

DIVERGING PERSPECTIVES ON ELECTRONIC CONTRACTING IN THE U.S. AND EU

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INTRODUCTION

Margaret Jane Radin's paper³ discusses the ways modern technologies have prompted new thinking within and about property, and the way the legal response has failed to take sufficiently into account the countervailing considerations that have shaped earlier Property Law developments. Some new technologies have also caused intellectual and practical struggles within Contract Law. This paper will consider some of the developments of Contract Law related to these changes, in particular the transactions relating to the sale, leasing or free use of computer software and the purchase of computers.

Part I of this paper introduces the topic and offers an overview of how American Contract Law has responded to the issues raised. Part II then looks at the distinctly different approach of the European Union.

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³Margaret Jane Radin, *A Comment on Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23 (2006).

I. THE U.S. LEGAL RESPONSE

The focus of this Article is the interrelated set of issues that have arisen, on one hand, from Internet transactions regarding the downloading of free or purchased software, as well as other Internet sales, and, on the other hand, the distinctive transactional problems that modern business practices have created under the rubric of “shrink-wrap” or “terms in the box”—a late presentation of terms associated with the sale of computers or the licensing of software (with the terms included in the packaging, rather than presented to the user ahead of time)—but not necessarily confined to those transactions.

Such transactions raise novel questions, in part because they frequently involve the sale of “new property,” and in part because they involve novel ways of contracting, even when the subjects of the contracts are conventional goods and services. At the same time, these transactions can be seen as primarily offering a new twist on a now-standard theme: the problem of unread terms in standard-form contracts. As Clayton Gillette wrote: “Consumers who deal with clickwrap, shrinkwrap, or browserwrap contracts are likely to ignore terms provided only on or within product containers, online at the time the goods are ordered, or in containers that arrive with the goods subsequent to the time when the goods are ordered.”⁴

This raises a basic unifying theme of these sorts of transactions: there is something unusual within Contract Law (though by no means unprecedented) regarding the way terms are presented and agreements are formed in these transactions. That is the focus of the next section.

A. Novel Presentation of Terms

There is at best a quite rough analogy between what is occurring with electronic contracting and the process of “propertization” discussed by Prof. Radin.⁵ The regulation of electronic contracting is primarily a matter of using existing Contract Law rule—directly, or with some extension.⁶ Direct application may be clearest in

⁴Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 975-76 (2005) (footnote omitted). Gillette continues:

Failure to read terms may be predicated on rational judgments about low defect rates or the low likelihood of either finding oppressive, enforceable terms or being able to negotiate around them. These tendencies to disregard terms, however, may be exacerbated by cognitive errors, other forms of bounded rationality, or informational lapses that cause even reading buyers to misperceive the risks attending the goods they purchase or to apply improper discount rates to the risks they bear and thus to miscalculate the effects of unfavorable terms.

Id. at 976.

⁵See Radin, *supra* note 3.

⁶On the topic of how Contract Law has been modified to deal with electronic contracting, along with the doctrines and principles discussed below, one might also note the extension/adaptation (by both courts and legislatures) of writing requirements to accept e-mail and other electronic signatures. See, e.g., Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C.A. §§ 7001-7031 (West Supp. 2005); UNIF. ELEC. TRANSACTIONS ACT (UETA) §§ 1-21 (1999), available at <http://www.law.upenn.edu/bl/ulc/fnact99/1990s/ueta99.htm>; see also *Int'l Casings v. Premium*, 358 F. Supp. 2d 863, 873 (W.D. Mo. 2005) (under UETA, adopted by Missouri, electronic signature suffices for written signature requirement of Statute of Frauds).

cases of “clickwrap,” a form of transaction common for on-line purchases and the on-line downloading of (free or paid) software. With “clickwrap” the transaction will not go forward unless and until the consumer clicks a button indicating “I agree” (or similar terms of express assent) after the statement of terms and conditions. Under such circumstances, one can easily find “offer” and “acceptance” (and terms fully presented prior to acceptance) just as in conventional contracts.

Even “shrink-wrap contracts”⁷—where terms are sent in the box with the computer or software or other object purchased or licensed, and the purchasers or users are deemed to have assented to the terms if they do not object and return the object in a timely manner⁸—have some analogues in existing Contract Law and practice. Insurance contracts may be the best and most salient analogy of such “rolling contracts” (where terms are added or clarified even after the initial agreement of the parties). In these contracts, one obtains insurance by coming to an agreement on the general terms of the policy (type of coverage, extent of coverage, deductibles, premiums, etc.), and often only after that (initial or tentative) agreement are all the terms of the policy sent to the insured. One might also point to the analogy of tickets to concerts or sporting events, where one frequently learns of disclaimers and limitations of liability by the seller only once one has received the tickets (with the disclaimers and limitations often printed on the tickets themselves).⁹

One should not underestimate the problems that can arise even with the relatively familiar-looking “click-wrap” transactions. While “click-wrap” contracts are structurally similar to conventional non-electronic contracts, the method of contracting still raises some concerns. It is common with that sort of contracting for the terms of the agreement to be relatively lengthy, while being shown in a small screen box, which requires one to “scroll down” to read all of the terms given. Thus, “click-wrap” contracts are often like standard-form contracts in a slightly new setting. Standard-form contracting in general raises issues regarding fairness and

⁷*See, e.g.,* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). *But cf.* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991) (shrinkwrap terms treated as suggested terms additional to existing contract, and excluded under U.C.C. § 2-207); Softman Prods. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001) (shrinkwrap terms on software not assented to where defendant had not loaded the software).

