Beyond Copyright: The Annexation of Looking by Contract

Pauline McBride

LL.B. (Hons), Dip.L.P.

Submitted in fulfilment of the requirements for the

Degree of Doctor of Philosophy

School of Law

College of Social Sciences

University of Glasgow

Abstract

Beyond Copyright: the Annexation of Looking by Contract

This thesis seeks to explore and map the public domain, conceived as an area free from the constraints of law and contract, in relation to information on open, publicly accessible websites.

The existing rich literature concerning the 'public domain' focuses largely on the impact of the intellectual property regime. By adopting a novel conceptualisation of the public domain as freedom from law *and* contract, the thesis offers a broader perspective on freedoms and limitations on the use of information.

While the existing 'public domain' literature does address the possibility for freedoms in relation to the use of information to be narrowed by contract, it focuses on the second order question of enforceability of terms. The first order question concerning the implications of the rules of contract formation is not thoroughly explored, a lack that this thesis seeks to address.

The thesis relies on the contract law requirement of exchange to tease out both aspects of the public domain, that is, freedom from law and contract. In the process it addresses a significant gap in case law and literature, namely, the character of the benefit conferred by the website on the user. Relying on insights derived from the ruling of the European Court of Justice in *Svensson* the thesis offers a novel conceptualisation of the benefit and the mechanism of its conferral in order to explore the contractual significance of the exchange.

The thesis suggests that the scope of the public domain is periled on the characterisation of the website's response to the user's request for content. It presents a contrasting account of the public domain according to two different characterisations of the website's response, offering reasons to prefer the account of the public domain that best preserves freedom to look.

Table of Contents

Table of Cases

Table of Legislation

Author’s Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Chapter I

Introduction

I. The thesis

This thesis is concerned with an aspect of liberty. Not Liberty, gloriously robed with torch held high, but 'liberty' in working apparel, exploring and charting, rather than advocating the reach of freedoms.

Liberty, in this modest sense, works to reveal the cluster of freedoms that go to make up the public domain conceived as an area free from the constraints of law and contract.

In this thesis, she is put to work in the context of the digital environment and has a specific task. The task is to map out, having regard to English law, the public domain associated with information available on open publicly accessible websites. [1]

Open publicly accessible websites are websites that do not employ any technological barriers that have the effect of preventing access to the content of the website, whether in the form of paywalls[2] or other code barriers.[3] The websites of the University of Glasgow,[4] Marks & Spencer plc,[5] and the Victoria & Albert Museum are examples of open publicly accessible websites.[6]

---

[1] The thesis is concerned only with information made available to the user by means of the request/response process forming part of the hypertext transfer protocol ('HTTP'). It is not concerned with information made available by models of service delivery not relying on the request/response process or involving data processing beyond the processing implicit in the request/response process. Thus it does not address information made available by means of push technologies, or games or apps that may be used online. The reasons for excluding information made available via these technologies are more fully explored in Chapter IV. Harrington notes that the 'World Wide Web' is generally based on 'pull' technology, that is, on the request/response process implicit in HTTP. Justin Harrington, 'Information society services: what are they and how relevant is the definition?' (2001) Computer Law & Security Report 174, 180 fn 40. See also Jill Pollock, Clive Gringras, and Elle Todd, *Gringras and Todd: The Laws of the Internet* (4th edn, Bloomsbury Professional 2013) para 9.14.

[2] Troupson defines paywalls as 'digital locks that limit access' to online content. Theresa M Troupson, 'Yes, It's Illegal to Cheat a Paywall: Access Rights and the DMCA's Anticircumvention Provision' (2015) 90 NYUL 325. See also Wikipedia, 'Paywall' <https://en.wikipedia.org/wiki/Paywall> (accessed 30 July 2015) ('A paywall is a system that prevents Internet users from accessing webpage content without a paid subscription.') Many news websites, including the websites of *The Times* and *The Daily Mail* operate paywalls.

[3] The website might display splash pages or dialogue boxes that the user must click in order to proceed into the interior of the website or it might require user authentication using htaccess or pluggable authentication modules. See for example Princeton University, 'Restricting Access to Web Pages' https://csguide.cs.princeton.edu/publishing/restrict (accessed 30 July 2015); Jim McIntyre, 'Using PAM to restrict access based on time' (12 October 2000) <http://www.techrepublic.com/article/using-pam-to-restrict-access-based-on-time/> (accessed 30 July 2015).

[4] <http://www.gla.ac.uk> (accessed 1 August 2015).

[5] <http://www.marksandspencer.com> (accessed 1 August 2015).

[6] <http://www.vam.ac.uk> (accessed 1 August 2015).

In the context of open publicly accessible websites, the question about the public domain as freedom from law and contract subsumes the question about the contractual status of browse wrap Terms of Use. By definition, websites that are both open and publicly accessible (if governed by Terms of Use) are governed by Terms of Use in browse wrap form. Browse wrap contracts are ones where the user signifies assent, if at all, merely by using or browsing the website,[7] such contracts typically being presented to the user by way of a hyperlink on a webpage.[8] In contrast to click wrap, [9] or click through[10] agreements, in the case of browse wrap agreements the user is not required or given the opportunity to signify assent by means of a click.[11] Terms of Use purport to impose contractual obligations on the user in respect of the use of the website and its contents whenever the user looks at the website.[12] As a result the exercise of mapping the public domain is very much concerned with whether and to what extent the activity of 'looking' falls within the public domain.[13]

---

[7] 'Such terms of use often begin with a statement that use or browsing of the web site constitutes agreement to the terms, hence the name "browse-wrap."' Juliet M Moringiello, 'Signals, Assent and Internet Contracting' (2004) 57 Rutgers L R 1307, 1318.

[8] '[A] browse-wrap agreement is typically presented at the bottom of the Web site where acceptance is based on the 'use' of the site.' Ian Rambarran and Robert Hunt, 'Are Browse-Wrap Agreements All They Are Wrapped Up to Be?' (2007) 9 Tul J Tech and Intell Prop 173, 174.

[9] A 'clickwrap agreement' allows a consumer to assent to the terms of a contract by selecting an 'accept' button on the web site.' *Am Eyewear, Inc, v Peeper's Sunglasses & Accessories, Inc,* 106 F Supp 2d 895, 905 n 15 (ND Tex 2000). 'Clickwrap agreements do not allow a user to progress until and unless the user clicks on a box containing the words 'I agree' or similar'. Nancy S Kim, *Wrap Contracts: Foundations and Ramifications* (OUP 2013) 39.

[10] The terms click wrap and click through are frequently used interchangeably. Christina L Kunz and others, 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' (2003) 59(1) The Business Lawyer 279, 279. I use 'click wrap' to refer to those agreements where the button or check box that the user clicks is accompanied by wording that conveys express assent. An example would be a button or check box accompanied by the text 'Yes, I agree to the above terms and conditions'. The 'click' has been held to signify express assent when accompanied by such wording. *Lawrence Feldman v Google, Inc* 513 F Supp2d 229 (2007). I use 'click through' to signify all other agreements where the user requires to 'click' to proceed but the button or check-box is not accompanied by wording that is sufficient to secure express assent from the user.

[11] 'Browsewraps may take various forms but typically they involve a situation where a notice on a website conditions use of the site upon compliance with certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink. … A defining feature of a browsewrap license is that it does not require the user to manifest assent to the terms and conditions expressly – the user need not sign a document or click on an "accept" or "I agree" button.' *Southwest Airlines Co v Boardfirst LLC* Civ Act No 3:06-CV-0891-B (ND Texas, September 12, 2007).

[12] '"[T]erms of use," because they control (or purport to control) the circumstances under which … visitors to a public Web site can make use of that … or site.' Mark Lemley, 'Terms of Use' (2006) 91 Minnesota Law Review 459, 460.

[13] The term 'looking' is used to describe the interaction between the user and a website when the user accesses the website in order to view its contents. In this sense, 'looking' is a metaphor since, in the context of websites, looking is mediated by machines. The metaphor carries some normative baggage. It invites concern for restrictions in relation to human interactions with websites as though such restrictions engage looking in the same way as looking unmediated by machine. That said, in assessing the freedom to look, in describing the constraints, legal and contractual on looking, the thesis moves beyond metaphor, taking account of the impact of the machine. The thesis tackles directly the question of the conceptualisation of the interaction between the website and the user, taking account of the technical aspects of the interaction, seeking to avoid metaphor's snares. To the extent that the analysis suggests that, on the conceptualisation proposed, the processes of accessing and viewing the website and its contents are free from the constraints of law and contract, the metaphor of 'looking' is apt. The problems associated with reliance on metaphor in order to inform legal classification of the nature of the arrangement between users and websites are well documented. See for example Maureen O'Rourke, 'Property Rights and Competition on the Internet: In Search of an Appropriate Analogy' (2001) 6 Berkeley Tech L J 561; Laura Quilter, 'The Continuing Expansion of Cyberspace Trespass to Chattels' (2002) 17 Berkeley Tech L J 421; Dan Hunter,

II. Context

The thesis is concerned with the scope and limits of freedom to make use of information. Provided that they have contractual effect browse wrap Terms of Use, like any contract, may seek to restrain uses not constrained by law, whether by virtue of the intellectual property regime or otherwise. Contract offers the possibility of total control over information that is subject to the contract.

Commentators have explored the implications of total control over uses of information. Total control, it is argued, has a chilling effect on free speech,[14] squelches creativity,[15] hinders the development of new technologies,[16] and is inimical to learning[17].

In exploring the demerits of total control, commentators have pointed to the likely effects of 'mass market contracts' including browse wrap Terms of Use.[18] Benkler, in particular, alerts to the likelihood of underutilisation of information made subject to contractual enclosure.[19] The widely reported spat between the National Portrait Gallery and the Wikipedia Foundation offers an illustration of how browse wrap Terms of Use may be relied on so as to constrain otherwise privileged uses of information.[20]

Of course the total control afforded by contract may not only result in the imposition of direct restrictions on or prohibitions of certain uses. It may also result in use being made subject to a range of conditions. Browse wrap Terms of Use frequently contain pro-website provisions as to applicable law and jurisdiction, a range of exclusions and limitations of liability and indemnity provisions.[21] In the US, where browse wrap Terms of Use are enforceable provided the website

---

'Cyberspace as Place and the Tragedy of the Digital Anticommons' (2003) 91 Cal L Rev 439; Mark A Lemley, 'Place and Cyberspace' (2003) 91 California Law Review 521; Jacqueline Lipton, 'Mixed Metaphors in Cyberspace: Property in Information and Information Systems' (2003) 35 Loy U Chi L J 235. For a different perspective on the impact of metaphor see David McGowan, 'The Trespass Trouble and the Metaphor Muddle' Minnesota Legal Studies Research Paper No. 04-5. <http://ssrn.com/abstract=521982> (accessed 15 April 2015).

[14] Yochai Benkler 'Free As The Air To Common Use: First Amendment Constraints On Enclosure Of The Public Domain' (1999) 74 New York University Law Review 354, 356, 357.

[15] The phrase is Viva Moffat's. Viva Moffat, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41 University of California, Davis Law Review 45, 49. See also Lawrence Lessig, *Code Version 2.0* (Basic Books 2006) 198, 199.

[16] Dan Hunter (n 13) 508; James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2002) 66 Law and Contemporary Problems 33, 64.

[17] Hugh Breakey, *Intellectual Liberty: Natural Rights and Intellectual Property* (Ashgate 2012) 55.

[18] Benkler (n 14) 434-440; Breakey (n 17) 56.

[19] Benkler (n 14) 435.

[20] The National Portrait Gallery sought to restrain the use of copies of digital images of portraits featured on its website by reference to the website's browse wrap Terms of Use. Given that the portraits were out of copyright, the Terms of Use arguably sought to constrain use of information not protected under the copyright regime. (The argument presupposes that the digital images lacked originality such that no copyright subsisted in the images). The dispute was not litigated. Technollama, 'National Portrait Gallery Copyright Row' (July 19, 2009) <http://www.technollama.co.uk/national-portrait-gallery-copyright-row> (accessed 5 February 2016).

[21] Lawyers frequently draft Terms of Use so as to confer on the website 'greater protection … than might be available … under the general law'. Michael Hart and Ben Allgrove 'Protecting website content: Contractual measures' <http://uk.practicallaw.com/4-107-4149> (accessed 27 June 2015) (offering drafting guidance). During the House of Lords debates about the Consumer Rights Bill (now in force as the Consumer Rights Act

offers adequate notice of the terms to users, websites have not hesitated to rely on choice of forum or arbitration provisions,[22] indemnities[23] and (though unusually) liquidated damages provisions in respect of unauthorised use of content.[24]

The status of browse wrap Terms of Use is significant for other, more prosaic, reasons. It is relevant for websites, users (and their respective lawyers) to know whether browse wrap Terms of Use have contractual effect since it impacts on the range of remedies available to the website in the event of a dispute with a user.[25]

The status of browse wrap Terms of Use has particular significance for certain market sectors. It affects education providers seeking to make lawful use of information on open publicly accessible websites whether for research or for teaching purposes.[26] Data aggregators and other entities whose business model depends on re-use of information made available on open publicly accessible websites (for example, price comparison websites, news aggregators, meta search engines) may find themselves forced out of the market where browse wrap Terms of Use prohibit the activities that are crucial to the business model.[27] Big Data technology, considered vital to Europe's economic growth,[28] presupposes a market in which the users of such technology may access and use data. The status of browse wrap Terms of Use has implications for the development of the data economy.[29]

The impact of browse wrap Terms of Use could in theory be ameliorated by a strong consumer protection regime and/or by provisions effectively ring-fencing the balance set in the copyright (or other intellectual property rights) regime as to uses that are free and those that are not. However, as I shall demonstrate in Chapter IX neither the UK consumer protection regime nor the

---

2015) Lord Stevenson of Balmacara raised concerns about the character of obligations imposed on consumers by website Terms of Use and noted that in the case of browse wrap Terms of Use, since the consumer gives no monetary consideration, the consumer will possess few of the new statutory remedies provided by the Bill in relation to digital content. HL DEB, 19 November 2014, vol 757, col 515.

[22] *Net2Phone, Inc v The Superior Court of Los Angeles County* 109 Cal App 4th 583 (Cal Crt App, June 9, 2003); *Cohn v Truebeginnings, LLC, et al* B190423 (Cal Crt App, July 31, 2007).

[23] *AV, et al v IParadigms, LLC* Civ Act No 07-0293 (ED Va, March 11, 2008).

[24] *Internet Archive v Suzanne Shell* 505 F Supp 2d 755, Civ No 06-cv-01726-LTB-CBS (D Colo, Feb 13, 2007).

[25] Ben Allgrove of Baker & McKenzie notes that following *Svensson* (C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014)) 'it is still unclear whether it is permissible to … link to works where that infringes website terms and conditions'. Ben Allgrove 'Linking: looking past Svensson' (2 June 2014) <http://www.iam-media.com/blog/detail.aspx?g=EAA9E5F9-2119-4CB4-B9C9-EF685652F0CC> (accessed 9 February 2016). Wragge Lawrence Graham and Company comment 'To date, the UK judiciary has been reluctant to be drawn into the thorny issue of the extent to which an internet user is bound by a website's terms and conditions and so it remains unclear how this issue will play out in the English courts. … The ability to restrict use of online databases by contractual terms is an issue that has wide-reaching implications.' Wragge Lawrence Graham and Company, 'Ryanair flying high at the CJEU' (29 January 2015) <http://www.wragge-law.com/insights/ryanair-flying-high-at-the-cjeu/> (accessed 8 February 2016).

[26] Moffat (n 15) 58.

[27] Hunter predicts the disappearance of aggregation products and maintains that thanks to Terms of Use 'We can say goodbye to new types of search engines that affect-in any way-the business models of the sites that they index.' Hunter (n 13) 508.

[28] European Parliament, 'Report on Towards a Digital Single Market Act' (2015/2147(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0371&format=XML&language=EN> (accessed 12 February 2016).

[29] See Jim Snell and Derek Care, 'Use of Online Data in the Big Data Era: Legal Issues Raised by the Use of Web Crawling and Scraping Tools For Analytics Purposes' (August 28, 2013) <http://www.bna.com/legal-issues-raised-by-the-use-of-web-crawling-and-scraping-tools-for-analytics-purposes/> (accessed 5 February 2016).

contract override provisions incorporated in the Copyright Designs and Patents Act 1988 make any real dent in the total control offered by browse wrap Terms of Use.

In part this is because neither the consumer protection regime nor the contract override provisions respond to constraints upon access and looking. The possibility that browse wrap Terms of Use may constrain freedom to access and look at information is especially problematic not only because looking is central to learning[30] but because if one can gate access and looking, one can effectively gate all other uses[31] and exclude any class of user.[32]

The prospect of total control by browse wrap Terms of Use presents a paradox. Ordinarily when information is made available total control can be retained only where the information is made available in an environment that is itself both 'closed' and protected by a legal right to exclude, or the information is made available *only in exchange* for contractual promises. What is particularly troubling about browse wrap Terms of Use governing information on open, publicly accessible websites is that they appear to represent an attempt to exercise and retain total control over information that *has already been made available*.

According contractual status to browse wrap Terms of Use appears to upset an important distinction between information that is withheld and that which has been already made available.[33] It not only engages general concerns about the likely impact of total control but specific concerns that the protection available for information may, in the context of open, publicly accessible websites, be enhanced to allow property-like total control regardless of the means by which and context in which the information is made available.

III. Scope and Method

III.1 Open, publicly accessible websites governed by browse wrap Terms of Use

The thesis is concerned only with open, publicly accessible websites governed by browse wrap Terms of Use. This focus is driven partly by considerations of scale but also considerations of impact.

[30] Breakey (n 17) 128-132.

[31] Access and looking are preliminary to all other uses. Even where access and looking are permitted control over access and looking may enable control over other uses. Use restrictions may be framed as access restrictions.

[32] Terms of Use may, for example, exclude not only commercial uses but commercial users. Commentators have puzzled over the effect of such restrictions in the context of the communication to the public right, wondering whether such restrictions narrow the scope of the public to whom communication is authorised by the rightholder. See, for example, The IPKat, 'Post-Svensson stress disorder #2: What does "freely available" mean?' <http://ipkitten.blogspot.co.uk/2014/03/post-svensson-stress-disorder-2-what.html> (accessed 10 February 2016).

[33] The distinction was implicitly recognised by Jefferson in his classic exposition of the non-rival and non-excludable characteristics of information that has been made available. Thomas Jefferson, letter to Isaac McPherson (Aug, 1813) quoted in *Graham v John Deere Co* 383 US 1 (1966) fn 2. It is explicitly recognised in Justice Brandeis' statement that 'The general rule of law is that … after voluntary communication to others, [information becomes] free as the air to common use'. *International News Service v Associated Press* 248 US 215 (1918) 250. See also Breakey (n 17) 129 (suggesting that State Secret acts and the law of confidence represent rare 'abridgements to our liberty to apprehend the world with our senses').

All forms of contract have the potential to restrict uses of information. However, as a result of the proliferation of contracts in the online environment,[34] contracts (or purported contracts) containing use restrictions 'appear everywhere in connection with a multitude of daily activities engaged in by millions of people'.[35]

Since the thesis is concerned with freedom from contract, that is a field of activity entirely free from contract, not merely free from particular contract terms, click-wrap and click-through contracts are excluded from account. Under the orthodox, objective theory of contract, the requirements for contract formation would seem to be supplied in the case of click-wrap and click-through Terms of Use.[36] An exploration of the public domain conceived as freedom from law and from contract would yield slim pickings in that context. It is submitted that, by contrast, in the case of open, publicly accessible websites governed by browse wrap Terms of Use, the nature of the exchange between website and user is such that the requirements for formation of contract are met only in limited circumstances. The public domain, conceived as freedom from law and contract, has content and meaning in the context of browse wrap Terms of Use.

III.2 The public domain according to English law

As Samuelson points out, 'The contents of the public domain vary from nation to nation.'[37] If one is to map the public domain, that is, address its contents, one must do so from within the perspective of the law of a particular jurisdiction.

Nevertheless, the choice by a Scots lawyer to focus on the public domain according to English law deserves some explanation.

First, the relative dearth of relevant case law authority from the Scottish Courts, coupled with the relative scarcity of authoritative commentary from a Scots law perspective means that English law, by comparison, provides the researcher with more and richer guidance than is offered by Scots law.

Second, while the thesis addresses questions about the extent to which the presentation of browse wrap Terms of Use qualifies as an offer, whether that offer is express or implied, and whether intention to be legally bound can be inferred from the exchange between the website and the user, the thesis is principally concerned with substantive aspects of the character of the exchange. It focuses on what the website gives in exchange for the user's promise. Substantive questions about the nature of the exchange between website and user may be addressed from

[34] Lemley (n 12) 465.
[35] Moffat (n 15) 64.
[36] John Cahir, ' The Public Domain: Right or Liberty' in Charlotte Waelde and Hector L MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain* (Edward Elgar 2007) 44-46. There are normative questions, to be sure, about whether the contract formation requirement for assent *should* be considered satisfied where, as in the case of click-wrap and click-through contracts, the user merely clicks to assent. However, these questions have already been addressed in the literature. Kim (n 9) 126-146. See also Cahir (supra). More to the point, this thesis is concerned with mapping the public domain according to the law as is: it does not engage with an exploration of normative questions impacting on the law of contract formation.
[37] Pamela Samuelson, 'Challenges in Mapping the Public Domain' in Lucie Guibault and P Bernt Hugenholtz (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006). This is as true of a contract-oriented conception of the public domain as any other.

the perspective of the requirement for assent but plainly engage questions about the application of the doctrine of consideration. While consideration is a requirement for contract formation under English law, the doctrine has no place in the Scots law of contract. The thesis considers how the doctrine of consideration responds to the nature of the exchange.

III.3 The use of comparative law material

While the thesis is concerned solely with the public domain gauged by reference to English law, and does not offer a comparative law analysis, extensive reference is made to case law from other jurisdictions.

Of course, the case law of other jurisdictions is not binding on the English Courts though the Courts can and often do refer to such cases by way of illustration. The thesis, similarly, uses case law from other jurisdictions in order to explore and illustrate how particular issues may be addressed. Particular attention is accorded to the case law of the US, Canada and Ireland in relation to the enforceability of browse wrap Terms of Use. The case law from these jurisdictions is especially useful on account of the strong commonalities between the law of England and that of these other jurisdictions on the question of contract formation. Nevertheless, and so as to secure an understanding of the public domain under English law, the thesis considers, as appropriate, how readily or otherwise the approach adopted in the case law from other jurisdictions may be transposed into English law.

III.4 An interpretative approach

The thesis offers an interpretative account of the public domain according to English law. [38]

A focus on the public domain according to positive law does not imply that a normative approach to the scope of the public domain has nothing to offer. Neither does the focus on the public domain according to positive law imply that the writer holds no preference, on normative grounds, for a broad or a narrow public domain in relation to information that has been made available.

There is an extensive body of literature offering normative reasons for preferring a broad public domain so as to encourage the production of creative works, enhance education, enable the development of new technologies and promote human flourishing. Commentators disagree about the optimum mix of control and freedom from control in relation to information but even among those who favour strong control many see a need for a minimum set of freedoms.[39] Breakey's argument that the ability to look, apprehend, and inform one's actions is central to any kind of

[38] English law, that is, including its European dimension. Thus while (at least on one view) the rulings of the CJEU in relation to EU Directives implemented in national law do not bind the English Courts in the manner of precedent, the English Courts, like all national Courts in the EU, must interpret national law in a manner consistent with the rules of EU law (as clarified by such rulings) provided that the rulings do not conflict with the express wording of national legislation. Case C-441/14 *Dansk Industri (DI) v Rasmussen's Estate*, Opinion of AG Bot (25 November 2015); Robert Schütze, *European Constitutional Law* (2nd edn, CUP 2016) 389, 390, 399.

[39] See, for example, Jane C Ginsburg, 'From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law' (2003) 50 J Copyright Soc'y USA 113 (advocating fair use limitations on what Ginsburg describes as an 'access right').

meaningful intellectual life is powerful; it lends itself to a normative argument in favour of freedom to look at information that has been made available.[40]

The normative arguments may be prayed in aid of a broad public domain and are relevant to wider questions of impact, but they are not invoked in mapping out the contours of the public domain. The choice to assess the public domain on an interpretative approach reflects the writer's conviction that a thorough analysis of the law as is, and the outcomes it secures, should first be carried out so as to inform subsequent conversations about what the law should be, and what outcomes it should secure. The findings of the thesis therefore offer a platform or baseline from which to marshal normative arguments whether for change or for preservation of the status quo.

The adoption of an interpretative approach serves a secondary purpose. It aligns with the approach likely to be adopted by and before the Courts, the fora in which the enforceability of browse wrap Terms of Use is likely to be tested. It is capable of practical application.

Thus the thesis does not seek to advocate a new approach to contract formation. Nor does it challenge the orthodox position that in general parties should be free to contract on any terms subject to clearly defined constraints.[41] Rather, it relies on the existing rules of contract formation so as to assess the status of browse wrap Terms of Use governing open, publicly accessible websites taking account of the nature of the exchange between the website and the user.

Nevertheless the scope and limits of the public domain in relation to information on open, publicly accessible websites cannot be assessed solely by reference to the rules of contract formation. The challenge for the interpretative assessment of the contours of the public domain lies not only in the application of the rules of contract formation but in the process of exploring and elucidating the nature of the exchange between open publicly accessible website and user.

III.5 The development of a model for conceptualising the nature of the exchange within an interpretative approach

In the thesis, exploration of the nature of the exchange takes place in tandem with assessment of the implications of the rules of contract formation. As the exploration proceeds in stages (through Chapters IV to VIII), the thesis by stages refines the conceptualisation of the exchange and eventually (at Chapter VIII) offers a model (dubbed the 'two-stage model') for conceptualising the nature of the exchange.

Two key interpretative findings inform the two-stage model.

The first is the assessment (Chapter V) that English law does not confer a power to control access on websites and that the grant of permission for access cannot clothe browse wrap Terms of Use with contractual effect. This finding invites assessment of the nature of the exchange on a service-based analysis.

[40] Breakey (n 17) 128-134. The writer agrees with much of what Breakey has to say but parts company from him to the extent that he suggests the freedom is a right.

[41] Such constraints may be imposed by the consumer protection regime or by general provisions, drawn from statute or common law, as to terms that are unfair or unlawful.

The second concerns the analysis of the character of such service as is provided by the website to the user. The thesis identifies the nature of the service provided by the website to the user as consisting in making available. That assessment is consistent with the Information Society Directive, the ruling of the CJEU in *Svensson*,[42] and the case law of the CJEU suggesting that making available, rather than access by the user, has economic significance.

Ultimately, however, the characterisation of the service as consisting in making available depends on the determination that the website's response to the user's request for a webpage or other content is not itself a service and forms no part of a service having no economic value for the user. In this context the assessment of economic value is carried out from within the framework of an interpretative approach. The assessment of economic value reflects the broad-brush approach to economic value within the doctrine of consideration. The question posed is a threshold question for determining economic value: does the response process provide the user with any benefit he did not otherwise possess? The answer to the question takes account of the technical aspects of transmission of content over the internet and draws on the clear message from *Svensson*[43] that by the time the user issues a request for information on a website, the information has already been made available.[44]

These two key findings enable the construction of the two-stage model according to which the website first, delivers a benefit consisting in the service of making content available, and (second) a (logically and temporally separate) benefit in the form of permission to use the content that has been made available.

In the context of the interpretative analysis, the two-stage model is preferred for reasons that relate to the assessments on which it is founded. The assessment that a website possesses no power to control access proceeds on a doctrinal analysis and is consistent[45] with the denial, by English law, of property-like protection to information as such. The assessment that such service as is provided by the website consists in making available pure and simple is not only consistent with English law in its European context[46] but proceeds from the ruling in *Svensson* that in the context of open publicly accessible websites content is available before the actuation of the response process. The model is internally coherent and has explanatory force.

---

[42] C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014).

[43] While the English Courts have not yet had occasion to directly apply *Svensson* they have signaled that they treat the ruling as authoritative. See *1967 Ltd v British Sky Broadcasting Ltd* [2014] EWHC 3444 (Ch), [2015] ECC 3 [16]; *Paramount Home Entertainment International Limited v British Sky Broadcasting Limited* [2014] EWHC 937 (Ch) [32].

[44] The question of economic value is as much a legal question as an economic question. The doctrine of consideration mandates an inquiry into the presence or absence of economic value. The approach to economic value acknowledges the argument, absorbed into the doctrine of consideration that the 'bird in the hand is worth two in the bush'. See Mindy Chen-Wishart, "'A Bird in the Hand': Consideration and Contract Modification" in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010). The response process does not deliver the bird to the hand: delivery is effected by the network, not the website.

[45] As to the significance of consistency or coherence for an interpretative account see Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition) <http://plato.stanford.edu/archives/sum2014/entries/legal-reas-interpret/> (accessed 10 February 2016).

[46] Specifically it is consistent with the Information Society Directive, the ruling of the CJEU in *Svensson*, and the case law of the CJEU suggesting that making available, rather than access by the user, has economic significance.

Any interpretative analysis has both a 'backward-looking conserving aspect and a forward-looking creative one'.[47] The forward-looking creative aspect implies the exercise of choice and judgment even if those choices and judgments are closely tethered to the positive law.[48] As Bigwood notes, an interpretative account can be more or less accurate and more or less sincere but can only ever be provisional.[49] This is especially so in the case of an interpretative account offered in the context of a thesis: ultimately the Courts will have the last word on the status of browse wrap Terms of Use and the merits of a two-stage model for conceptualisation of the benefit.

With this in mind the thesis also considers the scope of the public domain assessed according to a wholly different model, (the model suggested by the US decision in *Register.com v Verio*),[50] one that applies where, contrary to the arguments advanced in this thesis, the service provided by the website to the user includes the response process. The comparison incidentally provides additional reasons to prefer the two-stage model on an interpretative approach. The alternative model, it is submitted, requires one to proceed on the basis that a website can simultaneously make content available and withhold that content. It is an account that, by virtue of the apparent logical inconsistency, strains interpretative reasoning, calls into question the explanatory force of the model and threatens to blur the demarcation line between information made available and that which is not.

IV. The significance of the two-stage model

The two-stage model has significance both as a construct and as a tool. As a construct it is derived from the search, set out in the thesis, for an understanding of the nature of the exchange between open, publicly accessible website and user. As a tool, the two-stage model provides a means of visualising the characteristics of the exchange. It facilitates the task of mapping the nature of the exchange between website and user to the requirements for formation of contracts under English law so as to reveal the contours of the public domain according to the model.

In addition the two-stage model provides a comparator against which to assess the competing model of the exchange between open publicly accessible website and user suggested by the US decision in *Register.com*. It reveals that the choice of model for conceptualising the exchange has significant implications for the scope of the public domain. Whereas the model suggested by *Register.com* implies a narrow (in practice, non-existent) public domain in relation to information on open publicly accessible websites, the two-stage model by contrast points to a broad public domain, one that invariably makes room for looking at information that has been made available.

V. The structure of the thesis

Chapter II provides an elucidation of the conception of the public domain employed for the purposes of this thesis. It relies on Lon Fuller's vision of a 'field of human intercourse freed from legal restraints' including the constraints imposed by contract.[51] In Fuller's conception freedom from contract is to the fore. Chapter II serves to explain why this focus is apt, how the contract-

[47] ibid para 2.3.
[48] ibid para 2.2.
[49] Rick Bigwood, *Exploitative Contracts* (OUP 2003) 10,12.
[50] *Register.com Inc v Verio* 356 F 3d 393 (2d Circuit 2004).
[51] Lon L Fuller, 'Consideration and Form' (1941) 41 Colum L Rev 799, 813.

oriented conception of the public domain relates to conceptions of the public domain that focus largely on copyright and outlines the merits of the contract-oriented approach.

Chapter III fleshes out the conception of the public domain, focusing on the aspect of freedom of constraint from contract. Relying on an orthodox account of the rules of contract law it seeks to extract from those rules a framework and a methodology for assessing the contractual status of browse wrap Terms of Use. The analysis suggests that a proper understanding of the nature of the benefit conferred by the website on the user is key to the understanding of the contractual dimension of the public domain.

At Chapter IV I explore how the benefit conferred by the website on the user has been conceptualised in case law and commentary. The survey reveals an absence of in-depth analysis of the nature of the benefit conferred but suggests three different though related conceptions of the benefit, namely access to the website, the provision of some form of service by the website and use of the website or its contents.

The tentative exploration of the benefit conferred by the website on the user provides a platform from which to examine the contractual status of browse wrap Terms of Use using the methodology suggested by Chapter III.

The ability of the website to rein in the public domain by reference to the grant of access is explored in Chapter V. This entails a thorough analysis of the bases on which it may be claimed that the website may condition access on contractual terms. The analysis suggests that in the case of open publicly accessible websites, in the absence of a right to exclude users from the website, the grant of access cannot clothe browse wrap Terms of Use with contractual effect.

At Chapter VI I approach the contractual status of browse wrap Terms of Use on the basis that the website provides the user with a service. The analysis is directed to the nature of the service not the mode of its supply. While the analysis is generally inconclusive as to the contractual status of browse wrap Terms of Use, I argue that in the case of retail websites, there is scope for the argument that such Terms of Use typically lack contractual effect where the user merely looks at the website.

The services analysis carried out in Chapter VI has a limitation. It is concerned principally with the nature of the benefit, and though it takes account of the context of its transfer, it takes no account of the mechanics of transfer. It offers a static account of the interaction between website and user. An account of the dynamics of the interaction is needed if the interaction between website and user is to be fully tested according to the methodology set out in Chapter III.[52]

At Chapter VII I review the ruling of the Court of Justice of the European Union ('CJEU') in *Svensson.* [53] *Svensson* is concerned with the applicability of the copyright regime, specifically the making available right, in the context of the creation of hyperlinks to web-based content. While the case does not directly explore the nature of the benefit conferred by a website on a user, the CJEU's approach to the content of the making available right offers important pointers as to the

[52] The phraseology is Weinrib's. Ernest J Weinrib, 'The Structure of Unjustness' (2012) 92 Boston University Law Review 1067, 1077.
[53] C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014).

nature of the interaction between website and user. It suggests that the service element of the exchange between website and user may be understood in the context of *making information available*.

Armed with the insights drawn from *Svensson* and the related 'making available' jurisprudence, at Chapter VIII I offer a novel conceptualisation of the exchange, one that involves a two-stage model of benefits conferral. The first limb entails the provision of a service consisting in making information available while the second entails the grant of a licence for use of such information. In Chapter VIII I also contrast the two-stage model with the model of benefits suggested by the decision in *Register.com v Verio*, and explore how the selection of the model of benefits impacts on the outcome of the analysis of the contractual status of browse wrap Terms of Use.[54]

At Chapter IX I collate the results of the analysis of the contractual status of browse wrap Terms of Use, and marry them with an analysis of the user's pre-contract freedoms in relation to information that has been made publicly available so as to provide two different maps of the public domain. The first of those maps illustrates the public domain that results from the adoption of the two-stage model of conceptualisation of the benefit conferred by the website on the user. The second relates to the public domain according to the *Register.com* model. The outcome for the public domain differs markedly according to the choice of model, particularly, though not only, in relation to the activity of looking.

In Chapter X I review the findings of the previous Chapters and Liberty, in full raiment, makes a walk-on appearance.

VI. The contribution made by the thesis

The thesis makes four key contributions to the existing literature.

First, it adds another dimension to the burgeoning public domain literature by offering a working model of the public domain as freedom not only from the constraints of law but also from the constraints of contracts.[55] It reveals the possibilities for contract to shrink freedoms in relation to the use of information made publicly available.

This contribution provides a counter-balance to conceptions of the public domain that focus on the role of intellectual property, and copyright in particular, in drawing the boundaries of controls and freedoms in relation to the use of information.

Second, it offers a thorough analysis of the nature of the benefits invariably provided by an open publicly accessible website to a user. Such analysis is absent from the literature relevant to the

[54] *Register.com Inc v Verio* 356 F 3d 393 (2d Circuit 2004).

[55] See for example, Benkler (n 14); Boyle (n 16); Lucie Guibault and P Bernt Hugenholtz (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006); Pamela Samuelson, 'Enriching Discourse on Public Domains' (2006) 55 Duke Law Journal 101; Charlotte Waelde and Hector L MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain* (Edward Elgar 2007); James Boyle, *The Public Domain* (YUP 2008); Kris Erickson and Martin Kretschmer (eds), 'Research Perspectives on the Public Domain' CREATe Working Paper 2014/3 (February 2014) <http://www.create.ac.uk/wpcontent/uploads/2014/02/CREATe-Working-Paper-2014-03.pdf> (accessed 1 August 2015).

common law jurisdictions of England and the United States. Though not provided in response to Wendy Gordon's call for a jurisprudence of benefits, it makes a contribution in that regard.[56]

Third, it provides a comprehensive review, within an English law context, of the arguments for the existence of a 'right to control access', adopting the vocabulary of 'rights' suggested by Hohfeld for that purpose.[57] Efroni provides a sparkling analysis of the role for an 'access right'. However Efroni's account has a theoretical and normative bent and is primarily concerned with copyright.[58] My thesis engages in interpretative analysis and addresses arguments for the existence of a right to control access drawing on regimes beyond copyright.

Finally, the thesis proposes a novel model for the conceptualisation of the benefits conferred by the website on the user. The model depends on a particular understanding of the technical process by which the user accesses and views website content. It points to a need, for the purposes of contract law and beyond, for a common understanding of the significance of that process.

[56] Wendy J Gordon, 'Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship' (1990) 57(3) The University of Chicago Law Review 1009.
[57] Hohfeld set out his scheme of jural relations in two articles published in the Yale Law Journal in 1913 and 1917. The articles were reprinted with permission in Wesley Newcomb Hohfeld and Walter Wheeler Cook, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, And Other Legal Essays* (YUP 1923).
[58] Zohar Efroni, *Access-right: The Future of Digital Copyright Law* (OUP 2011).

Chapter II

The Public Domain

I. Introduction

In this Chapter I set out and develop a particular conception of the public domain. This conception of the public domain is captured by Fuller's vision of a 'field of human intercourse freed from legal constraints.'[1] This is a conception that accords attention to *relations* between persons: it is concerned, inter alia, with the reach of contract law.

Section II describes the conception of the public domain as freedom from legal constraints, (including freedom from contract) and explains the role of contract law in defining and mapping the contours of that domain.

Section III locates the conception of the public domain as freedom from legal constraints within mainstream discourse about the public domain. It compares this conception with other (notably copyright-centric) conceptions of the public domain. I suggest that a review of the concerns articulated by intellectual property academics about the impact of contracts on the use of information points to a need for a different perspective, and a different conception of the public domain.

At Section IV I set out a range of reasons, both theoretical and methodological, why the conception proposed here is best suited to determine what uses of information are 'free' in the context of content appearing on open, publicly accessible websites.

A summary and conclusion is set out in Section V.

II. A conception of the public domain as involving freedom from legal constraints

II.1 The conception

There are many alternative conceptions of the public domain.[2] The conception used here borrows from Fuller's vision of a 'field of human intercourse freed from legal constraints'.[3] There are two key elements in this conception. First, the 'freedom' entailed by this conception is freedom from legal constraints. It encompasses the notion of freedom from contract: it implies that the underlying rights matrix (that is, the bundles of legal rights, privileges, powers and immunities possessed by legal persons in relation to each other) *relevant to the arrangement under scrutiny* is one that cannot support a contract.

---

[1] Lon L Fuller, 'Consideration and Form' (1941) 41 Colum L Rev 799, 813.

[2] Samuelson reviews thirteen different conceptions of the public domain. Pamela Samuelson, 'Enriching Discourse on Public Domains' (2006) 55 Duke Law Journal 101. Boyle notes various different conceptions, suggesting that the variations are driven by purpose or function. James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2002) 66 Law and Contemporary Problems 33.

[3] Fuller (n 1) 813.

Second, I am concerned about the presence or absence of such freedom in a particular context. I am concerned with freedom in the context of inter-personal relations in the nature of 'dealings'. For these purposes the analysis of the underlying rights matrix takes into account all of the entitlements of the parties so far as relevant to the arrangement under consideration. The analysis includes but is not restricted to the parties' entitlements under intellectual property laws.

While therefore I am concerned on the one hand with the question of the implications of various legal rules, including the rules of contract law as to the requirements for a contract, the inquiry mandated by this approach must consider the impact of these rules, not in the abstract, but in the context of particular social relations.

Of course, as Benkler points out, for that kind of analysis to be useful, it must be concerned with generalised sets of circumstances.[4] It is necessary to focus on the paradigmatic case. Otherwise the exercise of identifying privileged uses would become so fact-specific as to offer no guidance of any kind.

For present purposes, the particular social relations that are the subject of scrutiny are those between an open, publicly accessible website and its users in relation to the access and use by the latter of information appearing on the website. The arrangement can properly be regarded as a paradigmatic case. The features common to all such arrangements include the interaction between website and user; the access to and use of the website by the user; the uniform method of browsing content on the website (uniformity being achieved by means of internet protocols); the presence of information on websites; and (by definition) the open configuration of such websites.

II.2. Fuller and a domain of freedom from constraints

Fuller wrote extensively on freedom, but his insistence on the 'need for a domain of "free-remaining" relations',[5] a 'field of human intercourse freed from legal constraints',[6] is striking.

He not only adopts a spatial metaphor to capture the boundaries of a kind of freedom, but he defines the freedom as involving the absence of legal constraints. Concerns for freedom from legal constraints are rooted in liberal traditional and, typically, underpinned by a theory of liberty that values maximal individual autonomy. For Mill, for example, 'liberty consists in leaving a man alone, in not imposing restraints on him.'[7]

Fuller strongly criticised Mill's negative conception of liberty.[8] He was at pains to emphasise the need for the constraints of legal order.[9] '"Free from"', he grumbled, 'carries … the general implication of an approved condition'.[10] Nevertheless his vision of a domain of 'free-remaining'

[4] Yochai Benkler, 'Free As The Air To Common Use: First Amendment Constraints On Enclosure Of The Public Domain' (1999) 74 New York University Law Review 354, 362, 363.
[5] Fuller (n 1) 813.
[6] ibid.
[7] Lon L Fuller, 'Freedom as a Problem of Allocating Choice' Proceedings of the American Philosophical Society, Vol 112, No 2, Law and Liberty (Apr 15, 1968) 101, 103.
[8] Lon L Fuller, 'Freedom: A Suggested Analysis' (1955) 68(8) Harvard Law Review 1305, 1306, 1310; Fuller, 'Freedom as a Problem of Allocating Choice' (n 7) 101, 103.
[9] Fuller, 'Freedom: A Suggested Analysis' (n 8) 1310-1312.
[10] ibid 1306.

relations plainly invokes just such an implication with its Millian overtones. In describing the need for such a domain as 'not merely spiritual' Fuller does nothing to curb those overtones.[11] Though it is clear that Fuller is principally concerned with limits on the kinds of promises that will be enforceable, with freedom from contract, he hints at a broader concern for a conception of a space free from all legal constraints, not merely those imposed by contract.[12]

If Fuller had in mind a normative basis, that might conceivably be described as 'spiritual' for suggesting that certain areas of human conduct (over and above certain categories of promises, in relation to which Fuller *did* present a normative argument) should remain outside law's domain, it remained unexpressed.[13] For present purposes the utility of a conception of a domain free from legal constraints is primarily descriptive.[14] No reliance is placed on Fuller's political theory.

II.3 A role for contract law in defining and mapping the public domain

Fuller's principal contribution to the development of a conception of the public domain (as freedom from constraints) that draws on contract law and subsumes freedom from contract is to act as a flag that such a conception is not only possible but capable of practical application and to hint at the reasons that make it so.

Fuller's vision of a 'free-remaining' domain is concerned with relations between persons, with acts directed at another person, at that other's entitlements. 'The man who enters a contract' Fuller says, exercises 'a power to effect, within certain limits, changes in … legal relations' between persons.[15]

The question of the existence of a contract involves an assessment of the parties' respective legal entitlements before and after the acts that are said to give rise to the contract. The need for such an assessment is explicit in Fuller's scheme since, as he affirms, the presence or absence of *exchange* is relevant to contractual liability.[16]

Fuller comes closest to expressing the relationship between freedom from contract and freedom from legal constraints in his observations about the significance of exchange in determining contractual liability. He maintains

[11] Fuller (n 1) 813.
[12] Fuller cites but does not quote Willis who describes freedom from contract as an aspect of 'personal liberty'. Hugh Evander Willis, 'Rationale of the Law of Contracts' (1936) 11 Ind L J 227, 230.
[13] The impracticality of seeking to enforce certain rules was, for Fuller, a good reason for not having them. Lon L Fuller, *The Morality of Law* (YUP 1964) 133. Fuller also recognised that for reasons of efficiency certain areas of economic activity should not be directly constrained by law. He offers the example of the operations of a firm. Fuller, *The Morality of Law* (*supra*) 171, 172. Neither reason can be described as 'spiritual'. See also William E Scheurman, 'Global Law in our High Speed Economy' in Richard P Appelbaum, William L F Felstiner, Volkmar Gessner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Pub 2001) 106.
[14] Kelsen uses such a conception in a descriptive sense. He observes that 'A legal order … can command only specific acts or omissions of acts; therefore no legal order can limit the freedom of an individual with respect to the totality of his external and internal behavior, that is, his acting, wishing, thinking, or feeling. The legal order can limit an individual's freedom by commanding or prohibiting more or less. But a minimum of freedom, that is, a sphere of human existence not interfered by command or prohibition, always remains reserved.' Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 43.
[15] Fuller (n 1) 806.
[16] ibid 814, 818.

> To the degree that a particular case deviates from this archetype [an exchange involving a business trade of economic values], the incentives to judicial intervention decrease, until a point is reached where relief will be denied altogether unless the attenuated element of exchange is reinforced, either on the formal side by some formal or informal satisfaction of the desiderata underlying the use of legal formalities, or on the substantive side by a showing of reliance or unjust enrichment, or of some special need for a regulation of the relations involved by private autonomy.[17]

In other words, in the absence of formal or substantive bases for enforcement the field of contractual liability peters out as the exchange element diminishes. The scope of the domain of '"free-remaining" relations', in Fuller's scheme, is tethered to the notion of exchange and mediated by the policy considerations embodied in his formal and substantive bases. In contract law, the parties' existing (pre-contract) entitlements dictate whether exchange is possible.[18]

Moreover in suggesting that the substantive bases for contractual liability include reliance and unjust enrichment as well as the principle of private autonomy, Fuller implicitly suggests both a need for comparison of the parties' entitlements before and after the purported contract [19] and that the 'public domain' represented by freedom from contract sweeps up considerations of tort and unjust enrichment. [20]

It is not necessary to subscribe to Fuller's views concerning the policy bases underlying contractual liability to appreciate that a focus on the need for exchange engages questions beyond the realm of contract law.[21] In contract law the need for exchange is encapsulated in the requirement for consideration, for the conferral of a benefit in exchange for the other's promise. Consideration consists in '[t]he giving or the promise to give of either a right, or a power, or a privilege, or an immunity'.[22] Couched in these terms, using the descriptors for the various 'jural relations' suggested by Hohfeld, it is apparent that the inquiry into the presence or absence of

---

[17] ibid 818.

[18] For example, where you own land and I have no rights in relation to your land, various exchanges of value relating to the land are possible by virtue of our respective entitlements. If on the other hand you own land but I have rights to access and use that land for agricultural purposes, our respective entitlements appear to rule out the possibility of an exchange of value consisting in the grant by you to me of the rights that I already hold.

[19] Kennedy links Fuller's 'substantive bases of contract liability', namely private autonomy, reliance and unjust enrichment, with a concern for 'commutative justice'. He observes that '[t]hey [reliance and unjust enrichment principles] restore the status quo ante, as that was defined by the pre-existing legal rights of the parties.' Duncan Kennedy, 'From The Will Theory To The Principle Of Private Autonomy: Lon Fuller's "Consideration And Form"' (2000) 100 Colum L Review 94, 170.

[20] Kennedy goes further and suggests that for Fuller 'contract law is the law of will, of tort, and of restitution, as well as the law of formalities.' Kennedy (n 19) 140. This exaggerates the extent to which Fuller saw an overlap between contract and other areas of law. Fuller's views are more clearly expressed in this passage: 'When one asks why a contract or tort liability is imposed, one discovers that the underlying "why", or rather, the underlying "whys", cut across compartmental divisions of the law. From such a viewpoint, "contract" is merely a convenient description for a set of related problems, possessing no definite boundary, but shading off imperceptibly into the law of tort, property, quasi-contract, and procedure on all sides.' Lon L Fuller, 'Williston on Contracts' (1939) 18(1) North Carolina Law Review 1, 2.

[21] See Raymond T Nimmer, 'Breaking Barriers: the Relation Between Contract and Intellectual Property Law', (1998) 13 Berkeley Technology Law Journal 827, 829, 832 (noting the need for exchange in contracts, and that in the digital environment the range of 'property' interests held by the information provider will extend beyond traditional intellectual property rights).

[22] Willis (n 12) 237.

consideration demands not only some form of comparison between the parties' entitlements before and after the purported contract but that the comparison may involve a review of the whole suite of 'jural relations' that exist under diverse bodies of law. The presence or absence of a contract therefore entails an assessment of the parties' rights and freedoms so far as relevant to the relations that the contract is supposed to address. [23]

Equally it is obvious that freedom from legal constraints is a measure of the extent to which one person's set of legal entitlements impacts on the entitlements of another. The exercise of determining whether a contract exists therefore subsumes the question of the freedoms and constraints entailed by the status quo ante *and* addresses those that result from the purported contract.

Consequently, by virtue of the contract law requirement for exchange, the freedom from legal constraints implicit in a certain configuration of parties' respective (pre-contract) entitlements feeds into freedom from contract while freedom from contract assures the continuity of freedom from legal constraints. The requirement for exchange keeps contract law in its place.[24] It limits the power of contract to create rights and duties.

The contract law requirement for exchange is heightened where express assent is absent. As I will discuss in later Chapters, for assent to be implied from conduct, the exchange must be one that results in the person said to have entered into the contract holding a right or privilege to do something that prior to the conclusion of the purported contract he held neither a right nor a privilege to do. In other words, in such cases, the exchange requirement not only has regard to the contours of the (pre-contract) 'commons of pure Hohfeldian privileges' but ensures that no contract comes into being where the act said to give rise to the contract is within the scope of the privileges of the person engaging in that act. [25]

In the case of browse wrap Terms of Use, where assent can only be implied, if at all, through conduct, both elements of the conception of the public domain proposed in this thesis may therefore be addressed through the inquiry as to the nature of the exchange.

III. Other conceptions of the public domain

III.1 Locating the conception of the public domain as freedom from constraints within 'public domain' discourse

[23] Benkler observes 'People do not contract in a vacuum. They contract against the background of law that defines what is, and what is not, open for them to do or refrain from doing. What background law makes possible is all that there is on the table. They negotiate from within the universe produced by law as to what they bring to the table and what they are permitted to take away.' Benkler (n 4) 432. While the need for exchange is most obviously captured by the doctrine of consideration, it is also at the heart of the rules of contract law governing the implication of assent from conduct.

[24] The phrase 'keeping contract law in its place' is Hedley's though he uses it in a different context. Stephen Hedley, 'Keeping Contract in Its Place: Balfour v Balfour and the Enforceability of Informal Agreements' (1985) 50 Oxford Journal of Legal Studies 391

[25] The phrase is Boyle's. Boyle also refers to 'the imagined world of Hohfeldian privileges'. Boyle (n 2) 64. There are no derogatory implications attached to Boyle's use of 'imagined': he means only that the scope of the domain can only be apprehended by the mind, not that the 'commons' or 'public domain' (Boyle accepts these may be used interchangeably) of Hohfeldian privileges is imaginary. Boyle describes the tradition of Hohfeldian analysis as 'sadly neglected'. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (n 2) 73.

There are many variants of the public domain construct in legal and political theory. In general such constructs deploy 'metaphors that conjure up images of contained, circumscribed spaces'.[26] All are concerned with a vision of a particular kind of freedom. However the spaces and freedoms they describe may be radically different.

The public domain may describe a forum for the free exchange of ideas, particularly in the political arena.[27] This is the kind of freedom that Fuller was typically concerned with.[28] More commonly the public domain is concerned with freedom from constraints, whether economic or legal. [29]

The term 'public domain' is now primarily used in the context of discourse about access to and use of information. As Samuelson puts it, '"public domain" became the new and then the predominant moniker for IP-free information resources.'[30]

Boyle notes that mainstream, IP-related conceptions of the public domain deploy a 'vision' of 'freedom *from the will of another*' or freedom 'from exclusive rights' and from costs.[31] Benkler identifies the public domain with 'privileged' uses of information, that is, uses free from legal constraints.[32] When Kapczynski queries whether the traditional conception of the public domain is sufficiently radical to protect the 'freedom imagined by A2K' she asks whether such freedom can 'be produced by merely the formal lack of … constraint'.[33]

If the vision underlying mainstream conceptions of the public domain has been one of freedom from legal constraints in general, the public domain is generally conceptualised as freedom from constraints *imposed under intellectual property regimes*.[34] Neither the constraints imposed by

[26] Clive Barnett, 'Convening Publics: The parasitical spaces of public action' in Kevin R Cox, Murray Low, and Jennifer Robinson (eds), *The SAGE Handbook of Political Geography* (Sage Publications Ltd 2008) 403 (criticising the reliance on spatial metaphors as a means of defining the public domain). In a notable departure from reliance on spatial metaphors, David Lange offers a conception of the public domain as a status. Samuelson, 'Enriching Discourse on Public Domains' (n 2) 128, 129.

[27] For example, see Cass Sunstein, *Republic.com2* (Princeton University Press 2007); Benkler (n 4) 357, 358 (asserting the importance of a strong public domain to democratic processes and free speech).

[28] Lon L Fuller, 'Some Reflections on Legal and Economic Freedoms--A Review of Robert L. Hale's "Freedom through Law"' (1954) 54 (1) Columbia Law Review 70, 77.

[29] For followers of Mill, the constraints imposed by law must be kept to a minimum. Isaiah Berlin explains that libertarians such as Mill assume 'that there ought to exist a certain minimum area of personal freedom which must on no account be violated … that a frontier must be drawn between the area of private life and that of public authority.' Isaiah Berlin, *Two Concepts of Liberty* (OUP 1958) 9. For a discussion of various liberty constructs see Ian Carter, 'Positive and Negative Liberty' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition), <http://plato.stanford.edu/archives/spr2012/entries/liberty-positive-negative/> (accessed 7 January 2015).

[30] Pamela Samuelson, 'Challenges in Mapping the Public Domain' in Lucie Guibault and P Bernt Hugenholtz (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006) 19.

[31] Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (n 2) 63.

[32] Benkler asserts: 'The core difference between the public domain and the enclosed domain is that anyone is privileged to use information in ways that are in the public domain, …' Benkler (n 4) 363.

[33] Amy Kapczynski, 'Access to Knowledge: A Conceptual Genealogy' in Gaëlle Grigorian and Amy Kapczynski, *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010) 41. The acronym 'A2K' refers to access to knowledge.

[34] According to Samuelson, 'The most common definition of 'public domain' among intellectual property professionals is information resources … that are unencumbered by intellectual property rights'.

contract nor the constraints imposed by virtue of other branches of law are relevant to the definition of the public domain in its traditional copyright-centric formulation.

The traditional conception of the public domain also rules out an approach that uses contract law as a tool to assess the scope of the public domain for two reasons: first, on this conception, contract is irrelevant to the proper scope of the public domain and second, (relatedly) even though contracts may threaten the public domain, this is an 'outside' threat that may be acknowledged and objected to, but cannot be addressed from within as part of the engine of the public domain.

The reasons for this are at least partly ideological. Intellectual property scholars are well aware that contract law and other bodies of law may impact on access to and use of information.[35] The rationale for a conception of the public domain framed in terms of freedom from constraints imposed under the intellectual property regime is the belief that issues about access to and use of information should be resolved according to interest-balancing 'deals' struck within that regime.[36]

This rationale is not without merit. Much of the legwork in shaping the extent of rights and freedoms in relation to information has been carried out from within an intellectual property framework.[37] However, we have not yet reached the stage (and, I suggest, are unlikely ever to reach a stage) where intellectual property law is the sole source of rules that operate to enable the constraint of uses of information by means of contract.[38] An account of the extent to which information may be used without legal constraint must look beyond intellectual property rights.

Samuelson, 'Challenges in Mapping the Public Domain' (n 30) 13. See also Jessica Litman, 'The Public Domain' (1990) 39 Emory L J 965, 968; Michael Madison, 'Legal-Ware: Contract and Copyright in the Digital Age' (1998) 67 Fordham L Rev 1025, 1096. Boyle provides an overview of various conceptions of the public domain. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (n 2).

[35] See for example Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006) 129.

[36] Litman describes how 'copyright specialists … [are] caucusing over the Internet about how the information superhighway will, indeed must, be paved with copyright asphalt.' Jessica Litman, 'The Exclusive Right to Read' (1994) 13 Cardozo Arts & Ent LJ 29, 29. O'Rourke argues 'Courts should not adopt a perspective that cedes all questions of terms of access and use to laws other than copyright.' Maureen O'Rourke, 'Common Law and Statutory Restrictions on Access: Contract, Trespass, and The Computer Fraud and Abuse Act' [2002] Journal of Law, Technology & Policy 295, 296.

[37] Consider the effort invested by the international copyright community under the auspices of the World Intellectual Property Organisation (WIPO) in addressing the challenges presented by the internet, culminating in the adoption of the WIPO Copyright Treaty ('WCT'). At a European level one might point to the rash of legislative activity in the late 1980s through to the early years of the new millennium with the adoption of Council Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] L298/23 ('Television without Frontiers Directive'); Council Directive 93/83/EC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15 ('Cable and Satellite Broadcasting Directive'); Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] L77/20 ('Database Directive'); Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] L167/10 ('Information Society Directive') (implementing the WCT). Heide maintains that the EU Commission adopted a 'copyright-centric' approach to resolving the challenges of the digital environment. Thomas Heide, 'Access Control and Innovation under the Emerging EU Electronic Commerce Framework' (2000) 15 Berkeley Tech LJ 993, 999 (fn omitted).

[38] Constraints may be imposed through the law of tort, obligations, or statutory regimes such as the computer misuse regime.

III.2 The different functions of alternative conceptions of the public domain

It must be stressed that while my conception of the public domain differs from the mainstream conception used in information-related public domain discourse, I do not suggest that the mainstream conception is wrong, only that it serves a different purpose.[39]

Benkler captures the different perspectives of a traditional conception of the public domain on the one hand and, on the other, a conception that aims to identify those uses of information that are free from legal constraints. The traditional, copyright-centric conception of the public domain, Benkler says, comprises

> not all uses of information privileged to the user, but only those uses privileged because there was something about *the information used* that was deemed unprotectible in principle.[40]

The former seeks to identify works that are free for use; the latter is concerned with uses that are free.

There is considerable overlap between Benkler's conception of the public domain and the conception proposed here. Like Benkler, I am concerned to isolate particular uses that are free from legal constraints. The distinguishing feature of my conception of the public domain is that I treat freedom from legal constraints as entailing freedom not only from all those constraints imposed by law (whether under the rules of intellectual property law, confidentiality, unjust enrichment or otherwise) but also freedom from contract. By that I mean that a use that is in the public domain is neither constrained by the default rules of law nor susceptible to the imposition of a contract by the information provider. In Fuller's words, this is a 'domain of "*free-remaining*" relations'.

A bare analysis of the intellectual property rights in the information will not suffice for these purposes. The analysis must certainly take those rights into account but it must also take into account all those aspects of context that pertain to the relationship between the information provider and user. This will include, for example, the mode of delivery of the information, and all other aspects of the supply arrangements. The scope and extent of privileged use can only be determined in the context of an analysis that is concerned with relations between persons.

III.3 Contract v copyright: some common themes

The need for a broadly based account of the public domain, that is, an account that looks beyond intellectual property rights may be inferred from the concerns expressed by intellectual property academics concerning the impact of contract on the use of information.

---

[39] As to the different functions of different conceptions of the public domain see Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (n 2) 67-69. See also Benkler (n 4) 361, 362. Joubish and others offer Rumi's poem 'The Elephant' as a compelling and gracious argument in favour of the adoption of a range of perspectives in order to apprehend the whole of something not otherwise known. Muhammad Farooq Joubish and others, 'Paradigms and Characteristics of a Good Qualitative Research' (2011) 12 World Applied Sciences Journal 2082.

[40] Benkler (n 4) 361.

These concerns can be grouped as follows

- The nature of the online environment makes it particularly easy for information providers to impose contracts on users so as to regulate access to and use of information[41]
- Contracts, particularly standard form contracts, may regulate access to and use of information[42]
- The effect of such contracts is akin to the effects of legislation since, in the online environment, these contracts may operate to create rights against the world[43]
- Contracts may therefore impact on the public domain (in its traditional formulation)[44]

By and large, despite the breadth of these concerns, intellectual property academics have focused on the conflict between contract and copyright as though such contracts are valid and binding.[45] Their attention is directed to particular clauses in contracts that upset the default position enshrined in intellectual property law: they are concerned with clauses that conflict with copyright exceptions or deny users the privileges accorded to them under the intellectual property regime.[46]

These concerns, of course, are valid and appropriate but they are 'second-order' concerns.[47]

---

[41] Heide notes 'The Web environment makes it easy to specify what a user can legally do with the work through the use of a mouse-click contract and/or terms and conditions. To be sure, injecting conditions at the point of initial access and requiring the user's assent prior to any usage allows the rights-holder to set the stage.' Thomas Heide, 'Copyright in the EU and US: What "Access-Right"?' (2001) 48(3) Journal of the Copyright Society of the USA 11. Lemley speaks of 'the ease with which electronic contracting permits the imposition of standard form contracts on a large, anonymous mass of users.' Mark Lemley, 'Terms of Use' (2006) 91 Minnesota Law Review 459, 465.

[42] Heide (n 41) 11; O'Rourke (n 36) 304.

[43] J H Reichmann and Jonathan A Franklin, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information' (1999) 147 University of Pennsylvania Law Review 875, 911; David Nimmer, Elliot Brown, and Gary N Frischling, 'The Metamorphosis of Contract into Expand' (1999) 87 Cal L Rev 1761; O'Rourke (n 36) 297. Benkler argues that 'contractual enclosure, like enclosure produced by altering the background rules of intellectual property, is a matter of constitutional concern.' Benkler (n 4) 431. See also Lemley 'Terms of Use' (n 41) 470, 471.

[44] Guibault tells us that 'on-line licenses may end up posing a threat to intellectual property objectives and the integrity of the public domain'. Lucie Guibault,'Wrapping Information in Contract: How Does it Affect the Public Domain?' in Lucie Guibault and P Bernt Hugenholtz (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006) 104. See also Niva Elkin-Koren, 'Copyrights In Cyberspace - Rights Without Laws?' (1998) 73 Chicago-Kent Law Review 1155, 1188, 1189; Deazley (n 35) 129.

[45] Nimmer (n 43); O'Rourke (n 36); Margaret Jane Radin, 'Regulation by Contract, Regulation by Machine' (2004) 160 Journal of Institutional and Theoretical Economics 142, 145.

[46] Nimmer (n 43); O'Rourke (n 36); Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 197 (stating that the 'heart of the matter' is 'the question of whether and to what extent the contracting parties may depart from the statutory limitations of copyright'); Viva Moffat, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41 University of California, Davis Law Review 45; Deazley (n 35) 127-129.

[47] Nimmer and O'Rourke expressly acknowledge this. Nimmer states that the 'ventilation of the contract issue in the context of copyright poses two analytically separate issues. The first question is whether, as a matter of contract law, the shrinkwrap license unilaterally imposed by the manufacturer constitutes a binding agreement'. For Nimmer the second question, about the extent to which the contract may be reined in or rendered unenforceable by other doctrines, concerns the pre-emption of contract by copyright. Nimmer (n 43) 43. O'Rourke notes 'The question of contract formation is however, at least partially analytically distinct from the enforcement of particular terms.' O'Rourke (n 36) 299.

While the imposition of terms that purport to override copyright exceptions plainly perpetuates the need for permission, the logically prior (first-order) difficulty is the 'permission culture' that makes it possible for the information provider to impose a contract at all, with or without restrictions on copyright.

The first-order question concerns those aspects of contract law, and the underlying matrix of entitlements of parties, (including but not limited to intellectual property entitlements) that make it possible for an information provider to impose a contract on the user. The failure of the intellectual property community to deeply engage with this issue is surprising.[48] After all, the public domain 'left' by copyright represents not only the 'space' in which activities may be carried out without infringing copyright but also the space in which a contract (usually a licence) cannot be demanded for use of the relevant work, at least on copyright grounds.[49] A contract-based conception of the public domain subsumes the question of whether contract terms may be demanded for a particular use of a work but looks beyond copyright and inquires whether terms may be demanded on other legal bases.

