

Online Contract Formation: Taking Technological Infrastructure Seriously

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IF ONE MENTIONS ONLINE CONTRACT FORMATION students and academics intuitively turn to the legal rules. This interpretive community seems less than convinced that the distinctive features of the virtual environment have new insights to offer. Whether that is likely to be the case cannot be ascertained if we continue to map our understanding of online contract formation in accordance with the textbook tradition of contract law. An illustration of this pattern of analysis can be seen by the way that discussion and analysis of online contract formation frequently focuses on two issues: first, the applicability of contract principles and, second, the shortcomings of the Electronic Commerce (EC Directive) Regulations 2002. The paper demonstrates the following: (a) that, to the extent that the rules of contract formation are relevant, they provide a preliminary and not a final point of understanding; (b) that the dominant role of computers in structuring and processing communications makes it critical to identify the values embedded in the technological infrastructure; and (c) that the narrative of values in the technological infrastructure provides a better route to understanding online contract formation. The layer principle, it is suggested, provides an appropriate basis for reconciling contract doctrine with the central role of the Regulations. The paper concludes that attempts to understand the governance challenges for online contract formation through legal rules are misplaced. To understand the contemporary role of contract we need to integrate the communications systems of hardware and software into our understanding of what it is that gives commitments their binding character.

SI L'ON MENTIONNE LA FORMATION DE CONTRAT EN LIGNE, d'emblée les étudiantes, les étudiants, les chercheuses et les chercheurs s'en remettent aux règles de droit. Cette communauté formée à l'interprétation semble douter que l'environnement virtuel, avec ses particularités, puisse offrir des idées nouvelles. Il est difficile de trancher si c'est oui ou non le cas, si nous cherchons toujours à comprendre la formation des contrats en ligne à partir des règles traditionnelles énoncées dans les ouvrages sur le droit des contrats. Ce modèle traditionnel ressort clairement dans la discussion et l'analyse de la formation des contrats en ligne qui souvent tournent autour de deux questions : premièrement, l'application des principes contractuels et, deuxièmement, les lacunes du Règlement de 2002 relatif au commerce électronique (la directive CE). L'article fait les observations suivantes : (a) dans la mesure où les règles relatives à la formation du contrat sont pertinentes, elles constituent un premier pas et non le point final de la compréhension; (b) eu égard au rôle clé joué par les ordinateurs dans la structuration et le traitement des communications, il est essentiel de reconnaître les valeurs sous-jacentes de l'infrastructure technologique; et (c) l'exposé des valeurs qui sous-tendent l'infrastructure technologique offre une meilleure avenue pour la compréhension de la formation des contrats en ligne. Le principe des couches, suggère l'article, offre un bon moyen de réconcilier la doctrine des contrats avec le rôle central du Règlement. En conclusion, l'article suggère que les efforts faits afin de comprendre les défis de la gouvernance en matière de la formation des contrats en ligne au moyen de règles juridiques sont mal orientés. Afin de saisir le rôle contemporain des contrats, il faut intégrer à son analyse la compréhension de ce qui dans le matériel et les logiciels des systèmes de communication donnent à l'engagement un caractère obligatoire.

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* Joseph Savirimuthu, Lecturer in Law, University of Liverpool. I am grateful for the comments of the anonymous referees with regard to the issue of technological neutrality. All errors and omissions are mine alone. The article had its genesis in the ILaw 03' program at Liverpool Law School. The students were adamant that online contract formation was "old wine in new bottles." This phrase is used to denote the undertaking of traditional transactions in a new environment.

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I. INTRODUCTION

IF ONE MENTIONS online contract formation, the intuitive response of many individuals would be to turn to the legal concepts of offer, acceptance and consideration.¹ The interpretive community, which subscribes to this linear approach to problem solving, is unlikely to be convinced that the distinctive features of the virtual environment introduce an additional dimension into the way in which we can now think about contract doctrine and its role.² Their resistance to reconciling doctrine with technology may be attributed to a perception that the coherence and rationality of contract rules and norms provide objective benchmarks for determining the legitimacy of the doctrine.³ Another reason for the scepti-

1. Examples of the linear approach to the conceptualization of online contract formation include: Chris Reed, *Internet Law: Text and Materials* (London: Butterworths, 2000); Graham J.H. Smith, *Internet Law and Regulation*, 3rd ed. (London: Sweet & Maxwell, 2002) at 449–59; Saravuth Pitiyasak, “Electronic Contracts: Contract Law of Thailand, England and UNCITRAL Compared” (2003) 9:1 Computer and Telecommunications Law Review 16; Christina Hultmark Ramberg, “The ECommerce Directive and Contract Formation in a Comparative Perspective” (2001) 26 Eur. L. Rev. 429; Simon Jones, “Forming Electronic Contracts in the United Kingdom” (2000) 11 Int’l Co. & Com. L. Rev. 301; Diane Rowland & Elizabeth Macdonald, *Information Technology Law*, 2d ed. (London: Cavendish, 2000) at 295–306; Andrew D. Murray, “Entering into Contracts Electronically: The Real W.W.W.” in Lillian Edwards & Charlotte Waelde eds., *Law & the Internet 2d ed.* (Oxford: Hart, 2000) 17. See, however, the critical stance put forward in the following literature with regard to the conceptualization of legal rules: Oliver Wendell Holmes, “The Path of Law” (1896–97) 10 Harv. L. Rev. 461, reprinted in (1996–97) 110 Harv. L. Rev. 991; P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979); P.S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986); Michael Furmston ed., *The Law of Contract* (London: Butterworths, 1999); Hugh Collins, *The Law of Contract*, 3rd ed. (London: Butterworths, 1997); Roger Brownsword, *Contract Law, Themes for the Twenty-First Century* (London: Butterworths, 2000).
2. See, generally, on the limits of formalism: Owen M. Fiss, “Objectivity and Interpretation” (1982) 34 Stan. L. Rev. 739; William Twining & David Meirs, *How to do Things With Rules*, 2nd ed. (London: Weidenfeld & Nicholson, 1982); John Bell, *Policy Arguments in Judicial Decisions* (Oxford: Oxford University Press, 1983); Jay M. Feinman, “Critical Approaches to Contract Law” (1983) 30 UCLA L. Rev. 829; David Sugarman & G.R. Rubin, “Towards a New History of Law and Material Society in England, 1750–1914” in G.R. Rubin & D. Sugarman eds., *Law, Economy and Society: Essays in the History of English Law, 1750–1914* (Abingdon: Professional Books, 1984); D. Sugarman, “Legal Theory, the Common Law Mind and the Making of the Textbook Tradition” in W. Twining ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 26; Brian Simpson, “The Common Law and Legal Theory” in W. Twining ed., *ibid.* at 8.
3. See Sugarman, “Legal Theory” *ibid.* at 26–28, 48–53 and Simpson, “The Common Law” *ibid.* at 10–18. See Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1948) at 27–32.

cism about the significance of internet methods of communications for the meanings we ascribe to the ideas of consent and agreement may be that doctrine is regarded primarily as a regime of rules, providing solutions to practical problems.

Whatever the reasons, the outcome is clear. The pattern of analysis is directed towards resolving two key issues: first, the universality of contract principles and, second, the significance of the *Electronic Commerce (EC Directive) Regulations 2002* for orthodox contract doctrine. The paper will demonstrate the following: (a) that, to the extent that the rules on contract formation are relevant, they provide a preliminary and not the final point of understanding; (b) that the dominant role of computers in structuring and processing communications makes it critical to identify the values embedded in the technological infrastructure; and (c) that the narrative encapsulated in the layer principle provides a better route to understanding online contract formation. Illustrations will be provided to support the hypothesis. The layer principle, it is suggested, provides an appropriate basis for reconciling contract doctrine with the central role of *Electronic Commerce (EC Directive) Regulations 2002*. The paper concludes that attempts to understand the governance challenges for online contract formation through legal rules are misplaced. In order to understand the contemporary role of contract we need to integrate the communications systems of hardware and software into our concept of what it is that gives commitments their binding character.

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2. THE NARRATIVE OF BINDING COMMITMENT: A CRITIQUE

2.1. Background

CONTRACT HAS LONG PROVIDED the backbone of commercial activity. It is not difficult to understand the reasons for this:

[O]ne of the functions of the law of contract is to discriminate between those transactions that are enforceable as contracts and those that are not. Doctrine lays down the constituents of a contract (agreement, consideration, certainty, intention and, in exceptional cases, written formality).... However, for the most part, lawyers will expect to recognise a "contract," as specified by the law of contract, when they see one.⁴

There is consensus among some commentators that, when thinking about online contract formation, we need not distinguish between the processes of constituting legal relations through online and offline contracts.⁵ If the claim is intended to do nothing more than to assert that the principles and rules of contract are universal, there is unlikely to be much dissent. In this narrow sense, we can understand Reed as restating what is uncontroversial:

4. Brownsword, *supra* note 1 at 1.

5. See literature in *supra* note 1.

The basic principles of contract formation are still the same, however, so that the existence of a contract and its terms are discovered by identifying the communications which pass between the parties, identifying the offer, and then determining whether that offer has been accepted.⁶

It cannot be seriously argued that different contract principles should apply to an online purchase of a book from amazon.co.uk as opposed to a purchase from a traditional bookstore.⁷ Reed's observation underscores the disposition of members of the interpretive community to frame online governance challenges through the linear narrative of doctrine based on jurisprudence. Indeed, his account of the governance challenges affirms the tradition of common lawyers to reach instinctively for the rules of contract formation. The reference to the "online" and "offline" contracts as being distinctions without a difference has another troubling aspect: those who adopt the strict, rule-oriented view of online contract governance can be seen as rejecting the thesis that software and hardware ought to be incorporated into the narrative of the regulations and institutions of control. The thesis is characterized as a form of "cyberspace fallacy," a phrase that attempts to signal a cautious approach to treating online contracts as meriting special attention. Consider, for example, the following observation:

The Cyberspace fallacy states that the Internet is a new jurisdiction, in which none of the existing rules and regulations apply. This jurisdiction has no physical existence; it is a virtual space which expands and contracts as the different networks and computers, which collectively make up the Internet, connect to and disconnect from each other... A moment's thought reveals the fallacy. All the actors involved in an Internet transaction have a real-world existence, and are located in one or more legal jurisdictions... It is inconceivable that a real-world jurisdiction would deny that its laws potentially applied to the transaction.⁸

This observation—whatever the cybertheorists may or may not have said—is as interesting as the line of analysis about the interaction between contract doctrine and the communications system:

[the Internet] is fundamentally no more than a means of communication, and that the new issues of Internet law arise from the differences between Internet and physical world communication methods, particularly communicating via intermediaries.... [T]he contracts themselves are not fundamentally different. What is different is the method by which those contracts are formed, using indirect communications via packet switching hosts.⁹

6. Reed, *supra* note 1 at 175.

7. By this I mean that binding commitments share a range of core values, which the rules on contract formation mirror. See Brownsword, *supra* note 1.

8. Reed, *supra* note 1 at 1-2. Contrast this account with a more nuanced attitude towards online contract formation: Margaret Jane Radin, "Online Standardization and the Integration of Text and Machine" (2002) 70 *Fordham L. Rev.* 1125 and Margaret Jane Radin, "Humans, Computers and Binding Commitment" (2000) 75 *Ind. L.J.* 1125, <<http://www.law.indiana.edu/ilj/v75/no4/radin.pdf>>.

9. Reed, *supra* note 1 at 174-75.

The core analysis of the paper will attempt to assess whether this characterization stands up to scrutiny. Lawyers should be interested in the communications system and its significance for the meanings we ascribe to concepts like "agreement" for a variety of reasons. First, the communications system now provides a new dynamic forum for social and economic relations.¹⁰ Second, an understanding of architecture and design values in software and hardware will help assess the coming of age of the institution of contract in the information age; in particular, we can begin to reflect on the normative values that now define the legitimacy of the private ordering regime.¹¹ Third, the new dynamics of the online environment will provide a context for evaluating the issue of whether the prescriptions under the *Electronic Commerce (EC Directive) Regulations 2002* require a reorientation of the way we tend to conceive binding commitments. We can deal with each of the reasons through a case study.

2.2. Case Study

Consider for example a company ("A"), which owns a web site in the UK.¹² "A" places an advertisement on its website offering 100 high-performance laptops. Each laptop is priced at £299. This is a pricing error. The price should have been £2999. The advertisement contains a statement saying that the offer is available only during the period of October 1 to November 1. "B" comes across this advertisement while surfing on the internet. "B" orders 10 laptops and completes the required web form. It is customary for "A" to include a copy of its standard terms and conditions with the goods. The web page also has an electronic version of the standard terms and conditions. Consumers making a purchase are required to click a button on the web page to signify their assent to the terms and conditions. If a consumer does not wish to accept the terms, then the transaction will not be processed. The two-page agreement can be viewed by scrolling with a function button on the screen.

