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I Click, You Click, We all Click - But Do We Have a Contract? A Case Comment on Aspenceri.com v. Paysystems

Charles Morgan

I Click, You Click, We all Click … But Do We Have a Contract?: A Case Comment on *Aspencerl.com v. Paysystems*

Charles Morgan †

It is trite to say that e-commerce has exploded over the last several years. Canadian individuals and businesses are entering into thousands and thousands of contracts online all the time. Yet, oddly enough, there is surprisingly little legal certainty or consistency regarding an essential legal question: what approach to online contract formation will create a binding legal contract? Such legal uncertainty is unfortunate, since buyers need to know when to "beware", merchants need to be able to manage risk, and courts need to have clear guidelines in order to be able to render informed, coherent decisions.

The issue of online contract formation was recently treated in the Quebec court decision *Aspencerl.com v. Paysystems Corporation*[1] (*Paysystems*). The legal argument in the decision differs significantly from existing Canadian and Quebec jurisprudence on the subject of online contract formation. Accordingly, this case comment is intended to analyse and critique the *Paysystems* decision, to discuss and evaluate current approaches to online contract formation more generally, and to provide advice regarding how to mitigate the risk of a finding of non-enforceability.

The *Paysystems* Decision

On January 31, 2005, the Cour du Québec rendered a decision in *Paysystems* that treated the issue of the enforceability of an amendment to a paper-based contract. The case involved a dispute in relation to a hosting and services agreement between Paysystems Corporation and Aspencerl.com Inc. The two parties entered into the agreement in 2002. The original agreement did not contain an arbitration clause. On October 23, 2003, Paysystems Corporation unilaterally amended the original contract and added an exclusive arbitration clause, made available via hyperlink and subject to the following online notice on the opening screen of the Paysystems Web site:

> Your continued use of My Paysystems Services is subject to the current version of the My Paysystems Contract.
>
> This contract was last updated December 18, 2003.
>
> Please click here to review.

The Court had to determine whether it had jurisdiction to hear the dispute, given the presence of the arbitration clause. In order to decide the matter, the Court first had to decide whether the online unilateral amendment was enforceable.

Pursuant to a legal analysis discussed below, the Court held that Aspencerl.com Inc.'s mere use of the Paysystems Corp. Web site following the posting of the amendment and the above notice was insufficient to establish binding consent to the posted amendments. Therefore, the arbitration clause that was contained in the said amendments was unenforceable.

Summary

Quebec jurisprudence on the subject of online contract formation is rare and the conclusions of such cases are broadly divergent. Under the circumstances, it is difficult to obtain legal certainty as regards the application of Article 1385 of the *Civil Code of Quebec* to online contract formation. Pursuant to the analysis below, I am of the opinion that the Court's reasoning in the *Paysystems* decision contains a number of significant errors of law that suggest that the case is unlikely to be followed or, if followed, that its reasoning will be subject to significant critique. The fact that the decision was rendered by the Cour du Québec will also limit its significance as a precedent.

The key to ensuring a binding online contract is to establish a direct correspondence between the offer and what is accepted, as well as a manifestation of the will of a person to accept an offer to contract. Such manifestation may be express or tacit.

Where an individual is presented with contractual terms in an electronic or paper environment and the individual writes or states or clicks "I agree", the individual is expressly manifesting his or her consent to the

†© Charles Morgan, a partner in the Technology Law Group of McCarthy Tétrault LLP in Montréal. The author wishes to acknowledge the research assistance of Valérie Lemieux, associate in the Technology Law group of McCarthy Tétrault LLP in Montréal. The opinions expressed in this case comment, as well as any errors that may appear herein, are the author's alone.

terms of the offer. Moreover, based on the jurisprudence cited below, tacit manifestation of consent may be established where the offeree performs a "positive gesture" that unequivocally demonstrates an intention to accept the offer.

Finally, in my conclusions and recommendations at the end of this case comment, I discuss various approaches to online contract formation and the most effective means of mitigating the risk of a court finding that the approach adopted will be held to be unenforceable.

Legislative Framework

Technological Neutrality

The Quebec *Act to establish a legal framework for information technology*[2] (the "Quebec Technology Act") enshrines the principle of technological neutrality at section 5, which states:

> The legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen.

A similar principle is contained in each of the *Uniform Electronic Commerce Act*-inspired, common-law provincial e-commerce legislation. For example, the Ontario Act provides that information or a document to which the Act applies is not invalid or unenforceable by reason only of being in electronic form.[3]

In light of this principle, courts should avoid placing any greater or lesser burden on parties who wish to contract in an electronic medium than they would on parties who contract orally or on paper.

Offer and Acceptance

Unlike the majority of *Uniform Electronic Commerce Act*-inspired e-commerce laws (applicable in the common-law provinces), the Quebec Technology Act does not contain provisions that specifically address contract formation by electronic means, nor does it address "electronic agents". Instead, the Quebec Technology Act implicitly relies on the inherent technological neutrality of the provisions of the *Civil Code of Quebec* ("CCQ") related to offer and acceptance.

According to Article 1385 of the CCQ:

> 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.[4] It is also of the essence of a contract that it have a cause and an object.

According to Article 1386 of the CCQ:

> The exchange of consents is accomplished by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person.

According to Article 1393 of the CCQ:

> Acceptance which does not correspond substantially to the offer or which is received by the offeror after the offer has lapsed does not constitute acceptance. It may, however, constitute a new offer.

Article 1394 of the CCQ states:

> Silence does not imply acceptance of an offer, subject only to the will of the parties, the law or special circumstances, such as usage or a prior business relationship.