Niva Elkin-Koren, perhaps alone in the ranks of intellectual property academics, *expressly* acknowledges that the first-order question concerning basic contract law rules about the requirements for a contract (as opposed to rules concerning the enforceability of particular terms) has a role in shaping the public domain. She warns

> if the standard of assent necessary to form contractual relationships is minimal, then no unlicensed access to works will be possible. The outcome will be very similar to the effect of a right in rem.'[50]

Elkin-Koren's insight relates to the first-order problem concerning how contracts come to be imposed at all. The problem is related to the question of the underlying entitlements possessed by the parties but concerns other questions too. For if, either, contract law allows courts to ignore

[48] Boyle refers to the 'familiar criticism that digital libertarianism is inadequate because of its blindness towards the effects of private power'. James Boyle, 'Foucault In Cyberspace: Surveillance, Sovereignty, and Hard-Wired Censors' (1997) 66 University of Cincinnati Law Review 177. Too great a concern about the actions of the state and too little concern for private power exercised through contract may suggest one reason for such failure. However, so far as the US is concerned, the exercise of engaging with the first-order question may appear downright quixotic given the line of US Courts decisions enforcing browse wrap contracts, and the weight of commentary to the effect that the contract law requirement of assent, to paraphrase Lemley, has all but withered away. Outside the US it may be the case that since the enforceability of various forms of standard form contracts (whether shrink-wrap, click-wrap or browse wrap) remains contested the intellectual property community has decided to train its resources on the second-order question of the enforceability of contract terms that conflict with the copyright regime.

[49] Watt notes: 'In general, copyright law can be seen to simply provide for a restricted space in which contracts can be written.' Richard Watt, 'Economic Theory of Copyright Contracts', paper in Martin Kretschmer and others, 'The Relationship Between Copyright and Contract Law' (Project Report, Strategic Advisory Board for Intellectual Property Policy 2010) 111 <http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf> (accessed 30 July 2015).

[50] Niva Elkin-Koren, 'Copyright Policy and the Limits of Freedom of Contract' (1997) 12 Berkeley Tech LJ 93, 103, 104. Nimmer, discussing the implications of the US case *ProCD v Zeidenberg*, implicitly acknowledges the significance of the question of contract formation for the public domain in the context of a discussion largely directed to the second-order question. Nimmer (n 43) 55. So too does the Australian Copyright Review Committee in the context of its review of the relationship between contract and copyright. Copyright Review Committee, 'Copyright and Contract' (2002) para 5.02 <http://www.austlii.edu.au/au/other/clrc/2/5.html> (accessed 30 July 2015).

or gloss over the reality of those entitlements, finding that an exchange has occurred when it has not, or to subvert the traditional features of the requirement for mutual assent, contract law itself contributes to a permission culture, and to the narrowing of the public domain.

III.4 Contract v copyright: a sub-theme

A sub-theme that appears in the academic literature relating to the interface between contract and copyright concerns the decreasing relevance of copyright and related rights in securing freedom from constraints in the use of information.

Benkler alludes to concerns as to the effect of enforcement of mass market licences in 'displacing copyright and related laws'.[51] Heide, recognising that the power to control access to online information may derive from sources other than copyright argues that 'unless we are to leave copyright completely behind, regulation of certain other rights structures is necessary.'[52] Elkin-Koren claims that

> … the shift to on-line dissemination suggests that the role of copyright law in securing owners' interests may be dispensable.[53]

Raymond Nimmer likewise prophesies the decreasing significance of copyright and rise of contract in shaping access to and use of online content:

> In the new world of digital information, especially on-line digital information, contract law and contracting practice play a dominant role. Traditional copyright law will recede in importance because many aspects of the on-line distribution methodology are not suited to property right constructs centered on the making and distributing of copies as the main property right. Instead, intellectual property law grounded in trademark and other competition or product identification principles will have increasing importance. New property interests, dealing with transmission, extraction, and access, will be created.[54]

Such comments speak to a pressing need for a discourse concerning the public domain that extends beyond intellectual property rights and to the significance of contract in shaping the extent of freedom from constraints in relation to the use of information, particularly in the online environment.[55]

III.5 Contract v copyright: responses by copyright academics

---

[51] Benkler (n 4) 431.

[52] Heide, 'Access Control and Innovation under the Emerging EU Electronic Commerce Framework' (n 37) 2. For a rebuttal of the view that contract will displace copyright see Robert P Merges, 'The End of Friction? Property Rights and Contract In the "Newtonian" World of On-Line Commerce' (1997) 12 Berkeley Tech LJ 115.

[53] Elkin-Koren, 'Copyright Policy and the Limits of Freedom of Contract' (n 50) 111.

[54] Raymond Nimmer (n 21) 829 (citations omitted). See also David Nimmer (n 43) 63 (expressing concern that copyright may become 'an adjunct' to contracts).

[55] Radin argued that the 'validity and enforceability' of '-wrap' contracts is a 'complex' and 'urgent' question, not least since 'contract is displacing intellectual property as the main source of rules governing distribution of rights … '. Radin (n 45) 144.

Those copyright scholars concerned by the impact of contract on the public domain have proposed various solutions from within and outside the copyright regime. Some have argued for statutory contract override provisions to preserve the public domain so far as enshrined in copyright exceptions;[56] some have argued for the development of public interest doctrines that might be pressed into service to protect the public domain;[57] some ask whether human rights might serve that function;[58] in the US some have looked to the doctrine of pre-emption for assistance.[59]

Few have explored whether contract law itself might have a role in policing the extent to which contracts may impact on the public domain.[60]

Elkin-Koren touches on the problem but not the solution. While Derclaye and Favale note that within Europe the question whether browse wrap contracts are prima facie valid remains unresolved they do not address whether greater attention to this issue would allay concerns about contractual incursions into the public domain.[61]

Mark Lemley argues that a focus on contract law will not assist since, he suggests, the real reason why courts enforce browse-wrap contracts is that the courts improperly conflate contract and property claims.[62] It may be true that courts have conflated such claims, but if the problem has arisen on account of careless assessments of the underlying entitlement position, it may equally have arisen on account of a failure to carefully apply the traditional contract law doctrines of assent and consideration. The true nature of the parties' entitlements can (and should) be unpacked in the context of the contract law analysis.

Lemley appears to take another swipe at the idea of addressing the problem of enforceability of restrictions contained in online terms and conditions from within a contract law perspective. He argues

> Saying that browsewraps are enforceable only where the drafter already had a right to prevent a particular use is the functional equivalent of refusing to enforce those browsewraps. The concept of contract does no useful work in either case.[63]

However, Lemley's criticism is directed at arguments concerning the enforceability of particular contract terms: it is directed at 'second-order' concerns.[64] More particularly it is directed at

[56] In 2014 the UK introduced statutory override provisions in relation to some but not all of the copyright exceptions. See for example, Copyright Designs and Patents Act 1988, s 29 (4B).
[57] Mark Lemley, 'Beyond Preemption: The Law and Policy of Intellectual Property Licensing' (1999) 87 Cal L Rev 111; Reichmann and Franklin (n 41) 929 (advocating a doctrine of 'public-interest unconscionability').
[58] Guibault, *Copyright Limitations and Contracts* (n 46) 152-175.
[59] David Nimmer (n 43); Viva Moffat (n 46).
[60] In relation to Europe, Guibault notes that 'The emergence of private governance … is still relatively unexplored ... ' Guibault, 'Wrapping Information in Contract: How Does it Affect the Public Domain?' (n 44) 99.
[61] Estelle Derclaye and Marcella Favale, 'User Contracts ('Demand Side')' paper in Martin Kretschmer and others, 'The Relationship Between Copyright and Contract Law' (Project Report, Strategic Advisory Board for Intellectual Property Policy 2010) 95 <http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf> (accessed 30 July 2015).
[62] Lemley, 'Terms of Use' (n 41) 481.
[63] ibid. Moffat makes much the same point. Moffat (n 46) 99. See also Derclaye (n 61).
[64] In Moffat's case the focus is explicit. Moffat (n 46) 99.

arguments that otherwise valid contracts should be cut down by the courts where the contract terms override the default balance between owner's and user's rights in copyright.[65] Whatever the merits of such proposals, as Lemley observes, the proposals do not concern contract law. Contract law can do useful work but, as Lemley recognises, not the work that he describes: it is not the role of contract to fossilise the status quo, provided that there is an exchange to be made.

In relation to the second-order problem of the impact of particular terms, various solutions are feasible in principle. In practice, faced with contracts that do not respect the limitations that may be imposed by public interest doctrines, human rights, consumer law or other forms of constraints, individual users may be hard pressed to vindicate the rights and privileges secured by these means. For every individual contract struck down or tamed as a result of challenges to its enforceability, others may spring up in its place. In order to tackle the threat to the public domain presented by '[u]nfettered private ordering'[66] one must also explore the internal constraints of contract law. One must tackle the contract law doctrines that breathe life into individual contracts.[67]

IV. Advantages of assessing the public domain through the lens of contract law

There are sound practical and theoretical reasons for coupling a broadly based conception of the public domain, as involving freedom from legal constraints, with a methodology for assessing the public domain through the lens of contract law.

The first reason relates to the nature of the task in hand. The aim of this thesis is to assess the extent to which browse wrap Terms of Use impact on the free use of information made available on publicly accessible websites. Only a contract-oriented approach can determine the initial question whether (even assuming the browse wrap is presented to the user in a way that satisfies notice requirements) the browse wrap meets the requirements for a contract. Unless it does, its impact on the public domain is limited to the 'in terrorem' effect of non-contractual terms.[68]

A second reason concerns the ease with which the arguments presented here may be applied in practice. Courts resolve arguments about the conflict between contract and copyright. Faced with a claim relating to breach of provisions contained in browse wrap Terms of Use, a court must carry out a contract law analysis in order to first determine whether the requirements for a contract are met.[69] The form of analysis adopted here is a 'long-form' version of the form of analysis adopted by and familiar to the courts.

---

[65] Lemley does not identify the proponents of what he describes as a 'pseudo-contract' theory. Thomas Bell, Raymond Nimmer and Lydia Pallas Loren argued for an extension of the copyright misuse doctrine to allow courts to treat offending contracts as unenforceable. Derclaye (n 61) 105.

[66] O'Rourke (n 36) 310.

[67] Even if only to demonstrate where the courts have, in Lemley's words, 'gone astray'. Lemley, 'Terms of Use' (n 41) 480.

[68] Lydia Pallas Loren comments extensively on the 'in terrorem' effect of contracts containing 'over-reaching' provisions that extend content provider's rights over content beyond the confines set by the copyright regime. Lydia Pallas Loren, 'Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse' (2004) 30 Ohio Northern University Law Review. See also Moffat (n 46) 57, 66.

[69] See for example *ProCD v Zeidenberg* 86 F 3d 1447, 1455 (7th Cir 1996); *Register.com v Verio* 356 F 3d 393 (2d Cir 2004); *Hines v Overstock* 668 F Supp2d 362 (2009); *Ryanair v Billigfluege.de* [2010] IEHC 47.

A third reason concerns methodology. This approach offers the only way of measuring, as part of one and the same directed inquiry, both the freedoms and limitations implicit in the parties' (pre-contract) bundle of legal entitlements and the impact of the activities said to give rise to a contract on the scope of parties' rights and freedoms. In Elkin-Koren's terminology, such an approach involves scrutiny of both 'the initial endowment' and any 'subsequent bargain'.[70] It is an approach that kills two birds with one stone.

The fourth reason relates to whether the mainstream model of the public domain is adequately equipped to tackle the concerns of its own proponents. There would appear to be little point in warning about the impact of contracts on the public domain and not addressing whether, and if so why, law permits the formation of contracts having such an impact. In order to address such questions the discourse about the public domain must embrace questions outside the realm of intellectual property; it must embrace questions of contract law.

A fifth reason, related to the third, concerns the potential dangers of an approach that is overly focused on intellectual property. The extent to which particular uses of information are 'free' depends not only on intellectual property regimes (however widely framed) but also on tort law, property law, unjust enrichment, theories of misappropriation, and on laws designed to protect computers and information held on computers. The Achilles heel of a conception of the public domain couched solely in terms of intellectual property constraints is its failure to capture the range of legal instruments that may impact on freedom of information from constraints. A contract-oriented approach, on the other hand, facilitates a broadly-based inquiry into the entire spectrum of the respective parties' entitlements, drawn from whatever source; it mandates an inquiry into what the website brings to the table besides the information itself and associated intellectual property rights.

A final reason is that concern about whether or not information is 'free' implies concern about the imposition of any contractual terms, not merely terms that purport to override copyright exceptions or other freedoms within the intellectual property regime.[71] In the context of typical Terms of Use, copyright restrictions are only one of many provisions that upset the default positions established by public rather than private ordering.

While terms that purport to override copyright exceptions plainly perpetuate the need for permission, the logically prior difficulty is the fact of the imposition of the contract. After all, a standard form contract can contain whatever provisions the drafter chooses.[72] The first-order question concerns freedom from contract: a contract law approach is needed.

---

[70] Elkin-Koren, 'Copyright Policy and the Limits of Freedom of Contract' (n 50) 105.

[71] Dawn Davidson, 'Click and Commit: What Terms are Users Bound to When They Enter Web sites?' (2000) 26(4) William Mitchell Law Review 1171, 1179; Ronald J Mann and Travis Siebeneicher, 'Just One Click: The Reality of Online Internet Retailing' (2007) U of Texas Law, Law and Econ Research Paper No. 104 < http://ssrn.com/abstract=988788 > (accessed 19 September 2015); Andrea M Matwyshyn, 'Mutually Assured Protection: Development of Relational Internet Security Contracting Norms' in Anupam Chander, Lauren Gelman, and Margaret Jane Radin (eds), *Securing Privacy in the Internet Age* (Stanford University Press 2008) 73; Marita Shelly and Margaret Jackson, 'Doing business with consumers online: privacy, security and the law' [2009] International Journal of Law & Information Technology 180. See also Dale Clapperton and Stephen Corones, 'Unfair Terms In 'Clickwrap' And Other Electronic Contracts' (author version) <http://eprints.qut.edu.au/7650/1/7650.pdf> (accessed 29 July 2015).

[72] Consider the provisions at issue in *Internet Archive v Suzanne Shell*: the judgment records that 'These terms include 'charging the user $5,000 for each individual page copied "in advance of printing," granting

Section V. Conclusion

In this Chapter I set out and developed a novel conception of the public domain as an area of freedom not only from law but from contract.

I explained that the conception has its genesis in Fuller's conception of a 'field of human intercourse freed from legal constraints'. I drew attention to particular aspects of Fuller's conception, its focus on freedom from contract, its links to Fuller's wider concern for liberty, its relationship to the rules of contract law that limit the scope for the imposition of contracts to situations of exchange between persons.

I considered how my proposed conception of the public domain fits with the existing public domain discourse. I noted that while the existing public domain discourse uses the language of freedom from constraints, typically it is concerned only with freedom from the constraints of law, and of intellectual property law in particular, not of contract. I argued that for a conception of the public domain to address the range of constraints that may, through law, be imposed on use of information, it must look beyond intellectual property.

I suggested that the need for a conception of the public domain that looks beyond intellectual property may be inferred from commentary. The commentary points to the overlap between contract and copyright. It is very much alive to the risk that contract law may displace the balance of interests secure through copyright law and impact on user freedoms. Yet, while several commentators tackle the second-order question of the enforceability of particular contract terms, scant attention is paid to the first-order question of contract formation, of how contracts come to be imposed at all.

I set out the advantages of assessing the scope of the public domain through the lens of contract law. These advantages are both practical and theoretical. They concern fitness for purpose, since the task of assessing the extent to which information made available on a publicly accessible website is free from constraints on use must take account of constraints imposed by contract; ease of application, on account of the fact that conflicts between contract and copyright invariably proceed according to an initial assessment as to whether a valid contract exists; methodology, since a conception of the public domain that takes account of freedom from law and contract subsumes questions of freedom from the constraints of intellectual property laws but looks further to the impact of other areas of law and of contract on the use of information; comprehensiveness; and responsiveness to concerns about the imposition, in relation to use of information made available on open publicly accessible websites, of contract terms generally, not merely those that conflict with the copyright regime.

Shell a perfected security interest of $250,000 "per each occurrence of unauthorized use" of the website in all of the user's land, assets and personal property, the user agreeing to pay "$50,000 per each occurrence of failure to prepay" for use of the website, "plus costs and triple damages," and agreeing to waive numerous defenses in any claims by Shell against the user.' *Internet Archive v Suzanne Shell* 505 F Supp 2d 755, Civ. No. 06-cv-01726-LTB-CBS (D Colo, Feb 13, 2007).

Chapter III

Towards a Contract-oriented Public Domain

I. Introduction

In this Chapter I develop the contract-oriented conception of the public domain in relation to information made available on open publicly accessible websites featuring Terms of Use. The aim is to put flesh on the bones of Fuller's conception of a domain free from the constraints of law and contract by hammering out a methodology for determining the scope of the public domain from the rules of contract formation.

I commence, in Section II, with an account of the key requirements for a contract, these being at once the touchstones for a contract and the way-markers of contract's scope and limits.

In Section III, from the range of questions flagged up by the key requirements for a contract, I select and address as a preliminary to the main inquiry, two questions about the application of the rules of contract law to browse wrap Terms of Use. These are, first, whether the website makes an offer to the user on the terms set out in the Terms of Use and, second, assuming the user assents to the Terms of Use whether the requirement as to intention to create legal relations is met.

The main inquiry relates to the requirements as to the existence of assent and consideration. These are considered in Section IV and V respectively.

At Section VI I describe how the key requirements for a contract may be pressed into service, providing a methodology for mapping the public domain. The methodology depends on a benefits-oriented articulation of the exchange between website and user. So translated, the contract law doctrines of consideration and mutual assent may be applied so as to determine if the exchange between user and website, mediated by browse wrap Terms of Use, is one that gives rise to a contract, so diminishing the scope of the public domain or is contract free.

Section II: The key requirements for a contract

In the following section I offer a skeletal outline of the key requirements for contract formation, namely, consensus ad idem evinced by offer met by acceptance, intention to create legal relations and consideration.

Treitel articulates the three requirements in the following terms

1. Consensus

The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is made when one party accepts an offer made by the other.[1]

2. Consideration

In English law, a promise is not, as a general rule, binding as a contract unless it is made either in a deed or supported by some 'consideration'.[2]

3. Intention to Create Legal Relations

An agreement, though supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations.[3]

Nothing in the orthodox account of the requirements for formation of contract requires that the contract should be express.[4] While many commercial contracts take the form of express, written agreements, signed by both parties, there are innumerable instances of contracts that are not express but come into being through a combination of words or writing and conduct. [5]

While, according to Chitty, it matters little whether contracts are express or implied, it makes a difference as regards contract formation in at least one respect.[6] Intention to create legal relations may 'commonly be assumed' in cases where the contract is express. [7] Moreover, although a relevant distinction is not expressly recognised in commentary or case law, it may in practice make a difference whether the offer is express or implied.[8]

In assessing whether the requirements for a contract are met, it is appropriate therefore to determine

[1] Edwin Peel and G H Treitel, *The Law of Contract* (13th edn, Sweet and Maxwell 2011) ('Treitel') para 2-001.
[2] Treitel (n 1) para 3-001.
[3] Treitel (n 1) para 4-001.
[4] In distinguishing between 'express' and 'implied' the Courts appear to give these terms their ordinary meaning. For example in *Aitchison v Lee*, the Court considered the meaning of the term 'expressly provided'. According to the Court 'Those words, according to their natural and obvious interpretation, refer, not to what may be collected by inference or implication from the supposed general tenor of the Act, but to some clause or clauses of the Act, in which the rights or remedies of creditors are by specific and express words diminished, prejudiced, altered or affected …' *Aitchison v Lee* (1856) 3 Drewry 637, 651. See also *Grossman v Hooper* [2001] EWCA Civ 615, [2001] 3 FCR 662.
[5] Most everyday contracts for sale and contracts for carriage are contracts implied from the parties' conduct. As to everyday contracts for sale, see Richard Stone, *The Modern Law of Contract* (8th edn, Routledge Cavendish 2009) para 2.12.1. As to contracts for carriage see Treitel (n 1) para 2-012.
[6] Joseph Chitty and HG Beale, *Chitty on Contracts* (28th edn, Sweet and Maxwell 2012) para 1–034.
[7] *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192 [102]. See also *Baird Textile Holdings Limited v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737; Treitel (n 1) para 4-026.
[8] The distinction between situations where the offer is express or implied *is* recognised, but the implications are not spelled out. For example in *Aragona v Alitalia Linee Aeree Italiane SpA* [2001] EWHC 463 (QB) a distinction is made between 'pure contracts by implication' and the situation in that case, where the offer was express. In *Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund* [2014] EWHC 3369 (Comm) the Court distinguished between the 'hybrid' case at issue before the Court (where some of the communications between the parties were express) and other cases where there is 'an expressly stated offer'.

1. Is there an offer?
2. Is it express or implied?
3. Is there acceptance?
4. Is there consideration?
5. Is there intention to create legal relations?

In tackling these issues I mean to first address and dispense with questions 1, 2 (considered together) and 5, returning to the key issues, acceptance and consideration, in Section IV.

Section III: Two Questions as to Contract Formation

III.1 Introduction

In this Section I address two questions: first, is there an offer express or implied and second, is the requirement for intention to create legal relations met in the case of browse wrap Terms of Use.

III. 2 Is there an offer, express or implied?

III.2.1 The meaning of 'offer'

According to Treitel

> An offer is an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed.[9]

It is implicit in this formulation and in Treitel's discussion of the topic that the offer must be communicated to the offeree.[10] An offer is 'nothing until it is communicated to the party to whom it is made.'[11]

III.2.2 The context of browse wrap Terms of Use

In the context of browse wrap Terms of Use the question is whether the presentation of the Terms of Use, typically by way of a hyperlink situated at the foot of a webpage, can properly regarded as an offer, express or implied. By way of illustration, Figure 3-1 shows a screenshot of Ryanair's home page after scrolling down below the fold.

[9] Treitel (n 1) para 2-002.
[10] Treitel (n 1) para 2-003. See also J Beatson, A Burrows, J Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 39, 51.
[11] *Thomson v James* 1855 18 D 1, 10.

Figure 3-1[12]

Figure 3-2 shows a close-up view of the bottom bar of the webpage on which the hyperlink to Ryanair's Terms of Use are situated.

Figure 3-2[13]

In this case the presentation of the hyperlink titled Terms of Use does not clearly signal the making of an offer. Even ignoring the question of whether the location and size of the text in the hyperlink titled 'Terms of Use' militate against the hyperlink operating as notice of terms, there is here no express statement of willingness to contract. In the absence of an express statement of willingness to contract is there an implied statement to that effect? In other words, does the presentation of the hyperlink titled 'Terms of Use' involve the making of an implied offer?

III.2.3 Implied offers: examples from case law

Case law provides examples of offers implied from conduct. Two cases offer particularly apposite examples.

Thornton v Shoe Lane Parking involved a claim for damages after the plaintiff was injured at the defendant's car park.[14] The defendant sought to exclude liability on the basis of conditions,

[12] Screenshot of the home page of Ryanair, with the URL <https://www.ryanair.com> (accessed 10 July 2015).
[13] Edited version of Figure 3-1 (n 12) to show close-up view of text in the bottom bar of the home page of Ryanair.
[14] [1971] 2 QB 163.

displayed in the interior of the car park and referred to on the ticket issued to the plaintiff by an automatic ticket machine situated at the entrance to the car park. The question on appeal was whether the plaintiff had notice of these conditions before the conclusion of the contract. For these purposes the key issues related to the timing of acceptance and the point at which, if at all, the plaintiff's attention was drawn to the existence of the conditions displayed within the car park. However, Lord Denning took the opportunity to express a view as to the manner in which an offer was made to the plaintiff.

In the particular circumstances of that case, Lord Denning considered that the automatic ticket machine made an offer 'when the proprietor of the machine holds it out as being ready to receive the money.'[15] The offer was impliedly made by the manner of presentation of the machine. The terms of a notice adjacent to the machine, and so visible at or before the point at which the customer put his money in the machine (this, according to the Court being the time of acceptance), were incorporated as terms of the contract. However the offer was made by the display of the machine, not the presentation of the notice.

The question of the mechanics of the offer was also addressed in the Court of Appeal decision in *Chapelton v Barry Urban District Council.*[16] The case related to the hire of deck chairs. The deck chairs were available on the beach. Next to the pile of deck chairs was a notice that read 'Barry Urban District Council. Cold Knap. Hire of chairs 2d. per session of 3 hours.'[17] The notice

> 'went on to state that the public were requested to obtain tickets for their chairs from the chair attendants and that those tickets should be retained for inspection.'[18]

The plaintiff hired a deck chair and was issued with a ticket that contained a condition limiting liability on the reverse of the ticket. The Court concluded that the lower court was wrong to have treated the ticket as incorporating the terms of the offer and that the ticket was a mere receipt. This aspect of the judgment, distinguishing between contractual documents and mere receipts, is not especially relevant for present purposes. Of more relevance is Slesser LJ's discussion of the manner in which, in his view, the Council made an offer to the plaintiff. His Lordship comments

> The local authority offered to hire chairs to persons to sit upon on the beach, and there was a pile of chairs there standing ready for use by any one who wished to use them, and the conditions on which they offered persons the use of those chairs were stated in the notice which was put up by the pile of chairs, namely, that the sum charged for the hire of a chair was 2d. per session of three hours. I think that was the whole of the offer which the local authority made in this case. They said, in effect: "We offer to provide you with a chair, and if you accept that offer and sit in the chair, you will have to pay for that privilege 2d. per session of three hours."[19]

The offer is made by the display of the chairs; the notice merely sets out the terms of the offer. The offer is an implied offer made by conduct though the payment terms are express.

---

[15] ibid 169.
[16] [1940] 1 KB 532.
[17] ibid 534.
[18] ibid.
[19] *Chapelton* (n 16) 536.

III.2.4 Arguing from analogy: from ticket machines and deck chairs to open publicly accessible websites?

By analogy with the exchanges described in *Thornton* and *Chapelton*, might it be said that an open publicly accessible website makes an implied offer simply by virtue of the display of the website? Two cases appear to assume that the website makes an implied offer through conduct though the question of precisely how the offer was made was of no significance in either case.

In *Register.com v Verio* the Court uses the analogy of the display of apples on a fruit stall with a notice at the side of the stall indicating the price of the apples, in order to assess whether a user who repeatedly accessed a website accepted terms intimated only after each occasion on which the website was accessed.[20] Implicit in the analogy is the idea that the display of the apples, and so presumably the display of the website, constitutes the offer, the notice merely intimating terms.

The assumption is made explicit in *Ryanair Ltd v Billigfluege.de GmbH* where Hanna J expresses the view (strictly obiter)[21] that

> the plaintiff, through their website, offer information for use, subject at all times to their Terms of Use policy, to the users of their website, including the defendants.[22]

Hanna J makes express reference to *Thornton* and treats the question about the contractual significance of Ryanair's Terms of Use as one of incorporation of terms, taking it as read that there is an offer of some sort merely by virtue of the display of the website.[23]

Nevertheless it is doubtful whether the mere display of a website featuring a hyperlink titled 'Terms of Use' or similar does constitute an offer. The scenario is different from that in either *Thornton* or *Chapelton* in (at least) one crucial respect: in both those cases money changed hands. When money changes hands (as in the case of the hire of deck chairs, the purchase of tickets for travel,[24] paid for licences for access to or use of property[25] or other resources[26]) it is plain that there is some form of contract and so the exercise of identifying the offer is largely a formality, the real question being one of which terms were incorporated.[27] Of such cases it may be said that

---

[20] 356 F 3d 393 (2d Cir 2004).

[21] The question as to whether a contract was formed was not necessary for the disposal of the case, a point confirmed on appeal to the Supreme Court of Ireland in *Ryanair Limited v Billifluege.de.GmbH/Ticket Point Reiseburo GmbH & Anor* [2015] IESC 15.

[22] [2010] IEHC 47, [2010] I L Pr 22, para 25.

[23] *Ryanair Ltd v Billigfluege.de GmbH* (n 22) paras 23, 24, 25.

[24] *Hood v Anchor Line* [1918] AC 837; *Thompson v London, Midland and Scottish Railway Co* [1930] 1 KB 41; *McCutcheon v David MacBrayne Ltd* 1964 SC (HL) 28.

[25] *LLanelly Railway and Dock Co v LNW Railway* (1874-75) LR 7 HL 550 (agreement to use railway lines); *Kerrison v Smith* [1897] 2 QB 445 (licence to post bills on a hoarding); *Hurst v Picture Theatres Ltd* [1915] 1KB 1 (ticket to attend a cinema performance); *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173 (agreement for use of a theatre); *Halbauer v Brighton Corporation* [1954] 1 WLR 1161 (arrangement to leave a caravan on a site); *Vehicle Control Services Limited v The Commissioners for Her Majesty's Revenue & Customs* [2013] EWCA Civ 186 (the issue of a parking permit). See also the Scottish case of *University of Edinburgh v Onifade* [2005] SLT (Sh Ct) 63 where a car parking arrangement was treated as contractual.

[26] *Harrods Ltd v Harrods (Buenos Aires) Ltd and Another* [1997] FSR 420 (use of the name 'Harrods').

[27] *McCutcheon* (n 24); *Reveille Independent LLC v Anotech International (UK) Ltd* [2015] EWHC 726 (Comm) [41] (treating payment as 'powerful evidence' as to the existence of a contract).

'The question is, what was the contract between the parties?'[28] No real issue exists as to whether there was a contract at all.

By contrast where the mere display or provision of items of property or other resources as available for access or use is not accompanied by a request for payment it is far from clear that such display entails the making of an offer.[29] On the contrary, very often in such cases Courts will imply a bare non-contractual licence.[30]

The defendants in *Century 21* raised this point in relation to the browse wrap Terms of Use of the plaintiff Century 21.[31] Punnet J notes that

> The defendants assert that the "ticket cases" do not address the issue of whether a contract was formed at all. That is, they start from the proposition that the parties know they are entering into a contract and then the issue addressed is whether they have sufficient notice of the terms of the contract. They know that they have the option of accepting the service offered and entering into an agreement or rejecting the offered service. … They [the defendants] submit that in the world of the Internet there is no awareness that accessing a website forms a contract.[32]

In response, Punnet J accepts that 'a party [must] have knowledge or notice of an offer in order to accept it or reject it.'[33] However Punnet J considers that the requirement as to notice of the *offer* is fulfilled by notice of *terms*. Since the defendants accepted that they had actual notice of the Terms of Use, he considered that questions about sufficiency of notice did not arise in that case.[34]

It is not clear that the question of the existence of an offer can be wholly determined by reference to notice of terms. The person to whom the terms are directed may have no appreciation that the terms are intended to have contractual effect. Just as the Courts, in the ticket cases, acknowledged that in certain situations a person receiving a ticket might 'put it in his pocket unread' having no reason to believe that the ticket contained contractual conditions, so a person

---

[28] *McCutcheon* (n 24) 33 (Lord Reid). *McCutcheon* is a 'ticket case'.

[29] See *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258 (holding that a free bus pass was not contractual) and *Gore v Van der Lann* [1967] 2 QB 31 (holding that it was). In *Confetti Records (A Firm) v Warner Music UK Ltd* [2003] EWHC 1274 (Ch), [2003] EMLR 35 the grant of a licence in the nature of clearance to use copyright material was treated as a bare licence on the basis that this was a unilateral, gratuitous grant. By contrast a letter permitting use of the name 'Herr Voss' was treated as a collateral contract in *Blue IP Inc v KCS Herr Voss UK Limited* [2004] EWHC 97 (Ch).

[30] For example, in *Davis v Lisle* [1936] 2 KB 434 at 440 Goddard J expressed the view that an implied licence is granted by the owner of an open garage or a shop to enter such premises. More recently in *Robson v Hallett* [1967] 2QB 939 at 940 the court confirmed that 'the occupier of a house gave an implied licence to any member of the public coming on his lawful business to come through the gate, up the steps and to knock on the door of his house ... ' See also Robert Megarry and others, *The Law of Real Property* (8th edn, Sweet and Maxwell 2012) para 34-003. Some commentators have expressed the view that (in the absence of Terms of Use) open publicly accessible website grant an implied licence for access and use. Chris Reed, 'Controlling World Wide Web Links, Property Rights, Access Rights and Unfair Competition' (1998) 6(1) Indiana Journal of Global Legal Studies 167, 183; Mark Lubbock and Louise Krosch, *E-Commerce: Doing Business Electronically* (TSO 2000) 24. See also Mireille M M van Eechoud, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer Law & Business 2009) 116.

[31] *Century 21 Canada Limited Partnership v Rogers Communications Inc* 2011 BCSC 1196.

[32] *Century 21* (n 31) [71].

[33] ibid [72].

[34] ibid [121].

might be entitled to ignore a notice of terms having no reason to suppose that these were associated with a contractual offer.[35] In reality, however, where the very existence of a contract is in issue[36] the question of whether there is an offer may in certain cases only be assessed in the round, taking into account both offer and acceptance.[37] If therefore the question about the existence of an implied offer is posed in isolation, the answer may be first, that no such offer can be clearly identified unless and until the courts take the view that users have become habituated to the idea that websites condition access to their websites on agreement to their Terms of Use[38] and second, that attention should be directed instead to the terms contended for and in particular whether such terms have been brought to the attention of the user, *as a preliminary* to determining whether a contract may be implied having regard to the test of necessity of implication.[39]

III.2.5 The implications of the US approach to notice of terms

Questions about the adequacy of notice of terms have been addressed in the US cases.[40] In one such case, *Hines v Overstock*, the Court addressed the question of whether a contract was made

[35] *Parker v The South Eastern Railway Company* (1877) 2 CPD 416, 422.

[36] See for example, *Wilson v Partenreederei Hannah Blumenthal* [1983] AC 854; *The Aramis* [1989] 1 Lloyd's Rep 213; *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195; *The Gudermes* [1993] 1 LlR311; *Baird Textile Holdings Limited* (n 7); *Modahl* (n 7); *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189. Of such cases, it may be said, 'This is not a case in which, the parties having evidently sought to make a contract, the court seeks to uphold its validity by construing the terms to produce certainty…' *Baird Textile Holdings Limited* (n 7) para 30. White, writing of the position under US law, states 'The silence by [sic, this should no doubt read 'as'] acceptance cases usually address the question whether a contract exists at all.' James J White, 'Autistic Contracts' (2000) 45 (4) Wayne L Rev 1693, 1709.

[37] See for example, *Aragona* (n 8) (the Court proceeding to carry out an analysis as to acceptance by conduct on the assumption that an offer was made); *A E Yates Trenchless Solutions Limited v Black and Veatch Limited* [2008] EWHC 3183 (TCC) ('a course of dealing and conduct, construed objectively, can amount to acceptance, in contractual terms of an offer made by a party.'); *Modahl* (n 7) (Latham LJ finding offer and acceptance in an athlete's being offered and accepting the opportunity to compete 'in the knowledge of the disciplinary consequences'; Mance LJ dispensing with the need to find offer and acceptance, instead asking whether there was agreement).

[38] The Courts might consider that commercial users are habituated to Terms of Use since they may deploy Terms of Use on their own websites. In *Century 21* Punnet J treated the fact that the defendants used Terms of Use similar to those of the plaintiffs as being relevant to the question of notice of the plaintiff's Terms of Use. *Century 21* (n 31) [120].

[39] In *Century 21* Punnet J notes 'If notice of the terms is sufficient, the issue in principle then becomes whether or not the terms are accepted by confirmation either by express agreement or by implied conduct.' *Century 21* (n 31) [73].

[40] 'Most courts analyzing the enforceability of the terms and conditions of browsewrap contracts focus on whether the user had actual or constructive knowledge of the terms and conditions such that their use of the website can constitute assent to the terms.' *Kraft Real Estate Investments, LLC v Homeway.com, Inc* 2012 WL 220271 (DS Car Jan 24, 2012). According to some commentators, in the US the Courts have proceeded on the basis that the question of notice is also dispositive of the question of assent. Notice therefore becomes the key question to be addressed. Mark Lemley, speaking of the US position, claims '[I]n today's electronic environment, the requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms.' Mark Lemley, 'Terms of Use' [2006] Minnesota Law Review 459, 465 (footnote omitted). Kim maintains that 'the manifestation of consent requirement has been swallowed up by notice'. Nancy S Kim, *Wrap Contracts: Foundations and Ramifications* (OUP 2013) 128. See also Margaret Radin, 'Boilerplate Today: The Rise of Modularity and the Waning of Consent' (2006) 104 Mich L Rev 1223, 1232 (suggesting that a focus on the requirement for notice may be an exercise in 'shoring up vestigial will theory'); Niva Elkin-Koren and Eli M Salzberger *The Law and Economics of Intellectual Property in the Digital Age* (Routledge 2013) 160. Steve Hedley, speaking

by the presentation of browse wrap Terms of Use by first assessing whether the user had notice of the terms.[41] The Court considered that the existence of a hyperlink at the foot of a webpage titled 'site user terms and conditions' was insufficient to provide the user with notice. The Court was concerned with two aspects of the presentation of the hyperlink. First, the Court considered that adequate notice of the terms was not supplied where the user had to scroll to the bottom of the webpage in order to see the hyperlink. However the Court was also concerned that the hyperlink should be displayed in such a way as to 'prompt the user to review' the terms made available by way of the hyperlink. In this respect the Court observed that

> Notably unlike in other cases where courts have upheld browsewrap agreements, the notice that "Entering this Site will constitute your acceptance of these Terms and Conditions," … was only available within the Terms and Conditions.[42]

The decision would seem to suggest that in the absence of conspicuous wording, visible on the webpage accessed by the user rather than merely accessible by hyperlink, clearly indicating that the website is proposing terms that are intended to form part of a mutual agreement, the user cannot be taken to know that the website intends any offer. In effect *Hines* suggests that at least in the case of non-commercial users, and where no other steps are taken to put users on notice of the terms, only an *express* offer with adequate notice of terms will suffice if browse wrap Terms of Use are to give rise to a contract.[43] The question has not arisen before the English Courts. It remains to be seen therefore what weight is accorded to the argument that in the absence of an express offer ordinary users cannot be taken to know that the website intends that the user should enter into an agreement regulating his use of the website.[44]

III.2.6 Is an open publicly accessible website capable of making an express offer?

The example offered by *Hines* indicates that it is feasible for websites to display Terms of Use in such a way as to communicate an express offer through the use of the form of wording suggested by the Court. Ticketmaster's website adopts such wording. Ticketmaster display the following legend at the foot of every page of their website

---

of the development of US law in relation to assent to browse wrap Terms of Use comments 'While it is understandable that the US case law should have reached this position, it is not a happy state for the law to be in.' Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Cavendish 2006) 250. The English Courts have not yet addressed the significance of notice or assent in the context of browse wrap Terms of Use. While the Irish case *Ryanair v Billigfleuge.de* (n 22) hints at a notice-based approach to assent, the Court's assessment as to the contractual status of browse wrap Terms of Use was strictly obiter.

[41] 668 F Supp 2d 362 (2009).

[42] ibid.

[43] *Hines* is in line with the approach previously suggested by the American Bar Association Working Party. The ABA expressed the view that 'clear language in a hyperlink that the terms constitute a proposed agreement is more likely to result in a binding contract.' Christina L Kunz and others, 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' (2003) 59(1) The Business Lawyer 279, 294. However it may also reflect the view expressed by Farnsworth that in distinguishing between offers and preliminary negotiations the presence of 'language suggesting that it is within the power of the recipient to close the deal by acceptance' is important. E Allan Farnsworth, *Farnsworth on Contracts* (3rd edn, Aspen Publishers 2004) § 3.10.

[44] It may make a difference whether the benefit purportedly conferred by the website on the user is designated as a service or mere access. Arguably contract law will more readily infer a contract where a service is provided. In *Century 21* the defendants argued that 'what Century 21 provides … is merely a grant of access to the site'. *Century 21* (n 31) [118].

BY CONTINUING PAST THIS PAGE, YOU AGREE TO OUR TERMS OF USE.

and

Your continued use of this website constitutes acceptance of these terms.[45]

This has the appearance of an *express* offer made subject to terms with notice that the terms are contained in the Terms of Use accessible by means of hyperlink. It is, in Treitel's words, 'an expression of willingness to contract on specified terms' and the terms themselves will very often contain a clear statement as to the website's intention that the terms should be binding on acceptance.[46]

It would appear therefore that while the question as to whether the website makes any offer save where it does so expressly is live, that difficulty may be addressed by a straightforward change in the mode of display.

III.3 Is the requirement as to intention to create legal relations met?

Modern English contract law tells us that intention to create legal relations is objectively assessed by the Courts.[47] The subjective intentions of the parties are not determinative. The apparent latitude afforded to the Courts by the requirement for an objective assessment of intent is moderated in practice by the operation of presumptions as to the presence or absence of intention to create legal relations.

Intention to create legal relations is normally inferred in express agreements of an ordinary commercial nature, but not in implied agreements or social or domestic agreements. [48] It is rare for judges to deny contractual effect to an express commercial agreement for want of lack of intention to create legal relations: the onus on a party to displace the presumption in favour of the requisite intention is 'heavy'.[49] In the case of implied agreements, the onus is on the party

[45] While the mode of display fails the test for conspicuousness suggested by *Hines* (n 41) (the user has to scroll to the bottom of the website to see the statement) that failure is easily remedied. The website need only display the text in the header bar of the website instead.

[46] For example, in *Century 21* the Court records that the Terms of Use contained the following statement 'Century 21 Canada Limited Partnership ("CENTURY 21") provides this website (the "Website") to you ("You") subject to your acceptance of the following terms and conditions of use (these "Terms of Use"). By accessing or using the Website You agree to be bound by these Terms of Use without limitation or qualification. If You do not agree to be bound by these Terms of Use, You must not access or use the Website.'

[47] The doctrine has its detractors. Atiyah suggests the doctrine is 'merely a legal justification for refusing to enforce a promise which the courts think, for one reason or another, it is unjust or impolitic to enforce'. P S Atiyah, *Essays on Contract* (Oxford Clarendon Press 1990) 184. Hedley disputes the need for the requirement. Stephen Hedley 'Keeping Contract in Its Place: Balfour v Balfour and the Enforceability of Informal Agreements' (1985) 50 Oxford Journal of Legal Studies 391. Megaw J expressed some difficulty in the application of the doctrine commenting 'Counsel for the plaintiff also submitted, with the support of the well-known textbooks on the law of contract, … that the test of intention to create or not to create legal relations is "objective." I am not sure that I know what that means in this context.' *Edwards v Skywards* [1964] 1 WLR 349, 355.

[48] In *Edwards* (n 47), 355 Megaw J commented 'In the present case, the subject matter of the agreement is business relations, not social or domestic matters … I accept the propositions … that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.' See also *Esso Petroleum Co v Customs and Excise Commissioners* [1976] 1 WLR 1, 5, 6.

[49] *Edwards* (n 47) 355.

seeking to establish the existence of the contract to show that the parties to the contract possessed the requisite intention. In such cases it is accepted that 'contracts are not lightly to be implied'.[50] However the question in every case is one for evidence.

On this account the question that is determinative for the operation of the presumptions is simply whether the contract is express or implied. It appears that this is so even where the offer or certain of its terms are express.

Thus in *Assuranceforeningen Gard Gjensidig*, Mr Justice Hamblen applied the presumption against an inference of intention to create legal relations where assent had to be implied from conduct though the offer was said to be set out in oral and written communications.[51] Justice Hamblen notes that

> In a hybrid case such as this, involving a combination of what the parties said and did and no expressly stated offer to contract in the terms alleged, I consider that in principle the onus is on the party claiming that a binding agreement was made to prove that there was an intention to create legal relations.[52]

Justice Hamblen does not explore whether a different approach would be appropriate if, on the evidence, there was an expressly stated offer to contract. He seems to imply that that factor would be significant though he does not say how.

The example presented by browse wrap Terms of Use is distinguishable from the situation in *Assuranceforeningen Gard Gjensidig.* In that case the offer, if there was once, had to be found in a combination of oral and written communications, none of which incorporated any expressly stated offer to contract.[53] If a website makes an offer on the terms contained within browse wrap Terms of Use, as we have seen, it may do so expressly by virtue of a clear statement in or accompanying the hyperlink by means of which the Terms of Use are made available.[54] Not only that but the Terms of Use will very often be couched in clear contractual terms so that assuming that the Terms of Use have been adequately brought to the attention of the user, the user will be on notice as to the website's intention that the Terms of Use should be binding.[55] While *Assuranceforeningen Gard Gjensidig* does not displace the usual rule that where contracts must be implied the onus is on the party seeking to enforce the contract to show that both parties possessed the requisite intention to create legal relations, it suggests, at the very least, that the presence of express terms, and more especially the presence of an express offer, is a factor that may weigh in the scales in assessing whether that onus has been met.

Indeed if, faced with an offer that is expressly stated to be contractual, the offeree engages in conduct that, in the eyes of the Court, is treated as signalling assent, it would seem to follow that the offeree must be supposed to have intention to create legal relations having been put on notice of the offeror's intentions. Chitty notes that the objective test as to intention to create

[50] *Blackpool Aero Club* (n 36) 1202; *Modahl* (n 7) [83].
[51] *Assuranceforeningen Gard Gjensidig* (n 8) [120].
[52] ibid.
[53] *Assuranceforeningen Gard Gjensidig* (n 8) [102].
[54] As in the example provided by the Ticketmaster website (n 45 and accompanying text). See also Juliet M Moringiello, 'Signals, Assent and Internet Contracting' (2004) 57 Rutgers L R 1307, 1318.
[55] See n 46.

legal relations 'prevents a party from relying on his uncommunicated belief as to the binding force of the agreement.'[56] The user having read (or having been taken to have read)[57] Terms of Use that clearly intimate that they are intended to have contractual effect, the website would, I suggest, have little difficulty in persuading a court that any resulting agreement possessed the requisite intention to create legal relations.[58]

III.4 Summary

There is reason to suppose that provided a website adopts the style of presentation of its Terms of Use approved by the Court in *Hines*, the presentation of the Terms of Use may be treated as an express offer, containing a clear statement as to contractual intent. It would seem therefore that in such cases neither the existence of an offer nor, where a Court finds assent on the part of the user, the presence of intention to create legal relations is likely to be in issue.

In the rest of this Chapter, and in the Chapters that follow I assess the contractual status of browse wrap Terms of Use on the basis that the website makes an express offer and the requirement for intention to create legal relations is met.

Section IV. Acceptance

IV.1 The meaning of 'acceptance'

Assuming that it is possible to identify an offer on terms sufficiently clear as to give rise to a contract in the event of acceptance, the question that must be resolved is whether the offer has been accepted.

Acceptance is a 'final and unqualified expression of assent to the terms of an offer'.[59] The offer may be accepted by conduct.[60] In the case of open publicly accessible websites featuring browse wrap Terms of Use, users do not typically engage in any direct communication with the website in relation to the offer incorporating the Terms of Use. If there is acceptance, it is acceptance through conduct.

Whether acceptance may be inferred from conduct is assessed according to an objective test.[61] The test is one of necessity of implication.

IV.2 The test of necessity of implication

[56] Joseph Chitty and HG Beale, *Chitty on Contracts* (31st edn, Sweet and Maxwell 2012) para 2-164. See also *Chartwell Estate Agents Limited v Fergies Properties SA, Mr Hyam Lehrer* [2014] EWHC 1567 (QB) [114].
[57] The duty to read extends to terms contained in an offer that may be accepted by conduct. *Parker v The South Eastern Railway Company* (1877) 2 CPD 416, 421. See also (as to the US position) John D Calamari and Joseph M Perillo, *Contracts* (2d edn, West Publishing 1977) § 9-42; Moringiello (n 54) 1312; Kim (n 40) 28, 65.
[58] Hogg suggests that this would be the position under Scots law, where according to Hogg, the test for agreement subsumes the test as to intention to be legally bound, a qualifying agreement being one which 'must disclose obligatory consent'. Martin A Hogg, 'Competing Theories of Contract: An Emerging Consensus?' in Larry DiMatteo and others (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013) 24.
[59] Treitel (n 1) para 2-016.
[60] Treitel (n 1) para 2-018.
[61] ibid.

Where a contract must be implied the Courts apply a test of necessity of implication.[62] The test applies both in cases of 'pure contracts by implication' where the contract as a whole must be implied from the parties' conduct and in 'hybrid' cases where the offer is express and only the question of assent falls to be implied.[63]

Mance LJ provides a review of the relevant authorities in *Baird Textile Holdings Ltd v Marks and Spencer plc*.[64]

Baird Textile Holdings Ltd was concerned with whether a contract could be implied as a result of a long course of dealing between the parties even though it was accepted that the defendants, Marks and Spencer plc had deliberately resisted entering into an express agreement. Affirming the decision of the lower court, and rejecting the argument that a contract was to be implied from the parties' dealings, the Court approved the test articulated by Bingham LJ in *The Aramis* that

> … it would … be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.[65]

This formulation scotches any notion that the test of necessity only concerns business reality.[66] It is concerned rather with necessity of inference having regard to the conduct of the parties and the terms of the contract contended for. In this respect, as Mance LJ points out, *The Aramis* is consistent with statements of principle set out in other cases.

His Lordship also refers to *Wilson v Partenreederei Hannah Blumenthal*.[67] The case was concerned with whether a contract to abandon an arbitration might be implied from conduct. In *Wilson* Lord Brandon of Oakbrook expressed the view that in order for a contract to be implied, it must be the case that

> the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement.[68]

---

[62] *The Aramis* (n 36); *Baird Textile Holdings Ltd* (n 7)*; James v Greenwich LBC* [2008] EWCA Civ 35, [2008] ICR 545; *Alstom Transport v Tilson* [2010] EWCA Civ 1308, [2011] IRLR 169 [8]. See also *Foster v Royal Trust Co* [1951] 1 DLR 147, a decision of the High Court of Ontario.

[63] n 9.

[64] n 7.

[65] *The Aramis* (n 36).

[66] May LJ in *The Elli* [1985] 1 Ll R 107, 115 stated '… no … contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.' The passage was cited with approval by Bingham LJ in *The Aramis*.

[67] n 36.

[68] ibid 914.

In that same case Roskill LJ refers to 'the only possible inference [being] that the agreement to arbitrate has been rescinded by mutual consent'.[69] Although it is not clear that Roskill LJ was doing more than referring to particular instances where such inferences are necessary, Mance LJ in *Baird Textile Holdings Ltd* appears to treat the statement as an accurate description of the limited circumstances in which a contract may be implied, that is, where the existence of a contract is the only possible inference.[70]

Although Mance LJ cites *The Aramis* he makes no reference to the judgment of Stuart-Smith LJ. Arguably Stuart-Smith LJ presents the clearest guidance as to the practical application of the test of necessity. Commenting on whether the presentation of a bill of lading coupled with part delivery of the goods gave rise to an implied contract between the holders of the bill of lading and the shipowners, Stuart-Smith LJ observed

> Since there is no evidence of any express agreement, it has to be inferred from the conduct of the parties. If their conduct is equally referable to and explicable by their existing rights and obligations, albeit such rights and obligations are not enforceable against each other, there is no material from which the Court can draw the inference. It is only if their conduct is *unequivocally referable to or explicable by one or more rights or obligations contained in the bill of lading* that there is factual material from which the court can draw the inference that a contract has been entered into between them.[71]

Here, the test of necessity of implication takes on flesh and is developed beyond a bare principle. There is a need, according to Stuart-Smith LJ, to assess the conduct relied upon in light of the terms contended for and to determine whether such conduct can only be explained by reference to the rights and obligations that arise by virtue of the purported contract.

Baird Textile, and the authorities to which Mance LJ refers all relate to 'pure contracts by implication'. However in *Ove Arup*,[72] and *FW Farnsworth*,[73] both cases in which the question at issue was whether an express offer had been accepted by conduct, the Court applies the test of necessity of implication using language that echoes that adopted by Stuart-Smith LJ.

In *Ove Arup*, May LJ narrates that according to '[o]rthodox legal analysis'[74]

> Acceptance may be by conduct, but the conduct needs to be clearly and unequivocally referable to the agreement contended for.[75]

In *FW Farnsworth* the Hon. Mr Justice Hildyard expressed the test for acceptance by conduct in these terms

---

[69] ibid 923.
[70] *Baird Textile Holdings Ltd* (n 7) [20].
[71] *The Aramis* (n 36) 230.
[72] *Ove Arup & Partners International Ltd & Another v Mirant Asia-Pacific Construction (Hong Kong) Limited & Another* [2003] EWCA Civ, 1729, [2004] BLR 49.
[73] *FW Farnsworth Limited v Paul Lacy* [2012] EWHC 2830 (Ch).
[74] *Ove Arup* (n 71) [62].
[75] ibid.

> In such a case, as it seems to me, the person who alleges inferred or implied acceptance must show that the benefit invoked, being the act relied on as giving rise to the inference of acceptance, was only available pursuant to the contract in question, and that the invocation of that contractual right was in unequivocal terms, such as to be referable only to acceptance of that contract.[76]

MSM Consulting Limited[77] and most recently *Reveille Independent LLC*, both cases in which the question for determination was whether there was acceptance by conduct, treat *Baird Textile* as authoritative on this issue.[78]

The test, whether or not the offer is express, is one of necessity of implication of mutual assent having regard to the parties' conduct and the terms of the proposed contract. Where (as is often the case) reliance is placed on the conduct of the offeree in taking a benefit said to flow from the contract, the benefit must be one that flows from the contract and only from the contract if assent is to be inferred. The arrangement, in other words, must involve an exchange.

Section V. Consideration

Treitel presents the doctrine of consideration as a conglomeration of discrete though related rules drawn from precedent.[79] He argues that consideration is a separate requirement for contract formation,[80] that the doctrine is concerned with reciprocity of exchange[81] but does not demand equality of exchange[82] or invite assessment of the value of the exchange provided the benefit conferred is real, not illusory,[83] has economic value [84] and does not consist in some act or forbearance which would have been carried out even in the absence of the making of a reciprocal promise.[85] For the purposes of this thesis, the rules expressed by these provisos are described as the 'exclusionary rules'.

I rely on and adopt Treitel's authoritative account of the 'rules' of the doctrine. However I am sympathetic to the view that the essence of the doctrine is found in the requirement for reciprocity of exchange, and that the 'rules' of the doctrine of consideration are merely the concrete manifestations of a broadly based principle which subsumes but extends beyond the 'rules'.[86]

---

[76] *FW Farnsworth Limited* (n 73) [30].
[77] *MSM Consulting Limited v United Republic of Tanzania* [2009] EWHC 121 (QB), 123 Con LR 154 [119].
[78] *Reveille Independent LLC* (n 27).
[79] Treitel describes the doctrine of consideration as 'a complex and multifarious body of rules'. Treitel (n 1) 3-001.
[80] Treitel (n 1) para 3-001.
[81] ibid para 3-002.
[82] ibid para 3-013.
[83] ibid para 3-028
[84] ibid para 3-027.
[85] ibid para 3-029. See *Stilk v Myrick* 170 ER 1168, (1809) 2 Camp 317; *North Ocean Shipping Co v Hyundai Construction Co (The Atlantic Baron)* [1979] QB 705.
[86] Brudner maintains that the 'innermost significance [of the consideration doctrine] is that it embodies the reciprocity condition for the objectified end-status of the person that we call a contractual right.' Alan Brudner, 'Reconstructing Contracts' [1993] University of Toronto Law Journal 1, 36. For a discussion of the 'bargain theory of consideration' see Rick Bigwood, *Exploitative Contracts* (OUP 2003) para 3.4.2.2.

The doctrine insists that for a promise to be legally binding, it must have been given *in exchange* for something of value 'in the eyes of the law'.[87] Pollock expressed the requirement in these terms

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.[88]

Consideration therefore requires the identification of a benefit (whether legal or practical)[89] *and* a cause and effect relationship between benefit and reciprocal promise.[90] It is concerned, inter alia, with *structural* questions about the nexus between benefit and promise.

The exclusionary rules of the doctrine expounded by Treitel only weakly grasp the relational aspects, concerning the causal connection between benefit and promise and the exchange (if any) between the provider and recipient of the benefit. Thus, the 'rules' that the benefit should be real, not illusory and have economic value are merely directed towards the nature of the benefit and though they may also take into account questions of context, they are not concerned with questions of causal nexus.

On the other hand the rule that in order to qualify as consideration the benefit conferred must be one that would not have been conferred absent the promise speaks to the need for a nexus between benefit and promise.[91] However, while this rule expresses a concern for reciprocity, demonstrated by a causal nexus, it operates to exclude certain arrangements from having contractual effect only where the beneficiary can demonstrate that the provider of the benefit would have supplied the benefit regardless of the promise.[92] Thus while the need to demonstrate a causal nexus between benefit and promise might suggest that the onus of demonstrating such causal nexus would fall on the party seeking to establish the contract, or alternatively, would fall to be objectively assessed by the Court, the onus instead is on the beneficiary to show a lack of causal nexus. In effect, while the exclusionary rules of consideration operate as a check on the kinds of arrangements that may be treated as contractual, they serve only weakly the notion that consideration is considered with *exchange*.

However the doctrine of consideration has one last trick up its sleeve. As a general rule, English law denies contractual effect to arrangements where the consideration given is 'past consideration'.[93] Under this rule, if the benefit is conferred in advance of the promise having

---

[87] Treitel (n 1) para 3-002.

[88] Frederick Pollock, *Principles of Contracts* (8th edn, Stevens and Sons 1911) 175. This formulation was accepted by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 855.

[89] The decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 put it beyond doubt that a practical, as opposed to a legal benefit, could constitute consideration.

[90] Thus in *Ladymanor* 'It must be for the offering fee-earner to explain for what service he is to earn it.' *Ladymanor Ltd v Fat Cat Café Bars Ltd* [2001] 2 EGLR 1, para 30. See also the discussion in *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) [14], [15]. Bigwood states 'Fundamentally, consideration is concerned with the need for a cause-and-effect linkage between the promise and its price.' Bigwood (n 34) 98.

[91] The question whether the benefit would have been conferred absent the exchange is alluded to but not fully explored in *Modahl* (n 7) [83].

[92] *Well Barn Farming Limited v Backhouse* [2005] EWHC 1520 (Ch), [2005] EGLR 109 [47]; Treitel (n 1) para 3-029.

[93] Treitel (n 1) para 3-017. See also the judgment of Andrew Phang Boon Leong JA of the Singapore Court of Appeal for an extensive discussion of the doctrine of consideration, including the rules relating to past consideration in *Gay Choon Ing v Loh Sze Ti Terence Peter and Another* [2009] 2 SLR 332, [2009] SGCA 3.

been made it does not qualify as good consideration since there is no contractual nexus or exchange.

The general rule is subject to certain exceptions. If the consideration was given before the promise was made but both consideration and promise are 'substantially one transaction' nothing will turn on the precise chronological order.[94] In addition past consideration consisting in the provision of services will be good consideration where the services were requested by the promisor in the knowledge that payment or other remuneration for the services was expected.[95]

The rule denying contractual effect to arrangements where the consideration is 'past consideration' makes an important contribution towards ensuring that contracts are concerned with exchanges.[96] In particular it operates to prevent parties from imposing contractual obligations on others by gratuitously conferring benefits on them and subsequently demanding something in return. The benefit must be conferred within the context of an exchange.[97]

Section VI. Deriving a methodology for the assessment of the public domain from the rules as to assent and consideration

The rules of contract law as to assent and consideration are the key to unlocking the scope and limits of the public domain in respect of the use of information made available on open publicly accessible websites.

These rules suggest a methodology for the assessment of the public domain conceived as a field free from the constraints of law and contract.

First, both sets of rules require the identification of the benefits, if any, that flow to the user from the contract said to incorporate the Terms of Use. In the case of assent through conduct, the question as to whether assent may be inferred depends on whether it may be demonstrated that the user takes a benefit that flows from the contract and only from the contract. In the case of consideration, the website must show some benefit to the user that qualifies as consideration.[98] The first task, therefore is to identify the benefit associated with the contract (if any) between website and user.

---

[94] Treitel (n 1) para 3-018.

[95] Treitel (n 1) para 3-019.

[96] John Adams and Roger Brownsword dismiss pronouncements by the Courts as to the requirement for the benefit to be conferred in the context of an exchange as '[j]udicial rhetoric'. However their assertion is considerably weakened by their concession that the doctrine of past consideration presents a challenge to that view. John Adams and Roger Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 MLR 536, 541. In the US the requirement for consideration to be given in the context of an exchange is made explicit in para 71 of the Restatement (Second) of Contracts (1981):

> §71. REQUIREMENT OF EXCHANGE; TYPES OF EXCHANGE
> (1) To constitute consideration, a performance or a return promise must be bargained for.
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

[97] *Ladymanor* (n 90).

[98] The value exchange may consist in a benefit to the recipient or a detriment to the provider, but since one is usually the corollary of the other, I focus on benefits. Treitel notes 'Usually, this detriment and benefit are merely the same thing looked at from different points of view'. Treitel (n 1) para 3-004.

Second, both sets of rules require the benefit, if any, to be conferred in the context of an exchange. In the case of the rules as to the implication of assent from conduct, this is the corollary of the requirement that for assent to be implied the benefit taken by the user must be one that flows from the contract and only from the contract. In more colloquial language the user must get from the contract something that he did not already possess.[99] In order to assess whether this requirement is met one must know what the user already possesses by way of rights and privileges. The second task therefore is to determine whether the benefits conferred on the user are ones that form part of his existing rights and privileges. This task serves a twin function: it not only serves to illuminate the user's pre-contract suite of rights and privileges in relation to the use of information but it also helps to determine to when assent may be implied.

In the case of the rules as to consideration the requirement for the conferral of the benefit to occur within the context of a relevant exchange is expressed in two aspects of the doctrine: the rule that for a benefit to qualify as consideration it must be one that would not have been conferred but for the promises made by the user by virtue of the Terms of Use, and the rule that for the benefit to qualify as consideration it must not be 'past consideration'. The first limb requires an assessment of the context of the transfer of the benefit. The second limb addresses whether the benefit was transferred gratuitously, and takes account of temporal aspects, that is, whether the benefit was transferred in advance of any purported exchange.

Finally the doctrine of consideration denies contractual status to arrangements where the benefit conferred fails the remaining aspects of the exclusionary rules, in particular where the benefit lacks economic value.[100]

The tasks may be summarised as follows:

1. Identify the benefit.
2. Consider whether it has economic value.
3. Determine whether or not it is a benefit that the user only gets via the contract.
4. For the purposes of (3) compare the benefit purportedly transferred with the user's existing suite of rights and privileges.
5. Consider the timing of conferral of the benefit so as to determine whether it is truly given only in the context of an exchange or rather given gratuitously in advance of any purported contract.

---

[99] See *Aragona* concerning the difficulty for the implication of a contract presented by lack of evidence as to terms of the employment contract in force prior to the purported new contract. *Aragona* (n 8). Madison, writing in a US context, was astute to anticipate that the debate about enforceability of browse wraps would concern 'whether an individual user manifested "assent" by "using' or taking the "benefit" of access to the information'. Michael J Madison, 'Rights of Access and the Shape of the Internet' (2003) 44 BCL Rev 433, 496, 497 fn 323. Without a requirement for some form of benefit transfer in cases where assent is implied, the requirement for assent in such cases is meaningless.

[100] I do not explore the question of whether the benefit conferred by the website is illusory. Certainly it is rare to find a promise couched in certain terms by the website in Terms of Use. Generally the website makes no commitment of any kind. However the contract, if any, between website and user is what Farnsworth describes as a 'reverse unilateral contract', one where the offeree makes a promise in exchange for the offeror's performance (such as providing access to the website). Farnsworth (n 43) 204 fn 5. Farnsworth offers by way of example of such a contract the statement that 'These apples are yours if you promise to pay me $100'.

6. Assess, given the context, whether the benefit would have been conferred anyway regardless of the user's promise.

If, after carrying out this assessment it appears that (a) questions 2 or 3 must be answered in the negative; or (b) that question 6 must be answered in the affirmative; or (c) that the answer to question 5 is that the benefit is given gratuitously in advance of any contract, then no contract exists between website and user. In that case the public domain, being the field of free-remaining relations, free that is both from the constraints of law and contract is the field of the user's rights and privileges identified as part of task (4).

Section VII. Conclusion

In this Chapter I have developed a framework and methodology for the assessment of the public domain conceived as a field of relations free from the constraints of law and contract.

In order to develop this framework I have considered the key requirements for a contract under English law, namely, consensus evinced by offer and acceptance, consideration and intention to create legal relations.

I have suggested that a website may readily present Terms of Use in such a way as to form part of an express offer, and that in such circumstances the requirement for intention to create legal relations is likely to be met. The real litmus test for the contractual status of browse wrap Terms of Use concerns the presence or absence of acceptance and consideration.

In the case of browse wrap Terms of Use the user's assent, if it occurs at all, is implied from the user's conduct. I reviewed the approach adopted by the English courts as to the circumstances in which a contract may be implied from conduct, noting that the test of necessity of implication applies whether the contract as a whole must be implied from conduct or only assent need be implied. In particular I highlighted the principle that if assent is to be implied from conduct involving the taking of a benefit conferred by the purported contract the benefit must be one that flows from the contract and only from the contract.

I reviewed the rules of the doctrine of consideration, pointing to the need for the transfer of the benefit to occur within the context of an exchange.

