce field. Instead the paper will concentrate on how the offeree should be taken into account in drafting e-contracts. This focus seems to run counter to the idea that, since consumers rarely read the contracts presented to them, it is preferable to surround contracts with legal doctrines such as good faith[21] or abusive clauses.[22] It is also true that the fairness of the contract is relevant both to the competi-

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14. Christian Atias, *Théorie contre arbitraire* (Paris: P.U.F., 1987) at 106–07; Vittorio Villa, "La science juridique entre descriptivisme et constructivisme" in Paul Amselek, *Théorie du droit et science* (Paris: P.U.F., 1994) at 288.

15. Some of our current research regarding contractual practices in an electronic environment is showing that many online contracts are illegal or unfair. This seems to be particularly true for licenses or contracts with ISPs. On this last point, see the *Commission des clauses abusives*' report (France) titled: *Recommandation n° 03-01 de la Commission des clauses abusives relative aux contrats de fourniture d'accès à l'Internet*, which was adopted on September 26, 2002 following a report by Laurent Leveneur. The recommendations were published in the January 30th 2003 edition of the *Bulletin officiel de la Concurrence*, de la Consommation et de la Répression des fraudes, <http://www.foruminternet.org/documents/rapports_avis/lire.phtml?id=496>.

16. Vincent Gautrais, "Les principes UNIDROIT face au contrat électronique" (2002) 36:2 R.J.T. 481 at 500.

17. *Ibid.* at 506ff. See also Gautrais, *supra* note 5 at 127.

18. Gautrais, *supra* note 5 at 139.

19. Other issues might include formal conditions, control of capacity, or any other contractual obligations.

20. Art. 1379 of the *C.C.Q.*: "A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable. Any contract that is not a contract of adhesion is a contract by mutual agreement."

21. Art. 1375 of the *C.C.Q.*: "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished." For a comparative approach, see Gautrais, *supra* note 5 at 47.

22. Art. 1437 of the *C.C.Q.*: An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

    An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

tiveness[23] and reputation[24] of the drafter, which are all the more important in the new economy.[25] Clearly, these considerations are important only in competitive markets, which is not necessarily the case in the sector under consideration here where a large wave of mergers and reorganizations has taken place during the years 1999–2000. This is perhaps one of the reasons why questions have been raised on the subject: Microsoft, Yahoo!, AOL, Netscape, etc. have, as we shall see, sometimes displayed somewhat exploitative attitudes toward their clients.[26]

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1. E-CONSENT AND LEGIBILITY

IT IS NECESSARY TO BEGIN WITH THE LAW. Article 1399 of the Quebec Civil Code states that "[c]onsent must be free and informed."[27] This notion is well understood by the legal community,[28] and has been for many years.[29] There still exist some doctrinal or jurisprudential debates on the subject;[30] in fact, interesting research on the will as the root of the binding power of contracts could and should be conducted.[31] That is, however, not the purpose of the present discussion. Instead, the point lies in the following statement: if consent is indeed a *sine*

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23. Robert A. Hillman & Jeffrey J. Rachlinski, "Standard-Form Contracting in the Electronic Age" (2002) 77 N.Y.U. L. Rev. 429 at 442.

    > Furthermore, even though many, if not most, consumers lack the time, skill, or desire to shop carefully among contract terms, economists argue that even a small percentage of savvy, vigilant consumers create adequate incentives to make businesses competitive. Unless a business easily can identify these alert consumers and offer more favorable treatment to them, it must choose between losing a small group of customers and offering efficient terms to the entire market. In a competitive market, providers of goods and services cannot afford to lose even a small group of customers. Consequently, businesses must write their boilerplate so as to compete effectively for the small group of savvy consumers.

    See Richard Craswell, "Remedies When Contracts Lack Consent: Autonomy and Institutional Competence" (1995) 33 Osgoode Hall L. J. 209 at 225.

24. Hillman, *supra* note 23 at 444–45:

    > Despite these concerns, courts recognize that the combination of businesses' efforts to compete for savvy consumers and businesses' concerns with their reputations often will dissuade them from attempting to exploit consumers with standard terms. Courts are also mindful of their own limited ability to distinguish exploitation from sensible business practices and of the costs associated with mistakenly refusing to enforce the latter. The adverse consequences of judicial reliance on market discipline might, in many cases, be less harmful than the consequences of judicial interference with sensible business practices. Therefore, courts should be certain that they have identified some failure of the market or of firm reputation before deciding to strike a standard term.

25. *Ibid.* at 469–71.

26. *Supra* note 15.

27. Gil Rémillard, *Commentaires du ministre de la Justice*, t. 1 (Québec: Bibliothèque nationale du Québec, 1993) at 849. Concerning art. 1399 *C.C.Q.*, he states: "le consentement doit non seulement *exister*, mais doit aussi être *libre*, c'est-à-dire donné librement et *non point sous la menace*, la crainte ou la contrainte, et *éclairé*, c'est-à-dire *intègre, donné en toute connaissance de cause, renseignements pris et donnés.*"[emphasis added]. Also see *Griggs v. Goyette*, (1999) R.E.J.B. 1999-16592: "Dans l'appréciation de ces qualités du consentement (être libre et être éclairé) les circonstances sont souveraines. Ainsi, le Tribunal doit prendre en considération toutes les circonstances de personnes, de lieu et d'état."

28. See, for example, Jean-Louis Baudoin & Pierre-Gabriel Jobin, *Les obligations*, 5th ed. (Cowansville: Éditions Yvon Blais, 1998) at 177ff. Jacques Ghestin, *Traité de droit civil—La formation du contrat*, 3rd ed. (Paris: L.G.D.J., 1993) at 349.

29. Alfred Rieg, *Rapport sur les modes non formels d'expression de la volonté en droit civil français* (Travaux association Henri Capitant, 1968) at 43, n. 3.

30. This concerns whether consent should be internal or declared.

31. *Supra* note 5.

qua non of all valid contracts,[32] it is also necessary that consent be manifested in a sufficient and unambiguous manner. With this in mind, does a web page purporting to be a contract satisfy this requirement? This question must be addressed not only in light of the capacities of the electronic medium, but also considering the communicative functions shared by all media. My treatment will therefore first take into account the existing principles in the area. Then, I will study some of the solutions suggested by the different communities affected by the topic.

1.1. General principles faced with the reality of e-consent

I believe that one's ability to read an electronic document, without necessarily being better or worse, are definitely different from one's ability to read a paper document. From this observation flow legal implications.

First, a computer monitor does not possess the same qualities of readability as paper. The importance of legibility has been noted in the law,[33] but not in the electronic context. It is therefore useful to examine this notion with this difference in mind. Jakob Nielsen was one of the first to argue strongly for such an examination, having been able to enumerate the lacunae of the electronic medium when compared to paper.[34] The importance of taking the consumer into account has already been considered in the context of improving understanding through the use of simple and non-legalistic language.[35] It seems clear that it is

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32. Art. 1385 of the *C.C.Q.*: "A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement. It is also of the essence of a contract that it have a cause and an object."

33. Art. 1436 of the C.C.Q.: "In a consumer contract or a contract of adhesion, a clause which is illegible or incomprehensible to a reasonable person is null if the consumer or the adhering party suffers injury therefrom, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party." For more on this topic, see Benoît Moore, "Autonomie et spécificité de l'article 1436 C.C.Q", in Pierre-Claude Lafond (dir.), *Mélanges Claude Masse: En quête de justice et d'équité* (Cowansville: Éditions Yvon Blais, 2003) at 595ff.

34. Jakob Nielsen, "Writing for the Web", <http://www.sun.com/980713/webwriting>. This electronic communication specialist considers whether it is necessary to rethink e-writing in order for it to have the same level of efficiency as paper documents. Concerning this author, read Vincent Gautrais & Ejan Mackaay, "Les contrats informatiques" in Denys-Claude Lamontagne, *Droit spécialisé des contrats*, vol. 3 (Cowansville: Éditions Yvon Blais, 2001) at 279, 296.

> Le document écran est source de beaucoup plus d'imprécisions, d'éventuels quiproquos, encore que l'usager ne manquera pas de faire preuve, face à un document électronique, de sa désinvolture habituelle. S'il se donne la peine de «scroller» (*scrolling*), c'est-à-dire de faire défiler le texte, il n'absorbe pas vraiment le contenu du texte et ne va pas voir d'éventuels liens hypertextes insérés dans le texte initial, pour finir par «cliquer» sans forcément avoir pleinement conscience de ce à quoi il s'engage.

Also see Andrew Dillon, "Reading from paper versus screens: a critical review of the empirical literature" (1992) 35 Ergonomics 1297–1326; Kathy Henning, "Writing for Readers Who Scan" (6 February 2001) clickz.com <http://www.clickz.com/design/onl_edit/print.php/836621>; Claire Gélinas-Chebat *et al.*, "Lisibilité—Intelligibilité de documents d'information" (1993), <http://www.ling.uqam.ca/sato/publications/bibliographie/C3lisib.htm>.

