Click-Wrap and Web-Wrap Agreements

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Introduction

The Internet has brought about permanent and fundamental changes to international commerce. The principles of contract law are old — they were formed in a world of paper and ink. The meeting of minds in cyberspace was never envisaged, and the validity and effect of the use of electronic messages in commercial communications were never contemplated. So the advent of the use of electronic communications for commercial transactions posed unexpected and complex legal problems.

Traders and consumers in the new digital economy sought legal certainty.[1] The digital economy has become a vehicle for tremendous economic growth.[2] A growing variety of goods and services may be ordered through the Internet or e-mail, and the conclusion of e-contracts has become commonplace. But the law applicable to e-commerce is in many respects uncertain. These uncertainties largely flow from the shift from paper to electronic trading, and the practical steps involved in negotiating a contract.[3]

Economic powerhouses, like the United States,[4] Canada,[5] Australia,[6] and the European Union[7] have adopted legislation for e-commerce. The South African

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[1] The specific conflict rules concerning online consumer contracts and other requirements for transacting online with consumers are not considered here. For a discussion of these issues, see, generally, Nick Graham 'Spam & Cookies' 2003 15 8 *Compliance Monitor* 15, Susan Singleton 'In Focus — New e-Commerce Regulations' 25 11(9) *Consumer Law Today* 19, Graham Smith & Alex Hand 'Implementing the e Commerce Directive' 2002 *NLJ* 152 7053, Mark Turner & Mary Traynor 'e Commerce — Better Late than Never' (2002) 10 9(19) *ITLT* 10, Simone van der Hof 'European Conflict Rules Concerning International Online Consumer Contracts' (2003) 12 *Information & Communication Technology Law* 165. See also the (Rome) Convention on the Law Applicable to Contractual Obligations (80/934/EEC) *Official Journal* L 266, 9 October 1980, and the Directive 97/7/EC of the European Parliament and of the Council 20 May 1997 on the protection of consumers in respect of distance contracts on distant selling *Official Journal* L 144/19, 4 June 1997.

[2] See Olivier Hance & Susan Dionne Balz *Business and Law on the Internet* (1996) 39.

[3] See Benjamin Wright *The Law of Electronic Commerce EDI, Fax and e-Mail: Technology, Proof, and Liability* (1991) 235. See also Toh Kiat *Paperless International Trade: Law of Telematic Data Interchange* (1992) 10–11, and 161–193.

[4] Uniform Electronic Transactions Act ('UETA') adopted by the National Conference of Commissioners on Uniform State Law at its annual meeting in Denver, Colorado, 23–30 July 1999.

[5] Uniform Electronic Commerce Act 1999 ('UECA'), accessible at *<http://www.law.ualberta.ca/alri/ulc/acts/eUECA.htm>*.

[6] Electronic Transactions Act 1999 ('ETA').

[7] See Directive 2000/31/EC L178 of the European Parliament and Council of the 8th of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, accessible at *<http://europa.eu.int/comm/internal_market/en/media/eleccomm/com31en.pdf>* (the 'e-Commerce Directive'), the Electronic Commerce (EC Directive) Regulations 2002 (Statutory Instrument 2002/2013). The e Commerce Directive was adopted in the United Kingdom in August 2002 see Graham op cit note 1 at 15, Tim Kevan & Paul McGrath *e Mail, the Internet and the Law: Essential Knowledge for Safer Surfing* (2001) 209–214, Smith & Hand op cit note 1 at 152 7053, Turner & Traynor op cit note 1 at 11. For a critical discussion, see Christina Hultmark Ramberg 'The e-Commerce Directive and Formation of Contract in a Comparative Perspective' (2001) 26 *European LR* 429 at 431. See also Christopher T Poggi 'Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation' (2000) 41 *Virginia J of International Law* 224 at 272 and 270.

Electronic Communications and Transactions Act[8] came into force on 30 August 2002.[9] The overall objective of the Act is to enable and facilitate electronic transactions, and to create public confidence in electronic transacting.[10] The Act contains minimalist enabling provisions on contract formation. It seeks to remove legal barriers to e-commerce in South Africa by providing for functional equivalent rules for electronic contracting.

Shrink-Wrap and Click-Wrap Agreements

The law has evolved certain principles concerning the so-called ticket cases to dispense with the requirement of obtaining signatures to signify assent. These contracts are by nature contracts of adhesion[11] — the possibility of negotiation is excluded; one simply declares one's acceptance or goes without.[12] This type of contract is today used broadly in almost all economic activities, from insurance policies to banking, consumer finance, and notably the licensing of software.