⁸While it seems relatively clear as a matter of doctrine in rolling contract situations that items can be returned if purchasers object to terms shortly after those terms are brought to their attention, there is some evidence that the commercial reality might be more complicated. Retailers may resist consumers returning computers after the box has already been opened (and generally the only way the consumers can see all the terms being applied to them is by opening the box). For example, under the policy of the prominent electronics chain store, Best Buy, opened software may not be returned, and returned computers may be subject to a significant “restocking” charge. No exception is stated for software or computers returned because the terms of sale or lease found with the items were not acceptable. Best Buy.com Return Policy, http://www.bestbuy.com/site/olspage.jsp?type=page&id=cat12098&contentId=1043363607061&_requestid=27708 (last visited Apr. 2, 2006).

⁹*See, e.g.,* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (enforcing forum-selection clause that was included among three pages of terms attached to ticket for cruise).

assent,¹⁰ but Robert Hillman has pointed out that such problems may be exacerbated with electronic contracting. The argument is that consumers may be even less likely to read the terms of “click-wrap” agreements than the terms of conventional standard-form contracts, since on-line transactions are frequently chosen because speed is valued, and in those circumstances consumers are less likely to stop to read and evaluate the fine print.¹¹

Electronic contracting caselaw and practice also include two salient deviations from the rules and practices of standard contracting. First, the way many courts have discounted or ignored the Uniform Commercial Code’s¹² provision for “the battle of the forms”¹³ in contexts where it seems to apply;¹⁴ and second, the acceptance by some courts of “browsewrap” as a valid means of acceptance/contract formation.

“Browsewrap” involves a presentation of terms on a Web site with the statement that some further action (continuing use of a site, downloading software, etc.) would be construed as acceptance, without any need of express assent. The terms themselves may be displayed prominently in a way a user would be unlikely to miss, or the display page might merely mention, and perhaps not even in a prominent way, that terms can be found elsewhere on the site. Under the rubric of conventional contract doctrine, the problem for such cases is that the purchaser or user has not done anything that could constitute an acceptance of the vendor’s terms (and Contract Law refuses, other than in exceptional circumstances, to treat silence and inaction as acceptance,¹⁵ and will usually only treat actions as implied acceptance where the terms are brought sufficiently to the offeree’s attention so that it is clear that the offeree’s actions can be fairly construed as accepting the terms¹⁶). Courts have split on whether to enforce “browsewrap” terms.¹⁷

¹⁰See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

¹¹Robert A. Hillman, *On-Line Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

¹²Article 2 of the Uniform Commercial Code (adopted as binding statutory law in all states other than Louisiana) governs the sale of goods.

¹³U.C.C. § 2-207 (1977).

¹⁴*ProCD*, 86 F.3d 1447 (refusing to apply U.C.C. § 2-207 on the [incorrect] basis that there was only one form involved in the transaction); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (refusing to apply U.C.C. § 2-207, citing *ProCD*); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 250 (N.Y. App. Div. 1998) (refusing to apply U.C.C. § 2-207, on the basis that the contract had not yet been formed). *But see* *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (applying U.C.C. § 2-207); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (applying U.C.C. § 2-207).

¹⁵See RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

¹⁶*Cf. id.*, § 50, cmt. a (“The acceptance must manifest assent to the same bargain proposed by the offer.” (emphasis added)).

¹⁷*E.g.*, *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (refusing enforcement); *Ticketmaster v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000) (concluding, for the purposes of preliminary injunction, that there is a possibility of a binding contract on “browsewrap” terms); *Pollstar v. Gigmania, Ltd.*, 70 F.