35. This question is not far from the "Plain English" precept used in consumer law. See Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (St. Paul, Minn.: West, 1981); Jeffrey Davis, "Protecting Consumers from Overdisclosure and Gobbledygook: an Empirical Look at the Simplification of Consumer-Credit Contracts" (1977) 73 Va L. Rev. 841; Robert C. Dick, "Plain English in Legal Drafting" (1980) 18 Alb. L. Rev. 509; Carl Felsenfeld, "The Plain English Movement in the United States" (1982) 6 Can. Bus. L. J. 408; David M. LaPrairie, "Taking the "Plain Language" Movement too far: The Michigan Legislature's Unnecessary Application of the Plain Language Doctrine to Consumer Contracts" (2000) 45 Wayne L. Rev. 1927; Melvin Aron Eisenberg, "The Limits of Cognition and the Limits of Contract" (1995) 47 Stan. L. Rev. 211; Melvin Aron Eisenberg, "Text Anxiety" (1986) 59 S. Cal. L. Rev. 305.

even more important to consider the consumer in the electronic context.[36]

Second, sellers who propose electronic contracts have a tendency to make them very long if there are no technical limits on length.[37] With respect to a physical medium, one cannot always present a multi-page contract because it could become more cumbersome than the product itself. Further, cost is directly associated with the "publication" of a paper contract. In an electronic medium, there are no financial limitations in making a document available to the public. Length, however, has a direct impact on the reader's understanding of a document.[38]

Third, length is all the more problematic since the offeree of an electronic contract expects the process to be quick given the fact that one goes online to save time.[39] This therefore exacerbates the problem of length.

Fourth, one notes that there are no set standards regarding the placement of contractual clauses.[40] There is a certain tendency to place legal clauses at the bottom of webpages, which is not very efficient from a communicative standpoint because it forces the buyer to scroll down to get to the contract. The aim of this paper is not to impose one way of doing things or another, although some have committed themselves to developing guidelines on this point.[41]

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36. Judee K. Burgoon *et al.*, "Testing the Interactivity Principle: Effects of Mediation, Propinquity, and Verbal and Nonverbal Modalities in Interpersonal Interaction" (2002) 52:3 Journal of Communication 657.

37. For examples concerning this practice, see eBay's User Agreement <http://pages.ebay.com/help/community/png-user.html>, a 20-page document containing many hyperlinks of *Yahoo!*'s Terms of Service contract <http://docs.yahoo.com/info/terms/> and *Verisign*'s Certification Practice Statement <http://www.verisign.com/repository/CPS2.1/cps2-1.pdf>, which is 105 pages long.

38. Hillman & Rachlinski, *supra* note 23 at 451–452.

    > To simplify matters, people tend to reduce their decisions to a small number of factors, even as they claim to use multiple factors. This narrow cognitive focus might be sensible, in fact. Numerous studies indicate that people who rely on simplified decisionmaking models also tend to make better decisions than if they used complicated models. Some scholars have argued that this tendency to simplify decisionmaking means that people essentially cannot evaluate the many situations covered by the terms in standard-form contracts. Instead, they focus their attention on a small number of aspects of a contract, such as price and quantity.

39. *Ibid.* at 479. "Furthermore, e-consumers might be more impatient, rather than more informed. Because of their relative youth and their frequent use of the Internet to save time, e-consumers might be a little too eager to complete their transactions." On this particular issue, the authors quote Naveen Donthu & Adriana Garcia, "The Internet Shopper" (1999) 39:3 J. Adver. Res. 52 at 56.

40. See Santiago Cavanillas Mugica, "Les contrats en ligne dans la théorie générale du contrat: le regard d'un juriste de droit civil" in C.R.I.D.: *Commerce électronique—Le temps des certitudes* (Brussels: Bruylant, 2000) at 102.

    > Tout ce qui apparaît dans les pages du site Web du vendeur peut s'incorporer au contrat, mais suivant deux règles différentes. D'abord, toute information ou toute clause pouvant être considérée (en tenant compte de sa situation et de sa clarté) comme acceptée par l'acheteur (du moins tacitement, puisqu'il a eu accès à cette information ou à cette clause) s'incorpore au contrat avec une force bilatérale, c'est-à-dire en obligeant aussi bien le vendeur que l'acheteur. Mais tout le reste—c'est-à-dire tout ce quoi, du fait de sa situation ou de son manque de clarté, ne peut être considéré comme faisant l'objet d'une acceptation véritable ou comme, du moins, ayant été mis à la disposition de l'acheteur—qui, dans une certaine mesure, a pu influencer l'acheteur, joue le rôle de la publicité et oblige donc le vendeur mais n'engage pas l'acheteur.

    See also Santiago Cavanillas Mugica, "Research Paper on Contract Law" in ECLIP, <http://www.eclip.org/documents/deliverable_2_1_7_bis_contract.pdf>; Principle 1.2 of the Office of Consumer Affairs of Industry Canada, *Principles of Consumer Protection for Electronic Commerce* (Ottawa: Industry Canada, August 1999), <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwGeneratedInterE/ca01185e.html>, which states that: "Information required by these principles should be 'prominently disclosed'"; The Office of Consumer Affairs of Industry Canada, *Canadian Code of Practice for Consumer Protection in Electronic Commerce* (Ottawa: Industry Canada, January 2003), <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwGeneratedInterE/ca01861e.html>.

41. Canada, Competition Bureau, *A Guide to Compliance with the Competition Act When Advertising on the Internet* (Ottawa: Industry Canada, 2001), <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02186e.html>.

Fifth and finally, it must be mentioned that the internet has its own particular features that not only affect reading but also the purchasing process. As a result, buying online is often a complex procedure in which the consumer may well become somewhat confused.[42] The succession of steps often includes a series of forms, in which the consumer must choose the product or service to be purchased, the method of payment, the place of delivery, the billing address, the delivery method, etc. Afterwards, the seller often sends emails regarding product availability, follow-up information and even a confirmation email, showing the existence of the contract. Of course, a more diligent seller will offer the consumer a personalized and information-rich service. It is necessary, however, to keep in mind that changes in habits are required and that it is important to provide appropriate follow-up to cyber-consumers. This is all the more important because approaches differ from one website to another.

The reader's vulnerability is therefore increased due to the characteristics of the screen and the medium. However, laws and jurisprudence have rarely taken the electronic context into consideration.[43]

1.2. Proposed solutions

Faced with this reality, it is important to do everything possible to ensure that the visual presentation on the screen is of sufficient quality. The weaknesses of the visual presentation are even more harmful when they have to do with important legal acts that often benefit from special protective measures. For example, the legal framework which governs insurance contracts has been drawn up in order to permit better communication of certain sensitive issues.[44] The same can be said of liability clauses,[45] and confidentiality clauses. With respect to the confidentiality clauses, law, jurisprudence and doctrine all require a higher level of for-

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42. *Ibid.* at section 1.

43. Quebec, Consumer Aid Service, *Insurance Services on the Internet* (Quebec: Publications du Quebec), <http://www.service-aide-consommateur.qc.ca/pdf/insuranceoninternet.pdf> at 53. "Those Laws, as well as those issued by the federal government do not necessarily fully protect the consumers who use the Internet to complete their transactions, especially when purchasing insurance products considering that such transactions were not designed for application in an electronic environment."

44. For example, art. 2416 of the *C.C.Q.* states that:

> In an accident and sickness policy, the insurer shall set out, expressly and in clearly legible characters, the nature of the coverage stipulated in it. Where the contract provides coverage against disability, he shall set out in the same manner the terms and conditions of payment of the indemnities and the nature and extent of the disability covered. Failing clear indication as to the nature and extent of the disability covered, the inability to carry on one's usual occupation constitutes the disability.

<http://publicationsduquebec.gouv.qc.ca/home.php#>. See also *An Act Respecting the Distribution of Financial Products and Services*, R.S.Q. c. D-9.2, arts. 28 & 431, <http://publicationsduquebec.gouv.qc.ca/home.php#>; Didier Lluelles, *Précis des assurances terrestres*, 3rd ed. (Montreal: Éditions Thémis, 1999) at 58.

45. On liability clauses, see Marcus Maher, "Open Source Software: The Success of an Alternative Intellectual Property Incentive Paradigm" (2000) 10 Fordham I. P. Media & Ent. L. J. 619 at n. 339; David Slee, "Liability for Information Provision" (1992) 23:3 Law Librn. 155 at 157. In Quebec civil law, see Benoît Moore, "À la recherche d'une règle générale régissant les clauses abusives en droit québécois" (1994) 28 R. J. T. 176, <http://www.themis.umontreal.ca/revue/rjtvol28num1/moore.html>.

mality in order to facilitate better awareness of their contents.[46] As the long list of examples where judicial protection is required suggests, it is important to consider the objective of improving the transmission of information wherever one party, for example the consumer, is in a more vulnerable position.