A shrink-wrap agreement is an example of a contract of adhesion. It is simply a printed standard-form agreement that is placed on or printed on top of the package containing the computer program to be marketed. It is encased in a cellophane wrapper — shrink-wrapped. Other terms used for this type of agreement are 'box-top', 'tear-me-open', or 'blister-pack' agreements.[13] The shrink-wrap agreement comes into effect when consumers break open the plastic shrink-wrap or install the software on their computers — by doing so they assent to the licence terms.

A concept similar to the shrink-wrap agreement is the click-wrap agreement that has been developed for e-commerce. In this case, a screen on a commercial web site will display the terms and conditions of a contract. If the customer wants to contract with the supplier through this 'electronic shop', she will be instructed to click on certain icons to indicate her acceptance of the contract terms.[14]

[8] Act 25 of 2002 ('ECTA').

[9] Proc R68 *GG* 23809 of 30 August 2002 (*Reg Gaz* 7449).

[10] See section 2(1)(c)–(f), (i)–(o) of the ECTA.

[11] See Andrew Burgess 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and Suggestion' (1986) 15 *Anglo American LR* 255, Todd D Rakoff 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard LR* 1174.

[12] See Ellison Kahn et al *Contract and Mercantile Law: A Source Book* vol 1 *General Principles of Contract, Agency and Representation* 2 ed by Ellison Kahn, Carole Lewis & Coenraad Visser (1988) 33.

[13] See Graham P Smith '"Tear-open Licences" — Are they Enforceable in England?' (1986) 2 *Computer Law and Practice* 128 at 129, Richard H Stern 'Shrink Wrap Licences of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?' (1985) 11 *Rutgers Computer & Technology LJ* 51. See also Simon Chalton 'Software Licensing: Implications of the Copyright, Designs and Patents Act' (1989–1990) 1 *Computer Law and Security Report* 7. David Einhorn 'The Enforceability of "Tear-me-open" Software Licence Agreements' (1985) 67 *J of the Patent and Trademark Office Society* 507, Michael J McNiel 'Trade Secret Protection for Mass Market Computer Software: Old Solutions for New Problems' (1987) 51 *Albany LR* 293, Christopher J Millard 'Software Licensing' (1987) 4 *Computer Law and Security Report* 8. Richard B Potter 'Copyright Law and Shrink-wrap Licence Terms' (1990 91) 3 *Computer Law and Security Report* 27, Michael Schwartz 'Tear-me-open Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion' (1986) 7 *Computer LJ* 261.

[14] See Gail Evans 'Opportunity Costs of Globalizing Information Licences: Embedding Consumer Rights Within a Legislative Framework for Information Contracts', paper presented at the Seventh Annual Conference on International Intellectual Property Law and Policy, 8–9 April 1999, New York.

Davies[15] notes that the seller may need to keep electronic audits to show that the buyer actually agreed to the terms of the contract by clicking on certain icons. Unlike shrink-wrap agreements where the contract terms are unread until the customer 'un-wraps' the software, with click-wrap agreements the customer is aware of the contract terms before she commits herself to the contact.[16]

Web-Wrap Agreements

The same principles that apply to click-wrap agreements apply to web-wrap agreements. The difference with a web-wrap agreement is that a party is not required to perform a positive act, such as clicking on an icon for the acceptance of the offer. A web-wrap agreement refers to online terms that are displayed, directly or by hyperlink. The web-wrap agreement is simply presented as terms and conditions that the user browses while she visits a web site.

Taking its name, somewhat misleadingly, from shrink-wrap licenses, a web-wrap agreement is a collection of terms presented electronically via the Internet by the vendor of goods or services to the other contracting party at some point during the contractual process. The buyer must signify her assent to the terms before she proceeds with the next step in the online 'process' established by the vendor.

The procedural aspects of web-wrap agreements are variations of click-wrap procedures. The main difference is the probative value of having a customer click through a click-wrap agreement. It is certain that where a user of a web-site indicates acceptance of online terms through a positive act such as clicking on an icon, actual assent is established. But it remains uncertain whether a web-wrap agreement is enforceable on the basis of quasi-mutual assent established through browsing or continued use. Although both acts have been held to found legal obligations, some still have reservations about the enforceability of web-wrap agreements.