B. Analysis

In general, electronic contracting cases sometimes seem like good examples of “legal realism”: the way that judges will manipulate the doctrine to achieve the outcomes they otherwise consider fair or practical. One can see it in Judge Easterbrook’s unwillingness to follow UCC formation rules in *ProCD v. Zeidenberg* and *Hill v. Gateway 2000, Inc.*;¹⁸ one can see it in the few cases where courts enforce browsewrap transactions¹⁹; and in many of the cases where the courts refused full enforcement of click-wrap transactions.²⁰ In these cases, it seems that the courts will try to find a way to enforce terms if they think that non-enforcement would lead to unjust enrichment of a bad actor, or would cause significant inconvenience, with little purpose, to businesses. As one commentator stated: “[T]he cases that approve RCs [rolling contracts] appear motivated by the utility and practicality of easy forms of contracting, and at least some approving opinions seem to fly in the face of doctrinal analysis.”²¹ It may be that the charitable way to read these developments is that when Contract Law overtakes new kinds of transactions it does a better job of taking into account countervailing considerations (here, business efficacy) than Property Law does – contrasting the problems with propertization shown in Prof. Radin’s paper.²² The less charitable way to view the developments is that both Prof. Radin’s paper and the U.S. cases discussed in this paper show a judiciary that tends to construct rules in ways favorable to business interests.

The general level of substantive and procedural fairness within current electronic contracting remains uncertain and controversial. Looking at the reported cases (and the media articles), one might get the impression that electronic contracting is more likely than other commercial transactions—or at least other consumer transactions—to include one-sided arbitration agreements, forum selection clauses, and other restrictive clauses.²³ That said, at least one researcher who has looked at the question

Supp. 2d 974 (E.D. Cal. 2000); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (enforcing browsewrap terms).

¹⁸*ProCD*, 86 F.3d 1447 (focusing on the fact that the purchaser intended to exploit for his own purposes work the vendor has spent \$10 million compiling); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (“Practical considerations support allowing vendors to enclose the full legal terms with their products.”).

¹⁹*E.g.*, *Register.com, Inc., v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

²⁰*See, e.g.*, *Williams v. America Online, Inc.*, No. 00-0962, 2001 WL 135825 (Mass. Super. Feb. 8, 2001) (refusing to enforce forum selection clause in clickwrap case, mentioning both formation questions and questions about the substantive fairness of the clause).

²¹Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 682 (2001) (footnote omitted). Of course, the utility and practicality may be more on the provider’s side than the consumer’s side. Comparison shopping of terms becomes much more difficult if one can only learn about terms by *purchasing* all the alternative items. *See* Julie E. Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 487 (1998).

²²*See* Radin, *supra* note 3.

²³Lucian Bebchuk and Richard Posner have recently argued that such one-sided terms are reasonable in a context where there is a danger that consumers might act opportunistically and where courts cannot perfectly observe compliance with terms. In such circumstances, they

more systematically claims that, at least for some categories of electronic contracting, the agreements are not significantly more pro-seller than comparable agreements outside the category.²⁴

It should be noted that with some of the transactions involved in these cases the consumers are ignorant (and occasionally misled) regarding the basic nature of the transaction – in particular, that transactions involving software are frequently licenses for a single use, rather than a conventional sale of a good.²⁵ This fact is complicated by two others: on one hand, that the users' reasonable expectations that they are entering a sale does not trump the vendor's terms that the transaction is in fact a license; and, on the other hand, that the terms set by the vendor on a sale or license can trump the copyright law rules that would otherwise control the use of data in the purchased or licensed material.²⁶

C. Uniform Law Responses

Efforts to aim regulation directly at electronic transactions remain at an early stage. An early effort co-sponsored by American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL), as the proposed Uniform Commercial Code Article 2B, was abandoned when the ALI walked out, believing that a proposal acceptable (and fair) to both suppliers and consumers was not obtainable. The proposal was carried forward by NCCUSL as the Uniform Computer Information Transactions Act (UCITA), finalized in July 1999,²⁷ but it was adopted by only two states, Maryland and Virginia.²⁸ In August 2003, NCCUSL suspended efforts to obtain state adoption.²⁹

argue, it makes sense for sellers to insert one-sided terms in their form contracts, but usually to decline to enforce them. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

²⁴See Florencia Marotta-Wurgler, *Are 'Pay Now, Terms Later' Contracts Worse for Buyers? Evidence From Software License Agreements* (NYU Law and Economics Research Paper No. 05-10, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799274.

²⁵Additionally, some courts have raised questions about whether the transactions the vendor characterizes as a "license," should be re-characterized as a sale (thus making Article 2 of the Uniform Commercial Code more clearly applicable). See, e.g., *Softman Products Co.*, 171 F. Supp. 2d at 1083-87.

²⁶See *ProCD*, 86 F.3d at 1453-55 (rejecting arguments based on copyright law).

²⁷UNIF. COMPUTER INFO. TRANSACTIONS ACT, available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita200.pdf>.

²⁸See VA. CODE ANN. §§ 59.1-501.1 to 509.2 (LexisNexis 2005); MD. CODE ANN. COM. LAW §§ 22-101 to 22-816 (LexisNexis 2005). The Virginia version was modified in 2004 in ways that responded to concerns about consumer protection and free expression. See MARGARET J. RADIN ET AL., *INTERNET COMMERCE: THE EMERGING FRAMEWORK* 836 n.3 (2d ed. 2006).