Notwithstanding the high level of legislative activity related to e-commerce, laws were mostly silent on the issue of electronic consent,[47] probably because, and this is laudable, general principles of contract law were thought sufficiently broad to encompass this new reality and that other legal sources could fill any void. Relevant other legal sources that should be considered are customs, codes of conduct, principles, and other informal norms emerging from interested communities.[48] It is indeed possible to identify a great deal of international,[49] national,[50] and even sectoral[51] studies which try to outline the model behaviour of

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46. See section 14 of *An Act respecting the protection of personal information in the private sector*, R.S.Q. c. P-39.1, <http://publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P_39_1/P39_1_A.html>. "Consent to the communication or use of personal information must be manifest, free, and enlightened, and must be given for specific purposes. Such consent is valid only for the length of time needed to achieve the purposes for which it was requested. Consent given otherwise than in accordance with the first paragraph is without effect." See also Schedule 1, Section 4.3 (Principle 3 – Consent) in the *Personal Information Protection and Electronic Documents Act*, <http://www.privcom.gc.ca/legislation/02_06_01_01_e.asp>.

47. One of the rare references to e-consent within legislative documents can be found in the EC, *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), [2000] O.J. L. 178/1, where article 10 states that:

> In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: (a) the different technical steps to follow to conclude the contract; (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible; (c) the technical means for identifying and correcting input errors prior to the placing of the order; (d) the languages offered for the conclusion of the contract.

Article 11 "Placing of the order" is also interesting since it foresees that:

> Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:—the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,—the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

<http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf>.

48. Gautrais, *supra* note 5, particularly Part 2 dealing with *Le complément normatif du contrat électronique: la notion de lex electronica*.

49. OECD Council, *Guidelines for Consumer Protection in the Context of Electronic Commerce* (December 1999), <http://www1.oecd.org/publications/e-book/9300023E.PDF>.

50. Office of Consumer Affairs, *supra* note 43; Canada, Industry Canada, *Internet Sales Contract Harmonization Template* (Ottawa: Industry Canada, 2001), <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwGeneratedInterE/ca01642e.html>; Australia, Consumer Affairs Division—Department of the Treasury, *Best Practice Model and Tools for Business* (Canberra: Australian Government Publishing Service, 2000), <http://www.ecommerce.treasury.gov.au/html/ecommerce.htm>; New Zealand, *Model Code for Consumer Protection in Electronic Commerce* (New Zealand, Ministry of Consumer Affairs, 2000), <http://www.consumeraffairs.govt.nz/policyandlaw/discussionpapers/model-code.html>; Electronic Commerce Platform Netherlands, *Model Code of Conduct for Electronic Business* (October 2001), <http://www.euroflex.org/downloads/ECP%20NL%20Model%20Code%20of%20Conduct%20for%20E-%20Business%20Oct%202001.pdf>; "The Nordic Consumer Ombudsmen Position Paper", (1998), <http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_FORUM00000000000C65>.

51. Direct Marketing Association, "The DMA Code of Practice for Electronic Commerce," <http://www.dma.org.uk/_Public/DMA%20Code%20of%20Practice%20for%20Electronic%20Commerce.pdf>; Fédération des Enterprises de Vente à Distance, "Le Code professionnel de la vente à distance", <http://fevad.com/informer/accueilsup.asp?sup=16>; Federation of European Direct Marketing, "FEDMA Code on E-commerce & Interactive Marketing," <http://www.fedma.org/img/db/Code_of_conduct_for_e-commerce.pdf>; Consumer Aid Service, "Accréditation Inter-*Nette*," <http://www.service-aide-consommateur.qc.ca/accreditation_1.htm>.

cyber-sellers in order to protect a cyber-consumer's personal information and, most importantly, his or her consent.

Among the suggested elements, certain behaviour is recommended in order that the consumer understand the contract regardless of the medium employed,[52] namely that legalistic language should be avoided,[53] and that the presentation be clear.[54] To these must be added the elements which have previously been identified regarding electronic reading.

Second, another important element concerns the careful use of hyperlinks. It is true that electronic contracts are not the only ones to use clauses incorporated by reference, which are generally frowned upon by the law.[55] These constitute an especially useful tool for cyber-consumers to get better information. Therefore, one must find a proper balance between the disadvantage of requiring consumers actively to visit other web pages and the advantage of providing consumers with additional concise information about the terms of the agreement. The curious reader may benefit from the liberty and effectiveness that the hyperlinks provide, but other consumers may not wish to take the trouble to pursue the information. Also, given that hyperlinks also pose readability problems,[56] it is without a doubt necessary to rethink their use.[57] Moreover, the guidelines of the Office of Consumer Affairs of Industry Canada emphasize the importance of keeping all conditions of sale within the same document.[58]

Third, even if I am departing a bit from the form of e-consent toward more basic questions, there is an ever-growing tendency to provide cyber-consumers with "post-contractual" support. "Post-contractual" support implies, that the online seller should facilitate consumer awareness and understanding of the contract's content, for example by sending an acknowledgement of receipt con-

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52. See, *e.g.* Canada, Task Force on the Future of the Canadian Financial Services Sector, *Report of the Task Force*, (September 1998) at 258, <http://finservtaskforce.fin.gc.ca/rpt/pdf/Main_E.pdf>; Canadian Council of Insurance Regulators, *Consumer Protection Initiatives Working Group Report* (Ottawa: 1999), <http://www.ccir-ccrra.org/publications/pdf/cons_protect_init_report.pdf>.

53. Office of Consumer Affairs, *supra* note 40 at section 1.1(a).

54. Bertrand Labasse, "La lisibilité rédactionnelle: fondements et perspectives" (1999) 121 *Communications & langages* 86.

55. Art. 1435 of the *C.C.Q.*: "An external clause referred to in a contract is binding on the parties. In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it." <http://publicationsduquebec.gouv.qc.ca/home.php#>.

56. On the notion of hyperlinks, see Christian Vandendorpe, "De la textualité numérique: l'hypertexte et la "fin" du livre" (1997) 17 Semiotic Inquiry 271, which is a paper that underlines the communicational ambiguities caused by hypertext and hyperlinks. See also Christian Vandendorpe, *Du papyrus à l'hypertexte: essai sur les mutations du texte et de la lecture* (Montreal: Boréal, 1999) at 271. Christian Vandendorpe, "Sur l'avenir du livre: linéarité, tabularité et hypertextualité" in J. Benard & J.J. Hamm, *Le livre: De Gutenberg à la carte à puce* (New York: Legas, 1996) at 149.

57. U.S., Federal Trade Commission, *DotCom Disclosers* (Washington, D.C.: United States Government Printing Office), <http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html> which suggests the following:

> When using hyperlinks to lead to disclosures: make the link obvious; label the hyperlink appropriately to convey the importance, nature and relevance of the information it leads to; use hyperlink styles consistently so that consumers know when a link is available; place the hyperlink near relevant information and make it noticeable; take consumers directly to the disclosure on the click-through page; assess the effectiveness of the hyperlink by monitoring click-through rates and make changes accordingly.

58. See Office of Consumer Affairs, *supra* note 40 at section 1.4 "[a]ll the terms and conditions of sale should be available in one place."

taining the contract's principal elements.[59] There is also increasing pressure on sellers to archive contractual documents and to make them available to consumers on demand.[60] Finally, sellers are sometimes required to facilitate the retention of the document by permitting the buyer, usually the cyber-consumer, to print the document. It is therefore important to encourage the consumer to do so, and to make the task easier by ensuring that the format is simple to read.[61]

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2. E-CONSENT AND DEMONSTRATION OF WILL

IT IS AMAZING TO NOTE THE SPEED with which doctrine[62] and, to a lesser extent, laws[63] have attempted to validate different behaviour as effective demonstrations of will. But why would it be otherwise, given the importance attributed to freedom of contract? A contract can be formed as soon as an agreement of the wills has been made; by such means as a handshake, the breaking of a piece of straw,[64] through electromagnetic waves, smoke signals,[65] or any sort of cable message.[66] However, in my opinion, the "click" and, to a greater extent, the hyperlink which is generally found at the bottom of a web page, do not necessarily reflect the criteria required to manifest one's will. It would, of course, be misguided to forbid such a practice, but it would be just as wrong to accept it without addressing the medium's particular features. Before I go any further, let me examine how case law has addressed these two processes.

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59. *Ibid.* at section 1.5. "Vendors should provide consumers with their own record of the transaction, including key details, as soon as possible after the transaction has been completed. In a sales transaction, consumers should be able to obtain their own record of the completed transaction as proof of purchase and a printable record of the terms and conditions of the contract." See also, OECD, *supra* note 49.

60. Jérôme Huet, "La problématique du commerce électronique au regard du projet de directive communautaire du 23 décembre 1998" (1999) *Communication-commerce électronique* 9. The same idea can be found in the *Projet de loi français pour la confiance dans l'économie numérique du 15 janvier 2003*, <http://www.assemblee-nat.fr/12/pdf/projets/pl0528.pdf>. Section 16 of the Bill states that: Il est inséré, après l'article L. 134-1 du code de la consommation, un article L. 134-2 ainsi rédigé: *Art. L. 134-2.* "Lorsque le contrat est conclu par voie électronique et qu'il porte sur une somme égale ou supérieure à un montant fixé par décret, le contractant professionnel assure la conservation de l'écrit qui le constate pendant un délai déterminé par ce même décret et en garantit à tout moment l'accès à son cocontractant si celui-ci en fait la demande."