Finally, according to Article 1387 of the CCQ:

> A contract is formed when and where acceptance is received by the offeror, regardless of the method of communication used, and even though the parties have agreed to reserve agreement as to secondary terms.

The language of these provisions is technologically neutral. The key to ensuring a binding online contract is to establish a direct correspondence between the offer and what is accepted, as well as a manifestation of the will of a person to accept an offer to contract. Such manifestation may be express or tacit.

Writing, Signature, and Other Formalities

On the whole, very few types of contracts are subject to formal requirements (such as writing, signature, disclosure, or delivery requirements) beyond valid offer and acceptance in order to be enforceable. For example, the Quebec *Consumer Protection Act* ("CPA") refers to very specific types of contracts that must be evidenced in writing at section 23 (including contracts for credit).[5] The CPA sets forth signature requirements at section 27.[6] Neither of these provisions (nor, to my knowledge, any other statutory formalism) applies to the contract described in the *Paysystems* decision.[7]

Jurisprudence

Quebec Online Contracting Decisions

Paysystems

In *Paysystems*, the Cour du Québec held that mere use of a Web site on which a notice was posted would not imply tacit consent to amended contractual terms (also posted on the Web site), particularly where there was uncontested testimonial evidence to the effect that the Web site user had not actually taken notice of the amendments.[8]

Although it is possible that the Court's conclusion is essentially correct, the Court's reasoning contains a number of errors of law that would suggest that the case is unlikely to be followed without significant critique and distinguishing.

First, the Court suggests that the procedure used by an Internet-based merchant to establish binding acceptance of contractual terms may not involve mere tacit acquiescence to such terms.[9] However, Article 1386 of the CCQ states clearly that the exchange of consents is accomplished by the express or *tacit* manifestation of the will of a person to accept an offer to contract made to

him by another person. In other words, it is legally erroneous to suggest categorically that tacit acceptance of an Internet-based offer is unenforceable under Quebec law. Instead, each case must be examined on its facts to determine whether or not there is sufficient evidence of tacit acceptance, based on the actions of the offeree.

Second, the Court, citing doctrine,[10] suggests that something more than a mere "click" is required in order to establish binding consent to an electronic contract.[11] The suggestion is oddly contradicted by the Court later in the same decision when it cites with approval the *Rudder v. Microsoft* decision (cited by the Court as an example of a decision which is consistent with the rules of the CCQ in relation to consent).[12] The *Rudder* decision stands for the proposition that a valid contract may be formed using a "clickwrap" approach to contract formation (a finding that has been codified in most Canadian provincial e-commerce laws). In many instances a mere "click" will be sufficient to establish consent (just as marking a paper contract with an "X" or saying "I Agree" may form valid contracts).

Third, the Court cites with apparent approval doctrine that suggests that "computer contracts" are subject to a signature requirement.[13] The Court then notes that the amendments were not "signed" by the parties.[14] This doctrinal and legal assertion is unfounded. As noted above, only a very limited subset of contracts (such as those referred to in section 27 of the CPA) are subject to signature requirements to be enforceable.

The net result is that the Court holds that (i) tacit acceptance of an electronic offer may never be binding; (ii) something more than a "mere" click is likely required to form a binding online contract; and (iii) a signature may be necessary to establish binding consent to the online contract. In my opinion, none of these assertions are accurate.

Finally, the Court's reasoning suffers from an error of omission. Specifically, while the Court cites both the Ontario Superior Court decision of *Rudder* and the Alberta Queen's Bench decision of *North American Systemshops v. King*,[15] it fails to cite the two decisions that are arguably most relevant to the analysis: *Kanitz v. Rogers Cable Inc.* and *Canadian Real Estate Association v. Sutton*, both of which are discussed below.

Sutton

Canadian Real Estate Association v. Sutton (Quebec) Real Estate Services Inc.[16] is a rare, recent example of a Quebec court considering electronic contract formation. In that decision, the Quebec Superior Court considered the enforceability of a webwrap agreement in the context of a request for an interlocutory injunction. The Court granted an interlocutory injunction against Sutton, ordering Sutton to cease downloading listings from the <http://www.mls.ca> Web site for the purpose of reposting the information on its own Web site. The Court found that Sutton's actions likely violated the "terms of use" agreement posted on the mls.ca Web site. The terms were subject to a webwrap approach to online contract formation rather than a clickwrap approach (i.e., they were posted on the Web site and made available via hyperlink, but a visitor to the Web site was not required to click on an "I agree" icon or otherwise expressly manifest consent to the terms). The Court granted the injunction nevertheless, holding that the Canadian Real Estate Association (CREA) had an apparent right in the integrity of its Web site, that Sutton had violated that right, and that Sutton had, apparently, knowingly violated the CREA "terms of use" agreement. While Sutton argued that it was not bound by the CREA's "terms of use" because it had not clicked on an "I Agree" button (or otherwise manifestly indicated its consent), the Superior Court decided that the issue was best left to be determined on final judgment. In granting the injunction, the Court appeared to be influenced by the fact that Sutton "knew what it was doing" and, among other things, found evidence that Sutton knew that the CREA terms of use applied to it (despite the fact that there was no clickwrap) because Sutton had its own "terms of use" posted using a webwrap approach on its own Web site.