Dunn[17] argues that it is obvious that web-wrap agreements are, unlike click-wrap agreements, not a response to the commercial practicality involved in selling pre-packaged software subject to an enforceable licence. They are simply electronically created contracts taking their name from the computer protocol used to communicate — the World Wide Web protocol.[18]

[15] See Clive Davies 'Electronic Commerce — Practical Implications of Internet Legislation' (1998) 3/3 *Communications Law* 82 at 84.

[16] § Ibid. See also Pamela Samuelson *A Case Study on Computer Programs: Global Dimensions of Intellectual Property Rights in Science and Technology* (1993) 284–285, Paula Samuelson 'Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy', paper presented at the Seventh Annual Conference on International Intellectual Property Law & Policy, 8–9 April 1999, New York.

[17] Gary Dunn 'On-Line Contract Formation — Contracting Issues for Businesses on the Net' (2001), accessible at *<http://www.dunn.com/papers/paper_14.shtml>*.

[18] Idem at 10. He argues that web-wrap agreements differ fundamentally from click-wrap agreements. Although they share a mechanism, conceptually they are not the same. Unlike a click-wrap agreement, the terms of a web-wrap agreement are agreed to during the contracting process, not after the goods or services are paid for (which typically corresponds to the last moment the contract could have come into existence). The logic of this argument is lost, as the value of a click-wrap agreement lies in the fact that a customer must indicate her assent before she concludes the contract.

Electronic Acceptance: Clicking and Browsing

The traditional model of offer and acceptance may readily be applied to e-contracting. An electronic contract may, for example, be formed by offer and acceptance through e-mail communication, or an offer may be made on a commercial web site that is accepted by clicking on an icon.[19] Section 22(1) of the ECTA states that an agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.

Section 24 of the Act provides for the valid expression of the offer and acceptance segments of contract formation. Validity is also provided for unilateral 'statements' by means of data messages.[20] This principle of functional equivalency is echoed in section 7*(b)* of the UETA, which states that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.[21]

In Canada, the UECA provides for electronic agents to conclude contracts for and on behalf of human actors.[22] These provisions are consonant with the ECTA, which similarly provides for the validity of an 'automated transaction'.[23] (An automated transaction is an electronic transaction performed or conducted by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person.[24] The critical element in this definition is the lack of a human actor on one or both sides of an electronic transaction.[25])

Also, article 11 of the e-Commerce Directive refers expressly to electronic contracts where the customer has to indicate her assent by 'clicking on an icon' — click-wrap agreements.[26] The UECA expressly recognizes click-wrap agreements. It provides that an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed by means of an electronic document, or by an action in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen, or otherwise communicating electronically in a manner that is intended to express the offer, acceptance, or other matter.[27]

Enforceability: the Courts' Views

Courts in the United States have ruled on the enforceability of shrink-wrap and web-wrap agreements on the basis of the facts of each case. Generally, the

[19] See, most recently, *MV Navigator (No 1) Wellness International Network v MV Navigator & another* 2004 (5) SA 10 (C).

[20] Section 24(1) of the ECTA.

[21] Likewise s 20(2) of the UECA. Section 8(1) of the ETA states that a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

[22] Vincent Gautrais ('The Colour of e-Consent' (2003–2004) 1 *Univ of Ottawa Technology LJ* 189 at 200) discusses e-assent and the demonstration of will.

[23] Section 20 of the ECTA.

[24] Section 1 of the ECTA.

[25] See Poggi op cit note 7 at 270 and 272. He notes that the European Union did not provide for the formation of contacts by means of electronic agents.

[26] See Samuelson op cit note 16 (paper) at 16.

[27] Section 20(1)(a)–(b) of the UECA.

courts are cautious to uphold the validity of such agreements. With web-wrap agreements there is always the argument that the user 'did not know' of the existence of the alleged online terms. It is then up to the party seeking to rely on them to prove that the requirements of the 'ticket cases' have been met.[28]

In *Ticketmaster Corporation v Tickets.com Inc*,[29] it was held that the defendant was not bound by the terms displayed on the web site. The terms restricted the use of the web site, and prohibited deep linking and copying for commercial purposes. These terms were displayed at the bottom of the homepage. Visitors to the web site could find the terms only by scrolling past the instructions, past the directory of the Ticketmaster event pages and the hyperlinks provided on the web site. One of the terms stated that anyone who went beyond the home page were presumed to have agreed to the terms and conditions displayed on the web site. The defendant was not required to manifest intent. The web site did not display any 'I agree' button or icon, or any other indication of assent that could be used by website users. The defendant could go directly to the linked page without viewing the terms and conditions. Also, the defendant could link to other pages without viewing those terms.[30] The court held that the defendant had not assented to the terms and conditions.[31]