61. See *e.g.* Canada, Interent Sales Contract, *supra* note 50 at section 3(2): "For the purposes of subsection (1), a supplier is considered to have disclosed to the consumer the information described in subsection (1)(a) if the information is (…)(b) made accessible in a manner that ensures that (…)(ii) the consumer is able to retain and print the information." OECD, *supra* note 49 at part III (C): "a manner that makes it possible for consumers to access and maintain an adequate record of such information." See also the Australia Code, *supra* note 50 at section 34 and the New Zealand Code, *supra* note 50 at section 24.

62. For example, Olivier Iteanu, *Internet et le droit* (Paris: Eyrolles, 1996) at 86.

63. Section 19 (1) of the *Electronic Commerce Act*, 2000 S.O. 2000, c. 17, <http://www.canlii.org/on/sta/cson/20030812/s.o.2000c.17/whole.html> states that: "An offer, the acceptance of an offer or any other matter that is material to the formation or operation of a contract may be expressed, (…)(i) touching or clicking on an appropriate icon or other place on a computer screen." Under Newfoundland's *Act to Facilitate Electronic Commerce by Removing Barriers to the Use of Electronic Communication*, (2001) <http://www.gov.nf.ca/hoa/bills/Bill0135.htm>, section 20 (1) (b) states that the formation and operation of contracts occurs "by an action in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter."

64. The Latin form of the word "stipulation" (stipulare) is said to have been used to describe a formal action which consisted of breaking a piece of straw as a way of manifesting one's intent to be contractually bound.

65. This example was given by Lord Denning in *Entores v. Miles Far East Corporation*, [1955] 2 Q.B. 327, 333; [1955] 2 All. E.R. 493.

66. *Howley v. Whipple*, (1869) 48 N. H. 487.

In the electronic context, consent can be given in many different ways. One common method, is what is often referred to as the "shrinkwrap" agreement. This neologism refers to an increasingly widespread practice in which consumers accept a series of contractual clauses as soon as they remove the cellophane from a newly purchased software program. It must be noted that the relevant clauses are usually reproduced on the box in order to allow the reader to be properly informed.[67] This same method has now been adapted to e-contracts with "click-wrap" (which involves clicking on an icon) or "browsewrap" (where there is generally a hyperlink to the terms of the contract at the bottom of a page) contracts.[68] These are similar concepts which have certain differences.[69] These practices have been the subject of much jurisprudential debate,[70] mostly in the United States, which is undeniably relevant to our case. The debate mainly concerns the adequacy of these procedures as means of demonstrating one's will and of allowing the offeree to be properly informed. I will focus here on the first part of this question which is directly related to the "click", while the second part deals with the readability of the on-line format, which I have already addressed.[71] In addition, I will also address what can be done to improve e-consent.

2.1. "Wrap" reality [72]

The issue is, therefore, the following: Awareness and understanding are fundamental concepts that have not often been identified as necessary conditions for all

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67. In certain cases, the contract is inside the box, which can be problematic when considering the nature of the contract (sale or licencing). See *North American Systemshops v. King*, (1989) A.J. No. 626; 68 Alb. L. Rep. (2d) 145; 26 C.I.P.R. 165 (C.A.); Noriko Kawawa, "Contract Law Relating to Liability for Injury Caused by Information in Electronic Form: Classification of Contracts—A Comparative Study, England and the US" (2000) 1 J. Info. L. & T., <http://www.law.warwick.ac.uk/jilt/00-1/kawawa.html>; Pierre-Emmanuel Moyse, "Le dynamisme contractuel" (Leger Robic Richard/Robic, 2000), <http://www.robic.com/publications/Pdf/252-PEM.pdf>; Philippe Le Tourneau, *Contrats informatiques et électroniques* (Paris: Dalloz, 2002) at 133–34; Michel Vivant, *Lamy droit de l'informatique et des réseaux* (Paris: Lamy, 2001) at 838.

68. Some authors prefer the term "webwrap."

69. On the differences between "clickwraps" and "browsewraps", see Kaustuv M. Das, "Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the 'Reasonably Communicated' Test" (2002) 77:2 Wash. L. Rev. 481 at 499–500.

> There are three important differences between clickwrap and browsewrap agreements. First, in the case of clickwrap agreements, users have constructive notice of the terms of the agreements because they are presented with all the terms of the agreements prior to entering into the agreement. However, with browsewrap agreements the terms of the agreement are displayed to users only if they click on the hyperlink that brings up the "terms and conditions" page. Second, in order to carry out their primary purpose (e.g., downloading software or purchasing tickets online), users must acknowledge the presence of both the clickwrap agreement and the displayed terms by clicking on a button. With a browsewrap agreement, users can carry out their primary purpose without ever clicking on the hyperlink that links to the "terms and conditions" page and without ever seeing the agreement or its terms. Finally, with a browsewrap agreement users may not even realize that a contract is being formed. It is precisely because of these differences that courts have treated enforcement of these agreements differently.

70. See *e.g.* Louisiana's *Software License Enforcement Act* LAR.S. 51 § 29 (1962) which "means any written document on which the word "license," either alone or in combination with other words, appears prominently at or near the top of such document in such a position of prominence so as to be readily noticeable to a person of average literacy viewing such document" is enforceable. See also Françoise Gilbert, "Louisiana software license enforcement act under judicial scrutiny: what impact on shrink-wrap license agreement?" (1987) 12:5 Law and Technology Press 1; Scott J. Spooner, "The Validation of Shrink-Wrap and Click-Wrap Licenses by Virginia's Uniform Computer Information Transactions Act" (2001) 7 Rich. J. L. & Tech. 27, <http://www.richmond.ed/jolt/v7:3/article1.html>.

71. See Part 1.1.1., para 5. above.

72. See Gautrais & Mackaay, *supra* note 34 at 279.

contracts.[73] This notion must be examined, both from a judicial and from a communications standpoint. The paper will address these two issues in succession.

2.1.1. The legal significance of the "wrap"

Although it may be impossible to do a rapid chronology of the decisions in the area, in Canada and more importantly in the U.S., it is fair to generalize that cases that have accepted the legality of the process are more common. Nonetheless, I believe that in many cases, it is important to look at each decision in its entirety, because it is not always possible to infer general principles from the holding alone. This paper will examine an American "shrinkwrap" case and a Canadian "clickwrap" decision in succession, before studying a "browsewrap" ruling hailing from the United States.

With respect to "shrinkwrap," it is possible to quote the famous *ProCD v. Zeidenberg*[74] case, where, on appeal, a person who had reproduced a database that was not protected by the *Copyright Act* was found to be bound by the contractual clauses found inside the box. The court held that the consumer had accepted the clauses, thereby recognizing this form of demonstration of will. This court in this case declined to follow previous case law and endorsed the practice.[75] The case exerted an important influence on subsequent cases.[76] Some may consider Zeidenberg's entrepreneurial but opportunistic[77] activity as "just" from the moral perspective and useful from the economic perspective,[78] but it is surprising to note the lack of basic principles or criteria for legal validity.[79] More precisely, I was not completely convinced by the court's reasoning that it was

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73. Barry B. Sookman, *Computer, Internet and Electronic Commerce Law*, vol.1, (Toronto: Carswell, 2000) at 2–73, as quoted in *North American Systemshops Ltd.*, *supra* note 67 at 152–53.

> The enforceability of shrink wrap licences has not yet been tested in the courts in Canada. It is submitted that they will not be enforceable against an ordinary vendee, unless there is some clear communication of the shrink wrap terms at the time of purchase to the party to whom the software is sold. The reason is that an ordinary vendee without knowledge of any restrictions affecting the use of goods is not bound to honour any restrictions concerning the goods since restrictive conditions do not run with them… If the vendor sells, imposing no restriction or condition upon his purchaser at the time of sale, he cannot impose a condition subsequently by a delivery of the goods with a condition endorsed upon them or on the package in which they are contained. Unless the purchaser knows of the condition at the time of sale, he has the benefit of the implied licence to use the article free from conditions.

74. *ProCD v. Zeidenberg* (1996) 86 F. 3d 1447 (7th Cir. 1996), http://www.kentlaw.edu/classes/rwarner/legalaspects_ukraine/contracting/cases/procd_v_zeidenberg.htm.

75. *Step-Saver Data Systems v. Wyse Technology*, (1991) 939 F. 2d 91 (3rd Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, (1988) 847 F.2d 255 (5th Cir. 1988), <http://cyber.law.harvard.edu/ilaw/Contract/vault.htm>; *Arizona Retail Systems v. Software Link*, (1993) 831 F. Supp. 759 (D.C.A. 1993), <http://cyber.law.harvard.edu/property00/alternatives/arizona.html>.

76. Ryan J. Casamiquela, "Contractual Assent and Enforceability in Cyberspace" (2002) 17 Berkeley Tech. L. J. 475 at 478.