"B" scrolls through part of the agreement and decides to click on the button executing the agreement. "B" also sends "A" an email confirming that he wishes to accept the offer and to place an order for 10 laptops. Among other things, the terms and conditions stipulate, first, that the offer is available while stocks last and, second, that each customer is limited to the purchase of one laptop and, third, that the company will not be bound to supply goods that are priced incorrectly. After clicking on the order button, "B" receives an automatic reply from "A" indicating that the order has been received and that the goods will be shipped by the end of the month. One day later, the company discovers the pricing error. "A" takes steps to amend the advertisement. Customers who

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10. See Mark Poster, *The PostModern Virtualities: The Second Media Age* (Oxford: Blackwell, 1995), chapter 2; Jean Baudrillard, "Simulacra and Simulations" in Mark Poster ed., *Jean Baudrillard, Selected Writings* (Stanford: Stanford University Press, 1988) 166; J. Baal-Schem & D. Shinar, "The Telepresence Era: Global Village Or Media Slums" (Spring 1998) 17:1 *IEEE Technology and Society Magazine* 28, <http://ieeexplore.ieee.org/xpl/abs_free.jsp?arNumber=663854>; "Martin Jacques Interviews Professor Stuart Hall, Open University" [n.d.] University of Sydney, <<http://www.usyd.edu.au/su/social/papers/hall1.html>>.
 11. See e.g. the attempts by the Motion Picture Association of America (MPAA) to lobby the US government to require computer-hardware manufacturers to include copy-protection schemes, as explained in Farhad Manjoo, "Hollywood to the Computer Industry: We don't Need no Stinking Napsters!" *Salon.com* (October 27, 2003), <http://www.salon.com/tech/feature/2003/10/27/broadcast_flag/index_np.html>.

made the booking based on the original price are sent emails and letters to their respective web-mail accounts and home addresses notifying them of this error. "B" is informed by email that the company deeply regrets the inconvenience caused by the error. The email also states that only one laptop will be available but at the price of £2900. To take advantage of this special discount, "B" is required to confirm the order within 48 hours.

2.3. Binding Commitment: A Linear Analysis

Commentators who define issues of online contract formation like agreement and consent rely exclusively on the vocabulary of existing doctrine. The communications system is seen as having no doctrinal significance as it appears to be nothing more than a passive communications system or a sophisticated telephone. When explaining the governance challenges raised by this new form of remote contracting, the decision to focus the discourse on specific categories of doctrine is underpinned by two premises. First, it is asserted that blending the virtual and the real worlds may overcomplicate the rational foundations of contract law:

The Internet, though, does raise unique technological issues when examining contract formation. It is these technological issues which all too often cloud our analysis of the contract.¹³

Second, it is claimed that the internet does not alter the fundamental character of a contract. For example, when alluding to the governance challenges posed for contract law, Reed makes this observation:

When we add to this the fact that a seller may not be communicating directly with the customer but instead form part of a virtual marketplace or Internet shopping mall, and that the customer may not be making purchasing decisions directly but acting through an automated agent, it becomes obvious that the process of contract formation is not so straightforward as in the physical world.¹⁴

These observations place the focal point for resolving questions regarding the constitution of contractual relations squarely within the boundaries of contract doctrine. More importantly, the authors intend to prescribe the primacy of the linear narrative of doctrine in explaining online contract formation. For example, the task of the lawyer is defined in terms of rule identification and application; the narrative of contract doctrine is seen as being comprehensive. The logic and coherence of the rules create the illusion that the governance

12. See also Peter Howitt, "Contracts: The Perils of Online Pricing" (2003) 5:4 E-Commerce Law & Policy 2 (this article provides an outline of the proactive self-help contractual devices that online retailers can adopt in order to avoid online pricing errors); *The Unfair Terms in Consumer Contracts Regulations 1999*, S.I. 1999/2083, <<http://www.legislation.hmso.gov.uk/si/si1999/19992083.htm>> [*Unfair Terms Regulations 1999*]; Amanda C. Brock, "Amazon and Pricing" (2003) *Electronic Business Law*, LexisNexis 5(5) at 16 (regarding pricing error in iPaq PDAs), <<http://www.juriscom.net/pro/visu.php?ID=276>>.

13. Murray, *supra* note 1 at 18.

14. Reed, *supra* note 1 at 175. The distinction between the physical world and the online environment seems at odds with the frequent assertion of engaging in cyberspace fallacy. If the distinction between the "real" and "cyber" worlds is questionable then the use of the distinction here could be subject to similar scepticism.

issues do not require anything beyond the identification and application of established rules and principles.

We can provide a brief illustration of what is entailed by the linear process of conflict resolution. For example, a web advertisement becomes characterized as being either an “offer” or an “acceptance.” The ruling in *Carlill v. Carbolic Smoke Ball* is regarded as providing a relevant case analogy.¹⁵ An advertisement is capable of binding a web host to a potentially wide audience, if the prerequisites of acceptance and reliance are met. In addition to the use of analogy, the lawyer relies on reasoned argument. If “A” contests this characterization of the advertisement, it will have to argue that the online advertisement is an expression that attempts to invite offers. In addition to precedents like *Pharmaceutical Society of Great Britain v. Boots Cash Chemists*, “A” may wish to limit the scope of *Carlill* by introducing public-policy arguments—of unlimited liability to unlimited members of the web community—to persuade the court that it would be unreasonable to subject companies like “A” to a rule that evolved from an entirely different set of social and technological conditions.¹⁶

“B” can neutralize this argument by pointing to the specificity of the advertisement—the numbers of laptops available and the duration of the offer.¹⁷ The online contract cannot be binding on the parties until there has been an agreement. The idea that an agreement is the product of a consensual undertaking is reflected in the rule, which requires the offer to be accepted; the corollary here is that a binding commitment emerges when the offeror has knowledge of the acceptance and when the offeree is similarly apprised of this. The reliance on reasoned argument leads one to conclude that the universal reach of contract rules and principles cannot be questioned.

Returning to the hypothetical, the resolution of the problem will depend on whether “B” has consented to the terms of the agreement. Similarities are likely to be identified between the online and offline contexts for contractual relations. The use of analogy and reasoning becomes critical to the process by which a solution is now provided. Lawyers may point to the absence of a meeting of minds since “B” had not read the entire agreement and understood its contractual importance. Precedent in the form of *Thornton v. Shoe Lane Parking* could be called to assist the claims of “B.”¹⁸ “B” could also take advantage of the *Unfair Terms Regulations 1999*.¹⁹

Over the course of the arguments some reference is likely to be made to two important legal rules. For example, in the online environment the decision in *Adams v. Lindsell* is seen as being authority for the proposition that an agree-

15. (1892), [1893] 1 Q.B. 256 (CA) [*Carlill*].

16. [1953] 1 Q.B. 401 (CA) [*Boots*].

17. For example, the courts have shown a willingness to take into account prevailing commercial practices and the reasonableness of the reliance when determining the question of whether a particular representation is sufficient to amount to an offer.

18. (1970), [1971] 2 Q.B. 163 (CA) [*Thornton*].

19. See *supra* note 13. Section 5(1) reads: “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” A consumer may now be capable of subjecting the online retailer on the grounds of unfairness, leading to the latter having to discharge the legal and evidentiary burden of good faith.

ment can be constituted even in cases where the offeror has no knowledge of the acceptance.²⁰ Under this rule, a contract is formally constituted when the letter is posted and not when the offeror's attention is drawn to the contents of the letter. Parties can "opt out" of the operation of the rule should they wish to do so, as can be seen from cases like *Henthorn v. Fraser*²¹ and *Holwell Securities Ltd. v. Hughes*.²² The postal rule does not apply where remote contracting takes place through instantaneous communications. Again, we can see how analogy and rule identification assist in the process of problem solving. For example, the rule in *Brinkibon* and *Entores* provides an alternative route to problem solving.²³ A contract is concluded when both parties are apprised of the other's intentions with regard to putative legal relations.²⁴

The aim of this illustration is to outline the approach that is frequently used to map the basis upon which binding commitments are constituted in the online environment. The familiar refrain "old wine in new bottles" may apply here. A number of commentators who give attention to the governance challenges for contract law in the online environment seem content to limit their analysis in terms of its linear rules. To be sure, contract doctrine is viewed as a regime of rules, with accessible discourse, specific categories and precedents. This view of contract doctrine provides the method for describing and analyzing the issue of online binding commitments. Ultimately, the linear character of the rule-oriented approach leads to online relations between "A" and "B" being formulated in the following terms: the identities of the offerors and offerees; whether the advertisement can be characterized as an "offer"; whether the offer has been "accepted"; and whether a "mistake" is sufficient to prevent reliance by the offeree at the expense of the offeror.

Within this context, the online methods of communications become passive conduits. Adherence to lawyer's law provides a look and feel about the rationality and legitimacy of the foundations for characterizing commitments as being legal and enforceable. Technology is not seen as exacerbating the tensions that already lie embedded within the doctrine. As the later discussion of the technological infrastructure and the account of the complex dimensions of contract law will demonstrate, the primacy given to the linear narrative in explaining online contract formation cannot go unquestioned. This is not to suggest that the validity of the approach is flawed or erroneous. Rather, the problem with adhering closely to the rule-oriented approach is that the analysis does not extend beyond rule identification and application. The premise that informs this approach is that technology and the communications system can be viewed as method; the context in which relations are constituted is marginalized and is regarded as having no bearing on our understanding of the doctrine.

20. (1818), 1 B. & Ald. 681, (1818), 106 E.R. 250 (KB) [Adams cited to B. & Ald.].

21. [1892] 2 Ch. 27 (CA) [Henthorn].

22. (1973), [1974] 1 All E.R. 161 (CA) [Holwell].

23. *Brinkibon Ltd. v. Stahag Stahl* (1982), [1983] 2 A.C. 34 (HL) [Brinkibon]; *Entores Ltd. v. Miles Far East Corp.*, [1955] 2 Q.B. 327 (CA) [Entores].

24. For example, it makes it possible for lawyers to state with confidence that sending emails and clicking on an order form do not disrupt the traditional paradigm of contract formation. But see *Pretty Pictures v. Quixote Films Ltd.*, [2003] EWHC 311 (Transcript: Smith Bernal) (QB) [Pretty Pictures].

This premise and the accompanying characterization are misconceived. As will be argued later, we cannot begin to think about the role of contract in formulating rules for identifying and enforcing binding commitments without acknowledging the impact of complex background forces like technological, cultural and political values, and economics.²⁵

2.4. Some Unanswered Questions

A preliminary observation can be made with regard to the emphasis placed by commentators on the issue of whether contract principles can be applied to online contracting. This is essentially an exercise that offers little in terms of new insights. A contract does not cease to have the fundamental components by the mere fact that an agreement is concluded online. In fact, Sommer—a cyber-sceptic—has provided a damning indictment of those who seek to cast doubt on the universal reach of contract principles:

In contract formation, UETA [*Uniform Electronic Transactions Act*] presents only one new issue—contracting with machines that have something resembling discretion. People have long been forming contracts with vending machines. Courts have not been fazed by such contracts, probably because they have closely resembled ordinary ‘take-it-or-leave-it’ consumer contracts.²⁶

One criticism of the rule-oriented approach is that discussions on whether contract principles apply to the online environment distract us from the real governance challenges that contract formation in the online environment seems to pose—those being how and why technology affects the traditional dynamics of contract relations and its significance for the meanings we ascribe to concepts like consent and agreement. It is worth recalling that traditional ideas of contract doctrine view consent as the product of autonomy and choices resulting from human interactions. Is this presumption valid where the entity concerned is software? There is, for example, a clear need to begin thinking about the normative meaning of agreement or consent in light of a consumer like “B” failing to appreciate the legal significance of clicking on the computer mouse. The policy arguments in favour of a doctrine of *caveat emptor* need to be reconciled with the contemporary emphasis on “good faith” in dealings with consumers. How do we define an agreement where retailers possess the technology to structure and process communications? How is agreement to be regarded as having been manifested?

The second criticism is that explanations suggesting that technology is passive are not accompanied by any plausible argument as to why it is that communications systems should be characterized as *method*.²⁷ “Old wine in new bot-

25. Marshall McLuhan, *The Gutenberg Galaxy* (Toronto: University of Toronto Press, 1962) at 23-31. See generally Manuel Castells, *The Information Age: Economy, Society and Culture* (Oxford: Blackwell, 1996) and Frank Webster, *Theories of the Information Society*, 2d ed. (London: Routledge, 2002).