It is not clear whether the Court in *Paysystems* consciously chose not to cite *Sutton* or whether it was simply not made aware of the decision. What is clear, however, is that the two decisions (*Sutton* and *Paysystems*) sit at opposite ends of the spectrum in terms of the guidance they provide to companies and individuals who wish to carry on electronic commerce. Specifically, whereas the *Paysystems* decision appears to suggest that even a "clickwrap" approach to online contract formation may be insufficient to establish binding consent, *Sutton* suggests that a mere "webwrap" approach to online contract formation may in some instances be binding.[17] This degree of divergence is unfortunate, as it makes it very difficult for merchants and consumers to know in advance what they must do in order to form a binding online contract.

The analysis below presents an attempt to provide a reasonable mean between these two extremes.

Quebec "Implicit Consent" Decisions

The applicable legal analysis to contract formation should be essentially technologically neutral so as to ensure the functional equivalence and legal value of documents, regardless of the medium used, and the interchangeability of media and technologies, in accordance with sections 2 and 5 of the Quebec Technology Act. Below is a summary of some of the leading Quebec jurisprudence regarding implicit or tacit consent as a means of providing guidance regarding the circumstances under which implicit or tacit consent to contractual terms posted online may be inferred.

Gestion Infopharm Inc.

In *Gestion Infopharm Inc. v. B.C.E. Emergis Inc.*,[18] the parties were subject to a software license and services agreement with a one-year term. The agreement contained a fees schedule in relation to programming services to be performed by Infopharm. The agreement was tacitly renewed at the end of its initial term. Approximately two years after the commencement of the contract, Infopharm unilaterally sent a revised fees schedule to Emergis that significantly increased the applicable service fees. Emergis responded by sending a termination notice.

One of the principal issues at trial was whether the new fees schedule had been accepted by Emergis. On this point, Infopharm argued that by failing to react in any way to the notice of the amended fees schedule during a period of five months following receipt of Infopharm's notice thereof, Emergis had tacitly accepted the revised contract terms. The Court, noting that Infopharm continued to apply the terms of the original fees schedule for four months following notice to Emergis thereof, rejected Infopharm's argument. It noted that Emergis immediately sent the notice of resiliation following receipt of Infopharm's first invoice that applied the new fees.

On the subject of tacit or implicit consent, the Court held the following:

> Emergis did not make any **positive gesture** that would have permitted Infopharm to consider that the **[revised fees schedule]** had been accepted. It is true that acquiescence may be tacit, but it must be unequivocal, which is to say that the intention to acquiesce or to waive rights must be demonstrated or clear. [translation]

The *Emergis* decision, in the passage cited above, cites two Supreme Court of Canada decisions, *The Mile End Milling Company v. Peterborough Cereal Company*[19] and *Grace and Company v. C.E. Perras,*[20] summarized below.

Mile End Milling Company

In *Mile End*, the dispute involved a contract for the shipment of flour. One of the questions before the Court was whether one of the parties had waived a contractual right by means of acquiescence. The Supreme Court held that one should never presume that another has waived a right. While acquiescence may be tacit, it must be unequivocal and demonstrated.

Grace and Company

In *Grace and Company*, following verbal negotiations regarding a supply agreement, one party sent a letter to the other party setting out the said party's understanding of the terms to which the parties had agreed, requesting that the other party confirm. The recipient of the letter did not respond. The question at trial was whether, under the circumstances, such silence implied acceptance of the terms. According to the Supreme Court, the silence of the party to whom a declaration regarding the existence of a contract is made does not, generally speaking, imply acceptance of an obligation. In order to consent, it requires a positive gesture. The former principle has been codified at Article 1394 of the CCQ.

L. Bucci Estimation Inc.

More recently, in *141517 Canada Inc. v. L. Bucci Estimation Inc.*,[21] the Cour du Québec summarized doctrine and jurisprudence (all Superior Court judgments) on implicit or tacit consent, by citing the following principles:

- Acceptance is tacit when it appears from the circumstances that the party wishes to take advantage of ("*se prévaloir*") the offer. [translation]
- Implicit consent is demonstrated by the facts and must not leave any doubt regarding the will and the person … [translation]
- Although it may be tacit and result from the acts and gestures of a party, tacit consent to a contract is not presumed. In the case of a doubt, the doubt must be interpreted against the formation of a contract. [translation]

Conclusions

Where an individual is presented with contractual terms in an electronic or paper environment and the individual writes or states or clicks "I agree", the individual is expressly manifesting his or her consent to the terms of the offer. Moreover, based on the above-cited jurisprudence, tacit manifestation of consent may be established where the offeree performs a "positive gesture" that "unequivocally" demonstrates an intention to accept the offer.

Canadian Common Law Online Contracting Decisions

Rudder

In *Rudder v. Microsoft Corp.*, [1999] O.J. No. 3778 (Ont. Sup. Ct) ("*Rudder*") an Ontario court, in a case of first impression in Canada, held that an online membership agreement became enforceable against a subscriber once the subscriber clicked an "I Agree" button. The plaintiffs argued that the member agreement was not binding on them because only a portion of the agreement was presented on the screen at one time and because the term which Microsoft sought to enforce against them, an exclusive forum selection clause, was not seen by the plaintiffs before they clicked on the "I Agree" button. The plaintiffs contended that the parts of the agreement which had to be viewed by scrolling throughout the agreement were essentially "fine print" and not enforceable against them. The *Rudder* Court held the "clickwrap" agreement to be enforceable. It also held that the forum selection clause to be binding on the

plaintiffs, even though they had not read that part of the agreement.