From the rules as to acceptance and consideration I distilled a set of tasks that might serve to determine whether a contract is formed by virtue of the presentation of browse wrap Terms of Use on open publicly accessible websites. The suite of tasks includes an assessment of the user's pre-contract rights and privileges. The tasks therefore not only serve to identify whether a contract exists between website and user but illuminate the scope of the public domain as a field of relations free both from the constraints of law and contract in relation to information made available on open publicly accessible websites.

The first of the tasks that must be carried out is the identification of the benefit conferred by the website on the user.

Chapter IV

Conceptualisation of the Benefit

I. Introduction

In this Chapter I engage in a preliminary exploration of the nature of the benefit conferred by open, publicly accessible websites on users. Such an inquiry is a necessary precursor to the assessment concerning the contractual significance of the conferral of such benefits. This Chapter paves the way for such analysis.

Section II contains a review of what is said in academic literature and in case law concerning the nature of the benefit conferred by websites on users. Although there is sparse analysis of the nature of any such benefit, both support categorisation of the exchange as involving the conferral of a benefit in the nature of access, a service, use of the website or of the information obtained via the website.

In Section III I compare the findings of the review of the academic literature and case law with what particular Terms of Use have to say about the nature of the benefit conferred. The review of Terms of Use suggests that where websites offer any description of the benefit conferred on the user, the benefit is described as access to the website, a service to the user or use of the website or its contents.

The terms proffered (access, service, use) at first blush seem straightforward. In reality, in the context of websites, these terms signal a particular approach to the conceptualisation of the benefit. In Section IV I explore the relevance of these terms for the conceptualisation of the benefit and address whether the benefits of access, a service and use are different in reality or only in name.

In Section V I outline the approach that will be adopted in relation to the conceptualisation of the benefits for the purposes of the contractual analysis carried out in later Chapters.

In Section VI I summarise the findings of this Chapter and recall Mihály Ficsor's admonition about digital transmission, that 'everyone sees something else in it', observing that while access, the supply of a service and use emerge as the key contenders for conceptualisation of the benefits associated with the exchange between website and user there may be other ways of looking at the exchange.[1]

II. Academic literature and case law

II. 1 The academic literature

[1] Mihály Ficsor, 'Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument' in P B Hugenholtz and E J Dommering, *The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium Organized by the Royal Netherlands Academy of Sciences (KNAW) and the Institute for Information Law* (Kluwer Law International 1996) 123.

No commentator, writing within the common law tradition, has carried out a systematic analysis of the benefits conferred by websites on users.[2]

Some (though not a great deal) of research has been carried out concerning the contractual significance of the arrangement between website and user, most notably by the American Bar Association ('ABA') and the Australian Copyright Law Review Committee.[3]

The ABA Joint Working Group on Electronic Contracting Practices carried out a thorough review of the US position in relation to contract formation in the context of browse wrap and click wrap contracts.[4] The review addressed, in particular, questions about notice of terms and the circumstances in which assent may be implied from conduct. However the report of the Working Group appears to assume either that the website confers a relevant benefit on the user,[5] or that assent may be implied whenever the user performs the act that according to the Terms of Use will be treated as assent.[6] Whichever of these explanations is correct, the report contains no analysis as to the nature of the benefits conferred.

The Australian Copyright Law Review Committee carried out a wide-ranging review into 'the relationship between contract and copyright.'[7] Under its Terms of Reference the Committee was to review 'the ability of owners or users of copyright to enforce agreements which exclude or modify exceptions to the exclusive rights of copyright owners'.[8] As part of its review the Committee considered the enforceability of browse wrap contracts taking into account questions of contract formation, and, in particular, questions as to whether the user has notice of terms and assent. The Committee was rather less sanguine than the ABA Working Party about the enforceability of browse wrap contracts taking the view that such contracts are

[2] For example, Kim's extensive discussion of 'wrap' contracts including browse wrap contracts contains no analysis of the nature of the benefits conferred by a website on the user. Nancy S Kim, *Wrap Contracts: Foundations and Ramifications* (OUP 2013). That is not to say that there is no commentary concerning Terms of Use or the activities said to trigger assent to Terms of Use but only that the commentary does not consider the nature of the benefits conferred. Lemley refers to the provisions of four sets of Terms of Use in order to illustrate the point that websites routinely maintain that users are bound by Terms of Use by visiting the website. The Terms of Use variously indicate that the actions that will be taken to signify assent include access, browsing and use. Mark A Lemley, 'Terms of Use' (2006) 91 Minnesota Law Review 459, 475, fn 55. Moffat, as part of a review of the extent to which Terms of Use exclude fair use of copyright material in the US, also refers to the provisions of a handful of Terms of Use so as to demonstrate what forms of conduct on the part of the user are said to signify assent, namely use of the website, access and services. Viva R Moffat, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41(1) U C Davis L Rev 45, 62. See also Dan Hunter, 'Cyberspace as Place and the Tragedy of the Digital Anticommons' (2003) 91 Cal L Rev 439, 506.

[3] The Centre for the Study of European Contract Law and the Institute for Information Law also conducted a study comprising a comparative analysis of legal and economic issues relevant to digital content contracts. The participant countries were Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, the United Kingdom, Norway and the United States. The report contains a brief summary of the validity of browse wrap contracts in each of these jurisdictions. Marco B M Loos and others, *Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Contracts* (University of Amsterdam, Centre for the Study of European Contract Law, Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE) 2011).

[4] Christina Kunz and others, 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' (2003) 59(1) The Business Lawyer 279.

[5] ibid 308.

[6] ibid 307, 311.

[7] Copyright Law Review Committee, 'Copyright and Contract' (2002) <http://www.austlii.edu.au/au/other/clrc/2/> (accessed 23 October 2015).

[8] ibid, Chapter One.

> particularly problematic given a lack of notice of terms combined with a lack of affirmative conduct by which adoption of terms might be signalled.[9]

While the report touched on the principles governing notice and assent, it made no reference to the nature of the benefit conferred by the website on the user.

Review of the relevant literature reveals only a smattering of references to the nature of such benefits in the context of fairly cursory explorations of the relevance of such benefits to the contract law doctrines of consideration and assent.

Lydia Pallas Loren maintains in relation to browse wrap Terms of Use that

> An argument can be constructed that many agreements concerning digital content are based on consideration that is separate from the rights granted by the Copyright Act. Often such arguments point to access to the work as separate consideration.[10]

Chris Reed hints that permission for access may be a benefit. He comments that

> The very act of making a web page available by placing it on a web server grants an implied licence to access that page. [11]

Madison considers that the benefit consists in 'access to an information resource'.[12]

Davidson suggests that 'users are getting the benefit of the information or services that the Web sites offer'.[13] Matthew Walden maintains that 'the web site owner provides consideration by performing the act of posting information', a formulation that is oriented to the conception of a service.[14]

Bouchard and Fogler, writing from a Canadian pespective suggest that 'Browse wrap agreements are agreements for the visitation and use of a website'.[15]

---

[9] ibid, para 5.14.

[10] Lydia Pallas Loren, 'Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse' (2004) 30 Ohio Northern University Law Review 5, fn15.

[11] Chris Reed, 'Controlling World Wide Web Links, Property Rights, Access Rights and Unfair Competition,' (1998) 6(1) Indiana Journal of Global Legal Studies 167, 183. See also Sarabdeen Jawahitha and Emna Chikhaoui, 'The adequacy of Malaysian law on e-contracting' (2007) 13(4) Computer and Telecommunications Law Review' 121 in which the authors comment 'Since … access to a website represents a benefit there is a possibility to hold that there is consideration.'

[12] Michael J Madison, 'Rights of Access and the Shape of the Internet' (2003) 44 BCL Rev 433, 496, 497 fn 323.

[13] Dawn Davidson, 'Click and Commit: What Terms are Users Bound to When They Enter Web sites?' (2000) 26 (4) William Mitchell Law Review 1171, 1179.

[14] Matthew D Walden, 'Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions' (2001) 58 Wash & Lee L Rev 1625, 1632, 1633.

[15] Gary N Bouchard, 'Canada' in Stephan N Kinsella and Andrew F Simpson (eds), *Online Contract Formation* (Oceana Publications 2004) 52. The authors of *Internet and E-commerce Law*, writing from an Australian perspective, do not refer to a single Australian case on the enforceability of browse wraps. B Fitzgerald and others, *Internet and E-commerce Law: Technology, Law, and Policy* (Lawbook Co 2007).

The relevant commentary is patchy, the nature of the benefits not fully explored.[16] Nevertheless the commentary points to a range of possible benefits including access, a service and use.

II.2 Case law

In the context of case law relating to Terms of Use, scant attention has been accorded to the nature of the benefits provided by a website to users. However some few cases explicitly address the nature of such benefits.

In *Spreadex* the Court had to consider whether a person was contractually bound by click-wrap Terms of Use.[17] In this context the Court had to determine whether the website could show that the purported contract was supported by consideration. Counsel for the claimants, who operated a gambling website, argued that the requirement was met by the 'grant of access' to the online betting system.[18] The judgment suggests that the Court was prepared to approach the question on the assumption that the grant of access might itself be a service[19] but that the service might also consist in 'the provision of an on-line interactive platform'.[20]

The United States Court of Appeals (Second Circuit) addressed the question of the benefit afforded by an open publicly accessible website to a user in *Register.com v Verio*.[21] The Court maintained that the website offered 'access to information',[22] but its reliance on an analysis concerning the conferral of services suggests that it regarded this facility as a service.

A similar approach was adopted by the Canadian Courts in *Century 21st*.[23] This was another screen-scraping claim in which the parties were at odds as to the contractual significance of the claimant's Terms of Use. Punnett J stated that the 'benefit of the information displayed on the Website' was consideration for the purported contract.[24] However, like the Court in *Register.com*, Punnet J relied on contract law principles regarding the circumstances in which a contract would be implied through the 'taking of the service'.[25] The defendants maintained that 'what Century 21 provides, in making their Website available to the public, … is merely a grant of access to the site', an argument that Punnet J described as 'correct in part'.[26]

---

[16] The lack might be explained (at least in relation to the US) by the prevalence of the view that the Courts, in practice, pay lip service to the contract law requirement for assent. Lemley speaking of the US position says 'in today's electronic environment, the requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms.' Lemley, 'Terms of Use' (n 2) 459, 465 (footnote omitted). See also Nancy S Kim, 'The Duty to Draft Reasonably and Online Contracts' in Larry A DiMatteo and others (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013) 196 stating (as regards the US) that '"Manifestation of consent" has been collapsed into the requirement of "reasonableness of the notice".'

[17] *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm), [2012] LLR 742.

[18] *Spreadex* (n 17) [14].

[19] ibid (referring to the relevance of the provisions of a clause in the Customer Agreement that reserved to the website 'the right to reduce or remove altogether our online service').

[20] *Spreadex* (n 17) [15].

[21] *Register.com Inc v Verio* 356 F 3d 393 (2d Circuit 2004).

[22] ibid 403.

[23] *Century 21 Canada Limited Partnership v Rogers Communications Inc.* 2011 BCSC 1196.

[24] ibid [123].

[25] ibid [119].

[26] ibid [118].

Ryanair v Billifluege concerned a claim by Ryanair relating to the screen-scraping activities of the defendant in relation to the claimant's website.[27] Faced with a challenge to its jurisdiction the Court considered whether Ryanair's browse wrap Terms of Use were binding on the defendants. Addressing the requirement for consideration the Court stated that 'the provision of information … constitutes a sufficient act of consideration'.[28]

Case law, like the academic commentary, conceptualises the benefit as access, a service, use of the website or of the information obtained via the website. However the case law also suggests that these categories overlap.

III. Terms of Use: what websites say about the nature of the benefit

Terms of Use may point to the nature of the benefit conferred in one or other of two ways. They may do so expressly, by referring to some grant of rights, permission or service to be undertaken by the website. Alternatively they may do so impliedly by pointing to some action that, according to the Terms of Use, indicates assent, presumably on the basis that such action involves taking a benefit.

Typically Terms of Use identify the benefits, whether expressly or by implication, as access, services, use of the website or its contents.[29]

IV. Access, service and use: different but the same?

IV.1 Access, service and use: different legal connotations

The use of the terms 'access' 'service' and 'use' to describe the benefit conferred by a website on a user may represent attempts to shoehorn the exchange between websites and users into pre-existing legal taxonomies or merely reflect the language customarily used (in legal and non-legal contexts) to describe that exchange.

Access suggests reliance on the metaphor of cyberspace as place.[30] Dan Hunter has shown how metaphor not only shapes language but how we think about and attempt to create legal rules for

[27] *Ryanair Ltd v Billigfluege.de GmbH* [2010] IEHC 47, [2010] I LPr 22.
[28] ibid [25].
[29] This observation draws on empirical research carried out for a Chapter not included in the final version of this thesis. The research involved consideration of the provisions of Terms of Use of 20 high-profile retail websites accessible in the UK. The majority of the websites provided for the express grant of limited permissions to use information obtained from the website. References to use of the website were also frequent. A few websites badged the website offering as a service. Two websites referred to the benefits of access and use, one expressly granting 'a personal, non-exclusive, non-transferable limited privilege to enter and use the Site.' Only one website referred solely to the benefit of access, explicitly granting access to the website. See also Margaret Jane Radin 'Regulation by Contract, Regulation by Machine' (2004) 160 Journal of Institutional and Theoretical Economics 142, 144 (providing examples of Terms of Use said to be binding on access or use); Moffat (n 2) 58 (providing an example of Terms of Use said to be binding on access, use, or obtaining products, content or services).
[30] The problems associated with reliance on metaphor in general, and on property-based metaphors in particular in order to inform legal classification of the nature of the arrangement between users and websites are well documented. See for example Maureen O'Rourke, 'Property Rights and Competition on the Internet: In Search of an Appropriate Analogy' (2001) 6 Berkeley Tech L J 561; Laura Quilter, The Continuing Expansion of Cyberspace Trespass to Chattels, (2002) 17 Berkeley Tech L J 421; Hunter (n 2); Mark A Lemley, 'Place and Cyberspace' (2003) 91 California Law Review 521; Jacqueline Lipton, 'Mixed

the internet.[31] The term 'access' lends itself to thinking about locations on the internet, including servers where websites are stored, or the websites themselves, as real property, as land.[32] By implication, owners of servers or of websites may permit or refuse access as they please.[33] Access implies a qualified, servient right in contrast to the dominant right of the owner or possessor of the place or thing being accessed.

In the UK, the US and elsewhere the language of access is hardwired into computer misuse statutes: in the context of websites it carries distinct legal as well as metaphorical connotations.[34] 'Access' may relate to the computer on which the website is stored, the website itself or the information obtained via the website.[35]

'Service', on the other hand explicitly links the activities of the website to services, the legal term used to cover a multitude of different inter-personal exchanges other than the sale of goods.[36] The language of services hints at a benefit that in principle qualifies as consideration for a contract: the jurisprudence of services concerns the performance of acts or forbearances that are economic in character.[37] Websites are 'information society services' within the meaning of the Ecommerce Directive.[38]

Metaphors in Cyberspace: Property in Information and Information Systems' (2003) 35 Loy U Chi L J 235. For a different perspective on the impact of metaphor see David McGowan, 'The Trespass Trouble and the Metaphor Muddle' Minnesota Legal Studies Research Paper No. 04-5. <http://ssrn.com/abstract=521982> (accessed 15 April 2015).

[31] Hunter (n 2).

[32] Hunter (n 2) 445, 487, 488; Lemley 'Place and Cyberspace' (n 25) 527; Lipton (n 25) 236, 237. See also *eBay Inc. v Bidder's Edge, Inc.* 100 F Supp 2d 1058 (N D Cal, May 24, 2000)

[33] According to Balganesh 'property is generally understood as a bundle of rights, with the right to exclude often characterized as the most important right within that bundle.' Shyamkrishna Balganesh, 'Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass' (2006) 12 Mich Telecomm Tech L Rev 265, 294. See also Madison (n 12) 445. According to Efroni the 'crucial common denominator connecting property theory and access rights to information is the rights-holder's private property right to exclude others from the resource'. Zohar Efroni, *Access-Right: The Future of Digital Copyright Law* (OUP 2011) 68, 71. Yet as Lemley observes ' … as any real property scholar will tell you, not all land is privately owned, and even privately owned land frequently does not fall totally within the owner's dominion.' Lemley 'Place and Cyberspace' (n 30) 533.

[34] The UK's Computer Misuse Act 1990 creates offences relating to 'unauthorised access' to 'any program or data held in any computer'. In the US the Computer Fraud and Abuse Act 18 USC § 1030 creates offences and civil liability in relation to access to a computer without authorization or exceeding authorized access to a computer. Both in the UK and the US the relevant statutory provisions have been applied in relation to unauthorised access to websites*. R v Cuthbert* (Horseferry Road Magistrates Court, 7 October 2005); *Craigslist Inc v 3Taps Inc*., 2013 WL 4447520 (N D Cal August 16, 2013).

[35] As Lipton points out, the use of real property metaphors can contribute to muddled thinking as to whether 'access' and 'access' protection is intended in relation to access to the 'box' (the computer) or the contents of the box (the data). Lipton (n 30) 244, 245. In one sense the problem about identifying the object of access is very real. In its computer misuse legislation the US has opted to implement protection in respect of access to computers. In the UK and other jurisdictions protection is afforded under computer misuse legislation in respect of access to information. In reality, in each case, the purpose of the legislation is to protect both computer and information but if the metaphor of access is not to unravel entirely, and for doctrinal coherence, the legislation must be based on one or other of access to a computer or access to information.

[36] Within Europe Article 57 TFEU makes provision for the freedom of services. Woods describes services as 'an amorphous concept'. Lorna Woods, *Free Movement of Goods and Services within the European Community* (Ashgate 2004) 159.

[37] The definition of services in Article 57 of the TFEU includes a requirement that the services should be 'normally provided for remuneration'. The definition of 'information society services' set out in the Article 1(2) of the Transparency Directive likewise incorporates the requirement that the services should 'normally be provided for remuneration.' Council Directive 98/48/EC of 20 July 1998 amending Directive 98/34/EC

The term 'use' has more neutral connotations though it recalls the existence of legal regimes governing computer misuse on the one hand, and, on the other, the use of information, whether protected by copyright or otherwise.[39] It may suggest use of the computer on which the website is stored, the website itself or the information obtained via the website.[40]

The terms 'access' 'service' and 'use' are loaded terms. Each term carries particular legal significance. However that observation alone provides no answer as to whether the terms truly describe the same benefit(s), but use different language in order to (consciously or subconsciously) drive a particular contractual analysis or whether each of the terms describes benefits of a different kind.

IV.2 Access, service and use: overlap between the benefits

The case law and academic commentary reviewed in Section II hints at an overlap. Dawn Davidson speaks of the benefit of information or services.[41] Matthew Walden's reference to the benefit of the act of posting information online (a service) implies the ability to access the information and the associated benefit of some use of the information.[42] Walden refers to the terms and conditions deployed by websites as either 'terms of use' or 'terms of service'.[43] In *Spreadex* the Court appeared to consider that the provision of a website might entail either a grant of access to the website or a service.[44]

Orin Kerr makes the point that where access is interpreted from the perspective of physical reality, 'accessing a computer is no different from simply using a computer.'[45] Madison hints that use of the information obtained via a website may also be subsumed within the notion of access. Acknowledging that he uses the term 'access' 'broadly and necessarily somewhat loosely' Madison suggests that 'access' means

> the ability of individuals to see, hear, understand, use, and in many cases reuse information content and/or services.[46]

---

laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 217/18 (the 'Transparency Directive').

[38] Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2002] OJ L 178/1 (the 'Ecommerce Directive'). Article 2(a) of the Directive adopts the definition of 'information society service' provided in the Transparency Directive.

[39] Moffat analyses 'use' restrictions in Terms of Use from the perspective of the copyright regime. Moffat (n 2).

[40] Lipton mentions all these variants of use, distinguishing between use of the hardware on which a website resides, the website itself and its content. Lipton (n 30) 242, 245.

[41] Davidson (n 13) 1179.

[42] Walden (n 14) 1633.

[43] ibid, 1627, 1628.

[44] David Donaldson QC, sitting as a Deputy High Court judge noted 'Counsel submitted that the necessary contractual consideration could be found in the grant of access to the on-line platform, but this submission ignored Clause 10(15) which provides that:
"We reserve the right to reduce or remove altogether our online service at any time."' *Spreadex* (n 17) [14].

[45] Orin S Kerr, 'Cybercrime's Scope: Interpreting 'Access' and 'Authorization' in Computer Misuse Statutes' (2003) 78(5) NYU Law Review 1596, 1621.

[46] Madison (n 12) 438. In *State v Allen* 917 P 2d 848 and *State v Riley* 846 P 2d 1365 (Wash 1993) (en banc) the US Courts relied on a definition of access as 'freedom or ability to obtain or make use of.'

What is the reason for the use of overlapping terminology and what is its significance for the conceptualisation of the benefit?

IV.3 A fresh assessment of the benefits conferred by the website on the user

In order to explore why the benefits conferred by the website and user are variously expressed in the language of access, service and use, and why, in commentary and case law, these terms are sometimes and to some extent used interchangeably, it is useful to consider afresh the range of benefits that might conceivably be conferred by the website on the user.

The website might provide access to the server on which the website is housed. It might provide access to an information resource. It may engage in acts or forbearances (provide a service) that facilitate access to the server or to an information resource. It may engage in acts or forbearances (provide a service) that extends beyond access to the server or an information resource. It may, for example, provide search tools, chatrooms, email updates ('additional services'). These services are distinguishable from access to the server or an information resource: such services involve data processing functions beyond the implementation of the user's 'GET' request for information.[47] The website may enable use of the server for access to the website or to enable use of an 'additional service'. It may enable use consisting in access to a particular information resource as well as uses of that information resource in ways that extend beyond access.

To what extent are these benefits different in substance or truly the same? In order to answer this question I provide and refer to a map showing the relationships between each of the elements of the benefits I have described.

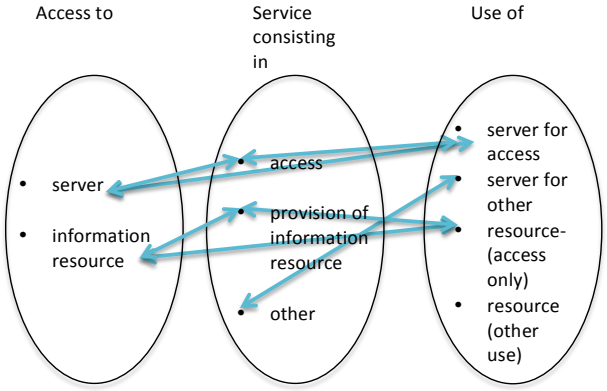

Figure 4-1.

The diagram in Figure 4-1 shows a pattern of benefits. It suggests links (not identity) between groups of benefit, variously labeled under the headings of 'access', 'service' and 'use'.

[47] A 'GET' request is a request for an information resource. By contrast a 'POST' request involves the submission of data by the user for processing. w3schools.com, 'HTTP Methods: GET vs. POST' <http://www.w3schools.com/tags/ref_httpmethods.asp> (accessed 7 October 2015). See also *In re Doubleclick Inc Privacy Litigation* 54 F Supp 2d 497, 2001 US Dist LEXIS 3498.

It identifies two key groups of benefits. The first involves access to the server on which the website is housed, and the second, access to the information resources comprised in the website.

It suggests a link between the provision and use of additional ('other') services.

It identifies a 'lone' benefit consisting in the use of an information resource in ways that extend beyond access to the resource.

I explain the significance of the patterns of links in turn.

IV.3.2 Access to the server/access to an information resource

Each of the benefits relevant to access to the server, whether labeled as access, service or use are linked. The same is true of the benefits relevant to access to an information resource.

The links are expressive, not of identity in the benefit, but identity in how the benefit is experienced by the user. From the user's perspective (ignoring the implications of the classification for the contractual analysis) it makes no difference whether the benefit that results in access to the server is badged as access, a service or use. Similarly where the user has the benefit of access to an information resource, it makes no difference (again, ignoring the implications of the classification for the contractual analysis) how the benefit is labeled.

What is more, though not reflected in Figure 4-1, these two key sets of benefits are linked to each other. Access to the server implies access to an information resource; access to an information resource implies access to the server.

However, another feature links each of the benefits comprised in the two key groups, namely the relationship between each of the benefits and the technical means by which users experience access to a website, its server or its contents.

Access depends on two technical processes. The first is the process by which the website uploads content to the internet and configures the website so as to make it open and publicly accessible. The second is the request/response process by which the user requests and the website returns a particular webpage or resource.

When a user clicks on a hyperlink or enters the URL for a webpage into his browser the browser issues a request for the webpage.[48] Provided the website is configured so as to be open and

[48] The request/response model is a key component of HTTP (hypertext transfer protocol). The parameters of both request and response are dictated by the protocol. Kurose and Ross explain

> HTTP defines how Web clients request Web pages from Web servers and how servers transfer Web pages to clients. … When a user requests a Web page (for example, clicks on a hyperlink) the browser sends HTTP request messages for the objects in the page to the server. The server receives the requests and responds with HTTP response messages that contain the objects.

James F Kurose and Keith W Ross, *Computer Networking: A Top-Down Approach* (6th edn, International edn, Pearson 2013) 125. Although Kurose and Ross refer specifically to requests initiated by clicking on a hyperlink, all requests for webpages, including requests by way of manual entry of the URL of a webpage in the user's browser bar, are handled in the exactly the same fashion.

publicly accessible the computer (server) on which the website is stored will return the requested webpage to the user so that the webpage is displayed on the user's computer.[49] This exchange is crucial to the interaction between website and user. Moreover the process of requesting a webpage whether by clicking on a hyperlink or entering the URL for a webpage is the *only* conduct engaged in by *all* users of a website.

The exercise of conceptualising the benefits conferred by the website on the user consists in large measure in making sense of these processes and their outcome for the user. The inconsistent use in case law and commentary of the terminology of 'access', 'service' and 'use' may reflect the struggle to make sense of these processes relying on conceptions that offer the prospect of analysis according to established legal frameworks.

Thus, either the configuration of the website as open and publicly accessible[50] or the return of the requested webpage to the user may said to afford 'access'.[51] The request/response process may be said to involve use of the computer on which the website is stored or use of the functionality of the website.[52] At least in relation to human users, access in this sense also necessarily implies looking. Use implies initial access.[53] Finally, insofar as the term 'service' without further specification is a catch-all term for activities characterised by the carrying out of acts or forbearances, the activity of the website operator in configuring the website so as to handle requests for webpages, or the activity of the website in handling the user's browser's request and returning the relevant webpage for use may be described as a service.[54]

The centrality of the processes relating to the configuration of the server, the upload of content and the request/response process is explicitly addressed in some of the commentary. Chris Reed, for example, equates website access with use of the computer on which the website is stored.[55] He uses the term 'viewer' to describe the user of a website, indicating that use of the computer inevitably involves use of the information.[56] Moreover Reed explains his analysis by reference to the technical aspects of the request/response process, observing that

> The viewer's entering of the URL into his browser software makes that software request a file from the proprietor's web server. The viewer is thus, indirectly, issuing commands to, and therefore using, the computer on which the web server software is running.[57]

[49] The web server software is programmed to handle requests according to a series of pre-determined instructions that make up its configuration. See for example Oracle, 'Sun Java System Web Server 6.1 SP11 NSAPI Programmer's Guide: How the Server Handles Requests from Clients' <http://docs.oracle.com/cd/E19857-01/820-7655/abvah/index.html> (accessed 26 May 2014).
[50] Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014).
[51] Kerr (n 45) 1620.
[52] Kerr (n 45) 1621.
[53] 'Every act of perception or of materialization of a digital copy requires a prior act of access.' Jane C Ginsburg, 'From Having Copies To Experiencing Works: The Development of an Access Right in U.S. Copyright Law' 50 J Copyright Soc'y USA 113, 115. '[F]or any use regulated under copyright to occur, there must first be access to a work or a copy thereof.' Thomas Heide, 'Copyright in the EU and US: What "Access-Right"?' (2001) Journal of the Copyright Society of the USA 5.
[54] For a discussion of the scope and limits of the concept of services see Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst* [2009] ECR I-3327, Opinion of AG Trstenjak.
[55] Chris Reed (n 11) 177.
[56] ibid 168.
[57] Reed (n 11) 176 fn 34.

Balganesh (speaking of the extension of the US doctrine of trespass to chattels in *CompuServe*)[58] likewise attempts to explain the interaction between website and user by reference to the technical processes relating to the configuration of the server and the request/response process. He notes

> Given that the Internet is often described in terms of metaphors, the court adopted the ideas of 'entering', 'visiting', 'intruding' and the like to apply the doctrine. In reality however, these activities never happen. When a person accesses a website by entering the address of the site into a browser, in reality, the browser never goes or visits any place, it merely sends information to a server, which in turn transmits information to the user's computer, according to a set protocol.[59]

In the same vein, according to Kerr, if we explore 'access' 'from the standpoint of physical reality',

> a user accesses a computer when the user sends a command requesting information in return and the computer responds by sending back information to the user.[60]

The commentary does not suggest that the classification of two key sets of the benefits under the headings of access, service or use is of no consequence, but it does suggest that the benefits flow from and are intimately connected to the technical processes of configuring the website, uploading the content and the request/response process.

IV.3.3 Additional services

Figure 4-1 shows a link between a service consisting in the provision of services other than the provision of access or an information resource and the use of the web server functionality in ways that extend beyond access to the server or an information resource. The link is self-explanatory. One is the mirror image of the other.

Such additional benefits are distinguishable from access as such to the server or an information resource and are not treated under the heading of 'access'. They involve processing that is not limited to the operation of the request/response process.

IV.3.4 Use of an information resource in ways that extend beyond access

Figure 4-1 also suggests that the provision of a benefit of use of an information resource in ways that extend beyond access cannot readily be labeled as 'access' or a 'service'. By definition such use involves more than access by means of the request/response process. Moreover the provision of a benefit of use implies the grant of permission for use: the grant of permission is not in the nature of a service.[61]

IV.3.5 Access, Service and Use: Different or the same?

---

[58] *CompuServe, Inc v Cyber Promotions, Inc*, 962 F Supp 1015 (S D Ohio 1997).
[59] Balganesh (n 33) 327 (citation omitted).
[60] Kerr (n 45) 1621.
[61] *Falco* (n 54) para 58.

The review suggests that the distinction between access, service and use is real, at least to this extent: first, the benefits that may be considered as involving the provision of additional services or use of additional services may not be pigeonholed within the category of access; second, the benefit of use extending beyond mere access cannot be addressed from within the 'access' or 'service' classifications.

At the same time, as regards the 'core' benefits associated with access to the web server and its information resources, the classification of such benefits as, variously, access, service and use may reflect different ways of conceptualising the technical processes that operate to provide the user with access, rather than different benefits as such.

The review also suggests that while use extending beyond mere access is a stand-alone benefit, otherwise the 'use' classification merely represents the provision of access or a service from the user's perspective.

V. Beyond classification: a benefits approach

For the purposes of the contractual analysis carried out in later Chapters, I approach the conceptualisation of the benefit from within the frameworks of access, a service and use that extends beyond access to the website and its contents.

I do so not merely because these are the benefits routinely referred to in case law, commentary and in Terms of Use but because in broad terms, assuming that the website transfers any 'core' benefit, it must be in the nature of a grant of rights (relating in some manner or way to access) or a service. The 'core' benefits do not involve a transfer of goods.

In considering the benefit of such service as may be provided by the website to the user, I take no account of additional services. I omit such benefits from consideration for reasons of scope and because they are of secondary importance.[62] Whereas it is impossible for the user to interact with a website without triggering the request/response process so as to access the website, the user may access, look at, view, copy and use the information resources of the website without taking any of the additional benefits. Such additional benefits are severable from the core benefits implicit in the configuration of the website and implementation of the request/response process.[63]

VI. Conclusion

This Chapter contains a thorough review of the nature of the benefits that may be conferred by an open publicly accessible website on a user. It is the first review of its kind from a common law perspective.

[62] Neither the commentary nor the case law makes any reference to the provision or use of such additional functionality in describing the nature of the benefit conferred by the website on the user.
[63] In *Kaschke v Gray* [2010] EWHC 690, [2011] 1 WLR 452 Mr Justice Stadlen accepted that a website might provide various services each of which was to be considered separately from the rest in determining whether such service might benefit from the 'safe harbour' provisions of the Electronic Commerce (EC Directive) Regulations 2002. See also *Mulvaney v Betfair* [2009] EIHC 133.

The review suggests that the benefits conferred by the website on the user are conceptualised under the broad categories of access, a service or use.

I explored whether such benefits were different in substance or only in name, pointing to the fact that while the choice of term appears to dictate the analysis of the benefit from within a particular legal framework, the fact that the terms are sometimes used interchangeably might suggest that in reality the benefits are the same.

In order to address this question I considered afresh the range of benefits that might be provided by the website to the user by reference to the broad headings of access, service and use. Relying on a diagram to illustrate the point, I suggested that it is possible to identify a pattern of benefits revealing sets of benefits that are linked and others that are independent from other benefits or sets of benefits.

The review suggested that one can identify four groups of benefits, those associated with access to the server where the website is hosted, those associated with access to the website content, the benefit of use of the website content in ways that extend beyond access or looking and those associated with additional services (including search tools, chatrooms, email updates).

The first two groups of benefits were identified as 'core' benefits. It was suggested that these groups of benefits could be linked not only on account of their function but their relationship to the technical processes involved in the facilitation and implementation of the request/response exchange between the website and the user's browser, that is the processes enabling digital transmission.

The centrality of these processes for understanding the exchange between the website and the user was underscored by the observation that the request/response process underpins all user interactions with the website; that the only conduct (directed at the website) in which all users engage is the activity of requesting a webpage; that the core benefits may equally be described by any of the terms 'access' 'service' and 'use'. So far as the 'core' benefits are concerned the inconsistent use of the terms 'access' 'service' and 'use' may reflect a struggle to make sense of the technical processes in a legal context.

The exercise of attempting to secure a clear understanding of the nature of the benefit conferred by the website on the user begins but does not end with this Chapter. Throughout this thesis the assessment of the contractual significance of the exchange proceeds in tandem with an exploration of the mode of conceptualisation that most accurately represents the character of the benefits conferred. In this respect I recall Mihály Ficsor's admonition about digital transmission, that it 'is like a *Rorschach test* for those who deal with copyright and neighbouring rights: everyone sees something else in it'.[64] While access, the supply of a service, and use emerge as the core means of conceptualising the exchange between website and user, I hope to fine-tune the analysis both as to the nature of the benefits and their contractual significance.

[64] Mihály Ficsor (n 1) 123.

Chapter V

Access

I. Introduction

In this Chapter I explore the contractual significance, under English law, of the benefit of access to open, publicly accessible websites. I argue that access in the sense of permission to access, whether express or implied, cannot clothe browse wrap Terms of Use with contractual effect: no benefit is conferred whose taking may operate as assent.

The argument proceeds on the footing that for permission for access to qualify as a relevant benefit, the website must possess a power to control access based on a right to exclude. I argue that the website possesses no such power and that as a result the grant of permission, express or implied, has no contractual significance in the context of browse wrap Terms of Use.

In Section II, relying on Hohfeld's scheme of jural relations, I set out why, for permission to qualify as a relevant benefit, a website that relies on browse wrap Terms of Use must possess a right to exclude.[1] In particular I explain that the possession of other legal interests, short of a right to exclude, cannot supply the requirements for a contract. At Section II.1 I explain the relevance of Hohfeld's scheme. At Section II.2 I distinguish between rights and privileges while at Section II.3 I discuss the nature of Hohfeldian powers, explaining that if a website can claim a 'right' to control access, such 'right' is truly in the nature of a power. I argue moreover that such a power can only be derived from a right to exclude. Applying these findings, in Section II.4 I note that the requirements as to assent in contract law limit the range of circumstances in which the holder of a privilege to erect barriers to access may 'trade up' the privilege through contract so as to acquire a contractual right. The grant of permission for access cannot supply the requirements for a contract where the website holds a mere privilege to control access and relies on browse wrap Terms of Use. The permission must be grounded in a right to exclude in order to clothe browse wrap Terms of Use with contractual effect.

Armed with an understanding of the significance of the possession on the one hand, of a right to exclude, and on the other, merely of a privilege to erect barriers to access, at Section III I examine whether a power to control access can be extrapolated from other rights or interests possessed by the owner of a website. I explore this question from two perspectives: first, at Section III.1, by reference to legal protections afforded to physical property (the box containing the information) here, the server on which the website resides; and second, at Section III.2, by reference to legal protection afforded to the information whether by virtue of copyright, other intellectual property rights or torts relating (broadly) to misappropriation. I conclude at Section III.3 that, under English law, and despite the range of protections afforded to property and information, there is no power to control access to a website, its information or the server on which it resides.

[1] Hohfeld's scheme of jural relations is set out in Wesley Newcomb Hohfeld and Walter Wheeler Cook, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, And Other Legal Essays* (YUP 1923).

In Section IV I review the decision in *Century 21 Canada Limited Partnership v Rogers Communications Inc*.[2] This is the only decision in a common law jurisdiction to explicitly address the enforceability of browse wrap Terms of Use by reference to whether the owner of a website possesses a 'right' to control access. The review includes an assessment as to whether the analysis adopted by the Canadian Court may readily be transposed into English law.

In Section V I explore the significance of the Computer Misuse Act 1990 ('CMA 1990'). The Act creates an offence relating to 'unauthorised access' to information stored on computer and links the meaning of 'unauthorised' to 'entitlement to control access'. Section V.1 sets out the legislative provisions concerning 'entitlement to control access', while Section V.2 provides an overview of the implications of the incorporation of that term within the legislation. At Section V.3 I explore the genesis of 'entitlement to control access' in the context of the CMA 1990, looking to the recommendations of the Law Commissions. A review of the Courts' treatment of 'entitlement to control access' is provided in Section V.4. At Section V.5 I set out my conclusions as to the significance of the reference to 'entitlement to control access' in the provisions of the CMA 1990.

In Section VI I summarise the findings of this Chapter, concluding that websites do not possess a right to control access and that in the absence of such a right, the conferral of a permission for access cannot clothe browse wrap Terms of Use with contractual effect.

II. The Contractual Implications of Permission for Access: A Hohfeldian Analysis

II.1 Hohfeld's Fundamental Legal Conceptions

Hohfeld lamented the lack of clarity of thinking caused by the failure to differentiate between different forms of legal interests possessed by one person in relation to another.[3] In his *Fundamental Legal Conceptions* he provided not merely a vocabulary for the different forms of legal interests but a scheme showing the relationship between the interests.[4] In particular he demonstrated that understood in the context of relations between persons each legal interest has a correlative: a right held by one person has as its correlative a duty on the part of the other; a power held by one is mirrored by a liability to the exercise of the power; a privilege is paired with a no-claim and so on.[5]

Hohfeld's scheme of jural relations has proved influential.[6] Several commentators writing in the field of information law identify particular legal interests according to the Hohfeldian scheme.[7]

---

[2] 2011 BCSC 1196 ('*Century 21*').
[3] Hohfeld (n 1) 35.
[4] Hohfeld (n 1) 36.
[5] ibid.
[6] Zohar Efroni, *Access-right: The Future of Digital Copyright Law* (OUP 2011) 61.
[7] Wendy J Gordon, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory' (1989) 41 Stanford Law Review, 1343; Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 New York University Law Review 354; Thomas Heide, 'Copyright in the EU and U.S.: What "Access-Right"?' (2001) 48 Journal of the Copyright Society of the USA 363; Lucie Guilbault, *Copyright Limitations and Contract* (Kluwer Law International 2002); Henry Smith, 'Intellectual Property as Property: Delineating Entitlements in Information' (2007) 116 The Yale Law Journal 1742; John Cahir, ' The Public Domain: Right or Liberty' in Charlotte Waelde and Hector L MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain*

Boyle expressly acknowledges the desirability of legal analysis of the public domain in relation to information according to 'the sadly neglected Hohfeldian tradition'.[8] Efroni uses Hohfeldian analysis in order to explore the nature of property rights and the 'contribution of classic property concepts to the intellectual property debate.'[9]

Despite Hohfeld's contribution, the debate about rights in relation to information generally, and about access to information in particular has suffered from lack of clarity about the nature of the legal interests at stake. The debate reveals significant confusion about the difference between rights and privileges and the relationship between rights, privileges and powers.[10] Such confusion has the potential to seriously mislead. The problem is this: if, as I maintain, for a permission to form the basis for an implied contract a right to exclude is needed, the mistaken identification of a mere privilege as a right allows one party's interests to trump those of another in a manner that subverts the arrangement set out in the scheme of legal interests provided by law.[11]

II.2 Of rights and privileges under the Hohfeldian scheme

Under Hohfeld's scheme the possession of a right gives the right-holder a claim against the holder of the correlative duty.[12] Hohfeld's scheme provides an analytical tool enabling us to check assertions about the existence of 'rights'. If no correlative duty can be found, no right exists.[13]

A privilege (or liberty),[14] on the other hand, is a legal interest consisting in the legal ability (not the right, nor the physical ability)[15] to do something by virtue of the absence of a legal duty not to

---

(Edward Elgar 2007); Hugh Breakey, *Intellectual Liberty: Natural Rights and Intellectual Property* (Ashgate 2012).

[8] James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' Law and Contemporary Problems, (2003) 66 Law and Contemporary Problems 33, 73, 74.

[9] Efroni (n 6) 59.

[10] Ginsburg conflates rights and privileges. Jane C Ginsburg, 'From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law' (2003) 50 J Copyright Soc'y USA 113, 123 fn27 (treating the privilege to choose how or whether to make a work available as a right). Heide derives powers to control access from mere privileges when a right is needed to confer such a power (as to which see nn 37-43 and accompanying text). He also appears to conflate physical ability with legal ability the latter, but not the former, being relevant to the existence of a power (as to which see n 15 and accompanying text). Thomas Heide, 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 368, 372, 373. In the hands of the formidable Wendy Gordon rights to exclude are given an attenuated meaning so as to encompass the exclusive rights of the copyright owner to carry out certain acts. The purpose is to apply the metaphor of access to land in a copyright context but the effect is to divorce the meaning of 'exclude' from its meaning in the context of real property, that is to keep out, as opposed to preventing certain acts. In the language of Hohfeld, the content and tenor of the right is altered. Wendy J Gordon, 'An Inquiry into the Merits of Copyright' (n 7) 1366 (arguing that because 'the section 106 [of the Copyright Act 1976 (US)] grants are 'exclusive,' the owner has the right to exclude others from the physical acts described.') Litman suggests that in the case of the drafters of Article 2B of the US Uniform Commercial Code there was no confusion but a deliberate attempt to mislead. Jessica Litman, 'The Tales that Article 2B Tells' (1998) 13 Berkeley Tech LJ 931.

[11] Hohfeld insists that 'Not only as a matter of accurate analysis and exposition, but also as a fact of great practical and economic significance, the property owner's rights, or claims, should be sharply differentiated from his privileges.' Hohfeld (n 1) 97.

[12] Hohfeld (n 1) 36,38,39.

[13] Hohfeld confirms that 'a duty is the invariable correlative of … a right …' Hohfeld (n 1) 39.

[14] 'A liberty considered as a legal relation must mean … precisely the same thing as a privilege …' Hohfeld (n 1) 42.

[15] Hohfeld distinguishes between a legal power and a 'mental or physical power' Hohfeld (n 1) 50.

do so.[16] Its correlative is a no-claim.[17] If I hold a privilege giving me the legal ability to cross your land, you possess no right (a 'no-claim') to prevent me from crossing the land.[18]

The limitations of a privilege may also be illustrated with reference to this example. If you erect fences or barriers around your land so that I can no longer cross it, a mere privilege does not supply me with a right against you that you should remove those barriers or refrain from imposing barriers so as to afford me access.[19]

Consider another example. Imagine a legal jurisdiction that did not recognise property rights in land. In this situation your legal ability to erect fences would not be buttressed by a right: you hold a mere privilege. I would have no duty to respect those barriers. I could circumvent those barriers at will without your having a right against me not to circumvent.[20]

Much of the debate about 'access-rights' in the context of information generally and websites in particular truly concerns privileges. The legal ability of a person to choose not to put information into circulation but rather to withhold it, the legal ability of an owner of copyright in a copyright work not to publish, the legal ability of a website owner not to make information available by uploading the information to the internet: these are all privileges not rights.[21]

The risk of confusion between rights and privileges increases where a person holds some form of right to exclude as well as a privilege. This may be illustrated by what (borrowing from Litman) might be described as the 'my-painting-may-be-in-the-public-domain-but-I-don't-have-to-let-you-into-my-house-to-see-it' scenario.[22] The owner of the house possesses a right to exclude on account of his property right in the house.[23] His right to exclude persons from his house buttresses his privileges in relation to the painting (to keep it hidden, to refuse to make it publicly accessible, to erect barriers to access).[24] In this situation he can impose conditions on access to the painting by virtue of his right to exclude from the house, not by virtue of his privileges.[25] As Litman points out, absent a right of property in the house, the owner of the painting could not legally exclude anyone from viewing the painting.[26] There is no 'right' to control access to the painting, though the right to exclude others from the property functions as though there were.[27]

---

[16] Hohfeld (n 1) 39.
[17] Hohfeld (n 1) 36, 39.
[18] Hohfeld (n 1) 39, 94.
[19] Hohfeld uses the example of 'the shrimp salad' to demonstrate confusion between rights and privileges. He presents a scenario where the owners of a shrimp salad confer a privilege on X to eat the salad but retain the privilege to interfere with X's attempts to eat by 'holding … fast to the dish'. X's privilege to eat the salad does not entail any right against the owners of the shrimp salad not to interfere with his attempts to eat. Hohfeld (n 1) 41.
[20] Litman 'The Tales that Article 2B Tells' (n 10) 938.
[21] Gordon identifies nondisclosure as a privilege. Wendy J Gordon 'An Inquiry into the Merits of Copyright' (n 7) 1390.
[22] Litman 'The Tales that Article 2B Tells' (n 10) 937.
[23] ibid 937,938.
[24] Gordon describes the legal ability to 'build fences' around property as a privilege. Gordon 'An Inquiry into the Merits of Copyright' (n 7) 1534 fn 34.
[25] This is how museums, concert halls and cinemas control the use of works performed or displayed within their premises, even where the works are in the public domain.
[26] Litman 'The Tales that Article 2B Tells' (n 10) 938.
[27] Heide discusses how property rights in buildings such as cinemas and theatres allows the rightholder both to set conditions concerning access [to the building] and to control the use of content once the user has gained access. Thomas Heide, 'Access Control and Innovation under the Emerging EU Electronic Commerce

Heide describes this effect as 'emanat[ing] from the recognition of property rights *in an infrastructure used to control access*.'[28] It is crucially important not to conflate the privileges associated with the painting (or other content) with the right to exclude associated with the house (or other infrastructure protected by a right to exclude), not least because in many cases a relevant right to exclude will not be available to support the privilege.[29]

II.3 Powers in the Hohfeldian scheme

Within the Hohfeldian scheme the legal ability to change legal relations is a power.[30] The litmus test for a power is whether legal relations are changed in consequence of its exercise.[31] Hohfeld suggests examples: the power to make a gift, appoint an agent, sell property, create contractual obligations.[32] The legal ability to authorise or license is in the nature of a power.[33] Hohfeld tells us that as a matter of law the owner of land has a right that others shall not enter on the land and 'the legal power to create a privilege of entrance in any person'.[34] If there is a 'right' to control access it is truly in the nature of a power.[35]

While powers and rights exist independently of each other,[36] a power *to control* can only be derived from a right to exclude.[37] A power to control consists in the legal ability to grant or refuse permission in a manner that changes the parties' legal relations.[38] Such a power can only arise where the person granting or refusing permission has the right to exclude the activity in question. This is implicit in Hohfeld's understanding of powers. For Hohfeld, the grant of permission only qualifies as a power where it is comprised of 'a group of operative facts'[39] by which Hohfeld means facts 'that suffice to change legal relations'.[40] If the grant of permission does not serve to change legal relations it cannot be said that the person making the grant possessed any power to control.

The point may be illustrated by reference to the following examples:

A holds a right to exclude. B holds a correlative duty not to access. A may effect a change in legal relations by granting a bare, non-contractual permission. The permission alters B's duty to A to a

---

Framework' (2000) 15 Berkeley Tech LJ 993, 1011; Heide 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 366 fn 10. See also Efroni (n 6) 149.

[28] Heide 'Access Control and Innovation under the Emerging EU Electronic Commerce Framework' (n 27) 1020 (emphasis added).

[29] In the online environment there are no 'buildings' or other forms of real property.

[30] Hohfeld (n 1) 50-51.

[31] Hohfeld maintains that the 'intrinsic nature' of a legal power concerns the ability to effect a 'change in a given legal relation'. Hohfeld (n 1) 50, 51.

[32] Hohfeld (n1) 51-53. For a more detailed discussion of powers in relation to contracts see Hohfeld (n1) 55-58. See also Derek Beyleveld and Roger Brownsword, *Consent in the Law* (Hart 2007) 70, 72.

[33] Hohfeld (n 1) 32.

[34] Hohfeld (n 1) 96.

[35] Heide recognises this. Heide, 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 365.

[36] Efroni (n 6) 65.

[37] Heide, 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 365.

[38] ibid.

[39] Hohfeld (n 1) 50. See also Hohfeld (n 1) 52 describing 'authorization' of an agent by a principal as 'consisting of a particular group of operative facts.'

[40] Hohfeld (n 1) 32.

privilege as against A.[41] A's legal ability to change legal relations between A and B by the grant of permission depends on A holding a right against B's privilege. In this situation, in the language of Hohfeld, A may be said to possess a power to control access.

A holds a privilege to erect barriers to access and holds no right to exclude. In these circumstances B owes no duty to A not to access. B can only possess a mere privilege to access (if B held a right, A would have a duty not to erect barriers;[42] if B held a duty not to access, A would have a right). In this situation A has no legal ability (power) to change B's legal position *as regards access* by the grant or refusal of permission.[43] B already holds a privilege to access. A has no power to control access.

A power to control access depends on possession of a right to exclude.

II.4 Access Contracts: Learning from the Hohfeldian scheme

The analysis carried out in Section II.3 also reveals why, *in the situation where assent must be implied,* the benefit of the grant of permission for access by the holder of a mere privilege can never supply the requirements for a contract.

The rules of contract law circumscribe parties' power to contract by specifying, inter alia, the generic facts that may operate to supply assent and consideration.[44] In particular the rule that for assent to be implied from conduct, the conduct must be unequivocally referable to the contract contended for, significantly limits the power to contract.

In the second of the examples set out in Section II.3, B's conduct in obtaining access is equally referable to his legal ability (privilege) to access as to the benefit of A's permission which effects no change in B's legal interest in relation to A as regards access. B's conduct, in this situation, can never operate as assent.

It is important to note that we can consistently recognise that A's permission may represent a benefit and insist that the conferral of the benefit does not supply the requirements for assent through conduct. In some cases, as Lessig points out, privileges to erect fences are more efficacious than rights to exclude.[45] Returning to Litman's scenario ('my-painting-may-be-in-the-

[41] Hohfeld (n 1) 94. In the example offered A may also revoke the permission, with the effect that the privilege to access is converted to a duty not to access. This change in relations, on account of the revocation of consent, is more difficult to explain within the Hohfeldian scheme. The correct way to understand it, I suggest, is that the initial grant of permission by A is conditioned on the (explicit or implicit) retention of a power to revoke the privilege at will or on such terms as may be agreed. For alternative explanations see Beyleveld and Brownsword (n 32) 74-85 (suggesting a gloss on Hohfeld to incorporate a 'consent proviso'); Efroni (n 6) 65 (suggesting that in this situation A has a 'potential right-claim').

[42] Efroni recognises that where a person possesses a 'Hohfeldian right-claim against the duty holder to enable access, … the opponent is under the affirmative legal duty to remove access obstacles and otherwise enable human-access.' Efroni (n 6) 154.

[43] Hohfeld's strictures about proceeding with caution in teasing out the implications of holding a particular privilege are relevant here. Hohfeld warns that one must keep in mind the 'content and tenor' of the privilege. The duty negatived by the holding of a privilege is a duty 'having a content and tenor precisely opposite to that of the privilege in question.' Hohfeld (n 1) 39. Thus a privilege to access implies the absence of a duty not to access.

[44] Hohfeld (n 1) 32.

[45] Lawrence Lessig, *Code Version 2.0* (Basic Books 2006) 169-171.

public-domain-but-I-don't-have-to-let-you-into-my-house-to-see-it') Litman envisages a situation where she seeks to secure the painting by a range of means, including

> the solidity of my house, my own personal strength (possibly augmented by the strength of such guards as I can hire), and the effectiveness of stay-away devices-locked doors, burglar alarms, electrified fences, vicious attack dogs …[46]

Litman maintains that in spite of these measures, without laws conferring rights to exclude, 'there's no reason in the world why people can't break in to see the painting without my permission.'[47] This statement is true, but only if Litman is referring to the lawfulness of breaking in as opposed to the feasibility of breaking in. Guards, locked doors, burglar alarms, electrified fences and vicious attack dogs represent some very good reasons not to break in. Permission for access necessarily implies that these measures will not be deployed: this forbearance is a benefit and in the context of express agreements (such as click wrap Terms of Use) will (subject to the usual exclusionary rules) supply the requirement for consideration provided that the permission is not revocable at will.[48] Thus in the context of *express* agreements the holder of a privilege (to erect barriers and other obstacles to access) can trade up his privilege so as to secure, via the contract, a right to exclude in exchange for the waiver of the privilege.[49] Where on the other hand assent must be implied, the privilege cannot be traded up in this fashion: in this situation the power to contract is constrained by the requirement that for the user's conduct in obtaining access to supply assent, that conduct can only be referable to the permission. In the absence of a right to exclude, the choice to access, even to break in, cannot be imputed to the grant of the permission as opposed to the absence of a duty not to access.[50] The user might be prepared to risk being met by fences, guards and dogs.

III. In Search of a Power to Control Access

---

[46] Litman 'The Tales that Article 2B Tells' (n 10) 938.

[47] ibid.

[48] In Hohfeld's shrimp salad scenario the owners of the shrimp salad confer a privilege on X to eat the salad but they retain the privilege to interfere with X's attempts to eat by 'holding … fast to the dish'. The owners only retain the privilege to interfere by expressly telling X: 'Eat the salad, if you can; you have our license to do so but we don't agree not to interfere with you.' Hohfeld (n 1) 41. In the ordinary situation where a license is given without such a qualification, the owners of the salad (or other item) would be treated as having abandoned their privilege to interfere.

[49] This is why McGowan is wrong to maintain that '… if site owners do not have a right to exclude persons from their sites, then they have no consideration to give in return for subscriber's payment.' David McGowan, 'Website Access: The Case for Consent' University Of Minnesota Law School Public Law and Legal Theory Research Paper Series Research Paper No 03-<http://ssrn.com/abstract=420620> (accessed 11 May 2015). They do, but assent is a problem unless it is express or (as discussed in n 50) the consideration consists in the removal of a barrier so as to enable access. It is also why the argument that website owners must 'take the bitter with the sweet', (McGowan, 'Website Access' 20-22) that is, password protect (or at least protect by some form of code that serves to keep the information 'closed') has merit. Contract law should not be subverted so as to provide websites with a means of controlling access through contract when such means exist already: rights to exclude should not be conferred simply because it is erroneously supposed that there is no other way of controlling access by contract.

[50] This situation should not be confused with the situation where the holder of the privilege to erect barriers agrees to *remove a barrier* as part of a contractual exchange. There the benefit taken by the person who secures access (assuming that he does not circumvent the barrier) is access through the removal of the barrier. His legal interests are changed since he acquires a right to have the barrier removed when previously he held a no claim in this regard. This is a benefit that can only flow from the exchange and so supplies the requirements for a contract, express or implied. This is why click-through Terms of Use (where a code barrier to access is removed only on the user clicking to indicate assent) are binding.

The question as to whether a website possesses a right to exclude, so as to have a power to control access, is one that must take account of the legal qualities of the content comprised in the website and the infrastructure in which it is 'housed'. That is, one must take into account both rights pertaining to the information itself and rights *that have the effect of protecting the information* in much the same manner as property rights in a house protect the contents as well as the house.[51]

III.1 A right to exclude in the infrastructure

Great controversy has attended the elaboration by the US Courts of a 'pseudo' right to exclude and concomitant power to control access to information by means of the doctrine of trespass to chattels.[52]

It is obvious that websites, unlike paintings, are not accessed via buildings but through the servers on which the websites are stored. Servers are tangible moveables, items of personal property or 'chattels'. It is easy to identify a right to exclude, with a concomitant duty to stay out in the case of real property, much less so in the case of chattels.

Undettered,[53] in relation to chattels, the US Courts have adopted an attenuated notion of a 'right to exclude',[54] where the duty no longer consists in staying out (access in a narrow sense), but in not using or interfering with (access in a broad sense). [55] Of course, if the duty has changed, so has the right: we should be sceptical therefore as to the character of the 'right to exclude' that is asserted in relation to chattels.[56]

The development of this new form of 'right to exclude' reached its high point in *eBay v Bidder's Edge*. There eBay sought to obtain preliminary injunctive relief against the defendant where the latter, in defiance of eBay's express prohibition, used screen-scraping techniques to obtain details

[51] See nn 22-28 and accompanying text.

[52] See for example, Susan M Ballantine, 'Computer Network Trespasses: Solving New Problems with Old Solutions' (2000) 57 Wash & Lee L Rev 209; Dan L Burk, 'The Trouble with Trespass' (2000) 4 J Small & Emerging Bus L 27; Edward W Chang, 'Bidding on Trespass; eBay, Inc v. Bidder's Edge and the Abuse of Trespass Theory in Cyberspace-law' (2001) 29 AIPLA Q J 445; Laura Quilter, 'The Continuing Expansion of Cyberspace Trespass to Chattels' (2002) 17 Berkeley Tech L J 421; Dan Hunter, 'Cyberspace as Place and the Tragedy of the Digital Anti-Commons' (2003) 91 Cal L Rev 439; Mark A Lemley, 'Place and Cyberspace' (2003) 91 Cal L Rev 521; RA Epstein, 'Cybertrespass' (2003) 70 The University of Chicago Law Review 73; Patty M De Gaetano, 'Intel Corp v Hamidi: Private Property, Keep Out - The Unworkable Definition of Injury for a Trespass to Chattels Claim in Cyberspace' (2004) 40 Cal W L Rev 355; Shyamkrishna Balganesh, 'Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass' (2006) 12 Mich Telecomm Tech L Rev 265; Michael Carrier and Greg Lastowska 'Against Cyberproperty' (2007) 22 Berkeley Tech LJ 1485.

[53] In *eBay* the Court described the distinction between the reality of the nature of the defendants' activities (involving access to a chattel, the server) and the analogy offered by the plaintiffs, of intrusion into a 'bricks and mortar' store as 'formalistic'. *eBay Inc v Bidder's Edge, Inc*
100 F Supp 2d 1058 (ND Cal, May 24, 2000).

[54] *eBay* (n 53). Hoeren queries whether it is helpful to use 'access' except in order to denote entry to a place. Thomas Hoeren, 'Copyright Dilemma: Access Right as a Postmodern Symbol of Copyright Deconstruction?' in Eberhard Becker, Willms Buhse, Dirk Günnewig, Niels Rump (eds), *Digital Rights Management: Technological, Economic, Legal and Political Aspects* (Springer-Verlag 2003) 577.

[55] ibid.

[56] It is important to pay attention to the 'content and tenor' of the legal interests under discussion. See Hohfeld (n 1) 39.

of eBay's auction listings and post those details on its (the defendant's) website. eBay relied on the doctrine of trespass to chattels in support of its claim. The Court granted the injunction, finding that the defendant's 'ongoing violation of eBay's fundamental property right to exclude others from its computer system potentially causes sufficient irreparable harm …'[57]

Despite the absolutist terms in which the Court asserts a 'fundamental … right to exclude' it is apparent that the right, such as it is, is qualified. Thus the Court accepts that

> In order to prevail on a claim for trespass to chattels based on accessing a computer system the plaintiff must establish: (1) defendant intentionally and without authorization interfered with the plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff.[58]

This passage makes it clear that the 'right to exclude' that has been asserted is a right against an interference with a possessory interest in the chattel that results in damage. This is a far cry from an unqualified right to exclude. The duty paired with this right is a duty not to interfere with a possessory interest in the chattel (the computer) in a manner that results in damage. This is not a duty not to access: mere access neither interferes with a possessory interest nor causes damage whether in the sense of 'impairment of the property or the loss of its use'.[59]

The limited character of the 'right' at issue in trespass to chattels claims involving unauthorised use of computer systems was made plain in *Intel v Hamidi*.[60]

Intel sought an injunction against Hamidi, a former employee, who sent mass emails, critical of Intel, to Intel employees at email addresses on Intel's email system. Injunctive relief on the grounds of trespass to chattels was granted at first instance and on appeal. However on appeal by Hamidi to the Supreme Court of California, the Court (by a 4/3 majority) granted review of the award of injunctive relief.

The Court insisted that in order to succeed Intel had to show that Hamidi's use of Intel's computer system caused injury. Moreover the requirement would only be satisfied (absent dispossession of the chattel, personal injury or physical injury) if

> "the chattel is impaired as to its condition, quality, or value, or … the possessor is deprived of the use of the chattel for a substantial time."[61]

In the absence of evidence that Hamidi 'used the system in any manner in which it was not intended to function or impaired the system in any way' the Court was not prepared to find that Intel had established injury to the computer system. In reaching that conclusion the Court took into account the following factors

---

[57] *eBay* (n 53).
[58] ibid.
[59] ibid.
[60] *Intel Corp v Kourosh Kenneth Hamidi* 30 Cal 4th 1342, 71 P3d 296, 1 Cal Rptr 3d 32, S103781 (Cal Supreme Ct, June 30, 2003).
[61] *Intel* (n 60) citing Restatement (Second) of Torts, § 218, paras (b) (c).

> the … evidence revealed no actual or threatened damage to Intel's computer hardware or software and no interference with its ordinary and intended operation. Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any measurable length of time. Intel presented no evidence its system was slowed or otherwise impaired by the burden of delivering Hamidi's electronic messages. Nor was there any evidence transmission of the messages imposed any marginal cost on the operation of Intel's computers.[62]

The Court was of course describing the impact of the mass emails sent by Hamidi to Intel's email system. However the evidence as to impact could equally describe the impact of access to a computer system by virtue of ordinary human access to a website. While recursive access by means of robots might impair the system by slowing it down, human access has no such impact.

Even allowing therefore for some elasticity in the notion of a 'right to exclude' it is plain that the trespass to chattels doctrine, as developed in the US, confers neither an absolute right to exclude, nor a duty not to access but only a right to exclude certain uses of the chattel, here the computer, and a correlative duty not to use the computer in ways that cause injury of a relevant kind.[63]

Trespass to chattels in English law

If the extension of the doctrine of chattels has given rise to controversy in the US, the complete absence of any similar judicial activity in England might suggest that there is very little prospect that the doctrine will be similarly extended so as to provide a right of action in relation to unauthorised use of computers.[64]

At least two factors militate against the development of the cause of action along US lines. First, although the position is not entirely clear, there is some authority for the view that in England, the owner or possessor of the chattel may restrain any unauthorised intermeddling with the chattel, even in the absence of injury.[65] As a matter of policy therefore the Courts may be wary of providing persons with possessory rights in computers with an unqualified right to restrain any unauthorised use.[66]

---

[62] ibid.

[63] Balganesh goes so far as to maintain that the requirement for damage has the effect of demoting the 'right to exclude' associated with ownership of personal property to a mere privilege. I am not convinced he is correct. Shyamkrishna Balganesh, 'Property along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence' (2006) 35 Comm L World Rev 135, 153.

[64] Balganesh suggests that the doctrine of trespass to chattels is 'largely dead in English common law'. Balganesh (n 63) 151.

[65] R F V Heuston, R A Buckley, and John W Salmond, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell 1996) 95 (stating that damage is not necessary); W V H Rogers, Percy Henry Winfield, J A Jolowicz, and Percy Henry Winfield, *Winfield and Jolowicz on Tort* (Sweet & Maxwell 2006) para 17-3 (stating that the 'general view' is that damage is not necessary); S F Deakin, Angus Charles Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Clarendon Press 2008) 484 (suggesting it is not 'altogether clear … whether the tort is actionable per se'); M A Jones, Anthony M Dugdale, J F Clerk, and W H B Lindsell *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014) para 17-131 (no requirement for damage (citing *Transco Plc v United Utilities Water Plc* [2005] EWHC 2784 (QB)). See also Mary W S Wong, 'Cyber-trespass and 'Unauthorized Access' as Legal Mechanisms of Access Control: Lessons from the US Experience' (2006) 15 International Journal of Law and Information Technology 90, 92,93 (providing a review of English law commentary on the tort and the damage requirement); Balganesh (n 63) 141.

[66] Wong (n 65) 94.

Perhaps more significantly, in English law, in contrast to the position under US law, the doctrine has not yet thrown off the constraint that the interference with the chattel should be tangible.[67] Faced with the same issue, the Canadian Courts declined to extend the reach of the tort to intangible interferences with the chattel by way of electronic signals, including electronic access.[68] Unless and until the English Courts dispense with this requirement, there is no prospect of development of the doctrine so as to provide a cause of action in relation to access to websites, whether the access is by human or robotic means.