26. Joseph H. Sommer, “Against Cyberlaw” (2000) 15 Berkeley Tech L. J. 1145 at 1177.

27. See e.g. Sommer, *supra* note 26. The author argues that the governance issues raised by technology are not new or difficult because legal concepts and rules have flexibility embedded in their institutions. This, it should be noted, is not the claim made in this paper. I do not suggest that we need a law of cyberspace, but rather that we need to understand *ex ante* technology and its design values so that we can articulate the responses of law. This is a separate argument and should not be conflated with the other premise, which is contestable—that is, that traditional laws are ill-equipped to deal with the issues raised by online activity.

bles" is already an overburdened metaphor.²⁸ Its use in this context tends to mislead since it reduces the complexities of online contracting to a requirement for us to do nothing more than identify and apply the legal rules.

Third, at a deeper level, the overemphasis on the idea of contract as rules leaves unexplored an aspect of contractual relations in the online environment—the legitimacy of the rules that enable law to enforce binding commitments. The institution of contract is founded on liberal ideals about private ordering and property ownership.²⁹ A contract is held out as a device, which captures these ideals. Contract rules and norms are viewed as mirroring the liberal ideals of a democratic society and the discipline imposed by the market. The scepticism regarding the restrictive structures of feudal society was supplanted by the acceptance that market norms and values provide a legitimate and transparent standard for ordering social and economic relations.³⁰ Contemporary accounts of contract provide a nuanced description of the way that norms and values like good faith and reasonableness can facilitate the process by which law attempts to legitimate binding agreements. Brownsword captures the shortcomings of a rule-oriented approach:

[W]hilst we might hope to construct a definition of a "contract" around the shared idea of an enforceable transaction, there is little agreement about how this is best articulated. Some definitions might centre on the idea of an enforceable agreement; others might be anchored to the concept of an enforceable promise (or set of promises); and others might emphasise that contracts are essentially exchanges, or perhaps bargained-for exchanges.... In practice, it might be thought, it cannot matter whether a contract is conceived of in terms of promise, agreement, bargain, or whatever.... On occasion, however, the way in which we conceive of a contract does have a practical bearing.³¹

Fourth, the present commentaries are noticeably silent with regard to the meaning to be ascribed to consent and its relevance in the light of the *Electronic Commerce (EC Directive) Regulations 2002*. Indeed, these regulations seem to acknowledge the primacy of the values typically regarded as being at the core of binding commitments in an environment where technology vests in retailers control over the process of structuring communications. Online contract formation potentially raises issues that fall into the no-man's land of reciprocity. The rules on offer and acceptance reflect cultural, economic and political ideas about consensual activity. According to contract law promises become binding when there is a meeting of minds; the reciprocal exchange of promises with consideration is deemed to bind the parties when an offer is accepted. How can we

28. See Jonathan H. Blavin & I. Glenn Cohen, "Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary" (2002) 16 Harv. J.L. & Tech. 265, <<http://jolt.law.harvard.edu/articles/pdf/v16/16HarvJLTech265.pdf>>.

29. Historians have long grappled with questions revolving around the way that society and institutions of ordering have been constructed and legitimated. See W.W. Buckland, A.D. McNair & F.H. Lawson, *Roman Law and Common Law: A Comparison in Outline*, 2d ed. (Cambridge: Cambridge University Press, 1952) and B. Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 Law Q. Rev. 247.

30. H. Collins, "Contract and Legal Theory" in Twining ed., *Legal Theory*, *supra* note 2, 136 at 137–39.

31. See Brownsword, *supra* note 1 at 1–2.

prescribe regulations which best reconcile the methods of contracting with the underlying values and assumptions about the legitimacy of doctrine?

Fifth, the debates on online contract formation do not provide a bridge between doctrine and the *Electronic Commerce (EC Directive) Regulations 2002*. This is a significant shortcoming. Two reasons may be provided as to why we cannot continue to perpetuate this status quo. Firstly, the enactment of these regulations reflects the growing domestic and international consensus among policymakers and industry that traditional ideas like agreement, autonomy and consent cannot remain unaffected by the increasing interaction between technology, law and society.³² Emerging case law from the United States and Canada suggests that questions of legitimacy and of the vulnerabilities of consumers are not far from judicial thinking about the growing prominence of technology and computer software in structuring and processing online communications.³³ Secondly, the predecessor—the *Electronic Commerce Directive* which the Directive of 2002 largely implements—has been seen as being out of step with orthodox principles of contract law and as not providing a response to the challenges of online contracting.

This is not true. Murray, for example, regards the reach of the Directive as falling short of what was expected.³⁴ What troubles him is the absence of a definition as to the precise point in time at which a contract is formally constituted. Its prescription, he suggests, is “an unsatisfactory solution” to the challenges posed by the online contracting environment.³⁵ The Directive:

...says remarkably little on contract formation. It provides duties for those who market their products over the Internet, but makes no attempt to define the legal position of an electronic offer or acceptance. In addition the Directive is of limited effect when dealing with contracts concluded exclusively by e-mail due to several exceptions which apply to e-mail communications.³⁶

Lloyd is puzzled by the fact that the new matrix provided by the regulations may not fit into the orthodox narrative of contract since it:

...would pose problems for the UK system which...sees offers emanating from the customer rather than the supplier. There appears also to be an element of unnecessary complication by adding the requirement of acknowledgment of receipt of acceptance as a condition for the conclusion of a contract.³⁷

Others have noted pointedly that the regulatory framework now in place:

...prove[s] to be extremely disappointing to those who read it with a hope of obtaining guidance on the formation of contract within the European Union.... it provides no more than equivalence at the point of formation of a contract.³⁸

32. See UNCTAD, *E-Commerce and Development Report 2003*, UNCTAD/SIDTE/ECB/2003/1 (November 2003).

33. See discussion in Part 4.

34. Murray, *supra* note 1 at 28.

35. *Ibid.*

36. *Ibid.*

37. I. Lloyd, *Legal Aspects of the Information Society* (London: Butterworths, 2000) at 243.

38. Murray, *supra* note 1 at 28.

In the light of these apparent deficiencies it has been suggested that:

"[I]t is perhaps time the postal rule was restated for the twenty-first century. A possible reformulation would focus on the non-instantaneous nature of communications which benefit from the rule."³⁹

One proposed solution is that "where an offer contemplates acceptance by a non-immediate form of communication, that acceptance is effective from the time it leaves the acceptor's control."⁴⁰ This proposal underlines the problems faced by contract fundamentalists when attempting to construct an intelligible response to the new vernacular of binding commitments in the online environment.

There is an easier way of grappling with the governance issues facing contract doctrine. We can simply redirect the focus of the inquiry without sacrificing the rationality of doctrine and ask how the communications system powered by the internet alters the dynamics of social and economic relations and whether the normative values used to uphold the legitimacy of the institution of contract are undermined by this technology. Furthermore, we can ask what doctrinal arguments must now be offered when evaluating the *Electronic Commerce (EC Directive) Regulations 2002*.

As businesses and individuals become reliant on new methods of information processing and transmission, it is contended that contract doctrine and the way we conceive binding commitments cannot remain insulated.⁴¹ Indeed, to insist on the artificial distinction of *method* and *process* merely delays the integration of the technological challenges into a coherent theoretical framework. It is in this sense that one can take issue with Reed's earlier observation that online and offline contracting environments are distinctions without a difference. There is a difference between the ideal of consent as a value upheld by contract rules on the one hand and mediated consent in the online environment which results from the values embedded in the programs of computer software and hardware on the other. Continued reluctance to confront the challenges posed by technology may not be an option since policymakers and judges have already recognized the need to accommodate this new phenomenon in the context of binding commitments.

Sixth, notwithstanding the discernible benefits of contract rules, academics reflecting on the governance challenges of contracting in the online environment seem not to be troubled by the fact that the methodology adopted has little affinity with the technological infrastructure and computer software.⁴² The method-process distinction reflects a fundamental difference in perception

39. *Ibid.* at 26.

40. *Ibid.*

41. See EC, Commission, "The Impact of the E-Economy on European Enterprises: Economic Analysis and Policy Implications," *Communication from the Commission to the Council and the European Parliament* (Brussels: EC, 2001) (COM (2001), 711 final), <http://europa.eu.int/comm/enterprise/ict/policy/doc/com_2001_711_en.pdf>. See also EC Commission, *E-Commerce in Europe: Results of the Pilot Surveys Carried Out in 2001* (pilot survey carried out by Eurostat, July 2002), <<http://europa.eu.int/comm/enterprise/ict/studies/lr-e-comm-in-eur-2001.pdf>> [EC Pilot Survey].

42. The irony of this view is that online contract formation is seen in terms of abstract concepts because they do not acknowledge the importance of context to the way that the rules are conceptualized *ex ante*.

about the way online relations and methods of communications are characterized: virtual reality versus real-world reality. The interpretive community would have us believe that there is only view of online contract relations—the topography mapped by the institution of contract and the methods of communication a passive receptor. In contrast, however, another perspective can be offered. Kerr, for example, has attempted to characterize the virtual-reality matrix in organic terms.⁴³ He uses the science-fiction thriller *The Matrix* to identify the significance of the experience of internet users for the way reality is viewed:

The Matrix points to an important problem that arises when we try to understand the nature of computer networks in general and the internet in particular.... [W]e can think about the Internet in two ways, virtual and real. The virtual perspective...accepts the virtual world of cyberspace as akin to reality.... But as we try to make sense of what the Internet is, to understand what we experience online, we might decide to treat that virtual world as if it were real.⁴⁴

Those who regard the substance of contract law as being amenable to orthodox “real-world” principles and analogies may be inclined to dismiss this characterization without any argument as to why that is likely to be the case. It has, for example, been suggested that the characterization of technology as method rather than process is the logical result of the fact that:

...the Internet is fundamentally no more than a means of communication, and that the new issues of Internet law arise from the differences between Internet and physical world of communications methods, particularly communicating via intermediaries.⁴⁵

Consequently, when thinking about governance in the online environment, we must avoid segregating our ideas about legal constitution of economic and social relations in terms of “virtual” and “real” worlds. This view of the rule-oriented model in the online environment has an air of inevitability about its primacy and value. The cognate here is that it would be irrational—almost illogical—to reify technology since contract rules can provide the right answers to the problems of online contracting.

We should recall that this line of reasoning can be traced back to the characterization of the online and offline worlds as being distinctions without a difference. Does this mean that those who call for a reassessment as to the way the design space of the internet now attempts to define the legitimacy of the market order are mistaken? To be sure, commentators like Lessig, Benkler and Boyle have consistently argued that the online environment poses governance

43. Orin S Kerr, “The Problem of Perspective in Internet Law” (2003) 91 Geo. L.J. 357, <<http://ssrn.com/abstract=310020>>.

44. *Ibid.* at 359.

45. Reed, *supra* note 1 at 174.

challenges, which require a nuanced view of regulability.⁴⁶ Lessig, for example, goes to great lengths to impress upon policymakers the significance of understanding the effect of design values embedded in the architecture of computer software and the internet, in particular, on the legitimacy of our governance institutions as nodes of control.⁴⁷ We are, in short, concerned with the values that underpin the rules of ordering and their legitimacy in the online environment. The insights offered by Lessig in this respect are not novel to the way critical legal scholars have viewed the institution of contract. A long-term critic of contract fundamentalism makes the following observation:

Until we have resolved our uncertainties about what values these modern legal developments represent...it is...therefore helpful to return to some first principles of political and moral philosophy.... [W]e can best understand the form of modern doctrines by situating them in a broader dialogue within liberal political philosophy concerning the relation between the citizen and the state.⁴⁸

These concerns can be referred back to the simple idea about binding commitments in the law of contract: they cannot take place until parties engage in some kind of interaction. In the online environment, this process cannot take place without the aid of hardware and software. The communications system that the hardware and software help to create can be seen as part of the process by which legal relations are constituted. The governance challenge for contract law is not so much a question of whether its rules apply in the online environment. The real question—one that contract fundamentalists seem to marginalize—is whether the design space of the internet now modifies traditional ideas of autonomy, choice and agreement.

It is the concern about design space being structured by the values of the programmers that forms the core of the “code-is-law” thesis articulated by Larry Lessig in *Code* and *The Future of Ideas*.⁴⁹ The flaw in the characterization of the communications system as method and not process is that the process by which agreements are constituted in the communications system conflicts with the issue concerning the application of contract rules in the online environment.

Seventh, the rule-oriented approach, with its emphasis on legal characterization of relevant facts, attaches little significance to context as a driving force for defining and shaping the institution of contract. As Brownsword observes, we cannot talk sensibly about the substance of contract law if we ignore the constraints imposed by law on the autonomy of individuals by cultural, political and economic values on the one hand and the institutions and instruments that we construct on the other.⁵⁰ Two observations can be made. The first

46. Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999) [*Code*]; Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001) [*The Future of Ideas*]; Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation” (2000) 52 Fed. Comm. L.J. 561, <<http://www.law.indiana.edu/fclj/pubs/v52/no3/benkler1.pdf>>; James Boyle, “A Politics of Intellectual Property: Environmentalism for the Net?” (1997) 47 Duke L.J. 187, <http://www.law.duke.edu/shell/cite.pl?47+Duke+L.+J.+87>>.