The *Rudder* Court found that although the visitors to the site claimed not to have read the entire terms and conditions, they should be deemed to have done so. One of the reasons for the decision was the fact that the terms and conditions were available for scrolling on the same Web page as the "I Agree" button. The terms and conditions were held not be "fine print" for which consumers might not be held accountable. Pursuant to the Court's reasoning, it would appear that it is not necessary to demonstrate that visitors actually read the entire terms and conditions in order for them to be enforceable, but merely that the visitor had an opportunity to do so and had accepted, by means of a positive gesture, their binding nature.

Kanitz

Kanitz v. Rogers Cable Inc.[22] ("*Kanitz*"), provides guidance as to the enforceability of unilateral contract amendments that are posted online. In the decision, the defendant moved to stay a proposed class action suit against it on the ground that the agreement between the plaintiffs and the defendant provided for arbitration of all claims (thereby barring court action). The arbitration clause in the agreement, however, had not been included in the original hard copy version of the agreement sent to all users of the "Rogers@Home" service. Rather, Rogers Cable inserted the arbitration clause in an amended version of the agreement posted online at Rogers's Web site. The Court concluded that the clause was enforceable, and hence, the action was stayed.

Various factors led the Court to conclude that the amended terms of the agreement, posted online, were enforceable. First, Rogers's original agreement provided for the possibility of unilateral amendment as follows:

> Amendment. We may change, modify, add or remove portions of this Agreement at any time. We will notify you of any changes to this Agreement by posting notice of such changes on the Rogers@Home web site, or sending notice via email or postal mail. Your continued use of the Service following notice of such change means that you agree to and accept the Agreement as amended. If you do not agree to any modification of this Agreement, you must immediately stop using Rogers@Home and notify us that you are terminating this Agreement.

Second, this amendment clause indicated that Rogers would provide notice of any future amendments and indicated the manner in which notice would be given. Third, it explicitly indicated that consent to the amendment could be established implicitly (i.e., based on continued use of the service following notice of the amendment). Fourth, the online version of the amended agreement was available via hyperlink beside which the following notice was posted:

> End user Agreement. The End user Agreement (EUA) is your contract with us. In most cases, the EUA was signed during the installation of the Rogers@Home service. It outlines the rights and responsibilities of both Rogers@Home and users of the service. Among other things, it tells the customers what services Rogers@Home provides as well as how these services can and cannot be used. To provide you with the best Internet services possible, we update the EUA on a periodic basis. Please keep checking back to obtain the latest End user Agreement. **The EUA was last updated on: January 12th 2001.** [The bold appeared in the original.]

Fifth, the fact that the user agreement had been amended was noted on the main page of the Customer Support site in the "News and Highlights" section.

In summary, according to the Court:

> The user agreement expressly allows the defendant to amend the user agreement and to give notice of that fact through its web site. Each of the representative plaintiffs who was originally a customer of the defendant actually signed the user agreement which contained this amending provision. Each of the representative plaintiffs who was originally a Shaw customer also signed a user agreement which contained an amending provision. The Shaw customers were given reasonable notice, when they became customers of the defendant pursuant to the swap, of the terms of service and other matters relating to the provision of the service by the defendant. **It would not be unreasonable to expect that those customers would take the time to visit the appropriate sections of the defendant's web site to familiarize themselves with the defendant's terms of service if they were interested in knowing what those terms of service were and whether they differed in any material respect from those of Shaw.** In my view, therefore, the former Shaw customers became bound by the defendant's amending provision once they became customers of the defendant pursuant to the swap and continued to use the defendant's service.[23]

The result of this decision is somewhat controversial in that it places a relatively high burden upon a consumer to seek out and review the amended terms of an online contract. It is not clear whether a Quebec court would come to a similar conclusion on the facts, since, in general, the Quebec consumer protection regime is considered to be particularly consumer friendly in comparison to its common law counterparts. In addition, the *Kanitz* decision is perhaps the first Canadian decision to uphold the enforceability of a notice and "webwrap" agreement (i.e., where the agreement is available online via hyperlink and users are deemed to have seen and consented to the agreement terms) as opposed to a "clickwrap" agreement (wherein the user must actively demonstrate acceptance of posted terms by means of a positive gesture such as clicking on an "I agree" icon).[24]

North American Systemshops Ltd.

Although *North American Systemshops Ltd. v. King*[25] is not an online contract formation case, it was cited with approval in *Paysystems* and the legal notion of "shrinkwrap" software licenses informed the development of judicial reasoning in relation to "clickwrap" and "webwrap" licenses. At issue in the *Systemshop* case was the enforceability of a software license, the terms of which were printed on the inside back cover of a user's manual sold with the software. The plaintiffs in the case

argued that the prominent presence of a copyright symbol on the package of the software placed a burden on the defendant to search for the license terms that governed its use. The defendant argued that the sale of the software without any apparent restrictions on use resulted in an implied license to use the software as the defendant saw fit. The Court sided with the defendant holding that the plaintiff had an implied license to use the purchased software, absent any conspicuous binding notice of constraints on use.

It is important to note, however, that in *Systemshops*, the Court was careful to distinguish the facts in the case from the more typical practice of exposing the "shrinkwrap" license terms directly under the cellophane wrap used to package the licensed software. In fact, American courts have upheld shrinkwrap agreements in a number of cases.[26] Their enforceability has been premised on there being an act by the proposed licensee, namely removing the cellophane, manifesting assent to the terms of the shrinkwrap license, or indicating an understanding that a contract is being formed as a result of action taken by the user.