III.2 A right to exclude in the information

III.2.1 Within the UK, it is settled law that information is not a form of personal property.[69] Thus while, as Chris Reed observes, people may commonly speak of information ownership,

> … this assumption of ownership is not strictly accurate. Information in digital form is generally not any kind of personal property unless it is recorded on a physical object, in which case property rights relate to that physical object and not the information itself.[70]

However legal protection short of property rights is afforded to content that qualifies for copyright, to confidential or private information or information that qualifies as personal data. Within Europe the sui generis database right provides protection in relation to certain assemblages of information. Some have argued that the law of unjust enrichment might offer a form of protection for unauthorised use of information.

Of these, only confidentiality and privacy are arguably capable of conferring a *limited* right to exclude.[71] However, where, as in the case of information made available on an open publicly

---

[67] Clerk and Lindsell (n 65) para 17-131 (suggesting a requirement for 'physical intromission'). See also Wong (n 65) 94.

[68] *Century 21* (n 2) [295]-[298].

[69] Lord Justice Floyd noted 'Although information may give rise to intellectual property rights, such as database right and copyright, the law has been reluctant to treat information itself as property.' *Your Response Limited v Datateam Business Media Limited* [2014] EWCA Civ 281, [2015] QB 41 [42]. See also Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP 2009) 1003 (noting that 'Up until now, the law has refused to recognize a property right in ideas or information'). In the US the traditional view is expressed in Justice Brandeis' dissenting judgment in *INS v AP* to the effect that 'knowledge, truths ascertained, conceptions, and ideas -- became, after voluntary communication to others, free as the air to common use.' *International News Service v Associated Press* 248 US 215 (1918) ('*INS v AP*') 250. See also Pamela Samuelson, 'Information As Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?' (1989) 38 Cath U L Rev 365, 368. Brandeis' statement stands in opposition to the rather glib comment by Lawrence Lessig that 'Legitimacy depends on the intention of the person granting access.' Lessig (n 45) 170. Legitimacy depends rather on the matrix of rights and privileges held by the respective parties. See also Nancy S Kim, 'The Duty to Draft Reasonably and Online Contracts' in Larry DiMatteo and others, *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013) 190 (claiming that 'Businesses have information property rights in their Web Sites').

[70] Chris Reed, 'Information "Ownership" in the Cloud' (March 2, 2010) Queen Mary School of Law Legal Studies Research Paper No 45/2010, 1 <http://ssrn.com/abstract=1562461> (accessed 18 May 2015).

[71] Bently and Sherman maintain that the law of confidence constrains use and disclosure of information but not acquisition. Bently and Sherman (n 69) 1039.This is the traditionally held view. However Lord Neuberger suggests that the law relating to confidentiality and privacy may operate to constrain 'looking' or access to the information. *Tchenguiz v Imerman* [2010] EWCA Civ 908, [2011] 2 WLR 592. Baroness Hale, delivering a minority judgment likewise suggests that it 'is an interference with privacy for someone to know or have access to private information even if they make no other use of it.' *R (on the application of S) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196. These dicta imply a right to

accessible website, the information has been published to the world at large, the information is no longer private or confidential.[72] In the context of such websites, neither confidentiality nor privacy can supply a right to exclude.

III.2.2 Copyright

Some commentators, notably Jane Ginsburg, argue that copyright confers a 'right' to control access to copyright works.[73] Even allowing for the point made by Heide (correctly), that if such a 'right' exists, it is truly in the nature of a Hohfeldian power, copyright does not confer such a 'right'.[74] Copyright does not confer a right to exclude persons other than the copyright owner from access to the work.[75]

Ginsburg relies on four different aspects of the 'rights' possessed by owners of copyright in order to substantiate her argument. These aspects relate to

1. The ability of the copyright owner to refrain from publishing the work.
2. The implications of the 'making available' right.
3. The reach of the reproduction right in the context of access to copyright works through the medium of computers.
4. The legal protection afforded to technological protection measures applied to copyright works.

Ginsburg does not suggest that any one of these aspects should be accorded greater significance than the others. Each aspect of the argument is separately addressed.

---

exclude and concomitant power to control access only *in relation to information that retains the quality of confidentiality*.

[72] *Coogan v News Group Newspapers Ltd & Anor* [2012] EWCA Civ 48; *Saltman Engineering Co v Campbell Engineering Co* [1963] 3 All ER 413 (Note). Bently and Sherman (n 69) 1014. See also Hazel Carty, 'The Common Law and the Quest for the IP Effect' [2007] IPQ 237, 262.

[73] Olswang advocates the introduction of an 'accessright' [sic] but does not suggest that such a right is implicit in copyright. Simon Olswang, 'Accessright: an evolutionary path for copyright into the digital era?' (1995) 17 EIPR 215. Fraser, writing in 1997, maintained that the effect of the then 'new' WCT was to create a new 'right of access' by which Fraser clearly means a right for copyright owners to control access. He anticipates many of the arguments advanced by Ginsburg. Stephen Fraser, 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure' (1997) 15 J Marshall J Computer & Info L 759, 781. Westkamp, like Ginsburg, considers that the combined effect of the making available right, protection for technological protection measures and the acceptance that temporary, or transient, copies engage the reproduction right, is to confer an 'access right'. Westkamp insists however that this development is at odds with the 'doctrine of freedom of information' in 'traditional copyright doctrine'. Guido Westkamp, 'Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law' (2004) 36 Geo Wash Int'l L Rev 1057, 1063.

[74] Heide 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 364 fn 5, 365. Efroni notes that 'Analysis of the "access right" as a legal copyright concept reflects at times a great deal of confusion.' Efroni (n 6) 144, fn 77.

[75] Heide points out that if it did, the owner of copyright in a book could 'control any act of unauthorised access occurring, for example, in the home, at the library, or the bookstore.' He insists that since 'any of us can watch videos or read books at home and go to the library or bookstore to read or browse — all without incurring legal liability — no such duty can be said to exist, and correlatively, neither can the "right against the gaining of unauthorised access" to a copyrighted work.' Heide 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 366, 367. Efroni likewise accepts that 'traditional copyright rules do not sanction or restrict mere access-conducts …' Efroni (n 6) 149. See also Hoeren (n 54).

The ability of the copyright owner to refrain from publishing the work

Ginsburg argues (though somewhat faintly) that

> the access right was implicit in the reproduction and distribution rights under copyright in the days before mass market copying devices. The copyright owner controlled access by choosing how to make the work available.[76]

The ability of the copyright owner to choose whether or how to make the work available is a privilege, not a right.[77] Moreover the privilege is not a creature of the copyright regime. The privilege is the correlative of the absence of a duty to make available. It is a privilege that has always existed subject to clearly defined exceptions. The limitations of the privilege are only now a problem since information providers want to have their cake and eat it. They want to make information available and yet derive the bargaining leverage implicit in not making it available.

The implications of the 'making available' right

Article 8 of the WCT enhanced the rights of copyright owners by introducing the making available right. Article 8 provides

> … authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, *including the making available to the public of their works in such a way that members of the public may access these works* from a place and at a time individually chosen by them.[78]

Ginsburg suggests that 'the copyright owner's ability to control the terms under which access is made available to the public may be implicit in this formulation.'[79]

However when we consider the nature of the right conferred by Article 8, that is, an exclusive right to make available, we see that its correlative is a duty on others *not to make available*.[80] Contrary to Ginsburg, the 'making available right' gives the copyright owner the power to control the terms on which a person is permitted to make the works available to the public. In other words it confers the power to impose contract terms on the person who makes the work available, but no power to impose contract terms on users. There is no right to exclude contained in Article 8, nor any corresponding duty not to access.

The reach of the reproduction right in the context of access to copyright works through the medium of computers

---

[76] Ginsburg (n 10) 123 fn27.

[77] Gordon, 'An Inquiry into the Merits of Copyright (n 7) 1390.

[78] Article 3 of Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167 ('Information Society Directive') is modeled on the provisions of Article 8 WCT.

[79] Ginsburg (n 10) 122. Stephen Fraser hints at an argument to this effect. Fraser (n 73) 790.

[80] So in *Svensson*, the claimant journalists, relying on the 'making available' right sought to restrain the defendants (online news providers) from making available their copyright works by providing hyperlinks to the works. C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13/2/2014). Efroni observes 'As a matter of both policy and common sense the exclusive communication right [that incorporates the making available right] should in no case affect the lawfulness of requests by end users initiating relevant transmissions.' Efroni (n 6) 280.

Ginsburg's third argument relates to the implications of the consensus that emerged that making a temporary copy of a copyright work within the RAM of a user's computer, whether by browsing or otherwise, entails the reproduction of that work and so engages the copyright owner's exclusive reproduction right.[81] Ginsburg argues that 'the seeds of an access right' may be found in 'the doctrine of RAM copying' since 'apprehending the work through a computer requires making at least a temporary copy'.[82]

Here the argument is that since every act of access to a work through a computer engages the reproduction right*, in effect* (in relation to works accessed though a computer, including all online works) the reproduction right comprises a right to exclude. Ginsburg would argue moreover that copyright always and in every context operated and operates to provide such a functional constraint on access: she maintains that 'the access right is an integral part of copyright'.[83]

I disagree. As Heide points out, if it did, the owner of copyright in a book would have a remedy for

> *any* act of unauthorised access occurring, for example, in the home, at the library, or the bookstore.[84]

Since, 'any of us can watch videos or read books at home and go to the library or bookstore to read or browse — all without incurring legal liability' neither a duty not to access on the part of users, nor a right to exclude on the part of copyright owners exists.[85]

I agree with Ginsburg, however, that in the context of access to works through a computer, an unfettered reproduction right would function as though it contained a right to exclude.[86] Ginsburg acknowledges that copyright owners have never possessed an unfettered reproduction right: exceptions to the rights of the copyright owner serve to limit the scope of the rights. However she underplays the effect of the exceptions, within Europe and the US in relation to

---

[81] Ginsburg (n 10) 121,122; Bently and Sherman (n 69) 138. For a contrary view, see Jessica Litman, 'The Exclusive Right to Read' 13 Cardozo Arts & Ent L J 29, 40-43 (arguing that there is no such consensus in the US and that temporary reproduction in RAM, that is, the random access memory of a computer, is too 'transitory' to qualify as a reproduction within the meaning of copyright law) and Westkamp (n 73) 1090. See also Fraser (n 73) 775-778 (relating to the discussions, prior to the introduction of the WCT, of the implications of temporary copying for browsing). Within Europe the consensus was reflected, inter alia, in Article 4(a) of Council Directive of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (the 'Software Directive') (temporary copying of a computer program subject to authorisation of the rightholder) and Articles 2 and 5 of the Information Society Directive. See S Bechtold, 'Information Society Dir, art 3' in Thomas Dreier and P B Hugenholtz, *Concise European Copyright Law* (Kluwer Law International) 2006.

[82] Ginsburg (n 10) 121,122.

[83] Ginsburg (n 10) 116. Henry Smith, while acknowledging that certain developments have strengthened copyright protection states 'Copyright law does not simply define a work or an idea and then give rights to exclusive access to such a resource.' Smith (n 7) 1807, 1808.

[84] Heide, 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 366 (original emphasis). Several other commentators have lined up to make the same point. See for example, Litman 'The Exclusive Right to Read' (n 81) 40; Westkamp (n 73) 1069. Benkler maintains that the law of copyright 'privileges' the activity of reading. Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom'* (YUP 2006) 451. See also the dicta of Lord Sumption in *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18, [2013] 2 All ER 852 [36].

[85] Heide, 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 366, 367. See also *MDY Indus, LLC v Blizzard Entm't Inc,* 629 F 3d 928, 952 (9th Cir 2010) [13] ('Historically speaking, preventing "access" to a protected work in itself has not been a right of a copyright owner arising from the Copyright Act.')

[86] Litman accepts this. Litman 'The Exclusive Right to Read' (n 81) 40.

liability for temporary copying.[87] To the extent that the exceptions limit liability in relation to the making of temporary copies whether in the RAM of a computer, in the user's browser cache or on their computer screen, it cannot be said that the reproduction right functions to provide a right to exclude.[88]

Moreover within Europe and in relation to access to a website, the point is now moot. The question whether users of websites need authorisation from the owners of copyright in order to access and view copyright material appearing on a website was addressed in *PRCA v Newspaper Licensing Agency*.[89] The UK Supreme Court answered that they do not. Lord Sumption, delivering the unanimous opinion of the Court maintained

> [I]t has never been an infringement, in either English or EU law, for a person merely to view or read an infringing article in physical form ... [all] that Article 5(1) of the [Information Society] Directive achieves is to treat the viewing of copyright material on the Internet in the same way as its viewing in physical form, notwithstanding that the technical processes involved incidentally include the making of temporary copies within the electronic equipment employed.[90]

In making this statement, Lord Sumption was under no illusions about the fact that the viewing he described was the result of access to the website, noting that 'the creation of copies in the cache or on screen … requires no other human intervention than *the decision to access* the relevant web-page.'[91]

Given the significance of the question, however, the Supreme Court submitted a reference to the Court of Justice of the European Union ('CJEU'). The CJEU confirmed that the effect of the mandatory temporary copying exception set out in Article 5(1) of the Information Society Directive[92] (implemented within the UK as section 28A CDPA 1988) is to ensure that users of websites do not require authorisation from copyright owners in order to view content appearing on websites, whether or not the content has been made available with the consent of the copyright owner.[93] It has, in short, emphatically rejected the idea that the reproduction right confers a right to exclude and a power to control access.

The legal protection afforded to technological protection measures applied to copyright works.

---

[87] For example Article 5.1 of the Software Directive (n 81) specifies that '[i]n the absence of specific contractual provisions the acts referred to in Article 4 (a) [temporary copying] … shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose …' See also Heide, 'Copyright in the EU and U.S.: What "Access-Right"?' (n 7) 370, 371.

[88] As to RAM copying in the context of browsing see Gretchen McCord Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing' (2000) 9 Tex Intell Prop L J 97, 102.

[89] *PRCA* (n 84). For a discussion of the Supreme Court decision see Alan Baker, 'Case Comment: EU Copyright Directive: does internet browsing require copyright licences? Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd (C-360/13) (the Meltwater case)' (2014) 25(7) Ent LR 257.

[90] *PRCA* (n 84) [36].

[91] *PRCA* (n 84) [31] (emphasis added).

[92] n 78. See generally Bechtold (n 81).

[93] Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* (5 June 2014) paras 54-56.

Ginsburg maintains that the anti-circumvention provisions of the Digital Millennium Copyright Act[94] 'in effect create a new right under, or perhaps over, copyright: the right to control access to copyrighted works.'[95]

The DMCA introduced provisions imposing civil and criminal sanctions on those who circumvent a technological protection measure that effectively controls access to the work. Similar provisions were introduced in Europe. Article 6 of the Information Society Directive required Member States to provide 'adequate legal protection against the circumvention of effective technological measures'.[96] Such measures are treated as effective

> where the use of a protected work [that is protected by copyright or the sui generis database right] or other subject matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work …[97]

These provisions do not *directly* provide copyright owners with a general power to control access to their copyright works. Instead, where copyright owners choose to enforce copyright restrictions by means of technological protection measures ('TPMs') the law affords protection to those measures.

The implications of legislative provisions imposing liability for circumvention of access controls are far-reaching. Previously copyright owners possessed only a privilege to build 'fences' to protect their works.[98] Law did not protect the 'fence'. Now it does. As Benkler points out the effect is to allow copyright owners who employ such 'fences' to 'extinguish' the user's privilege to circumvent the fence.[99]

Commenting on the US position Benkler argues that the law protects the fence *per se*, that the protection is not limited to circumstances where the rights of the copyright owner are infringed.[100] The US Courts are split on the point. In *Chamberlain* the Federal Circuit took the view that the protection for the technological measure will not be available where circumvention of the measure does not cause or facilitate the infringement of the rights possessed by the copyright owner. [101] For liability to arise there must be 'a reasonable relationship between the circumvention at issue and a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization.'[102] The Ninth Circuit disagreed,[103] expressing the

---

[94] Digital Millennium Copyright Act, 17 USC s 1201.

[95] Ginsburg (n 10) 118. See also Guido Westkamp, 'Author's Rights and Internet Regulation: The End of the Public Domain or Constitutional Re-Conceptualization?' in Meir P Pugatch (ed), *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Edward Elgar 2006) 278-280.

[96] n 92.

[97] Information Society Directive, art 6(3).

[98] Benkler (n 7) 421; Gordon, 'An Inquiry into the Merits of Copyright' (n 7) 1534 fn 34.

[99] Benkler (n 7) 354, 421.

[100] Benkler (n 7) 421.

[101] *Chamberlain Group Inc v Skylink Technologies Inc* 381 F 3d 1178 (Fed Cir 2004). For commentary see Barry B Sookman, 'Technological protection measures (TPMs) and copyright protection: the case for TPMs' (2005) 11 CTLR 143.

[102] *Chamberlain Group Inc v Skylink Technologies Inc* (n 101).

[103] For different views as to the manner in which the split should be resolved see Robert Arthur, 'Federal Circuit v. Ninth Circuit: A Split Over the Conflicting Approaches to DMCA Section 1201' (2013) 17 Intellectual

view that the statutory provisions plainly intended to provide for protection against the circumvention of access controls without the need for any 'infringement nexus'.[104] So far as Europe is concerned however, the CJEU has confirmed that the protection for TPMs is available only

> … with regard to technological measures which pursue the objective of preventing or eliminating, as regards works, acts not authorised by the rightholder of copyright referred to in paragraph 25 [reproduction, communication to the public, making available to the public, distribution] … Those measures must be suitable for achieving that objective and must not go beyond what is necessary for this purpose.[105]

In any event such provisions do not and cannot supply the conceptual underpinnings of a general power on the part of website owners to control access to websites. The rights and duties imposed by anti-circumvention provisions may, subject to the caveats outlined above, function as though they entail a right to exclude *where the rightholder employs effective technological protection measures* but not otherwise. [106] By definition such measures are not deployed in the case of open publicly accessible websites. Unless and until the website does employ those measures it possesses only a privilege to erect fences, as before.

In summary, copyright does not confer a right to exclude and a power to control access to copyright works on rightholders. The legal protections for TPMs approximate a right to exclude and a power to control access but only where TPMs are in fact deployed. While the expansive interpretation of the implications of the reproduction right in the digital environment understandably invited speculation about the development of a 'disguised' 'access right', within Europe the CJEU has put paid to that speculation by confirming, in the clearest terms, that access, per se, does not infringe the reproduction right.

III.2.3 *The sui generis database right*

The Database Directive made provision for the introduction of the sui generis database right.[107] It conferred protection for database producers in relation to their investment in the creation of the database. The protection is available where there has been substantial investment in obtaining

---

Property L Rev 265; Theresa M Troupson, 'Yes, It's Illegal to Cheat a Paywall: Access Rights and the DMCA's Anticircumvention Provision' (2015) 90 NYUL 325.

[104] *MDY Indus* (n 85) [16].

[105] C-355/12 *Nintendo Co Ltd and Others v PC Box Srl and 9Net Srl* (23 January 2014) para 31. See also Séverine Dusollier, 'The protection of technological measures: Much ado about nothing or silent remodeling of copyright' in Rochelle Cooper Dreyfuss and Jane C Ginsburg, *Intellectual Property at the Edge: the contested contours of IP* (CUP 2014).

[106] Maureen O'Rourke, 'Property Rights and Competition on the Internet: In Search of an Appropriate Analogy' (2001) 16 Berkeley Tech L J 561, 585 (stating that the equivalent measures in the US Digital Millenium Copyright Act do not protect publicly available websites from unwanted access). Efroni suggests that the anti-circumvention provisions provide a 'pseudo' access right. Efroni (n 6) 144. For a discussion of the application of the US provisions concerning protection of technological protection measures applied to websites (including passwords and 'captcha' technology) see Joseph P Liu, 'Paracopyright-a peculiar right to control access' in Rochelle Cooper Dreyfuss and Jane C Ginsburg, *Intellectual Property at the Edge: the contested contours of IP* (CUP 2014).

[107] Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ 1996 L77/20.

verifying or presenting the contents of the database.[108] The maker of the database is the first owner of the right.[109]

Some websites may qualify for the protection afforded by the sui generis database right.[110] The key to protection is in the nature of the investment. If the investment consists in the creation of the contents of the database as opposed to obtaining verifying or presenting the contents the protection is not available.[111] The investment must also be substantial.[112]

David Bainbridge suggests that the database right confers a right to control access to qualifying databases.[113]

Certainly the maker of a database has no obligation to make it available and can choose to not to make it available at all or only to selected persons. He holds a privilege to withhold access to the database. It is in this vein that we must understand the CJEU's comments in *The British Horseracing Board Ltd v William Hill Organisation Ltd*, that

> Of course, the maker of a database can reserve exclusive access to his database to himself or reserve access to specific people.[114]

'Of course', because subject to clearly specified exceptions, (for example under freedom of information laws, or under the subject access provisions of the data protection regime) no-one has a duty to make information or any other asset available. The CJEU does not suggest that the legal ability (privilege) to reserve access flows from the database right.

The database right, like copyright, does not confer a general power to control access. It confers only a power to control extraction and re-utilisation of the contents of the database.[115] Extraction

---

[108] Article 7(1) of the Database Directive provides:
'1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

[109] ibid.

[110] Graham J Smith and Ruth Boardman, *Internet Law and Regulation* (4th edn, Sweet and Maxwell 2007) 68. See for example, C-202/12 *Innoweb BV v Wegener ICT Media BV, Wegener Mediaventions BV* (19 December 2013) (protection afforded to the respondents' website that provided access to car sales advertisements).

[111] Case C-203/02 *British Horseracing Board Ltd and Others v William Hill Organization Ltd* [2004] ECR I-10415, ('*BHB v William Hill*') paras 30-38. See also Tanya Frances Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* (OUP 2013) 242.

[112] In proceedings relating to the practice of screen-scraping to collect data for the purposes of operating a price comparison website, Ryanair sought the protection afforded by the sui generis database right for the flight data accessible on their websites. The Gerechtshofte Amsterdam (Court of Appeal, Amsterdam) refused protection on the grounds that the investment had not been substantial. Case C-30/14 *Ryanair Ltd v PR Aviation BV* (15 January 2015) para 22.

[113] David I Bainbridge, *Intellectual Property* (7th edn, Pearson Longman 2009) 280.

[114] *BHB v William Hill* (n 111) 55.

[115] Article 7(2) of the Directive provides:
2. For the purposes of this Chapter:
(a) extraction shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;
(b) re-utilisation shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission.

has been given a broad interpretation by the CJEU but it does not extend to mere consultation of the database or its contents.[116] On the contrary the CJEU noted that

> if … [the maker of the database] makes the contents of his database or a part of it accessible to the public, his sui generis right does not allow him to prevent third parties from consulting that base [sic].[117]

Read in isolation, this passage might be taken to suggest that looking at databases, whether web-based or analogue, can never infringe the database right. However the passage must be construed in the light of Recital 44 of the Directive that

> … when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder …

Access to a web-based database will generally involve (at least) the temporary transfer of some of the contents of the database to the user's computer.[118] Thus, despite the apparent breadth of the Court's statement concerning the implications of consultation, it appears that online access to a web-based database may infringe the database right where access involves the transfer or extraction of a substantial part. In a later passage in *BHB v William Hill* the CJEU confirms that

> … a user whose access to the contents of a database *for the purpose of consultation* results from the direct or indirect consent of the maker of the database, may be prevented by the maker, under the *sui generis* right provided for by Art.7(1) of the directive, from *then carrying out acts of extraction* … [119]

The Court explains that, in line with Recital 44, authorisation is required where on-screen display of the database necessitates transfer of the whole or a substantial part of the database even where the maker of the database has consented to access by the user.[120] Thus, as Derclaye observes, while consulting (or looking at) a paper or analogue database does not entail infringement looking at an electronic database may do so. [121]

Access to, or looking at, an online database may infringe the database right where access entails the transfer of the whole or a substantial part of a qualifying database. However Article 7(5) of the Directive also prohibits

---

The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;
public lending is not an act of extraction or re-utilisation.

[116] Martin Husovec, 'The End of (Meta) Search Engines in Europe?' 14 Chi Kent J Intell Prop (forthcoming) <http://ssrn.com/abstract=2411917> (accessed 16 May 2015).

[117] *BHB v William Hill* (n 111) para 55. According to Aplin 'This aspect of the ECJ'S judgment minimises the risk that the right of extraction will operate as an electronic access right'. Tanya Frances Aplin, *Copyright in the Digital Society* (Hart Publishing 2005) 140.

[118] Estelle Derclaye, *The Legal Protection of Databases: A Comparative Analysis* (Edward Elgar 2008) [104.]

[119] *BHB v William Hill* (n 111) para 58 (emphasis added).

[120] ibid para 59.

[121] Derclaye (n 118) 104.

> The repeated and systematic extraction … of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database ...

By way of clarification the CJEU, in *BHB v William Hill*, notes that

> The provision therefore prohibits acts of extraction made by users of the database which, because of their repeated and systematic character, would lead to the reconstitution of the database as a whole or, at the very least, of a substantial part of it, without the authorisation of the maker of the database …[122]

It follows that access to an online database may infringe only where access (whether a single act of access or repeated and systematic access) entails (singly or cumulatively) the transfer of the whole or a substantial part of the contents of the database.[123] Unauthorised access per se will not infringe the database right.[124]

The effect of the Database Directive is therefore to confer on the database owner a *limited* power to control access where access entails the transfer of the whole or a substantial part of the contents of the database. In the context of open publicly accessible websites casual browsing or looking is very unlikely to result in such transfer.[125] Repeated and systematic browsing could conceivably produce that result.[126] However, even in such cases, such a result seems inherently implausible save where the user's intention is to *appropriate* rather than to look at the contents of the database. Strong support for this view is offered by the CJEU in *BHB v William Hill*. The Court maintains that the provisions of Article 7(5) relating to repeated and systematic extraction

> refer to unauthorised actions *for the purpose of reconstituting*, through the cumulative effect of acts of extraction, the whole or a substantial part of the contents of a database protected by the sui generis right …[127]

In other words, repeated and systematic extraction having the effect of transferring all or a substantial part of the contents of a database implies an appropriative purpose as distinct from normal exploitation such as looking.

Thus, in the context of open publicly accessible websites, the limited power to control access conferred by the database right, is properly understood as a power to control appropriation rather than access as such.

III.2.4 *Unjust enrichment*

---

[122] *BHB v William Hill* (n 111) para 87.
[123] P Bernt Hugenholtz, 'Database Dir., art. 8' in Thomas Dreier and P Bernt Hugenholtz, *Concise European Copyright Law* (Kluwer Law International 2006) 331.
[124] ibid.
[125] ibid. See also Lucie Guibault and Andreas Wiebe, 'Safe to be open: Study on the protection of research data and recommendations for access and usage' (Universitätsverlag Göttingen c/o SUB Göttingen 2013) 120.
[126] ibid.
[127] *BHB v William Hill* (n 111) para 89.

Some commentators have attempted to tease out from the law relating to unjust enrichment a broad general entitlement to a remedy for the unauthorised use of information, even where the information would not otherwise benefit from the protections afforded by intellectual property and privacy laws.[128] If the law of unjust enrichment truly conferred a remedy for all such unauthorised use, then it might conceivably offer a basis for asserting a right to exclude in relation to information.[129]

In fact, however, no such right to exclude can be derived from the law relating to unjust enrichment (first) because remedies for unjust enrichment are usually restitutionary rather than preventative[130] and (second) on account of the substantive criteria that must be met for a claim of unjust enrichment to succeed.[131]

The authors of Goff and Jones note that 'Preventative remedies for unjust enrichment are not often awarded'.[132] They suggest that the rationale may be that a claimant who anticipates that the defendant may be unjustly enriched by his (the claimant's) acts can ordinarily refrain from acting so as to prevent the unjust enrichment.[133] Instead remedies for unjust enrichment are typically restitutionary, and usually in the form of an award 'of a sum of money representing the value of the benefit … received at the claimant's expense.'[134]

Where the law serves *only* to order restitution to the benefactor for the transfer of the benefit to the beneficiary, the benefactor can possess neither a right to exclude nor any power to control access to the benefit. As Wendy Gordon explains, in unjust enrichment the 'wrong, if any, lies in the lack of payment, not in the transfer or sharing of the resource.'[135] The wrong gives rise to a duty to effect payment, not to a duty to refrain from accessing or using the benefit. These duties are not interchangeable.

Moreover unjust enrichment does not provide a remedy in every case where one person benefits from the actions or assets of another. In order to succeed in a claim the claimant must show

> that the defendant has been enriched, that this enrichment was gained at the claimant's

[128] Wendy J Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia Law Review 149 (expressing reservations about the development of a tort of misappropriation but advocating that any such tort should be based on a 'slimmed down' form of unjust enrichment); Brian F Fitzgerald and Leif Gamertsfelder, 'Protecting informational products (including databases) through unjust enrichment law: an Australian perspective' (1998) 20 EIPR 244 (strongly arguing for such an approach and suggesting that the framework for such claims is already in place). See also Burk (n 52) 55,56 (calling for a 'carefully calibrated causes of action [including unjust enrichment] sounding in restitution …' as a means of resolving disputes about access to computer networks).

[129] Hazel Carty notes 'If the misappropriation argument is accepted then potentially all ''valuable intangibles'' arising from ideas, information or images—not simply specific ''rights'' … —would be protected against unauthorised use by another.' (Carty refers to misappropriations and unjust enrichment interchangeably). Carty (n 72), 265.

[130] Robert Goff, Goff of Chieveley and others, *The Law of Unjust Enrichment* (Sweet & Maxwell 2011) ('Goff and Jones') para 36-29.

[131] As to which see Goff and Jones (n 130) para 1-09.

[132] Goff and Jones (n 130) para 36-29.

[133] ibid.

[134] Goff and Jones (n 130) para 36-03.

[135] Gordon, 'On Owning Information' (n 128) 188. Goff and Jones express this point in a different way, explaining that the law of unjust enrichment is concerned with 'reversals of transfers of value'. Goff and Jones (n 130) para 1-15.

> expense, and that the defendant's enrichment at the claimant's expense was unjust. [136]

Any attempt to derive a power to control access to websites from unjust enrichment must therefore be predicated on the assumption that

1. A user is enriched (in a legally relevant sense) by access to the website.
2. The user's enrichment is at the expense of the website.
3. The user's enrichment is unjust.

These requirements present a formidable hurdle for a would-be claimant.

According to Goff and Jones, the English law of unjust enrichment now offers a

> single set of rules governing the identification and quantification of benefit … without debarring claims in respect of particular types of benefit'[137]

However the authors, in the core English law textbook on unjust enrichment, make no reference to claims for unjust enrichment relating to the use of information assets. Instead they focus on the types of benefit that have typically been at issue in unjust enrichment claims: money, land and goods, services and discharged obligations.[138]

The omission may be explained by a dearth of case law authorities concerning claims for unjust enrichment in relation to information.[139] It may be that unjust enrichment law is treated as part of the *lex generalis* and is supposed to be displaced in matters relating to the protection of information by the *lex specialis* constituted by the intellectual property regime.[140] However it might also be explained by the difficulty in establishing that the transfer of the benefit of information 'enriches' the beneficiary at the expense of the benefactor.[141]

---

[136] Goff and Jones (n 130) para 1-09.
[137] Goff and Jones (n 130) para 1-14.
[138] Goff and Jones (n 130) para 4-02.
[139] Commentators point to the US decision *INS v AP* (n 69) as effectively offering a remedy in unjust enrichment under the banner of the tort of misappropriation. Gordon, 'On Owning Information' (n 128) 244; Fitzgerald and Gamertsfelder (n 128) 245,246; Carty (n 72) 260. *INS v AP* involved a claim by the Associated Press that International News Service copied (with and without modification) and re-distributed their (AP's) news to INS' customers for gain. The news content per se did not qualify for copyright protection. The US Supreme Court enjoined INS from engaging in this activity, finding that they had misappropriated AP's 'quasi-property' in the news. In the interim the US courts have largely rejected the doctrine of misappropriation so that the tort is thought to be available and not pre-empted by copyright law only for 'hot news' misappropriation by a competitor and possibly in circumstances akin to those in which the European sui generis database right is available. Elaine Stoll, 'Hot News Misappropriation: More Than Nine Decades after Ins v. AP, Still an Important Remedy for News Piracy' (2011) 79 U Cin L Rev 1239, 1258,1259.
[140] This argument reflects the doctrine to the effect that a law governing specific subject matter should take precedence over a law governing general matters. Dixon J, in the High Court of Australia explicitly adopts this approach referring to the protections of intellectual property law as being 'dealt with under English law as special heads of protected interests and not under a wide generalisation'. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 509.
[141] Goff and Jones expressly states that the 'legal tests' as to whether a transfer of value has taken place are 'currently uncertain'. Goff and Jones (n 130) para 1-15. The problem is particularly acute where an attempt is made to identify a transfer of value relating to the use of information. There is very little guidance from the courts but in *Ladymanor Ltd v Fat Cat Café Bars Ltd* the court, speaking of the possibility of a claim in

If (as is the case in common law jurisdictions) information is not property and so cannot be owned,[142] in what respect does access to or use of the information involve 'a transfer of value'?[143] It is relatively straightforward to identify transfers of value where it is possible to point to an exchange that alters pre-existing rights or privileges[144] but attempting to identify a transfer of value that does not fit within the scheme of entitlements provided by law (here, in particular, by the intellectual property regime) has the appearance of an exercise in making gold out of straw.[145] The situations in which the law of unjust enrichment pulls itself up by its own bootstraps so as to create entitlements rather than adjust in the light of pre-existing entitlements are closely circumscribed: they include liabilities to repay monies paid by mistake or coercion, and for services.[146]

Within contract law, the problem of assessing whether a benefit qualifies as consideration is eased by the fact that the willingness of the parties to contract itself suggests that the benefits transferred have an economic value.[147] In unjust enrichment this safeguard is absent.[148] If the assessment of transfer of value is to be anything other than arbitrary some check is required. For Gordon, Fitzgerald and Gamertsfelder, two factors operate as a safeguard against arbitrary assessment of transfer of value in disputes relating to the unauthorised use of information. The

---

unjust enrichment observed that 'information provided by an estate agent is not self-evidently enriching in its quality.' [2001] 2 EGLR 1 [6] (West London County Court).

[142] As to the UK position see n 69. In the US the traditional view is expressed in Justice Brandeis' dissenting judgment in *INS v AP* to the effect that 'knowledge, truths ascertained, conceptions, and ideas -- became, after voluntary communication to others, free as the air to common use.' *INS v AP* (n 69) [250]. See also Samuelson (n 69) 368.

[143] Goff and Jones explains that the law of unjust enrichment is concerned with 'the reversal of transfers of value between claimants and defendants.' Goff and Jones (n 130) para 1-15.

[144] Grantham and Rickett suggest that unjust enrichment can *only* respond to alterations in the status quo, arguing that 'it does not seek to institute a new state of affairs between the parties or to facilitate a transformation of their rights.' Ross Grantham and Charles Rickett, 'On the subsidiarity of unjust enrichment' [2001] LQR 117, 273, 275. Edelman, on the contrary, suggests that the 'event which generates … [the] right to restitution of unjust enrichment is not a violation of any anterior right.' He offers the examples of monies paid by mistake or undue influence as examples. James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell, and James Penner, *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 223. Gordon also notes that in providing remedies for monies paid by mistake and for services rendered and unpaid, unjust enrichment is constitutive of rights. Gordon, 'On Owning Information' (n 128) 197.

[145] Gordon suggests that in many cases those who advocate the use of unjust enrichment to protect information not otherwise capable of protection under the intellectual property regime consciously or subconsciously erroneously reason in this fashion: information has value; value is property; the 'owner' of information has a right to protect his property against unauthorised use. Gordon, 'On Owning Information' (n 128) 178. Such an approach may well have been at play in *Century 21st* (n 2) and *Register.com, Inc v Verio, Inc* 356 F 3d 393 (2d Cir 2004). Dixon J explicitly rejected such an approach in *Victoria Park Racing and Recreation Grounds Co Ltd* (n 130) observing that 'it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches.'

[146] Edelman (n 144) 223. Gordon, 'On Owning Information' (n 128) 197.

[147] In the context of claims for unjust enrichment for services, evidence that the defendant requested the services in the knowledge that the claimant expected a price might provide a similar safeguard.

[148] The issue may be regarded as relevant to the protection of the defendant's personal autonomy and is a factor in arguments for 'subjective devaluation' of benefits transferred in claims for unjust enrichment so as to take account of the choices the defendant might have made in a consensual context. Goff and Jones (n 130) paras 4-06 and 4-10.

first is that the unauthorised use must entail use in competition with the claimant.[149] The second is that the use must relate to the benefit of services, whether alone or as value-add to information.[150] Both requirements involve a concession that unjust enrichment cannot readily be applied to the benefit of information *per se*. They signal a retreat to the traditional ambit of protection afforded by unjust enrichment (money, land and goods, services and discharged obligations) and an acceptance that the requirement that the user's benefit should be at the information provider's expense presents an insurmountable obstacle to claims for unjust enrichment grounded solely in access to and use of information.

Fitzgerald and Gamertsfelder could not make this concession any clearer. The 'competitive market criterion is necessary' they say, because 'it objectifies the value of the misappropriated intangible.'[151] In other words, mere taking of the information presents a real difficulty for determining whether the beneficiary is enriched at the expense of the benefactor. Thus unjust enrichment

> … seeks to remedy unauthorised taking of the *value added to the information by the plaintiff*, not the inherent value of the information *which is owned by the public*. In this sense the competition requirement is subsumed by the unjust enrichment inquiry. If there is unjust enrichment, meaning the subtraction of value from plaintiff to the defendant, there must inevitably be an unfairness in competition in the market, as one person has misappropriated from another to gain a competitive advantage in unjust circumstances which may in turn reduce the incentive for the plaintiff to produce the value-added product.[152]

It is the taking of a service that adds value that triggers the potential for liability in unjust enrichment, not the taking of the information. Since the information is 'owned by the public' the 'taking' cannot simply entail receipt of the information comprised in the service but must involve some additional use. Likewise for the enrichment of the defendant to be at the expense of the claimant, the use by the defendant must deprive the claimant of a benefit other than the information. The defendant must make use of the claimant's value-add, something he can only do in the context of competition with the claimant.

Whether the law relating to unjust enrichment can constrain *competitive uses* of information by imposing liabilities to make payment for services involving the supply of information is germane to our broader inquiry but it is a question at one remove from the present inquiry namely whether a right to exclude and a power to control access can be derived from that law. The analysis demonstrates that even if at some future date the courts were minded to extend the reach of unjust enrichment to provide a remedy for unauthorised taking of information, the

[149] Fitzgerald and Gamertsfelder (n 128) 251, 252; Gordon, 'On Owning Information' (n 128) 189 fn 153, 223. Such a requirement is implicit where, as Gordon contends, the law of unjust enrichment is based on a qualified version of 'an intuition of fairness that … one should not "reap where another has sown"'. The phrase implies commercial useage in a manner that displaces the ability of the other to commercialise. Gordon, 'On Owning Information' (n 128) 156, 243.

[150] Fitzgerald and Gamertsfelder (n 128) 252; Gordon repeatedly makes it clear that she is concerned with issues about the appropriation of the product of labour. Gordon, 'On Owning Information' (n 128) 208, 209, 246-248

[151] Fitzgerald and Gamertsfelder (n 128) 252 (fn omitted).

[152] ibid (fn omitted, emphasis added)

requirement for enrichment at the expense of the claimant effectively limits the impact of the claim to use, rather than access, and competitive use at that.

III.3 Conclusions as to legal basis for a power to control access based on right to exclude in relation to websites

The analysis set out in this Section demonstrates that the search for a power to control access to a website, whether by reference to the infrastructure housing the website, that is the server, or the information comprised in the website is in vain. No such power to exclude exists in English law.

Specifically the analysis indicates that outside the regime relating to real property, and provided that, in the particular circumstances, the activity in question is restrained neither by a prior contract nor confidentiality, English law has declined to constrain gaining access to or securing use of a resource where such use consists in mere looking.

IV. *Century 21 Canada Limited Partnership v Rogers Communications Inc*: Access denied: Mi Casa no es Zoocasa

In light of the analysis carried out at Section II, the decision in *Century 21* is surprising.[153] The Supreme Court of British Columbia, faced with a question about the enforceability of browse wrap Terms of Use, suggested that businesses have 'rights to control access to their business assets and information'.[154] It maintained moreover that parties have a 'right … to control access to, and use of, their websites'.[155]

In this Section I review the decision in *Century 21*, and suggest that the decision is flawed in two key respects. The Court's analysis is marred by a failure to differentiate between rights and privileges. Moreover the Court appears to assume that property protection is available for anything of value, failing to recognise that protection can only be available at law where law so provides.

The Dispute

Century 21 operates a real estate website. Zoocasa, a wholly owned subsidiary of the defendants, operates a website containing information about particular neighbourhoods. The Zoocasa website featured photographs and other information, copied from other websites, relating to property listings. It also provided links to those other websites, enabling users to access and view additional information about the properties. Zoocasa relied on screen-scraping technology to index the contents of third party websites (including the website operated by Century 21) and to display the indexed content on its own website. Century 21 objected to the practice of screen-scraping and the display of information copied from its website. Litigation followed. Century 21 alleged breach of copyright, trespass to chattels, and breach of contract, namely the Terms of Use of the Century 21 website.

[153] *Century 21* (n 2).
[154] *Century 21* (n 2) [115].
[155] *Century 21* (n 2) [114].

The facts in *Century 21* are unremarkable. Disputes concerning the practices of indexing, screen-scraping and data aggregation are not new. However *Century 21* is important on account of the grounds on which the defendants contested the validity and enforceability of the browse-wrap Terms of Use.

The Defendants' Arguments

Most cases relating to browse-wrap Terms of Use stand or fall on the question of whether the user-defendants had notice of the Terms of Use as a whole, or adequate notice of particularly onerous terms. Zoocasa could not seriously maintain that they did not have notice of the Terms of Use. Instead, they submitted that 'affirmative agreement was required even if they had notice of the terms' and that such affirmative agreement was not supplied by their conduct in continuing to access and use the website.[156] Specifically they argued that 'a contract is not formed merely because they [Zoocasa] perform an activity that they have the right to do without a contract'.[157] The question is correctly framed as relating to the presence or absence of assent in light of the nature of the benefit conferred and the parties' existing (pre-contract) 'rights' position.

Occasionally Punnet J appears to fail to entirely grasp aspects of the defendants' argument.[158] Punnet J notes

> They [Zoocasa] assert that a contract is not formed merely because they perform an activity that they have the right to do without a contract. They submit for example that in looking at a billboard no contract is formed.[159]

This submission must be read alongside the defendants' contention that what the plaintiffs provided in making their website publicly accessible was 'merely a grant of access to the site'.[160] In effect the defendants argue that merely viewing (accessing) a website cannot supply the requirement for assent in cases where assent must be implied from conduct since they already have a 'right' to view the website just as they hold a 'right' to view a billboard.

Punnet J brushes the defendants' billboard argument aside, treating the argument as relating to the question of whether it is possible to identify an express offer made by the website and whether the user of a website can indicate assent to the offer.[161] He observes that a billboard 'does not make an offer capable of a response' and 'There is nothing the observer of a billboard does that is capable of indicating consent.'[162]

---

[156] *Century 21* (n 2) [63].

[157] *Century 21* (n 2) [74]. The argument recalls that posed by Elizabeth Macdonald in relation to the enforceability of browse wraps. She asks '… why make a contract to do something you can do without making a contract?' Elizabeth Macdonald, 'When is a contract formed by the browse-wrap process?' (2011) 19 IJL & IT 285. While Macdonald raises the question, the answer is not fully explored. For Macdonald, the question offers a platform from which to advocate a particular approach to the issue of formation of contract in the context of browse-wrap Terms of Use. While she recognises the significance of the 'prior rights' held by the parties she does not examine what those prior rights may be.

[158] The writer is obliged to W Stanley Martin of Fasken Martineau DuMoulin LLP, who acted as Counsel for the defendants, for sight of a copy of a version of the draft arguments prepared for submission in the hearing before Punnet J. The analysis of the case proceeds, however, on the basis of the case report.

[159] *Century 21* (n 2) [74].

[160] *Century 21* (n 2) [118].

[161] *Century 21* (n 2) [74].

[162] ibid.

The question of whether the billboard analogy is apt can be treated as a question about the dynamics of exchange between website and user: in this sense the offer and acceptance analysis is appropriate. It is implicit in the billboard analogy that the information has already been made available, while Punnet J, on the contrary, maintains that the website merely offers the information. Punnet J suggests that the mechanics of offer and acceptance may be discerned on account of the interactive nature of the website but he does not explore the point.[163]

However the thrust of the defendants' 'billboard' argument is concerned with whether, given the parties' existing rights position, the taking of the benefit of access is capable of supplying the requirement for assent where acceptance must be implied from conduct. Moreover the billboard argument strongly suggests that in advocating a 'right' of access, the defendants were in reality arguing that they held a 'right' in the nature of a Hohfeldian privilege.

Similarly Punnet J also appears to misunderstand the argument advanced by the defendants in relation to the relevance of the 'ticket cases'. The plaintiffs had placed some reliance on these cases in support of their argument that the Terms of Use were binding on the defendants. The ticket cases, as the defendants point out

> do not address the issue of whether a contract was formed at all. That is, they start from the proposition that the parties know they are entering into a contract and then the issue addressed is whether they have sufficient notice of the terms of the contract. They know that they have the option of accepting the service offered and entering into an agreement or rejecting the offered service. Despite the fact that in ticket cases most consumers likely do not read the fine print they do know that they are entering into an agreement. They know that they are purchasing a service. The defendants submit that what the ticket cases really address is the issue of notice of the terms of a contract. They submit that in the world of the Internet there is no awareness that accessing a website forms a contract.[164]

The defendants argue, in effect, that this is not a situation in which acceptance can readily be implied from the taking of the benefit of a service. The issue here is whether there is any service (note the oblique reference to the question as to whether the benefit is 'access' or a 'service' or both) whose taking unequivocally indicates assent to the Terms of Use. Punnet J carefully notes the defendants' argument about the ticket cases but does not address the nub of their argument: how can it be shown that the defendants were taking the benefit of a service (if they were) rather than exercising their pre-existing 'rights'?

However, having for a while skirted round the key issue, Punnet J gets to the business of assessing the parties' pre-existing (pre-contract) legal interests for the purposes of determining whether there was assent.

Punnet J addresses the parties' respective rights

[163] *Century 21* (n 2) [74], [75]. The significance of divergent views concerning the dynamics of exchange between website and user and the relevance of interactivity is explored in Chapters VII and VIII.
[164] *Century 21* (n 2) [71].

Both the defendants' submissions and Punnet J's judgment frame the issue as relating to the parties' 'rights'. No attempt is made to differentiate between rights, privileges or other legal interests. Rather, as Hohfeld observes in relation to the use of 'rights' language in the context of litigation generally, [165]

> the word "right" is used generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity.[166]

It may be that the defendants were bound to fail before Punnet J since he expresses the view (without reference to authority) that a website may hold 'proprietary claims' in the information contained in the website over and above such rights in copyright as they may possess.[167] This reference may suggest the kind of flawed reasoning identified by Wendy Gordon, making the leap from value to property to a right to protect the property from unauthorised use.[168] Such reasoning flies in the face of the warning by Justice Holmes in *INS v AP* that

> Property, a creation of law, does not arise from value, although exchangeable … a matter of fact. … Property depends upon exclusion by law from interference …[169]

However, it is a pity that the defendants did not expressly designate the 'right' of access contended for as a privilege.[170] Had the defendants argued that they possessed a privilege to access rather than a right, Punnet J might have been compelled to consider their argument more closely.

Punnet J *did* consider the implications of the defendants possessing a (Hohfeldian) 'right' of access. This, he said (with evident distaste), 'implies that all information that is made available on the web must be available to all without contractual restrictions'.[171] Punnet J is right. If users possessed a right of access websites could not impose any barriers to access or secure assent to contractual restrictions on mere access, whether by way of browse wrap or other form of agreement. However this disability is not present where (as is the case) users possess only a privilege to access. True, as we have seen, the website will not be able to impose contractual restrictions on mere access through browse wrap Terms of Use but it will be able to secure assent by way of click wrap agreements (where assent is express) or click-through agreements (where the benefit is the removal of a 'code' barrier restricting access).

---

[165] It is rare but not unheard of for the parties' representatives or the judge to refer to the Hohfeldian scheme so as to distinguish between the forms of legal interest. See for example *Anton v South Ayrshire Council* 2013 SLT 141 (Lady Clark expressing the view that the scheme is of assistance in 'disentangling' certain interests); *Assaubayev v Michael Wilson and Partners Ltd* [2014] EWHC 821 (QB), [2014] 3 Costs LO 446.

[166] Hohfeld (n 1) 71 (footnote omitted).

[167] *Century 21* (n 2) [76]. Canada, like other common law jurisdictions, rejected the notion that information is a form of property. Mistrale Goudreau, 'Protecting Ideas and Information in Common Law Canada and Quebec' (1994) 8 IPJ 189, 202, 203.

[168] See n 145. Punnet J recorded that 'Century 21 has expended over $6,345,849.59 [on its website] from 2006 to December 31, 2009'.

[169] *INS v AP* (n 69).

[170] *Century 21* (n 2) [75].

[171] *Century 21* (n 2) [111].

In the event Punnet J summarily rejects the defendants' argument that there is a 'right' of access to publicly accessible websites.[172] By way of authority Punnet J refers with approval to an observation made by Tasker and Pakcyk that '…. there is no blanket presumption of open, public access to a web site just because it is accessible via the World Wide Web.'[173] I agree with Punnet J that the defendants did not possess a 'right' of access but the explanation for that absence lies in the lack of any correlative duty to provide access, not in the realms of presumptions about access or consent.

If Punnet J had asked different questions in response to the defendants' assertion, if he had asked rather,

> What kind of a right is a right to access information? Is this right derived from statute or common law? Is it a positive freestanding right, expressly provided by statute or common law or is it truly a privilege, that is, a legal ability to do something simply by virtue of the fact that no other person has a right to restrain you from doing it?[174]

he might have considered that the defendants' argument (truly in favour of a privilege, not a right) could not so easily be swept aside. He would not only have been able to more fully address the defendants' assertion but would have been better equipped to critically evaluate his own assertion that businesses possess a 'right to control access to their business assets and information', a right, according to Punnet J, that should not be lost by making such information available on a publicly accessible website.[175]

Punnet J makes no attempt to trace the 'right to control access' to its source in law. He suggests rather that the 'acceptance of click wrap and browse wrap agreements acknowledges the right of parties to control access to, and the use of, their websites.'[176]

This statement is significant and warrants close consideration. First, Punnet J states that browse wrap agreements have been 'accepted'. It is not entirely clear whether Punnet J is referring to acceptance by the Courts or the business community. Issues relating to terms posted on websites had come before the Canadian Courts but this was the first case in which a Canadian Court had to determine the enforceability of browse wrap Terms of Use.[177]

Having quoted Tasker and Pakcyk, Punnet J ignores what those authors say about the questionable enforceability of browse wrap agreements but relies strongly on the US cases in which browse wrap Terms of Use were treated as enforceable.

---

[172] *Century 21* (n 2) [111].

[173] Ty Tasker and Daryn Pakcyk, 'Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements' (2008) 18 Alb LJ Sci & Tech 69, 121, 122.

[174] In the language of Hohfeld, the question is whether the user possesses a right or a privilege.

[175] *Century 21* (n 2) [115]. Punnet J implies that the 'right' he asserts does not derive from the law of confidentiality since confidentiality is lost when information is made publicly available.

[176] *Century 21* (n 2) [114].

[177] *Kanitz v Rogers Cable Inc* (2002) 58 OR (3d) 299 (Ont Sup Ct) was concerned with amendments to a signed agreement by way of terms posted on a website, not about the enforceability of browse wrap Terms of Use. *Canadian Real Estate Association v Sutton (Québec) Real Estate Services Inc*, [2003] JQ No 3606, 2003 CanLII 22519 (QC CS) was concerned with browse wrap Terms of Use but the Court did not reach a finding as to the enforceability of the purported contract.

Assuming that Punnet J was arguing, in effect, that acceptance of browse wrap agreements by the US Courts 'acknowledges the right of parties to control access to … their websites', to what extent is that statement true or relevant for jurisdictions other than the US?

It is certainly true that within the US browse wrap agreements have been treated as enforceable at least in relation to commercial users but these cases are not predicated on a 'right' (power) to control access. The leading US case concerning the enforceability of browse wrap Terms of Use, *Register.com v Verio*, adopts a services analysis in support of its findings.[178]

Neither are the US cases regarding the enforceability of browse wrap Terms of Use concerned with mere access: they are concerned with the re-use of information for commercial purposes, conduct that involves taking a different form of benefit and engages a different suite of legal interests. Indeed in most of these cases the court has not considered it necessary to identify the benefit secured by users of the website since (in the face of criticism from commentators) they have been prepared to hold (first) that where the website specifies that using the website operates as assent, use will supply assent provided the user has notice of the terms and (second) that there is some form of consideration.

The mere fact of acceptance of browse wrap agreements by the US Courts does not support an inference of a (pre-contract) right to control access. Such acceptance could be explained by reference to the application of standard contract law doctrine to a particular services-based conception of access to and use of a website. It might also be explained by reference to the development of US contract law in a particular direction, whether on policy grounds or otherwise. It is, moreover, difficult to understand why the US authorities should be unhesitatingly applied in another jurisdiction or taken to offer support for the existence of a 'right to control access' in any other jurisdiction.

It may be that Punnet J truly derives the 'right to control access' from what he describes as the claimants' 'proprietary' interest in the information.[179] Granting the injunction, he explains that an injunction is prima facie appropriate where a defendant 'wrongfully interferes with the claimant's rights as an owner of property'.[180] Punnet J's use of a property metaphor to describe access to a website, linking the 'right to control access' with the conception of 'entry' to property may also suggest a property basis for the right contended for. Thus Punnet J maintains,

[178] 356 F 3d 393 (2d Circuit 2004). If, in the US, a website possesses a 'right to control access' it does so only by virtue of the Computer Fraud and Abuse Act 18 USC § 1030 ('CFAA'). According to the United States District Court for the Northern District of California, the effect of the criminal and civil provisions of the CFAA is to confer a right to control access on computer owners. *Craigslist Inc v 3Taps Inc*, 2013 WL 4447520 (N D Cal August 16, 2013). Goldman suggests that the case 'threatens to break internet law'. Eric Goldman, 'Craigslist Wins Routine But Troubling Online Trespass to Chattels Ruling in 3Taps Case' (20 September 2013) <http://blog.ericgoldman.org/archives/2013/09/craigslist_wins_1.htm> (accessed 24 October 2015); See also Nicholas A Wolfe, 'Using the Computer Fraud and Abuse Act to Secure Public Data Exclusivity' (2015) 13 Nw J Tech & Intell Prop 301. The Supreme Court has not issued any rulings on the CFAA while the Federal Courts of Appeal are split over the meaning and purpose of its provisions.

[179] *Century 21* (n 2) [76], [382].

[180] *Century 21* (n 2) [373].

> … when a user accesses a main page that merely places the user at Century 21's door. Entry is an additional step and one that website owners *clearly control* and users can undoubtedly choose to take.[181]

However Punnet J nowhere explicitly states that information is property and the reliance on metaphor only serves to underscore the absence of a clear foundation for the 'right to control access'.

What are the implications of the right to control access asserted by Punnet J?

Century 21 presents a conundrum. In stating that websites possess a 'right to control access' Punnet J purports to acknowledge a pre-existing legal position rather than create new law. However, none of the cases cited by Punnet J offer support for the existence of a 'right to control access' while the notion that information is property has not found favour in common law jurisdictions. While the US Courts have used property metaphors to describe access to websites, the server, not the website has been treated as the property under consideration, and as moveable, not real property.

Moreover the use of the generic term 'right' means that it is not clear whether Punnet J is truly asserting a power to control access, based on a right to exclude or whether instead he uses the term 'right' to describe the suite of privileges possessed by the 'owner' of information. Punnet J offers little by way of explanation. He suggests that as a matter of policy 'Just because a party chooses to do business on the Internet should not mean they relinquish their rights to control access to their business assets and information.'[182] However in this context the term 'rights' might equally allude to the power to control access to a building or the privilege to withhold, or erect barriers to access to, assets or information. Thus even if Punnet J, in asserting a right to control access, is looking to posit the existence of a 'right' that secures for website operators a level of control having functional equivalence to the control enjoyed by 'offline' businesses in relation to their assets and information, it is still far from clear that such a 'right' is in the nature of a right to exclude so as to provide a basis for enforceability of browse wrap Terms of Use.

While therefore, at least for the time being, in Canada, browse wraps are enforceable and websites possess some form of 'right to control access', there is little reason to suppose that the English Courts would follow suit. The contours of the 'right to control access' asserted by Punnet J remain sufficiently vague as to make it impossible to say whether, even in Canada, websites truly possess a (Hohfeldian) right to exclude and a power to control access or whether the 'right' possessed is of a lesser character. Punnet J's reasoning as to the existence of a 'right to control access' is neither sufficiently transparent, nor so obviously rooted in orthodox thinking about rights in information as to make it inevitable that the English Courts would adopt the same approach.

Summary and Conclusions in relation to Century 21

Century 21 is significant in shifting the debate about browse-wrap Terms of Use from the rather formalistic question about notice of the terms to the more substantive question about the basis

[181] *Century 21* (n 2) [118].
[182] *Century 21* (n 2) [115].

for assent. The defendants' arguments rightly focus attention on the respective pre-contract 'rights' position of both website and user. Their assertion, that assent is not supplied where the user merely carries out an act which he was entitled to undertake by virtue of his pre-existing 'rights' position, accurately reflects the common law of contract in relation to the circumstances in which assent may be implied from conduct. Given the focus in the US authorities on the question of notice, the defendants' arguments are both bold and insightful.

It is a pity therefore that the parties' pre-existing 'rights' positions are not more fully explored. It is particularly disappointing that in finding that websites possess a 'right to control access' Punnet J failed to clearly locate a basis for that right and omitted to spell out the character of the right.

Century 21 points the way to the proper analysis of the contractual significance of browse wrap Terms of Use. However, the case does not enable one to identify on what grounds it might be said that Canadian law already provided a 'right to control access' nor, therefore, to discern a basis on which it might be argued that such a right might, by analogy, be extrapolated from English law.

V. The Implications of the Computer Misuse Act 1990

Within the UK, website owners may point to the Computer Misuse Act 1990 ('CMA 1990') as the basis for a 'right' to control access.[183] The CMA 1990 creates the offence of unauthorised access to programs or data stored on a computer.[184] The offence is sufficiently broadly framed as to apply to unauthorised access to a website, essentially a collection of programs and data stored on a computer, the host server.[185]

V.1 Entitlement to control access in the CMA 1990

The legislation offers a definition of 'unauthorised' that in turn refers to the notion of 'entitlement to control access'. Under subsection 17(5) access of any kind by any person to programs or data held on a computer is 'unauthorised' if

> (a) he is not himself entitled to control access of the kind in question to the program or data; and
> (b) he does not have consent to access by him of the kind in question to the program or data from any person who is so entitled; …

[183] The UK was an early adopter of computer misuse legislation but many countries now have computer misuse provisions. The Council of Europe's Convention on Cybercrime requires the parties to the Convention to 'adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the access to the whole or any part of a computer system without right.' However, under the Convention, it is the computer system that must be protected, not the information in the system. This distinction is significant for two reasons. First, a case may more readily be made for a right to control access to a computer system, since a computer is property. Second, website owners may but need not own the servers on which their websites reside. Century 21, for example, did not own the servers on which their website was hosted. Their case based on trespass to chattels failed since they neither owned the servers nor held a sufficient possessory interest in the servers. In finding that Century 21 held a 'right to control access' to their website, the court plainly considered that the issue at stake was access to information, not access to computers. *Century 21* (n 2).
[184] CMA 1990, s 1.
[185] See *R v Cuthbert* (Horseferry Road Magistrates Court, 7 October 2005) in which the defendant was convicted of unauthorised access to a website.

The CMA 1990 offers no definition of or guidance on 'entitlement to control access'.[186] When one asks, 'How is entitlement conferred? What are the hallmarks of entitlement?' neither the legislation nor the courts provide an answer.

V.2 Overview of the reference to entitlement to control access in the CMA 1990

The CMA 1990 does not create 'rights'. This is a criminal statute pure and simple.[187] It vests the Crown with certain powers and creates liabilities in those who carry out the offences specified in the legislation. However it does not vest any natural or legal persons with 'rights' in relation to access. The legislation does not confer entitlement to control access on any persons nor does it specify the circumstances in which any such entitlement might be claimed.

The lack of attention to what is meant by 'entitlement to control access' might suggest that the meaning of the phrase, and the circumstances in which a person may be said to control access to programs or data held in a computer are so obvious that no further elucidation is required. In fact, as the legislative history shows, the legislation simply assumes the existence of some form of broad general entitlement to control access to information held on computers when no such entitlement exists.

V.3 The legislative history of the basis for 'entitlement to control access' in the CMA 1990

The origins of 'entitlement to control access', in the context of the CMA 1990, can be traced to this passage in the Scottish Law Commission's Report on Computer Crime

> Meaning of 'unauthorised'
>
> 4.16 Hitherto we have spoken, in relation to the offences which we have been considering, of obtaining 'unauthorised' access to a program or data. The term 'unauthorised' probably requires no further explanation but, in the interests of completeness, we should perhaps set out what we mean by the term. We accordingly recommend:
>
> > (9) For the purpose of offences of unauthorised access, 'unauthorised' should mean not having authority granted by the person or persons entitled to control access to the program or data in question.[188]

The passage makes it clear that 'entitlement to control access' was not born out of any first-principle analysis nor thoroughly explored but that the term is proffered simply as an extended definition of what is meant by 'unauthorised'. The extended definition is appropriate insofar as it only makes sense to speak of authorisation where one can point to a person vested with the

[186] The phrase 'entitled to control access' appears in *Manchester Airport Plc v Dutton* [1999] 3 WLR 524. The case relates to the entitlement of a licensee to eject trespassers from land where the licensee is not already in occupation of the land. In such a case the entitlement (power) is clear and is associated with rights in real property.

[187] Some statutes with criminal provisions are creative of rights. The CMA 1990 is not one of them (save to the extent it creates a privilege for the police in relation to access to computers).

[188] Scottish Law Commission, *Computer Crime* (Scot Law Com No 106, 1987) para 4.16.

power to grant or refuse authorisation.[189] However, unless the law makes some provision for a person or persons to possess such power, the use of the term 'unauthorised' is suspect. As Litman observes

> The trouble with control-based rights is that they're circular: they depend for their legitimacy on the existence of some extrinsic legal system that the proponents of control-based rights often assume away.[190]

It is interesting to compare the definition set out in section 17(5) with the Law Commission's recommendation. The Commission had recommended that

> a person's access to any program or data held in a computer should be regarded as unauthorised … *if* (a) some person other than the person whose access is in question is entitled to control access to the program or data; and (b) the person whose access is in question does not have consent from any such entitled person.[191]

This proposal invites inquiry as to whether any person holds entitlement to control access. The commission of an offence is conditioned on the existence of a person holding such an entitlement. Section 17(5) on the other hand is framed *on the assumption* that some person is entitled to control access.

The Law Commissions, writing in the late 1980's could not point to a basis for an entitlement to control access. The anti-circumvention provisions of the copyright regime (which might be thought to provide a functional equivalent to entitlement to control access) were not introduced in the UK until 2003.[192] Nor could they point to the isolated dicta of Lord Neuberger in *Tchenguiz*[193] and of Baroness Hale in *R (on the application of S) v Chief Constable of South Yorkshire*[194] to the effect that the law of confidentiality or privacy might restrain mere looking at or access to information.[195] These dicta formed no part of the then legal landscape. On the contrary the Younger Committee on Privacy had stated categorically 'There is no protection in law

---

[189] Speaking of the meaning of 'acts which are not authorised' in the context of the anti-circumvention provisions of the Copyright Designs and Patents Act 1988, Jacobs LJ observed 'When speaking of "acts which are not authorised" it is implicit that one is considering only acts which need authorisation, i.e. acts which are otherwise restricted. To "authorise" a man to do something he is free to do anyway – something which needs no authority - is a meaningless concept.' *R v Higgs* [2008] EWCA Crim 1324 [32]. For Hohfeld 'authorization' clearly implies the grant of authority in a manner that changes legal relations. Hohfeld (n 1) 52.

[190] Litman 'The Tales that Article 2B Tells' (n 10) 937.

[191] Law Commission, *Computer Misuse* (Law Com No 186, 1989) para 3.33 (emphasis added).

[192] The relevant provisions were introduced by the Copyright and Related Rights Regulations 2003, SI 2003/2498, effective 31 October 2003.

[193] n 71.

[194] n 71.