47. See Part 4 for a fuller analysis.

48. Collins, *supra* note 2 at 137.

49. Lessig, *supra* note 46.

50. Brownsword, *supra* note 1 at 1.

is that contract law does not operate in a technological and societal vacuum.⁵¹ This is not a radical observation and the fact that it eludes those who seem intent on using doctrine to separate the substance of the rules from its context remains a puzzle. For example, it has been pointed out that technological innovation in the contemporary environment is increasingly confronting communities, policy-makers and industry with difficult questions.⁵² In the space of a decade, the deterministic nature of technological rules in the area of cloning, genetic screening, biometrics, surrogacy, digital music and surveillance has resulted in policy-makers, judges and communities re-examining the ramifications of the latent ambiguity of their values for legal institutions and societies.⁵³ The resulting tensions challenge the ability of policymakers and judges as they attempt to use the institutions of law and its instruments to establish regulatory frameworks. The law of contract has not been insulated from the diverse background conditions. Indeed, the curtailment of the privity doctrine, the re-examination of the doctrine of consideration and the introduction of obligations of good faith suggest the benefits of drawing on the wider background when explaining the shifts in the governance of contractual relationships.

With regard to the second observation, Kerr's emphasis on perspective is relevant. The perspectives—virtual and real—are suggestive of two ways of characterizing the way that we view relations and institutions in society, these being both offline and online. By asserting the unassailable nature of the claim that the virtual technological infrastructure is method, the interpretive community perhaps brushes aside too readily the point that the idea of what constitutes "facts" can be contested. Facts, as Fish reminds us, do not have an objective meaning in themselves.⁵⁴ It cannot be seriously argued that the rules of contract and of relations between parties take on a meaning independent of their observers. Take, for example, the traditional narrative of lawyers applying the law to the facts. At first blush it might appear that the facts as constituted through information gathered from documents and interviews of witnesses are objective and independent. This is both a gross simplification and a misconception of the process of characterization and of what we assume as being objective reality. As John Casti correctly observes:

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51. Andrew Feenberg, *Critical Theory of Technology* (Oxford: Oxford University Press, 1991); Andrew Feenberg & Alastair Hannay, eds., *Technology and the Politics of Knowledge* (Bloomington: Indiana University Press, 1995).
 52. Kirk Semple, "UN to Consider Whether to Ban Cloning of Embryos" *New York Times* (November 3, 2003), <<http://query.nytimes.com/gst/abstract.html?res=FA061FFE3A540C708CDDA80994DB404482>>.
 53. Stephen Labaton, "Rules Near on TV Piracy: Critics Press Their Case" *New York Times* (October 27, 2003), <<http://query.nytimes.com/gst/abstract.html?res=F00B10FB3A550C748EDDA90994DB404482>>. See also Brian Greene, *The Elegant Universe: Superstrings, Hidden Dimensions, and the Quest for the Ultimate Theory* (New York: W.W. Norton & Company, 1999) at 3-17 and Batya Friedman & Peter H. Kahn, Jr., "Human Values, Ethics and Design" in Julie A. Jacko & Andrew Sears, eds., *The Human-Computer Interaction Handbook* (New Jersey: Lawrence Erlbaum Associates, 2003) at 1177, <http://faculty.washington.edu/pkahn/articles/Human_Values_Ethics_Design.pdf>.
 54. Stanley Fish, *Is there a Text in this Class?* (Cambridge, Mass.: Harvard University Press, 1980) at 1-3.

The universe of material objects...exists independently of us.... This image of an impersonal, aloof cosmos was engraved onto the scientific consciousness by the authority of Newton and his idea of events that unfold in an arena of absolute space and time.... The essence of the "objectivist" position, nowadays termed *naïve realism*, is that the world consists of a collection of independently existing "things" that are simply "out there" whether we observe them or not.⁵⁵

We can analogize the point Casti makes by alluding to facts as being represented by the metaphor of the Necker cube. The meaning that we give to the facts will depend on the stance or interest that is being pursued. Recalling Kerr's general argument, it seems to be that when we think about the internet we are dealing with two possible perceptions of contractual relations in both the online and offline environments: first, that binding commitments are concluded against the background of a passive technological medium; and second, that the technological becomes part of the process through which contractual commitments are ascertained. Reed is of course correct in his assertion of the pervasive nature of contract principles or that contractual relations can be situated in a physical-geographical locality, and involving real individuals ("consent as process"). That being said, it could not be seriously denied that the architecture of the internet and of other methods of communication also alters the way in which parties now communicate through technology ("consent as method").⁵⁶ By characterizing attempts to integrate the online environment into the process by which we define the nature of the binding commitment, it seems to be assumed that contract doctrine is free of contradictions between "facts" and myths.⁵⁷ Even if one assumes that the interpretive community is correct—whilst it is plainly not the case—it is not entirely clear why it is acceptable to engage in fictions when parties contract in real space *but* it is unacceptable to do this when we attempt to configure legal relations in the online environment.

Consider, for instance, the image of the meeting of the minds and the evocation of its values when parties use the post. In *Adams v. Lindsell*, it was held that legal relations were constituted when the acceptance was posted.⁵⁸ The offeror was bound even though the offeror had not received the letter of response. In effect, a binding commitment was constituted without both parties

55. John L. Casti, *Paradigms Lost: Images of Man in the Mirror of Science* (New York: William Morrow, 1989) at 414-15 [emphasis in original].

56. Baal-Schem & Shinar, *supra* note 10; John Suler, "Psychology of Cyberspace: Identity Management in Cyberspace," <<http://www.rider.edu/~suler/psycyber/identitymanage.html>>; Peter Ludlow, "Self and Community Online: Introduction to Chapter 5 of *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace*," <<http://www-personal.umich.edu/~ludlow/intro5.html>>; William J. Mitchell, *City of Bits: Space, Place and InfoBahn* (Cambridge: Massachusetts Institute of Technology, 1996) c. 3 at 26; Sherry Turkle, "Tinysex and Gender Trouble" *IEEE Technology and Society Magazine* 18:4 (Winter 1999/2000) 8; Donna J. Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York: Routledge, 1991) c. 8 at 149-81, <<http://www.stanford.edu/dept/HPS/Haraway/CyborgManifesto.html>>; Mark Poster, "CyberDemocracy: Internet and the Public Sphere" University of California School of Humanities <<http://www.hnet.uci.edu/mposter/writings/democ.html>>.

57. See William Blackstone, *Commentaries on the Laws of England. Book the Third* (Oxford: Clarendon Press, 1768) at 267-68, who extols the value of fictions. See also Jeremy Bentham, *The Works of Jeremy Bentham: Published under the Superintendence of his Executor, John Bowring* (New York: Russell & Russell) vol. 4 at 498.

58. *Supra* note 20.

knowing that the promises had been exchanged.⁵⁹ Or take the case where the legal rule stipulates that a manufacturer has consented to be bound by a unilateral act of a consumer who responds to an advertisement through the simple act of purchasing a product. The phrase “meeting of minds” conjures up the image of an agreement being constituted independently of physical reality. A realist perspective suggests that both parties did not know that they were bound. Another view is that the judges at common law have long relied upon fictions and myths to give effect to the underlying values and norms of contemporary society. The idea that legal facts correspond with a legal rule and that this equates with objectivity and avoidance of bias is misleading.

Objective realism, in short, is not as might be thought—the product of independent observations of fact.⁶⁰ Indeed, what constitutes observable physical ingredients is contentious. The judges at common law have avoided the contradictions and artificiality of the rules by relying on the process of reasoning and creative interpretations of facts and principles.⁶¹ Gordley, for example, highlights the ambivalence surrounding the effect of mistake on the nature of consent.⁶² He suggests that the desire to provide a remedy in contract disputes on the basis of some idea of fairness prompted the willingness of the judiciary to rewrite the contractual documents.⁶³

Returning to the present discussion, arguments about whether the internet is method or process cannot be portrayed purely as exercises in untangling interpretation puzzles. The aim in drawing attention to the contestability of perspectives is to make explicit the fact that rule application involves the shaping of identifiable things or attributes which are then referred to legal terms like offer and acceptance.⁶⁴ To summarize, an overemphasis on contract doctrine and the linear approach to problem solving does not reflect the realities of online contracting and, finally, leaves unexplained not only the role of the *Electronic Commerce (EC Directive) Regulations 2002* but also its complementarity with conventional contract doctrine. The emphasis on the traditional, textbook approach to contract analysis does not allow us to transcend the problem-solving paradigm. This restrictive view of contract law obscures a fundamental, deep-seated argument about the basis upon which rules on contractual ordering of social relations are now to be legitimated. This debate, it is suggested, cannot be undertaken without reference to the contextual background of the internet.⁶⁵

59. *Supra* note 20 at 683.

60. *Supra* note 55.

61. *Supra* note 57.

62. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon, 1991) at 140-46.

63. *Ibid.*

64. Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart” (1958) 71 *Harv. L. Rev.* 630 at 661-69.

65. See Manjoo, *supra* note 11 for the attempts by the Motion Picture Association of America to lobby the US government to require computer-hardware manufacturers to include copy-protection schemes. This is the justification provided by the entertainment industry: “The broadcast flag is a sequence of digital bits embedded in a television program that signals that the program must be protected from unauthorized redistribution. It does not distort the viewed picture in any way. Implementation of this broadcast flag will permit digital TV stations to obtain high value content and assure consumers a continued source of attractive, free, over-the-air programming without limiting the consumers’ ability to make personal copies.”

The rule-oriented approach fails to provide a comprehensive understanding of the dynamics of contract relations for three reasons. First, no evidence is offered for the claims that technology is a passive conduit. Second, characterization, in short, is not mandated by a legal rule but by the result of arguments used to shape facts to “fit” into a legal rule or outcome.⁶⁶ There is room for pursuing alternative routes to understanding the legitimacy of contract-ordering rules. Third, the rule-oriented approach implies that the institution of contract is free of contradictions and omissions. This is not necessarily borne out in the jurisprudence of the common law.⁶⁷ It has already been shown that the rational foundations in cases of the postal rule and mistake are attempts by the common law to provide a result that blends pragmatism and fairness. The image of a meeting of the minds epitomizes the reliance on abstractions to articulate the values of private-ordering rules. Furthermore, both the postal rule and the rule on instantaneous communications are defined by reference to the distinctive architecture of the technical media.

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3. CODE, ARCHITECTURE AND MEDIATED CONSENT

WHAT IS THE GOVERNANCE CHALLENGE facing contract doctrine in the online environment?⁶⁸ The main shortcoming of the rule-oriented approach lies in its inability to free itself from the internal critique and process of reasoning. Yochai Benkler, a communications theorist, provides us with a heuristic that may help us to unite contract doctrine with the communications system.⁶⁹ Lessig sums up Yochai’s ideas of the layers principle well:

The layers that I mean here are the different layers within a communications system that together make communications possible.... At the bottom is a “physical” layer, across which communication travels. This is the computer, or wires, that link computers on the Internet. In the middle is a “logical” or “code” layer—the code that makes the hardware run. Here we might include the protocols that define the Internet and the software upon which those protocols run. At the top is a “content” layer—the actual stuff that gets said or transmitted across these wires. Here we include digital images, texts, on-line movies, and the like. These three layers function together to define any particular communications system. Each of these layers in principle could be controlled or could be free.... [W]e could imagine a world where the physical and code layers were controlled but the content layer was not.⁷⁰

66. *Supra* note 55.

67. See especially Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986) at 263-301.

68. The following account builds on the insights provided by critical contract scholars like Atiyah, *supra* note 1; Brownsword, *supra* note 1; Collins, *supra* note 1; and Furmston, *supra* note 1, c. 2 at 159-436. Their accounts provide us with a foundation for understanding the political, cultural and economic foundations of contemporary contract doctrine. It is beyond the scope of this paper to revisit their arguments and analysis. The aim of the paper has been to take a small step towards bridging the gap between “theory” and “technology” by exploring the benefits of re-thinking binding commitments in the online environment. None of the authors have, however, undertaken a critique of *Regulations 2002*, *infra* note 95, through the heuristic of code.

69. Benkler, *supra* note 46 at 561-63.

70. Lessig, *The Future of Ideas*, *supra* note 45 at 23.

It is a mistake to characterize this account of the layer principle as just another linguistic metaphor.⁷¹ Lessig's description of the process of understanding relations within a communications system is particularly relevant, as the oral and textual tradition of communications is now being channelled through software—which is ultimately what the communication system powered by the internet is. Sceptics might argue that this medium of communication and the process of constituting legal relations are no different from purchasing items from the vending machines or automated services provided by banks or car parks. It is a fair comment but only up to a point. In qualitative terms, however, it cannot be seriously argued that the purchase of a book online is akin to the purchase of refreshments or cigarettes from a vending machine. One outcome of the internet becoming a prominent communications medium is that software assumes an important role in a number of critical respects; software programs now structure and process the choices, needs and expectations of both the retailer and the consumer. This, in essence, is Lessig's "code-is-law" thesis.