U.S. Common Law Online Contracting Decisions

Ticketmaster

A California District Court underscored the common-law principles that will govern contractual enforcement of Web site terms and conditions in the case of *Ticketmaster Corp. v. Tickets.com, Inc.*[27] Ticketmaster claimed, among other things, that rival Tickets.com's practice of deep linking; that is, linking directly to Web pages within Ticketmaster's Web site, violated the terms and conditions of Ticketmaster's Web site. The judge granted Tickets.com's motion to dismiss the breach of contract claim. Key to the judge's decision to dismiss the breach of contract claim appeared to be the lack of conspicuousness of the terms and conditions at issue. The judge noted:

> The home page contains (if a customer scrolls to the bottom) "Terms and Conditions" which proscribe, among other things, copying for commercial use. However, the customer need not view the Terms and Conditions to proceed straight to the event page which interests him.[28]

The judge in *Ticketmaster* distinguished the lack of conspicuousness of the notice and the lack of a requirement of consent in this case from shrinkwrap cases, noting:

> In defending this claim, Ticketmaster makes reference to the "shrinkwrap license" cases, where the packing on the outside of the CD stated that opening the package constitutes adherence to the license agreement (restricting republication) contained therein. This has been held to be enforceable. That is not the same as this case because the "shrink-wrap license agreement" is open and obvious and in fact hard to miss. Many websites make you click on "agree" to the Terms and Conditions before going on, but Ticketmaster does not. Further, the Terms and Conditions are set forth so that the customer needs to scroll down the home page to find and read them. Many customers instead are likely to proceed to the event page of interest rather than reading the "small print." It cannot be said that merely putting the Terms and Conditions in this fashion necessarily creates a contract with anyone using the website.[29]

Netscape

A 2001 decision of a New York court emphasized essentially the same principles. In *Specht v. Netscape Communications Corp.*[30] Netscape attempted to enforce an arbitration clause in an end user license agreement. The license agreement was allegedly made by Netscape and agreed to by users by downloading computer software known as "SmartDownload" from Netscape's Web site. By clicking on a box, visitors initiated the downloads. The sole reference to the license agreement appeared in text that was visible only if a visitor scrolled down through the page to the next screen. If the visitor did so, he or she saw an invitation to review the license agreement.[31] Visitors were not required affirmatively to indicate their assent to the license agreement, or even to view the license agreement, before proceeding with a download of the software.

The New York court refused to enforce the SmartDownload License Agreement. The Court distinguished this form of agreement from both clickwrap and shrinkwrap licenses, which require users to perform an affirmative action unambiguously expressing assent to a contract. Netscape's SmartDownload, in contrast, allowed a user to download and use the software without taking any action that plainly manifested assent to the terms of the associated license or indicating an understanding that a contract was being formed. Accordingly, the Court refused to find Netscape's license enforceable. The Court stated the following:

> Netscape argues that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent. Netscape's failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed …
>
> The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force. Defendants' position, if accepted, would so expand the definition of assent as to render it meaningless. Because the user Plaintiffs did not assent to the license agreement, they are not subject to the arbitration clause contained therein and cannot be compelled to arbitrate their claims against the Defendants.[32]

Register.com v. Verio, Inc.

In 2004, in *Register.com, Inc. v. Verio, Inc.*,[33] the United States Court of Appeals for the Second Circuit confirmed the District Court ruling in the same matter,[34] providing further insight into the American common-law position on online contract formation.

A registrar of Internet domain names, Register.com, operated an independent and interactive online database, called the "WHOIS" database containing the names and personal contact information of the plaintiff's customers. Through the use of an automated software program, or "robot", the defendant harvested information from this database, using the information to advertise its own competing services to users who had recently registered Internet domain names with Register.com.

Certain terms and conditions governing the use of Register.com's WHOIS database at the time of the impugned activities by Verio were printed on each search result of the WHOIS database. They read as follows:

> By submitting a WHOIS query, you agree that you will use this data only for lawful purposes and that, **under no circumstances will you use this data to: (1) allow, enable, or otherwise support the transmission of mass unsolicited, commercial advertising or solicitations via direct mail, electronic mail, or by telephone;** or (2) enable high volume, automated, electronic processes that apply to Register.com (or its systems). The compilation, repackaging, dissemination or other use of this data is expressly prohibited without the prior written consent of Register.com. Register.com reserves the right to modify these terms at any time. **By submitting this query, you agree to abide by these terms.** [Emphasis added]

It must be emphasized, however, that these terms and conditions were only displayed to the user following the submission of the WHOIS query.

At trial, the District Court held, among other things, that Verio had assented to the above terms of use, even though it was not required to click an "I Agree" icon. On appeal the Court of Appeal agreed.

The decision of the Court of Appeal is based on three key factors: (i) the terms of use were published in full on the search results (rather than being made available via hyperlink); (ii) Verio engaged in persistent data mining, returning to the Web site repeatedly to collect more information (hence, while Verio may have successfully argued after a single visit that it was unaware of and/or had not assented to the terms of use, Verio could not continue to argue this point following multiple access); and (iii) Verio actually admitted that it was aware of the terms of use. In effect, the fact that Verio *came* to know of the terms and conditions during its frequent visits to the site (and hence, knowingly acted in violation of contractual terms that governed the use of the Web site) resulted in a contract breach. The Court reasoned that the situation of the defendant in this case was not analogous to the one-time users in *Specht* who were oblivious to the presence of terms posted at the bottom of a Web page. Indeed, Verio admitted that its daily access to the WHOIS database supplied them with full awareness of the terms according to which Register.com offered a right of entry. The reasoning in *Specht* was thus maintained, but distinguished on the facts.