Additionally, at least four states (Iowa, North Carolina, West Virginia, and Vermont) have adopted anti-UCITA "bomb shelter" laws to prevent vendors transacting business in those states from "opting into" UCITA based on the states where it is in force. See IOWA CODE ANN. § 554D.125 (West Supp. 2005); N.C. GEN. STAT. ANN. § 66-329 (LexisNexis 2005); VT. STAT. ANN. tit. 9, § 2463a (LexisNexis 2005); W. VA. CODE ANN. § 55-8-15 (LexisNexis 2005).

In the meantime, the ALI has returned to the topic, with work on “Principles of the Law of Software Contracts” (ALI Principles).³⁰ When UCITA emphasized “freedom of contract,” allowing the parties to set the terms of their transactions, critics argued that this in effect would allow the imposition of unfair and one-sided terms by sophisticated vendors against unsuspecting consumers.³¹ The ALI Principles, at least at the present stage, emphasizes primarily the advance disclosure of terms.³² For example, as regards transactions downloading from Internet sites, Section 2.01(c) states:

- A standard-form agreement ... is not enforceable unless
- (1) the standard form is reasonably accessible electronically prior to the immediate transaction;
 - (2) the transferee can complete the transaction only by signifying agreement at the end of the standard form; and
 - (3) the standard form is reasonably comprehensible;
 - (4) the transferee can store and reproduce the standard form.³³

This would effectively negate “browsewrap” claims. As regards “terms in the box” (shrink-wrap), the ALI Principles would also require significantly more from vendors than most of the current case-law: that any standard form be “reasonably accessible electronically prior to payment,” and that any retail store offer “reasonable access to the standard form prior to payment.”³⁴

D. Contrast with Europe

As will be discussed in Part II, the European response to the issues raised by these new forms of contracting has turned on separating consumer transactions from transactions between businesses. While there is a tradition of consumer protection through separate legal rules in the United States (both at the state and federal level),³⁵ and while some commercial rules will be different for consumers than they are for business-to-business transactions,³⁶ on the whole the rules for the construction and enforcement of agreements is the same for both.

²⁹Patrick Thibodeau, *New Battle Brews Over UCITA, Software Licensing Terms: Some Users Worry That the Act Could Be Cited By Default in Courts*, COMPUTERWORLD, July 11, 2005.

³⁰*See, e.g.*, AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, PRELIMINARY DRAFT NO. 2 (Aug. 20, 2005) [hereinafter ALI PRELIMINARY DRAFT].

³¹Links to letters supporting UCITA against such criticisms can be found at http://www.nccusl.org/nccusl/ucita/UCITA_Standby_Comm.htm.

³²*See* ALI PRELIMINARY DRAFT, *supra* note 30.

³³*Id.* § 2.01(c).

³⁴*Id.* § 2.02(c). There are also subsections dealing with comprehensible content and storage and reproduction of the form. *Id.*

³⁵There is sufficient jurisprudence in this area to support the occasional course and textbook. *See, e.g.*, DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW (4th ed. 2006).

³⁶There are a number of provisions of the sales provision (Article 2) of the Uniform Commercial Code that apply only when both of the parties are merchants. *See, e.g.*, U.C.C. §

While there have been some suggestions in recent academic work for treating the two categories of agreements differently,³⁷ there is little reason to believe that legislative rules or judicial decisions will move in that direction any time soon. The basic assumption—belief, hope, or dogma—is that consumers, with the help of market pressures, are adequately able to protect their own interests;³⁸ or, in any event, that efforts to help consumers would likely do them (and the businesses that deal with them) collectively more harm than good.³⁹

II. THE EU LEGAL RESPONSE

A. Introduction: *The UCF-Que Choisir v. AOL France Case Study*

The experience of AOL in France illustrates clearly the sharp discrepancy that has emerged in U.S. and EU law governing consumer online contracts. The Union Fédérale des Consommateurs - Que Choisir (UFC)⁴⁰ brought suit against AOL claiming that 36 terms found in AOL's standard form agreements violated French law. In 2004, the Tribunal de Grande Instance in the Paris suburb of Nanterre found that 31 of the 36 terms agreements were either unfair or illegal, and therefore null and void under French law.⁴¹ Among the terms the trial court found unenforceable because they were either unfair or unlawful under French law were:

- Providing that tacit acceptance by the subscriber of the general conditions would constitute acceptance;
- Providing that the subscriber's sole remedy in the event of breach by AOL is termination of the agreement;
- Presuming that e-mail notices have been accepted 2 days after delivery;

2-207(b) (1977) (stating the rules for incorporating new terms in a battle of the forms when the agreement is "[b]etween merchants").

³⁷See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543-47 (2003) (arguing for treating firm-to-firm contracts different from all other contracts, including consumer contracts).

³⁸See, e.g., Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953, 968-70; (2005). *But cf.* Gillette, *supra* note 21 (discussing how there are various mechanisms for ensuring the representation of buyers' interests in the development of contract terms, though noting that these mechanisms are imperfect and uneven).