[195] *Tchenguiz* (n 71) [68] - [69]; *R (on the application of S) v Chief Constable of South Yorkshire* (n 71) [73]. It is questionable, despite the dicta in these cases, whether the activities alluded to consisted in looking pure and simple. The dicta in these cases may be contrasted with those of Lloyd J in *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, [455]. While the decision has been criticized in relation to the Court's finding that a scene that was to be photographed in the open grounds of a hotel for the purposes of a photo-shoot was confidential, the Court nevertheless accepted that the obligation of confidence that arose did not extend to prevent looking at the scene or communicating information about it, but only served to prevent the taking of photographs.

against people who intrude merely by looking ... '[196] This was so even where the person seeking to protect information had made it clear that he did not intend that the information should be accessed.[197] While *Campbell v MGN*[198] was instrumental in extending the reach of actions for breach of confidence to private information, it did not alter the fact that the action for breach of confidence does not extend to mere looking. Indeed in *Campbell* Lord Hoffmann indicates that the cause of action afforded by the law of confidence to private information is concerned with 'the right to control the dissemination of information,' not its acquisition.[199]

At best, the Law Commissions and the legislature may have relied on the notion articulated by Chris Reed that although information is not property

> … information is subject to a combination of the laws of intellectual property, confidence, privacy and contract, among others, and the composite effect of these laws gives the enterprise a level of control over its information which is very similar to owning physical property.[200]

However, in the late 1980's, the composite effect of the protections then in place certainly provided (principally through copyright) a level of control over copying, distribution, and certain uses of information but no control of any kind over access per se.

Of course in the context of particular relationships, most obviously in employment relationships, contracts might make provision for control over resources, but such control is achieved by virtue of the relationship: it is the special characteristics of the relationship not contract law itself that provides a power to control access to information.

Even now the composite effect of such laws does not provide any level of control over access and viewing information except (a) where the anti-circumvention provisions apply, that is where content in which copyright subsists is protected by code or other effective access control mechanisms and (b) (but only if the relevant dicta in *Tchenguiz* and *R (on the application of S) v Chief Constable of South Yorkshire* are correct) where the content has been kept private or

---

[196] Younger Committee, Report of the Committee on Privacy (Cmnd 5012, 1972) at 117.

[197] *Mars UK Ltd v Teknowledge Ltd* [1999] EWHC 226 (Pat). Mars argued that they could rely on the law of confidence to protect information about algorithms used to achieve certain functionality within a machine that they manufactured and sold. A purchaser of the machine reverse engineered the machine, by-passing encryption to find out the algorithms. Mars argued that the fact of encryption imported an obligation of confidence that was breached when the information was de-crypted. Jacob J accepted that encryption signaled that the seller did not want the information to be accessed but refused to find that the fact of encryption gave rise to an obligation of confidence let alone a breach. Lack of consent to access cannot make that which is not confidential subject to an obligation of confidence. See also *Victoria Park Racing and Recreation Grounds Co Ltd* (n 140). In that case the plaintiffs who operated a racing ground objected when an adjacent landowner built a structure to enable him to look over the plaintiff's fences to view and provide commentary on the races. The High Court of Australia affirmed the decision by the lower court to refuse injunctive relief. The erection of fences did not give rise to any obligation not to view. Latham CJ observed 'Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence.'

[198] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[199] ibid [51].

[200] Reed (n 70) 1. I disagree with Reed that the composite effect of such rights is to provide a broad entitlement to control access. Such rights, moreover, may be dispersed among a number of persons, are capable of waiver and extinction and may be limited temporally and geographically. Such rights, alone or in combination are incapable of giving rise to a single monolithic conception of a right to control access.

confidential and is not in the public domain. Now, and when the legislation was being debated and introduced, there is and was no basis for a broad general 'entitlement to control access' to information that has been made available to the public.

V.4 Entitlement to control access in the Courts

The absence of basis for 'entitlement to control access' could, in theory, have been cured by judicial activity.[201] The Courts could have chosen to give content and meaning to the term, effectively using the opportunity afforded by the legislation to flesh out and develop the notion of 'entitlement to control access'. In fact, although the legislation has been in force for more than twenty years, the Courts have scarcely considered the meaning of 'entitlement to control access'.

R v Bow Street Magistrates Court and Allison, an appeal against the refusal of an extradition warrant, is the only case to seriously tackle the question of what is meant by 'unauthorised' in the context of the CMA 1990.[202] Addressing the meaning of the definitions section that makes reference to 'entitlement to control access' Lord Hobhouse states

> … subsection [17(5)] lays down two cumulative requirements of lack of authority. The first is the requirement that the relevant person be not the person entitled to control the relevant kind of access. The word 'control' in this context clearly means authorise and forbid. If the relevant person is so entitled, then it would be unrealistic to treat his access as being unauthorised. The second is that the relevant person does not have the consent to secure the relevant kind of access from a person entitled to control, ie authorise, that access.
>
> Subsection (5) therefore has a plain meaning subsidiary to the other provisions of the Act. It simply identifies the two ways in which authority may be acquired — by being oneself the person entitled to authorise and by being a person who has been authorised by a person entitled to authorise.[203]

Lord Hobhouse makes no attempt to explore, let alone devise, the basis of 'entitlement'. His analysis, if anything, underscores the circularity of the definition of 'unauthorised access' by reference to 'entitlement to control access'.

The Courts' failure to scrutinise the meaning of 'entitlement to control access' may be explained by various factors. First, defective or not, the Courts must give effect to the legislation. The legislation identifies lack of authorisation for access as an ingredient of the offences under sections 1 and 2 of the CMA 1990. The Courts must proceed on that basis.

Second, in determining whether, for the purposes of the legislation, 'access is unauthorised' it will very often be unnecessary for the Courts to examine which persons, if any, might be entitled to

[201] The Courts might consider, however, that 'It is not for the courts to invent that which Parliament did not create.' *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785, 800. The dilemma presented by the legislation is that for 'unauthorised access' to be meaningful, 'entitlement to control access' must likewise be meaningful but without specification of the source of or criteria for entitlement, neither is meaningful.
[202] *R v Bow Street Magistrates Court and Allison* [2000] 2 AC 21.
[203] ibid.

grant or withhold authorisation.[204] In many cases it will be plain that the alleged offender either had no authorisation from any person who might conceivably have claimed entitlement to control access, or if he could point to some authorisation, that authorisation was plainly limited.[205] Conversely, if the prosecution fails to demonstrate that the accused knew that his access was unauthorised, the prosecution will fail on the grounds that the relevant mens rea is absent, regardless of whether or not the accused was in fact granted authority by a person with entitlement to control access.[206]

Third, in a prosecution under the CMA 1990 there is no requirement for the prosecution to specify or prove which person or persons hold entitlement to control access. In this respect the provisions of the unauthorised access offences may be contrasted with those of section 55 of the Data Protection Act 1998 (unlawfully obtaining information without the consent of the data controller) where the prosecution must be prepared to evidence the identity of the data controller.[207]

Finally, defendants have not, it seems, challenged the legislation on the basis that in reality no person holds 'entitlement to control access' to programs or data held on a computer.

V.5 The significance of 'entitlement to control access' under the CMA 1990

Whether one regards the CMA 1990 as a pragmatic response to a social problem[208] or as an exercise in disingenuous drafting,[209] the fact remains that the legislation makes some form of provision for 'entitlement to control access'. What is the reach of these provisions, and, in particular, do they have any relevance outside the realms of criminal law?

---

[204] The actus reus of the offence is not 'unauthorised access', as one might suppose, but 'caus[ing] a computer to perform any function'. Ian Walden, *Computer Crimes and Digital Investigations* (OUP 2007) para 3.251; Martin Wasik, 'The Computer Misuse Act 1990' [1990] Crim LR 767, 769; Stefan Fafinski, 'Access denied: computer misuse in an era of technological change' (2006) 70 J Crim L 424, 431. The mens rea of the offence is in two parts: there must be intent to secure access to any program or data and knowledge that the access is unauthorised. Walden (supra) para 3.253; Wasik (supra) 769. While the Courts have recognised that access must be unauthorised for the offence to be made out, the relegation of the question of lack of authorisation to an aspect of the mens rea might militate against close scrutiny of this question. The structure of the offence under s 1 of the CMA 1990 may be contrasted with that of the offence under s 55 of the Data Protection Act 1998 in relation to the unlawful obtaining of data without the consent of the data controller. Under s 55 the absence of consent forms part of the actus reus. *ICO v Adair, Roberts and Evans* (St Albans Crown Court 16 May 2014) para 117 <https://www.ncoa.org.uk/media/3741/ICO-v-Adair-Evans-and-Roberts-dismissal-judgment-final.pdf> (accessed 13 May 2015).

[205] See the Scottish Law Commission, *Computer Crime* (CM No 68, 1986) para 2.37: '"hacking" … describes the activity whereby an organisation's computer is accessed from long range by a person…who certainly has no authorisation to make such access.'

[206] *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch), [2012] Ch 613 [824].

[207] This reflects the writer's experience of the approach adopted by the Crown in Scotland.

[208] See for example, Law Commission, *Computer Misuse* (Law Com No 186, 1989) para 2.13-2.24.

[209] The idea that the legislature might introduce statutory provisions that depend on a key definition whose conceptual underpinnings are not merely shaky but at odds with the framework of protection (and absence of protection) in law for information is somewhat discomfiting. The same approach, engendering significant criticism, was adopted in the proposal for the introduction of a new Article 2B in the US Uniform Commercial Code. The proposal was predicated on the existence of an entitlement on the part of owners of information to control access to that information. In the event Article 2B was not adopted. Litman 'The Tales that Article 2B Tells' (n 10). See also J H Reichmann and Jonathan A Franklin, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information' (1999) 147 University of Pennsylvania Law Review 875, 883 fn 27 describing the drafter's notes accompanying the draft of Article 2B as 'disingenuous at best'.

If the CMA 1990 had expressly conferred 'entitlement to control access' on specified categories of persons, or had otherwise linked entitlement to control access to other rightsholdings (say, ownership of computers,[210] or rights of confidentiality or privacy in information) then plainly 'entitlement to control access' would have reach and meaning outside the confines of criminal law. This would also be true had the Courts supplied that want. As it is, however, it remains the case that 'entitlement to control access' has not been expressly conferred on any category of persons nor clearly linked to other recognisable legal rights or interests.

What is more, the notion of a broad general 'entitlement to control access' to information held on computers is functionally equivalent to a right of property in such information. English law, so far, has set its face against a right of property in information (including information held in computers).[211] The would be no purpose in judicial denials of the existence of such a right if the CMA 1990 supplied its functional equivalent for purposes outside the criminal law.

The Law Commissions appear to have supposed that the CMA 1990 would serve to protect information only by means of the operation of criminal law, having no broader ramifications. Thus the Law Commission noted that

> … the *effect* of introducing an offence of unauthorised access will be to criminalise some people who look at other people's information and, by the same token, to give some protection of the criminal law for that information.[212]

It was not the intention of the Law Commissions that information, stored on computers or not, should be accorded proprietary status.[213]

Likewise the statements by the Courts that commission of an offence under the CMA 1990 'by no means necessarily gives rise to a civil action' suggests a limited role for 'entitlement to control access'.[214] It is noteworthy that in those cases where the civil law implications of the alleged commission of an offence under the CMA 1990 have been mooted, the Courts have confined themselves to deliberation of the potential for claims arising from established rights whether in privacy, confidentiality, or copyright, or claims relating to unfair competition or breach of legal

[210] Clough argues that the CMA 1990 protects 'the rights and privileges of the computer owner'. Jonathan Clough, 'Data Theft? Cybercrime and the Increasing Criminalization of Access to Data' (2001) 22 Criminal Law Forum 145, 160. However there is no reason to suppose that 'entitlement to control access' is conferred on computer owners. Under the CMA 1990 'entitlement to control' is linked to the programs or data accessed not to the computer on which it is stored. While reaching no decision on the issue, the Court in *Tchenguiz* (n 71) considered that there was an arguable case that the owner of a server (on Clough's argument the person possessing the relevant rights and privileges) might nevertheless have committed the criminal offence of unauthorised access in relation to third party data held on the server.
[211] *Your Response Limited* (n 69).
[212] Law Commission, *Computer Misuse* (Law Com No 186, 1989) para 2.13. These 'contingent effects' were thought to be outweighed by 'strong grounds' for the introduction of the unauthorised access offence.
[213] Scottish Law Commission, *Computer Crime* (Scot Law Com No 106, 1987) para 3.14(2).
[214] *Tchenguiz* (n 71) [94]; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) [191].

professional privilege.[215] It has never been suggested that 'unauthorised access' per se might form the basis for a cause of action.

The significance of 'entitlement to control access' (in the context of access to information), it is submitted, is strictly limited to the sphere of criminal law. The CMA 1990 does not confer 'entitlement to control access' on any person. If, on account of the drafting artifice deployed in the legislation, the notion that 'entitlement to control access' does not spill over from the realm of criminal law so as to be creative of rights seems hard to accept, the point may be confirmed from a different vantage point. From whom would users of websites secure authorisation if they were concerned to ensure that their access was lawful? From the website operator, the owner of the host server, the website content provider(s)? Which of these is 'entitled to control access' to the programs or data comprised in the website? The answer is unclear not because of interpretative difficulties but because, except as the logical corollary of the use of the term 'unauthorised', 'entitlement to control access' has no content and meaning whether in the context of the CMA 1990 or beyond.

VI. Conclusion

The discussion in the previous Sections reveals a strong motivation on the part of some commentators and courts to locate or create a power on the part of information 'owners' to control access to information. However, at least for the time being, no such power exists.

The absence of such a power is relevant to our inquiry about the contractual effect of browse wrap Terms of Use and our wider inquiry about the scope of the public domain in relation to information appearing on open, publicly accessible websites.

I have shown, with the assistance of the analytical tools provided by Hohfeld, that the owner of a website, being in possession of a suite of privileges but no right to exclude, cannot impose a contract on users of the website by means of browse wrap Terms of Use where the benefit conferred consists in permission to access the website.

I have also demonstrated that, despite the language of the CMA 1990, English law does not confer a power to control access to information on any person or category of persons.

This finding makes it possible to draw provisional conclusions about the enforceability of browse wrap Terms of Use. The benefit of access to open publicly accessible websites, characterised as permission to access, appears to fall within the public domain: that is, such access is free from legal constraints, including those imposed by contract. Looking appears to fall within the public domain.

These conclusions must remain provisional meantime since, as discussed in Chapter III, the benefit conferred by the website on the user may be conceptualised as consisting in something other than permission for access. In particular, it is necessary to explore the contractual

[215] See *Ashton Investments Ltd v OJSC Russian Aluminium (Rusal)* [2006] EWHC 2545 (Comm), [2007] 1 All ER (Comm) 857; *L v L* [2007] EWHC 140 (QB), [2007] 2 FLR 171; *Tchenguiz* (n 71); *Bristol Groundschool Ltd* (n 203).

significance of the benefit conceptualised not as permission for access but as the provision of a service by the website to the user.

I turn to this task in Chapter VI.

Chapter VI

Services

I. Introduction

I.1 Overview

In this Chapter I explore the contractual significance of the benefit conferred by an open publicly accessible website on a user where the benefit is conceptualised as a service.

The Chapter tackles this question from three different perspectives.

First, it seeks to assess, by reference to the link between the meaning of 'services' and the notion of economic value, whether one can invariably say of *all* open publicly accessible websites that the benefit conferred by the website on the user, conceptualised as a service, possesses economic value for the user.

Second, it seeks to assess whether, having regard to the categories of service set out in the Ecommerce Directive,[1] the services provided by an open publicly accessible website (of whatever character) might invariably lack economic value for the user. The assessment suggests that of the services provided by an open publicly accessible website to the user (so far as set out in the Ecommerce Directive) only such service as consists in the provision of information may possess economic value for the user. Since websites invariably provide information this analysis suggests that in principle (and ignoring the dynamic aspects of the exchange between website and user) such service may possess economic value for the user.

However the analysis also indicates that the provision of information in the nature of advertising raises difficult questions for the assessment of economic value. This insight is of particular relevance for retail websites since the information provided by such websites is predominantly in the nature of advertising. Yet the analysis suggests that the economic value of the provision of advertising information can only be assessed in the round, taking account of other tests that form part of the doctrine of consideration.

Third, it explores the particular situation of retail websites, testing economic value on a holistic basis, taking account, in particular, of the rule that for a benefit to qualify as consideration it must not consist in an act that would be carried out regardless of the promise made by the recipient.

The approach set out in this Chapter has certain constraints. By focusing on the characteristics of the services the assessment considers the benefits 'conceived statically' rather than in the context of the exchange between the website and user.[2] It therefore drives an analysis that is concerned whether the benefit qualifies as consideration and, in particular, on whether it has economic

[1] Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2002] OJ L178/1 (the 'Ecommerce Directive').

[2] Weinrib, discussing the role of benefits in the law of unjust enrichment distinguishes between the benefit 'conceived statically' and the benefit 'as transferred'. The distinction is just as appropriate in the law of contract. Ernest J Weinrib, 'The Structure of Unjustness' (2012) 92 Boston University Law Review 1067, 1077.

value. Questions about the nexus between the benefit and the user's promise, relevant both to the issue of whether the benefit may be 'past' consideration and the issue as to the presence or absence of assent, cannot be addressed from within this approach.

I.2 Structure

The discussion of the contractual character of the provision of a website and its contents as a service commences with an analysis in Section II as to the scope and meaning of the term 'services'. In particular, in Section II.2 I highlight the implicit requirement that for an activity to come within the scope of the term 'services' it must have an economic aspect. The requirement is significant since for a benefit to qualify as consideration it must have economic value. In view of the conceptual link between services and economic value, I consider whether it follows that all activities that are designated as a service have economic value and so qualify as consideration. Closer consideration of the EU jurisprudence of goods and services, and specifically (at Section II.3) the extended meaning accorded to the requirement that services normally be provided for remuneration, suggests that it does not.

Nevertheless the EU jurisprudence of goods and services does have a contribution to make to the assessment of the economic value of services. In Section III.1 I identify the concept of ancillary services, in effect, a by-product of the EU jurisprudence of goods and services, and suggest that the concept may shed some light on the range of activities, badged as services, that may be regarded as without economic significance, and so incapable of qualifying as consideration. Developing this theme, at Section III.2 I suggest that the notion of 'selling arrangements' relates to a group of ancillary services that are invariably without economic significance for the recipients of the core goods or services with which the ancillary services are linked.[3]

At Section IV, and so as to link the services analysis more closely to the nature of the benefit conferred by website on a user, I explore the meaning of 'information society services' within the Ecommerce Directive.[4] The Directive suggests three broad categories of 'service' relevant to websites namely, services consisting in the sale of goods or services, services giving rise to online contracting and services offering information. Each of these is assessed by reference to the insights derived from the analysis of the EU jurisprudence of goods and services. The assessment suggests that the first two categories are purely ancillary and without independent economic value for consumers. However the third category, which has relevance for all websites (not only ecommerce websites), is only obviously ancillary where the information supplied is in the nature of advertising. It is submitted that these findings indicate that while the supply of information can have economic value for users of websites, the supply by retail websites of information in the nature of advertising is without economic value for consumers.

At Section V I explore two challenges to the argument that the supply of information in the nature of advertising is without economic value for the consumer. The first challenge is presented by the views of the economist Kaldor. The second challenge is presented by the decision of the Irish High Court in *Ryanair Ltd v Billigfluege.de GMBH*.[5] I also refer to the decision of the Spanish Tribunal Supremo in *Ryanair Ltd v Atrápalo SL* where the Tribunal declined to rule out the possibility that

[3] The term 'selling arrangements' was coined by the Court of Justice of the European Union ('CJEU') in Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 to describe restrictions on aspects of the marketing of goods which do not qualify as 'measures having equivalent effect' to a quantitative measure within the meaning of the free movement of goods rules.

[4] n 1.

[5] [2010] IEHC 47, [2010] ILPr 22.

the provision of such information in the nature of advertising might form the basis for a contract.[6] The challenges suggest that it is not possible to resolve conclusively whether the supply of information by retail websites can qualify as consideration by reference to the EU jurisprudence of goods and services and that a fresh approach is needed, one that looks beyond economic value and assesses the supply of information by ecommerce websites by reference to other aspects of the doctrine of consideration.

Section VI provides an assessment of the contractual status of the provision of a retail website and its contents as a service by reference to the exclusionary rules of the doctrine of consideration. I argue that the assessment demonstrates that the service provided by such a website to the user, whether conceptualised as the supply of the website or the supply of the information contained in the website does not qualify as consideration.

Section VII summarises the findings of this Chapter.

II. The meaning of 'services'

II.1 An overview

The jurisprudence concerning the meaning of 'services' is sparse, not clearly articulated, and lacking in coherence.[7] The General Agreement on Trade in Services (GATS) contains no comprehensive generic definition of services since the contracting parties were unable to agree a definition.[8] In *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst* ('*Falco*') the Advocate General draws distinctions between the 'usual' and other meanings of services, between the meaning of services under domestic and European law, between services under Article 50 of the TEC[9] (now Article 57 TFEU)[10] and the special meanings of services under Regulation No 44/2001 and in Directives on value added tax.[11] 'Services' also acquires a specialised meaning in the context of the definition of 'information society services'.[12] The term is used loosely. Policy objectives (freedom of goods or services, promotion of information society services) appear to trump concerns for consistency of terminology.[13]

---

[6] *Ryanair Limited v Atrápalo SL* Tribunal Supremo 9 October 2012 <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=6566436&links=atrapalo&optimize=20121210&publicinterface=true> (page accessed 22 February 2014).

[7] Woods describes services as 'an amorphous concept'. Lorna Woods, *Free Movement of Goods and Services within the European Community* (Ashgate 2004) 159. See also Loos, suggesting that 'at present neither at a national level or at the level of the European Union, a coherent legal framework exists on the basis of which service contracts may be regarded.' Marco B M Loos, 'Towards a European Law of Service Contracts' (2001) 9(4) European Review of Private Law 565.

[8] Rolf H Weber and Mira Burri, *Classification of Services in the Digital Economy* (Springer 2013) para 2.1. See also Mary E Footer and Carol George, 'The General Agreement On Trade In Services' in Patrick McCrory, Arthur Appleton and Michael Plummer, (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005) 822.

[9] The Treaty Establishing the European Community ('TEC') now replaced by the TFEU (Treaty on the Functioning of the European Union). The TFEU, inter alia, has renumbered many of the articles of the TEC. Since most of the cases and commentary to which I refer use the pre-Lisbon TEC numbering, I use the 'old' pre-Lisbon numbering throughout, with the post-Lisbon numbering referred to in brackets immediately after the old where appropriate.

[10] Treaty on the Functioning of the European Union.

[11] Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst* [2009] ECR I-3327, Opinion of AG Trstenjak.

[12] n 1.

[13] See *Falco* (n 11) para 63.

There is likewise no single agreed definition for services across the range of international and national classification regimes for the statistical analysis of services as an economic sector.[14] Some though not all of the classifications expressly include 'online content' within a comprehensive classification of services.[15] The classifications are tools for facilitating compliance with GATS.[16] They flow from the international legal regime. The policies embodied in the classification regimes in turns inform and are derived from conceptions of services that are essentially legal.[17] European jurisprudence is fully conversant with and occasionally expressly relies on such classification regimes[18] while insisting that law, not the classifications must dictate the meaning and scope of 'services'.[19]

Despite the lack of consensus at international level on an overarching definition of services, it is nevertheless possible to discern within international trade law, the classifications associated with the GATS regime and European jurisprudence, some common themes in relation to the scope of the term 'services'. A service minimally entails the performance of some action or activity by the service provider.[20] It is distinguished from activities involving the sale of goods.[21] It must have an economic aspect.[22]

It is this last feature of the scope of services which is particularly relevant for the purposes of the analysis of the contractual status of the provision of websites as 'services'. This aspect links the meaning of services to an aspect of the doctrine of consideration, that is, the requirement that consideration should have 'economic value'.

---

[14] For a detailed discussion of WTO and other classifications see Weber and Burri (n 46) para 2.1.

[15] For example, 'on-line content' is included as a group of services in CPC Version 2. United Nations Statistics Division, 'CPC Ver.2 Detailed structure and correspondences of CPC Ver.2 subclasses to ISIC Rev.4 and HS 2007' 100 <http://unstats.un.org/unsd/cr/registry/cpc-2.asp> (accessed 1 January 2014). ISIC Rev.4 code includes 'online publishing of other information' within class 5819. United Nations Statistics Division, 'International Standard Industrial Classification of All Economic Activities, Rev.4' <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=27> (accessed 2 January 2014).

[16] Footer and George explain

> GATS Article XX requires that each Member set out its Part III commitments in Schedules that are an integral part of the GATS, and identifies what is to be specified therein, … no agreement was reached as to a common classification structure for adoption by all Members. Although Members were free to use any classification system they deemed appropriate, it was recommended that they apply the Services Sectoral Classification List 317 (W/120), compiled by the Secretariat on the basis of the United Nations Central Product Classification (CPC) system with some comment by participants.

Footer and George (n 8) 865, 866. See also Weber and Burri (n 8) paras 2.4 3.4 and 4.3; Fiona Smith and Lorna Woods, 'A Distinction Without a Difference: Exploring the Boundary Between Goods and Services in The World Trade Organization and The European Union' [2005] 12 (1) Columbia Journal of European Law 1, 20.

[17] Smith and Woods maintain 'Whether a product is a good or a service is … a question of law, rather than of economics or fact.' Smith and Woods (n 16) 58.

[18] For example Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114 expressly refers to and incorporates references to the nomenclature used by NACE and the CPC prov, international classification regimes.

[19] This approach is implicit in *Falco* (n 11).

[20] ibid para 57.

[21] Article 50 TEC (Article 57 TFEU) defines services as being 'normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.

[22] nn 23-25 and accompanying text.

II.2 The requirement for services to have 'economic value'

Smith and Woods maintain that an 'ordinary language' approach to the meaning of services under GATS strongly suggests that services are by definition essentially 'tradable' and 'capable of being the subject of a commercial transaction' (and conversely, that if activities are not tradable or do not possess 'commercial capability' they are not services).[23] I have some reservations about the extent to which these conclusions are supported by the dictionary definitions to which the authors refer but these reservations are of little consequence. A requirement for services to be 'tradable' and 'capable of being the subject of a commercial transaction' *is* implicit in GATS.[24]

Within the EU, a range of instruments condition either, the definition of a contract for services, or the definition of services itself on the services being 'normally provided against payment'.[25] This requirement, like the requirement under GATS that services should possess tradability and commercial capability, on the face of it conditions the designation of an activity as a service on its having an economic value which is capable of forming the basis for a trade exchange.

If that were so then all services (at least under GATS and EU law) by definition, have economic value and so may form the subject matter of a contract: the supply of a service, on the face of it qualifies as consideration. This is a neat theoretical conclusion which suggests a neat solution: in order to determine if particular activities have economic value we need only determine if they fall within the scope of the definition of services. In reality, matters are less straightforward.

In particular, within the EU, the term 'normally provided for remuneration' has been extended in such a way as to divorce the meaning of services from the question of economic value.

II.3 The extended meaning of 'normally provided for remuneration'

In *Humbel*, the CJEU, exploring the requirement that services should 'normally provided for remuneration', stated that

> The essential characteristic of remuneration … lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.[26]

Despite this clear statement as to the existence of a necessary link between the definition of services and consideration, other decisions of the CJEU make it plain that remuneration, a

[23] Smith and Woods (n 16) 49, 50.

[24] Article 1.1 of GATS makes it clear that GATS concerns 'trade in services'. For a discussion of the meaning of 'trade in services' see Aly K Abu-Akeel, 'Definition of Trade In Services Under The GATS: Legal Implications' (1999) 32 Geo Wash J Int'l L & Econ 189.

[25] The definition of services in Article 50 of the TEC includes a requirement that the services should be 'normally provided for remuneration'. The definition of 'information society services' set out in Article 1(2) of Council Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37 as amended by Council Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 [1998] OJ L217/18 likewise incorporates the requirement that the services should be 'normally provided for remuneration.' See also Case C-355/00 *Freskot* [2003] ECR I-5263, paras 54 and 55; Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, para 23; and *Falco* (n 11) para 57.

[26] Case 263/86 *Humbel* [1988] ECR 5365, para 17.

prerequisite for a service, need not consist in consideration.[27] Consideration consists in remuneration *in exchange* for the service, yet the CJEU has confirmed that wherever a service has an economic aspect,[28] and is paid for by someone, (not necessarily the recipient of the service), it must be regarded as 'normally provided for remuneration'.[29]

By way of example, the CJEU, determining that cable operators provide a service when they transmit cable programmes on behalf of broadcasters, explains that this activity qualifies as a service because the cable operators receive remuneration not from the broadcasters but their subscribers. The CJEU notes

> Firstly, the cable network operators are paid, in the form of the fees which they charge their subscribers, for the service which they provide for the broadcasters. It is irrelevant that the broadcasters generally do not themselves pay the cable network operators for relaying their programmes.[30]

Such payment may properly be regarded as remuneration but it is not consideration. It is not paid by the recipient of the service (the broadcaster) in exchange for the service. The CJEU's interpretation of the requirement that services should 'normally be provided for remuneration' severs the meaning of 'services' in EU jurisprudence from the question as to whether, *as regards a recipient of these services*, the services have economic value. The fact that *someone* pays for the services indirectly, for example, through advertising revenues, does not mean than the services are independently tradable or have economic value for a recipient of the service.[31]

A broad interpretation of 'normally provided for remuneration' is consistent with the policy objective of achieving the free movement of services within the common market but means that it is impossible to resolve issues about economic value, and so the presence or absence of consideration, according to the designation of an activity as a service.

III. The concept of ancillary activities: a by-product of goods and services jurisprudence

III.1 Ancillary activities

The notion of activities that are ancillary to the supply of goods or services is a by-product of the goods and services jurisprudence. However the treatment of such activities (where appropriate) as services for the purposes of the EU regime, demonstrates the absence of any necessary connection between the meaning of services and economic value.

---

[27] Schütze says of the decision in *Humbel*, that the Court 'started with a more conservative definition' (Schütze draws attention to the twin aspects of remuneration according to the case, namely, its link to consideration and its relevance to the provider/recipient relationship) but that 'this restrictive definition was subsequently opened on either side …' Robert Schütze, *European Union Law* (CUP 2015) 637.

[28] Case C-281/06 *Jundt v Finanzamt Offenburg* [2007] ECR I-12231, para 32.

[29] Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, para 16. See also Commission, 'Legal analysis of a Single Market for the Information Society' (SMART 2007/0037) (November 2009) ch 6 para 4.1.1 <http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037> (accessed 1 January 2014).

[30] *Bond van Adverteerders* (n 29) para 16.

[31] Hatzopolous and Do comment on the development of the meaning of 'remuneration' in these terms: 'Thus, consideration was found to exist not only in triangular situations, but, more importantly, in situations where the correlation between services received and monies paid is only indirect, or economically non-existent.' They criticise the CJEU's 'accordion-like approach to the concept of remuneration'. Vassilis Hatzopoulos, Thien Uyen Do, 'The case law of the ECJ concerning the free provision of services: 2000-2005' (2006) 43(4) Common Market Law Review 923, 947.

While the WTO and many legal regimes differentiate between goods and services, it is not always straightforward to determine whether a particular supply should be classified as a supply of goods or services.[32] Problems may arise because it is genuinely difficult to determine whether the supply of a single identifiable product should be treated as involving goods or services. This is true of the supply of intangible items such as electricity, or digital content.[33] However problems may also arise because the supply of a product has 'both a goods and services component'.[34] In such cases it may be possible to separate the distinct aspects of the supply.[35] In other cases one or other aspect of the supply (whether goods or services) may be treated as ancillary to the other such that the whole supply is treated as either involving goods or services.

This approach is implicit in the definition of 'supply of a service' in Article XXVIII (b) of the GATS which provides

> "supply of a service" includes the production, distribution, marketing, sale and delivery of a service …

Nothing in Article XXVIII (b) excludes the possibility that the ancillary activities of production, distribution and marketing may involve goods, suggesting that ancillary activities, even where involving goods, may be subsumed within 'services' for the purposes of classification. This interpretation is supported by the decisions of the Panel and the Appellate Body in *China — Publications and Audiovisual Products*.[36] Commenting on the meaning accorded to the supply of a service under Article XXVIII (b) the Panel noted 'the supply of a service may well involve goods'[37] while the Appellate Body observed

> The definition of "supply of a service" in Article XXVIII(b) of the GATS would not in itself exclude the possibility of drafting a Schedule entry in a way that covers only the distribution of physical goods.[38]

Such distribution can only entail the supply of services if the distribution of the goods is regarded as ancillary to and subsumed within the service. Conversely Aly Abu-Akeel suggests that where the services are 'auxiliary to the supply of goods' protection may not be available under the GATS services provisions.[39]

EU jurisprudence concerning the distinction between goods and services for the purposes of Articles 28 and 29 and 49 and 50 of the TEC[40] explicitly adopts an approach that entails goods-related activities being subsumed within services (or services within goods) where both the

[32] Simon Lester, Brian Mercurio, Arwel Davies, *World Trade Law* (2nd edn, Hart Publishing 2012) 636.
[33] For discussion of this issue see Lorna Woods (n 45) 27; Smith and Woods (n 16) 46, 47.
[34] Lester, Mercurio and Davies (n 32) 636.
[35] ibid 637.
[36] WTO, 'Panel Report, China — Publications and Audiovisual Products' WT/DS363/R 12 August 2009.
[37] ibid, para 7.1209.
[38] WTO, 'Appellate Body Report, China — Publications and Audiovisual Products' WT/DS363/AB/R 21 December 2009 para 379.
[39] Abu-Akeel (n 24) 195.
[40] Now ArtIcles 34, 35 and 56, 57 TFEU. Articles 34 and 35 concern goods while Articles 56 and 57 concern services.

freedom of goods and of services are implicated and one supply is ancillary to the other.[41] The CJEU has confirmed that

> it is settled case-law that, where a national measure relates to both the free movement of goods and another fundamental freedom, the Court will in principle examine it in relation to one only of those two fundamental freedoms, if it appears that one of them is entirely secondary in relation to the other and may be considered together with it …[42]

There is some support in case law and commentary for the view that the assessment as to whether, when both freedoms are in issue, one is ancillary or secondary to the other is based merely on a rule of preponderance. In other words, according to this view, one aspect of the supply is treated as the main aspect and the other the minor aspect, with the result that the entire supply is assessed according to the characteristics of the main aspect. This view is in line with that expressed (but not explicitly endorsed) by Advocate General Trstenjak in *VTB-VAB*, where she summarises the views of Holoubek and Kluth in these terms

> If such a breakdown into individual goods or services is not possible, that is to say, is [sic] to be assessed as a single supply, that assessment must be based on a rule of preponderance. Under such a rule, the predominant content of the supply in question is the determining factor. The effect of a distinction drawn according to that criterion may therefore be that the service aspect is purely incidental in character, so that the service is subsumed under the free movement of goods …[43]

In *Canal Satélite Digital*, the CJEU also suggests that a rule of preponderance may, in appropriate cases, be relied on to determine which of two freedoms may be secondary to the other. Referring to the difficulties presented by cases involving the supply of telecommunications equipment and services the Court observes

> In the field of telecommunications, however, it is difficult to determine generally whether it is free movement of goods or freedom to provide services which should take priority. … The supply of telecommunication equipment is sometimes more important than the installation or other services connected therewith. In other circumstances, by contrast, it is the economic activities of providing know-how or other services of the operators concerned which are dominant, whilst delivery of the apparatus, equipment or

[41] Kaczorowska discusses the position where the supply of goods is ancillary to services and so 'do not fall within the definition of "goods" but are covered by the provisions relating to … services.' Alina Kaczorowska, *European Union Law* (Routledge 2011) 18.1. Smith and Woods note 'The ECJ has generally taken the view that where the service is the main object of the transaction, the issue falls under Article 49, [that is under services] even though the TEC specifies that the services provisions are residuary in character.' Smith and Woods (n 16) 42.

[42] Case C-20/03 *Burmanjer* [2005] ECR I-4133, para 35 (citing the following: Case C-275/92 *Schindler* [1994] ECR I-1039, para 22; Case C-390/99 *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA* [2002] ECR I-607, para 31; Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025 para 46). The same point is made in Case C-108/09 *Ker-Optika Bt V ÀNTSZ Dél-dunántúli Regionális Intézete* [2010] ECR I-12213 para 43.

[43] Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV* [2009] ECR I-2949, Opinion of AG Trstenjak. fn 52.

> conditional-access telecommunication systems which they supply or market is only accessory.[44]

However the cases and commentary also appear to suggest a different tack, one that involves assessment of the economic significance of the twin aspects of a mixed supply from the perspective of the actual or prospective recipient of the goods and services. Such an approach focuses on the relevance of the twin aspects in the context of the supply such that one may be designated as 'purely ancillary' to the other where it is 'not an end in itself' and merely facilitates the delivery of the core aspect of the supply. The approach points to a category of activities that, from the perspective of the recipient, may well involve the conferral of a benefit but does not possess any independent economic value.

This approach is evident in *Schindler* where the CJEU concluded that the importation of lottery tickets and advertisements (goods) with a view to facilitating participation in a lottery were to be treated as part and parcel of the provision of the opportunity to participate in the lottery (a service).[45] These activities were therefore treated as a service, not as import or export of goods. The Court took the view that

> those activities are *only specific steps in the organization or operation of a lottery* and cannot, under the Treaty, be considered independently of the lottery to which they relate. *The importation and distribution of objects are not ends in themselves*. *Their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery.* [46]

Commenting on *Schindler*, Rosa Greaves observes that the importation of the items was 'incidental to the main activity'.[47] Lorna Woods argues that the tickets 'had no value in themselves'.[48] She suggests that the test as to whether, in a case involving goods and services, the matter will be viewed as goods, services or both is whether the goods or services 'are purely ancillary or whether they have an economic value of their own'.[49] While, in *Schindler*, the CJEU does not expressly assess the economic value of the activity of importation of the tickets, the analysis of the purpose of the activities, and their role in merely facilitating participation in the lottery suggests that the Court took the view that the activity had no independent economic significance.

A similar approach was adopted in *Football Association Premier League Ltd*[50] where the CJEU was called on to assess whether national law restrictions under copyright law on use of foreign decoder cards in order to decrypt satellite channels broadcast in another Member State

---

[44] Case C-390/99 *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA* [2002] ECR I-607 para 32. See also Hatzopolous and Do (n 31) 950 (discussing with reference to *Canal Satélite Digital* circumstances in which 'it is impossible to establish a hierarchy between the goods and services').

[45] Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039.

[46] ibid para 22 (emphasis added).

[47] Rosa Greaves, 'Advertising restrictions and the free movement of goods and services' [1998] European Law Review 305, 313.

[48] Woods (n 7) 22.

[49] ibid 27.

[50] Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083 ('*FAPL*').

implicated freedom of movement of goods, services or both. The decoder cards were marketed with the authorisation of the service provider, with the intention that they should be used to decrypt the service. However the service provider intended that the cards should only be used by customers within a specific national territory, and issued the cards subject to that condition. In these circumstances the CJEU considered that in determining the impact of the national law restrictions the goods aspect was 'entirely secondary' to the services aspect. Referring to *Schindler* by way of analogy the Court said that it was appropriate to consider the matter by reference to freedom of services where the supply of the telecommunications equipment (decoder cards) was 'entirely secondary' to the provision of the encrypted broadcasts.[51] This was especially so

> where making such equipment available constitutes only a specific step in the organisation or operation of a service and that activity does not display an end in itself, but is intended to enable the service to be obtained.[52]

This analysis, like that in *Schindler* points to an economic analysis that is not concerned with questions of preponderance but with the object of the transaction with the recipient. In effect the Court asks, what is the contract for? It treats certain supplies as merely facilitating and preliminary to the 'core' supply, actual or prospective. This analysis suggests sensitivity to the fact that some benefits simply fall outside the scope of a contractual exchange with the recipient. If the consumer enters into a transaction for the purchase of those 'core' goods or services he is paying in order to buy those core goods or services, not the goods or services that are purely ancillary.[53] Their 'purely ancillary' character reflects the fact that so far as the recipient is concerned, such benefits are not tradable and do not possess commercial capability. In other words, as Woods suggests, they possess no independent economic value for that recipient.

The two approaches are not mutually exclusive. It may be, as *Canal Satélite Digital* suggests, that in some instances it is appropriate to apply a rule of preponderance where one supply is major, and the other minor. At the same time, as *Schindler* and *FAPL* suggest, it may be possible to identify particular situations in which one supply is purely ancillary to the other in the sense that in the language of *Schindler*, it is 'not an end in itself'. The notion of ancillary activities is therefore not merely an analytical tool to assist in the classification of mixed supplies of goods and services, it suggests a category of activities that have no economic significance for a class of recipients and so (as regards those recipients) cannot qualify as consideration.

III.2 Activities targeted by 'selling arrangements': activities that are 'purely ancillary'

If *Schindler* and *FAPL* point to a category of activities that have no economic significance, the notion of 'selling arrangements', an offshoot of the EU jurisprudence of goods and services, appears to relate to activities that, from the perspective of the recipients of the 'core' supply are invariably purely ancillary and without economic significance.

---

[51] ibid paras 78-81.

[52] ibid para 81.

[53] So, commenting on *Schindler*, Chalmers, Davies and Monti observe, 'The customer paid to participate in the lottery-a service-not in order to own a piece of paper.' Damian Chalmers, G T Davies and Giorgio Monti, *European Union Law* (3rd edn, CUP 2014) 802. See similarly the discussion as to the significance of the supply of discount offers with a magazine and free breakdown services with fuel (both treated as ancillary to the goods, since from the consumer's perspective what is purchased is the magazine and fuel respectively, not the services) in *VTB-VAB* (n 43), Opinion of AG Trstenjak. paras 101-105.

In *Keck*, the CJEU devised the term 'selling arrangements' to describe restrictions imposed by national law affecting the sale of goods that are distinct from restrictions relating to the characteristics of the product.[54] While *Keck* does not provide any guidance as to what kinds of restrictions may be treated as selling arrangements,[55] the Court appears to have in mind restrictions on methods of sale[56] and 'on the manner in which trading activity is pursued (who sells what, and when, where and how sales can be effected).'[57] Guidance produced by the EU Commission maintains that a selling arrangement is 'associated with the marketing of the good rather than the characteristics of the good.'[58]

Activities targeted by rules relating to the 'when, where, how, by whom, and at what price goods may be sold'[59] plainly relate to activities on the part of the trader that are not ends in themselves but are merely steps in the organisation of the sale of the goods. The designation of rules relating to such activities as 'selling arrangements' captures aspects of the activities themselves: such activities are preliminary and 'purely ancillary' to the core supply. From the perspective of the consumer of the core goods or services these activities, invariably in the nature of services, are not the object of transactions: they are not tradable and do not possess commercial capability.[60][61]

By way of illustration, restrictions on advertising are treated as selling arrangements.[62] The CJEU, in *Karner*, describes the advertising of an auction of goods as a 'secondary element' and 'not an

[54] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. In the context of the law relating to the freedom of goods and services, *Keck* is significant because it directs that 'selling arrangements' will not be caught by the rules of the TEC relating to the freedom of movement of goods provided that the restrictions in question 'apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.' (*Keck*, supra para 16). See Julia Hörnle, 'Country of origin regulation in cross border media: one step beyond the freedom to provide services?' [2005] International & Comparative Law Quarterly 89, 95, 96.

[55] Lorna Woods and Philippa Watson, *Steiner and Woods EU Law* (12th edn, OUP 2014) 397; Jukka Snell and Mads Andenas, 'Exploring the Outer Limits: Restrictions on Free Movement' in Mads T Andenas and Roth Wulf-Henning (eds), *Services and Free Movement in EU Law* (OUP 2002) 105.

[56] See Laurence W Gormley, 'Two Years After Keck' (1995) 19(3) Fordham International Law Journal 866.

[57] Case C-292/92 *Hünermund v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, Opinion of AG Tesauro, para 20. See also Snell and Andenas (n 55) 106.

[58] Commission, *Free Movement of Goods - Guide to the Application of Treaty Provisions Governing Free Movement of Goods* (Publications Office of the European Union 2010) 14. See also *Sinclair Collis Limited* [2011] CSOH 80, 2013 SC 221.

[59] This formulation was adopted by Advocate General Jacobs in Case C-412/93 *Société d'Importation Eduard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* ('*Leclerc Siplec*') [1995] ECR-I-179, Opinion of AG Jacobs, para 26.

[60] Woods notes that 'Selling arrangements … benefit from a rebuttable presumption that they are too remote from trade to fall within Article 28 [now Article 34 TFEU].' Woods (n 7) 64.

[61] The United States Patent and Trademark Office reaches the same conclusion, namely that advertising services do not possess economic value for the consumer, by a different route noting that 'While an advertising agency provides a service when it promotes the goods or services of its clients, a company that promotes the sale of its own goods or services is doing so for its own benefit rather than rendering a service for others. *In re Reichhold Chemicals, Inc*, 167 USPQ 376 (TTAB 1970). USPTO, 'Trademark Manual of Examining Procedure April 2014' <http://www.uspto.gov/trademark/guides-and-manuals/trademark-manual-examining-procedure-april-2014> (accessed 1 June 2015).

[62] Joined Cases C 34–36/95 *Konsumentombudsmannen v De Agostini (Svenska) Forlag AB and TV-Shop I Sverige* [1997] ECR I-3843; *Hunermund* (n 57); *Leclerc-SIplec* (n 59); Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR I-1795; Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025. See also Chalmers, Davies and Monti (n 53) 789 (describing restrictions on advertising as selling arrangements); Catherine Barnard and Steve Peers, *European Union Law* (6th edn, CUP 2014) 337.

end in itself.'[63] Lorna Woods, commenting on the protections afforded to goods and services under EU law, implies that advertising services are 'purely ancillary' to the goods or services and have no 'economic value'.[64] Woods notes

> Although advertising is clearly a service when it is provided by an advertising agency to a manufacturer, the advertising itself is considered to form part of the goods, or where a service is being advertised, those services. Thus, advertising itself might become subject to different rules, depending on what is being advertised.[65]

Likewise the authors of Wyatt and Dashwood imply that where restrictions in the nature of selling arrangements must be assessed for impact on the supply of advertising services to consumers (the intended recipients of the goods) rather than retailers, the advertising will be 'entirely ancillary to the supply of goods.'[66]

DocMorris[67] and *Ker-Optika*[68] confirm that restrictions on point of sale activities or on sales channels, including restrictions on the sale of goods over the internet are treated as 'selling arrangements', and relate to activities that are 'entirely secondary' to the sale of goods.[69] Again, on the face of it, the provision of services that consists of the provision of sales channels (whether the internet, mail order or other means) appear to have no independent economic value as regards the ultimate consumer of the goods and services sold.

The rule in *Keck* to the effect that (subject to the provisos) 'selling arrangements' fall outside the controls in relation to the freedom of goods applies only to 'selling arrangements' relating to goods.[70] 'Selling arrangements' relating to services do not benefit from the rule so that where services are concerned the restrictions must be assessed for conformity with the rules as to freedom of services.[71] However the lack of even-handedness in the CJEU's treatment of restrictions that might be regarded as 'selling arrangements' according to whether the freedom of movement of goods or services is at stake is not relevant for present purposes. The relevance of the notion of 'selling arrangements' for this thesis that it flags up a group of activities, including sales processes and advertising that are purely ancillary and without economic significance.

III.3 Summary: the assessment of economic value by reference to the EU jurisprudence of services

[63] *Karner* (n 62) para 47.
[64] Woods (n 7) 27.
[65] ibid 26.
[66] Anthony Arnull, Derrick Wyatt, and Alan Dashwood, *Wyatt and Dashwood's European Union Law* (Hart 2011) 427 and fn 76.
[67] Case C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV* [2003] ECR I-14887 (ban on sale of medicinal products via the internet a 'selling arrangement').
[68] *Ker-Optika* (n 42).
[69] Chalmers, Davies and Monti (n 53) 789 (describing restrictions on sale via certain channels as selling arrangements). See also Barnard and Peers (n 62) 337; Commission (n 58) 21.
[70] José Luís Da Cruz Vilaça, 'On the Application of Keck in the Field of Free Provision of Services' in Mads T Andenas, and Roth Wulf-Henning (eds), *Services and Free Movement in EU Law* (OUP 2002).
[71] In *Alpine Investments*, the UK and Netherlands governments argued that restrictions on 'cold calling', a form of marketing, should be designated as 'selling arrangements' in relation to the services that were being marketed. The CJEU did not take issue with the categorisation of the restriction as a selling arrangement but declined to extend the rule in *Keck* to restrictions where the freedom of movement of services was concerned. Case C-384/93 *Alpine Investments BV v Minister van Financien* [1995] ECR I-01141.

The statement by the CJEU in *Humbel* linking the meaning of services to consideration tends to suggest that one way of determining whether a benefit may, in principle, qualify as consideration is to ascertain whether it is in the nature of a service. In fact, the meaning of services has been broadened so as to encompass activities that are not directly remunerated or possess no independent economic value. It is not possible, therefore, to ascertain whether the activities carried out by a website in relation to a user have economic value and may qualify as consideration simply by determining whether such activities are truly a service.

On the other hand, the EU jurisprudence of goods and services lends itself indirectly to the assessment of economic value and so the presence or absence of consideration, through the identification of activities that are economically ancillary to the supply of goods or services. In particular, in pointing to a category of activities that may be affected by restrictions characterised as 'selling arrangements' it indirectly highlights activities in the nature of services that invariably lack economic value for the recipient.

IV. 'Information society services' under the Ecommerce Directive

IV.1 Overview

The Ecommerce Directive is the single most important instrument of EU law for the regulation of online activities. Its aim is to 'ensure that electronic commerce could fully benefit from the internal market'.[72] Specifically, its objective is to 'create a legal framework to ensure the free movement of information society services between Member States'.[73]

The Ecommerce Directive assists in assessment of whether the service provided by an open publicly accessible website to a user qualifies as consideration in two ways.

First, under the umbrella of 'information society services', it expressly refers to three distinct categories of activity that are relevant to websites.[74] It is relevant to the exercise of conceptualisation of the benefit conferred by an open publicly accessible website on a user since it gives content to the notion of the benefit as a service.

Second, the definition of 'information society services' adopted by the Ecommerce Directive expressly relies on the meaning accorded to services under the TEC.[75] As a result the categories of service suggested by the Directive are amenable to analysis in line with the EU jurisprudence of services. In particular they are amenable to assessment as to whether they must be regarded as 'purely ancillary' and without independent economic value.

IV.2 The relationship between 'information society services' and services under Article 50 TEC

[72] Ecommerce Directive (n 1) Recital 4. See also Peggy Valcke and Egbert Dommering, 'Directive 2000/31/EC 'e-commerce' Directive (eCD)' in Oliver Castendyk, Egbert Dommering and Alexander Scheuer, *European Media Law* (Wolters Kluwer 2008).
[73] Ecommerce Directive (n 1) Recital 8.
[74] ibid Recital 18.
[75] Article 2(a) of the Ecommerce Directive incorporates the definition of 'information society services' within the meaning of Article 1(2) of Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37 as amended by Council Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 [1998] OJ L217/18. Recital 19 of Directive 98/48/EC specifically links the meaning of information society services to the meaning of services within the TEC and the case law of the CJEU.

The meaning accorded to services by Article 50 TEC and the relevant case law of the CJEU is the foundation for the definition of 'information society service' adopted by the Ecommerce Directive.[76] The Directive incorporates the definition of 'information society service' set out in the Transparency Directive[77] that, in turn, expressly refers to the definition of services under the TEC and includes the requirement that the services should 'normally be provided for remuneration'. [78]

However Recital 18 of the Ecommerce Directive also expressly incorporates the jurisprudence of the CJEU as to the extended meaning of 'normally for remuneration' directing that

> information society services … in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them …

The CJEU has affirmed that these provisions of Recital 18 are to be understood to mean that where, for example, the service provided by an online news provider is remunerated indirectly through advertising rather than by the recipients of the service, such a service will nevertheless qualify as an 'information society service' for the purposes of the Directive.[79]

While therefore, the consensus is that most websites, including those paid for only indirectly through sales of goods or services or by advertising, will be treated as 'information society services' for the purposes of the Directive, it does not follow that such services possess any independent economic value.[80] Rather the Directive, in line with EU jurisprudence on services deems the requirement for tradability to be met by indirect remuneration.

While the Ecommerce Directive incorporates the jurisprudence of the EU concerning services, including the attenuated meaning of 'normally for remuneration', it features a few quirks and tics of its own. In particular, as will be demonstrated below, the Ecommerce Directive not only subsumes within the meaning of 'services' activities that are purely ancillary to the supply of services,[81] it goes further, directing that activities that are purely ancillary to the online sale of *goods* must be treated as services.[82]

---

[76] Commission, 'Legal analysis of a Single Market for the Information Society' (SMART 2007/0037) (November 2009) ch 6 para 4.1.1 <http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037> (accessed 1 January 2014).

[77] Council Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 [1998] OJ L217/18 (the 'Transparency Directive').

[78] Recital 19 of the Transparency Directive narrates 'Whereas, under Article 60 [post-Amsterdam, Article 50] of the Treaty as interpreted by the case-law of the Court of Justice, 'services' means those normally provided for remuneration … ' Hörnle comments 'The E-commerce Directive is based on the powers in the EC Treaty to adopt measures for the coordination or approximation of law in the areas of freedom to provide services, freedom of establishment, and internal market.' Hörnle (n 54) 89, 93.

[79] Case C-291/13 *Papasavvas v O Fileleftheros Dimosia Etairia Ltd* (11 September 2014).

[80] Stephen Ketteley, 'The E-Commerce Directive — Thoughts on Issues Raised During the Government's Recent Consultation, Conducted Prior to the Implementation of the E-Commerce Directive' (2002) 18 (3) Computer Law & Security Report 172, 172. See also Out-Law.com, 'The UK's E-Commerce Regulations' <http://www.out-law.com/page-431> (accessed 8 June 2015).

[81] Hörnle (n 54) 96, 97 (noting that 'selling arrangements' concerning online activities, including online advertising and online sale of goods, are within the scope of the co-ordinated field relating to 'information society services' under the Directive).

[82] Ordinarily such activities would be subsumed within the protection afforded to goods. The change is remarkable since it is introduced without comment or explanation and indirectly by way of the Recitals. The conflict between the language of 'services' and activities relating to the sale of physical goods was not lost on Advocate General Mengozzi in *Ker-Optika* (n 42). The Advocate General took the view (not shared by the CJEU) that since the Directive was concerned with services rather than goods, and since moreover goods such as contact lenses could not be 'transmitted by electronic means' the Directive could not apply to their

The extension of the definition of services to cover activities that are preliminary to or merely facilitate the sale of goods is counter-intuitive in the light of EU jurisprudence relating to the freedom of movement of goods.[83] For the purposes of this thesis the development is noteworthy only because it represents a departure from an approach that clearly distinguishes between goods and services, subsuming services ancillary to goods within the rules as to freedom of movement of goods, and those ancillary to services within the rules as to freedom of movement of services: it does not alter the argument concerning the ancillary nature of the activities or their lack of economic significance.[84]

IV.3 Information society services

IV.3.1 The meaning of information society services

Information society services are defined to include 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.'[85]

This somewhat abstract definition serves to exclude certain categories of service, most notably those without an interactive element, but the definition itself provides little assistance as to the content or scope of the services concerned. However Recital 18 to the Directive provides some guidance as to the scope of information society services.

IV.3.2 *The categories of service suggested by the Ecommerce Directive*

Recital 18 of the Ecommerce Directive provides a non-exhaustive list of the kinds of activities that may fall to be regarded as information society services. Some of these are not relevant to the activities of websites.[86] However the Recital refers to three categories of services that are relevant for websites, namely services that 'consist of selling goods on-line', services 'giving rise to on-line contracting' and 'offering on-line information'.

---

online sale. In other words, the extension of the definition of 'services' to activities consisting in the sale of goods caused bafflement. *Ker-Optika* (n 42), Opinion of Advocate General Mengozzi, paras 35,46. Hörnle likewise appears to find the approach baffling in light of EU jurisprudence of goods and services. She notes that online advertising of goods is a service under the Ecommerce Directive but adds that when a person buys clothes from a retailer after looking at the retailer's website, what he is buying is goods 'not a service at all.' Hörnle (n 54) 90, 91.

[83] Hörnle and others have pointed to the difficulties presented by the Ecommerce Directive, including the potential for conflict between the broad scope for the protection of information society services (including the online sale of goods) and the limited protections for 'selling arrangements' relating to goods under Article 28 in light of the case law of the CJEU. Hörnle (n 54) 95-97.

[84] The development may suggest that Smith and Woods were right to ask whether the distinction between goods and services is more apparent than real (Smith and Woods (n 16)) and that Hatzopolous and Do may be right to suggest a trend towards convergence of the freedoms (Hatzopolous and Do (n 31)).

[85] Article 1(2) of Council 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 [1998] OJ L204/37 as amended by the Transparency Directive. For a discussion of some of the difficulties associated with the term 'information society services' see Justin Harrington, 'Information society services: what are they and how relevant is the definition?' (2001) Computer Law & Security Report 174.

[86] Recital 18 includes within 'information society services', 'providing tools allowing for search, access and retrieval of data; … services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; … services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services'.

Each of these categories is considered in the light of the insights derived from the EU jurisprudence of goods and services in order to assess whether the services possess economic value and may qualify as consideration.

IV.3.3 Services consisting in selling goods online

Services consisting of selling goods online relate to the *process* of online sale. So in *Ker-Optika* where the court had to consider restrictions on the online sale of contact lenses,[87] the CJEU observed that

> the coordinated field of Directive 2000/31 [the Ecommerce Directive] covers the national provisions which prohibit acts relating to the selling of contact lenses, namely, in particular, *the online offer and the conclusion of the contract* by electronic means.[88] [89]

The designation of the sales process as a service epitomises the extended meaning of services under the Ecommerce Directive. It is plain that such activities only qualify as services because they are treated as indirectly remunerated through the online sale of *goods*.

As regards the purchaser of goods and services they have no independent economic significance: they are neither tradable nor capable of being the subject of a commercial exchange; there is no subject matter for the exchange.[90] When a person sells his goods or services, there is a single contract that relates to the *deliverables* under the contract namely the goods or the services.[91] The process of online sale does not give rise to a separate contract for services. A service consisting of the sale of goods has no economic value for the consumer of the goods.[92]

It is apparent that the sales process is an activity that is wholly ancillary to the supply of the goods. The CJEU, in *Ker-Optika* was in no doubt that that was so. It proceeded on the basis that

---

[87] *Ker-Optika* (n 42).

[88] ibid para 28 (emphasis added). See also Ketteley (n 80) 172 (noting that 'It is assumed that the Directive is concerned with the point of contract formation.'); Hörnle (n 54) 92.

[89] In referring to the 'online offer' the Court may have been referring to the display of information about goods, including pricing information, on websites; such display, in the UK, will not constitute an offer but only an invitation to treat. Other EU Member States including Spain and Belgium treat such display as an offer. See also Peter Møgelvang-Hansen, 'The Binding Effects of Advertising' in Reiner Schulze (ed), *New Features of Contract Law* (European Law Publishers 2007) 177, 178 as to the position in Danish law.

[90] This situation may be contrasted with the situation where entering into a contract is the consideration for some other benefit. As to which, see *Heilbut Symons and Co v Buckleton* [1913] AC 30, 47; *Esso Petroleum Co Ltd v Customs and Excise Commissioners* [1976] 1 WLR 1, 6. Here there is no scope for asserting that there is any contract other than the contract for sale since no separate benefit is conferred in exchange for the contract of sale.

[91] The alternative construction, that there are two separate contracts, the first a contract for the service consisting of the sale of goods and the second the contract for the sale of goods is highly artificial. Such an argument recalls the attempt in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 to suggest that when a gambler pays money and receives chips to facilitate gambling, there are two separate contracts, a contract to pay cash for the gaming chips and a separate gaming contract. The House of Lords rejected this argument along with the suggestion that the gaming chips would constitute valuable consideration.

[92] Indeed the notion of a service consisting in the sale of goods is at odds with the approach adopted in the EU in relation to the meaning of services for the purposes of trade mark law. The CJEU has accepted that the sale of goods as such by a trader is not a service for the purposes of the Trade Mark Directive (Council Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L 299/25). Case C-421/13 *Apple Inc v Deutsches Patent- und Markenamt* (10 July 2014), para 25. See also IPO, 'Trade Marks Manual' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406241/Manual_of_trade_marks_practice.pdf> (accessed 1 June 2015) 12 (stating that 'retailing goods is not a service per se').

the service of sale of the goods via the internet was 'entirely secondary' to the supply of the goods and characterised the restrictions on sale of contact lenses via the internet as a 'selling arrangement'.[93] The provision of such a service cannot qualify as consideration.

IV.3.4 Services giving rise to online contracting

It is unclear whether this category is concerned only with the delivery of content in order to enable a user to select a product or service for purchase or whether it is also concerned with the provision of functionality that enables the user to complete the purchase.

The explanatory memorandum accompanying the proposal for the Directive offers some pointers. It refers to interactive teleshopping and on-line shopping malls as examples of 'services giving rise to online contracting'.[94] Thus while the category of 'services giving rise to online contracting' undoubtedly has relevance for ecommerce services, it may be possible to tease out the characteristics of services falling within this category by reference to the characteristics of teleshopping.[95]

The service provided by an ecommerce website, that is a website that facilitates the purchase of goods or services, is analogous to 'teleshopping': commentators refer to ecommerce as a form of teleshopping[96] and a 'segment of teleshopping that is Internet based'.[97] Indeed it is entirely possible that where some of the Commission documents refer to 'teleshopping'[98] the Commission intends to refer to the sale of goods or services on an ecommerce website as well as via television channels.[99]

The Television without Frontiers Directive defined teleshopping as 'direct offers broadcast to the public with a view to the supply of goods or services … in return for payment'.[100] The CJEU in *Österreichischer Rundfunk*, (assessing whether the inclusion in a broadcast television programme of an offer to the public of an opportunity to participate in prize draw in return for payment of telephone charges was teleshopping for the purposes of the Television Without Frontiers

[93] *Ker-Optika* (n 42) paras 43-45.
[94] Commission 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market' COM (1998) 586 final, 15.
[95] As to the relevance of the proposal and Directive for ecommerce see COM (1998) 586 (n 94) 3; Recital 4 of the Directive.
[96] A Nagurney, June Dong and P L Mokhtarian, 'Teleshopping Versus Shopping: A Multicriteria Network Equilibrium Framework' (2001) 34 Mathematical and Computer Modelling 783.
[97] Patricia L Mokhtarian, 'A conceptual analysis of the transportation impacts of B2C e-commerce' (2004) 31(3) Transportation 257, 259.
[98] For example, in the Vade-Mecum to Directive 98/48/EC (Commission, 'Vade-Mecum to Directive 98/48/EC which introduces a Mechanism for the Transparency of Regulations on Information Society Services' (Standards and Technical Regulations Committee) Doc S-42/98 - EN (Def)) and the explanatory memorandum accompanying the proposal for the Ecommerce Directive (n 94).
[99] The Commission provided this definition 'Electronic commerce: often called, confusingly and incorrectly, "teleshopping" or described as an "electronic purchasing system", electronic commerce would enable the consumer to order products directly via his television set or computer terminal.' Commission, 'Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee concerning regulatory transparency in the internal market for information society services' COM(96) 392 final, 5. See also *R v Smartweb Trade Mark Application* [2003] ETMR 22 para 10.1.1 (equating e-commerce with teleshopping).
[100] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23.

Directive) focuses on the promotional aspects of teleshopping.[101] On the other hand the in *RTI*, the Advocate General, describing teleshopping as electronic retailing, emphasises the direct sales aspect of the service and the possibility for the user of the service to make a direct order, suggesting a focus not only on content but the functionality offered by the service.[102] Lorna Woods appears to allude to the twin aspects of teleshopping, raising the question as to whether teleshopping should be regarded in the same way as advertising or as 'just another sales mechanism'.[103] The better view, it is suggested, is that the service combines elements of advertising and sales mechanism.[104]

Would the service provided by an ecommerce website be treated as analogous to teleshopping? There are some hints that it might. For example, in *DocMorris* (which preceded the introduction of the Ecommerce Directive) the Advocate General noted that the Greek Government treated sales of medicinal products over the internet in the same way as teleshopping.[105] He suggested moreover that the display of product information about medicines on websites should be regarded as advertising within the meaning of Council Directive 92/28/EEC on the advertising of medicinal products for human use.[106][107] The analogy between teleshopping and ecommerce websites is appropriate. Ecommerce websites, like teleshopping channels, provide product information in the nature of advertising while at the same time offering a mechanism for direct sales.[108]

If a 'service giving rise to online contracting' is intended to capture only the promotional or advertising aspects of teleshopping or an ecommerce website then such a service, from the perspective of the user, is purely ancillary to the sale of the goods or services and without independent economic value.[109]

If, on the other hand, a service giving rise to online contracting must be taken to include offering a platform for sales rather than merely promotional or advertising material, is the position different? From the user's perspective, does the service have economic value? The question as to the economic significance of the provision of a platform for sales can be posed in a different way. We may ask: is this activity tradable, does it possess commercial capability, is it normally provided for (direct) remuneration? The answer to all these questions, at first blush, is 'no'. Separate payment is not made for access to shops, the use of shopping trolleys or the provision of tills, manned or not, though of course the costs of the provision of such equipment and services will no doubt be included in the cost of the goods. On the other hand where goods or services are

[101] Case C-195/06 *Kommunikationsbehörde Austria v Österreichischer Rundfunk* [2007] ECR I-8817.
[102] Joined Cases C-320, 328–329 & 337–339/94 *Reti Televisive Italiane SpA (RTI) and others v Ministero delle Poste E Telecomunicazioni* [1996] ECR I-06471, Opinion of AG Jacobs, para 21.
[103] Woods (n 7) 217, fn 81.
[104] Council of Europe, *Programme Sponsorship and New Forms of Commercial Promotion on Television* (Council of Europe, 1991) para 345.
[105] *DocMorris* (n 67), Opinion of AG Stix-Hackl, para 240.
[106] ibid paras 207-213.
[107] OJ 1992 L113/13.
[108] Jones notes that in the case of online sales via websites information about products 'will normally be contained in the website as advertising.' Simon Jones, 'Forming electronic contracts in the United Kingdom' [2000] 11(9) ICCLR 301, 301.
[109] Schauss includes within the term 'teleshopping' the supply of data on products where 'such services are ancillary to the principal service of teleshopping'. M Schauss, 'Description of Teleshopping Services' in Y Poullet and GPV Vandenberghe and H W K Kaspersen, *Telebanking, Teleshopping and the Law* (Kluwer Law and Taxation Publishers 1988) 17 (fn omitted).

purchased by telephone, a share of the telephone charges paid by the purchaser might be paid to the retailer under revenue sharing arrangements with the telecommunications provider.[110] However in such a situation, so far as the purchaser is concerned, the payment relates to the 'core' goods or services. Thus, in *Österreichischer Rundfunk* the CJEU considered that the payment made by an individual for use of a premium rate telephone number was payment for participation in a game, not for the service of making participation in the game possible via the premium rate line.[111] A service that consists in the provision of a sales channel whether via telephone, the internet or other means has no *independent* economic significance for the user of the service.