Significantly, however, the decision in *Register.com* challenged the decision of the Central District of California Court in *Ticketmaster* to the effect that one must actively click a separate "I agree" button in order to be bound by the terms of the agreement.

The Court of Appeal held as follows:

> We recognize that contract offers on the Internet often require the offeree to click on an "I agree" icon. And no doubt, in many circumstances, such a statement of agreement by the offeree is essential to the formation of the contract. But not in all circumstances. While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take a benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly becomes binding on the offeree.

In short, the Court held that even in the absence of a "click", an online contract may be held to be enforceable if there is sufficient evidence that the Web site user was made aware of terms governing the use of the Web site and the user continued to use the Web site thereafter.

Although these cases are American, the reasoning in these cases would likely be applied in Canada (particularly in the common-law provinces). As illustrated in the cases, the issues likely to be dispositive in upholding the validity of an online contract are whether the Web site user has knowledge of the conditions and has given express or implied consent to them.

Conclusions and Recommendations

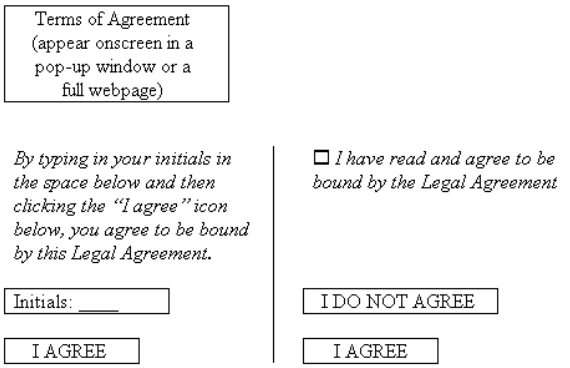
In the *Paysystems* decision, the Court held that Paysystems's approach to online contract formation was unenforceable. Ultimately, this conclusion is defensible under Quebec law insofar as Paysystem's approach to contract formation did not provide a means of determining whether or not the other party was actually aware of the amended contractual terms posted on Paysystems's Web site or an unequivocal means of determining whether those terms had been accepted. However, in the *Paysystems* decision, the Court appears to assert further that (i) tacit acceptance of an electronic offer may never be binding; (ii) something more than a "mere" click is likely required to form a binding online contract; and (iii) a signature may be necessary to establish binding consent to the online contract. It is submitted that none of these latter assertions is accurate.

Case law on point from the United States and applicable case law from Canada (including Quebec) suggests that whether terms and conditions will be binding will depend on the method used to obtain the consent of Web site users. Applying the principles that have been applied in shrinkwrap license and webwrap cases, it appears likely that Web site terms and conditions will be

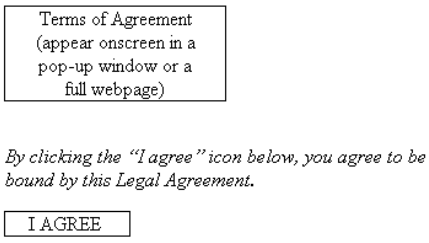
enforced where (i) the terms and conditions are conspicuous and likely to be read by, or knowledge of them may be reasonably imputed to, visitors at the time of their initial visit; and (ii) consent with the terms and conditions may be reasonably implied.

On the basis of the above analysis, it is possible to distinguish six different approaches to obtaining online contract formation, as follows:

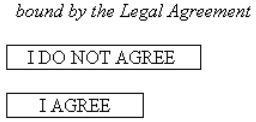
1. **The "click plus" approach.** The user is presented with contractual terms and must scroll through, click an "I agree" icon and do "something more" (such as typing in a password, initials, OR clicking on a separate toggle button) prior to accessing the online product or service. For example:



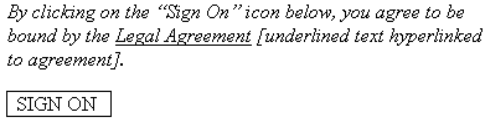
2. **The "clickwrap" approach.** The user is presented with the contractual terms and must scroll through and click an "I agree" icon onscreen prior to accessing the online product or service. For example:



3. **The "notice + dual confirmation" approach.** The user is presented with an unambiguous notice to the effect that by performing a positive gesture (such as clicking an icon) the user will be deemed to have accepted the terms of the agreement that is made available by means of a hyperlinked text contained in the notice. The user must perform a dual confirmation gesture prior to accessing the online product or service (such as clicking a toggle button, then clicking an "I agree" icon).[35] For example:



4. **The "notice + click" approach.** The user is presented an unambiguous notice to the effect that by performing a positive gesture (such as clicking an icon) the user will be deemed to have accepted the terms of the agreement that is made available by means of a hyperlinked text contained in the notice. The user must perform the positive gesture prior to accessing the online product or service. For example:



5. **The "notice + passive hyperlink" approach.** The user is presented an unambiguous, conspicuous notice to the effect that in subsequently using the Web site the user will be deemed to have accepted the terms of an agreement that is made available by means of hyperlinked text contained in the notice. The user is not required to click on the hyperlink nor perform any other positive gesture prior to accessing the online product or service. For example:

> *By using this Web site, you will be deemed to have accepted the terms and conditions of the* Legal Agreement *[underlined text hyperlinked to agreement].*

6. **The "webwrap" approach.** The user is presented with a hyperlink that leads the user to contractual terms posted on the Web site. The user is not required to click on the hyperlink nor perform any other positive gesture prior to accessing the online product or service. The following hyperlink is placed on the Web page (often at the bottom of the page). For example:

> Legal Agreement *[underlined text hyperlinked to agreement].*

The risk that a court will hold that an approach to online contract formation is unenforceable will increase as one moves from the "click plus" approach to the "webwrap" approach.[36] Based on the analysis above, the first four approaches should form a binding contract in Canadian common and civil law (assuming no other statutory formalities apply to the contract). The fifth approach may create a binding contract in common-law jurisdictions, but likely will not create a binding contract under Quebec civil law. The pure webwrap approach will almost never create a binding contract (unless there is other circumstantial evidence that demonstrates knowledge of and consent to the posted terms).