What we are witnessing in the online environment is a new process by which social and economic relations are initially created and then constituted. Consider for example the case where a user on the internet receives a pop-up advertisement from the Microsoft website. The message indicates that the user's Office 2000 program is in need of an update. This service is free and the user can only take advantage of the service by entering into a click-wrap agreement. The software prevents the user from using the service until the user clicks on the icon stating, "I Agree." The user purports to enter into an agreement when he clicks on the icon. Is the user bound by the click-wrap agreement?⁷² What do we expect of the software agent if the user does not scroll through the agreement or misinterprets terms in the agreement? Should the doctrine of *caveat emptor* be applicable here?⁷³

These questions are equally relevant when we turn to the hypothetical case study involving "A" and "B." Is there an agreement between the buyer and the seller when the buyer signifies his assent to buying a laptop by clicking on the mouse? Obviously, we cannot say that there is a meeting of the minds at the time of receipt or at the time of sending. In the former case, electronic agents do not possess the *legal persona* and attributes of natural persons.⁷⁴ In the latter, even if the electronic intermediary possesses these features, there can be no meeting of the minds because each party is unlikely to know that other has knowledge of the acceptance. We could, of course, use the analogies in the

71. See generally Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan, 1987); Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicholson, 1990); J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale L.J. 743; and Jaques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" trans. by Mary Quaintance, (1990) 11 Cardozo L. Rev. 919.

72. See <<http://office.microsoft.com/home>>.

73. What values should policy-makers and judges now emphasize when parties contract online? Even greater problems are posed with the value of consent in the online environment. It is useful to recall that in the postal rule, consent was implied by the act of posting. Is it right to imply consent in the online environment by the mere act of clicking on the mouse? Can consent by clicking the mouse be deemed to deprive the buyer, should he change his mind and attempt to communicate his withdrawal by using an expeditious method like telephone or fax?

74. Tom Allen & Robin Widdison, "Can Computers Make Contracts?" (1996) 9 Harv.J.L.& Tech. 26.

postal rule and instantaneous communications, but those do not resolve the conundrum.⁷⁵ Indeed, the phrase “meeting of the minds” is a distraction. The real question that the use of the online communications system poses is this: what constitutes assent in the cultural and economic environment of software? Before we examine the way in which the communications infrastructure can be said to provide an intuition pump for understanding the dynamics of contract relations, a caveat is warranted. Further study and research are still needed to explore in greater depth how the communications system will result in refinements to be offered by policymakers and judges.⁷⁶ Just as the events of the sixteenth to the eighteenth centuries provided the building blocks for the way that we now rationalize binding agreements, so too are we entering a period in which issues of consent and agreement will in time be resolved through a combination of precedent and legislative enactment.

The dynamics of contractual relations in the online environment can be analyzed in terms of three layered components: the architectural, the design and the doctrinal.⁷⁷ It should be noted that many of the points raised in this part of the paper are not internet specific, since the process of understanding contractual relations can be similarly adopted in real-world transactions.

3.1. Consent as Architecture

Consider, for example, the situation where a book is purchased over the telephone or at a bookstore. For a binding commitment to be constituted, the book must be identified and the purchase price paid. The method of communications does not prevent us from indicating when a binding commitment has been concluded. The exchange of promises and the resulting binding commitment are said to emerge when the offer is accepted. There is a meeting of the minds. The system of communications powered by the internet provides a distinct architecture where relations are constituted through clicks of the mouse and through the response of the computer software to each.⁷⁸

In his seminal works, *Code* and *The Future of Ideas*, Lessig uses the metaphors of architecture and code to make explicit the new intuition pump for understanding private ordering and the traditional institutions of governance.⁷⁹ He begins by acknowledging that centralized institutional structures of control

75. See e.g. *Pretty Pictures*, *supra* note 24 (the court had to address the question of whether a contract could be formed when email was used during the negotiation process). See also J. Englefield, “Will your email correspondence result in a binding contract?” (2003) 17(9) *Corporate Briefing* 12 (this article provides a normative account of the challenges facing businesses as online methods of communication are increasingly incorporated into the negotiation process). See also Kevin de Haan, “Betting Contracts: Determining where a bet is struck” (2003) 5:7 *E-Commerce Law & Policy* 10 (The author provides an overview of the scope of the postal rule with regard to the placement of bets online. He concludes that certainty, with regard to the applicable principles, can be promoted by bookmakers placing standard terms on the homepage); Peter Howitt, “Avoiding legal uncertainty” (2003) 5:5 *E-Commerce Law & Policy* 12 (the primary focus is on the restrictions placed by the *Unfair Contract Terms Act 1977* on computer contracts).

76. See e.g. *EC, Pilot Survey*, *supra* note 41.

77. The accompanying account will not review the detailed accounts of the internet architecture. Further details can be found in Reed, *supra* note 1. See also Mitchell, *supra* note 56 at 111.

78. Mark Stefik, ed., *Internet Dreams: Archetypes, Myths and Metaphors* (Cambridge: Massachusetts Institute of Technology, 1996); Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Reading, Mass.: Addison-Wesley, 1993).

79. Lessig, *supra* note 46.

and ordering provide a counterpoint to the Hobbesian prognosis; in a market economy, the modalities of law, market and norms provide the checks and balances in the construction of society. The hardware and software of the internet architecture, according to Lessig, now provide a framework for understanding governance. Code assumes some features of the institution of law, such as regulability, values and control. Although Lessig's normative premises may be questioned, the metaphor he employs can be incorporated into a way that we could begin to think about online contract formation.

The metaphor of architecture makes two dimensions of the contract matrix explicit. First, the legal rules for constituting relations can be viewed as subsisting within the technological infrastructure: the physical, the substantive and the content.⁸⁰ For example, media—either in its crude form of oral communications between parties dealing at arms length or in the form of telephone, fax and online-communications infrastructure—can be seen as constituting the “physical” layer; social norms and values, the rules on contract formation, doctrines on contract vitiation and enforcement, and the design of the computer software program can be seen as constituting the substantive layer; and the duties, rights and obligations that law and the market attempt to regulate can be seen as constituting the “content” layer.

Second, each communication method embodies a distinctive architecture—these features being either active or passive. The latter category will include the purchase of goods or services through the use of the post, a telephone or a visit. Each form of communication or media—be it oral, written, post or instantaneous—embodies a distinctive mode of coordination. The architecture of the telephone, for example, can be differentiated from that of the post. The features of both media can be distinguished from a situation where two parties enter into an agreement in the presence of one another. More generally, the benefit of employing the architecture metaphor is that we need not artificially exclude the instrumental role of technology in constituting social relations.

One feature that distinguishes online methods of communication from traditional media is that software now assumes an instrumental role in constituting agreements. If the buyer intends to make a purchase online, he will need to engage with the code. The software interprets the steps in the negotiations purely on the basis of the clicks made by the buyer. If the buyer does not communicate the range of predicted responses, either the process will cease or a new range of options will be presented for consideration. These are not the only avenues through which software attempts to regulate relationships in the online environment. For example, the website may have agreements that stipulate the process by which commitments become binding. Refusal to assent to the terms will lead to the termination of the transaction. This may not be a bad thing, since a buyer may move on to another online retailer.

80. The layer principle is sufficiently expansive in its idea to accommodate the media, the rules and the content. It is instructive to note that much of the legal infrastructure provided by contract law resonates with the interplay between the physical, substantive and content layers. It is not without significance that, as the architecture alters, so too does law's view of the technology and the appropriate rule or norm that is to be used to govern the situation.

It is true that end-to-end architecture may create new opportunities and choices. Where code assumes the identity of law through the programming of its values, the user has two options: he either complies with the pre-determined structure of communications or moves on to another website. Code's latent ambiguities have the ability to structure choices and preferences. Yet, despite this, it cannot be overlooked that contract law is designed to resist the pressures of relations descending into a market for lemons. Code embeds values, which cannot be dismissed when we think about the values to be pursued by contract. The orthodox values of transparency, certainty and autonomy may now be arbitrarily marginalized by code. This outcome threatens to displace the traditional idea that the rules on agreement can be aligned with a model of consent.

3.2. *Design as Consent*⁸¹

Central to Lessig's approach to understanding the new governance framework in cyberspace is the imbalance in cultural or economic relations resulting from the control residing in the owners of code. Lessig views the latent ambiguity of code as having the capacity to undermine established democratic governance processes. This is, perhaps, an extreme view. That being said, many are likely to view a thesis of code as a form of internet exceptionalism or as "cyberspace fallacy"; the activities on the internet take place in real space, involve human beings and exist within the regulatory reach of domestic and international laws. Although we may not share Lessig's normative outlook, the insight about design space is pertinent to our study. Lessig ought not to be viewed as introducing an argument about technological determinism or as claiming that we need customized laws for the internet. Attempts to characterize Lessig in these terms are tantamount to raising a man of straw. The reality, however, is that Lessig's "code-is-law" thesis makes the subtle but nonetheless important point that the software program has embedded values. They conceal a latent ambiguity, which can either enhance the values of private ordering or impose the bias of their creators.

These are not idle concerns. For example, the prevalence of digital-rights-management software illustrates an important feature in the structuring of contractual licences and in the enforcement of rights arising under the transaction.⁸² Technology, according to Lessig, can never be ideologically neutral nor content free. This is a characterization that is in direct conflict with those that view the communications system as purely one of method. It is also a characterization that understands that technology cannot be divorced from its cultural attributes. Those who reject Lessig's arguments are likely to suggest that real-world rules will continue to provide the answers to the governance challenges.

81. See later discussion on case law involving computer software and browsewrap contracts. See also Bill Gavers, "Designing for Homo Ludens" *Computer Related Design, Royal College of Art* (2002), <http://www.interaction.rca.ac.uk/equator/papers/design_for_homo_ludens.pdf>.

82. See OUT-LAW.COM, News, "Does P2P help or hinder music sales?" (May 10, 2002), <http://www.out-law.com/php/page.php3?page_id=doespphelporhin1021028325.>; Motion Picture Association of America, Jack Valenti Press Releases, "Study Shows Copyright Industries as Largest Contributor to the U.S. Economy" (April 22, 2002), <http://www.mpaa.org/jack/2002/2002_04_22.htm>; Motion Picture Association of America, Jack Valenti Press Releases, "A Clear Present and Future Danger: The potential undoing of America's greatest export trade prize" (April 23, 2002), <http://www.mpaa.org/jack/2002/2002_04_23b.htm>.

This is correct in part. For example, it could be suggested that the post or telephone are appropriate equivalents to the online methods of communication. That being said, this approach merely appeals to the idea that contract principles operate in a technological vacuum. Even if this were the case, taken to the logical extreme, we should ask ourselves whether we should subscribe to the following line of analysis: if the agreement in question is brought within the rules of contract, it must follow, *ex post*, that the ideals of contract are realized.⁸³ The conclusion that we are encouraged to accept cannot be faulted if technology is content neutral and value free.⁸⁴ This is not the case in the online contracting environment. Consider, for example, the manner in which browsewrap contracts and online purchases of software structure the options and the operative terms governing purchases by online consumers. Consent is artificially induced by defining the routes of agreement, which ultimately compels the buyer to align his interests with those of the seller.