In *Williams v America Online Inc*,[32] the defendant's assent to a forum selection clause was in issue. The court held that the defendant did not assent to the terms and conditions, including the contested clause.[33] The court held that the terms were accessible only by twice overriding the default choice of the 'I Agree' icon. The court concluded that AOL had built in a compelling incentive for the defendant to assent without reading the terms.[34]

In *Pollstar v Gigamania Ltd*,[35] the terms and conditions were so inconspicuous that the court held that the defendant had not assented to them. The court expressed concern about the enforceability of the browse-wrap license — '... many visitors to the site may not be aware of the license agreement [as] notice of the license agreement is provided in a hyperlink by small gray text on a gray background'.[36]

In *Specht v Netscape Communications Corporation*,[37] the defendant had downloaded software from a site. The question was whether he was bound by

[28] See Christina L Kunz et al 'Click Through Agreements: Strategies for Avoiding Disputes on Validity of Assent' (2001) 57 *Business Lawyer* 401. Christina L Kunz et al 'Browse-Wrap Agreements Validity of Implied Assent in Electronic Form' (2003) 59 *Business Lawyer* 279 See also the guidelines of the American Bar Association Working Group on Electronic Contracting Practices, of the Electronic Commerce Sub committee of the Cyberspace Law Committee of the Business Law Section of the ABA, as reported by Anandashankar Mazumdar 'ABA Group Participants Formulating Guidelines for Browsewrap Contract Terms' April 2003 *Electronic Communication & Law Report (BNA)* 387, accessible at <*http://ippubs.bna.com/ip/BNA/EIP.NSF/c776264947 9f833085256b57005afd29/ba6066afa*>.

[29] No CV 99-7654, 2000 WL 525390 (CD Cal 27 March 2000)

[30] At 3

[31] At 5

[32] No 00-0962, 2001 WL 135825 (Mass Super Ct 8 February 2001)

[33] At 2–3

[34] At 3

[35] No CIV-F-00 5671 RCC, 2000 WL 33266437 (ED Cal 17 October 2000)

[36] At 6

[37] 150 F Supp 2d 585 (SDNY 2001)

the terms of the licence agreement. He was able to download the software by clicking on the 'download button' without manifesting assent to the license terms. The court held that the defendant was not bound to the software licence agreement.[38] After the software had been downloaded, a screen appeared with the following wording: 'Please review and agree to the terms of the "Netscape SmartDownload software license agreement" before downloading and using the software.'[39] The court held that this statement was a mere invitation, not an offer. As the defendant had already downloaded the software it was not a condition to downloading or using the software.[40] The court concluded that as the defendant was not required to assent to the licence before downloading the software, and as the he did not assent to the licence terms before he downloaded the software, the licence did not bind him.[41]

No Canadian court has ruled specifically on the enforceability of click-wrap agreements, although *Rudder v Microsoft*[42] suggests that they are enforceable.[43] In this case, a forum selection clause in a click-through contract was expressly held to be valid where a sign-up procedure required the user to accept contract terms each time they appeared on the computer screen. Other factors that led the court to favour upholding the licence was that the entire agreement could be viewed by scrolling down the screen, and that the contract terms were in clear print.[44] It has been said that current Canadian law suggests that click-wrap agreements are enforceable only if the contract terms are available to both parties prior to their entering into the agreement. Of course, the agreement could also contemplate that it was subject to other conditions that would be available later.[45]

Incorporation by Reference

Although the validity of click-wrap agreements has not yet been tested in South Africa, they were thought to be enforceable before express recognition was conferred by the ECTA.[46] As I have indicated, section 24(2) states that an expression of intent or other statement can validly be made in the form of a data message, and that an expression of intent or other statement can validly be made through means other than an electronic signature.[47]

An innovation in the ECTA is section 11(2), which deals with incorporation by reference. It states that information has full legal force and effect even

[38] At 596

[39] Ibid

[40] At 595–596

[41] At 596

[42] CPR (4th) 474 (1999), 732 A 2d 528 (NJ Super Ct App Div 1999)