Notes:

[1] J.Q. No. 1573 (C.Q. Civ.) [*Paysystems*], 500-22-101613-043 (C.Q.).

[2] S.Q. 2001, c. 32.

[3] *Electronic Commerce Act*, S.O. 2000, c. 17, s. 4.

[4] Under Canadian common law, a binding contract requires the following elements: (i) Offer — an expression of willingness to enter into a contract on the stated terms; (ii) Unequivocal acceptance — acceptance of an offer must be "unconditional" (i.e., on precisely the same terms as the original offer) and communicated to the offeror; (iii) Consideration — the requirement that each party to a contract must give something in return for the other's obligation to them, e.g., money or an exchange of obligations (which must have some value even if not monetary) as part of the same transaction. Consideration given later may not be sufficient because "past consideration" is not good consideration; (iv) Intention to create legal relations — both parties must intend to be legally bound by the terms of the contract; and (v) Certainty of terms — the parties to the agreement must agree upon precisely the same terms. Terms of a contract can be either express or implied. An express term has the advantage of certainty, although a number of implied terms are now well-established. These basic elements of contract formation are supplemented on occasion by statutory formalities, such as writing and signature requirements required in order to ensure the enforceability of the contract as a whole. In the common-law provinces, these common-law rules have been supplemented by statutory e-commerce provisions that specifically address online contract formation. Specifically, all Canadian provinces and territories have enacted electronic commerce legislation. With the exception of the Quebec Technology Act, provincial legislation has been largely based on the *Uniform Electronic Commerce Act* ("UECA"), a model law. The binding provincial legislation is as follows: Alberta: *Electronic Transactions Act*, S.A. 2001, c. E-5.5 (the "Alberta Act"); British Columbia: *Electronic Transactions Act*, S.B.C. 2001, c. 10 (the "B.C. Act"); Manitoba: *Electronic Commerce and Information Act*, C.C.S.M. 2000, c. E55 (the "Manitoba Act"); New Brunswick: *Electronic Transactions Act*, S.N.B. 2001, c. E-5.5 (the "N.B. Act"); Newfoundland and Labrador: *Electronic Commerce Act*, S.N.L. 2001, c. E-5.2 (the "Newfoundland Act"); Nova Scotia: *Electronic Commerce Act*, S.N.S. 2000, c. 26 (the "N.S. Act"); Ontario: *Electronic Commerce Act*, S.O. 2000, c. 17 (the "Ontario Act"); Prince Edward Island: *Electronic Commerce Act*, S.P.E.I. 2001, c. E 4.1 (the "P.E.I. Act"); Quebec: *Act to establish a legal framework for information technology*, S.Q. 2001, c. 32 (the "Quebec Technology Act"); Saskatchewan: *Electronic Information and Documents Act*, S.S. 2000, c. E-7.22 (the "Saskatchewan Act"). The Ontario Act, which is typical of the UECA-based e-commerce legislation, confirms that an agreement or contract may be formed electronically. Subsection 19(1) provides 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: (a) by means of electronic information or an electronic document; or (b) by an act that is intended to result in electronic communication, such as touching or clicking on an appropriate icon or other place on a computer screen. The remaining common-law provinces, other than New Brunswick (see below), generally echo the requirements in the UECA and the Ontario Act for electronic contract formation. They provide that unless the parties agree otherwise, an agreement may be formed (i) by means of an electronic document; or (ii) by an act, such as touching a computer screen or clicking on an icon, that is intended to electronically communicate assent. The N.B. Act does not contain the above provision. Nevertheless, the New Brunswick government released a Discussion Paper in December 2000, wherein the Legislative Services Branch of the Department of Justice indicated that it doubted the section says "anything tha t is not the law already".

[5] *Consumer Protection Act*, R.S.Q. P-40.1, s. 23.

[6] In common-law provinces, writing, signature, and other formal requirements are typically set forth in Statute of Frauds, based or other statutory consumer protection legislation, such as *Consumer Protection Act*, R.S.B.C. 1996, c. 69 (British Columbia), *Fair Trading Act*, R.S.A. 2000, c. F-2 (Alberta), *Consumer Protection Act*, S.S. 1996, c. C-30.1 (Saskatchewan), *Consumer Protection Act*, C.C.S.M. c. C200 (Manitoba), *Consumer Protection Act*, R.S.O. 1990, c. C-31 (Ontario), *Consumer Protection Act*, S.O. 2002, c. C-30, Sched. A (Ontario), *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1 (New Brunswick), *Consumer Protection Act*, R.S.N.S. 1989, c. 92 (Nova Scotia), *Consumer Protection Act*, R.S.P.E.I. 1988, Cap. C-19 (P.E.I.), *Consumer Protection Act*, R.S.N.L. 1990, c. C-31 (Newfoundland and Labrador).

[7] This case comment is not intended to provide exhaustive treatment of issues related to the enforceability of online contracts. Rather, it is intended to provide concrete guidance in relation to online offer and acceptance.

[8] The judgment is silent as to whether or not the Paysystems original agreement stipulated that the contract could be amended by means of an online posting of amended terms.