Another example of the potential bias inherent in the technology can be seen in the way that electronic agents, without any restraint, monitor the manner and use of software and digital products.⁸⁵ The recent media coverage of digital-rights-management software deployed by manufacturers to define the uses to which computer software or music compact discs may be put is another example of the potential bias in technology. The primary purpose of the technology is to prefer the interests of the sellers and not those of the consumers.⁸⁶

We can cast the issue of design values in wider terms. Despite the complexity of the governance challenges, the institution of the law has been extremely resilient and has attempted to cope with tensions arising from our technological creations with some measure of consistency. An example of such a tension can be seen in the emergence of the neighbourhood principle during an intensive period of social and economic restructuring that took place in post-agrarian English society; the ruling in effect opens an alternative line of justiciable remedies to parties who have suffered damage as a consequence of manufacturers' breach of acceptable standards of care.⁸⁷

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83. See Micheal Luck, Peter McBurney & Chris Preist, *Agent Technology: Enabling Next Generation Computing, A Roadmap for Agent Based Computing* (Agent Link II, 2003), <<http://www.agentlink.org/admin/docs/2003/2003-48.pdf>>.
84. See William W. Gaver, Jake Beaver & Steve Benford, "Ambiguity as a Resource for Design" *Interaction Design Research Studio, Royal College of Art* (2003), <<http://www.interaction.rca.ac.uk/equator/papers/ambiguity.pdf>>.
85. See e.g. in the structuring process of Windows XP technology, which allegedly directs consumers to use the Internet Explorer web browser even if they expressed a different preference. See Associated Press, News, "Microsoft Lassos Music Customers" (October 20, 2003), <<http://wired.com/news/business/0,1367,60899,00.html>>.
86. See, however, Laurie Cranor, "Bias and Responsibility in 'Neutral' Social Protocols" (Position piece presented at the DIMACS workshop on Design for Values: Ethical, Social and Political Dimensions of Information Technology, February 1998) *Computers & Society* 17 (1998), <<http://lorrie.cranor.org/pubs/dimacs-values.html>>.
87. Compare *Hedley Byrne v. Heller* (1963), [1964] A.C. 465, [1963] 2 All E.R. 575 (HL) [*Hedley* cited to A.C.]. The developments here can be contrasted with the recognition by the law in *Hedley* that financial loss was justiciable in respect of non-physical damage. This would have been unthinkable half a century previously. The heated arguments surrounding the proper limits of tort law in contemporary society and, specifically, surrounding the failure of large pension institutions and the liability of professional-accountancy firms for tortious liability, are characteristic of the complex interactions that arise among the many layers within technology, society and law.

We also see similar interactions and tensions in the debates on the legitimacy of extending nineteenth-century copyright rules and norms to the digital media; the extension of proprietary interests from “copy” right to “access” rights is not coincidental as the commodification of ideas also reflects the important shifts in the way that we think about the values embedded in technology and the ramifications of adopting their rules.⁸⁸ Attempts by the entertainment industry to impose technological solutions on the way that we consume music raise not just legal issues but also impinge on cultural ideas about music and the way that it ought to be consumed. Despite the economic arguments put forward to justify the contemporary role of copyright in the new media, it would seem that the fate of the technological prescriptions may involve a careful compromise between end-to-end, cultural expectations and political expediency.⁸⁹

3.3. Contracts as Consent or Code

Attempts to understand the nature of a binding commitment through contract rules and the deployment of equivalent analogies conceal a tautology. The emphasis on rules and on the application of these to the facts results in an assumption of that which needs to be understood in the first place. For example, by focusing on whether the particular facts fit into the rules and the category of cases, it might be tempting to conclude that, since the binding commitment falls within the scope of the rules, the obligations correspond with the values of contract law. An agreement, as texts and cases in contract emphasize, is the product of a voluntary exchange of promises. An agreement implies that there is a meeting of the minds or that there is consent. There is, however, a big difference between the facts fitting in with the discourse of specific categories and the basis upon which we regard the values as being present.

In the absence of a meeting of the minds, can there be said to be an agreement that satisfies the core values of contract law? Does it make sense to import this image into the online environment? Radin has provided a useful account of the way that the online environment now challenges the traditional ideals associated with the image of the meeting of minds.⁹⁰ She begins by

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88. See Julie E. Cohen, “A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace” (1996) 28 Conn. L. Rev. 981, <<http://ssrn.com/abstract=17990>>; Julie E. Cohen, “Some Reflections on Copyright Management Systems and Laws Designed to Protect Them” (1997) 12 Berkeley Tech. L.J. 161, <<http://www.law.berkeley.edu/journal/btlj/articles/vol12/Cohen/html/reader.html>>.
89. See generally Janelle Brown, “MP3 Crackdown” *Salon.com* (November 17, 1999), <<http://www.salon.com/tech/log/1999/11/17/riaa/index.html>>; David S. Cheval, “Copyright Protection in the Digital Age: The Case against Napster” (2001) 6 W. Va. J. L. & T. 1.1, <<http://www.wvu.edu/~wvjolt/Arch/Cheval/Cheval.htm>>; Marshall Brain, “How Compact Discs (CDs) Work” *howstuffworks.com*, <<http://howstuffworks.com/cd.htm>>; Kathy Bowrey & Matthew Rimmer, “Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law” (2002) 7:8 First Monday Peer-Reviewed Journal on the Internet, <http://www.firstmonday.org/issues/issue7_8/bowrey/index.html>; *KaZaA B.V. v. Buma & Stemra*, 2002 AE 0805, (28 March 2002), Amsterdam 1370/01SKG (Amsterdam CA), <http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=32573> (original Dutch judgement); John Schwartz, “With CableTV at MIT, who needs Napster?” *New York Times* (October 27, 2003), <<http://www.uhoh.org/nyt-20031027-mit-cable-music.htm>>; Richard Stallman, “The GNU Manifesto,” <<http://www.fsf.org/gnu/manifesto.html>>; Richard Stallman, “The GNU Operating System and the Free Software Movement” in Chris DeBona, Sam Ockman & Mark Stone, eds., *Open Sources: Voices from the Open Source Revolution* (Sebastopol, Calif.: O’Reilly and Associates, 1999) at 53; M. Pfahl, “Giving Music Away to Make Money: Independent Musicians on the Internet” (2001) 6:8 First Monday Peer-Reviewed Journal on the Internet, <www.firstmonday.org/issues/issue6_8/pfahl/index.html>.
90. Radin, “Humans, Computers and Binding Commitment,” *supra* note 8.

observing the significance of the qualitative and quantitative differences between online and offline contracting. To this she adds that:

The contract-as-consent model is the traditional picture of how binding commitment is arrived at between two humans. It involves a meeting of the minds between two humans, or at least voluntariness, or at least consent. These terms are both fuzzy and contested; the traditional picture is out of focus. At minimum, consent involves a knowing understanding of what one is doing in a context in which it is actually possible for one to do otherwise, and an affirmative action in doing something, rather than a merely passive acquiescence in accepting something. These indicia translate into requirements that terms be understood, that alternatives be available, and probably that bargaining be possible.⁹¹

The fuzzy picture is now complicated by the emergence of a wide range of contracts entered into between humans and computers. Her central argument with regard to the governance challenges should now be familiar: the online environment does challenge normative ideas and images of contract. What is the role of contract law when disintermediated contracting becomes the norm? Her argument reflects the earlier account of the hidden bias in the instrumental role of computers and technology in ordering contractual relations:

... there exists something of a puzzle about how to justify changes of position imposed on one private party by another, and that the advent of contract in cyberspace may make the puzzle more urgent. The problem, in a nutshell, is that our ordinary-discourse commitment to a consent-based system will come into clearer conflict with practices that do not seem consensual.⁹²

Two conclusions can be drawn. First, by viewing code as law, we can avoid the parsimonious explanation of the discourse-specific narrative of contract rules. By integrating the hardware and software into online communications we can incorporate our insights about control, autonomy and acquiescence into the way we begin to evaluate the *Electronic Commerce (EC Directive) Regulations 2002*. Technology ceases to be regarded as providing passive methods of communication because the values it embodies assume a number of characteristics of law.

Second, the metaphor of code also makes explicit the fact that the image of contract as a meeting of the minds has very little purchase in the online environment. That being said, by taking into account the perspective of consumers, it becomes pertinent to assess whether consent becomes an important value in contract formation. The programming of values, which have hidden bias, all too clearly suggests that unwary users can contract away their rights to autonomy, choice and consent. Code permits us to draw attention to the fact that there is a considerable difference between the argument that contract principles apply and the argument that the values underpinning the ideal of the contract model may be overreached by the design values of internet methods of communications.

91. *Ibid.* at 1125–26.

92. *Ibid.* at 1127–28.

The interpretive community overlooks both the distinction and the significance of the latter argument for the way that we think about the consent model of contracts. The question of whether an agreement is now to be constituted by the sending of an email or by the clicking of the mouse in the web form presupposes an appreciation of a hierarchy of values and public-policy goals. This observation can be underscored by the fact that the postal and instantaneous-communications rules are products of judicial attempts to rationalize their legitimacy against the backdrop of the interaction between technology, culture and politics and their significance for the way autonomy, bargains and morality are perceived and valued. If we are prepared to accept that such interactions are necessary in order to underline the legitimacy of the rules that we set in place, should it be any different when technological media now assume a pivotal role in the online contractual matrix? Indeed, by adopting a nuanced overview of contracting in the online environment, we can avoid assuming that the interaction between the values of technology and those of contract are irreconcilable. The aim of this modelling is to transform the technological infrastructure into a heuristic for grasping the dynamics of binding commitments in the online environment.⁹³ I propose that online contract formation is best understood in terms of architecture and code. This model of mediated consent, it is suggested, provides an appropriate vernacular for explaining the central role of *Electronic Commerce (EC Directive) Regulations 2002*, the reach of its provisions and how it is reconcilable with contract doctrine.

To summarize, legal rules and principles merely provide us with a partial picture of the governance challenges facing the institution of contract law.⁹⁴ The claims and assumptions underpinning the characterization of technology are fundamentally flawed since they fail to illuminate the hidden bias of technology in the online environment and its potential for eroding the image of contract as being the product of consent or a meeting of the minds. Furthermore, the coming into force of the *Electronic Commerce (EC Directive) Regulations 2002*, with their emphasis on the technological processes, weakens the argument that an understanding of the technological infrastructure impairs legal analysis of binding commitments. The fact that the interpretive community has yet to engage fully with the developments in the online contract environment need not detain

93. See generally H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593 at 606–15.

94. See generally Jerome Frank, *Law and the Modern Mind* (New York: Tudor Publishing Company, 1936) at 134–38.

us because we can look at what policy-makers have done in the United Kingdom with the above-mentioned regulatory initiative.⁹⁵

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4. EMERGING THEMES AND THE ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002

IN MANY WAYS the perceived irreconcilability between doctrine and the *Electronic Commerce (EC Directive) Regulations 2002* is explicable on the grounds that the issue of binding commitments has been approached from an unduly narrow perspective. Those who adopt a rule-oriented approach define online contract relations in terms of the boundaries mapped by doctrine. Those who follow this approach view contract as a regime of rules—as a regime for solving problems. The communications system is not integrated into the process by which agreements are constituted. The layer principle emphasizes the emergence of software as a means for establishing power relations in the online environment.⁹⁶ In one sense, a contract can be seen as a metaphor where law enables one party to exercise power in its relations with another. How should we now articulate the contract doctrine and its values in the light of the hypothetical case study, asking whether an agreement has been concluded and what are the terms of the agreement?

The above-mentioned regulations need to be viewed in the context of the coming of age of the institution of contract, which goes to some extent to redress the apparent imbalance in the power relations between the online retailer and the consumer. For example, the wording of the provisions—the focus of which notably is on agreements rather than on the orthodox narrative of doctrine—places great emphasis on the contents of the agreement and on the observance of procedural formalities. It should also be said that the policy informing

95. *Electronic Commerce (EC Directive) Regulations 2002*, S.I. 2002/2013, <<http://www.legislation.hmso.gov.uk/si/si2002/20022013.htm>> [*Regulations 2002*]. There are three Directives that should be taken into account when we think about binding commitments: EC, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*, [2000] O.J. L. 178/1, <http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&1g=EN&numdoc=32000L0031>; EC, *Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures*, [2000] O.J. L. 13/12, <http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&1g=EN&numdoc=31999L0093>; and EC, *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] O.J. L. 144/19, <http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&1g=EN&numdoc=31997L0007> [*Directive 97/7/EC distance contracts*]. It is beyond the scope of this paper in considering the US regulatory initiatives that attempt to clarify the core and reach of binding commitments in the online environment. See e.g. *Electronic Signatures in Global and National Commerce Act*, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified as *Contracts at 15 U.S.C. 7001*), <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ229.106.pdf>; *Uniform Electronic Transactions Act*, § 7, 5 and 3 (1999), <<http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>>; *Uniform Computer Information Transactions Act*, §§ 107, 202 & 103 (2002), <<http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>> [*UCITA*]. According to § 202 "(a) A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract." Section 103 prescribes the scope and exclusions. It is of particular interest to note that *UCITA* does incorporate into the rules the expectations and the customary norms in the computing and software industry. Further and updated information can now be found at <www.nccusl.org> and <www.ucitaonline.com>.