This conclusion is supported by the decision in *Spreadex Limited v Cochrane.*[112] There, David Donaldson QC, sitting as a Deputy High Court Judge, expressed the view that

> [The] test [as to the presence of consideration] is, however, in my view not satisfied by *arrangements which merely facilitate the making by the two parties of ad hoc contracts* in the form of the individual trades. The provision of an on-line interactive platform is in effect simply a more modern equivalent of the expressed readiness of a potential contracting party (also covered in the Consumer Agreement) to enter into contracts by receiving and responding orally to telephone calls.[113]

This conclusion might be read as signalling implicit concerns about the 'economic value' of the provision of a platform for sales. It could be construed as a straight policy decision as to the kinds of benefits and detriments that can qualify as consideration. Despite expressions of surprise from some quarters, it is reassuring that the doctrine of consideration still has power to set boundaries as to the kinds of arrangements to which contractual obligations may be tacked.[114]

Spreadex is authority for the proposition that the provision of a platform for sales which merely facilitates the conclusion of contracts does not qualify as consideration between the website and its customer.[115] As a decision of the High Court in relation to an application by the claimant for summary judgment, *Spreadex* has limited value as precedent. Nevertheless higher Courts may be slow to take a different approach. The idea that a trader might demand some form of consideration (monetary or otherwise) for use of 'just another sales mechanism' is troubling,

---

[110] Ofcom, 'Extending Premium Rate Services Regulation to 087 Numbers (Statement 5 February 2009)' <http://stakeholders.ofcom.org.uk/binaries/consultations/087prs/statement/statement.pdf> (accessed 29 May 2015).

[111] *Österreichischer Rundfunk* (n 101) para 31. This is consistent with the guidance issued by the UK regulator PhonepayPlus which treats the service paid for via the premium rate line as (for example) specialist helplines, charitable donations, voting or competitions rather than a service consisting in making such services available. PhonepayPlus, 'What are premium rate numbers?' <http://www.phonepayplus.org.uk/for-the-public/what-are-premium-rate-numbers> (accessed 10 June 2015).

[112] [2012] EWHC 1290, [2012] LLR 742.

[113] ibid [15] (emphasis added).

[114] Olswang, 'Like taking candy from a baby? Spreadex v Cochrane' 09 July 2012 <http://www.olswang.com/articles/2012/07/like-taking-candy-from-a-baby-spreadex-v-cochrane/> (page accessed 23 February 2014); Ashurst, 'Spread-betting contracts: child's play?' July 2012 <www.ashurst.com/doc.aspx?id_Content=8042> (page accessed 23 February 2014).

[115] There is scope for the argument that *Spreadex* is relevant not only to the provision of a website as a service but also to arrangements concerning the grant of access to websites. Although the Court does not expressly say so, it must also be the case that the mere fact of ability to access the website was not thought adequate to qualify as consideration. However since the judgment does not expressly deal with the point, the issue remains open.

particularly where the mechanism depends on the provision of facilities by the user of the sales mechanism as well as the trader.

It appears that neither the display of promotional or advertising information nor the provision of functionality that facilitates sales, the twin faces of a service giving rise to online contracting, has independent economic value for the user.[116]

III.3.5 Offering online information

The Ecommerce Directive includes 'offering online information' within the meaning of 'information society services'.[117] It contains no limitations as to the character of the information but makes it plain that online advertising is included.[118]

I argued earlier that the supply of advertising is an activity that is purely ancillary and has no independent economic value for the recipient. However the supply of other forms of information may possess economic value. Loebbeke suggests that the supply of the following kinds of online content is tradable: 'digital on-line periodicals, magazines, music, education, searchable databases, advice and expertise' as well as 'an online sports scoreboard, a news service or daily horoscope'.[119] The supply of such information may be described as 'an end in itself'.

Nothing in the goods and services jurisprudence of the EU affords an argument that the supply of information that is not in the nature of advertising or promotional material is purely ancillary and without economic value. How relevant then is the categorisation of information in the nature of advertising as without economic value? For example, if the website features advice or product reviews in addition to information in the nature of advertising, will the website nevertheless be treated as essentially consisting in advertising or must one suppose that the supply of any information other than advertising is sufficient to avoid categorisation of the supply of information by the website as without economic value? It is submitted that the answer is that the issue must be determined according to a rule of preponderance. The alternative approach, that is, to treat the supply of information other than advertising as a discrete service, severable from the supply of advertising information, would mean that in many cases it would be impossible (in relation to the supply of non-advertising information) for the requirement for the service normally to be provided for remuneration to be met.

The application of a rule of preponderance would mean that the content of a great many websites would fall to be regarded as advertising. Information on retail websites usually consists of information about the retailer's products and services, and constitutes advertising material relating to the retailer's commercial offerings.[120] A study carried out by Ducoffe found that 57% of

[116] The argument that the mere display of promotional or advertising material has no economic value for the consumer recalls the argument advanced by the defendants in *Century 21* that 'in looking at a billboard no contract is formed'. *Century 21 Canada Limited Partnership v Rogers Communications Inc*, 2011 BCSC 1196 [74].

[117] The significance of the term 'offering' is not explored in this Chapter.

[118] Article 2 (h)(i) includes advertising within the co-ordinated field for information society services.

[119] Claudia Loebbeke, 'Digital Goods: An Economic Perspective' in H Bidgoli (ed), *Encyclopedia of Information Systems* (Academic Press 2002) 642.

[120] Article 2 of Council Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising (codified version) [2006] OJ L376/21 (the 'Misleading and Comparative Advertising Directive') defines advertising as follows

respondents considered that the entire contents of corporate websites (not merely retail websites) constituted advertising.[121] The EU jurisprudence concerning goods and services strongly suggests that the provision of information in the nature of advertising has no independent economic significance from the goods or services to which it relates. It suggests, at the very least, that in relation to retail websites (which typically consist in the main of information in the nature of advertising) the service provided by website to user, where treated as consisting in the supply of information to the user should be regarded as without economic value.

IV.4 Summary

The categories of service suggested by the Ecommerce Directive are of benefit in providing a framework for analysis of the nature of the service provided by open, publicly accessible websites to users by reference to the EU jurisprudence of goods and services. The Directive suggests three categories of service that are relevant for present purposes: services consisting in the sale of his goods or services, services giving rise to online contracting and the supply of information via the website.

The analysis indicates that the supply of services consisting of the sale of goods or services can never qualify as consideration.

The position with regard to services giving rise to contracting is less straightforward: the category may encompass diverse forms of services. However, there is scope for the argument that where the service consists in the provision of a platform for sales, or the provision of product information in the nature of advertising, or both, the service possesses no independent economic value for the user.

The analysis indicates that the supply of information can in principle qualify as consideration. On the other hand it suggests that the supply of information in the nature of advertising is a special case and that such information is without economic value for users. It therefore cannot qualify as

---

> 'advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations;

Article 3 of the Directive directs that advertising includes information concerning

> (a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
> (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
> (c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

See also *Ker-Optika* (n 42).

[121] Robert H Ducoffe, 'Advertising Value and Advertising the Web' Journal of Advertising Research' (1996) 36 (5) Journal of Advertising Research 21, 27. See also Yuan Gao, 'Consumer Attitude in Electronic Commerce' in Margherita Pagani, *Encyclopaedia of Multimedia Technology and Networking* (Idea Group Reference 2005) 105.

consideration. This conclusion has particular relevance for retail websites since, in the main, the information on such websites consists of advertising.

V. Two challenges (and a 'definitely maybe') in relation to the argument that the supply of information in the nature of advertising is without economic value and cannot qualify as consideration

V.1 The economic significance of information in the nature of advertising: an economist's view

The economist Kaldor maintains that while the price of advertising to the recipient is 'always nil', advertising is a special kind of 'free gift',[122] with an economic value for the recipient, whose cost is absorbed in the price of the goods or services advertised.[123]

Kaldor suggests that the question as to whether a consumer will pay for advertising is a question of fact which is determined by the availability of the information.[124] If advertising were not provided freely, Kaldor maintains, the consumer would be 'quite willing to pay for the supply of market information' offering as an example the purchase by consumers of railway timetables.[125] One could add to that the example of catalogues provided at modest cost to consumers (though generally the consumer recoups these costs in the event that they purchase goods from the catalogue).[126]

The examples of the (paid for) railway guide and catalogue suggest that it is not possible to say that the supply of information in the nature of advertising has no economic value and can never qualify as consideration.[127]

Could it be that Hedley is right to suggest that

> Contract law is the law of which benefits are to be paid for by the recipient (though it is other things as well) … Attempts to define 'benefit' will always lead back to the market one way or another—'benefit' always turns out to mean what the holder paid or might

[122] Kaldor does not use the phrase 'free gift' but describes advertising as a form of subsidised commodity 'where the subsidiary service is retailed entirely free of charge, but separately'. Nicholas Kaldor, 'The Economic Aspects of Advertising' (1950) 18 The Review of Economic Studies 1, 3

[123] Kaldor (n 122) 2, 3. Lester Telser adopts the same analysis. Lester G Telser, 'Supply and Demand for Advertising Messages' (1966) 56 The American Economic Review 457. See also Kyle Bagwell, 'The Economic Analysis of Marketing' in Mark Armstrong and Robert Porter (eds), *Handbook of Industrial Organization: Volume 3* (Elsevier/North Holland 2007) 1713.

[124] Kaldor (n 122) 2, 3, 5.

[125] Kaldor (n 122) 5.

[126] Stigler mentions the example of catalogues. George Stigler, 'The Economics of Information' (1961) 69 Journal of Political Economy 213, 222. In *DocMorris* (n 67) (concerning restrictions on advertising of medicinal products) the CJEU declined to comment (since it was unnecessary for disposal of the reference) on whether some of all of a website should be regarded as equivalent to a price list or a trade catalogue.

[127] It is possible to differentiate between the catalogue (or the railway guide) and the website since the catalogue, unlike the website, is provided at the individual request of the recipient. However that distinction is relevant to assent rather than consideration.

> have paid, or the price it has been or might be sold for. 'benefit' is not intelligible without reference to the market; and the law of the market is called 'contract'.[128]

One of the problems in assessing the contractual status of the provision of information by an open publicly accessible retail website is that neither law nor the market has conclusively determined whether consumers are prepared to pay for such services whether by way of monetary remuneration or otherwise. The widespread use of browse wrap Terms of Use, coupled with the uncertainty as to their enforceability, means that the market has not properly tested whether consumers (or non-consumers) are truly prepared to suffer a detriment (by virtue of the risk allocation achieved by Terms of Use) in order to obtain the information.[129] In failing to address the issue of assent in relation to browse wrap Terms of Use, law has also perpetuated ambiguity as to whether, in reality, users are prepared to pay a price (monetary or otherwise) for the supply of information on retail websites. The fact that retailers routinely attach Terms of Use to their websites is in no way determinative of the issue.

In any event law, not the market, has the last word on the kinds of arrangement that will be accorded contractual effect. *Spreadex* provides an example.[130] There the Court denied contractual effect to the click wrap Customer Agreement which purported to govern the terms on which customers of the online gambling website carried out their trades. This was not a case where the customer's assent to the terms was in doubt. No doubt a great many customers had given their assent to the agreement since use of the online gambling facility was conditioned on acceptance of the terms of the agreement. The market might therefore suggest that the service provided by the website, namely, the provision of a website as platform for trades, is tradable, possesses commercial capability and so qualifies as consideration but the Court decided differently.

Indeed, Kaldor's assessment of the circumstances in which consumers are prepared to pay for advertising is instructive. He suggests that this depends on whether the information is made available on a free gift basis and on whether the consumer receives information not otherwise freely available to him. If these are market questions, they are also legal questions.[131] These

---

[128] Steve Hedley, 'Implied contract and restitution' [2004] Cambridge Law Journal 435, 438-439 (fn omitted).

[129] The decision in *Ryanair Ltd v Billifluege.de GMBH* [2010] IEHC 47, [2010] ILPr 22 is of no assistance in this regard. On appeal to the Supreme Court of Ireland, the Supreme Court expressly stated that the decision is not a precedent concerning the question of whether there was a valid contract. Moreover Hanna J in the lower court treats the Terms of Use in issue as click wrap Terms of Use though his description of the mode of display of the Terms of Use indicates that browse wrap Terms of Use were at stake. The Supreme Court decision suggests, perhaps by way of explanation for the muddle, that the evidence as to whether Billligfluege.de accessed browse wrap or click wrap Terms of Use (Ryanair's website features both, the latter being accessed at point of sale) was confusing.

[130] *Spreadex* (n 112).

[131] For example, though not essential for the determination of the issues referred to the CJEU, in *VTB-VAB* (n 43), Opinion of AG Trstenjak, the Advocate General offers a detailed analysis of marketing strategies involving the supply of ancillary products or services. In a passage which recalls Kaldor's discussion (Kaldor (n 122) 2, 3) about 'subsidised commodities' the Advocate General provides this commentary on the distinction between free gifts and other combined offers

> A free gift can be defined as an (accessory) gift dependent on the purchase of the main product or service, which, at no separate charge, comes in addition to the main product or service different from it, has an economic value of its own and, because of its accessoriness in relation to the main item, is likely to influence the customer's purchasing decision. However, in the case of combined and package offers, which combine two or more, even different, products in a single offer, there is

questions may be reconfigured as questions about assent and consideration. The question as to whether the information is gifted involves questions about the dynamic aspects of the relationship between the provider and recipient of the information: these aspects are not explored in this Chapter. However the question as to whether the information is otherwise freely available to the recipient may be formulated as questions concerning the exclusionary rules of consideration and, in particular, whether the supplier would have performed the activities that confer a benefit even in the absence of a reciprocal promise. Kaldor's analysis, in essence, invites assessment of the economic significance of advertising by reference to the rules of the doctrine of consideration. Indeed his insight suggests that economic value cannot be considered in isolation but is inextricably linked to the other market-related tests that form part of the exclusionary rules of the doctrine of consideration.[132]

V.2 *Ryanair Ltd v Billigfluege.de GMBH*

The decision in *Ryanair Ltd v Billigfluege.de GMBH*, a decision of the Irish High Court, also presents a challenge to the argument that the supply of information on retail websites in the nature of advertising has no economic value and so can never qualify as consideration.[133] In that case Hanna J had little hesitation in concluding that the provision of information via a retail website qualifies as consideration.

Ryanair offers low fare scheduled passenger flights.[134] It operates an open, publicly accessible website at ryanair.com which allows passengers to book flights. Billigfluege.de run a price comparison website. Ryanair maintained that Billigfluege.de took information from Ryanair's website, through the activity of screen-scraping, so as to provide the defendant's customers with price comparison information. It maintained that this activity breached its website Terms of Use and infringed its intellectual property rights. The defendant challenged the jurisdiction of the Irish Courts to hear the dispute. The hearing before Hanna J related only to the issue of jurisdiction.

The jurisdiction point turned on the provisions of Article 23 of the Brussels Regulation which provides

> If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

---

no free gift, because each individual product or component is part of the whole package and is included in the calculation of the total price.

[132] The decision in *Esso Petroleum Co Ltd. v Customs and Excise Commissioners* [1976] 1 WLR 1 as to whether promotional items (world cup coins given free with petrol) were truly free gifts or formed part of a contract (for sale or otherwise) demonstrates an attempt to make sense of the true aspect of the economic arrangement by reference, inter alia, to the doctrine of consideration. Their Lordships considered the value of the coins (3/16 pence) and whether the price of the petrol had been increased to take account of the value of the coins (it had not). The relative simplicity of the question as to whether the arrangement involved a free gift or not was obscured by their Lordships' insistence on an analysis from the doctrine of intention to create legal relations.

[133] n 129.

[134] Ryanair, 'Strategy' <https://www.ryanair.com/doc/investor/Strategy.pdf> (page accessed 7 February 2014).

Ryanair sought to rely on a clause in their website Terms of Use conferring exclusive jurisdiction on the Irish courts. If the Terms of Use constituted an 'agreement' Ryanair would be able to rely on Article 23 and the Irish Courts would have jurisdiction. Ulrich Magnus argues that for the purposes of Article 23 all that is required is consensus or 'the mere expression of will', no more. In particular he argues that 'The consideration doctrine appears to be no part of the 'agreement' envisaged by the provision.'[135] Hanna J disagreed. In his view for the Terms of Use to constitute an agreement for the purposes of Article 23, the claimant required to show that the Terms of Use were a valid and binding contract having regard to 'the traditional contract principles of offer, acceptance and consideration'.[136][137] As to consideration he concluded, without further analysis, that

> … the provision of information as to flights and prices of flights by Ryanair on their site, subject at all times to their Terms and Conditions, constitutes a sufficient act of consideration for the purposes of making the contract legally binding.[138]

The decision has been criticised on a number of grounds,[139] including that Hanna J

> purported to find as a fact in the context of a jurisdiction motion that a legally binding contract existed between the plaintiff and Billigfluege and that the Terms of Use was a contractual document entered into by the parties.[140]

That criticism is well made. In *Ryanair Limited -v- On the Beach Limited* which, like *Billigfluege.de,* concerned a challenge to the jurisdiction of the Court in relation to claims relating to screen-scraping, Laffoy J noted

> It is worth reiterating that apart from the application of Article 23(1), the Court is not concerned with whether a contractual relationship based on the Terms of Use exists between the parties.[141]

---

[135] Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation* (Sellier European Law Publishers 2012) 477.

[136] n 129 [23].

[137] Although, of course, the Irish and English laws of contract are not the same, the Irish law of contract is broadly in line with English law and incorporates the doctrine of consideration. The Irish Courts draw heavily on precedents from the English Courts though of course these are of persuasive value only. See James Gordley (ed), *The Enforceability of Promises in European Contract Law* (CUP 2001) 59, fn 141.

[138] n 129 [25].

[139] The decision may also be criticised on account of the erroneous assertion that the Terms of Use at issue were click wrap Terms of Use. Hanna J records that 'the Terms of Use were clearly accessible by way of a hyperlink which was at all times clearly visible to users of the plaintiff's site.' n 129 [23]. This is a description of browse wrap Terms of Use. The discussion in the case concerning the presence or absence of notice of the Terms of Use is only relevant since browse wrap Terms of Use were in issue. So while the decision of the Supreme Court on appeal by Billigfluege.de from the decision of Hanna J, records that there was considerable confusion as to whether Billigfluege.de merely accessed the browse wrap Terms of Use on Ryanair's website or whether they purchased flights on behalf of the customer and at the same time assented to click wrap Terms of Use, that cannot explain the muddled use of terminology in the lower court. *Ryanair Limited v Billifluege.de.GmbH/Ticket Point Reiseburo GmbH & Anor* [2015] IESC 15 [9]. See also TJ McIntyre 'Ryanair screenscraping: Irish court accepts jurisdiction, rules on enforceability of website terms of use' (1 March 2010) <http://www.tjmcintyre.com/2010/03/ryanair-screenscraping-irish-court.html> (accessed 15 September 2015) (stating that the decision adopts a 'very wide browsewrap theory').

[140] *Ryanair Limited -v- On the Beach Limited* [2013] IEHC 124 [29]. This criticism formed part of the defendant's submissions.

[141] Ibid [34].

Although Laffoy J stops short of saying that Hanna J was wrong to suppose that it was necessary, for the purposes of Article 23, to locate a benefit which might qualify as consideration, the topic of consideration is conspicuous by its absence from the decision in *On the Beach*. On appeal by Billigfleuge.de from the decision of Hanna J, the Supreme Court confirmed that the approach adopted by Laffoy J 'emerges as the more correct approach'.[142] Moreover it stated categorically that Hanna J's decision cannot be regarded as 'precedent … that a binding contract was entered into, [but] only that a clear choice of jurisdiction has been made by the parties.'[143]

Nevertheless it is useful to explore more closely the factors (both factual and legal) taken into account (and just as importantly omitted from account) by Hanna J in deciding that the provision of information by Ryanair qualified as consideration. After all, while the decision has no value as precedent it is reasonable to suppose that, faced with the same set of facts in a context where the presence or absence of consideration was squarely in issue, Hanna J would be minded to reach the same conclusion.

Hanna J notes that Ryanair's website supplies information as to flights and prices of flights.[144] He makes no observations about the significance of the nature of that information. There is no discussion as to whether such information is in the nature of advertising, whether in the hands of consumers or in the hands of Billigfluege.de. As a consequence there is no discussion as to whether the information possesses economic value whether for consumers or entities such as Billigfluege.de looking to use the information for commercial advantage.

There is no discussion in *Billigfluege.de* as to the rules of consideration. Thus while the Irish law of contract is modelled on English law, there is no discussion as to whether the benefit consisting (according to Hanna J) in the provision of information is a benefit that would have been conferred absent the user's promise such that it does not qualify as consideration.

These omissions are significant since even if one accepts Kaldor's view that advertising has economic value it does not follow that the benefit of the provision of information in the nature of advertising will invariably qualify as consideration. In the context of retail websites, such as that operated by Ryanair, the question as to whether the website operator would provide the service (whether to commercial or consumer users) regardless of the user's promise is very much alive. [145]

V.3 Definitely maybe …

In *Ryanair Limited v Atrápalo SL* (another screen-scraping case) the Spanish Tribunal Supremo rejected Ryanair's contention that Ryanair's Terms of Use were binding on the online agent Atrápalo, on the basis that Atrápalo did not assent to the Terms of Use.[146] However the Tribunal was at pains to point out that it did not exclude the possibility that the information supplied by

[142] *Ryanair Limited v Billifluege.de.GmbH/Ticket Point Reiseburo GmbH & Anor* (n 139) [18].
[143] ibid [45].
[144] n 129 [25].
[145] One of the perceived risks for online retailers-the risk that persons other than the consumer obtain and re-use advertising information about the goods, services and pricing-is not new. Chiplin and Sturgess observe that 'advertisers will not be able to direct information solely to potential consumers.' Brian Chiplin, Brian Sturgess and John Dunning, *Economics of Advertising* (Holt, Rinehart and Winston with the Advertising Association 1981) 76.
[146] *Ryanair Limited v Atrápalo SL* (n 6). For commentary see Fidel Porcuna, 'RYANAIR: screen scrapers, databases, free-riding and unfair competition in Spain' <http://screenscrapingservices.blogspot.co.uk/2013/05/ryanair-screen-scrapers-databases-free.html> (page accessed 22 February 2014).

Ryanair might be the subject of a contract, nor that access to such information might be regulated by way of Terms of Use with contractual effect. It noted

> … precisaremos que la sentencia recurrida no rechaza la posibilidad abstracta de que la información sobre las ofertas -tratos precontractuales- pueda ser objeto de un contrato, ni que el propio acceso a las ofertas pueda condicionarse por la vía de un contrato regulador de la "navegación" en la Web.[147]
>
> (… we make it clear that the judgment on appeal does not rule out the abstract possibility that the information concerning offers - precontractual information - might be the object of a contract, nor that proper access to the information might be made subject to conditions by means of Terms of Use.)[148]

The judgment is couched in such terms that it is impossible to second-guess what the approach of the Tribunal might be if it were called on to resolve whether the supply of what the Tribunal describes as 'precontractual information', that is, surely, information in the nature of advertising, meets the civil law requirement for causa.[149]

In any event the decisions of the Spanish Courts in relation to causa cannot easily be transposed into English law: the doctrines of causa and consideration fulfil similar functions but they are not the same.[150]

V. Summary

If the decision in *Billigfluege.de* can be discounted on account of its lack of value as a precedent, and the decision in *Atrápalo* on account of the equivocal nature of the comments of the court as well as the fact that the doctrines of causa and consideration are not the same, Kaldor's views are not so easily dismissed. His challenge suggests that a different tack may be needed in order to assess the contractual significance of the supply of information in the nature of advertising.

VI. Retail Websites: analysis from the exclusionary rules of the doctrine of consideration

VI.1 A different approach

In light of the challenges to the view that advertising is without economic value for recipients of the advertising, a different approach is needed in order to resolve the question as to whether the supply of information in the nature of advertising may qualify as consideration. Kaldor's approach invites assessment according to the requirements of contract law as to assent and consideration. The question as to whether the user assents to website Terms of Use is not explored in this Chapter. However, in this Section I consider the implications of the exclusionary rules of the doctrine of consideration for the question as to whether the benefit conferred by the website on the user, (where the benefit consists in the supply of information in the nature of advertising) may qualify as consideration. This analysis provides what was lacking in the assessment carried out by Hanna J in *Billigfluege.de*.

---

[147] *Atrápalo* (n 6).
[148] The writer's translation.
[149] As to pre-contractual information as advertising see Møgelvang-Hansen (n 88).
[150] For an exploration of the similarities and differences in the contract law of various European common law and civilian law systems, see Gordley (n 137).

The doctrine of consideration prescribes that for a benefit conferred or a detriment suffered to qualify as consideration it must not only have 'economic value',[151] but it must be 'real, not illusory'[152] and it must not consist in some act or forbearance which would have been carried out regardless of the promise made by the beneficiary.[153] Even if Kaldor is correct to suggest that advertising has economic value, this last aspect of the exclusionary rules of the doctrine of consideration presents a formidable hurdle for retail websites.

V.2 Would a retail website supply information in the nature of advertising regardless of the user's promise?

There are powerful commercial imperatives for retailers to implement an ecommerce strategy, selling goods and services and providing product information via a website. The Wall Street Journal reports

> Online sales increased by more than double the rate of brick-and-mortar sales this holiday season. Shoppers don't seem to be using physical stores to browse as much, either. Instead they seem to be figuring out what they want online then making targeted trips to pick it up from retailers that offer the best price.[154]

Kathy Gordon describes 'the legacy of a large store footprint' as a 'millstone in the digital age.'[155] Customers no longer settle for traditional ecommerce offerings; tech-savvy consumers are demanding more not less from 'digital commerce'.[156] According to Forrester Research the 'top investment initiative' for retail companies in 2014 is mobile shopping.[157] PWC report that

> today's consumers now view multichannel shopping as a given. Convenient physical stores, a website capable of handling purchases, a mobile site or app—these capabilities are simply the price of admission for a healthy relationship with a consumer.[158]

In the current market few retailers fail to include a website in their range of channels to market.[159] The market analysis strongly suggests that retailers obtain a competitive edge through

---

[151] Edwin Peel and G H Treitel, *The Law of Contract* (13th edn, Sweet and Maxwell 2011) ('Treitel'), para 3-027.
[152] Treitel (n 151) para 3-028.
[153] Treitel (n 151) para 3-029.
[154] Shelly Banjo and Drew Fitzgerald, 'Stores Confront New World of Reduced Shopper Traffic' The Wall Street Journal 16 January 2014 <http://online.wsj.com/news/articles/SB10001424052702304419104579325100372435802?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304419104579325100372435802.html> (copy kindly supplied by WSJ as access to the article is subscription only).
[155] Kathy Gordon, 'Online Is Where It's At for U.K. Retailers' The Wall Street Journal 16 January 2014 <http://online.wsj.com/news/articles/SB10001424052702304149404579324220716000030?KEYWORDS=stores+footfall&mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304149404579324220716000030.html%3FKEYWORDS%3Dstores%2Bfootfall> (copy kindly supplied by WSJ as access to the article is subscription only).
[156] PWC, 'Achieving Total Retail: Consumer expectations driving the next retail business model' February 2014 < http://www.pwc.com/en_GX/gx/retail-consumer/retail-consumer-publications/global-multi-channel-consumer-survey/assets/pdf/achieving-total-retail.pdf> (page accessed 27 February 2014).
[157] Forrester, 'The State Of Retailing Online: Key Metrics And Initiatives 2014: Why read this report' <http://www.forrester.com/The+State+Of+Retailing+Online+Key+Metrics+And+Initiatives+2014/fulltext/-/E-RES111401> (page accessed 27 February 2014).
[158] PWC (n 156).

properly implemented ecommerce offerings. It is scarcely conceivable that retailers would peril such advantage on the consumer's choice (if choice was truly offered) as to whether or not to agree to the retailer's website Terms of Use.

There are also strong reasons to suppose that both the provision of the website and the supply of information relating to the retailer's goods and services are acts which would be carried out regardless of the user's assent to the Terms of Use. I have not encountered click wrap Terms of Use on retail websites (save where incorporated in terms and conditions relating to sales of goods or services).[160] The norm, for retail websites, is for Terms of Use to be presented in browse wrap form. It is far from clear that browse wrap Terms of Use are enforceable in the UK on account of lack of consent.[161] Neither the French nor the Spanish Courts have shown any enthusiasm for browse wrap Terms of Use,[162] and while browse wrap Terms of Use have been enforced in the US, much depends on whether adequate notice of the terms was given to the user.[163]

---

[159] According to Kathy Gordon, Primark 'refuses to sell online because its clothes are so inexpensive that it wouldn't be profitable.' Gordon (n 155).

[160] Hancock, writing in 2003, notes 'We have yet to visit any Web site aimed at the general public that required a viewer to expressly assent to a terms-of-use policy before proceeding.' William A Hancock, 'Website Terms of Use' (2003) 19(1) Corporate Counsel's Quarterly 36, 38.

[161] A study commissioned by the UK Strategic Advisory Board for Intellectual Property Policy comments 'The status of shrink-wrap, click-wrap and browse-wrap licences is all but certain at international level.' Martin Kretschmer and others, 'The Relationship between Copyright and Contract Law' (Project Report, Strategic Advisory Board for Intellectual Property Policy 2010) para 3.3.1.1 <http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf> (accessed 30 July 2015). Likewise the Law Commissions suggest that a 'court would be unlikely to find that [browse-wrap licenses] are a contract.' The Law Commission and the Scottish Law Commission 'Unfair Terms in Consumer Contracts: a new approach? Appendices A to D (25 July 2012)' <http://www.scotlawcom.gov.uk/files/4313/4313/4086/unfair_terms_in_consumer_contracts_appendices_A-D.pdf> (accessed 29 July 2015) para C.18 (though the Commissions, noting that the US courts have held that 'licences of this type do not have contractual status', ignore a clear line of authority from *Register.com Inc v Verio Inc* 356 F 3d 393 (2d Cir 2004) onwards). See also Christina Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts' in L Edwards and C Waelde (eds), *Law and the Internet* (3rd edn, Hart Publishing 2009) 110; Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart 2009) 138 (suggesting that 'browse wrap contracts have been accepted for their convenience and economy'); Simon Blount, *Electronic Contracts: Principles from the Common Law* (LexisNexis Butterworths 2009) 90 ('In browsewrap contracts it is uncertain how parties have reached consensus on terms sufficient to make a contract …'); Marco B M Loos and others, *Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Contracts* (University of Amsterdam, Centre for the Study of European Contract Law, Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE) 2011) (noting that within Europe 'there remains uncertainty regarding the validity of contract terms known as 'click-wrap' and 'browse-wrap' licenses' but suggesting, without authority, that while there is 'no definitive case law from the UK on this' there 'is consensus that the growing body of US case law may well be followed in the UK'); Stuart Weinstein, 'Contractual Aspects of Electronic Commerce' in Charles Wild and others, *Electronic and Mobile Commerce Law: An Analysis of Trade, Finance, Media and Cybercrime in the Digital Age* (University of Hertfordshire Press 2011) 6 (asking but not answering whether mere browsing operates as assent so as to confer contractual status on browse wrap agreements under English law).

[162] *Société de droit irlandais Ryanair Limited v SAS Opodo* Cour d'Appel de Paris (23 March 2012) STS 7748/2012 <http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3481> (accessed 22 February 2014); *Ryanair Limited v Atrápalo SL* (n 6).

[163] See *Specht v Netscape* 306 F 3d 17 (2d Cir 2002); *Register.com Inc v Verio Inc* 356 F 3d 393 (2d Cir 2004); *Southwest Airlines v Boardfirst, LLC*, 2007 WL 4823761 at 5 (ND Tex Sept 12, 2007); *Hines v Overstock* 38011 F App'x 22 (2d Cir 2010); *Cvent, Inc v Eventbrite, Inc*., 739 F Supp 2d 927, (Dist Court, ED Virginia 2010); *Kwan v Clearwire Corporation* C09-1392JLR (WD Wash; Jan 3, 2012); *Van Tassell v* United Marketing Group, LLC 795 F Supp 2d at 792 (ND Ill 2011); *Koch Industries v Does No. 2*:10CV1275DAK, 21 2011 WL 1775765, 24-25 (D Utah May 9, 2011). See also Tarra Zynda, 'Ticketmaster Corp. v Tickets.com, Inc.: Preserving

Most websites feature the link to browse wrap Terms of Use 'below the fold'.[164] A report commissioned by Google in 2011, whose purpose was to compare the effects of keyword advertising websites displayed on ordinary PCs or laptops and on mobile phones, demonstrated that only 21% of the users forming part of the survey looked at search results 'below the fold'.[165] In other words empirical evidence supports the view, generally expressed by US Courts, that links situated below the fold are not sufficient to provide the user with notice of the terms.[166] These uncertainties have not deterred websites from supplying information on open, publicly accessible websites subject to browse wrap Terms of Use situated below the fold.

It is commonly said that it is not practical for websites to adopt a click wrap model for Terms of Use.[167] It is important to be clear about what this really means. Retail websites *could* use the click wrap model, and do use the click wrap model to ensure enforceability of terms and conditions of sale, but if access to the website is conditioned on affirmative agreement to the Terms of Use by means of the click wrap process, the retailers might lose traffic to the website. The decision to use browse wrap Terms of Use represents a choice that strongly indicates that online retailers are choosing traffic over certainty about the existence of affirmative assent. This view is shared by Mann and Siebeneicher who suggest that

> for the great majority of Internet retailers, the ease of the shopping experience is more important than concerns about possible future liability. Thus, few retailers – only about 6% in our population – use contracting interfaces sufficiently robust to make it reasonable to expect that their contracts are enforceable against their customers. [168]

Mann and Sibeneicher speculate that this choice is driven by 'the desire to maintain high conversion rates'[169] and they point to various studies concerning the importance of the design of website interfaces in 'maximis[ing] positive consumer response'.[170] The decision by retailers to opt for browse wrap Terms of Use suggests that the supply of a website, and the information contained in the website, is not conditional on the user's promise set out in Terms of Use.

Minimum Requirements of Contract on the Internet' (2004) 19 Berkeley Law Journal 495, 507; Mark A Lemley 'Terms of Use' (2006) 91 Minnesota Law Review 459.

[164] Arnold J provided this explanation of 'the fold' in relation to websites namely 'the division between the part of the first page which appears on screen immediately and the part which requires the user to scroll down.' *Interflora Inc & Anor v Marks and Spencer Plc & Anor* [2013] EWHC 1291 (Ch) [155].

[165] Arnold J makes extensive reference to the study in *Interflora* (n 164) [152]-[155].

[166] *Specht* (n 163); *Hines* (n 163); *In re Zappos.com Inc., Customer Data Security Breach Litigation*, 2012 WL 4466660 (D Nev Sept 27, 2012).

[167] Karen Ngan, 'Internet and the Law: Enforceability of browse-wrap terms and conditions' 4 April 2013 <http://www.simpsongrierson.com/ezine-enforceability-of-browse-wrap/> (page accessed 26 February 2014).

[168] Ronald J Mann & Travis Siebeneicher, 'Just One Click: The Reality of Online Internet Retailing ' U of Texas Law, Law and Econ Research Paper No. 104 40 < http://ssrn.com/abstract=988788> (page accessed 6 April 2014). The writers explored the use of a range of online contracting mechanisms relating to the purchase of goods as well as the use of websites from which goods were bought. The low percentage figure is therefore particularly surprising.

[169] ibid 21.

[170] ibid 4. The study by Lan Xia and D Suharshan concerning the effect of 'interruptions' on the purchasing behaviour of online consumers is especially relevant though it does not address the effect of the interruption occasioned by the presentation of a click wrap or click through agreement in the course of the browsing or purchasing process. Lan Xia and D Suharshan, 'Effects of Interruptions on Consumer Online Decision Processes' (2002) 12 J Consumer Psych 265.

A sense of the importance placed by online retailers on traffic and the costs they are prepared to incur to drive traffic to their websites is provided by *Interflora Inc v Marks and Spencer plc*.[171] The litigation concerned the policy, adopted by Marks and Spencer plc in 2008, of bidding on keyword advertising terms incorporating competitor brand names, including the name 'interflora'. They introduced this practice after Google changed their policy to allow bidding on keywords corresponding to trade marks. The effect of successful bids for such terms was to ensure that Marks and Spencer's adverts would be prominently displayed in the list of results appearing in response to a user carrying out an online search for those terms and so drive traffic to their website. The judgment narrates that in response to notification of the change in Google's policy a manager in Marks and Spencer's online marketing department emailed 'we are reading this thinking how we can nick traffic from the opposition cheaply, admit it. (Interflora, Interflora!).'[172] Interflora raised proceedings for trade mark infringement. The judgment notes that 'Visits to the main flowers page on the M & S website have risen from 1,862,057 in 2006 to 2,757,474 in 2012.'[173] What the judgment reveals about the costs Interflora were prepared to spend in response to Marks and Spencer's policy is equally striking. The judgment records that

> Since May 2008 IBU has paid £1,597,619.07 to Google in bidding costs for the term "interflora" alone so that IBU's website appears in the "golden box" in response to a user search for "interflora".[174]

Traffic is money. It is scarcely conceivable that a retail website would risk a drop in traffic by insisting that users agree click wrap Terms of Use before accessing the website and viewing its contents. The inference which must be drawn from the commercial realities of online retailing is that both website and information are made available for sound commercial reasons which have nothing to do with the user's promises set out in website Terms of Use. On Treitel's orthodox account of the exclusionary rules of consideration, neither the supply of the website nor the information qualifies as consideration. The argument implicates both the provision of the website as a platform and the supply of information in the nature of advertising.

V.3 Do retail websites make the contents of the website freely available elsewhere*?*

A secondary argument is available in relation to the question whether the supply of information may qualify as consideration. As Kaldor suggests, the economic value of information in the nature of advertising depends in part on whether it is freely available elsewhere.[175]If the information available on the retailer's website is available elsewhere, without being made subject to the website's Terms of Use, the supply of the information on the website may have little or no economic value.

In fact snippets of information are available elsewhere, notably through search engines such as Google. Search engines search (or crawl) the websites so as to collect, index and display limited content from the website in search results. The result shown in Figure 6-1 is typical.

[171] [2013] EWHC 1291 (Ch), [2013] ETMR [35].
[172] ibid [118].
[173] ibid [35], [80].
[174] ibid [139].
[175] Kaldor (n 122) 5.

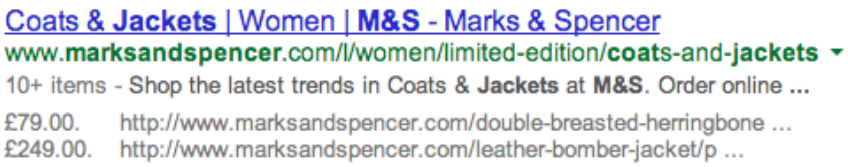

Figure 6-1[176]

Admittedly the information is limited. The consumer cannot make any sensible purchasing decision based on the snippet alone.

Information is also available from the Internet Archive WayBackMachine which enables users to access archived snapshots pages of websites.[177] Figure 6-2 shows how frequently the website at www.marksandspencer.com is archived, most recently on 25 February 2014, the day before I accessed the pages of the WayBackMachine.

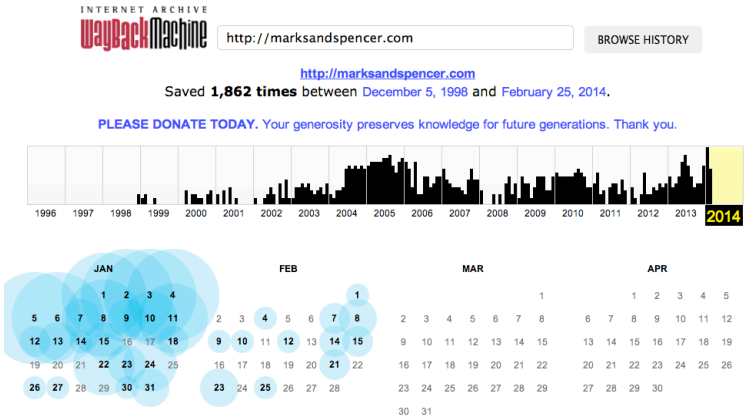

Figure 6-2[178]

The pages archived on 25 February 2014 includes the page in Figure 6-3, but only a few of the website pages are archived and no pricing information is available. Pricing information is available in some of the pages archived on 21 February 2014.

Figure 6-3[179]

[176] Snippet from search results obtained from a search in Google on 26 February 2014 for 'marks and spencer jackets'.
[177] Available at http://archive.org/web/.
[178] Copy of screen shot of webpage at <web.archive.org/web/*/marksandspencer.com> (accessed 26 February 2014).

Of course, no user wants to trawl the pages of the WayBackMachine for information. These sources are not substitutes for the contents of the website. The information, while accurate, is not complete and may not be up-to-date. There is also an argument (though I do not think it is a strong one) that since the web pages displayed by the WayBackMachine include the original links to the originating website's Terms of Use such display is governed by those Terms of Use even though the pages appear on the website of the Internet Archive.

Many retailers provide information about their products and services to affiliates and price comparison websites with a view to increasing sales. For example, Marks and Spencer plc provide data feeds comprising product information to third party websites 'in order to increase distribution and sales'.[180] My research did not reveal the identity of the organisations to which Marks and Spencer plc might supply such data. As eDigitalResearch point out 'The nuances of business models and commercial arrangements are not always visible and known to consumers'.[181] However the independent price comparison website mysupermarket.co.uk offers price comparison information relating to groceries and health and beauty products from many of the main UK retail stores.[182]

The fact that information supplied by retail websites may be available elsewhere, (without being subject to the retailer's Terms of Use) has a bearing on the economic value of the supply of information via the website. It lends support to the argument that in reality the supply of the information is not conditioned on the user's agreement to the Terms of Use.

Finally, within the EU, regulatory requirements make it mandatory for an online retailer to provide information including information as to the main characteristics of the goods and services, and the price of the goods or services.[183] Of course, nothing in the regulations requires that the information should be made available on an open publicly accessible website, but the information must be set out on the website, regardless of how it is configured. In effect, for retailers, the decision to operate an ecommerce website is a decision to place information relating to goods and services on the website so that it is accessible to all.

V.4 The analysis from the exclusionary rules of the doctrine of consideration: a summary

Even if Kaldor is correct, such that advertising has economic value, the choice by retail websites to use browse wrap Terms of Use suggests that both the website and its information contents would be supplied regardless of the user's promise. In other words, the commercial realities concerning

---

[179] Copy of screen shot of webpage at <web.archive.org/web/20140225042818/http://www.marksandspencer.com/- Welcome to Marks & Spencer> (accessed 26 February 2014).

[180] New Media Knowledge, 'Marks and Spencer expands e-commerce practice with impressive results' (11 January 2012) <https://www.nmk.co.uk/article/2012/1/11/marks-and-spencer-expands-e-commerce-practice-with-impressive-results> (accessed 17 March 2014).

[181] eDigitalResearch, 'Comparing comparison sites Price comparison website mystery shopping report for Consumer Focus' <http://www.consumerfocus.org.uk/files/2013/01/Comparing-comparison-sites.pdf> (accessed 17 March 2014).

[182] This includes Tesco, Morrisons, ASDA, Sainsbury's, Boots, Superdrug, Waitrose, Ocado, Aldi.

[183] See in particular the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134 implementing many of the provisions of Council Directive 2011/83/EU of 25 October 2011 on consumer rights [2011] OJ L304/64.

the need to attract traffic to websites, coupled with uncertainty under English law as to the enforceability of browse wrap contracts, indicate that in the case of retail websites, neither the supply of the website (whether as a sales channel or platform for sales or otherwise) nor its contents will qualify as consideration, these being acts or forbearances that would be carried out irrespective of the user's promise. The fact that some retail websites make information on their website available through other channels tends to support this conclusion.

VII. Conclusion

The analysis carried out in this Chapter allows certain conclusions to be drawn as to whether the benefit conferred by an open publicly accessible website on a user may qualify as consideration.

First, the analysis demonstrates that it is impossible to infer from the mere designation of the benefit as a service that the benefit qualifies as consideration.

However, the analysis also suggests that it is possible to identify certain activities in the nature of services that invariably possess no economic value and so cannot qualify as consideration. These are activities that the CJEU describes as purely ancillary, and not ends in themselves. Services in the nature of 'selling arrangements' fall into this category.

The Ecommerce Directive suggests three categories of service that may be provided by a website, namely, a service consisting in selling goods or services, a service giving rise to contracting, and a service consisting in the supply of information.

The insights drawn from the case law of the CJEU provide a means of assessing the economic significance of the categories of service suggested by the Ecommerce Directive. The assessment suggests that neither a service consisting in selling goods or services, nor (where the service consists in the provision of advertising or a platform for sales) a service giving rise to contracting, nor the supply by the website of information in the nature of advertising will qualify as consideration, all such services being purely ancillary and without independent economic value. On the other hand the analysis suggests that supply of information other than advertising may possess economic significance and so in principle qualify as consideration.

These conclusions have particular significance for retail websites since advertising accounts for much of the information supplied by such websites. Moreover, in the case of retail websites, a separate analysis by reference to the exclusionary rules of the doctrine of consideration appears to support the view that retail websites will struggle to demonstrate that the supply of the website or its contents may qualify as consideration. It suggests, in other words, that the mere supply of the website and its contents will not suffice to clothe browse wrap Terms of Use with contractual effect. In the absence of a right to control access to the information, in the case of retail websites, receipt of and looking at the contents of a retail website would seem to be within the public domain.

In the introduction to this Chapter I alerted to the fact that an analysis that focuses only on the nature of the benefit rather than the context of its exchange is necessarily limited. It drives an analysis of the benefit 'conceived statically' and is concerned only with questions about the presence or absence of consideration, rather than assent. It cannot provide any means for determining whether the consideration should be regarded as 'past consideration' since the dynamic aspects of the exchange are omitted from account. In the following Chapter, Chapter VII,

I explore the CJEU's decision in *Svensson*.[184] *Svensson* offers new insights as to the nature of such service as may be provided by the website to the user and the dynamic aspects of its supply.

[184] Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014)

Chapter VII

Svensson

I. Introduction

I.1 Overview

The analysis carried out in this Chapter resumes consideration of the contractual significance of the benefit conferred by the website on the user, where the benefit is conceptualised as a service. This Chapter takes account of the dynamics of the exchange and explores the content of the service by reference to the process by which information on websites is delivered to the user.

Analysis of the technical processes by which websites supply webpages to users might suggest three possible interpretations of the nature of the service, if any, provided by website to user. The service might consist solely in the issue of a response (including the content of the webpage) by the web server to the user. It might consist in the various technical steps that precede the issue of the response as well as the response itself. Alternatively it might consist in all the preliminaries necessary for the issue of the response, including the creation of the webpages, the hosting of the website and the connection of the server to the Internet as well as the response itself. On all of these interpretations, the last step, the issue of the response by the server, would seem to be crucial. On the face of it, without this step, there is no supply of information to the user and so no service.

Ordinarily, in order to test these assumptions according to an interpretative analysis, one might look to contract law. A contract law analysis as to the enforceability of browse wrap contracts might explore the nature of the benefit provided, and if a services analysis commended itself to the Court, it might consider the scope of the service. Since however the enforceability of browse wrap contracts has not been tested in the English Courts one must look elsewhere.

Perhaps surprisingly, it is in the field of copyright that one finds a rich seam of jurisprudence that serves to illuminate the content of the service provided by the website to the user. Three aspects of the copyright regime coalesce to produce this result.

First, the copyright regime incorporates a 'making available' right. The right has relevance for website content delivered interactively by the request/response process. In the context of the copyright regime the term 'making available' is not a term of art. Questions about when the right is infringed may reveal which acts serve to make content available on websites. The existence of the right hints that such acts may possess economic significance and qualify as a service.

Second, and most importantly, the ruling of the CJEU in *Svensson* provides an authoritative ruling that the act of making content available is complete at the point where content is uploaded to the internet; transmission of content to the user is not required. [1]

[1] C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014). The ruling is authoritative not in the manner of binding precedent but because, first, the rulings of the CJEU effectively augment the

Finally, and having regard to the rationale for copyright protection, the case law of the Court of Justice of the European Union ('CJEU') explicitly addresses the economic significance of the activity of making content available. It maintains that it is the act of making content available, rather than access to the content that has economic significance.

Together, these aspects of the copyright regime offer pointers to the conceptualisation of the service provided by the website to the user. Most importantly the ruling in *Svensson* draws a line in the sand as to the point at which content is made available and therefore provides a baseline from which to consider the economic significance of website activities (specifically the response process) that occur after that point.

In this Chapter I argue that the ruling of the Court of Justice of the European Union ('CJEU') in *Svensson* indirectly offers support for the view that the website's response to the user's request for content forms no part of the service provided by the website. On this construction the service, if any, is delivered as soon as the webpage is 'made available' for viewing whether by way of a hyperlink or otherwise. Once available, all users need do is 'avail themselves' of the resource.[2] The server function, on this approach, is incidental.

This analysis paves the way for the development, in Chapter VIII, of the two-stage model as a means of conceptualising the benefits conferred by the website on the user. The first stage consists in the service of making content available; the second the benefit that consists in permission to use information that has been made available.

I.2 Structure

In the following Sections I endeavour to deconstruct *Svensson* and demonstrate how the ruling offers support for an account of the service offered by an open publicly accessible website as consisting in the content being made available, not in its being supplied.

At Section II I provide an account of the Court's ruling, placing it in the context of the relevant provisions of the Information Society Directive and conflicting accounts of the significance of the 'making available right'.[3] I argue that the Court was right in *Svensson* to confirm that the making available right has content and meaning which extends to activities short of transmission.

---

language of the Directives to which they relate and second, because national Courts are obliged to interpret national law in a manner that is consistent with EU law as clarified by the rulings. Case C-441/14 *Dansk Industri (DI) v Rasmussen's Estate*, Opinion of AG Bot (25 November 2015); Robert Schütze, *European Constitutional Law* (2nd edn, CUP 2016) 389, 390, 399. While the English Courts have not yet had occasion to directly apply *Svensson* they have signaled that they treat the ruling as authoritative. See *1967 Ltd v British Sky Broadcasting Ltd* [2014] EWHC 3444 (Ch), [2015] ECC 3 [16]; *Paramount Home Entertainment International Limited v British Sky Broadcasting Limited* [2014] EWHC 937 (Ch) [32].

[2] This expression (which appears in the judgment in *Svensson*) while rather old-fashioned, captures something of the essence of 'making available'. *Svensson* (n 1) para 19.

[3] Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (the 'Information Society Directive').

In Section III I endeavour to extract the meaning of 'making available' from *Svensson* and other case law (from other jurisdictions and in different contexts) with a view to determining which acts, in which circumstances, qualify as 'making available'.

I explore this question from a different angle in Section IV by asking whether 'making available' consists of a single act or a series of acts. This analysis is inconclusive as to whether the transmission of website content on access to the website by a user forms part of the process/service of making available. Consequently I proceed in Sections V to IX to explore this issue further by considering first (in Section V) what the case law of the CJEU has to say about the correlation between broadcasting, making available and the nature of broadcast services; second (in Section VI) by considering how websites differ from traditional broadcast services, noting that interactivity differentiates websites and broadcasting; third (in Section VII) by exploring how the definition of 'information society services' under the Ecommerce Directive captures the requirement for interactivity so as to separate such services from broadcasting and inquiring whether classification of a website as an information society service impacts on the conceptualisation of the service (as including or excluding transmission); fourth, in Section VIII by considering the technical aspects of the website's role in transmission, specifically its role in the request/response process; and finally at Section IX by exploring whether the website's response to a user's request for content (whether or not labelled as transmission) forms part of the service provided by the website to the user.

I conclude (Section X) that the service provided by an open, publicly accessible website must be regarded as consisting in making content available, that the response by the website to the user's request is outside the scope of the service and that the service is therefore complete before the user accesses any content on the website whether by clicking on a hyperlink or otherwise.

II. *Svensson*

II.1 The ruling

The ruling in *Svensson* provides this account of the dispute between the parties in the main proceedings before the Swedish national court

> The applicants in the main proceedings, all journalists, wrote press articles that were published in the Göteborgs-Posten newspaper and on the Göteborgs-Posten website. Retriever Sverige operates a website that provides its clients, according to their needs, with lists of clickable Internet links to articles published by other websites. It is common ground between the parties that those articles were freely accessible on the Göteborgs-Posten newspaper site ...
>
> The applicants in the main proceedings brought an action against Retriever Sverige … in order to obtain compensation on the ground that that company had made use, without their authorisation, of certain articles by them, by making them available to its clients.[4]

[4] *Svensson* (n 1) paras 8 and 9.

The applicants relied on the Swedish legislation implementing Article 3(1) of the Directive. Article 3(1) incorporates the making available right as an aspect of the communication to the public right and is in these terms

> Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The application was initially heard in Stockholm District Court. That Court refused the application and the matter was appealed to the Svea Court of Appeal which referred various questions to the CJEU including this question

> If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive [2001/29]?[5]

The reference to the CJEU in *Svensson* rightly attracted a great deal of attention.[6] The Court had not previously ruled on the application of the 'communication to the public' right to the practice of hyperlinking. As the European Copyright Society remarked 'The importance of this particular reference should [have been] … evident to the Court'.[7] Despite the significance of the reference the Court disposed of the issue summarily in these terms

> In the circumstances of this case, it must be observed that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works.
>
> As is apparent from Article 3(1) of Directive 2001/29, for there to be an 'act of communication', it is sufficient, in particular, *that a work is made available to a public in such a way that the persons forming that public may access it*, irrespective of whether they avail themselves of that opportunity …
>
> *It follows that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of that provision.*[8]

[5] *Svensson* (n 1) para 13.
[6] The European Copyright Society issued an Opinion in response to the reference in *Svensson*. European Copyright Society, 'Opinion on The Reference to the CJEU in Case C- 466/12 *Svensson*' (15 February 2013) <http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf> (accessed 21 June 2014). The Executive Committee of the Association Littéraire et Artistique Internationale also issued a Report and Opinion in relation to copyright and hyperlinking on 16 September 2013. ALAI, 'Report and Opinion on the Making Available and Communication to the Public in the Internet Environment—Focus on Linking Techniques on the Internet' (16 September 2013) <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf> (accessed 21 June 2014).
[7] The European Copyright Society (n 6) para 2.
[8] *Svensson* (n 1) paras 18-20 (italics added).

One could be forgiven for supposing that the logic and conclusions set out in these few paragraphs are obvious and non-contentious: the ruling contains no hint of or sop to the debate amongst academics, legal commentators and at the level of the national courts about the scope and limits of the 'making available' provisions.

II. 2 The contested character of the 'making available' provisions of Article 3(1)

II.2.1 Two issues

Two aspects of Article 3(1) invite debate. First, the structure and language of Article 3(1) creates ambiguity as to the relationship between the 'communication to the public' right and the provisions concerning 'making available'. Second, the Directive contains no definition or guidance as to the meaning of 'making available'.[9]

II. 2.2 The relationship between the 'communication to the public' right and the 'making available' right

Many academics have argued that the 'making available' right is merely a species or subset of the 'communication to the public' right.[10] On certain variants of this argument, the key question is whether there is a communication: 'making available' (whatever it may mean) is only relevant where it meets the criteria for a 'communication'.[11] Thus the 'making available' provisions in the Information Society Directive are regarded as wholly subordinate to the 'communication to the public' right. This approach underpins the Opinion published by European Copyright Society as a response to the reference in *Svensson*.[12]

Others, while accepting that the 'making available' right falls within the 'umbrella' provisions of the 'communication to the public' right suggest that 'communication' should be interpreted broadly: on this account the express 'making available' provisions (in the WCT and the Information Society Directive) were needed only for clarity and to silence those who doubted that the communication to the public right already embodied a 'making available' right.[13]

---

[9] The absence of a definition is noted in a study commissioned by the European Commission. Jean-Paul Triaille and others, *Study on the Application of Directive 2001* (European Commission 2013) 25 <http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf> (accessed 21 June 2014)

[10] For example Triaille and others state that 'At least as far as the authors' copyright is concerned, the making available right is protected as a species of the right of communication to the public, not as a sui generis right.' Triaille (n 9) 26. Bechtold describes the right as 'a special case of the general right of communication to the public'. Bechtold S, 'Information Society Dir, art 3' in Thomas Dreier and P B Hugenholtz, *Concise European Copyright Law* (Kluwer Law International) 2006. See also Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996* (Tottel Pub 2007) 108; Paul Goldstein, Bernt Hugenholtz, *International Copyright* (3rd edn, OUP 2013) 336.

[11] 'The fact that the making available right is categorised under the legal umbrella of the communication to the public right logically entails that the (inherent) limitations to the right of communication to the public also apply to the making available right.' Triaille (n 9) 27.

[12] The argument is not made explicit since the Opinion resolutely avoids discussion of the purpose of the inclusion of the making available provisions in Article 3(1).

[13] The explanatory notes to the Basic Proposal for the Treaty indicate that on one view the making available provisions (repeated more or less verbatim in Article 3(1) of the Directive) were inserted merely for clarification, commenting 'However, the features that have been confirmed in the second half, the "making available" part of the provision, could fall within a fair interpretation of the right of communication in the existing provisions of the Berne Convention. Nevertheless, other interpretations may also exist concerning

Provided, either, there is consensus that 'communication' should be broadly interpreted, or that the 'making available' provisions have content and meaning which expand or enhance the meaning of 'communication', a divergence of views as to the relationship between the 'communication to the public' right and the 'making available' right would not much matter. In either case the provisions of Article 3(1) of the Directive would have broad scope. Where, on the other hand, the argument that the 'making available' right is wholly subordinate to the 'communication to the public' right is coupled with a narrow interpretation of 'communication' the two sets of views cannot be reconciled: such an argument implies a narrow scope for the provisions of Article 3(1).

In fact there is no consensus among academics as to the meaning of 'communication' or 'making available' so the issue about the relationship between the 'communication to the public' right and the 'making available' right is a live one. For present purposes, it is not necessary to resolve whether the 'communication to the public' right encapsulates the making available right or whether the making available right has been grafted on to the communication to the public right but it is important to demonstrate, in line with *Svensson* and contra the European Copyright Society that Article 3(1) has to be broadly interpreted so as to cater for a 'making available' right.

II.3 Different interpretations of Article 3(1): the European Copyright Society versus *Svensson*

The European Copyright Society argues for a narrow interpretation of Article 3(1). One of the main planks of its argument is that 'communication' implies transmission and that the scope of Article 3(1) does not extend to acts that are not also transmissions.[14] In *Svensson*, had the Court accepted (a) that the 'making available' provisions had no independent substance, being merely a subset of 'communication to the public' and (b) that communication to the public (read in the light of the making available provisions) implies transmission by the person said to engage in the communication there could be no question of the provision of hyperlinks infringing Article 3(1). A hyperlink is a referencing aid,[15] a pointer[16] or signpost and a set of instructions to a user's browser[17] but it does not (in the ordinary sense of the words) communicate, transmit or carry content.[18]

---

obligations under the Convention. The objective of the proposal is to harmonize the obligations and to avoid any discrepancies that may be caused by different interpretations.' WIPO, 'Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference' (the 'Basic Proposal for the Treaty') CRNR/DC4 (30 August 1996) para 10.13 <http://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_4.pdf> (accessed 22 June 2014).

[14] The European Copyright Society (n 6) para 15. Bechtold, on the contrary states that for the making available right to apply, 'The mere possibility of the public accessing the work suffices.' Bechtold (n 10) 361.

[15] Aplin states that a link refers users to where a work may be found and provides 'a form of citation'. Tanya Aplin, *Copyright in the Digital Society* (Hart Publishing 2005) 151.

[16] *British Telecommunications v Prodigy Communs* 217 F Supp 2d 399, 406. ('A hyperlink points to the URL for a Web page.')

[17] Ben Allgrove and Paul Ganley, 'Search engines, data aggregators and UK copyright law: a proposal' (2007) 29(6) EIPR 227 ('a hyperlink is simply a set of directions for your web browser').

[18] The question as to whether a hyperlink involves communication was addressed in the US case *Perfect 10 Inc. v. Amazon.com Inc.* where the court said this

> Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML

Svensson takes a different approach: 'communication' has to be understood broadly to include all those circumstances where a work is merely made available, and no transmission takes place.[19] Where the European Copyright Society argues that a communication or transmission is the sine qua non for Article 3(1) to be engaged,[20] the Court insists that

> it is sufficient … that a work is made available to a public in such a way that the persons forming that public may access it.[21]

Assuming an ordinary language interpretation of 'making available' it appears self-evident that a hyperlink does make content available by 'afford[ing] … users direct access' to such content.[22]

My argument as to the scope of the service provided by an open publicly accessible website depends on a conceptualisation of the service which aligns with the interpretation adopted by the Court. The European Copyright Society present a carefully constructed argument but the approach adopted in *Svensson* more faithfully reflects the legislative purpose of the provisions.[23]

II.4 In support of the approach adopted by *Svensson*

II.4.1 Three arguments

Three arguments are presented below in support of the approach adopted in *Svensson*. The arguments are a direct response to and draw on the material relied upon by the European Copyright Society in support of its argument. The first relies on guidance offered by the travaux préparatoires relating to the Directive and the explanatory notes to the Basic Proposal for the Treaty. The second relies on a straightforward analysis of the language of Article 3(1). The third considers the case law of the CJEU predating *Svensson*.

II.4.2 An analysis from the travaux préparatoires and the explanatory notes to the Basic Proposal for the Treaty

---

> instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen.

Perfect 10 Inc. v. Amazon.com Inc. 487 F3d 701, No 06-55405 (9th Cir May 16, 2007) 5771 [7].

[19] Headdon makes the point that the Court in *Svensson* 'implicitly rejected the views expressed by The European Copyright Society that 'communication' required a 'transmission' of the underlying work and that a hyperlink could not be a communication 'of a work'. Toby Headdon, 'An epilogue to Svensson: the same old new public and the worms that didn't turn' [2014] Journal of Intellectual Property Law & Practice 4.

[20] The European Copyright Society (n 6) para 15.

[21] *Svensson* (n 1) para 19.

[22] *Svensson* (n 1) para 18.

[23] For the history of the introduction of Article 8 of the WCT on which Article 3(1) of the Information Society Directive is modelled see Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (OUP 2002).

The European Copyright Society makes much of the travaux préparatoires relating to the Directive in support of its argument.[24] The Society also relies on the explanatory notes that accompanied the Basic Proposal for the Treaty:[25] the wording of Article 3(1) of the Directive was closely modelled on Article 8 of the WCT.[26] Yet, with respect to the authors of the Opinion, they have been selective in the passages they quote. Those passages relate to the 'communication to the public right' and strongly suggest that 'communication' entails transmission. However the authors studiously avoid reference to those passages in the travaux préparatoires and the explanatory notes to the Basic Proposal for the Treaty that expressly refer to the 'making available' provisions. This approach can be explained on the basis that, in the view of the European Copyright Society, the 'making available' provisions are wholly subordinate to the 'communication to the public' provisions. Nevertheless the passages that deal expressly with the 'making available' provisions (while not entirely free from ambiguity) suggest that the ordinary meaning of 'communication' is, for the purposes of the Directive, enhanced to accommodate all acts of 'making available'.