³⁹See generally Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993) (discussing the disadvantages of using protective doctrines like unconscionability to deal with problems of unfair terms or insufficient information).

⁴⁰More information about the UFC is available at its website, <http://www.quechoisir.org/> (last visited Jan. 31, 2006).

⁴¹Tribunal de Grande Instance de Nanatarre, *available at* <http://www.clauses-abusives.fr/juris/tgin020604f.htm> (accessed January 31, 2006); Bradley Joslove & Andréi Krylov, *Standard American Business to Consumer Terms and Conditions in the EU*, 18 MICH. INT'L LAWYER 2 (Spring 2005), *available at* <http://www.michbar.org/international/pdfs/spring05.pdf> (last visited Apr. 11, 2006).

- AOL's unilateral right to modify the agreement, payment terms and the subscriber's user name at AOL's discretion;
- AOL's disclaimer of all liability for service interruptions, errors and other failures.
- AOL's unilateral right to modify the agreement, even though this right was qualified by a duty to provide 30 days prior notice and the subscriber's right to terminate the agreement within that period; and
- AOL's right to reasonable attorney's fees in the event of the subscriber's breach.⁴²

On September 15, 2005, the Court of Appeals in Versailles affirmed in full the decision of the Nanterre trial court.⁴³ By contrast, any U.S. court called upon to review the 2003 version of the AOL France contract would likely have found it enforceable in full, given that AOL had not included in it any of the terms that have proven controversial in U.S. online consumer contracts. While many lawyers and legal academics in the U.S. who study the development of online markets are aware of the profound differences in U.S. and EU information privacy laws,⁴⁴ the magnitude of the divergence in recent consumer electronic contracting law developments is not as widely recognized.

B. European Integration as an Engine for Consumer Contract Law Reform

The significant differences that have emerged in recent years between consumer Contract Law in the EU and U.S. reflect different assumptions about the role of government in regulating markets, and about what legal reforms, if any, may be needed to achieve regulatory objectives. In the U.S. in recent decades, the skepticism regarding the efficacy of government regulation has been growing at the same time that enthusiasm for market-driven institutional arrangements has increased. Outside the U.S., however, the notion that unmediated market forces should play a greater role in the relationship between merchants and consumers has not been embraced so eagerly. Based on the number of times they have enacted major new consumer protection laws in recent years, EU legislators appear to believe that market failures are more likely to occur in consumer markets than do their counterparts in the U.S.⁴⁵ The EU approach to the role of the state in managing risk

⁴²Joslove & Krylov, *supra* note 41, at 2-3.

⁴³Cour d'appel [CA] [regional court of appeal] Versailles, 1e ch., Sept. 15, 2005, J.C.P. IV 150905, available at <http://www.clauses-abusives.fr/juris/cav150905f.htm> (accessed January 31, 2006); see also Bradley Joslove, *French Appeals Court Upholds Decision Calling AOL's Contract Terms Unfair*, 10 ELECTRONIC COMMERCE & LAW REP. 1137 (November 23, 2005).

⁴⁴See, e.g., DOROTHEE HEISENBERG, *NEGOTIATING PRIVACY: THE EUROPEAN UNION, THE UNITED STATES, AND PERSONAL DATA PROTECTION* (2005).

⁴⁵A complete description of recent consumer protection legislation passed in the EU can be found on the Directorate General for Health and Consumer Affairs website for consumer affairs issues at http://www.europa.eu.int/comm/consumers/index_en.htm (last visited Mar. 25, 2006).

in consumer markets is closer to the approaches taken in Canada,⁴⁶ Australia,⁴⁷ New Zealand,⁴⁸ Japan⁴⁹ and other developed economies⁵⁰ than the U.S. approach, which expects ordinary consumers to navigate consumer markets with much less support. EU regulators and their counterparts in other developed countries also appear quite confident that the benefits of having regulators dictate what are permissible contract terms outweigh the costs. Popular sentiment in the U.S., by contrast, appears more skeptical both about the frequency of market failures and whether the likely benefits outweigh the costs when the costs of unintended negative consequences of regulatory intervention are taken into account.

For whatever reason, there appears to be a large gap in attitudes about the risk of regulation on the one hand, and the risk of unfettered free enterprise on the other. Courts and regulators in the U.S. are generally deferential to private initiative and innovations in marketing. By contrast, EU regulators presume that EU consumers will avoid new markets unless they can be shown to be as highly regulated as traditional markets, and that new regulations are required to raise new distribution channels to meet the high levels of consumer protection provided through established channels.