77. *ProCD, supra* note 74. The case concerned an individual copying the content of a databank for which no copyright existed (the databank consisted of a list of phone numbers, something which is not protected under the *Copyright Act* according to the *Feist Publications v. Rural Telephone Service* (1991) 499 U.S. 340 case). The individual in question then made the database available online for a fee, something which was forbidden by the licence agreement. He therefore made substantial profits on the back of the initial author of the database who invested time and money in the project thinking that his interests were contractually protected.

78. Robert W. Gomulkiewicz, "The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing" (1998) 13 Berkeley Tech. L. J. 871 at 902–03.

79. Although mention can be made of section 2-204 of the *Uniform Commercial Code* (U.S.), which states that: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

irrelevant that the key clauses were inside the box and not immediately accessible to the reader on the outside. The court's decision generally reflects usage, custom, or what is already being done.[80] Two particular aspects of the decision deserve to be mentioned above all others. First, the comparison with insurance contracts[81] does not seem apposite given that coverage can occur before the insured party formally accepts the agreement, in an attempt to favour the weaker party and to ensure that protection begins as rapidly as possible. This inequality between parties, this factual element, and the public order relevant to the insurance context seem absent from the information industry context in the *ProCD* case. Furthermore, the court includes a listing of consumer contracts where the consumers' acceptance occurs once the contract is formed is proposed.[82] There again, I feel that these examples are different from the present case,[83] whether these distinctions are a difference in the stakes, the importance of the restriction imposed by the clause, or the impossibility of doing things otherwise, etc. Generally speaking, the court's rhetorical approach based on these examples does not seem very convincing.

In the same vein, the *Rudder v. Microsoft* case[84] has somewhat led to the unconditional acceptance of the "clickwrap" notion despite its being an isolated case. Like the *ProCD* case, even if the final decision seems warranted, it is not automatically adaptable to all e-contract cases. First, the claim made by the two law students for 75 million dollars seemed somewhat frivolous even though the claim did not contain explanatory facts. The case consisted of a class-action suit on behalf of 89,000 MSN service subscribers. In the preliminary proceedings, the plaintiffs tried to argue that the jurisdiction clause, which gave jurisdiction to the courts in Microsoft's home state of Washington, was unenforceable. Winkler, J. reasoned that the plaintiffs had not shown that he ought to question the validity

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80. *ProCD*, *supra* note 74 at 2. "Transactions in which the exchange of money precedes the communication of detailed terms are common."

81. *Ibid.*

> Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs.

82. *Ibid.* The Court of Appeal mentions buying a concert ticket, a radio, medicine, etc., but also the matter of online sales:

> Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with BytePusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features.

83. *Ibid.*

84. *Rudder v. Microsoft Corp.* (1999) 2 C. P. R. (4th) 474.

of the jurisdictional clause,[85] nor had they shown that the transmission of information through an electronic medium was substantially different from a transmission on paper.[86] This last point is obviously very interesting since *Rudder* is one of the rare cases which "tries" to compare both mediums.[87] It seems evident, after reading the judge's decision, that the plaintiffs' legal background, in addition to the fact they were aware of the jurisdiction clause,[88] was taken into consideration.

Conversely, it is difficult to find arguments in support of the ruling in *Kanitz v. Rogers Cable*,[89] where the Ontario Superior Court ruled that an amended clause subsequently put on a website is sufficient to constitute notice. Notwithstanding the basic complaints one could make about this type of practice,[90] and notwithstanding the plaintiff's arguments relative to the form of the contract,[91] (i.e. that (1) notification should have been done by email,[92] (2) the contract should have been on the website's homepage[93] and (3) the arbitration

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85. *Ibid.* at 475, 478 [emphasis in original].

> Forum selection clauses are generally treated with [a measure of] deference by Canadian courts… Madam Justice Huddart, writing for the court in *Sarabia v. "Oceanic Mindoro" (The)* (1996), 4 C.P.C. (4th) 11 (B.C.C.A.), leave to appeal denied, [1997] S.C.C.A. No. 69 (QL)…, adopts the view that forum selection clauses should be treated the same as arbitration agreements. She states at 20: Since forum selection clauses are fundamentally similar to arbitration agreements...there is no reason for forum selection clauses not to be treated in a manner consistent with the deference shown to arbitration agreements. *Such deference to forum selection clauses achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity.*

86. *Ibid.* at 479 para. 11.

> The argument advanced by the plaintiffs relies heavily on the alleged deficiencies in the technological aspects of electronic formats for presenting the terms of agreements. In other words, the plaintiffs contend that because only a portion of the Agreement was presented on the screen at one time, the terms of the Agreement which were not on the screen are essentially "fine print". I disagree. The Member Agreement is provided to potential members of MSN in a computer readable form through either individual computer disks or via the Internet at the MSN Web site. In this case, the plaintiff Rudder, whose affidavit was filed on the motion, received a computer disk as part of a promotion by MSN. The disk contained the operating software for MSN and included a multimedia sign-up procedure for persons who wished to obtain the MSN service. As part of the sign-up routine, potential members of MSN were required to acknowledge their acceptance of the terms of the Member Agreement by clicking on an "I Agree" button presented on the computer screen at the same time as the terms of the Member Agreement were displayed.

87. *Ibid.* at 480 para. 14. However, "…there are no physical differences which make a particular term of the agreement more difficult to read than any other term… no fine print... The terms are set out in plain language, absent words that are commonly referred to as 'legalese.'"

88. *Ibid.* at 479 para. 13.

> Rudder admitted in cross-examination on his affidavit that the entire agreement was readily viewable by using the scrolling function on the portion of the computer screen where the Membership Agreement was presented. Moreover, Rudder acknowledged that he "scanned" through part of the Agreement looking for "costs" that would be charged by MSN. He further admitted that once he had found the provisions relating to costs, he did not read the rest of the Agreement.

Similarly, the fact that the plaintiff in *Forrest v. Verizon Communications* (2002) 805 A. 2d 1007 at 1009 was a lawyer for the Department of Justice also came into play.

89. *Kanitz v. Rogers Cable Inc.*, (2002) 58 O. R. (3d) 299.

90. It must be mentioned that some countries forbid such practices unless the clause has explicitly been brought to the consumer's attention. In France, see section R. 132-2 paragraph 2 of the *Code de la consommation*, quoted in Commission des clauses abusives relative aux contrats de fourniture d'accès à l'Internet, *supra* note 15.

91. This paper will not address arguments regarding the unconscionability of such a clause (which, incidentally, were put aside by the judge) since, as mentioned above, the discourse focuses on form rather than substance.

92. This is a pretty simple procedure, especially since it can be automated by the service provider. Furthermore, as far as community standards are concerned, many important companies have adopted such a way of doing business. See Jean Braucher, "Replacing Paper Writings with Electronic Records in Consumer Transactions: Purposes, Pitfalls and Principles" (2003) 7 North Carolina Banking Institute 29 at 36.

93. As a matter of fact, no less than five clicks were needed to access the said document.

clause was buried among other clauses), the judge in this case considered the amendment to be valid. He stated that the initial contract adequately warned the consumer that the drafter of the agreement could modify it at will. The judge also took into account the nature of the service and said:

> I am also mindful, in reaching my conclusion on this point, of the fact that we are dealing in this case with a different mode of doing business than has heretofore been generally considered by the courts. We are here dealing with people who wish to avail themselves of an electronic environment and the electronic services that are available through it. It does not seem unreasonable for persons, who are seeking electronic access to all manner of goods, services and products along with information, communication, entertainment and other resources, to have the legal attributes of their relationship with the very entity that is providing such electronic access, defined and communicated to them through that electronic format.[94]

The evidence seems to indicate that the plaintiff admitted visiting the page that mentioned that the contract had been amended.[95] This decision, in a context similar to that of a browsewrap, does not appear to take the plaintiff's arguments into account, even though it is true that plaintiff's case was poorly presented.[96] This decision offers few guidelines to a nascent industry, which is badly in need of them, and does not respect the general principles that are developing in the context of electronic commerce.[97] Even if this particular plaintiff understood the field, and was therefore not really vulnerable,[98] I believe it is difficult to apply the case generally.[99]

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94. *Kanitz*, *supra* note 89 at 310 para. 32.

95. *Ibid.* at 307 para. 25.

96. *Ibid.* at 304 para. 12.

> Before turning to my analysis of the issues, I should also mention that on this motion there were two affidavits filed. For the plaintiffs, an affidavit from the plaintiff, Hugh Wallis, was filed and on which he was cross-examined. For the defendant, an affidavit from Vic Pollen, Vice-President of Customer Operations, was filed. No cross examination took place on that affidavit. There are two consequences that flow from this. One is that the evidence of the defendant is largely unchallenged. The other is that I have only the evidence of one of the representative plaintiffs regarding the circumstances surrounding the execution of the user agreement, the efforts made to access the defendant's web site for updates to the user agreement, the alleged lack of notice to customers of the amendments to the user agreement, the allegations of unconscionability and so on.

97. Since trust is at the core of electronic consumption, and since its absence is often considered e-commerce's main hurdle, one solution often put forth to solve this dilemma is to personalize relations between buyers and sellers. Hence, an impersonal technique such as that used by the defendant wouldn't be considered commercially viable.