96. Accord Lawrence B. Solum & Minn Chung, "The Layers Principle: Internet Architecture and the Law" (2003) University of San Diego Public Law and Legal Theory Research Paper 55, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=416263>.

contractual ordering cannot be separated from the forces shaping the ideological "European experiment," which is to promote trust and reduce barriers to the free movement of information-society services between member states of the European Union.⁹⁷ The interests shaping the new online market order have characteristic economic and political overtones.⁹⁸ The elaborate process by which the regulations define an agreement also reflects the civil-law concept of "good faith" and the currency of ideas about consumer welfare. A pilot study, *E-Commerce in Europe*, illustrates the target audience of the enactment:

Confirming the need for a trustworthy environment in which to conduct e-commerce, enterprises cited the uncertainties about the conditions under which transactions take place as the main problems when using e-purchasing or as a barrier to using it.... Uncertainties concerning contracts, terms of delivery and guarantees were said to be of high or of some importance by 40% of enterprises....⁹⁹

The Electronic Commerce (EC Directive) Regulations 2002 attempt to strike a balance by focusing on two key areas of governance challenges associated with online contract formation: (i) those arising from the fact that the communications system now creates a new set of dynamics in social and economic

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97. See EC, Commission, *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market COM (1998) 586 final*, O.J. C. 30/4, <http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&1g=EN&numdoc=51998PC0586&model=guichett>. Article 9 of the Draft Directive requires Member States to make provision in their legislation in order to ensure that the legal requirements applicable to the contractual process neither prevent the effective use of electronic contracts nor lead to such contracts being deprived of legal validity because of the fact that they have been concluded electronically. See also EC, Commission, *Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a European Initiative in Electronic Commerce (COM(97) 157 final)*, [1998] O.J. C. 167/171 at 203, <http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&1g=EN&numdoc=51997DC0157&model=guichett>. See also EC, Commission, *Opinion of the Economic and Social Committee on the 'Communication from the Commission to the Council and the European Parliament on European contract law' COM/2001/398 final*, [2002] O.J. C. 241/1, <http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&1g=EN&numdoc=52001DC0398&model=guichett> for the move towards convergence of national contract laws. See generally documents at <http://europa.eu.int/information_society/topics/ebusiness/ecommerce/index_en.htm> and <http://www.dti.gov.uk/industries/ecommunications/electronic_commerce_directive_0031ec.html>. As for the history of the development of a unified regulatory framework, see documents at <http://europa.eu.int/information_society/topics/ebusiness/ecommerce/8epolicy_elaw/law_ecommerce/legal/1ecommerce/index_en.htm>.
98. See *Directive 97/7/EC distance contracts*, *supra* note 95; *The Consumer Protection (Distance Selling) Regulations 2000*, S.I. 2000/2334, <<http://www.legislation.hmso.gov.uk/si/si2000/20002334.htm>> [*Distance Selling Regulations 2000*]. (This UK regulation implements the *Directive 97/7/EC distance contracts*). The Regulations must be read alongside the obligations imposed on businesses under *Distance Selling Regulations 2000*.
99. EC, Commission, *E-Commerce in Europe: Results of the pilot surveys carried out in 2001* (Eurostat 2002) at 36, <<http://europa.eu.int/comm/enterprise/ict/studies/lr-e-comm-in-eur-2001.pdf>>.

relations; and (ii) those arising from the fact that autonomy is now defined by the design of software.¹⁰⁰

What emerges from the regulations is twofold: first, the act of constituting an agreement is kept separate from the terms binding the parties and, second, the design of the communications system provides the forum for approximating the intentions of both parties. We can examine each point in turn. For instance, it is made clear that, save where email or more traditional media are used, online electronic contracts can only be constituted in accordance with the provisions in the regulations. The jurisprudential question of whether the phrase "meeting of the minds" can be applied where one or both parties to the transaction are electronic agents is now to be regarded as only being of academic interest.¹⁰¹ The focal point is on the questions of identifying consent and its contents.¹⁰² The regulations do not prescribe a set of categories or a narrative as to what an agreement (or acceptance) entails. This is a policy prescription intent on ensuring that the regulations embody institutional flexibility and technological neutrality in the communication infrastructure.

Could the policy of "technological neutrality" be seen as undermining Lessig's "code-is-law" thesis? There is some foundation for this question. Regulation 12, for example, states that the placement of an order need not necessarily be characterized as a contractual offer. More generally, the open-ended character of the rules on contract formation may be seen as legitimating the cautionary overtones of the interpretive constituency. According to this view, substantive contract doctrine rather than code may seem to provide a *de jure* organizing framework for discourse. These assertions cannot go without comment. Intuitively, the concept "technology neutrality" implies objectivity. It is also to be regarded as a basis for emphasizing the primacy and rationality of doctrine.

This conflation of "technological neutrality" and "linearity" is to be

100. *Regulations 2002*, *supra* note 95. Regulation 2(1) provides:

'information society services'...recital 17 of the Directive as covering 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing including digital compression and storage of data, and at the individual request of a recipient of a service'...has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations..., as amended by Directive 98/48/EC of 20 July 1998....

Regulation 2(1) covers service providers utilizing commercial communications in their dealings with consumers. This is said to cover:

'commercial communication'...a communication, in any form, designed to promote, directly or indirectly, the goods, services or image of any person pursuing a commercial, industrial or craft activity or exercising a regulated profession, other than a communication—(a) consisting only of information allowing direct access to the activity of that person including a geographic address, a domain name or an electronic mail address; or (b) relating to the goods, services or image of that person provided that the communication has been prepared independently of the person making it (and for this purpose, a communication prepared without financial consideration is to be taken to have been prepared independently unless the contrary is shown).

101. That being said, there are some refinements to this view.

102. See e.g. "E-Shoppers Are Now E-Spenders" *Business Week online* (November 24, 2003), <http://www.businessweek.com/technology/content/nov2003/tc20031125_6802_tc136.htm?c=bwtechnov27&n=link1&t=email>, which suggests that retailers are going out of their way to ensure that technology is utilized to realize consumers' expectations of online transactions; Alex Salkever, "These Sites Are a Shopper's Dream" *Business Week online* (November 25, 2003), <http://www.businessweek.com/technology/content/nov2003/tc20031125_1528_tc136.htm?c=bwtechnov27&n=link3&t=email> for the way that architecture can be used to re-intermediate contracting parties.

avoided. Indeed, recourse to orthodox analogies with the post or with the instantaneous-communications rule is likely to be an encumbrance when thinking about what kind of act is sufficient to manifest assent. Of course, we still need to ask whether a retailer has fulfilled the statutory obligations imposed on him by the regulations. A fundamental objection to the idea that the policy of "technological neutrality" constrains the "code-is-law" thesis has already been addressed; the idea of technological neutrality conceals a tautology to which I have already alluded. In defining the scope and reach of the rules on online contract formation, we cannot avoid dealing with the question of why the rules on online contract formation are constructed in the way that they are. The emphasis on procedural safeguards in the process of constituting contractual relations, notwithstanding the perception of the process as being arbitrary or open-ended, is perhaps an unavoidable consequence of acknowledging the imbalance in the relations between the buyer and the seller.

More important, however, is the significance of the strategy designed to impose a list of requirements on online service providers. The regulations introduce two new ideas about online contract formation that are implicit in the "code-is-law" thesis. First, the placement of the onus on the retailer to fulfil the various obligations creates a presumption of non-agreement. The regulations assume that retailers have the means and the incentive to program design values, which ensure that there is no ambivalence surrounding the issue of assent. Second, contract relations are now seen as being fluid and as possibly involving a process that may extend the initial-communication phase.

The "code-is-law" thesis can therefore be seen as providing a heuristic for understanding the dynamics of contractual relations in the online environment. It cannot now be readily assumed that a binding commitment arises by the mere act of clicking "I Accept" since "B" can rely on Regulation 9, which provides that:

(1) Unless parties who are not consumers have agreed otherwise, where a contract is to be concluded by electronic means a service provider shall, prior to an order being placed by the recipient of a service, provide to that recipient in a clear, comprehensible and unambiguous manner the information set out in (a) to (d) below—

- (a) the different technical steps to follow to conclude the contract;
- (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- (c) the technical means for identifying and correcting input errors prior to the placing of the order; and
- (d) the languages offered for the conclusion of the contract.

(2) Unless parties who are not consumers have agreed otherwise, a service provider shall indicate which relevant codes of conduct he subscribes to and give information on how those codes can be consulted electronically.

(3) Where the service provider provides terms and conditions applicable to the contract to the recipient, the service provider shall make them available to him in a way that allows him to store and reproduce them.

(4) The requirements of paragraphs (1) and (2) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.¹⁰³

There are two possible ways of interpreting the outcome to the relations between “A” and “B” in our hypothetical case study. One way would be to ascertain whether “B” was presented with the terms and conditions in a manner that provided him with an opportunity to make an informed decision. The threshold for what constitutes an opportunity to make an informed decision has yet to be determined. The other view would be that the requirement under Regulation 9(1)(c) leads to the creation of a tiered or layered contract. The question of an act (*i.e.* clicking on the mouse) which gives rise to an agreement is treated as being separate from the *enforceability* of the terms.¹⁰⁴

The absence of case law in the UK illuminating the interpretation of the regulations is not fatal as the questions that contract-formation disputes raise have to some extent been considered in the United States and Canada.¹⁰⁵ An analogy can, for example, be drawn between the hypothetical case study and *ProCD v. Zeidenberg*.¹⁰⁶ In that case, goods were purchased by a customer and payment made at the time of the order rather than upon receipt. It was held that a binding commitment was created at the point in time that the shrink-wrapped

103. *Regulations 2002*, *supra* note 95.

104. Click-wrap contracts denote agreements placed on web pages. When filling an online agreement, consumers have to signify their assent to these terms by clicking on the mouse. See Radin, *supra* note 90. Radin describes a machine-made contract as comprising a number of variants, notably those that involve negotiations between two electronic agents, electronic enforcers and viral contracts.

105. See Phillip Johnson, “All Wrapped Up? A Review of the Enforceability of ‘Shrink-Wrap’ and ‘Click-Wrap’ Licenses in the United Kingdom and the United States” (2003) 25:2 Eur. I.P. Rev. 98-102.

106. 86 F.3d 1447, <<http://www.ca7.uscourts.gov/op3.fwx?yr=96&num=1139&Submit1=Request+Opinion>> (7th Cir. 1996) [*ProCD*].

packaging was removed from the merchandise.¹⁰⁷ The terms of the agreement were presented at the time that the goods were delivered. An agreement could not be constituted at the time that the purchase price was made since the consumer had no knowledge of the terms. Easterbrook J.'s conclusion can be seen as departing from the strictures of the narrative of offer and acceptance. His approach seems to acknowledge that technology can lead to an altering of the dynamics of power relations between the parties; manufacturers can control and define when an agreement is constituted and also the terms applicable to the relationship. It could be suggested that the recognition of the alteration of the dynamics in contractual relations and the recognition of what constitutes acceptable commercial norms and practices leads Easterbrook J. to advocate the idea of "tiered contracting": the content of the agreement is seen as being built gradually in tandem with the ongoing communications between the parties.¹⁰⁸ It is pertinent to note that in reaching this conclusion the court was approaching the issue of binding commitment through *ex post facto* rationalization. The court placed particular emphasis, for example, on the overt act of the consumer removing the shrink-wrap as evidence of assent and deemed this to be the opportunity to review the terms of the licence.¹⁰⁹ The opportunity, whether it was taken or not, was deemed to constitute the legal relations.¹¹⁰

What this approach seems to suggest is that, whilst formalism has a particular value, the court—at least in this case—was prepared to accommodate the technological dimensions in the contract-formation process. This approach would seem to be very much in line with the balance that the regulations attempt to strike between consumer welfare and the role of software in structuring relations. For instance, prior to an order being placed by the consumer, information regarding the process of constituting the legal relations is to be provided in a clear, comprehensible and unambiguous manner. "A" is therefore required to provide information enabling "B" to identify and correct any input errors. The omission of any provision enabling "A" to rewrite the agreement in view of its

107. *Ibid.* See also *Hill v. Gateway 2000*, 105 F.3d 1147, <<http://www.ca7.uscourts.gov/op3.fwx?yr=96&num=3294&Submit1=Request+Opinion>> (7th Cir. 1997) [*Gateway 2000* cited to F.3d]; *Klocek v. Gateway, Inc.*, 104 F.Supp. 2d 1332, <<http://www.ksd.uscourts.gov/opinions/992499-36.html>> (D. Kan. 2000) [*Klocek* cited to F.Supp.].

108. Compare *Step-Saver Data Systems v. Wyse Technology*, 939 F. 2d 91 (3rd Cir. 1991); *US Surgical Corp. v. Orris, Inc.*, 5 F.Supp. 2d 1201 (D. Kan. 1998); *Arizona Retail Systems v. Software Link*, 831 F.Supp. 759 (Dist. Ct. Ariz. 1993).

109. See Johnson, *supra* note 105 at 110.

110. See *UCITA*, *supra* note 95 at 59, 64, s. 112(a): "A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it: (1) authenticates the record or term with intent to adopt or accept it; or (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term." Section 113: (a) "A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review"; (b) "An electronic agent has an opportunity to review a record or term only if it is made available in a manner that would enable a reasonably configured electronic agent to react to the record or term"; (c) "If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record. However a right to a return is not required if: (1) the record proposes a modification of contract or provides particulars of performance under Section 305; or (2) the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass market transaction, and the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began."

own errors could be construed as being determinative of the parties' rights and expectations. Regulation 9(3) stipulates that, where a service provider provides terms and conditions applicable to the contract to the recipient, the service provider shall make them available to him in a way that allows him to store and reproduce them. As previously noted, it is not entirely clear what the standard of review is with regard to the issue of "informed decision making."