C. The Need for European Harmonization

In Europe, a large body of consumer protection law has been developed to overcome barriers to the integration of the European markets and to promote fair and vigorous competition in consumer markets. Analysis of the impact of technological innovation on contract behavior under EU law is only one element of this larger push to strengthen and harmonize consumer protection law throughout Europe. The Single European Act of 1986 and the push to complete the internal market by 1992 were strongly oriented toward liberalization and strengthening of market mechanisms. Several important pieces of consumer protection legislation were passed as part of the move to a single market, including Directives regulating doorstep selling,⁵¹ consumer credit,⁵² and package travel.⁵³ In 1997, the European

⁴⁶*See, e.g.*, Canada, Industry Canada, Internet Sales Contract Harmonization Template (Ottawa: Industry Canada, 2001), available at <http://strategis.ic.gc.ca/epic/internet/inocabc.nsf/en/ca01642e.html>.

⁴⁷*See, e.g.*, Australia Trade Practices Act 1974, available at <http://scaleplus.law.gov.au/html/pasteact/0/115/top.htm>.

⁴⁸New Zealand, Model Code for Consumer Protection in Electronic Commerce (New Zealand, Ministry of Consumer Affairs, 2000), available at <http://www.consumeraffairs.govt.nz/policyandlaw/discussionpapers/model-code.html>.

⁴⁹*See, e.g.*, Consumer Contract Act 2001, available at <http://www.lrz-muenchen.de/~Lorenz/material/ccactjp.htm>.

⁵⁰*See, e.g.*, Singapore Unfair Contract Terms Act, (1994) Cap. 396, available at <http://statutes.agc.gov.sg/>.

⁵¹Council Directive 85/577/EEC of 20 December 1985 to protect the Consumer in respect of contracts negotiated away from business premises, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31985L0577:EN:html>.

⁵²Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit,

Commission announced its intention to create a coherent legal framework within Europe for electronic commerce by the year 2000.⁵⁴ Although in recent years, the volume of new EU consumer protection legislation has slowed, it has not abated altogether. For example, in 2005, the EU passed the Unfair Commercial Practices Directive, harmonizing and updating the law of unfair and deceptive trade practices in member states.⁵⁵

EU law defining who can be a consumer, and the standards of behavior that can be expected of consumers differ significantly from U.S. law. Under U.S. law, a consumer transaction is commonly defined as one undertaken by a natural person for goods or services for personal, family or household use.⁵⁶ By contrast, most European countries define a consumer as someone acting outside his or her trade or profession, so a merchant may be covered if acting outside his or her specialized trade or profession.⁵⁷ However, the European Court of Justice has set limits on the ability of merchants in some countries to use technical requirements of consumer protection law to invalidate contracts with other merchants on the grounds that a consumer protection law was violated.⁵⁸

D. EU Consumer Electronic Contract Law Reforms

Some of the most significant differences between the EU and U.S. consumer Contract Law applicable to online transactions are attributable to the Unfair Contract Terms Directive, which regulates form contracts offered by merchants to consumers whether online or offline; the Distance Selling Directive, which regulates transactions between remote merchants and consumers, whether by means of television, telemarketing, Internet or other electronic communications medium; and the Electronic Commerce Directive, which promotes transparency and accountability in online commerce. Because as a general rule, EU Directives do not affect the rights and obligations of individuals until the Directive has been transposed into national law, it is hard to form an accurate impression of the impact of Directives on individual rights and obligations until the corresponding national legislation has been

available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31987L0102&model=guichett.

⁵³Council Directive 90/314/EEC of 12 June 1990 on package travel, package holidays and package tours, *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31990L0314&model=guichett.

⁵⁴A European Initiative on Electronic Commerce, COM(97) 157 final, 16.6.1997, *available at* <http://europa.eu.int/scadplus/leg/en/lvb/l32101.htm>.

⁵⁵Giuseppe Abbamonte, *The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach* (unpublished manuscript, on file with authors).

⁵⁶*See* 15 U.S.C. § 1602(h) (2005) (Truth in Lending).

⁵⁷*See, e.g.*, Brussels Convention 13(1) (contract concluded by a person who can be regarded as outside his trade or profession); *Soci t  Bertrand v. Paul Ott KG*, [1978] ECR 1431, *Bertrand C-150/77*.

⁵⁸*See Di Pinto C-361/89 Criminal Proceedings v. Patrice di Pinto*, [1991] ECR I-1189, *Bayerische Hypotheken- und Wechselbank C-45/96 Bayerische Hypotheken- und Wechselbank AG v. Edgar Dietzinger*, [1998] ECR I-1199.

considered.⁵⁹ Given that it is beyond the scope of this paper to give a detailed account of European national consumer protection laws, the following analysis will focus on examples from the United Kingdom to illustrate the general character of national law in this area.