[43] See also Dunn op cit note 17 at 7–8

[44] *Rudder v Microsoft Network* supra note 42 at 533

[45] See Dunn op cit note 17 at 9

[46] For a discussion of the position in South Africa prior to the enactment of the ECTA, see Tana Pistorius 'The Rights of the User of a Computer Program and the Legality of "Shrink-Wrap" Licences' (1991) 3 *SA Merc LJ* 57, Tana Pistorius 'The Enforceability of Shrink-Wrap Agreements in South Africa' (1993) 5 *SA Merc LJ* 1

[47] See also s 13(5) of the ECTA

though it is only referred to in a data message, but is not actually part of such message. For example, a message may have embedded in it uniform resource locators (URLs) that direct the reader to the target document. These URLs can provide 'hypertext links' that allow the user to use a pointing device (like a mouse) to select a key word associated with an URL. The target text is then displayed. Such text can be regarded as part and parcel of the data message.

But such incorporation is valid only if the reference is such that a reasonable person would have noticed it, and if it is accessible to the buyer in a form that is readable, retrievable, and capable of being stored. In evaluating the accessibility of the target text, factors to be considered include the availability of the linked information,[48] data integrity,[49] and the extent to which those terms are subject to later amendment.[50]

This begs the question — what constitutes reasonably sufficient notice? The courts apply an objective test based on reasonableness. Note that the nature of the document itself is material to the principles that apply to ticket cases. The document itself should be sufficient to gain the attention of a reasonable customer. So a notice with a hyperlink to online terms should be visible and the online terms readily available through such hyperlink. These principles were recently applied by the Supreme Court of Appeal in *Durban's Water Wonderland (Pty) Ltd v Botha & another*.[51]

Section 11(2) is intended to remove the prevailing uncertainty about whether click-wrap and web-wrap agreements are enforceable on the basis of actual or quasi-mutual assent. There is an important distinction, though, between South African law and foreign case law relating to browse-wrap agreements. From the cases I have discussed, it is clear that the courts often find that a positive act, such as clicking on an icon, is necessary to indicate acceptance of an offer. As incorporation by reference enjoys explicit recognition in terms of South African law, it is not necessary for the user to perform any action, such as clicking on an icon, to regard information as incorporated into the data message itself.[52] An unsigned document that contains contractual provisions cannot by itself constitute proof that the parties agreed to those terms.[53] But where the alleged terms have been displayed prominently and the reference meets the requirements of section 11(2), the information will be regarded as part and parcel of the web page.

When will the referenced text be regarded to be in a form sufficiently clear and distinctive so as to enable a reasonable person to notice it? When will such incorporated information be deemed to have been incorporated in a form that is readable, retrievable, and capable of being stored? What other factors may

[48] Such as the hours of operation of the repository, and ease of access.
[49] Such as the verification of the content, the authentication of the sender, and the mechanism for correcting communication errors.
[50] Such as notice of updates, and notice of the amendment policy.
[51] 1999 (1) SA 982 (SCA).
[52] *Ticketmaster Corporation v Tickets.com Inc* supra note 29 at 5.
[53] See Schalk van der Merwe, LF van Huysteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 2 ed (2003).

point to the full force and legal effect of such incorporation? These questions may be answered by referring to how, where, and when terms to be incorporated should be displayed.

In the first instance, how should these terms be displayed? Or when will they be displayed in such a manner that a reasonable person will notice them? When will they be deemed to be readable? The terms should be displayed in a manner that catches the eye. Grey hyperlinked text on a grey background is not good enough.[54] The font of the URL to the linked information should at least be as big as the font of the other text on the page. I believe that it should be displayed in a bright colour to make it more noticeable. If the URL is displayed in a manner that makes it clear and distinctive, it will catch the eye of a reasonable person. If the font size and colour are acceptable, the text will be deemed to be readable.[55] Ease of use is also important. For example, where the terms and conditions are accessible only after double-clicking on 'accept' buttons, they will not be deemed to have been displayed in such a manner that the reasonable person will notice them.[56]

The last 'how-to-link' requirement relates to the fact that it must be in a form and format that will enable the user to store and retrieve the information electronically. For example, terms and conditions displayed in a 'pdf format' which can be viewed and printed but not saved will not meet this requirement. A fleeting display of terms and conditions will, for these same reasons, not be deemed to have been incorporated.