In *Specht v. Netscape Communications Corp.*, it was observed by the court that the act of downloading browser software did not bind the user to an arbitration clause in the licensing agreement.¹¹¹ This begs the question of what would constitute *affirmative* assent. Consent, in the *Specht* situation, implies an additional signification of agreement. The court seems to be acknowledging that the architecture of code and the power to control the process of agreement formation were matters with which consumers could not reasonably be expected to be familiar. As the Court of Appeal stated:

[A] reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendant's [Netscape's] invitation to download the free software.¹¹²

In *Specht*, the "act" failed to attain the status of an "unambiguous manifestation of assent" because "[a]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious."¹¹³

This approach can be contrasted with the ruling in the Canadian case of *Rudder v. Microsoft Corporation* where it was held that the forum-selection clause in the click-wrap contract was enforceable against the plaintiffs.¹¹⁴ The plaintiffs were seeking to avoid the jurisdiction clause by pointing to the format of the click-wrap contract, which made genuine agreement elusive; in short, the plaintiffs characterized the forum-selection clause as being fine print. Ironically, whilst seeking to strike out the forum-selection clause, the plaintiffs were content

111. 150 F.Supp. 2d 585 (Dist. Ct. S.D.N.Y. 2001) [*Specht*]. See also *Pollstar v. Gigmania Ltd.*, 170 F.Supp. 2d 974 (Dist. Ct. E.D. Cal. 2000) [*Pollstar*].

112. *Specht*, *supra* note 111 at p. 585.

113. *Ibid.*

114. (1999), 47 C.C.L.T. (2d) 168, (1999), 2 C.P.R. (4th) 474 (Ont. Sup. Ct.) [*Rudder* cited to C.C.L.T./C.P.R.]. The relevant clause in the Member Agreement was as follows: "15.1 This Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County, Washington, in all disputes arising out of or relating to your use of MSN or your MSN membership." The plaintiff, contrary to the terms of the agreement, instituted legal proceedings against Microsoft for breach of contract in Ontario.

to accept the terms in the agreement that were favourable to their breach-of-contract litigation.¹¹⁵

The ruling in *Kanitz v. Rogers Cable Inc.* illustrates the ease with which method and process can be integrated into the way that courts reason about binding commitments.¹¹⁶ The court in that case rejected the plaintiffs' claim that they had not agreed to the terms of the contract that enabled the defendants to effectively create a "rolling contract" that would be updated through the triggering of specified notification procedures. After reviewing the process by which the contractual relations were structured, the court made the following observations:

115. *Ibid.* at paras. 13–17. In particular note the "clean-hands" rule being employed here. "Rudder admitted in cross-examination on his affidavit that the entire agreement was readily viewable by using the scrolling function on the portion of the computer screen where the Membership Agreement was presented. Moreover, Rudder acknowledged that he 'scanned' through part of the Agreement looking for 'costs' that would be charged by MSN. He further admitted that once he had found the provisions relating to costs, he did not read the rest of the Agreement. An excerpt from the transcript of Rudder's cross-examination is illustrative:

Q. 314. I will now take you down to another section. I am now looking at heading 15, which is entitled 'General,' and immediately underneath that is subsection 15. 1. Now, do I take it, when you were scanning, you would have actually scanned past this, and you would have at least seen there was a heading that said 'General?' Is that fair? Or did you not even scan all the way through?

A. I did not go all the way down, I can honestly say. Once I found out what it would cost me, that is where I would stop..."

"On cross-examination, Rudder admitted to having seen the screen containing the notice. In order to replicate the conditions, portions of the cross-examination were conducted while Rudder was being led through an actual sign-up process including the online connection portion. While online, and after having been shown the notice posted above, Rudder responded to questioning as follows:

Q. 372. All right. You see immediately below the printing that we have just read, a rectangular box that says, 'MSN Premier Membership Rules?'

A. Yes..."

"It is plain and obvious that there is no factual foundation for the plaintiffs' assertion that any term of the Membership Agreement was analogous to 'fine print' in a written contract. What is equally clear is that the plaintiffs seek to avoid the consequences of specific terms of their agreement while at the same time seeking to have others enforced. Neither the form of this contract nor its manner of presentation to potential members are [sic] so aberrant as to lead to such an anomalous result. To give effect to the plaintiffs' argument would, rather than advancing the goal of 'commercial certainty,' to adopt the words of Huddart J.A. in *Sarabia*, move this type of electronic transaction into the realm of commercial absurdity. It would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium. On the present facts, the Membership Agreement must be afforded the sanctity that must be given to any agreement in writing. The position of selectivity advanced by the plaintiffs runs contrary to this stated approach, both in principle and on the evidence, and must be rejected. Moreover, given that both of the representative plaintiffs are graduates of law schools and have a professed familiarity with Internet services, their position is particularly indefensible."

116. (2002), 58 O.R. (3d) 299, (2002), 16 C.P.C. (5th) 84 at para. 7 (Ont. Sup. Ct.) [*Kanitz* cited to O.R./C.P.C.]. The subscription service provided by Rogers@Home included a clause that provided for unilateral amendments to the user agreement. The amendments were to be contractually binding on notification: "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." It remains to be seen whether the use of the terms in *Kanitz* passes the "welfare-threshold" provisions in the EU consumer-protection enactments.

The issue is whether there was notice given of the amendments as contemplated by the terms of the user agreement. I believe that there was. 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.¹¹⁷

No matter how hard we try to think that architecture assumes a nominal role, the court seems to be reaching for a compromise in ensuring that the responsibilities are distributed in an even-handed manner. The theme of reasonableness is used to mediate the power relations:

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. The effect of the terms of the amending provision in the user agreement, in my view, is to place an obligation on the customer, who is interested in any amendments that the defendant may choose to make to the user agreement, to check the web site from time to time to determine if such amendments have been made. Further, in order to check for such changes, I do not accept that the customer can reasonably assert that all he or she should have to do is simply go to the main screen of the defendant's web site and expect to find a notice regarding any such amendments. The defendant is a large company with many different interests, all of which are represented on its web site. Cable Internet access customers, who are the only customers who we are concerned with here, can reasonably be required to visit that portion of the web site dealing with the Internet access aspect of the defendant's business to find such a notice. Such a customer can also be reasonably required, once at the Internet access portion of the web site, to have to go to that portion of that site where the defendant's policies and agreements are maintained to find any such notice. One would not expect to look for such a notice in those portions of the web site dealing with other matters, such as "View and Pay Bills" or "Price Comparison" or "Store Locator" or any of the other different portions of the web site.¹¹⁸

This is an important clarification. More significantly, it also reflects the extent to which the benchmarks for what constitutes a binding commitment will depend on evidence of established commercial practices and consumer familiar-

117. *Ibid.* at paras. 22–23.

118. *Ibid.* at paras. 23–24.

ity with the online technology:

The evidence establishes that had any of the plaintiffs taken the time to go to the Customer Support section of the Internet access portion of the defendant's web site, they would have seen a notice that the user agreement had been amended. Further, if they had ever reviewed the user agreement on the web site, they would have also known of the fact that the defendant posts the last change date for the user agreement and they could have easily determined therefrom whether any further changes had been made to the user agreement since the date they last checked for any amendments. In either way, they would receive notice of any changes made. While the plaintiffs make much of the fact that the defendant could have, but did not, send e-mail notifications to customers of the amendments to the user agreement, the fact is that e-mail notification is a separate mode of communication authorized by the amending provision. As long as the defendant uses one authorized method, it cannot be faulted for not having used another. I conclude, therefore, that the defendant did give notice of the amendments as required by the user agreement. The evidence also establishes that each of the plaintiffs continued to use the defendant's service subsequent to the posting of the notice and the amended user agreement. Under the terms of the user agreement, therefore, they were each deemed to have accepted the amendments.¹¹⁹

The issue of whether a binding commitment has been concluded will continue to exercise the minds of the judiciary and policy-makers as online consumer-purchasing activity becomes pervasive. It would be churlish to regard the approach adopted by the Canadian court in *Kanitz* as one that is likely to become the norm. In *America Online, Inc. v. Booker*, it was held that an agreement with an Internet Service Provider was valid.¹²⁰ The court reasoned that the choice-of-forum clause was not unconscionable or unreasonable. In *Caspi v. Microsoft Network*, the inclusion of icons to enable a user to signify his assent or disagreement was regarded by the court as being sufficient to hold that the click-through agreement was valid.¹²¹ In *Specht*, an arbitration clause was deemed not to have been enforceable because it was not apparent from the website whether assent was required.¹²² Finally, in *Ticketmaster Corp. v. Tickets.Com Inc.*, it was observed that terms governing the use of the website (i.e. deep linking, copying) were not binding on the user.¹²³ The absence of any button requiring the user to signify his assent was regarded as being fatal.

The only conclusion that seems permissible at this relatively early phase of the internet's emergence as a viable market of commerce is that the questions of binding commitment will boil down to a policy question of whether the law should

119. *Ibid.* at paras. 25–26.

120. 781 So. 2d 423 (3 Dist. Ct. App. Fla. 2001) [*Booker*]. See also *America Online v. Superior Court*, 108 Cal. Rptr. 2d 699 (1 Dist. Ct. App. 2001) [*America Online*].

121. 732 A.2d 528, <<http://lawlibrary.rutgers.edu/courts/appellate/a2182-97.opn.html>> (N.J. Sup. Ct. A.D. 1999) [*Caspi* cited to A.2d.]. The users were presented with two boxes—"I Agree" and "I Don't Agree"—and these were placed alongside the terms of the agreement, which users could scroll through with the mouse. See also *Compuserve v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) [*Compuserve*].

122. *Supra* note 111.

123. 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. 2000) [*Ticketmaster*].

now use as a benchmark the innocent-but-unsavvy internet surfer or the informed-and-calculating internet surfer intending to benefit at another's expense.¹²⁴

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5. CONCLUSION: WHITHER THE PARADOX?

AT FIRST BLUSH, commentators faced with issues of online contract formation intuitively turn to the traditional narrative of contract law. The characterization of technology in terms of method leads to an overemphasis on the universal reach of contract principles. The paper advocates in favour of three arguments in defending the thesis that governance challenges in the online environment cannot be viewed purely in terms of contract narratives. The first argument is that contract rules provide a preliminary but not exhaustive account. Rule-application analysis, I suggest, cannot be conflated with the prior but overlooked question of the core and reach of binding commitments.

The second argument is that technology is mischaracterized as method. A corollary to this argument is that consent is process. The methods of communication and computer software pose important conceptual questions about the nature of a binding commitment. Should this be overlooked, the ideals and values we associate with the law of contract may be compromised by code. This oversight will have clear implications for the way that we attempt to evaluate the *Electronic Commerce (EC Directive) Regulations 2002* in terms of their ability to protect the values embedded in contract law. As businesses and individuals become reliant on the new methods of data processing and transmission it is contended that governance structures and relationships cannot remain unaffected. Indeed, to insist on the artificial distinction of method and process merely delays the integration of the technological challenges into a coherent theoretical framework. The continued reluctance to confront the challenges posed by technology may not be an option because policy-makers have already recognized the need to accommodate this new phenomenon in the context of binding commitments. This is the paradox of online contracting.

The third argument is that we can reconcile the above-mentioned regulations with the ideals of contract law. Its provisions recognize the imbalance in the power relations that the design values of the technological infrastructure create and potentially embody. The history of consent and of the various exceptions to its requirement tell us that contract law, whilst aspiring to the ideals, has always been concerned with the realities. The danger in not recognizing this is that it distracts us from recognizing that the architecture of the internet raises

124. See *Distance Selling Regulations 2000*, *supra* note 98. Regulation 11(2) attempts to clarify the status of the postal rule with regard to online contracts: (a) "the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them; and (b) the acknowledgement of receipt may take the form of the provision of the service paid for where that service is an information society service." It may be that inactivity on the part of the consumer, which brings him outside the cooling-off period of the *Distance Selling Regulations 2000*, may be seen as a cut-off period. The importance placed by Parliament on the obligations being taken seriously and on consumers not being deceived is underscored by regulation 13. This provision states unequivocally that "[t]he duties imposed by regulations 6, 7, 8, 9(1) and 11(1)(a) shall be enforceable, at the suit of any recipient of a service, by an action against the service provider for damages for breach of statutory duty."

some serious questions about contract formation where the absence of consent may have far-reaching consequences for consumers and for their trust in this medium for forming contracts. It is hoped that this paper provides sufficient justification for undertaking a serious debate about the way that consent ought to be conceptualized in cyberspace.