98. Since the plaintiff possessed a Master's degree in computer science, his attitude was considered disingenuous (paragraph 29). And this may be at the very heart of the debate. It seems to us that the judge's true motives were of a more subjective nature in regards to the defendant's person and the way in which he orchestrated his demand.

99. J. Braucher, *supra* note 92 para. 37 [Footnotes omitted].

> Consumer protection enforcement actions have focused on misleading or unfair practices with respect to changes in terms, such as price increases or loss of aspects of service. If, for example, a consumer signs up for an initial term of access to an online service, notice should be given at that time that price and services may change upon renewal. Furthermore, when the renewal date arrives, it is safest to get active assent after disclosure, requiring the customer to send a message or to click to sign up for renewal. The customer should have a clear option to terminate the service to avoid the changed terms. Blanket assent to later changes, given at the time of contracting, is insufficient. Tricky practices with respect to renewal are very annoying to customers. They are not a recipe for long-term customer loyalty or trouble-free relationships with regulators.

This Canadian case is all the more surprising when compared with the most remarkable U.S. case concerning "browsewraps," *Specht v. Netscape*.[100] The case distinguished between "clickwrap" and "browsewrap" contracts without altogether condemning "browsewrap" as a way of doing business. Inspired by the *Pollstar*[101] case, the judge considered that the defendant had not made sufficient effort to ensure the plaintiffs' awareness and understanding. Moreover, other Netscape products could only be downloaded by actively clicking.[102] The response to this type of contract seems more transparent and less random.

One thing is for certain: it is difficult to extract basic principles from these few decisions, particularly given the importance of the context. It therefore becomes important to go further in our search for principles. This requires that we start with a non-legal analysis of the features of the "click."

2.1.2. Communicational "wrap" reality

It is difficult not to take into account the existence of the phenomena of the "click" and the hyperlink. It is indeed important to consider a certain number of elements which undermine the function for which they are employed, namely the demonstration of will. First, the "click" is perhaps too simple, making it easy for the "clicker" to click on an icon or a banner without realizing that this action could have legal repercussions.[103] It is therefore all too easy for the user to become a "compulsive clicker," especially when one considers the action of clicking to be performing exactly the same action as turning on a computer. Furthermore, this behaviour needs to be socially and psychologically understood, which currently seems to be far from the case. According to Christian Vandendorpe, the "cyber-reader," rather than associating himself with a text or making it his own, "zaps,"[104] or browses through it. The author writes:

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100. *Specht v. Netscape Communications Corp.* (S.D.N.Y. 2001) 150 F. Supp. 2d 585, <http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/01-07482.PDF>.

101. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (ED Cal. 2000).

> Viewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement. Notice of the license agreement is provided by small gray text on a gray background… No reported cases have ruled on the enforceability of a browse wrap license… While the court agrees with [the defendant] that the user is not immediately confronted with the notice of the license agreement, this does not dispose of [the plaintiff's] breach of contract claim. The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time.

102. Specht, *supra* note 100 at 14.

103. "Clicks" can be used in many different cases like accessing software, surfing the web, etc. One just has to think of all the "clicks" needed to start up a computer; there is no demonstration of will which will lead to contractual obligations attached to these actions.

104. Vandendorpe, *supra* note 56 at 271.

> How can we stop the reader from clicking all over the map, and thus passing by developments that the author considers significant? In itself, each button is an invitation to go further, a promise of contents [translated by author].[105]

It is also important to take into account the idea that it is part of the very nature of the internet to proceed with speed thereby skipping over some steps.[106] It may therefore be necessary to deliberately slow down the process in order to give consumers time to absorb contractual clauses fully.

It is essential that the consumer become aware that with an effortless "click" has legal significance, and that the importance of the action of "clicking" be internalized by the consumer.

2.2. Proposed solutions

E-commerce law is often referred to as a "no-man's land"; the very notion of "judicial void"[107] having been associated with cyberspace on more than one

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105. *Ibid*. The author also writes:

> Par le mécanisme de dévoilement qui lui est inhérent, ce système en appelle particulièrement à la psychologie enfantine. Valéry a noté combien l'enfant tend à faire fonctionner tout ce qui est susceptible d'un fonctionnement: S'il y a un anneau, on tend à le tirer, une porte, à l'ouvrir, une manivelle, à la tourner—une culasse, à la faire jouer. (...) S'il y a un escalier, à le gravir...un morceau de bois, à le mordre, un bassin d'eau, à y jeter toute chose. (*Cahiers I*, p. 912) De façon générale, le déplacement par clics de souris contribue à donner au lecteur le sentiment d'avoir le plein contrôle de l'objet (dans la mesure où le programmeur a bien voulu laisser ce contrôle au lecteur...) et de pouvoir suivre souverainement ses impulsions. Par la médiation technologique, l'usager se donne ainsi un sentiment de puissance bien supérieur à celui que procure la manipulation des pages d'un livre. En somme, la souris produit un effet analogue à celui de la télécommande dans le domaine de la télévision. Le simple fait de pouvoir changer de chaîne à partir d'une légère impulsion du pouce encourage une consommation frénétique de miettes d'émissions. De même, la navigation par souris tend à encourager des déplacements chaotiques et extrêmement rapides, au cours desquels le lecteur n'a pas toujours le temps d'assimiler l'information qui lui est présentée.

See <http://www.uottawa.ca/academic/arts/lettres/vanden/Textualite%20num%E9rique.pdf>.

106. Roger E. Schechter, "The Unfairness of Click-On Software Licenses" (2000) 46 Wayne L. Rev. 1735 at 1742–1743. See Part 1.1.1. above.

107. André Lucas, "La réception des nouvelles techniques dans la loi: l'exemple de la propriété intellectuelle" in Ysolde Gendreau (dir.), *Le lisible et l'illisible* (Montreal: Éditions Thémis, 2003) at 125, 134, *Juriscom.net* (27 January 2001), <http://www.juriscom.net/uni/doc/20010127.htm>. "Il y a un véritable fantasme, relayé par les médias et souvent par les responsables politiques, du vide juridique. La vérité est que les groupes de pression appellent vide juridique la règle existante qui ne leur convient pas. Prétendre légiférer à chaque nouvelle percée technique, c'est se condamner à une fuite en avant qui ne peut être que porteuse d'insécurité juridique."

occasion. According to recent jurisprudence[108] and doctrine,[109] which offer a range of examples and solutions to the e-contract problem, nothing could be further from the truth.

Before studying these in detail, the review of numerous legal sources causes us to consider consent as a form of "transaction cost," as Judge Easterbrook observed in the *ProCD v. Zeidenberg* case.[110] In my view, it is possible to establish two main categories of criteria.

First, it is possible to identify certain subjective criteria and, among them, the importance of the contractual clause in play, the ease with which it can be brought to the consumer's attention, and the sophistication and knowledge

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108. For example, *America Online v. Booker*, 26 Fla. L. Weekly D 386 (Fla. Dist. Ct. App. 2001) No. 3D00-2020; *America Online v. Super. Ct. (In re Mendoza)*, (2001) 108 Cal. Rptr. 2d 699 (Ct. App. 2001); *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999) <http://gsulaw.gsu.edu/lawand/papers/su03/darden_thorpe/732%20A.2d%20528.html>; *Celmins v. America Online*, (1999) 748 So. 2d 1041 (Fla. Dist. Ct. App. 1999); *Compuserve v. Patterson*, (1996) 89 F.3d 1257 (6th Cir. 1996), <http://www.law.emory.edu/6circuit/july96/96a0228p.06.html>; *Groff v. America Online*, (R.I. Super. Ct. 1998) No. PC 97-0331, 1998; *Hotmail v. Van$ Money Pie*, 47 USPQ.2d (BNA) 1020 (N.D. Cal. 1998); *Lieschke v. RealNetworks*, 2000 US Dist. LEXIS 1683 (N.D. Ill. 2000); *In re RealNetworks*, (N.D. Ill. 2000) No. 00 C 1366, 2000 WL 631341; *Williams v. American Online*, (2001) 43 U.C.C. Rep. Serv. 2d 1101; *Specht v. Netscape Communications*, *supra* note 100; *Ticketmaster v. Tickets.com*, (C.D. Cal. 2000) No. CV 99-7654 HLH; *Williams v. America Online*, (Mass. Super. Ct. 2001) No. CIV A. 00-962; *Mortenson v. Timberline Software*, (1999) 970 P. 2d 803 (Wash. Crt. App., 1999); *Forrest v. Verizon Communications*, *supra* note 93.