[9] In *Paysystems*, *supra* note 1 at para. 25 the judge writes:

> Il importe donc que la procédure utilisée par le vendeur de site Internet, ou l'hébergeur, soit telle que l'acceptation de l'acheteur, ou hébergé, puisse être clairement donnée, sans équivoque, non par clause négative, ou prévoyant acquiescement tacite au cas d'utilisation du site. [emphasis added]

[10] *Ibid.* at para. 13, citing Mes. Vincent Gautrais et MacKay, « Les contrats informatique », in Denys-Claude Lamontagne, dir., Droit specialisé des contrats, vol. 3, Cowansville, Yvon Blais, 2001 à la p. 288-289.

[11] The judge writes:

> Il semble donc nécessaire, tant à ces auteurs qu'à la Cour, d'exiger une preuve plus valable d'acceptation d'un contrat informatique qu'un simple « clic », sans possibilité de vérifier la rencontre des volontés qui forment un contrat, où il doit y avoir « *accord de volonté* » (art. 1378 CCQ), sur le même objet (art. 1412 CCQ).

Ibid. at para. 14.

[12] The judge writes:

> La Cour accepte bien ce qui précède mais tel contrat demeure quand même soumis au Code civil en matière de Consentement, objet et moyens de preuve. À titre d'exemple: en 1999, la Cour Supérieure d'Ontario acceptait un contrat conclu sur Internet parce que le co-contractant devait « cliquer » sur une icône marquée « I agree », signifiant ainsi directement son accord audit contrat. (*Rudder et al. v. Microsoft Corporation*, 2. Canadian Patent Reporter, 4th, p. 274).

Ibid. at paras. 23, 24.

[13] Me Antoine Leduc, « Les contrat de création et le contrat d'hébergement d'un site web: éléments de négociation, de rédaction et d'interprétation » in *Développements recents en droit de l'Internet*, Cowansville (QC), Yvon Blais, 2001, 143 à la p. 179 cited in *Paysystems supra* note 1 at para. 3 writes:

> On estime que, sauf exception, les contrats informatiques ne requièrent pas normalement le respect d'exigences autres que celles, habituellement demandées, de la signature, et ce, quelque (sic) soit le support (pages 287 à 888).

[14] The judge writes:

> Il est admis que les amendements R-1 audit contrat l-1 n'ont pas été signés par les parties, mais la requérante allègue qu'ils sont valables parce que l'intimée a continué à utiliser le site après la date du 23 octobre 2003. Il y aurait donc consentement tacite du fait de cette utilisation postérieure à l'avis contenue en R-2, et cité plus avant. Ce geste équivaudrait à signature.

Ibid. at para. 12.

[15] A.J. No. 512 (Q.B.).

[16] J.Q. No. 3606 (C.S.).

[17] See online: Multiple Listing Service Canada, <http://www.mls.ca>. Despite the preliminary finding in *Sutton*, the MLS Web site has subsequently adopted a clickwrap approach to online consent (instead of a mere webwrap approach).

[18] J.Q. No. 1105 (C.S.).

[19] S.C.R. 120 at. 131.

[20] (1921) 62 S.C.R. 166 at 169.

[21] 2001 11JCan 14469 (QC C.Q.).

[22] O.J. No. 665, 22 (Sup. Ct.).

[23] *Ibid.* at para. 23 [emphasis added].

[24] It is of relevance to note that section 42 of the Regulations to the *Ontario Consumer Protection Act, 2002*, O. Reg. 17/05, which came into force, subsequent to the *Kanitz* decision, on July 30, 2005, effectively allows a supplier to amend, renew, and extend an Internet agreement unilaterally provided that (a) the agreement authorizes the supplier to do so, (b) the agreement allows the consumer to either terminate or retain the existing

agreement, and that (c) advance prior notice is given to the consumer. Such notice must be given between the 30th and 90th day before the date the amendment, renewal, or extension is proposed to take effect, must be provided in a manner that is likely to come to the consumer's attention, and must explain the consequence for the consumer of not responding to the notice.

[25] *Supra*, note 15.

[26] See, e.g., *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (1989), *Arizona Retail Systems Inc. v. Software Link*, 831 F.Supp. 759 (D. Ariz. 1993), *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447 (1996), *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (N.D. Ill. 1996), *M.A. Mortenson Company Inc. v. Timberline Software Corporation*, 970 P.2d 803 (2000).

[27] 2000 U.S. Dist. LEXIS 4553, 2 Fed. Appx. 741 (C.D. Cal. 2000).

[28] *Ibid.*, at 2.

[29] *Ibid.*, at 8.

[30] 150 F. Supp. 2d 585 (S.D.N.Y. 2001) [*Specht*].

[31] The wording of the notice stated the following: "Please review and agree to the terms of the *Netscape SmartDownload Software License Agreement* before downloading and using the software".

[32] *Specht*, *supra* note 30 at 28.

[33] 356 F. 3d 393 (2d Cir. N.Y. 2004), 2004 U.S. App. LEXIS 1074.

[34] 126 F. Supp. 2d 238, 2000 U.S. Dist. LEXIS 18846 (S.D.N.Y., 2000).

[35] The toggle must not be pre-selected by default if this is to be considered an effective dual confirmation mechanism.

[36] Note: for any one of these approaches, the likelihood of a finding of enforceability should be further increased or decreased depending on the relative clarity of the terms used in the consent notice, the size of font, the relative conspicuousness of the placement of the notice on the screen (above or below the fold), the ability of the user to access the online products or services directly by bypassing the above notices, etc.