Secondly, where should the URL be displayed? I believe that the link to these terms should be displayed where a reasonable person will expect notices of the kind to be placed. This implies that the URL should not be displayed at the very bottom of the home page or be buried on another page, but should be displayed prominently and on the first page.[57] Links to all relevant terms and conditions should be placed prominently on the same page where, for example, a form is filled in to purchase or order an item. Also, the enforceability of the incorporation will be enhanced where all the terms are displayed in one screen.[58]

Thirdly, when should the terms be made available to ensure their enforceability? The terms should be made available the moment the web site is accessed and at least before any action, such as the downloading of software, takes place. Where the terms are made available after use or after the performance of an action, such terms cannot be presumed to have been assented to if they were not visible or accessible prior to such use or performance.[59]

[54] See *Pollstar v Gigamania Ltd* supra note 35 at 6.
[55] See *Rudder v Microsoft Network* supra note 42 at 533.
[56] *Williams v AOL* supra note 32 at 3.
[57] *Ticketmaster Corporation v Tickets.com Inc* supra note 29 at 5.
[58] See *Rudder v Microsoft Network* supra note 42 at 533.
[59] *Specht v Netscape Communications* supra note 37 at 596.

Conclusion

The provisions of the ECTA on incorporation by reference give guidelines to the proper construction of browse-wrap agreements. Is it preferable to have a click-wrap agreement rather than a web-wrap agreement? The main difference is the probative value of having a click-wrap agreement. Although both forms are legally enforceable, with web-wrap agreements there is always the argument to be made by a user that she 'did not know' of the existence of the alleged online terms. It is then up to the party seeking to enforce the terms and conditions to prove that the requirements of the 'ticket cases' have been met.

VAT in the European Union and Electronically Supplied Services to Final Consumers

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1 Background

The European Union's (EU) basic but non-definitive model for indirect taxation (such as Value-Added Tax (VAT)) is commonly called the Sixth VAT Directive.[1] When the Sixth Directive was put in place, it was unheard of that products could be delivered electronically. It provided that in the EU, the supply of services would, generally, take place in the state in which the supplier has established his business, has a fixed establishment from which to service his supply, or has a permanent address where he usually resides,[2] subject to a number of exceptions.[3]

When these rules were applied to electronic supplies, few problems were experienced in respect of business-to-business (B2B) transactions, as an EU VAT registered business buyer is required to self-assess the tax under the reverse charge mechanism, whether or not the supplier of services or electronic products was from the EU.[4] But problems resulted from business-to-consumer (B2C) transactions.[5] Unless special provision is made,[6] the default position of section 9(1) applies, despite the fact that this section was initially designed to deal with national supply, on the assumption that services are consumed where they are supplied.[7] In terms of this general provision, electronic deliveries from an EU supplier were taxed where the supplier was established, whether the

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1 Council Directive 77/388/EC on the common system of value-added tax, of 17 May 1977.

2 Article 9(1).

3 Article 9(2) and (3). Locating the real place of supply becomes complex when the exceptions to the general rule are identified. The rules are difficult to apply, and not consistently incorporated by all Member States, and sometimes lead to distortions detrimental to EU based operators. See V Thuronyi (ed) *Tax Law Design and Drafting* (1998) 195n85; Commission of the European Communities Proposals COM(2000)349 final at 13.

4 This system seems to work well and the new proposals have had little impact: David Hardesty 'Europe Proposes New Taxes on EU Sellers' 18 June 2000 *e-Commerce Tax News*, accessible at <*http://ecommercetax.com/doc/061800.htm*>

5 Where I use the word 'consumer' in this article, I refer to a private customer who is non-registered, non-taxable (in the sense that he does not have to account for VAT), and a final consumer.

6 Article 9(2).

7 It was anticipated that even the application of the special provisions of art 9(2) to digital deliveries would not obviate the problems. For example, art 9(2)*(c)* supplies are taxed where the services are performed or physically carried out, which will, generally, be in the country of consumption. But as soon as art 9(2)*(c)* supplies are delivered digitally (for example, when music, videos, or films are supplied online), the place of performance will probably not correspond with the place of consumption, as performance could have occurred earlier, anywhere. Such a discrepancy may result in non-taxation or misallocation (resulting in a distortion of competition) of VAT revenue. The 'effective use and enjoyment' anti-avoidance provision is not available to correct the situation in respect of art 9(2)*(c)* supplies. It was also felt that the appointment of a fiscal representative by the foreign supplier to act on his behalf in the consumer's Member State would not guarantee the effective taxation of these types of service, as there was no uniform Community practice. The Sixth Directive leaves the application of this option to the discretion of the Member States.