109. See Anthony M. Balloon, "From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions" (2001) 50 Emory L. J. 905; Melissa Robertson, "Is Assent Still a Prerequisite for Contract Formation in Today's economy?" (2003) Wash. L. Rev. 265; Mark A. Lemley, "Intellectual Property and Shrinkwrap Licenses" (1995) 68 S. Cal. L. Rev. 1239, <http://cyber.law.harvard.edu/property/alternative/lemley1.html>; Richard G. Kundel, "Recent Developments in Shrinkwrap, Clickwrap and Browsewrap Licenses in the United States" (2002) 9-3 E LAW – Murdoch U. E. J. L., <http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93nf.html>; Jennifer Femminela, "Online Terms and Conditions Agreements: Bound by the Web" (2003) 17 St. John's J. Legal Comment. 87; Sean F. Crotty, "The How and Why of Shrinkwrap License Validation under the Uniform Computer Information Transaction Act" (2002) 33 Rutgers L. J. 745; David L. Hayes, "The Enforceability of Shrinkwrap License Agreements On-line and Off-line" (1997), <http://www.fenwick.com/pub/ip_pubs/Enforceability%20Shrinkwrap/shrinkwrap.htm>; Francis M. Buono & Jonathan A. Friedman, "Maximizing the Enforceability of Click-Wrap Agreements" (1999) 3:4 J. Tech. L. Pol'y 3, <http://journal.law.ufl.edu/~techlaw/4-3/friedman.html#ren*>; David A. Einhorn, "Shrink-wrap Licenses: The Debate Continues" (1998) 38 IDEA: J. L. & Tech. 383; Peter Brown, "Validity of Clickwrap Licenses" (2002) Practising Law Institute 45; Daniel B. Ravicher, "Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses" (2000) 5 Va. J.L. & Tech. 11, <http://www.vjolt.net/vol5/issue3/v5i3a11-Ravicher.html>; Martin H. Samson, "Click-Wrap Agreement Held Enforceable" (2000), <http://www.phillipsnizer.com/artnew27.htm>; Jean Braucher, "Delayed Disclosure in Consumer E-Commerce As An Unfair and Deceptive Practice" (2000) 46 Wayne L. Rev. 1805; Mark E. Budnitz, "Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?" (2000) 16 Ga. St. Univ. L. Rev. 741; Francis M. Buono *et al.*, "The Hype over Hyperlinked Terms of Service—They are Likely Unenforceable" (Dec. 2000–Jan. 2001) *E-Com. L. Rpt.* 2; Dawn Davidson, "Click and Commit: What Terms Are Users Bound to When They Enter Web Sites?" (2000) 26 Wm. Mitchell L. Rev. 1171; Jane M. Rolling, "The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses" (1999) 104 Com. L. J. 197; Zachary M. Harrison, "Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts" (1998) 8 Fordham I. P. Media & Ent. L. J. 907; Darren C. Baker, "*ProCD* v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, And Notions of Manifested Assent in the Arena of Shrinkwrap Licenses" (1997) 92 NW. U. L. Rev. 379; Joseph C. Wang, "*ProCD*, Inc. v. Zeidenberg and Article 2B: Finally, the Validation of Shrinkwrap Licenses" (1997) 16 J. Marshall J. Computer & Info. L. 439; Donnie L. Kidd Jr. & William H. Daughtrey Jr., "Adapting Contract Law To Accommodate Electronic Contracts: Overview and Suggestions" (2000) 26 Rutgers Computer & Tech. L.J. 215; Mark J. Selick, "E-Contract Issues and Opportunities For The Commercial Lawyer" (2000) 16 B.F.L.R. 1; R. David Whitetaker, "An Overview of Some Rules and Principles for Delivering Consumer Disclosures Electronically" (2003) 7 N.C. Banking Inst. 11; Batya Goodman, "Honey, I Shrink-Wrapped The Consumer: The Shrink-Wrap Agreement as an Adhesion Contract" (1999) 21 Cardozo L. Rev. 319; David E. Case, "Common Mistakes Made by Licensors in Administrating Clickwrap Agreements" (2002) 19 Computer and Internet Lawyer 16; R. A. Hillman & Jeffrey J. Rachlinski, *supra* note 23; R. E. Schechter, *supra* note 106; Lydia Wilhelmi, *supra* note 11; R. J. Casamiquela, *supra* note 76; K. M. Das, *supra* note 69; S. J. Spooner, *supra* note 70; J. Braucher, *supra* note 92.

110. *ProCD*, *supra* note 74 at para. 2, "…accelerating effectiveness and reducing transactions costs."

of the consumer. In sum, one should evaluate the drafter's effort to bring the contractual clauses to the consumer's attention. Another subjective criterion arises from the opportunistic attitude of certain profiteers.[111] These more general criteria are a matter of common sense. This indirect formalism[112] requires that a correlation be made between the importance of the transaction and the effort made to conclude the transaction. A reasonable trade-off between the extent to which contractual clauses are brought to the consumer's attention and the speed and efficiency of electronic contracting should be reached. It will therefore be important to put forth a "proportionality test,"[113] similar to those used in constitutional and administrative law.

Due to the general nature of these subjective criteria, it is necessary to emphasize other more objective criteria. Jurisprudence and doctrine have attempted to suggest objective criteria, such as the verification of contractual terms before contracting, the clarity of the clauses, the general contractual procedure, the management of the visual space, and the consumer's acceptance, etc. In fact, these objective criteria allow us to appreciate one last subjective criterion, namely the effort put forth by the seller to make the content of the contract known. Together these criteria allow us to draw a tentative framework for best practices in an area that is in dire need of better harmonisation.[114]

A group of writers,[115] inspired by American jurisprudence, have identified five major categories[116] from among the objective criteria for bolstering the readability of documents and promoting consumer understanding of the full significance of the "click."

Although it may seem obvious,[117] it is important that that the consumer be able to access the contractual clauses before the electronic contract is actu-

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111. That's the case in *ProCD*, *supra* note 74, but also in *Rudder v. Microsoft*, *supra* note 84. *Register.com v. Verio* (2000) 126 F. Supp. 2d 238 is also worth mentioning (individual using a list of domain name owners found through the register website to send spam even though the e-contract was a browsewrap document).

112. Indirect formalism refers to form which is not necessary to establish an act's validity, but that helps in regards to proof. See Jérôme Huet & Herbert Maisl, *Droit de l'informatique et des télécommunications* (Paris: Litec, 1989) at 657; Alain Piedelievre, *Les transformations du formalisme dans les obligations civiles* (Paris: Thèse française, 1959) at 71–72.

> Le formalisme indirect est le régime où l'élément formel n'est pas prépondérant. Au sens strict du mot, il n'y a même pas formalisme puisque, en théorie, l'acte juridique créé sans l'emploi des formes prévues ne sera pas entaché de nullité; bien au contraire il conservera toute sa validité. Mais, si l'on passe sur la plan pratique, ou mieux si l'on envisage l'efficacité des droits, on constate que le principe du consensualisme est alors fortement atténué... Atténuation au consensualisme peut être, mais nous croyons qu'il faut plutôt voir dans ces manifestations un formalisme indirect, car, en pratique, on est obligé de passer par une certaine forme. Que vaut en effet un droit que l'on ne peut ni prouver, ni opposer! Ce n'est plus qu'une pure vue de l'esprit qui ne permet pas de faire apparaître l'inévitable corollaire du droit en fonction de son existence, la sanction.

Also see Jacques Flour, *supra* note 3 at 101.

113. See generally Das "Forum Selection Clauses", *supra* note 69.

114. Restatement (2d) Contracts § 211: "Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions".

115. Christina L. Kunz *et al.*, "Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent" (2001), <http://www.steptoe.com/publications/ACF2E.pdf>; American Bar Association, "Bibliography on Click-Through Agreements" (2002), <http://www.abanet.org/buslaw/cyber/sub/econtracting/materials/20020930bib.pdf>.

116. These five groups were inspired by this last reference.

117. However, Jean Braucher, an American professor who participated in the writing of a federal bill regarding the online sale of copyrighted works (UCITA), claimed that, in 1999, out of the 64 companies who sold such products online, only 8 allowed the buyer to access their contract before the sale was concluded.

ally formed.[118] It should be impossible to access the goods, services or licences that one wants to acquire before viewing the contractual clauses.[119] Furthermore, contractual clauses must be easy to read;[120] suggesting that the use of hyperlinks must be weighed carefully and, for example, that it must be possible for the consumer to print the electronic contract. Finally, access to the contract should also be possible once the contract has been "signed."[121]

Second, these writers identify several criteria associated with the general presentation of contractual clauses: they must be of good quality, be adapted to the relevant medium, and conform to formal requirements such as those governing writings[122] or signatures.

Third, consent must be explicit. This can be achieved in many different ways. It may be useful to put an "I refuse" icon next to the "I accept" icon.[123] If the consumer clicks the "I refuse" icon, he or she will be refused access to the goods or services. The icon should also be clear and unambiguous.[124] Again, it is important that the process used to demonstrate one's will be unequivocal and not resemble behaviour normally used to "surf" a website.[125] In an even more

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118. *Ticketmaster, supra* note 108; *Williams*, *supra* note 108; *Specht*, *supra* note 100; *Pollstar, supra* note 101. This is also established by Ontario's *Consumer Protection Act*, S.O. 2002, c. 30, <http://www.canlii.org/on/sta/cson/20030812/s.o.2002c.30sch.a/whole.html>. Sections 37 through 40 of the Act concern "Internet agreements." Within this grouping, section 38 (1) establishes that: "Before a consumer enters into an internet agreement, the supplier shall disclose the prescribed information to the consumer." Manitoba's *Consumer Protection Act*, S.M. 2000 C.C.S.M. c. C200, <http://web2.gov.mb.ca/laws/statutes/ccsm/c200e.php>, also addresses "Internet Agreements" (sections 127 through 135), where section 129(2) states that:

> For the purpose of subsection (1), a seller shall be considered to have provided the prescribed information to a buyer in writing if (a) the information is sent to the e-mail address provided by the buyer to the seller for the provision of information related to the retail sale or retail hire-purchase agreement; or (b) the information is made accessible to the buyer on the Internet in a manner that ensures that (i) the buyer has accessed the information before entering into the agreement, and (ii) the information is capable of being retained and printed by the buyer.