For example paragraph 10.10 of the explanatory notes to Basic Proposal for the Treaty has this to say about the 'making available' provisions

> 10.10 The second part of Article 10 explicitly states that communication to the public includes the making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. *The relevant act is the making available of the work by providing access to it.* What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals.[27]

The Explanatory Memorandum to the Initial Proposal for the Directive is perhaps even clearer, noting

> As was stressed during the WIPO Diplomatic Conference, the critical act is the 'making available of the work to the public', thus the offering of the work on a publicly accessible site, which precedes the stage of its actual 'on-demand transmission'.[28]

This passage makes it plain that the 'making available' provisions are intended to address acts that precede and so cannot logically include transmission.[29] This creates problems for the argument that acts of making available are a mere subset of and subordinate to communications while at the same time maintaining that communication invariably requires a transmission. It may

[24] The European Copyright Society (n 6) para 15. Headdon observes 'While compelling, however, the semantic arguments [presented by the European Copyright Society] are not entirely bullet-proof.' Headdon (n 19) 2.
[25] The Basic Proposal for the Treaty (n 13).
[26] The European Copyright Society (n 6) para 21.
[27] The Basic Proposal for the Treaty (n 13).
[28] Commission, 'Explanatory Memorandum to Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society of 10 December 1997' COM(1997) 0628 final, OJ C108/6, 7 April 1998 (the 'Explanatory Memorandum to the Initial Proposal') 26.
[29] Michel M Walter and Silke von Lewinski, *European Copyright Law* (OUP 2010) para 11.0.38 ('The Initial Proposal determined the online offering as the relevant act of use; accordingly, the legal protection was not restricted to the actual transmission of the work or other protected subject matter.')

be that the drafters of the Basic Proposal to the Treaty anticipated that when a work which was made available was accessed, there would *then* be a transmission and it could be that what was intended was that acts of 'making available' would only be treated as communications if and to the extent that accessing the works made available triggered a transmission.[30] This gloss might serve to reconcile partly the statements in the explanatory notes to Basic Proposal for the Treaty that 'communication always involves transmission' with the plain wording in the Explanatory Memorandum to the Initial Proposal that 'making available' precedes transmission but it cannot change the fact that even on this account 'making available' is separate and distinct from communication. Moreover this gloss does not imply any requirement that the entity that 'makes available' and the entity that transmits content once it has been accessed should be one and the same.[31]

Far from supporting the notion that the 'making available' provisions of Article 3(1) have no relevance or bite, the travaux préparatoires, read in conjunction with the explanatory notes forming part of the Basic Proposal for the Treaty, confirm that the making available provisions are intended to secure a broad interpretation of 'communication' to include acts of making available.

II.4.3 A linguistic analysis

Consideration of the wording of Article 3(1) leads to the same conclusion. It is possible to maintain that the structure and grammar of Article 3(1) indicates that the exclusive right conferred only comes into play in relation to communications and that acts of 'making available' are relevant only to the extent that they are included within the scope of communications. However, if that were so the 'making available' provisions in Article 3(1) would seem to be otiose.[32] More to the point, on an ordinary construction the term 'making available' carries a

[30] The EC delegation to the joint sessions of the Committees which preceded the Diplomatic Conference in relation to the WCT explained that under the EC proposal (which was adopted with minor modifications) 'for the completion of the act of communication it would not be required that an actual transmission takes place; for this, the mere making available of works to the public … for subsequent transmission would be sufficient.' Ficsor (n 23) para 4.140 quoting Document BCP/CE/VII/4-INR/CE/VI/4,4. The Explanatory Memorandum to the Initial Proposal (for the Directive) also offers some support for this gloss. In relation to Article 3(1) it states that 'One of the main objectives of the provision [that is the 'making available' provisions in the second part of Article 3(1)] is to make it clear that this right covers 'on-demand' interactive acts of transmission.' Explanatory Memorandum to the Initial Proposal Explanatory Memorandum to the Initial Proposal (n 28) 25. The possibility that 'communication' might (in the absence of express making available provisions) include making a work available so that the public might receive 'emissions' was acknowledged by the French Cour d'appel in *Cable News Network v Novotel* 20 September 1995 (extensive extracts from the judgment are set out in WIPO, Professeur Pierre Sirinelli, *Notions Fondamentales Du Droit D'auteur: Recueil de jurisprudence* (WIPO, July 2002) <http://www.wipo.int/export/sites/www/freepublications/en/copyright/844/wipo_pub_844.pdf> (accessed 1 July 2014)).

[31] Ficsor provides a detailed extract of the summary that he prepared and presented at the Naples World Forum in relation to the rights which 'should be applied for transmissions in digital networks'. The summary expressed the view that the 'concept of communication to the public extends not only to the acts that are carried out by the communicators, the transmitters themselves … but also to the acts which consist of making the work … only accessible to the public …'. Though Ficsor does not say so expressly, this summary at the very least suggests the possibility that the person effecting the transmission and the person making accessible (available) need not be one and the same. Ficsor (n 23) para 4.86.

[32] The explanatory notes to the Basic Proposal for the Treaty indicate that on one view the making available provisions (repeated more or less verbatim in Article 3(1) of the Directive) were inserted merely for clarification, commenting 'However, the features that have been confirmed in the second half, the "making available" part of the provision, could fall within a fair interpretation of the right of communication in the

much wider range of meanings than is implied by 'communication'. On the face of it, the inclusion of the 'making available' wording signals an intention to ensure a broad interpretation of the communication to the public right so as to encompass a making available right.

II.4.4 An analysis from the case law of the CJEU

The CJEU had already hinted in *SGAE* that the 'making available' provisions, though related to the provisions concerning the communication to the public right, were not wholly subordinate to those provisions.[33] Both the Advocate General's Opinion and the judgment in *SGAE* contain this statement

> It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it.[34]

The ruling in *Svensson* plainly has this statement from *SGAE* in mind when it notes

> As is apparent from Article 3(1) of Directive 2001/29, for there to be an 'act of communication', it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it …[35]

The European Copyright Society makes no comment on the passage from *SGAE* quoted above as to the significance of the 'making available' provisions. However the Society accepts that the case law of the CJEU had already indicated that an intervention, short of transmission, might be sufficient to qualify as communication.[36] It notes that

> In several … cases the Court clarified that communication to the public requires an act of intervention … This 'intervening... to give access' might be interpreted as broader than 'transmitting' the work and thus to be capable of encompassing the provision of hyperlinks.[37]

Certainly an act of communication requires an intervention but this requirement is little more than a requirement for a positive deliberate act. As to intervening to give access, *SGAE*, the first of the cases to use this terminology in relation to the communication to the public right, has this to say

> The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the

existing provisions of the Berne Convention. Nevertheless, other interpretations may also exist concerning obligations under the Convention. The objective of the proposal is to harmonize the obligations and to avoid any discrepancies that may be caused by different interpretations.' Basic Proposal for the Treaty (n 13) para 10.13. See also Walter and von Lewinski (n 29) para 11.3.6.

[33] Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519 ('*SGAE*').

[34] *SGAE* (n 33) para 43; *SGAE* (n 33), Opinion of AG Sharpston para 43.

[35] *Svensson* (n 1), para 19.

[36] European Copyright Society (n 6) para 25.

[37] ibid.

> catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers.[38]

It is not at all clear from this passage that the court intends, *by means of the notion of intervening to provide access*, to broaden the scope of 'communication' beyond 'transmission'. Of the cases mentioned by the European Copyright Society only one, *Airfield*, confirms in terms that an intervention short of transmission might entail communication to the public and give rise to infringement.[39]

Airfield related to arrangements between a satellite package provider (Airfield), its technical services company (Canal Digitaal, a company within the same group as Airfield) and broadcasting organisations.[40] Airfield provided a service to its subscribers, enabling them to receive access to television programmes broadcast by satellite. The arrangements between Airfield and the broadcast organisations fell into two categories, involving either direct or indirect transmission of the broadcast works by the broadcaster. So far as the first category is concerned the court notes that

> The intervention of Airfield and Canal Digitaal is confined to supply of the access keys to the broadcasting organisations concerned, so that the correct codes are applied and Airfield's subscribers are thereby enabled to decode the programmes subsequently by using the decoder card.[41]

In other words Airfield and Canal Digitaal are not involved in transmission. On the other hand in the case of indirect transmission

> [the] intervention [by Airfield and Canal Digitaal] consists, essentially, in receiving those signals from the broadcasting organisations, possibly decoding them, rescrambling them and beaming them up to the satellite concerned.

Although such involvement suggests a role in transmission the Court is content that

> a communication to the public by satellite, such as that at issue in the main proceedings, is triggered by the broadcasting organisation under whose control and responsibility the programme-carrying signals are introduced into the chain of communication leading to the satellite.[42]

Nevertheless the Court is clear that the intervention of Airfield and Canal Digitaal, in the context of *both* direct and indirect transmission, entails a communication to the public on account of the fact that the intervention

---

[38] *SGAE* (n 33) para 42.
[39] Joined Cases C-431/09 and C-432/09 *Airfield NV, Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Airfield NV v Agicoa Belgium BVBA* [2011] ECR I-9363.
[40] See IPKat, 'Airfield v Sabam: just when you thought the Kats forgot ... ' (Thursday, 17 November 2011) <http://ipkitten.blogspot.co.uk/2011/11/airfield-v-sabam-just-when-you-thought.html> (accessed 25 June 2014).
[41] *Airfield* (n 39) para 26.
[42] *Airfield* (n 39) para 75.

> *render[s] the protected subject-matter accessible* to a public wider than that targeted by the broadcasting organisation concerned, that is to say, a public which was not taken into account by the authors of those works when they authorised the use of the latter by the broadcasting organisation.[43]

In order to reach this conclusion the court relies heavily on *SGAE* commenting that

> … it follows from the Court's case-law that … authorisation must be obtained in particular by a person who triggers such a communication or who intervenes when it is carried out, so that, by means of that communication, he makes the protected works accessible to a new public, that is to say, a public which was not taken into account by the authors of the protected works within the framework of an authorisation given to another person ...[44]

In effect the court in *Airfield* elects to interpret the 'communication to the public' provisions of the Satellite Broadcasting and Cable Retransmission Directive[45] (which contains no express making available provisions) as impliedly extending so as to incorporate a making available right.[46]

While there may be some force in the objection that the meaning of 'communication' should not be extended by the notion of 'intervening … to give access' when that language has not found its way into any of the Directives providing for a communication to the public right,[47] the need for consistency as to the interpretation of 'communication to the public', coupled with the judgment in *SGAE*, made it inevitable that 'communication' should be broadened to include a 'making available' right even in the absence of express provisions to that effect.[48]

Nevertheless the European Copyright Society insists that the extension of the meaning of 'communication' in this fashion is misconceived. It comments

> … 'intervening... to give access' might be interpreted as broader than 'transmitting' the work and thus to be capable of encompassing the provision of hyperlinks. In our view,

[43] *Airfield* (n 39) para 76 (italics added).
[44] *Airfield* (n 39) para 72.
[45] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248.
[46] Jane Ginsburg notes that similarly 'the "re-utilization" right set out in the 1996 Database Directive (Directive 96/9/EC, OJ 1996 L 77, p. 20, art. 7), [which contains no express making available provisions] … has been understood to constitute a "making available" right for non-original databases.' Jane C Ginsburg, 'News From the EU: Where Does the Act of 'Making Available' Occur?' (October 29, 2012) <http://www.mediainstitute.org/IPI/2012/102912.php> (accessed 1 July 2014).
[47] The preparedness of the CJEU to contemplate extending the operation of the communication of the public right to interventions short of transmission in the context of EU instruments which (unlike the Information Society Directive) contain no 'making available' provisions, indicates that the CJEU favours a broad interpretation of the 'communication to the public' right to encompass a making available right (even in the absence of express making available provisions).
[48] In *Airfield* the court notes '… it should be borne in mind that Directive 93/83 is not the only European Union instrument in the field of intellectual property and that, in view of the requirements deriving from the unity and coherence of the legal order of the European Union, the terms used by that directive must be interpreted in the light of the rules and principles established by other directives relating to intellectual property, such as, in particular, Directive 2001/29…' *Airfield* (n 39) 44.

that would be a logical mistake, converting a description of one of the characteristics of a 'communication' into a redefinition of 'communication'.[49]

On the contrary the mistake is to suppose that the purpose and import of the making available provisions set out in Article 3(1) of the Information Society Directive is merely to act as a descriptor for the characteristic *outcome* of a communication, namely access: their purpose is to make separate provision in relation to the *process or act* of making available.[50]

II.5 *Svensson*: a summary

Svensson, in line with *SGAE*, and contrary to the views of the European Copyright Society, confirms that the making available right has content and meaning which augments the scope of the communication to the public right and relates to the provision of access to content. Beyond that the *Svensson* ruling does little to illuminate the scope of the making available right. Such little additional clarity as it provides must be inferred from the ruling.

Section III. 'Making available': determining which acts, in which circumstances qualify as 'making available'

III.1 *Svensson* and making available

Svensson clarifies that a hyperlink makes content available since it 'affords … direct access' to that content.[51] It echoes the explanatory notes that accompanied the Basic Proposal for the Treaty to the effect that 'the relevant act is the making available of the work by providing access to it'.[52] The test as to whether a work has been made available is whether it may be accessed. This approach is in line with the approach adopted in the *Philips* case as to whether information has been made available.[53] According to *Philips* information is available when a person has 'direct and unambiguous access' to it.[54]

Commenting on the significance of the 'making available' right in the WCT, Jane Ginsburg says 'It is all about access'.[55] I disagree. The right is all about making available. Every act of making available has access as its *outcome* but not every act of providing access will make available. Moreover 'the provision of access' does not capture the various aspects of the *process* of making available or illuminate which acts encroach on the making available right.[56]

---

[49] European Copyright Society (n 6) para 25.

[50] Steven Tepp, in the context of the US public roundtable discussion on whether the US caters for a making available right puts the point more pithily commenting 'To the extent that commenters are offering the view that making available does not include making available, it seems to tax credulity.' US Copyright Office, 'Public Roundtable on the Right of Making Available' (Monday May 5, 2014) 330 <http://www.copyright.gov/docs/making_available/public-roundtable/transcript.pdf> (accessed 15 September 2015).

[51] *Svensson* (n 1) para 18.

[52] Basic Proposal for the Treaty (n 13) para 10.10.

[53] *PHILIPS/Public availability of documents on the World Wide Web* [2012] EPOR 40 ('*Philips*').

[54] *Philips* (n 53) para 108.

[55] US Copyright Office (n 50) 380.

[56] The working document prepared for the third session of the WIPO Committee of Experts on Model Provisions for Legislation in the Field of Copyright (which considered, inter alia, the debate concerning the 'communication' theory and 'emission' theory of broadcasting) refers to 'the whole process of making available to the public'. Document CE/MPC/III/2, 24-26 (an extract is provided in Ficsor (n 23) para 4.46).

Svensson confirms that the provision of hyperlinks to content entails making the content available. The ruling says nothing about the *process* by which the content is made available.

III.2 The process of making available

One can consider what might be involved in the process of making available by considering the implications of the provision of a hyperlink to publicly accessible content. A hyperlink carries out three key functions. It acts as a signpost to users, informing them where to locate content whose network location (its URL) may otherwise be unknown: it tells users where to look. A hyperlink may serve a referencing or citation function. However a hyperlink is more than a mere reference since the user, simply by clicking on the hyperlink, may be taken *directly* to the work without further ado: it secures immediate accessibility of the location of the work by way of the automatic instruction to the user's browser. Which of these functions (alone or cumulatively) entails 'making available'?

Svensson does not explicitly address this question. The ruling implicitly recognises that the process of making available encompasses activities that extend beyond the provision of access at the point of the network location where the material is stored. A hyperlink does not provide access in this sense. However we must look beyond *Svensson* for guidance as to what aspects of the functionality of a hyperlink make content available.

III.3 'Making available' in the Courts

III.3.1 *Paperboy*

Some consideration was given to the extent to which the functionality of hyperlinks satisfies the criteria for making available in *Paperboy*. In that case (which considerably predates *Svensson*) the German court acknowledged two aspects of the functionality of hyperlinks namely the function of telling users where to look for the work as well as the referencing function. As to the first the Court commented

> Access to the work is only made possible through the hyperlink and therefore the work literally is made available to a user, who does not already know the URL as the precise name of the source of the webpage on the internet.[57]

Despite conceding that by telling users where to look, 'the work literally is made available' by the hyperlink the Court rejected the argument that the provision of a hyperlink to content in which copyright subsists infringed the communication to the public right on the basis that hyperlinks are 'no different to a reference to a print or to a website in the footnote of a publication.'[58] The Court failed to acknowledge the third aspect of the functionality provided by a hyperlink, its ability to secure immediate accessibility of the location of work by way of automatic instruction to the user's browser.

[57] *Paperboy* (Case I ZR 259/00) [2005] ECDR 7, 42.
[58] ibid.

Post-*Svensson*, it is plain that *Paperboy* would now have to be differently decided but it remains unclear which aspect(s) of the functionality of a hyperlink meet(s) the criteria for making available.

III.3.2 *Philips*

Some illumination as to the scope and meaning of the *process* of making available is provided by the decision of the Technical Board of Appeal in *Philips*, a decision concerning a challenge to a granted patent. *Philips* does not relate to the making available right but considered, for the purposes of Article 54(2) of the European Patent Convention 1973, whether documents had been 'made available to the public' with the effect that the information contained in the documents formed part of the prior art to be taken into account when assessing the novelty of the patent.[59]

In *Philips* the documents in question were 'theoretically' accessible on the internet at specified URLs.[60] In assessing whether the fact that the documents could be accessed at the URLs made them available to the public the board relied on analogy, comparing the presence of documents at specified URLs to the presence of works in libraries or archives.[61] The board accepted the argument that a document that was accessible at a URL that was not indexed by the search engines so as to make it discoverable was comparable to 'a non-indexed diploma thesis in a library, which was deemed not to be publicly available'.[62] For *Philips*, knowing where to look is a crucial aspect of availability.

In the library analogy, provided the work is located within the publicly accessible library, the indexing of that work is both *necessary and sufficient* to make that work available. In other words, subject to that proviso, making available consists in providing users of the library with information about where to look for the work.

III.3.3 *Hotaling* and *Diversey*

There has been considerable debate as to whether US copyright law currently makes provision for a 'making available' right. There is some support in US case law (*Hotaling*[63] and *Diversey*[64]) for the argument that the distribution right provided under section 106 (3) of the Copyright Act 1976 implicitly provides protection for authors in respect of the 'making available' of their works. Both cases relate to works deposited in publicly accessible libraries.

---

[59] *Philips* (n 53).
[60] *Philips* (n 53) para 165.
[61] *Philips* (n 53) para 68-72.
[62] *Philips* (n 53) para 83. It is because indexing by the search engines is so important for visibility of websites and content that the CJEU, insisting that the 'right to be forgotten' is already enshrined in the current EU data protection regime, considered that implementation of that right in the context of the internet entails de-indexing of content by the search engines. Case C-131/12 *Google Spain SL, Google In. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (13 May 2014).
[63] *Hotaling v Church of Jesus Christ of Latter-Day Saints* 118 F 3d 199 (4th Cir 1997).
[64] *Diversey v Schmidly* 738 F 3d 1196 (10th Cir 2013).

In *Diversey* the plaintiff complained that copyright in his unpublished Doctor of Philosophy dissertation was infringed by administrators and members of the Board of Regents of the University of New Mexico when the University made a copy of his dissertation available in the Zimmerman Library without authorisation. The University argued that the claim had not been made timeously. In order to assess this argument the Court had to consider at what point the work had been made available to the public (who had access to the library). The Court took the view that the work was not made available when it was deposited in the library but only at the point when it was included in the library catalogue. It notes 'the distinction between the deposit in the library and the library's subsequent distribution of the work', commenting

> the deposit of the dissertation in the library was not tantamount to the distribution of the work. The essence of distribution in the library lending context is the work's availability 'to the borrowing or browsing public.' ... Until the work was available in the catalog system, Diversey had no reason to believe it was available to the borrowing or browsing public.[65]

For present purposes it is irrelevant whether the US distribution right is capable of encompassing a making available right. *Diversey* is significant for our purposes because, like *Philips,* it recognises that making available is not 'all about access'.

III.4 Reconciling *Svensson* with the cases

Diversey suggests both (1) that the act of making available may consist in the provision of information about the whereabouts of a work *provided* that the location is publicly accessible and the work free from access restrictions;[66] and (2) that the test for availability implies more than accessibility of the location of the work and that the work is free of access restrictions: at the very least availability implies the need for users to have information about the location of the work.

Svensson is consistent with an interpretation of 'making available' that is in line with the first of these suggestions. *Svensson* tells us that the provision of a hyperlink to a work makes that work available *provided that the work is 'published and freely accessible'* on the destination website. However *Svensson* does not expressly address whether the hyperlink achieves this simply by acting as a pointer or signpost to the content or by making the content readily accessible by way of automatic instructions to the user's browser.

Although *Diversey*, *Philips* and *Hotaling* suggest that in the library context the provision of information in an index or catalogue is sufficient to make the work available provided that the library is accessible to the public, the fact that the index or catalogue is situated within the library may be an unacknowledged factor in that determination. In other words, a mere reference to a work and its location may not suffice when the index, reference or catalogue is spatially disconnected from the location where the work is situated.[67] More may be needed, in that

[65] ibid.

[66] A conclusion which drew expressions of concern from Eugene DeAnna of the Library of Congress as to the implications for the lawfulness of cataloguing items in library collections. US Copyright Office (n 50) 116, 117.

[67] The making available right provided by Article 3(1) of the Information Society Directive 'is characterized by a distance element.' Walter and von Lewinski (n 29) para 11.3.28. It has no application in the traditional library context.

situation, for the work to be made available. In the case of hyperlinks that 'more' may be provided by the automatic instruction to the user's browser, a process that allows the user to more speedily access the content. Such a requirement addresses the concern, expressed in *Paperboy*, that a mere reference or citation might be regarded as making a work available while according with the ruling in *Svensson*. [68]

Svensson, at best, fails to engage with the second suggestion. The CJEU appears to conclude (1) that the provision of a hyperlink to publicly accessible content on another website invariably makes content available to users of the website where the hyperlink is located and so makes content available to a public; and (2) that a publicly accessible website invariably makes content available to all internet users.

Thus, though the Court in *Svensson* was careful to limit the implications of many of its pronouncements to 'the circumstances of this case'[69] (without specifying the circumstances which it considered relevant) it states without qualification that

> the provision on a site of a clickable link to a protected work published and freely accessible on another site has the effect of making that work available *to users of the first site and that it therefore constitutes a communication to the public*.[70]

Similarly the Court is unequivocal about the scope of the 'circle of recipients' of the work on the website which hosts that content

> The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, *all Internet users could therefore have free access to them*.[71]

It is submitted that both conclusions involve an overly broad interpretation of 'making available'.

III.5 An argument that the conclusions in Svensson as to the circumstances in which works are 'made available' are overly broad

The first conclusion fails to take account of an aspect of the condition that for a work to be made available one must know where to look for it: if this condition is to be met by the provision of an index, catalogue, signpost or hyperlink these things must themselves be 'available'.

Moreover, in *Svensson*, although the Court does not record the fact, Retriever Sverige, the defendants in the main proceedings, provide a service consisting in the provision of hyperlinks to

[68] In *Ticketmaster Corp v Tickets.com Inc* the court suggested that use of a hyperlink 'is analogous to using a library's index card to get reference to particular items, albeit faster and more efficiently'. *Ticketmaster Corp v Tickets.com, Inc.* 2000 US Dist Lexis 4553 (CD Ca, March 27, 2000). Headdon notes 'A hyperlink serves both as a reference to another web source and as the means by which that source can be accessed.' Headdon (n 19) 2.
[69] *Svensson* (n 1) paras 18, 20, 23, 25, 27, 32.
[70] *Svensson* (n 1) para 30.
[71] *Svensson* (n 1) para 26.

content on other websites only to persons who register with the website.[72] It follows that the hyperlinks are not available to all users of the website but only those who register with the site. The distinction is significant since for the making available right to be infringed the work must be made available to the public. According to the case law of the CJEU the term public refers to 'an indeterminate number' of persons and 'implies a fairly large number of persons'. In the case of Retriever Sverige it seems very likely that the number of persons who register for the service will be relatively high, high enough, at any rate to qualify as a public. However the failure to distinguish between the users of a website and those who register for a service offered by the website is troubling. Moreover a decision, ex ante, that users or potential users of a website will invariably be sufficiently many to qualify as a public has no basis in fact.[73] The website may limit access (through a registration process or otherwise) to a very small class of persons.

In *Philips* the Board states only that the existence of a hyperlink to a document located on another website *may* serve to make the document available. Thus, in connection with the test proposed by the board in order to determine whether a document is made available to the public simply by virtue of its presence on a website the board adds

> if any of Conditions (1) and (2) is not met, the above test does not permit to conclude [sic] whether or not the document in question was made available to the public. In such a situation, in particular where Condition (1) is not met, *it must be examined on a case-by-case basis* whether there were other circumstances *possibly providing direct and unambiguous access to the document*, such as a written or oral disclosure of the URL, *the presence of the URL (e.g. in a hyperlink) on a webpage available to the public*, the document being accessible via a public web search engine not using keywords as search inputs (e.g. based on similarities between images), publication of the document in a Web-based discussion forum, etc.;[74]

Note that the Board refers to a hyperlink on a webpage that is *available* to the public, not merely free from access restrictions. A hyperlink to a document impacts on availability only to the extent that the hyperlink is itself available. A hyperlink on a 'hidden', unindexed website does not make content on the destination website available to any section of the public while a hyperlink on a website with a low search engine ranking[75] may no more infringe copyright by making such content available than a dentist in a private dental practice infringes copyright by having a radio

[72] The publicly accessible part of the website (English language version) only provides details of the services which can be provided by Retriever Sverige. Users must contact Retriever Sverige to set up login details. The website is available at <http://www.retriever-info.com/en/?redirect=true> (accessed 27 June 2014).
[73] The term 'public' 'refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons' Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* [2012] Bus LR 1870 para 84. See also *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), [2014] ECDR 7 [12] (providing a summary of the principles adopted by the CJEU in interpreting the 'communication to the public' right).
[74] *Philips* (n 53) para 118.
[75] The correlation between page ranking and hyperlinks to a website is explained by Baggio and Corigliano: 'A good indicator of the probability of finding a website is provided by the PageRank. … PageRank assigns a measure of relevance or importance to each web page, allowing Google to return high-significance pages in response to a user query. The recursive nature of the algorithm, where a page is highly ranked if it is linked to by other highly ranked pages ensures good robustness and reliability.' Rodolfo Baggio and Magda Antonioli Corigliano, 'On the Importance of Hyperlinks: A Network Science Approach' in Wolfram Höpken, Ulrike Gretzel, and Rob Law, *Information and Communication Technologies in Tourism 2009: Proceedings of the International Conference in Amsterdam, the Netherlands* (Springer 2009) 311.

broadcast music in his waiting room.[76] In each case the 'audience' for the work achieved by means of the hyperlink may be so restricted as not to qualify as a public. It is a question of fact in every case whether a hyperlink makes content available. The extent to which the website where the hyperlink appears is visible to and indexed by the search engines is a crucial part of that factual matrix.

Thus, contrary to the first conclusion adopted by *Svensson*, the provision of a clickable link to a protected work freely accessible on another cannot invariably entail a communication to the public.

The second conclusion fails to take account of the conditions which must be met for a website to make content available. The fact that a work appears on a website that is freely accessible (that is, there are no restrictions on access)[77] does not imply that the work is, in practice, available. As the Technical Board of Appeal in *Philips* so clearly appreciated, whether information is made available to the public by means of the World Wide Web is in part a factor of the visibility of a website to search engines. The fact that a document exists on the World Wide Web does not, according to the board, 'go beyond mere *theoretical* accessibility'.[78] The same is true of any work or content appearing on a publicly accessible website.

Indeed *Philips* goes further explaining that the mere fact that a document can be found on the web by means of a keyword search using a search engine does not imply that the public has 'direct and unambiguous access' to it.[79] The Board observes

> This is a consequence of the fact that it is possible to store a document on the web in such a way that it is indexed by a public web search engine only with (one or more) keyword(s) unrelated to the essence of the content of the document, thus *making it impossible to find it* by entering only keywords related to the essence of the content of the document.[80]

As a result the Board maintains that it can only be 'safely concluded that a document stored on the World Wide Web was made available to the public' where

> … [the] document stored on the World Wide Web and accessible via a specific URL
> (1) could be found with the help of a public web search engine by using one or more keywords all related to the essence of the content of that document and

[76] Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* (n 73) concerned the scope of the 'communication of the public' right under Directive 92/100/EC. Del Corso, a dentist, broadcast music by radio in the waiting room of his private dental practice. The court considered that having regard to 'the number of persons to whom the same broadcast phonogram is made audible by the dentist, it must be held that, in the case of the patients of a dentist, the number of persons is not large, indeed it is insignificant, given that the number of persons present in his practice at the same time is, in general, very limited.' The small size of the group of persons who might hear the work was a significant factor in the court's determination that there was no 'communication to the public'.

[77] *Svensson* appears to equate free access with the absence of any restrictive measures but does not explain whether this should be taken to include only technical restrictions or restrictions imposed by contract. *Svensson* (n 1) para 26.

[78] *Philips* (n 53) para 86 (original italics).

[79] *Philips* (n 53) para 109.

[80] *Philips* (n 53) para 109 (italics added).

> (2) remained accessible at that URL for a period of time long enough for a member of the public … to have direct and unambiguous access to the document, …[81]

The approach in *Philips* is in stark contrast to *Svensson* where the existence of a hyperlink to a website free of access restrictions is regarded as sufficient to secure availability.

It is difficult to know what significance, if any, should be accorded to the fact that *Svensson* ignores the extent to which accessibility of content is conditional on the manner in which content is indexed by the search engines. One might argue that the omission indicates that the CJEU considers that 'visibility' of content, whether achieved by way of search engines or the 'signpost' function of hyperlinks is not relevant to the making available right. On this interpretation a hyperlink makes content available by automatically instructing the user's browser to access the URL where the content is situated, nothing more. This interpretation is plausible but flawed since, as I have observed earlier, a hyperlink on a 'hidden' website does not make content available in any meaningful sense.

Alternatively the omission might suggest that the CJEU considers that while the supply of information about the location of a work (by hyperlink or otherwise) is *sufficient* to make the work available (provided of course all the other conditions for availability are met including that the location is accessible and the work free of access restrictions), it is not *necessary* for a work to be made available that such information should be supplied; accessibility of location and freedom from access restrictions to the work will suffice. Such an approach cannot be reconciled with the internal logic of making available: if the supply of information about location may suffice to make a work available, it must also be the case that the supply of such information is a necessary ingredient or precondition for making a work available even if, in the particular circumstances, such supply is not the initial act that secures availability.

It seems much more likely that the court simply failed to address the question of the visibility of a website (or the hyperlink appearing on a website) since (a) the Göteborgs-Posten website is 'visible' as well as publicly accessible;[82] and (b) careful analysis of the extent to which (and to whom) the hyperlinks provided via the Retriever Sverige website made content available was unnecessary: since the Göteborgs-Posten website (probably) made content available to all users of the internet the hyperlinks provided via the Retriever Sverige website could not make content available to a new public.[83]

III.6 *Svensson* and making available: a summary

'Making available' is either 'all about access' or all about making available, not something in between. By deciding that hyperlinks make available the CJEU (consciously or not) has rightly opted for the latter. While the CJEU does not engage in any analysis of the meaning of 'making available' nothing in *Svensson* suggests that 'making available' is a term of art. The term must be

[81] *Philips* (n 53) para 117.

[82] A Google search by the writer for the terms 'goteborgs posten' returned more than a million results with the link to the Göteborgs-Posten website <http://www.gp.se> (accessed 27 June 2014) ranked first in the list of results.

[83] The website is indexed by the search engines, but it is impossible to know whether all of the content on the website is so indexed, and whether it is indexed in such a way as to make it available in practice. The likelihood is that it is: after all, this is a news website aimed at the public.

accorded its ordinary meaning so as to take account of the full range of conditions that must be met so as to enable users to directly 'avail themselves' of the content.[84] One must hope that future cases relating to the making available right will provide a more thorough exposition of the criteria that must be met for a work to be made available.

Section IV. Beyond *Svensson*: 'making available': a single act or a series of acts

IV.1 Lack of clarity as to the elements necessary or sufficient for works to be 'made available' and a choice of approach

The lack of clarity about the act(s) that trigger the making available right has been noted in the European Commission's Consultation Document issued as part of the Public Consultation on the review of the EU copyright rules.[85] The Consultation Document states

> Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of 'making available' takes place.[86]

Svensson makes it clear that actual reception is not a necessary ingredient for availability (or accessibility) but it provides little guidance as to the acts that are necessary or sufficient to achieve availability.

The Consultation Document suggests that the principal difficulty is one of location of the act(s), an issue relevant to applicable law and jurisdiction.[87] In the context of private international law the problems presented by a tort that is only completed by a series of acts taking place in various jurisdictions are well known: the issues are by no means confined to the copyright regime.[88]

However the issue is not only one of location. Equally the real issue is not that the making available provisions do not indicate whether the right is triggered by upload or some other specific technical process in the chain of events which serve to make content available: after all, one of the stated aims of the drafters of the provisions of Article 8 of the WCT was that the making available provisions should be technology neutral. The problem rather is that it is unclear whether, in principle, the right is triggered only by the single act that completes the process of making available or is infringed by each and all of the various acts that contribute to making the

[84] *Svensson* (n 1) para 2. This is subject to the qualification that 'the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention …' WIPO, Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996, Concerning Article 8 <http://www.wipo.int/treaties/en/text.jsp?file_id=295456> (accessed 1 October 2015). See also *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), [2012] 3 CMLR 14 [32].

[85] Commission, 'Public Consultation on the review of the EU copyright rules' <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm> (accessed 3 July 2014).

[86] ibid, para B1.

[87] ibid.

[88] For example in complex criminal matters where the elements of the offence may have been carried out in different jurisdictions, the English Courts have grappled with whether to assume jurisdiction only where the 'last act' of the offence took place within England and Wales or whether jurisdiction might be assumed where any part of the offence was committed there. See *R v Smith (Wallace Duncan) (No.4)* [2004] EWCA Crim 631, [2004] QB 1418.

work available. This is particularly relevant where the individual acts which go to make up the tort are carried out by different actors, and so concerns the logically prior question of which actors are liable for which acts and whether as primary or secondary infringers.

IV.2 The significance of the choice of approach

The choice of approach matters both as regards the reach of the making available right and our understanding of the acts that may be comprised in the process of making available.

The single act approach favours a conceptualisation of 'making available' in which the act is complete as soon as the work is first made available (in the copyright context, to a particular sector of the public and by a particular means). The series of acts approach stipulates that any of the acts which serve to make the content available (to a particular sector, by particular means), *including* (on one account) acts which are carried out after the content is first made available, are relevant and engage the right.

In the context of websites, the single act approach suggests a characterisation of the act of making available which is complete at the point where the content is uploaded and may be accessed by the user. The series of acts approach does not require but may be consistent with a characterisation in which the subsequent transmission of content to the user is also relevant.

IV.3 The single act approach

Some of the commentary on the 'making available' right supports the single act approach according to which if a series of acts is needed to make a work available only one of these acts, the first to deliver availability, engages the right.

Thus the notes that accompanied the Basic Proposal for the Treaty provide the following commentary on the draft text of Article 10 on which Article 8 of the WCT was modelled

> The relevant act is the making available of the work by providing access to it. What counts is the *initial act* of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals.[89]

It is implicit in this passage that in any given set of circumstances (which may vary from case to case) there is a single relevant act and that both the steps that precede it and those that follow are irrelevant to the activity of 'making available'.

IV.4 A series of acts approach that includes the act of transmission

In *Football Dataco*, which concerned the interpretation of the re-utilisation right conferred by the Database Directive, the Advocate General argues strongly for an interpretation of 'making available' which is characterised by a series of acts.[90] He comments

[89] Basic Proposal for the Treaty (n 13) para 10.10 (italics added).
[90] Case C-173/11 *Football Dataco Ltd, The Scottish Premier League Ltd, The Scottish Football League, PA Sport UK Ltd v Sportradar GmbH and Sportradar AG* (18 October 2012), Opinion of AG Cruz Villalón.

> … Article 7(2)(b) of Directive 96/9 … defines 're-utilisation' as 'any form of making available to the public' the content of a protected database.
>
> To my mind, that phrase, 'making available to the public', has to be the essential conceptual key to giving an answer to the question raised by the UK court. On that basis, the term 're-utilisation' would *include the collection of acts which, in this case, starting with the 'sending' of data from Sportradar's server and ending with the acts performed by the betting companies, culminates in the customers of those companies having access to the data sent.*
>
> Finally, in so far as, in an internet context, *'re-utilisation' is not usually a single act but the sequential succession of a number of acts which … occur in that medium as a result of the actions of individuals located in different territories, the conclusion must be that the 'place' of the 're-utilisation' is that of each of the acts needed to produce the result comprising the 're-utilisation', that is to say, the 'making available'* of the protected data.[91]

In *Football Dataco*, the CJEU confirms this approach, adding that the act of 'making available' includes the transmission of data from the website to the end user.[92] This construction is at least arguably mandated by the terms of the Database Directive which defines re-utilisation as

> any form of making available to the public all or a substantial part of the contents of a database *by the distribution of copies, by renting, by on-line or other forms of transmission. …*[93]

This approach expressly rejects the argument advanced by Counsel for the defendants in the main proceedings that

> … it is making the data available which is the restricted act. The public do not in fact have to avail themselves of the database. The act is committed once the data is placed on a server from which it can be accessed.[94]

IV.5 A series of acts approach that excludes subsequent transmission

The argument advanced by Counsel for the defendants in *Football Dataco* (though primarily intended to address the question of the place where the act of making available took place rather than the constituent elements of the act) is couched in terms that anticipate the ruling in *Svensson*. Moreover *Football Dataco* jars with *Svensson*. If a hyperlink on a website suffices to make content available, can it consistently be said that the subsequent transmission of such content (when the user clicks on the hyperlink) by *that* website (so excluding any argument about a different means of communication to the public) makes content available? Implicit in the notion of content being made available is the idea that no further act is needed to allow use by the public: once available how can content be *made available* again?

---

[91] ibid paras 57-59.
[92] ibid para 34.
[93] Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L 77/ 20, art 7.
[94] *Football Dataco Limited, The Scottish Premier League Limited, The Scottish Football League, PA Sport UK Limited v Sportradar GmbH, Sportradar AG* [2010] EWHC 2911 (Ch), [2011] ECC 16 [71].

This aspect of the internal logic of making available is recognised by the court in the US case, *Hotaling*.[95] In *Hotaling* the defendant operated a library which made several unlawful copies of the plaintiffs' work and sent the copies to its branch offices. The work was protected by copyright. The copies were in microfiche form and could not be checked out of the libraries but could be used within the libraries. The plaintiffs were unable to prove that anyone had used the unlawful copies but argued that the defendant infringed their distribution right by making the copies available to the public. On appeal by the plaintiffs against summary judgement in favour of the defendants the appellate court said this

> When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public it has completed all the steps necessary for distribution to the public. At that point, members of the public can visit the library and use the work.[96]

The Court recognises that the act of making available may either consist in or be preceded by a series of steps, and that by the time the work has been made available no further steps are needed to allow use by the public.[97] Any further acts or steps are superfluous.

Similarly the working document prepared for the third session of the WIPO Committee of Experts on Model Provisions for Legislation in the Field of Copyright (discussing making available in the context of broadcasting) suggests that the process of making available includes various steps but is completed when the works are in fact made available to the public. [98]

IV.6 Choosing between the different approaches: the problem of *Football Dataco*

It could be argued that *Football Dataco* is of limited application since the wording of the Database Directive, unlike that of the Information Society Directive expressly mentions the transmission of data as a means of 'making available'.[99] However the CJEU has made it clear that bearing in mind the 'the requirements deriving from the unity and coherence of the legal order of the European Union' terms in use across a range of intellectual property Directives should be consistently

[95] *Hotaling* (n 63).
[96] ibid para 203.
[97] None of this is susceptible to the criticism of *Hotaling* by William Patry on the grounds that the court conflated 'making available' for distribution with actual distribution. There is a lively debate among US commentators as to whether the US Copyright Act 1976 makes provision for a 'making available' right and thus whether the US has implemented its obligations under the WCT. For a detailed discussion see Thomas Sydnor, 'The U.S. Making-Available Right: Preserving the Rights "To Publish" and "To Perform Publicly"' (April 25, 2014). <http://ssrn.com/abstract=2421724>
(accessed 27 June 2014).
[98] Document CE/MPC/III/2, 24-26 (an extract is provided in Ficsor (n 23) para 4.46). Admittedly, in the context of broadcasting, unlike websites, once the signal has been transmitted and access given, there is no subsequent on-demand transmission thus the issue as to whether the subsequent transmission is relevant to the act of making available does not arise.
[99] As Ross notes 'the question is whether the decision applies only to the transmission of data for the purposes of database law, or whether it will apply to the transmission of other material such as copyright works under the copyright harmonisation directive.' Alexander Ross, 'Case Comment: Football Dataco Ltd v Sportradar GmbH' (2013) 24(2) Ent LR 64, 65.

applied.[100] It is possible therefore that *Football Dataco* may have wider relevance for the interpretation of 'making available'.

Football Dataco can be regarded as an illustration of a problem of conceptualisation. The problem arises when an act of making available (in the sense in which it is used in the Information Society Directive, that is, an act which falls short of transmission) is followed by an act of transmission. The ruling in *Football Dataco* represents the assimilation of the subsequent act of transmission to an overarching notion of making available without considering the logical inconsistency in saying that the content was *made* available both by upload to the publicly accessible website and its transmission from that website.[101] Ficsor by contrast maintains that where a work that has been made available is then transmitted, there is a single act of communication of the work to the public, rather than two separate acts: making available and communication to the public.[102] It is questionable whether this analysis can survive the recognition, implicit in *Svensson*, that the two acts may be carried out by separate actors.

These questions of conceptualisation are not easy to resolve. The difficulty may speak of a fundamental problem associated with seeking to resolve questions of conceptualisation of services exclusively from within the framework of the copyright regime. In particular the rather uneasy relationship between the communication to the public right and the making available right may both illustrate and compound the difficulties associated with unbundling the nature of the services in issue.

In the sections which follow I will argue for an approach which is neutral as to whether 'making available' consists in a series of acts or a single act but excludes *subsequent* transmission from the process of making available.

Section V. Mapping 'making available' under the copyright regime to the characterisation of services: an argument from the case law of the CJEU

V.1 From the exploitation of copyright to the delivery of a service

Although *Svensson* is concerned with the provision of hyperlinks it identifies two distinct activities that *may* make works available. The first is the provision of a hyperlink to that work. The second is the provision of a work on a publicly accessible website.[103] For the reasons set out above both conclusions must be qualified to take account of the fact that a publicly accessible website

[100] *Airfield* (n 39).

[101] Ficsor suggests that a work could be made 'accessible' to the public (so engaging the 'making available' right) but that the public would '*still have to cause the system to make it actually available to them*'. Mihály Ficsor, 'Copyright for the Digital Era: The WIPO Internet Treaties' 1997 Columbia-VRA Journal of Law and the Arts 197, 209 (original emphasis).

[102] Ficsor (n 23) para C8.23. Reinbothe and von Lewinski appear to adopt a similar approach, but on the basis that 'availability of the works is only *accomplished* when the work is transmitted to the member of the public'. Reinbothe and von Lewinski (n 10) 108 (emphasis added). This approach is out of step with *Svensson*.

[103] Although *Svensson* describes the activity engaged in by the website as 'communication' it can only mean 'communication' in its extended meaning under the second part of Article 3(1) so as to include making available since it refers to the 'public targeted by the initial communication' as consisting in 'all *potential* visitors to the site'. Svensson (n 1) 26.

(including hyperlinks appearing on that site) may nevertheless be 'hidden' and invisible to the search engines such that information may be accessible only in theory and not in practice.

Svensson does not explore the economic rationale for extending the protection of the copyright regime so as to require authorisation for the act of making available. It contains no commentary as to whether, for Article 3(1) to be infringed, the person engaged in making content available has to derive some economic benefit from the activity. Nor does *Svensson* touch on whether the act of making available (whether by hyperlink or by website) should be regarded as a particular form of service with economic significance. On the other hand *Svensson* clearly aligns with a clutch of CJEU rulings and Advocates General's Opinions, all of which relate to various incarnations of the 'communication to the public' right and point to an understanding of certain forms of exploitation of copyright works in terms of services whose main characteristic is making information available.

V.2 The relationship between copyright and services in the case law of the CJEU

Three cases are of particular relevance in illuminating the links between acts that may infringe copyright, specifically the communication to the public right, and the nature of the services provided by the alleged infringer.

In the first of these cases, *Entidad de Gestion de Derechos de los Productores Audivisuales v Hosteleria Asturiana SA* ('*EGEDA*') Advocate General La Pergola considered the scope of the right of communication to the public in the context of the retransmission of broadcast works by cable via televisions sets installed in hotel bedrooms.[104] The Spanish Government argued that the retransmission of the broadcast works was not communication since

> effective reception of the broadcast work depends on an act personally performed by the hotel guest (switching on the television set and tuning in to the original broadcaster).[105]

Rejecting this argument Advocate General La Pergola insisted that the position taken by the Spanish Government

> contradicts one of the fundamental principles of copyright: copyright holders are remunerated on the basis not of the actual enjoyment of the work but of a legal possibility of that enjoyment. For example, publishers must pay royalties to authors for their novels on the basis of the number of copies sold, whether or not they are ever read by their purchasers. Similarly, hotels that are responsible for the simultaneous, uncut and unchanged internal cable retransmission of an original satellite broadcast cannot refuse to pay the author the remuneration due to him by maintaining that the broadcast work was not actually received by the potential viewers who have access to the televisions in their rooms.[106]

For the Advocate General, the economic rationale for copyright protection is linked to the possibility of access to a work rather than actual access and still less, transmission as such. This rationale, the Advocate General suggests, extends to all forms of work protected by copyright and

[104] C-293/98 *Entidad de Gestion de Derechos de los Productores Audivisuales v Hosteleria Asturiana SA ('EGEDA')* [2000] ECR I-629, Opinion of AG La Pergola.
[105] ibid para 21.
[106] ibid para 22.

all aspects of the rights afforded by copyright protection, not merely to broadcasts. Moreover while the mechanism by which access is afforded is not irrelevant, the rationale for protection has the outcome of the acts (the possibility of access) as its focus.[107]

The second of these cases, *SGAE*, like *EGEDA*, concerned the retransmission of broadcast works by cable via televisions sets installed in hotel bedrooms.[108] As in *EGEDA*, an argument was advanced to the effect that there could be no communication to the public without actual access to the works. Whereas in *EGEDA*, the Advocate General considered the interpretation of the provisions of Article 11 of the Berne Convention, in *SGAE*, with the Information Society Directive now in force, the issue was framed in relation to Article 3(1) of that Directive. Relying strongly on the comments made by Advocate General La Pergola in *EGEDA*, and expressly approving the rationale offered for affording copyright protection in relation to the provision of access to broadcast works, Advocate General Sharpston insisted that

> … for there to be communication to the public, it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive, contrary to the submissions of the defendant and the Irish Government, that customers who have not switched on the television have not actually had access to the works.[109]

In *SGAE* the CJEU accepted and repeated this conclusion more or less verbatim. The first sentence of this passage is also adopted and repeated in *Svensson* where it forms a key step in the court's reasoning.[110] It is worth noting that in *SGAE* the court repeatedly refers to the work being 'made available' even though the 'distribution of a signal' clearly implies transmission of the work.

Importantly for present purposes *SGAE* makes a link between the acts that implicate the communication to the public right and the nature of the service supplied by the service provider. *SGAE* expressly refers to the nature of the service provided by the hotel to the customer observing that

> the action by the hotel *by which it gives access to* the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. [111]

Likewise in *Airfield*, which considered the communication to the public right in relation to satellite broadcasting, the service is conceptualised in terms of the provision of access to the work

> Moreover, the satellite package provider's intervention amounts to the supply of an autonomous service performed with the aim of making a profit, the subscription fee being paid by those persons not to the broadcasting organisation but to the satellite

[107] The ALAI comments that 'Making available to the public (and other overarching phrases) is a phrase that has been used for a much longer time as a means to implement the basic policy of letting copyright embrace whatever method there is - or may be - by which protected works are made available to the public.' ALAI (n 6) 5.
[108] *SGAE* (n 33).
[109] *SGAE* (n 33), Opinion of AG Sharpston, para 43.
[110] *Svensson* (n 1) para 19.
[111] *SGAE* (n 33) para 44 (italics added).

> package provider. It is undisputed that that fee is payable not for any technical services, but *for access to the communication by satellite and therefore to the works* or other protected subject-matter.[112]

V.3 The significance of *EGEDA, SGAE* and *Airfield*

These cases, precursors to *Svensson*, speak strongly of the existence of a correlation between the economic rationale for copyright protection in relation to the communication of works to the public and an understanding of the service (if any) entailed by acts of communication of works to the public as consisting in making the works available. The act which has economic significance is making available, not transmission.[113]

Section VI. From broadcasting to websites: interactivity as the differentiator

Each of *EGEDA*, *SGAE*, and *Airfield* relates to the communication to the public right in relation to broadcasts not websites or hyperlinks. It is, moreover, also true to say that the linkages between the economic aspects of broadcasting (whether free-to-air, satellite or cable), the communication to the public right and so, implicitly, the notion of making available to the public had been fully worked out by the time the 'new' making available right was introduced.

These linkages were expressly acknowledged in the debates as to whether the communication theory or the emission theory should apply to determine the applicable law in relation to the act of broadcasting. It was argued for example that

> broadcasting is a sub-category of 'communication to the public' and, thus the whole process of making the program available to the public should be considered to be covered by the notion of 'broadcasting', which starts with the emission but also includes the upleg stage towards the satellite and the downleg stage towards the footprint of the satellite and is only completed when the signals reach the surface of the footprint and, thus, are made available … to the public …[114]

This characterisation of the act of broadcasting was enshrined in the Satellite and Broadcasting Directive as

> involving a process which is only completed at the end of the down-link stage when the programme becomes available to the public[115]

[112] *Airfield* (n 39) para 80 (italics added).
[113] Jane Ginsburg makes a link between infringement by way of making available (in the context of the US distribution right and on the assumption that the right extends to the act of making available) and securing liability for copyright infringement 'at the level of the economic actor that is causing … copies to be made …' US Copyright Office (n 50) 54, 55.
[114] Ficsor (n 23) para 4.46.
[115] Ficsor (n 23) para 4.48 (fn 82).

There is no question but that the Information Society Directive recognised that the 'spread of digital technology' enabled the development of services that differed from traditional broadcast services.[116] In particular, it recognised the growth of online, on-demand, interactive services. Nevertheless the Explanatory Memorandum to the Initial Proposal for the Information Society Directive also explicitly links acts which engage the 'making available' right with the nature of the service offered by the service provider, observing that

> Interactive on-demand services are characterized by the fact that a work or other subject matter stored in digital format is made permanently available to third parties interactively[117]

Likewise the Basic Proposal for the Treaty makes it plain that the 'new technologies' including 'interactive, on-demand transmission of works' and 'electronic publishing' are conceptualised in the same manner as 'some forms of traditional dissemination' noting that

> As far as the public is concerned, these new forms of publishing are functionally no different than the traditional forms: *the works are available*.[118]

It might be argued therefore that as in the case of broadcasting the service provided by a publicly accessible website must be regarded as complete at the point where the relevant content is made available. Although this characterisation appears apt to capture aspects of the service provided by a website, there is a crucial distinction between traditional broadcasting and websites. [119]

Traditional broadcasting entails transmission regardless of whether the user accesses the broadcast service. In the case of interactive, on-demand services the transmission occurs only 'on-demand' and after the content has been made available. If 'making available' defines the service (whether in broadcasting or websites) transmission is within the scope of that service in the case of broadcasting but not in the case of websites.

In order to determine the contractual status of browse wrap Terms of Use it is crucial to understand the scope of the service (if any) provided by the website. In particular it is crucial to know whether or not transmission forms part of the service. If it does not there is a strong argument that there is no valid consideration and the Terms of Use are not valid and binding against a user who merely browses the website. If it does, it is almost certainly the case that subject to the provisos more fully explored in Chapter 6, the transmission of information will qualify as valid consideration and (subject to the usual rules about notice) user assent is assured such that the Terms of Use will be valid and binding.

---

[116] Explanatory Memorandum to the Initial Proposal (n 28) 4.
[117] Explanatory Memorandum to the Initial Proposal (n 28) 5.
[118] Basic Proposal for the Treaty (n 13) para 3.03 (italics added).
[119] The distinction between broadcast services and websites is expressed by Justin Harrington in these terms 'The World Wide Web is generally based on pull technology, where the client browser requests a Web page before it is sent. Broadcast media consists of push technologies, because they send information out regardless of whether anyone has requested it.' Justin Harrington, 'Information Society Services: What are they and how relevant is the definition?' (2001) Computer Law & Security Report 174, 180 (fn 40). Walter and von Lewinski draw strong parallels between broadcasting and 'making available' stating 'Similar to broadcasting, the making available is completed by the mere provision of the material on the net.' Walter and von Lewinski (n 29) para 11.3.30.

Svensson suggests that the service provided by a website consists in 'making available' but it is not determinative. However the question as to whether transmission is within the scope of any service provided by a website may be addressed by examining more closely how European law has articulated the distinction between websites (and other forms of 'making available') and broadcasting.

While the effects of convergence mean that it is not always possible to draw a bright line between traditional broadcasting and other acts of 'making available'[120] the difference is reflected in the separation of the meaning of television broadcasting and 'information society services'. The key to the distinction lies in the question as to whether the service is interactive. [121]

Section VII. Websites as information society services: does it make a difference to the categorisation of the service?

While WIPO debated how the copyright regime should be tweaked to address the challenges of digital technology, the European Commission, recognising the economic importance of the new services that might be delivered by digital transmission, sought to classify and make special provision for such services. The Commission proposed to introduce, by way of the Transparency Directive, a definition of 'information society service'. The proposal (subsequently adopted) was accompanied by a communication in which, as Harrington notes

> The Commission went on to emphasize that interactivity is one of the key distinguishing factors which makes Information Society services different 'from television broadcasting services in that the consumer can interactively gain access to them, manipulate them and choose and control their content in order that they may meet their own distinct requirements'.[122]

The Transparency Directive sets out the following definition of an Information Society service:

> 'service', any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.[123]

The Directive expands upon the requirement for an individual request specifying that

> 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.[124]

The definition of 'information society service' incorporates a requirement for an individual request for the transmission of data. [125] In interactive services, unlike broadcast services,

[120] Walter and von Lewinski (n 29) para 11.3.32.
[121] Case C-89/04 *Mediakabel BV v Commissariaat voor de Media* [2005] ECR I-4891 para 39.
[122] Harrington (n 119).
[123] Council Directive 98/48/EC of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 217/18 (the 'Transparency Directive'), art 2.
[124] ibid.

transmission is initiated only on user request. The definition corresponds with the conceptualisation of interactive services from a copyright perspective. For example, Recital (25) of the WCT narrates that 'interactive on demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.'

The definition of 'information society service' distinguishes between the service and transmission. So while, in order to qualify as an information society service, the service must be provided interactively 'through' transmission of data at individual request the service may but need not encompass the transmission of the data.[126] Transmission of data may simply be the means by which the service is delivered, or (as in the case of hosting) a necessary preliminary for provision of the service, and may be effected by a person other than the provider of the service. Thus Recital 18 of the Ecommerce Directive, by way of illustration of the ambit of 'information society services', refers to the service of 'offering on-line information'. The phrase recalls the language used in the Explanatory Memorandum to the Initial Proposal for the Information Society Directive to describe the relevant act of 'making available' namely 'the offering of the work on a publicly accessible site, *which precedes the stage of its actual "on-demand transmission".*'[127]

Most commentators assume that a website should be classed as an information society service. [128] The definition of 'information society service' implies an element of interactivity that distinguishes the service (if any) provided by websites from free to air broadcasting. However the definition in no way implies that the service provided by an open publicly accessible website includes transmission of data by the website.

---

[125] If, instead, as some commentators suggest, the definition must be interpreted as containing a requirement for an individual request for the *service*, the definition would not capture the interactivity requirement. Most (non-interactive) services are supplied on individual request. Moreover the clarification in Article 2 as to the meaning of 'at the individual request of a recipient of services' would be superfluous if the individual request related to the provision of the service. See Harrington (n 119); Graham JH Smith and Ruth Boardman, *Internet Law and Regulation* (4th edn, Sweet and Maxwell 2007) paras 6-085-6-087. Lodder and Kaspersen state 'The service should be delivered on demand …' leaving ambiguity as to whether the authors consider that the service or the transmission must be 'on demand'. Arno R Lodder and Henrik Kaspersen (eds), *eDirectives: Guide to European Union Law on E-Commerce* (Kluwer Law International 2002) 72.

[126] The Ecommerce Directive distinguishes between a mere conduit (where the service entails transmission) and hosting (where the service 'consists of the storage of information provided by a recipient of the service'). The hosting service, while an information society service, does not consist of transmission. Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

[127] Explanatory Memorandum to the Initial Proposal (n 28) (emphasis added).

[128] Harrington (n 119); Mark Turner and Mary Traynor, 'Electronic Commerce (EC Directive) Regulations 2002 – Worth The Wait?' [2002] Computer Law & Security Report 396; Stephen Ketteley, 'The E-Commerce Directive -Thoughts On Issues Raised During The Government's Recent Consultation, Conducted Prior To The Implementation Of The E-Commerce Directive' [2002] 18(3) Computer Law & Security Report 172; Claudia Andrea Hernández Sánchez, 'The Meaning Of The Information Society Services In The E-Commerce Directive' (Master Information Communication and Technology, University Of Oslo 2005); Lodder and Kaspersen (n 125) 72; Out-Law.com, 'The UK's E-Commerce Regulations' <http://www.out-law.com/page-431> (accessed 8 June 2015). See also Commission, 'Legal analysis of a Single Market for the Information Society' (SMART 2007/0037) (November 2009) Ch 6 para 4.1 <http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037> (accessed 1 January 2014) suggesting that web shops are information society services.

Thus the categorisation of an open publicly accessible website as an information society service is entirely consistent with the categorisation of the service provided by such a website as consisting in making available, pure and simple, excluding subsequent transmission.

The interactive aspect of information society services does not preclude the possibility that the service provided by open publicly accessible websites may be considered as analogous to (free to air) broadcasting services.

Section VIII. Transmission and the request/response process

So far, in this Chapter, it has been assumed that the website is involved in transmitting content to the user. In this section, consideration is given to the technical aspects of transmission of content from websites and the limited role of websites in transmission.

Internet service providers deliver the 'core' services of data transmission. ISPs, not websites, carry data across networks.

Web-based content providers, even large content providers such as YouTube[129] or Netflix[130] depend on ISPs to carry their data across the various interconnected networks that make up the internet. Network routers and the network communications links (including cable, copper wire, fibre optic cable) perform the task of moving the data across the network.[131] The transmission of content across the internet depends on the involvement of and co-operation between the website's ISP, the user's ISP and possibly other intermediary ISPs depending on the manner in which the data is routed across the internet. Although ISPs co-operate by means of a range of formal and informal agreements[132] in order to secure end to end connectivity between users (including websites and their customers) ISPs do not, typically, guarantee data transmission over networks owned or operated by other ISPs.

Websites do not (directly or indirectly, whether through their contract with their ISP or otherwise) carry data across the network to the user. Some websites expressly disclaim responsibility for problems associated with failures in data transmission.[133] Websites do not provide 'core' transmission services to the user.[134]

---

[129] Geoff Huston, 'Carriage vs Content' (July 2012) <http://www.potaroo.net/ispcol/2012-07/carriagevcontent.html> (accessed 29 July 2015).

[130] Sebastian Anthony, 'Why Netflix streaming is getting slower, and probably won't get better any time soon' (23 February 2014) <http://www.extremetech.com/computing/177073-why-netflix-streaming-is-getting-slower-and-probably-wont-get-better-any-time-soon> (accessed 29 July 2015).

[131] James F Kurose and Keith W Ross, *Computer Networking: A Top-Down Approach* (6th edn, International edn, Pearson 2013) 30.

[132] For example, ISPs may enter into peering agreements. See Iljitsch van Beijnum 'Playing chicken: ISP depeering a high-school lovers' quarrel' (21 March 2008) <http://arstechnica.com/uncategorized/2008/03/isps-disconnect-from-each-other-in-high-stakes-chicken-game/> (accessed 3 October 2015).

[133] See, for example, Boots.com, 'Terms and Conditions' <http://www.boots.com/?&cm_mmc=bmm-_-google-_-Boots%20Main%20Account-_-Boots%20-%20Brand%20Keywords&gclid=CLvQrpmS08gCFRATGwod_3sBgA> (accessed 20 October 2015) ('we cannot guarantee uninterrupted and totally reliable access to this website'); Halfords.com "Terms of Use' <http://www.halfords.com/advice/customer-services/policies-regulations?topCategoryId=292503> (accessed 20 October 2015) ('due to the fact that Halfords does not have direct control over the servers used to hold data or information on the site and due to the intrinsic nature of websites, Halfords shall have

While websites do not carry data across the network, the request/response process initiates transmission of the data from the website to the user. When the user requests the transmission of a webpage by entering the relevant URL in his browser bar, or by clicking on a hyperlink, the request triggers a complex series of automated interactions between the web server and the user's system. The website responds to the user's request in accordance with a series of pre-determined instructions that make up the configuration of the web server software. [135] Assuming the request is successful the web server responds by handing the data over to the network for onward transmission by ISPs.[136] The entire process takes place after the contents of the website have already been made available.

The argument that websites are involved in sending, or transmission, can only (sensibly) relate to characterisation of the website response since the website is not otherwise involved in transmission.

Therefore, as regards the conceptualisation of the service provided by the website to the user, the key question concerns the significance of the website's response. The issue is whether the response (whether or not labelled as transmission) forms part of the service provided by the website.

IX. Does the response process form part of the service provided by the website?

IX.1 Factors relevant to the existence of a service

The discussion in Chapter VI demonstrates how difficult it is to determine, in the abstract, whether an activity qualifies as a service. Two factors are relevant in determining whether an activity constitutes a service. First, as a minimum, it must be possible to point to some voluntary act or forbearance. Second, the activity must posses an economic aspect.

IX.2 Does the response by the website entail some voluntary act or forbearance?

The question whether the website's response entails some voluntary act or forbearance draws a mixed response from Courts and commentators.

In the Scottish case *Shetland Times Ltd v Wills*, in the context of a hearing for an application for interim interdict, the Court expressed the view (but did not decide) that the service provided by the Pursuer's website might consist in the 'sending of information'.[137] In this regard Lord Hamilton noted

---

no liability whatsoever for any damages or losses arising directly or indirectly as a result of you being [sic- the word 'not' is omitted] able to access the site').

[134] Chris Reed, *Internet Law* (2nd edn, CUP 2004) 27.

[135] See for example Oracle, 'Sun Java System Web Server 6.1 SP11 NSAPI Programmer's Guide: How the Server Handles Requests from Clients' <http://docs.oracle.com/cd/E19857-01/820-7655/abvah/index.html> (accessed 26 May 2014).

[136] For a description of how data is passed from the web server to the network see Kurose and Ross, (n 131) 115, 125, 126, 258.

[137] 1997 SC 316.

> In my view the pursuers' contention that the service provided by them involves the sending of information is prima facie well founded. Although in a sense the information, it seems, passively awaits access being had to it by callers, that does not, at least prima facie, preclude the notion that the information, on such access being taken, is conveyed to and received by the caller. If that is so, the process may arguably be said to involve the sending of that information. If the information is being sent, it prima facie is being sent by the pursuers on whose web site it has been established.'[138]

The 'sending of information' implies some positive act. Commenting on the case, Paul Torremans and Hector MacQueen, while not addressing whether the website provides a service by issuing a response to the user's request, hesitate over whether a website 'sends' information in response to a user's request preferring to settle for the view that the website 'at least' enables the information to be sent.[139]

Support for the view that the website 'sends' or 'transmits' information to the user in response to the user's request is also afforded by the ruling of the CJEU in *Football Dataco*. The CJEU states that the concept of re-utilisation under the Database Directive

> covers an act … in which a person sends, by means of his web server, to another person's computer, at that person's request, data previously extracted from the content of a database protected by the sui generis right.[140]

Like the Court in *Shetland Times Ltd v Wills*, the CJEU treats the website's response as involving the positive act of sending.

On the other hand, Jérôme Passa (writing after the WCT was concluded but before the Information Society Directive was agreed) suggests that in the case of websites (other than those using push technology) '*positive* emission' is absent; that on demand systems (he expressly refers to video or music on demand) do not entail 'any *positive* diffusion'; and endorses the notion that an on demand system should be characterised as involving 'electronic self-service'.[141] The CJEU, in *Svensson*, expresses the same idea in more prosaic fashion suggesting that the user 'avails himself' of content already made available. The implication is that the website response is essentially passive and that on-demand transmission implies action by the user, not the website.[142]

---

[138] *Shetland Times Ltd* (n 137) 319.

[139] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (7th edn, OUP 2013) 651; Hector L MacQueen, 'Copyright and the Internet' in L Edwards and C Waelde, *Law and the Internet: A Framework for Electronic Commerce* (Hart Publishing 2000) 192.