1. Unfair Contract Terms Directive

Several European countries had enacted laws regulating “unfair” terms in standard form contracts used in consumer transactions. For example, in 1977, the UK had enacted the Unfair Contract Terms Act which limited the enforcement of “exemption clauses” (which might be referred to as disclaimers under U.S. law) to the extent they were not “reasonable.” As a result, the Directorate General (DG) for Health and Consumer Affairs developed a Directive that would harmonize unfair contract terms laws, which was enacted in 1993.⁶⁰ The fundamental premise of unfair contract terms laws is that general Contract Law is not adequate to protect consumers from overreaching by merchants, and that the contours of “unfairness” can be spelled out without too much difficulty. The regulation of unfair contract terms establishes a much lower threshold for intervention by courts and regulators than the concept of unconscionability under U.S. Contract Law, or federal and state regulation of unfair and deceptive trade practices. The Directive provides that contract terms not individually negotiated will be deemed unfair if they create a significant imbalance, to the consumer’s detriment, between the rights and obligations of the contracting parties.⁶¹ If a contract term is drafted in advance and the consumer has no influence over the substance of the term, then it is always considered not to be individually negotiated, and hence subject to review based on substantive fairness.⁶² An annex to the Directive contains a list of terms that may be deemed unfair.⁶³

⁵⁹There are limited exceptions. *See, e.g.*, *Van Duyn v. Home Office* 41/74, [1974] ECR 1337 (ECJ held that only Directives that establish clear and unconditional legal norms and do not leave normative discretion to the member states are of direct effect; however, direct effects are normally effective against governments, not private parties); *C-106/89 Marleasing SA v. La Comercial Internacionale de Alimentacion SA* [1990], ECR I-4135 (national law must be interpreted in light of Directives even if they have not yet been transposed into national law).

⁶⁰Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29. Member States were expected to pass laws implementing its provisions by the end of 1994. *Id.* art. 10, § 1.

⁶¹*Id.* art. 3, § 1.

⁶²*Id.* art. 3, § 2.

⁶³The terms listed in the annex include:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

The nature of the goods or services covered by the contract, the circumstances surrounding the drawing up of the contract, and the other terms in the contract or in another contract to which it relates will be taken into account in assessing the unfairness of a term.⁶⁴ Contract terms offered to consumers in writing must always be drafted in plain language and where there is doubt as to the meaning of a term, the

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- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
 - (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
 - (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
 - (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
 - (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
 - (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
 - (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
 - (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
 - (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
 - (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
 - (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
 - (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
 - (o) obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his;
 - (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
 - (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

Id. Annex.

⁶⁴*Id.* art. 4, § 1.

interpretation most favorable to the consumer will prevail.⁶⁵ In the event terms in a consumer contract are found to be unfair, those terms will not be binding on consumers, although the remainder of the contract will be enforceable.⁶⁶

The successful UFC suit against AOL is based on French Unfair Contract Law. While French Unfair Contract Terms Law may be among the most stringent in Europe, it is hardly unrepresentative of the current state of consumer protection law that would be applied to online contracts involving a U.S. merchant and an EU consumer. Even England, which is generally more supportive of market-oriented business regulation and competition than France, has a very strong and well established Unfair Contract Terms Law. The Unfair Contract Terms Act of 1977 (UCTA) has been supplemented by the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) which are based on the Unfair Contract Terms Directive.⁶⁷ The UK Office of Fair Trading provides extensive guidance to merchants regarding the application of the UTCA and the UTCCR by publishing interpretations of specific contract terms and explaining why they are either invalid or withstand scrutiny.⁶⁸

2. Distance Selling Directive

In 1997, the EU adopted the Distance Selling Directive (“DS Directive”).⁶⁹ The DS Directive is supposed to promote online commerce by providing consumers with the guarantee that they will be protected by their own national consumer-protection regime when they enter into distance-selling contracts. “Distance selling” is defined as the conclusion of a contract regarding goods or services whereby the contract between the consumer and the supplier takes place by means of technology for communication at a distance.⁷⁰ The rights granted consumers through the enactment of the DS Directive’s provisions into national law may not be waived by the consumer.⁷¹ Some provisions of the DS Directive are similar to the provisions of the FTC Mail Order Rule,⁷² which requires that a transaction be completed within thirty days or notice of the situation be sent to the consumer and the consumer given the option to cancel the transaction.⁷³

⁶⁵*Id.* art. 5.

⁶⁶*Id.* art. 6, § 1.

⁶⁷Unfair Terms in Consumer Contracts Regulations, 1999, SI 1999/2083. *See generally* RICHARD LAWSON, EXCLUSION CLAUSES AND UNFAIR CONTRACT TERMS (6th ed. 2000).

⁶⁸The UK OFT unfair contract terms guidance is available on its website at <http://www.offt.gov.uk/Business/Legal/UTCC/guidance.htm> (last visited Mar. 29, 2006).

⁶⁹Directive 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 [hereinafter Council Directive 97/7/EC]. The Member States had until May 20, 2000 to enact national laws embodying the terms of the DS Directive. *Id.* art. 15.

⁷⁰*Id.* art. 2.

⁷¹*Id.* art. 12, § 1.

⁷²16 C.F.R. § 435.1 (2005).