Saskatchewan's *Act to Amend The Consumer Protection Act*, S.S. 2002, c.16, <http://www.qp.gov.sk.ca/documents/english/Chapters/2002/chap-16.pdf>, gives similar results. Subsections 75 (5) through 75 (9) (Internet Sale Contract) of the Act, and particularly section 75.52(1) states that:

> Before entering into an Internet sales contract with a consumer, a supplier must: (a) disclose to the consumer the information prescribed for the purposes of this section; and (b) provide to the consumer an express opportunity: (i) to accept or decline the Internet sales contract; and (ii) to correct errors immediately before entering into the Internet sales contract. (2) A supplier is considered to have disclosed to the consumer the information prescribed pursuant to clause (1)(a) if the information is: (a) prominently displayed in a clear and comprehensible manner; and (b) made accessible in a manner that ensures that the consumer: (i) has accessed the information; and (ii) is able to retain and print the information.

119. *Ibid.*

120. *RealNetworks*, *supra* note 108; *Rudder*, *supra* note 84.

121. See Part 1.1.1., para 5, above, notably concerning the European situation (*Directive on Electronic Commerce*, *supra*, note 47). This last element is reminiscent of the idea of "subsequent reference" found in the UNCITRAL *Model Law on Electronic Commerce*, <http://www.uncitral.org/en-index.htm> and which is used to define the term "writing."

122. *RealNetworks*, *supra* note 108. In this case, the argument centered on an arbitration clause that had to be "written." The judge ignored the established criteria of "subsequent reference" (found in western Canada) or "integrity" (found in Quebec and France), and simply claimed that the document could be "printed and stored."

123. *Caspi*, *supra* note 108; *Groff supra* note 108; *Specht*, *supra* note 100. Again, see Ontario's *Consumer Protection Act*, *supra* note 118 at section 38(2): "The supplier shall provide the consumer with an express opportunity to accept or decline the agreement and to correct errors immediately before entering into it".

124. *Specht*, *supra* note 100.

125. *Register.com*, *supra* note 111 also comes to mind, since the contract concluded with the following sentence: "by submitting this query [to the web site's database], you agree to abide by these terms." Therefore, determination of will materialized through sending an email, which, according to *Specht*, *supra* note 105, is not a valid way in which to give consent.

explicit manner and in order to put aside all risks, it might be advisable for consumers to manifest consent by filling out a textbox with the consumers' name or other identifiers.

Fourth, the contractual process must allow the consumer to annul the contract. For example, section 10(2) of the *Uniform Electronic Transaction Act* allows the consumer to annul actions taken by mistake.[126] A similar provision can be found in Quebec's *Act to establish a legal framework for information technology*.[127] Legal provisions to permit such corrections can take many forms, including a right of repentance without justification,[128] or in certain case law, in which consent is held effective only once the consumer fails to exercise his or her right to repent,[129] or in the doctrine that supports a one or two-day correction right or "cooling-off period."[130]

Fifth and finally, regarding the tri-temporal characteristic of e-contracts,[131] it is important that reasonably permanent evidence of the contract be available. This can be done either by encouraging the consumer to print the terms of sale, or by the seller taking it upon himself to do the same.[132]

These five categories are but a draft of what a diligently written e-contract should, and soon likely will, be, once people realize the importance of taking the end-user into account.

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CONCLUSION

AFTER READING THE PRESENT PAPER, certain readers might believe that the colour of e-consent, to use the expression coined by Professor Popovici,[133] should be "red," full of demands, of claims and taking into account the "little ones," clients and consumers. "Red" is also a colour often used to draw the attention, something needed in this young and evolving field. The spirit of this work is therefore influenced by a need to make the end-user more aware.

This brings forth a problem present in general in contracts, but which is true even more in electronic contracts, namely, the expression of one's will is less

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126. National Conference of Commissioners on Uniform State Laws, *Uniform Electronic Transactions Act* (1999) <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>.

127. R.S.Q. C-1.1 at article 35, <http://www.autoroute.gouv.qc.ca/loi_en_ligne/loi/bill%20161_english.pdf>.

> A party that offers a product or service by means of a pre-programmed document must, on pain of non-enforceability of the communication or cancellation of the transaction, see to it that the document provides instructions that allow users to promptly advise the party of any errors or contains means that allow users to avoid or correct errors. Similarly, users must be provided instructions or means to avoid receiving unwanted products or services because of an ordering error, or instructions for the return or destruction of unwanted products.

128. For example, see the EC *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] O.J. L. 144/19 at article 6.

129. *Hill v. Gateway*, 105 F. 3d 1147 (7th Cir. 1997); *Bischoff v. DirectTV*, (2002) 180 F. Supp. 2d 1097 at 1107.

130. For example, see Anthony T. Kronman, "Paternalism and the Law of Contracts" (1983) 92 Yale L. J. 763 at 764.

131. Ian R. Macneil, "The Many Futures of Contracts" (1974) 47 S. Cal. L. Rev. 691 at 706. He addresses the question of temporal multiplicity in a section entitled "Conscious Awareness of Past, Present and Future." This is similar to the theory put forth by Katsh, *supra* note 6 at 129.

132. See *supra* notes 62–63.

133. Adrian Popovici, *La couleur du mandat* (Montreal: Éditions Thémis, 1995) at 521. The postscript reads: "Si vous me demandez quelle est la couleur du mandat, je vous répondrais: «Vert, mais pas souvent»."

and less considered to provide contracts with their obligatory force.[134] On the other hand, the formalities that must be taken into account when drafting an electronic contract must involve an improved consideration of the expression of will. Contractual formalities involve the expression and affirmation of the will. While they have often been considered opposites, formalism in fact reflects consensualism. The opposition is fictitious; the conceptual war is over.

This is all the more important when one considers that technology can improve the manner in which the will is taken into account: from the use of multimedia to the use of procedures whereby turn-key agreements may be concluded.[135] Granted, this is still just a vision for tomorrow, but until that day comes, I believe that the proper attitude is one that respects the consumer and that takes his or her position into consideration. We should ensure that tomorrow's chosen path differs from the one all too often followed by today's businesses. E-commerce is still looking for that value-added contribution which will distinguish it from traditional commerce. We often refer to the personalization of services, often considered as one of the essential innovations of the internet economy,[136] that technology renders more accessible given the many possibilities available on-line to reach consumers.[137] Furthermore, it is now possible to encourage clients to act more responsibly regarding their general attitude towards security and to act more diligently than they do in traditional commerce. However, this can only be achieved if the client has previously been appropriately informed of his duties and obligations.[138] Once this is done, the consumer can start to incorporate these qualities within the framework of his judicial relationships.

The law is thus a tool that can be used to reassure cyber-consumers, and a tool that can reinforce confidence in the e-economy, if it respects its role of protecting the weakest among us. As we have seen, in proposing more protection through legal rules,[139] headings,[140] and form, the law can bring maturity to the field.

Hence, the colour of e-consent is: "red."

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134. Gautrais, *supra* note 5 at 21–80.

135. In a similar context, the OECD has created a privacy tool. The tool titled, "What is the OECD Privacy Statement Generator?" <http://cs3-hq.oecd.org/scripts/pwv3/pwhome.htm>, allows a business to order a tailor-made policy. The creation of an equivalent for consumer relation policies could therefore be feasible.

136. See Jacques Nantel, "Opportunités d'affaires et l'Internet: où en sommes nous?", <http://www.hec.ca/pages/jacques.nantel/publications/recherche/gestion02.htm>.

137. That is why we believe that *Kanitz*, *supra* note 89 is not well adapted to the facts.

138. Certain electronic services, notably in the banking field, have a direct effect on consumers' responsibilities. In these types of relationships, responsibilities are shared between the parties, the consumer having the obligation to protect his personal identification number, which goes without saying when considering the nature of the transaction. However, contractual clauses imposing other security measures to the consumer must be controlled. Credit card contracts have, in most countries, given way to discussions between the interested parties (credit card companies, businesses, consumer watchdogs, government) and laws (*e.g.* to put forth an insurance policy). Such discussions would be welcome in order to establish how much is too much when considering consumer responsibilities.

139. See Commission, *supra* note 15.

140. It's shocking to see that some websites hide important clauses in more neutral and less "frightening" sections such as "Legal notice", "Warning", "Terms of use", etc., in order to lure the consumer's attention away from these clauses.