⁷³Council Directive 97/7/EC, *supra* note 69, art. 7.

The DS Directive covers most forms of direct marketing, including catalog mail order, telephone sales, direct-response television sales, newspapers, magazines, and electronic communications such as e-mail. The DS Directive requires that a consumer be given certain minimum information both at the time of contract solicitation and at or before the time of delivery.⁷⁴ Written confirmation must be received by the consumer in some form of durable medium accessible to the consumer.⁷⁵ Consumers must be given a “cooling-off” period of at least seven working days, subject to certain exceptions.⁷⁶ Where the consumer exercises his or her right of withdrawal from the contract, the supplier is obliged to reimburse the consumer for any sums paid. Cold-calling of consumers by telephone, fax, or e-mail is not permitted unless the consumer has consented.⁷⁷

In an effort to protect merchants from unreasonable burdens in consumer transactions, some types of transactions are exempt from the coverage of certain DS Directive protections.⁷⁸ For example, unless the parties have otherwise agreed, the consumer’s seven-day right of withdrawal does not apply to contracts for the provision of services if performance has begun before the seven days are up; for the supply of goods or services whose price depends on fluctuations in the financial market that cannot be controlled by the supplier; for the supply of goods made to the consumer’s specifications or clearly personalized, or which are likely to deteriorate or expire rapidly; for audio or video recordings or computer software which were unsealed by the consumer; for the supply of newspapers, periodicals, or magazines; or for gaming or lottery services.

In the UK, the Directive was transposed into national law as the Consumer Protection (Distance Selling) Regulations 2000,⁷⁹ which were updated by the Consumer Protection (Distance Selling) (Amendments) Regulations 2005.⁸⁰ The UK Office of Fair Trading and Office of Trade and Industry each provide merchants with guidance regarding their distance selling obligations on their respective Websites.⁸¹ One of the provisions of the Distance Selling Regulations most at odds with current U.S. law is the requirements that merchants provide complete disclosure regarding the terms of the contract to consumers prior to the formation of the contract.⁸²

⁷⁴*Id.* art. 4.

⁷⁵*Id.* art. 5.

⁷⁶*Id.* art. 6.

⁷⁷*Id.* art. 10.

⁷⁸*Id.* art. 6, § 3.

⁷⁹Consumer Protection (Distance Selling) Regulations, 2000, S.I. 2000/2334, (U.K.).

⁸⁰Consumer Protection (Distance Selling) (Amendment) Regulations, 2005, S.I. 2005/689, (U.K.).

⁸¹Office of Fair Trading, Distance Selling Regulations, <http://www.oft.gov.uk/Business/Legal/DSR/default.htm> (last visited Mar. 29, 2006); Department of Trade and Industry, Distance Sellings Regulations & E-Commerce, <http://www.dti.gov.uk/ccp/topics1/ecom.htm> (last visited Mar. 29, 2006).

⁸²S.I. 2000/2334 § 7. The Electronic Commerce Directive also makes certain disclosures mandatory in online contracting. Directive 2000/31/EC of the European Parliament and

Furthermore, the information must be provided to the consumer in writing or another durable medium accessible to the consumer.⁸³ If the merchant has provided the consumer with the required disclosures in writing before the contract was formed, or at the latest, at the time of delivery, then the consumer's unconditional right to cancel an order must be exercised within seven days of receipt of the goods purchased.⁸⁴ If the disclosures are not provided pre-contract or at delivery, but no later than three months after delivery, then the consumer's right to cancel the order may be exercised until seven days after receipt of the written disclosures.⁸⁵ The consumer is responsible for paying the shipping costs to return the goods only if the merchant clearly disclosed that term to the consumer in the written pre-contract disclosures; if the merchant is silent with regard to responsibility for shipping charges, then the consumer merely has to make the goods available for the merchant to collect and is not responsible for returning them.⁸⁶

CONCLUSION

In her article, Prof. Radin showed how things can go badly—and have gone badly—when new areas get “propertized.”⁸⁷ Our article has explored the contrasting ways in which the United States and the European Union have responded to Contract Law's extension to new kinds of transactions. The U.S. legal system has tried, at times awkwardly, to fit the new transactions into existing doctrinal categories, leaving protection of consumers primarily to market mechanisms. The EU has similarly responded to new transactions much as they have to conventional contracts, but this has involved greater governmental intervention in consumer transactions, expressing requiring some terms while prohibiting others. As the new types of contracting develop, real-world results will teach us which approach has been the more successful.

Council Directive of June 8, 2000 on Certain Legal Aspects of Information Society Services, in particular, Electronic Commerce in the Internal Market, 2000 O.J. (L 178) 1.

⁸³S.I. 2000/2334 § 8.

⁸⁴S.I. 2000/2334 § 12.

⁸⁵*Id.*

⁸⁶S.I. 2000/2334 § 17.

⁸⁷*See* Radin, *supra* note 3.