[140] *Football Dataco* (n 94) para 21.

[141] Jérôme Passa, 'The Protection of Copyright on the Internet' in Frédéric Pollaud-Dulian (ed), *The Internet and Authors' Rights* (Sweet & Maxwell 1999) 25, 53-55. Passa refers to *Brel-Sardou* in which the Court appeared to accept the defendants' arguments that a website made no positive emission, while treating that aspect as irrelevant to whether the website infringed the reproduction right by making content available without authorisation. *Brel-Sardou* Tribunale de Grande Instance de Paris 14 August 1996 ('… il importe peu qu'ils n'effectuent eux même aucun acte positif d'émission …).

[142] Thus, Passa does not demur from the argument that 'the server … [is] passive towards interactive users accessing the site by typing its electronic address or clicking on hypertext links'. Passa (n 141) 53. Smith and Boardman are equivocal as to whether the activation of a hyperlink by a user is active or passive. Smith and Boardman (n 125) para 2-015.

Arguably Article 3(1) of the Information Society Directive supports this construction. Article 3(1) provides that

> Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 3(1) implies that once the website (or other content provider) has made the content available it has no further role to play: thereafter the user initiates access.

The characterisation of the website response as passive tends to suggest that the handover of data to the network does not form part of a service. Without some positive act or forbearance carried out for the benefit of the user, there is no service.

Consideration of the technical aspects associated with the website response might seem to support the argument that the response is essentially passive. The response is initiated by the user; it is automated; the website does not exercise discretion in its response which is entirely dictated by the programming of the web server software. On the other hand, there is no reason why a service may not be provided by automated means. The voluntary nature of the automated process is achieved by embedding intention into the programming instructions. It is difficult to reach any certain conclusions, simply by reference to the technical aspects of the request/response process, as to whether the website response lacks a sufficiently 'active' aspect as to meet the criteria for a service.

IX.3 Does the response by the website possess an economic aspect?

Philips suggests that making available implies 'direct and unambiguous access' to content. *Svensson* takes a similar approach. The website having in effect already provided access, what economic significance can be attached to the process by which the website hands data to the network for onward transmission to the user?

If, on the contrary, access is only truly secured where the user is able to view the website content on his computer, access might be supposed to possess an economic value distinct from accessibility (on a version of the argument that the bird in the hand is worth two in the bush).[143] However the website's response to the user's request does not secure access in this sense. The response entails handover to the network, not the user. From the user's perspective the website's response makes no difference to the accessibility of the content. The content was available before the website's response. It remains 'available' after the website's response. Access (in the sense of receipt by the user) is only achieved by means of the transmission services provided by ISPs.

It would appear, therefore, that so far as the user is concerned the website's response lacks economic significance. Although 'making available' implies that a user's request will be met with a

[143] Whether or not, in general, access has an economic value separate from or additional to accessibility may depend on whether the providers of access/accessibility are separate economic actors, and, if they are, the extent to which the provider of accessibility exercises control over the provision of access. It may depend, in other words, on whether access is a 'given' once content has been made accessible.

successful response, the *actuation* of the response, as opposed to the configuration of the server so as to generate that response on request, is not a necessary ingredient for making available. The response does not add to the service of 'making available' (complete before the user accesses the website) and is not otherwise a service in its own right.

IX.4 The implications of the analysis for the conceptualisation of the service provided by the website to the user

The analysis as to the economic significance of the response process chimes with the categorisation of the website's response as passive. It accords with the fact that the Court in *Svensson* implies that no economically significant act occurs between the website's making available on the one hand and the user's 'availing' on the other. The Court's approach reflects the demarcation suggested by Article 3(1) of the Information Society Directive between making available and access by the public. Economic analysis of the technical aspects of the request/response process appears to favour a conceptualisation of the service provided by the website as consisting in making available and no more. However that conceptualisation is also to be preferred for reasons of consistency and fit, not only with the judgment in *Svensson* but also with the Information Society Directive.

In the event, therefore, the analogy between open publicly accessible websites and (free to air) broadcasting appears to be apt, notwithstanding the interactive aspects of the former, inasmuch as both may be said to entail a service that consists in making available.

Section X. Conclusion

Svensson is an important ruling. It is the first ruling of the CJEU in relation to the application of the communication to the public right to hyperlinks. It sets out (albeit implicitly) the CJEU's understanding of the relationship between the communication to the public right and the making available right. Though it fails to deliver any form of exegesis of the meaning of 'making available' in the context of the Information Society Directive, it implicitly endorses a conceptual framework for analysis of the provision of information on publicly accessible websites which shifts the focus from the point of supply of information to the point at the information is made available.[144] In this respect *Svensson*, far from representing a radical development, must be viewed as the natural progeny of a series of CJEU rulings concerning the application of the communication of the public right particularly in the context of broadcasting. It is this shift towards conceptualisation of services relating to the supply of information as consisting essentially in making such information available that is particularly relevant for present purposes.

Svensson is directly concerned with whether and when hyperlinks involve a communication to the public but points to an understanding of the service delivered by a website which is complete as soon as its content is accessible. It affirms that in the copyright context, 'making available' not only triggers a requirement for authorisation but also (assuming that there is an economic aspect to the activity) constitutes a service regardless of whether or not the recipients of the service access the content. The line of thinking that underpins *Svensson* has much to commend it. It is reasonably clearly articulated, internally coherent and aligns with the aims of the EU copyright regime.

[144] Information Society Directive (n 3).

Analysis of the technical aspects of the processes engaged in by the website, in particular the process by which the website responds to the user's request for content, suggests that the response by the website lacks economic significance. It suggests, moreover, that the response process does not form part of the service of making available and is not a service in its own right. In this respect the economic analysis accords with *Svensson* and the Information Society Directive.

If the premise that the service offered by websites consists in making information available is accepted, the constituent elements of that service may be fleshed out by reference to an understanding of 'making available' which is consistent with the copyright regime and incorporates some of the insights set out above.

For a particular act (or acts) to make content available certain conditions must be met. For a website to make information available, the relevant content must be indexed by the search engines and capable of being located either by means of an ordinary keyword search related to that content or, more exceptionally, as a result of disclosure of the URL where the content is located, the presence of a hyperlink to the content on a publicly available website or where other facts make it possible for the content to be located. *Provided these conditions are met* the act of making available 'is completed by the mere provision of the material on the net'.[145] This might consist in configuring a server to which content is uploaded so as to make the content publicly accessible. It might consist in uploading content to a server that has already been so configured. It does not consist in 'the mere provision of server space, communication connections, or facilities for the carriage and routing of signals':[146]these are all preliminaries to making available. Crucially, for present purposes, *it does not consist in the transmission of content to a user as part of the request/response process between browser and server.* This activity follows the act of making available.

Assuming therefore that the service consists in making available and no more, the service is complete before the website responds to the user's request. The implications of this conceptualisation, along with the implications of the view that on the contrary the response process forms part of the service provided by the website, are explored in Chapter VIII.

[145] Walter and von Lewinski (n 29) para 11.3.30.
[146] The Basic Proposal for the Treaty (n 13) para 10.10.

Chapter VIII

A New Model of Conceptualisation

I. Introduction

Relying on insights derived from *Svensson*, in this Chapter I propose a two-stage model of benefits. I argue that this model should be adopted for the analysis of the exchange between open publicly accessible website and user and I explore the contractual significance of the exchange according to this model.[1]

Section II summarises the insights drawn from *Svensson* both as to the nature of the benefits conferred on the user, and the dynamic of the exchange.

Section III outlines the contours of the two-stage model suggested by *Svensson*.

At Section IV I discuss the novelty and utility of the model. In particular I suggest that the model may serve to explain what is truly in issue between the two-stage model and other competing models of the exchange.

In Section V I discuss the reasoning of the majority in the US case, *Register.com v Verio*, and argue that the case indirectly reveals that there is a choice to be made between two competing service-based conceptualisations of the exchange between open publicly accessible website and user, that is the two-stage model drawn from *Svensson* and the unitary model suggested by the majority.[2]

What is at stake between the two competing service-based conceptualisations of the exchange suggested by *Register.com* is explored in Section VI. I argue that the key difference between the models relates to the characterisation of the request/response process as either, part of the service provided by the website to the user, or extraneous to the service.

At Section VII I argue that for the purposes of contractual analysis the two-stage service-based model should be adopted in preference to other models of the exchange between open publicly accessible website and user.

In Sections VIII to X I explore the significance of the adoption of the two-stage model by way of a comparison of the outcomes of a contractual analysis based, on the one hand, on the unitary model proposed by the majority in Register.com (Section VIII) and, on the other, the two-stage model drawn from *Svensson* (Section IX).

Section X sets out a summary of the findings in relation to the benefits conferred by open publicly accessible websites at each of the two stages of interaction with users. It anticipates the

[1] C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014). *Svensson* is considered in Chapter VII.
[2] *Register.com Inc v Verio* 356 F 3d 393 (2d Circuit 2004).

discussion in Chapter IX of the scope of a user's rights and privileges under English law in relation to information that has been made publicly available.

II. The insights drawn from *Svensson*

II.1 The first insight

The first insight derived from *Svensson* concerns the characterisation of the service provided by an open publicly accessible website to users as consisting in making information available.

Svensson suggests that this service is complete at the point where the website uploads the information to the host server provided the host server is connected to the internet and the website is configured so as to be open and publicly accessible. At this point, regardless of whether the user (or any user) accesses the information, the information is available and the service is complete. [3]

It is implicit in this characterisation that no part of the process of transmission of information from website to user (including the website's response to the user's request) forms part of the service of making available.[4]

II.2 The second insight

The second insight derived from *Svensson* is that there are close similarities between free to air broadcasting and making information available via an open, publicly accessible website.[5] This further insight suggests the possibility of relying on the analogy between open, publicly accessible websites and broadcast services in order to understand more fully the nature of the benefits exchange between open publicly accessible website and user.

II. 3 The broadcast analogy

Economists regard free to air broadcasting as a public good, consisting in the transmission of information to all those who possess the necessary equipment to receive the signal. The 'public good' aspect of free to air broadcasting is linked to the characteristics it shares with information, namely that it is non-rival and non-exclusive.[6] No contract, express or implied, exists between broadcaster and recipient.[7] Ruth Towse maintains 'The public goods features of over the air

[3] The Court of Justice of the European Union ('CJEU') indicates that a work may be made publicly available irrespective of whether the persons forming that public 'avail themselves' of content. *Svensson* (n 1), para 19.

[4] This is so not only because transmission services are carried out by ISPs and telecommunications providers rather than websites but also because the process of handover of data by website to the network is not a service.

[5] In *PRCA* Lord Sumption analogised the viewing of websites to the reception of television broadcasts. *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited* [2013] UKSC 18, [2013] 2 All ER 852 [4], [27].

[6] 'Broadcast programmes are always non-rival as listening or viewing by one person does not alter the quantity, quality or any other aspect of the service for other viewers.' Ruth Towse, *Advanced Cultural Economics* (Edward Elgar 2014) para 8.2.2.

[7] A television licence is a statutorily imposed licence relating to the installation and use of a television to watch and record broadcast programmes. It is not a licence in respect of a broadcast service. TV Licensing,

broadcasting meant that directly charging for the services was not possible'.[8] I prefer to find a reason based on contract law to explain why no contract is possible between the free to air broadcaster and recipient. No contract is possible because, in the absence of a mechanism that allows the broadcaster to withhold the service and provide it only in exchange for consideration from the recipient, the service is given away and does not form part of any mutual exchange.[9]

However it is plain that the provision of a free to air broadcast service consisting in making content available does not exhaust the provider's rights in that content. While the process of making information available is transformative, altering the nature of the rights attaching to the information, the rights-holder still retains certain rights in the information.

These residual rights are capable of commercial exploitation. The broadcast company may licence its content to others. It may, for example, licence the content to satellite broadcast companies so as to reach a wider audience.[10] The residual rights are also capable of being enforced. Viewers may watch television programmes broadcast free to air but they may not transmit the programmes to a new public.[11] The nature of the rights retained enables the rights-holder to restrain unauthorised use insofar as the use conflicts with the residual rights.

It appears therefore that the broadcast company may confer two different benefits at two different points in time. The first stage benefit consists in making content available. The second stage relates to the content that has been made available: at this stage the content provider may confer a further benefit in the nature of a licence to use the content for purposes other than the purposes for which it was made available.

The example of broadcast services suggests, by analogy, that the exchange between open publicly accessible websites on users may possess a dual aspect, involving making information available on the one hand and giving permission to use the information that has been made available on the other.

However the analogy does more than flag up the dual aspect of the benefits conferred. It also suggests a dynamic where the first benefit is given away by the website as by the broadcast company, that is, the benefit is conferred outside the context of any contractual exchange, while the second benefit, given later if at all, appears to be given in a contractual exchange context.

'Why do I need a TV licence?' <http://www.tvlicensing.co.uk/about/foi-legal-framework-AB16> (accessed 3 October 2014).

[8] Ruth Towse (n 30) para 8.2.2.

[9] In satellite broadcasting, the position is different. The broadcaster provides a service but uses technical restrictions to control access to the service. The use of technical restrictions allows the broadcaster to condition access on assent to contract terms.

[10] Joined Cases C-431/09, C-432/09 *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* and *Airfield NV v Agicoa Belgium BVBA* [2011] ECR I-9363.

[11] Case C-306/05 *Sociedad General de Autores y Editores de España v Rafael Hoteles SA* [2006] ECR I-11519 (retransmission of programmes by hotel to guests in hotel bedrooms); Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure* [2011] ECR I-09083 (transmission to customers in a public house).

II.4 The two-stage model suggested by *Svensson*

The insights derived from *Svensson* therefore suggest, first, that the service provided by an open publicly accessible website to a user consists in making information available, and second that the exchange may be understood according to a two-stage model of benefits conferral involving, first, the service of making available and second, a licence or permission to use the information that has been made available.

III. The two-stage model

It is a central argument of this thesis that the two-stage model suggested by *Svensson* is not merely apt but captures the true nature of the exchange between open publicly accessible website and user.

The key characteristics of the two-stage model I propose are as follows:

1. There are two separate stages of benefits conferral and at each stage the benefits and the dynamic of conferral are different.
2. At the first stage, the benefit consists in the service of making information available.
3. The service and the transfer of benefit entailed by the first stage is complete at the point where the information is made available, namely when the information is uploaded to a server connected to the internet and the website is configured so as to be open and publicly accessible.
4. The service is complete therefore and the benefit transferred to all users (the public) regardless of whether or not any user accesses the website.
5. The handover of information by the website to the network in response to the user's request for transmission of information does not form part of any service provided by the website to the user.
6. The transmission of information across the network does not form part of any service provided by the website to the user.
7. At the second stage, the benefit consists in a permission or licence to use the information made available.
8. This benefit is conferred only once the user has had an opportunity to view the licence, that is, once the user has accessed the website. The licence will normally be contained in the Terms of Use. [12]

[12] Occasionally the website will expressly design its Terms of Use as a 'licence'. For example, in the US case, *Pollstar v Gigmania Ltd*, the claimants provided information about concerts on their website. The website contained a notice, in browse wrap form, that use of the information was subject to a licence agreement. *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000). Susan Chao differentiates between web-wrap agreements and site licences, suggesting 'A web-wrap agreement is any substantive agreement that is merely displayed on a web site's home page. While web-wrap agreements are primarily characterized by placement, site licenses are concerned with those issues involving the access of web site content. Site licenses make explicit the copyright and trademark rights of the web site owner. Moreover, they make clear what the owner consents to as acceptable uses of the intellectual property contents within the web site.' Susan Y Chao, 'District Court for the Central District of California Holds that a Web- Wrap Site License Does Not Equate to an Enforceable Contract,' (2001) 54 SMU L Rev 439, 440, fn 7. However it is now much more usual for a website to display a single set of Terms of Use that may or may not explicitly address both access and use.

IV. The novelty and utility of the two-stage model

IV.1 The two-stage model is novel

The two-stage model proposed builds on the insights from *Svensson* and from those, like the defendants in *Brel-Sardou*, who argued that the website's role in the implementation of the request/response process was passive.[13] It represents the taking of a stance in relation to a question that has bedevilled some of the literature about the making available right, namely the difference between making available and access by the user and whether making available is 'accomplished' by the former or only by the latter (opting for the former).

Like most constructions, the two-stage model has not emerged fully formed. Rather it involves the construction of a whole from disparate parts, making explicit what was at best merely implicit in arguments seen in the best of the case law.

Thus, the argument by Counsel for the defendants in *Century 21* that an open publicly accessible website should be regarded as analogous to a billboard suggests that Counsel considered that even before a user accessed the website the information had been made available, just as in the case of supply of information on a billboard.[14] The information having already been made available, the supply of the information could not form the basis for a contract. Any contract would come into being, if at all, only in the event of subsequent use of the information. Here the two-stage process is implicit, as is the notion that the dynamic of exchange is different at each stage. However, while Counsel proposed the analogy, its significance was not fully explored in argument and, it seems, was lost on Punnet J who brushed the analogy aside as inapt.

The two-stage model is more closely anticipated by Judge Parker, who, in *Register.com* prepared a draft Opinion at odds with that of the majority.[15] Unlike the majority, Judge Parker clearly distinguishes between two separate benefits that might be conferred by the website operated by Register.com, between 'that which it "owns" — access to its WHOIS database'[16] and that which it does not own, namely the WHOIS information.[17] Judge Parker takes account of the mechanics of the conferral of the benefits and provides separate analyses in respect of the two forms of benefit. However the two-stage model proposed in the thesis differs from Judge Parker's analysis

[13] *Brel-Sardou* Tribunale de Grande Instance de Paris, August 14 1996. According to Graham Smith, this is the first case to decide that 'making information available to the public on a webpage is … a publication'. Graham Smith and Ruth Boardman, *Internet Law and Regulation* (4th edn, Sweet and Maxwell 2007). Passa, commenting on the case, does not demur from the argument that 'the server … [is] passive towards interactive users accessing the site by typing its electronic address or clicking on hypertext links'. Jérôme Passa, 'The Protection of Copyright on the Internet' in Frédéric Pollaud-Dulian (ed), *The Internet and Authors' Rights* (Sweet & Maxwell 1999) 25, 53.

[14] *Century 21 Canada Limited Partnership v Rogers Communications Inc*. 2011 BCSC 1196 (Supreme Court of British Columbia) [74].

[15] The publication of a draft Opinion of a dissenting judge along with the Opinion of the majority is highly unusual. The judgment records that Judge Parker had been tasked with drafting the Opinion of the Court but changed his mind about the merits of the case in the process. He died before the draft Opinion of the majority was circulated. The Court took the decision to publish his draft Opinion which sets out his dissenting views.

[16] *Register.com* (n 2) (draft Opinion of Judge Parker) 418.

[17] 'It is important to recognize that in contrast with the registrar's computer systems (including the database housing WHOIS information), which the registrar undoubtedly owns, WHOIS information is public information that is not owned by anyone …' *Register.com* (n 2) (draft Opinion of Judge Parker) 418.

in that it expressly designates the first stage of the process of benefits conferral as a service and expressly excises the process of handover of information from website to network as well as subsequent transmission from the scope of the service.

The novelty of the two-stage model lies in three characteristics. First, the model avoids inconsistent usage of the terminology of access, service and use. Second, there is novelty in the insistence that the first stage of benefits conferral should be treated as a service.[18] Finally, and this is crucial, the designation of the website's response to the user's request as outside the scope of any service provided by website to the user, while prefigured by the arguments by the defendants in *Brel-Sardou* as to the passive role of the website in that process, is new.

IV.2 The utility of the two-stage model

IV.2.1 The two-stage model assists understanding of the dynamic of the exchange

The two-stage model offers a more sophisticated tool for the analysis of the exchange between open publicly accessible websites and users than other benefits analyses.

In particular while other conceptualisations allow for assessment of the benefit 'conceived statically', the two-stage model offers a means of comprehending the dynamic of the exchange.[19]

Part of the difficulty about conceptualisation of the benefit conferred by website on user is that one may intuitively grasp that there are two different kinds of benefit involving access to the website and subsequent use of the information without immediately being able to map that intuition to an analysis of the relevant *exchange*. This point recalls Weinrib's admonition as to the appropriate assessment of the nature of the benefit conferred in the context of unjust enrichment claims

> What the recipient accepts is not the benefit conceived statically at the time that the acceptance becomes operative, but rather the benefit *as transferred*. This includes not only the transfer's non-donativeness [or, one might add, its donativeness] but also its occurrence at a particular point of time. The acceptance, in other words, is of the transfer whose subject matter is the benefit, not of the benefit standing alone, for it is the transfer that links the parties to each other.[20]

It will not do to assess the nature of the benefit 'conceived statically' as though collapsing the process of conferral and receipt of the benefit into a single point in time, so as to artificially create an impression of a synchronous bilateral exchange in the nature of a contract. One must tease out from the interaction between website and user not only the relevant benefits but also the dynamic context of the exchange. The two-stage model assists in that process.

[18] It must be treated as a service since (as Chapter V demonstrates) in the absence of right to control access a model based on the grant of permission for access does not get past first base. The act (or series of acts) of providing access *could* be treated as a waiver of the privilege not to give access, but since it is the act that is crucial, the service characterisation is apt where the waiver characterisation is liable to mislead.

[19] The phrase is Weinrib's. Ernest J Weinrib, 'The Structure of Unjustness' (2012) 92 Boston University Law Review 1067, 1077.

[20] Weinrib (n 19) 1077 (original emphasis).

IV.2.2 The two-stage model acts as a flag concerning the significance of the characterisation of the request/response process

The need, for the purposes of the two-stage model I propose, to designate the request/response process as separate from the service provided by website to user suggests that the characterisation accorded to the process may serve to explain some of those instances where the proponents and opponents of the enforceability of Terms of Use appear to be not only at odds but talking at cross purposes.

For example, David McGowan claims that in the absence of a right to control access an open publicly accessible website cannot supply consideration for its Terms of Use.[21] Nancy Kim says of the browse wrap agreement in issue in *Register.com* that 'The benefit [Kim does not specify what it is] had already been received.'[22] Yet other commentators maintain that the website provides consideration in the form of access, or the provision of information or use of the website.[23] In *Century 21* there is an obvious disconnect between the defendants' use of the billboard analogy, where the activity of the user in relation to the website is treated as analogous to merely looking at a billboard, and the insistence by Punnet J that the website makes an offer that the user chooses to accept.[24] Similarly the view of the majority in *Register.com* that the website makes an offer of access to information[25] cannot be reconciled with the view of Judge Parker, that the website has 'given away' access to its database and that the subsequent use of the information, in the circumstances, is not constrained by law.[26] Neither the commentators nor the courts provide any explanation as to what separates the dissonant views or how these views might be reconciled.

The answer, I suggest, lies in the characterisation of the request/response process.

Section V. *Register.com v Verio*

The significance of the two-stage model of benefits conferral suggested by *Svensson* may be explored by contrasting it with the model of benefits conferral suggested by the majority in the US case, *Register.com v Verio*.

V.1 Background

[21] David McGowan, 'Website Access: The Case for Consent' Loyola-Chicago Law Journal (forthcoming) <http://ssrn.com/abstract=420620> 20 fn 124. Such considerations may also underlie Hedley's criticism that 'The Court in [the US case] Register.com simply assumed that … the web site owner is entitled to impose terms [that is, Terms of Use] … But this is to assume the very point in issue: does a web site owner have the right to impose this choice?' Steve Hedley *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Cavendish 2006) 250.

[22] Nancy S Kim, *Wrap Contracts: Foundations and Ramifications* (OUP 2013) 56.

[23] Dawn Davidson, 'Click and Commit: What Terms are Users Bound to When They Enter Web sites?' (2000) 26 (4) William Mitchell Law Review 1171, 1179; Matthew D Walden, 'Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions' (2001) 58 Wash & Lee L Rev 1625, 1632, 1633; Lydia Pallas Loren, 'Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse' (2004) 30 Ohio Northern University Law Review 5, fn15.

[24] *Century 21* (n 14) [74].

[25] *Register.com* (n 2) 402.

[26] *Register.com* (n 2) (draft Opinion of Judge Parker) 431.

Register.com is a registrar of domain names. In that capacity it was obliged by virtue of its contract with ICANN to update and provide public access to a database (the WHOIS database) providing information about the registrants of domain names. Persons seeking information about the registrant of a particular domain name could query the database by means of an interactive web page or by submitting a query directly to the Register.com servers via a nominated port on those servers.

The defendant Verio engaged in website development and design and related services. Verio used the WHOIS database operated by Register.com as a marketing tool, accessing the database to obtain and use details of potential recipients of its services.

Each time a query was submitted to the Register.com servers and a response returned to Verio, the information provided was accompanied by a legend to the effect that the information should not be used for marketing purposes. Register.com sought and obtained a preliminary injunction against Verio, restraining Verio from access to or use of the information contained in the WHOIS database in contravention of Register.com's 'terms and conditions', namely the legend which accompanied each response.[27] Verio appealed against the injunction, arguing, inter alia, that it had not assented to and so was not bound by the terms of the legend. The US Court of Appeals Second Circuit refused the appeal.

In upholding the preliminary injunction the Second Circuit did not decide that the terms and conditions were binding but only that Register.com could show a reasonable likelihood of success on the contract claim. Nevertheless the analysis offered by the majority has been adopted and approved in subsequent US cases.[28]

Verio argued first, that it did not have notice of the terms and conditions and second, that even if it did, it was free to reject the terms and conditions and take the information from the Register.com website. In order to tackle these arguments the majority relies on a striking analogy as part of its reasoning. Ultimately the analogy is flawed, but it serves to illuminate first, the power of analogy to conceal or mislead and second, that a choice must be made between two facially plausible conceptualisations of the exchange between website and user.

V.2 The fruit stand analogy

The court suggests the following analogy as a means of comprehending the exchange between Verio, as user of the Register.com website and the website itself:

> The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples-50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in

[27] Although the terms intimated by Register.com were not in browse wrap form, the issues at stake in *Register.com* are entirely relevant to questions about the contractual status of browse wrap Terms of Use.
[28] *Cairo, Inc v CrossMedia Services, Inc* No C04-04825 (JW) (ND Ca, April 1, 2005); *Southwest Airlines Co v BoardFirst LLC* Civ Act No 3:06-CV-0891-B (ND.Texas, September 12, 2007); *Hines v Overstock.com, Inc*, 668 F Supp 2d 362 (EDNY 2009); *Major v McCallister* 302 SW 3d 227 (Mo Ct App SD 2009); *Schnabel v Trilegiant Corp* 697 F 3d 110 (2d Cir 2012).

> return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.[29]

The example offered by way of analogy is plainly intended to mimic the situation where the website makes information available and the information is subsequently taken and used. It suggests a two-stage process, the display of the apples and the subsequent taking and use of the apples.

One of the (several) problems about this analogy is that it may be relied on to support two very different constructions of the exchange between website and user.

On the first construction, the analogy is consistent with the conceptualisation I have drawn from *Svensson*. The display of the apples on the stand maps to the process of making information available on the website. The information has been made available before the visitor comes to the stand. The subsequent taking and eating of the apple maps to the user taking the information by way of the request/response process and viewing or otherwise using the information. The user avails himself of the information and puts it to use.

The second construction, that suggested by the majority in *Register.com*, is entirely different. Rather than operating as an analogy for the practical, factual aspects of the exchange between website and user the analogy serves only to express a view as to the appropriate legal construction of the exchange. On this construction the display of the apples is to be understood as an offer to take (and eat) the apple. The taking and eating of the apple by the visitor to the fruit stand is an acceptance of that offer. The Court explains

> Returning to the apple stand, the visitor, who sees apples offered for 50 cents apiece and takes an apple, owes 50 cents, regardless whether he did or did not say, "I agree." The choice offered in such circumstances is to take the apple on the known terms of the offer or not to take the apple. As we see it, the defendant in Ticketmaster and Verio in this case had a similar choice. Each was offered access to information subject to terms of which they were well aware. Their choice was either to accept the offer of contract, taking the information subject to the terms of the offer, or, if the terms were not acceptable, to decline to take the benefits.[30]

By analogy (a poor one when deployed in order to short-circuit the legal analysis),[31] the website makes an offer of a service involving the provision of access to the information,[32] while the user accepts that offer by taking the information.[33] It is not entirely clear from the majority's reasoning whether acceptance is triggered by mere access (the taking of the apple) or by use (the biting of the apple).

---

[29] *Register.com* (n 2) 401.
[30] *Register.com* (n 2) para 403.
[31] The use of a goods analogy makes for a strikingly compelling argument but it serves to obscure the true nature of the benefit in issue.
[32] *Register.com* (n 2) para 402, 403.
[33] ibid.

These two constructions cannot be reconciled. The first implies that the website has voluntarily conferred a benefit on the user by making the information available *before* the user visits the website (benefit 1). What the user takes therefore by means of access to and use of the information is the benefit of the information that has been made available (benefit 2), not the benefit of a service *offered* to the user. Here there are two benefits, conferred at different points in time.

The second construction implies that the website has given away nothing (only an offer has been made) until the point where the user accepts the offer of access and use by taking those benefits. The acceptance therefore is acceptance of the offer of a service in providing access coupled with permission to use. Here there are two aspects to the benefit but both are transferred simultaneously and encompassed by the acceptance of the offer.

V.3 *Register.com*: revealing the difference between the two competing service-based models

The majority in *Register.com* does not explore in any detail the technical aspects of the service said to be provided by the Register.com website to Verio. The court says merely that the offer made by Register.com was for the provision of access to information. However, given the court's insistence that up until the point of access by the user, there was only an offer of access, it is reasonable to suppose that the court considered that the service consisting in the provision of access was only delivered and complete once the user accessed the website by means of the request/response process.

On the *Svensson* construction, by contrast, the service provided by an open publicly accessible website to user is complete at the point where the information is uploaded to the server, the server connected to the internet and the website configured to supply information in response to browser requests for transmission. All such activities are performed by the website outside the context of any exchange with users.

The two constructions differ according to the significance accorded to the request/response process. By implication, the court in *Register.com* supposes that the website's response to the user's request entails the delivery of a service without which the user has no access to the website. *Svensson* implies (but does not decide) that the service provided by the website is complete before the request/response process is initiated and before the user visits the website. Where, in *Svensson*, the CJEU refers to the user 'availing himself' of content that has been made available the court plainly supposes the user to have an active and the website merely a passive role in accomplishing access through the request/response process.

V.4 Why the two-stage model drawn from *Svensson* should be preferred

For the reasons discussed in Chapter VII, the *Svensson* construction should be preferred.

While the question as to what to make of the website's response to the user's request is not free from difficulty, it is difficult to credit the reflexive, automated process by which a website hands over data to the network for onward transmission as a service to the user. The role of the website in responding to the user's request is limited to processing the request in accordance with pre-set criteria and handing the webpage (or other data) over to the network. The website does not transmit the data across the network to the user. I prefer the view, broadly in line with *Svensson*,

that the website exercises a passive role in responding to the user's request, and therefore that the service provided by the website is complete at the point the information is made available by uploading the content to the internet and configuring the website as open and publicly accessible. Ironically the analogy provided by the majority in *Register.com* indirectly supports this view: the visitor to the fruit stand need only take the apple, the fruit stand provider having no further role after making the apples available.

VII. Assessing the significance of the choice between the model suggested by *Register.com* and the two-stage model

The question as to which of the two competing models is to be preferred is crucial to the determination of the contractual status of the exchange between open publicly accessible website and user. The significance of the choice is best appreciated by comparing the results of the contractual analysis according to the conceptualisation offered by the majority in *Register.com* and according to the conceptualisation drawn from *Svensson* on the other.

VIII. *Register.com*: a contractual analysis according to the conceptualisation suggested by the majority

VIII.1 The majority's application of the rules of US contract law

The majority applies rules of US contract law in order to assess whether Register.com had reasonable prospects of success on its contract claim. The majority suggested that the taking by the user of the benefit of access to and use of the information provided by the website must be regarded as assent to the offer of a service consisting in the provision of such access and use.

While relying on a goods analogy, the majority expressly founds on the rules of contract law concerning the implication of a contract where services are offered and accepted by conduct. The court suggests that the general principle might be expressed in these terms

> It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.[34]

Read in isolation this passage is open to the criticism that the statement of general principle is overly broad, and not supported by authority insofar as it purports to extend to any and all benefits, not merely the benefit of services.[35] However the statement of general principle must be construed in light of the authorities cited by the Court in support of the statement, all bar one of which refer expressly to the benefit of services. The single exception involves a reference to a case concerning the supply of goods. Given the emphasis on the implication of a contract through acceptance of services, it is reasonable to suppose that the majority considered that what was at stake was the acceptance of a service.

[34] *Register.com* (n 2) 403.

[35] The principle may be extended to goods (see *Markstein Bros Millinery Co v J A White and Co* 151 Ark 235 S W 39 (1921)) but there is no authority to support its extension to intangibles and in particular to information. See Brian Blum, *Contracts: Examples and Explanations* (4th edn, Aspen Publishers 2007) 75.

In particular the majority founds on this passage from the writings of the eminent US jurist Corbin

> The acceptance of the benefit of the services is a promise to pay for them, if at the time of accepting the benefit the offeree has a reasonable opportunity to reject it and knows that compensation is expected.[36]

Although this statement accurately reflects both US and English law, Corbin is on difficult ground. Commenting on the application of the 'principle' in *Register.com* in *Cairo v Crossmedia Services*[37] Eric Goldman observes

> The Register.com case improperly conflates the doctrine of quasi-contract (restitution as a cause of action) with offer/acceptance (the apple stand analogy shows this best). Here, the court unhesitatingly applies Register.com without questioning it, suggesting that browsewrap "contracts" may be binding against electronic agents without any further evidence of manifestation of assent.[38]

Corbin expressly acknowledges that his statement may belong to the realm of quasi-contract.[39] Corbin uses the term 'quasi-contract' to refer to claims for unjust enrichment.[40] However, while acknowledging that his statement of principle might belong to quasi-contract Corbin insisted that

> … it is just as easy to find a promise to pay such compensation by implication in fact as it is to hold that the law creates such a duty without regard to assent. [41]

It is just as easy, in other words, to imply a (contractual) promise to pay as to find a remedy in quasi-contract (unjust enrichment). This explanation suggests that Corbin was also concerned with the implication of terms (a promise to pay) *in those limited situations where assent might readily be implied from conduct*.[42] In other words, in those circumstances, a contract, rather than

---

[36] Arthur L Corbin, *Corbin on Contracts* (West Pub Co 1952) para 71. This passage has found its way (with some modifications) into section 69(1)(a) of the Restatement (Second) of Contracts.

[37] *Cairo, Inc* (n 28). Madison foresaw that the question of enforceability of browse wrap contracts would be tested according to traditional contract principles including 'whether an individual user manifested "assent" by "using' or taking the "benefit" of access to the information'. Michael J Madison, 'Rights of Access and the Shape of the Internet' (2003) 44 BCL Rev 433, 496, 497 fn 323.

[38] Eric Goldman, 'Cairo v Crossmedia Services' (12 April 2005) <http://blog.ericgoldman.org/archives/2005/04/cairo_v_crossme.htm> (accessed 14 October 2014). See also Kim (n 22) 56.

[39] ibid.

[40] The discussion at Corbin (n 36) para 234 makes this plain. In the UK for some time a lively debate existed as to whether unjust enrichment should be regarded as a quasi-contractual ground of action, or a separate category whose defining feature is the unjust taking of the benefit. In the event the latter theory prevailed, allowing Goff and Jones to decry the 'quasi-contract fallacy' and maintain that the 'implied contract theory [as the basis for claims for unjust enrichment] is now unequivocally "a ghost of the past"'. Robert Goff, Goff of Chieveley, and others, *The Law of Unjust Enrichment* (Sweet & Maxwell 2011) ('Goff and Jones') paras 3-12 and 1-06. In practice, the drawing of such bright lines may not be so simple, it being rare for claims for unjust enrichment to take place other than against the backdrop of some failed contract. In the US too the Courts have emphasised that quasi-contract and contractual rules about implied agreements are separate and distinct. *Weichert Co Realtors v Ryan* 128 N J 427 (1992), 608 A 2d 280.

[41] Corbin (n 36) para 71.

[42] 'Common examples of contracts implied in fact are where a person performs services at another's request, or "where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances" fairly raising the presumption that the parties understood and intended that compensation was to be paid.' *Commerce Partnership 8098 Limited Partnership v Equity Contracting Company, Inc.*, No. 95-2619, March 26, 1997 District Court of Appeal of Florida, Fourth District

a quasi-contract results.[43]

This interpretation is consistent with the reworked version of Corbin's statement as it appears in section 69(1)(a) of the Restatement (Second) of Contracts

> §69. ACCEPTANCE BY SILENCE OR EXERCISE OF DOMINION
>
> (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
>
> (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.[44]

Where Corbin speaks only of the implication of a promise, that is, of terms, section 69 (1)(a) clearly deals with implied acceptance in a situation where the services are merely offered, not having been 'thrust on the recipient'.[45]

In other words, while the seeming overlap between contract law and the law relating to unjust enrichment may concern some, the majority base their approach on clear authority concerning the circumstances in which assent may be implied from conduct. [46]

Moreover, while the version of the statement of general principle articulated by the majority

---

citing *Lewis v Meginniss*, 30 Fla 419, 12 So 19, 21 (1892); *Tipper*, 281 So 2d at 13; *Lamoureux v Lamoureux*, 59 So 2d 9, 12 (Fla 1951); *AJ v State*, 677 So.2d 935, 937 (Fla 4th DCA 1996); *Dean v Blank*, 267 So 2d 670 (Fla 4th DCA 1972); *Solutec Corp v Young & Lawrence Assoc*, Inc., 243 So 2d 605, 606 (Fla 4th DCA 1971). 'Th[e] rule [that acceptance may be by conduct or inaction] applies primarily to instances where services are rendered and the party benefited by the services is aware of the terms upon which the services are offered.' *Pride v Lewis* 179 S W 3d 375 (2005). See also *Jones v Brisbin* 41 Wash 2d 167, 172, 247 P 2d 891 (1952); *Moore v Kuehn* 602 S W 2d 713 (1980).

[43] This interpretation is shared by Morrison. Mary Jane Morrison, 'I Imply What You Infer Unless You are a Court: Reporter's Note to Restatement Second of Contracts § 19 (1980)' (1982) 35 Oklahoma Law Review 707, 717 (presenting a scenario consistent with that envisaged by Corbin and describing it as an 'implied-in-fact' (or actual) contract rather than a contract implied in law (or quasi-contract).

[44] Corbin served as a Special Reporter on contracts in relation to the first Restatement of Contracts. Charles E Clark, 'The Restatement of the Law of Contracts' (1933) 42 Yale Law Journal 643, 653. Prior to his death in 1967 Corbin served as a consultant in relation to the drafting of the Restatement (Second) of Contracts. E Allan Farnsworth, 'Ingredients in the Redaction of the "Restatement (Second) of Contracts"' (1981) 81(1) Columbia Law Review 1, 3. Although the Restatements are not binding on the US Courts it appears that the Courts routinely cite to the Restatements as though they were. Gregory E Maggs, 'Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law' (1988) 66 Geo Wash L Rev 508. For a criticism of the provisions of the first Restatement of Contracts, and the exceptions in relation to the usual rules as to acceptance see Clarke B Whittier, 'The Restatement of Contracts and Mutual Assent' (1929) 17 Cal L Rev 441, 445, 446.

[45] Section 69 may have replicated the terms of section 72 of the Restatement (First) of Contracts, which may have repeated, more or less verbatim, the wording used by Williston in the first edition of *Williston on Contracts*. As to the relationship between the Restatement and Williston's revised edition of *Williston on Contracts* see Horace E Whiteside, 'Williston on Contracts' (1938) 23 Cornell L Rev 269. Corbin will have been very familiar with Williston's writings.

[46] As to the difficulties in drawing the boundaries between contract and unjust enrichment see David M Walker, *The Law of Contracts and Related Obligations in Scotland* (Butterworths 1979) para 3.5; Gordon DL Cameron, 'Consensus in Dissensus' 1995 SLT (News) 132; Goff and Jones (n 39) para 3-01 ('The relationship has been, and continues to be, a problematic one'). In relation to the US see *Maglica v Maglica* (1998) 66 Cal App 4th 442, 455 (stating that the line between the two 'is fuzzy indeed').

glosses over certain aspects of the general principle, leaving them implicit rather than explicit, the majority accepts that the taking of the benefit of services only gives rise to implied acceptance where the recipient had an opportunity to reject the benefit offered.

VIII.2 The application of the principle set out in section 69 of the Restatement is consistent with the requirement that assent by conduct should be unequivocal

Corbin does not explicitly address how his statement as to the implications of taking the benefit of services, in the knowledge that compensation is expected and where the recipient had an opportunity to reject the benefit of the services, is to be reconciled with the principle, affirmed, as regards the US, in *Specht*, that assent will only be implied from conduct where the conduct is unequivocally referable to the contract contended for.[47]

Nothing in Corbin, (nor in section 69 (1)(a) of the Restatement Second of Contracts), alters the principle that for conduct to give rise to assent it must be unequivocally referable to the contract. His statement might therefore be taken to imply that in those instances falling squarely within the parameters he outlines, assent will readily be implied since the conduct in taking the benefit must be regarded as unequivocally referable to the contract. This would seem to be correct for how else can one explain not only the taking of the benefit of the services but the conduct of the service provider in proceeding to deliver the services in a situation where the recipient has an opportunity to reject the services and the service provider makes it clear in advance that the services will only be delivered in exchange for terms. In other words, Corbin is not suggesting an exception to the general rule concerning the need for an unequivocal showing of assent but rather a category of action where it is possible, ex ante, to say that the requirement is met.

VIII.3 Section 19 of the Restatement (Second) is not at odds with section 69

Nancy Kim suggests that if US courts, faced with the problem of assessing the contractual implications of wrap contracts (Kim has in mind click wrap as well as browse wrap contracts), adopted the principle set out in section 19 of Restatement (Second) of Contracts rather than the principle expressed by section 69(1)(b), the outcome would be different.[48] Section 19 provides that

> the conduct of a party is not effective as a manifestation of assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer

[47] *Specht*, one of the seminal US cases on browse wrap terms, expresses the general rule as to acceptance by conduct in the following terms: 'Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even wilful inaction, as long as it is unequivocally referable to the promise, may create a contract.' *Specht v Netscape* 150 F Supp 2d 585 para 587 (emphasis added). The same point is made elsewhere. Thus 'an acceptance "must comply with the terms of the offer and be clear, unambiguous and unequivocal."' *Krumme v WestPoint Stevens Inc*, 143 F 3d 71, 83 (2d Cir 1998) (quoting *King v King* 208 A D2d 1143, 617 N Y S 2d 593, 594 (1994)). This statement is quoted with approval in *International Business Machines Corp v Johnson* 629 F Supp 2d 321 (2009). Similarly section 58 of the Restatement (Second) of Contracts requires that acceptance should be unequivocal. In *Register.com* the US Court of Appeals for the Second Circuit cited to *Specht* but made no reference to the requirement that the conduct should be unequivocal in signaling assent.

[48] Kim (n 22) 128.

from his conduct that he assents.

Kim offers little by way of analysis of the implications of section 19. She maintains that 'Courts routinely enforce wrap contracts where consumers have no intent of entering into a contract.'[49] Here Kim appears to read section 19 as though it contained a requirement for subjective intention to manifest assent rather than *intentional conduct* coupled with an objective test[50] as to the inference of assent.[51]

However, since the situation presented by Corbin is consistent with the requirement that the conduct said to give rise to assent should be *unequivocally* referable to the contract, it follows that the party whose conduct is in issue must, on an objective construction, (that is, in line with the approach adopted in contract law in the US and in England) be taken to have reason to know that the other party may infer that he assents.[52] Thus, in the situation presented by Corbin, section 19 is of no assistance in rebutting an inference of assent.

VIII.4 The rules of contract law applied by the majority are consistent with those of English law

The learned editors of Chitty on Contracts accept that in the circumstances described in section 69 (1)(a) of the Restatement (Second) of Contracts a contract might be implied under English law.[53] The approach taken by the editors contains echoes of Corbin. Like Corbin, they are concerned primarily with the implication of a promise to pay against a backdrop of an inference as to the existence of a contract for services to be rendered.[54] However the crucial point is the recognition that in some instances (particularly where, as in the case of browse wrap Terms of Use, there is no question of incomplete negotiations as to terms)[55] it is appropriate for a court to infer the existence of a valid contract for services where the services are offered on terms and the

[49] ibid.

[50] The Comments to section 19 of the Restatement (Second) of Contracts offer a form of test as to whether there is reason to know. Restatement (Second) of Contracts § 19, Comment b. See also Richard E Speidel, 'Restatement Second: Omitted Terms and Contract Method' (1982) 67 Cornell Law Review 785, 794, 795; James J White, 'Autistic Contracts' (2000) 45(4) Wayne Law Review 1693,1695, fn 1 (describing the test under section 19 as 'objective'); Rick Bigwood, *Exploitative Contracts* (OUP 2003) 256.

[51] Farnsworth makes it clear that under the objective theory, 'universally accept[ed]' by the Courts, there is no requirement that actions said to constitute assent should be 'done with the intention of assenting to an agreement'. E Allan Farnsworth, *Farnsworth on Contracts* (3rd edn, Aspen Publishers 2004) § 3.6. The California Civil Jury Instruction offers the following guidance as to implied-in-fact contracts 'Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.' Justia, 'California Civil Jury Instructions (CACI) 305. Implied-in-Fact Contract' <https://www.justia.com/trials-litigation/docs/caci/300/305.html> (accessed 2 July 2015). This suggests that, in line with my own interpretation, the terms of section 19 should be construed literally and not as Kim suggests.

[52] In *Pride v Lewis* the court stated that 'Th[e] rule [that acceptance may be by conduct or inaction] applies primarily to instances where services are rendered and the party benefited by the services is aware of the terms upon which the services are offered.' *Pride v Lewis* 179 S W 3d 375 (2005).

[53] Joseph Chitty and H G Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) ('Chitty') para 29-070. See also *Hellmuth Obata & Kassabaum Inc (t/a Hok Sport) v King* (unreported) 29 September 2000, Colin Reese QC.

[54] ibid.

[55] Contrast for example, the finding of an implied contract in *RTS Flexible Systems Limited v Molkerei Alois Müller Gmbh & Company KG (UK Production)* [2010] UKSC 14 (where negotiations were complete) and the rejection of a contractual basis for recovery in *Leading Edge Events Australia Pty Ltd v Kiri Te Kanawa* [2007] NSWSC 228 (where negotiations were in progress).

recipient expressly or impliedly requests the services.[56]

Treitel's discussion of acceptance through conduct is brief.[57] Treitel refers to acceptance by conduct in the context of services but the examples provided concern acceptance by the service provider rather than the recipient of services.[58] However Treitel expressly refers to acceptance by conduct where a person takes the benefit of goods offered for sale, noting that

> An offer to sell goods made by sending them to the offeree can be accepted by using them. Conduct will however only have this effect if the offer did the act with the intention (ascertained in accordance with the objective principle) of accepting the offer.[59]

By extension, an offer to supply services can be accepted by using them.[60] If, as Hedley suggests, in each case (that is the examples of goods of services) the inference of assent is a 'fiction',[61] it is a fiction routinely applied in the law of contract where assent is inferred from conduct and not according to the parties' subjective intentions.[62]

An obiter passage in *Ladymanor* suggests that in principle if an offeree has the opportunity to reject proffered services but chooses instead to take the benefit of those services assent may be implied.[63] Similarly in *Taylor v Allon* the Court was prepared to accept (but did not determine, since on the facts the point did not need to be resolved) that an offer of insurance contained in a temporary cover note might be accepted by conduct in taking a car on the road in reliance on the cover.[64]

In practice, the English Courts are likely to imply a contract in just the kind of situation described in section 69 (1)(a), though they are likely to be much more circumspect about ex ante declarations as to those sets of facts that might warrant the implication of contracts.[65] There is therefore every reason to suppose that if the English Courts were to adopt the conceptualisation of the exchange proposed by the majority in *Register.com* they would reach the same view as the majority through the application of English law.

---

[56] Chitty (n 53) para 29-070.
[57] Edwin Peel and G H Treitel, *The Law of Contract* (13th edn, Sweet and Maxwell 2011) ('Treitel') para 2-018.
[58] ibid.
[59] ibid.
[60] See for example, *Empirnall Holdings Ltd v Machon Paul Partners Pty Ltd* 1988 NSWLR 523 (New South Wales Court of Appeal). Commentary on the case states that for McHugh JA, 'the case was … one of Empirnall taking the benefit of an offer with knowledge of its terms and conditions and knowledge of the offeror's reliance on payment being made …' JG Starke, 'Contract - offer and acceptance - acceptance of offer implied from conduct and taking of benefit by "offeree."' (1989) 9 Australian Law Journal 642. See also *Scottish Water Business Stream Ltd v Chataroo* (unreported) 28 August 2015, citing this passage from *Ballantine v Stevenson* (1881) 8R 959, 976: 'where one of the parties takes benefit from the proposed contract, and where another party has fulfilled some obligation which was incumbent upon him only if the contract were a completed contract; and if this last is done with the knowledge, and presumably with the consent, of the other party to the contract, then both are bound.'
[61] Steve Hedley, 'Implied contract and restitution' [2004] Cambridge Law Journal 435, 449, 450.
[62] For Hedley, the implication of a contract where a person takes goods without paying, is a fiction (though a useful one). Hedley (n 61) 450. This, according to Treitel, is precisely where the law is prepared to infer assent from conduct.
[63] *Ladymanor Ltd v Fat Cat Café Bars Ltd* [2001] 2 EGLR 1 [13].
[64] [1966] 1 QB 304 [311].
[65] 'Whether the court will hold that a binding contract was made depends upon all the circumstances of the case, of which that [the fact that the work was performed] is but one.' *RTS Flexible Systems Limited v Molkerei Alois Müller Gmbh & Company KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753 [54].

VIII.5 The implications of the contractual analysis according to the conceptualisation of the service suggested by the majority in *Register.com*

If then, one adopts the conceptualisation suggested by the majority in Register.com, to the effect that the website merely makes an *offer* of services, namely the provision of access to (and use of) information, the benefit of which is taken by the user in accessing the website (and using the information), it follows that the user must be deemed to assent to terms drawn to his attention before taking the benefit. Subject therefore to satisfaction of the requirement for consideration, which in the case of services involving the doing of some act that gives access to information would appear to be met save (possibly) where the information is in the nature of advertising or (very likely) where the information is provided on a retail website, the benefit conferred on the user suffices to clothe the Terms of Use with contractual effect.[66]

IX. A contractual analysis according to the two-stage model

IX.1 Two separate analyses

The conceptualisation of the arrangement between website and user drawn from *Svensson* suggests that the website confers two different benefits at different points in time. At the first stage, the website provides a service that involves making the content available to the user. At the second stage the website may provide a further benefit in granting some form of permission or licence for use of the information made available.

It follows that in assessing whether consideration has been granted by a website in order to support a valid, binding contract, it is essential to take into account the two forms of benefit, noting the different stages at which each benefit is conferred. Similarly, when assessing whether the user's conduct, in taking the benefit that is supplied by the website, is apt to indicate assent to the website's Terms of Use, the analysis must encompass both forms of benefit.

IX.2 The first stage benefit

IX.2.1 Analysis

If, as *Svensson* suggests, the service supplied by an open publicly accessible website consists in making information available, the supply of such service is past consideration. The content is made available before the user accesses the website, before he has notice of the Terms of Use and so before the earliest point at which the Terms of Use could be binding on him.

The content is made available 'by the mere provision of the material on the net'.[67] As we noted in Chapter VII this is achieved where the content is uploaded to the server, the server connected to the internet and the server is configured so as to make the content publicly accessible.

[66] As regards the provision of access to information in the nature of advertising 'possibly' because it is impossible to rule out the prospect that a court would consider that a service involving provision of access qualifies as consideration even if the provision of information in the nature of advertising per se does not qualify.

[67] Walter and von Lewinski maintain 'Similar to broadcasting, the making available is completed by the mere provision of the material on the net.' Michel M Walter and Silke von Lewinski, *European Copyright Law* (OUP 2010) para 11.3.30.

The provision by the website of content 'on the net' is not part of a near-contemporaneous exchange between website and user of consideration and promise. The user's promise, set out in the Terms of Use, is not, in substance, part of a single transaction that also encompasses the website's making content available. The process of making the content available occurs without reference to any particular user and takes place regardless of whether any user accesses the website let alone specific content.

Nor can it be said that the user directs a request to the operator of the website to make the website contents available. The website operator sets up the website, populates it with content, arranges for it to be hosted on a server and for the server to be linked to the internet without reference to or any request from a user.

When the user inputs the URL for a particular website in his browser bar, or clicks on a link for a webpage or its contents, he makes a request for transmission of the content but not a request for the content to be made available: that has been achieved by 'the mere provision of the material on the net'. There is no request for services consisting in making the content available.

The analysis set out above indicates that in the case of open, publicly accessible websites, and to the extent that the benefit is conceptualised as a service consisting in making information available, (or its equivalent, the de facto grant of access) the website provides no consideration.[68] This is so regardless of how the Terms of Use are displayed on the website and regardless of how often the user returns to the website after being given notice of the Terms of Use. As a matter of practicality, an open publicly accessible website cannot fix the user with notice of the Terms of Use before making the content available. The service is complete before the user visits the website.

IX.2.2 Support for the analysis as to the non-contractual character of the transfer of the first-stage benefit

IX.2.2.1 In praise of Judge Parker

Support for this analysis may be found in the draft Opinion of Judge Parker in *Register.com*. For Judge Parker, the first stage benefit is access to the Register.com database rather than the provision of a service consisting in making available. However Judge Parker appears to accept that in the case of an open publicly accessible website, access has in effect been given away. The language is different but the point he makes is essentially the same: once you have made a website open and publicly accessible, access to the information is already available to the user.

Judge Parker makes the point in these terms:

> By the time Register.com presents its proposed terms, *it has already given away* that which it "owns" — access to its WHOIS database.[69]

In *Register.com* users were able to access the database via the *Register.com* website (or by access

[68] Dawn Davidson acknowledges that there is an issue as to 'Whether access to a Web site that is publicly offered and accessible by "surfing the net" constitutes consideration' and adds 'There is a plausible argument that sufficient consideration does exist, …' Davidson (n 27) 1179, fn 48.
[69] *Register.com* (n 2) (draft Opinion of Judge Parker) 431 (emphasis added).

to the special port) without first seeing the terms that Register.com sought to impose. The terms were only intimated along with the response issued in relation to each of Verio's queries. In this respect the facts in *Register.com* differ from the usual position that applies in relation to access to open publicly accessible websites governed by browse wrap Terms of Use.[70] The usual position is that the user will have had some opportunity to view the Terms of Use on accessing the website.

However the point Judge Parker makes does not concern notice. Judge Parker maintains that even once Verio, through repeated use of the database, had notice of the terms proposed by Register.com they could nevertheless *reject the terms proposed by Register.com while still taking the benefits*.[71]

Judge Parker attaches significance to the fact that access to the website was not conditioned on an express and unambiguous manifestation of assent to terms imposed by the website.[72] He observes that Register.com could, in theory, have prohibited access to its database.[73] He notes that

> Instead, when an end-user submits a WHOIS query, access is granted, the query is processed, and the WHOIS information is sent to the end-user.[74]

His analysis suggests that a website 'gives away' access to its content whenever a website is configured so as to be open and publicly accessible, whenever, that is, access is not conditioned on affirmative assent though click-wrap terms.[75] I agree. This is 'past consideration' whether badged as a service or a grant of access. The content is made available without reference to users. The user has no control over, and no opportunity to reject, the service (or other benefit) that consists in making the information available.

IX.2.2.2 *Century 21 v Roger*

Oblique support for this analysis may also be found in the arguments of Counsel for the defendants in *Century 21*. The billboard argument suggests that Counsel saw the *process* by which the information was made available as irrelevant to the question of whether a contract might be implied. By the time information appears on a billboard it has already been made available without reference to prospective viewers of the billboard: the process of making the information available cannot therefore form the basis for a contract. That service has been given away.

---

[70] While Judge Parker took the view that this fact alone was sufficient to distinguish the proposed terms in Register.com from browse wrap agreements, the consensus amongst commentators is that the decision concerns browse wrap terms. See for example Ryan J Casamiquela, 'Contractual Assent and Enforceability: Cyberspace' (2002) 17 Berkeley Tech L J 475, 484; Christina L Kunz and others, 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements' (2003) 59(1) The Business Lawyer 279, 288; James J Tracy, 'Browsewrap Agreements: Register.com, Inc v Verio, Inc' (2005) 11 BU J Sci & Tech L 164, 166 (describing Register.com as 'the most important browse wrap decision to date'); Kim (n 22) 42 (stating that Register.com 'may have had the most influence in persuading subsequent courts to enforce the browse wrap form'); Michelle Garcia, 'Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum' (2014) 36 Campbell L Rev 31, 52, 53.

[71] *Register.com* (n 2) (draft Opinion of Judge Parker) 431.

[72] *Register.com* (n 2) (draft Opinion of Judge Parker) 429.

[73] *Register.com* (n 2) (draft Opinion of Judge Parker) 432.

[74] ibid.

[75] Judge Parker evidently attaches significance to the fact that 'hypothetically' (in the absence of its contractual agreement with ICANN) Register.com 'could prohibit access to its [WHOIS] database' but did not do so. *Register.com* (n 2) (draft Opinion of Judge Parker) 432.

IX.2.2.3 *Ladymanor Ltd v Fat Cat Café Bars Ltd*

Ladymanor Ltd v Fat Cat Café Bars Ltd, a recent English case concerning the use of unsolicited information, provides a useful illustration as to the application of the general rule in relation to 'past consideration' and serves to illustrate how the English courts might approach the question of the contractual implications of the exchange between an open publicly accessible website and the user according to the two-stage model.[76]

In *Ladymanor* the plaintiff, an estate agency, supplied information to the defendant regarding properties for sale. The defendant had made no request to the estate agency to provide the information. The defendant used the information and acquired a property. The estate agents sought payment of fees. On appeal from the District Court the County Court decided that the defendant was free to use the information without any obligation to the estate agency, even though the correspondence enclosing the information indicated that the estate agency expected payment of a fee in the event of the purchaser using the information to purchase a property.[77] The supply of the information, it said, was 'past consideration'.[78]

Judge Cowell rightly makes the point that the rule against 'past consideration' is a corollary of the 'general principle' that 'if I confer an unrequested benefit upon another, whether it be by the doing of works or the provision of information or in some other way, I am not entitled to require payment from him, the recipient of the benefit'.[79] The mere fact that the recipient receives and uses a benefit, without more, does not give rise to a contract, complete with consideration. In the case of conferral of an unrequested benefit, both assent and consideration are lacking.

The situation described in *Ladymanor* is analogous to the supply of information by the website at the first stage of the two-stage model. The information is made available to the user without his having requested that it should be made available. The supply of the information does not give rise to a contract.

The Court observed that if, on the other hand, the estate agency had indicated that it had further information that might be of benefit to the purchaser, and the purchaser requested the supply that additional information, the use of that information would give rise to an obligation to make payment, where the estate agent had communicated an expectation of payment.[80] This is how the court in *Register.com* construed the exchange between the website and user, supposing that the service was only delivered after an offer had been made and accepted.

Nearly 50 years separates the publication of the one volume edition of *Corbin on Contracts* and the decision in *Ladymanor*. However the example Corbin chooses in order to expand upon the passage on which the majority in *Register.com* relies is almost identical to the scenario presented in *Ladymanor*. Corbin explains

[76] n 63.
[77] ibid para 12.
[78] ibid paras 8 and 13.
[79] ibid para 6.
[80] ibid.

> A real estate broker may without request on the part of the principal find and bring him a willing and able purchaser, informing the principal that he will expect a commission if a sale is made. The broker's work is then all done and he makes no promise. No doubt the principal can then make a sale to the purchaser introduced by the broker without binding himself to pay a commission. This is because the services have been thrust upon him; he is privileged not to accept the offer and he is not disabled from making a sale without accepting the offer.[81]

Notice that Corbin frames the issue as one relating to the privileges of the recipient of the services. The recipient, Corbin says, holds a privilege to receive and use services that are provided without the recipient having an opportunity to reject those services. The taking of the benefit of the services does not give rise to a contract, *since the user already holds a privilege to accept services provided without opportunity to reject*. The law of contract in England and in the US are at one on this point: the majority analysis in *Register.com* diverges from mine only in their interpretation of when the service is delivered.

Section IX.3 The second stage of conferral of benefits: a contractual analysis

IX.3.1 The hurdle of assent

At the second stage of conferral of benefits, where the website grants some form of permission to use the information made available, provided the user has adequate notice of the Terms of Use no question of past consideration arises.

However a website using browse wrap Terms of Use faces significant hurdles in establishing assent. Browse wrap Terms of Use are characterised by the fact that the user does not provide explicit assent. If the user assents, he does so impliedly and by virtue of his conduct in using the website and the information supplied.

IX.3.2 Acceptance by conduct under English law

An offer may be accepted by conduct.[82] However in order to give rise to an inference of assent the conduct must 'be clearly and unequivocally referable to the agreement contended for.'[83] What this means in practice is spelled out in *FW Farnsworth Ltd v Lacy*.[84] The Hon. Mr Justice Hildyard observes

[81] Corbin (n 36) para 71. Note that Corbin uses the conception of a 'privilege' to describe the recipient's freedom to use the information. Corbin deliberately adopted Hohfeld's terminology to distinguish between rights, powers and privileges. Friedrich Kessler, 'Arthur Linton Corbin' (1969) 78(4) Yale Law Journal 517, 518. The privilege applies on account of the absence of legal constraints.

[82] *Brogden v Metropolitan Railway* (1877) 2 App Cas 666; *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB); *Reveille Independent LLC v Anotech International (UK) Limited* [2015] EWHC 726 (Comm); Richard Stone, *The Modern Law of Contracts* (Routledge Cavendish 2009) para 2.12.1; Treitel (n 57) para 2-018; Richard Taylor and Damian Taylor, *Contract Law Directions* (5th edn, OUP 2015) 39.

[83] *Ove Arup & Partners International Ltd & Another v Mirant Asia-Pacific Construction (Hong Kong) Limited & Another* [2003] EWCA Civ 1729 [62]. The same point is made in *Khatri v Cooperatieve Centrale Raiffiese-Boerenleenbank BA* [2010] EWCA Civ 397, [2010] IRLR 715 [47]; *FW Farnsworth Limited v Paul Lacy* [2012] EWHC 2830 (Ch); *Reveille Independent LLC* (n) [26]. See also *Foster v Royal Trust Co* [1951] 1 DLR 147, a decision of the High Court of Ontario.

[84] *FW Farnsworth Ltd* (n 83).

> the person who alleges inferred or implied acceptance must show that the benefit invoked, being the act relied on as giving rise to the inference of acceptance, was only available pursuant to the contract in question, and that the invocation of that contractual right was in unequivocal terms, such as to be referable only to acceptance of that contract.[85]

The benefit must flow from the contract, and only from the contract, for the taking of the benefit to give rise to acceptance.[86]

IX.3.3 Unequivocal assent cannot be shown where a person holds a right or privilege to engage in the conduct said to indicate assent

If a person already holds either a right or a privilege to engage in the conduct said to involve the taking of the benefit, the conduct cannot be relied on as an indication of assent since his conduct is equally referable to the exercise of the right or privilege as to assent to the contract.

This point is powerfully made in *The Aramis*.[87] There, in relation to an argument that a contract fell to be implied between the presenter of a bill of lading and a shipowner to whom the bill of lading was delivered but not endorsed, Stuart-Smith LJ stated

> If their conduct is equally referable to and explicable by their existing rights and obligations, albeit such rights and obligations are not enforceable against each other, there is no material from which the Court can draw the inference. It is only if their conduct is unequivocally referable to or explicable by one or more of the rights or obligations contained in the bill of lading that there is factual material from which the Court can draw the inference that a contract has been entered into between them.[88]

In line with this approach the English courts have therefore declined to find assent through conduct where, for example, the conduct is as consistent with an existing contract as a purported new contract.[89]

IX.3.4 The situations in which assent may be inferred from conduct are not widened by provisions prescribing the form of assent

Terms of Use very often specifically state that assent may be inferred from conduct.[90] Website Terms of Use may expressly state, for example, that

---

[85] *FW Farnsworth Ltd* (n 83) 30.
[86] *The Aramis* 1989] 1 Ll LR 213; *The Gudermes* [1993] 1 Ll R 311, 320.
[87] *The Aramis* (n 86) 230.
[88] *The Aramis* (n 86) 230. Similarly, in *The Gudermes* and in relation to an argument that a new contract should be implied from de facto arrangements between the parties Staughton LJ observed '... it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract.' *The Gudermes* (n 86) 320. Lord Staughton's statement is cited with approval in *Baird Textile Holdings Limited v Marks & Spencer Plc* [2001] EWCA CIV 274.
[89] *Khatri* (n 83) (the court refusing to find that an employee had accepted a new contract by continuing in employment).
[90] Kim (n 22) 41.

> By accessing, browsing, using, registering with, or placing an order on the Website, you confirm that you have read, understood and agree to these Website Terms in their entirety. [91]

or,

> Use of this site is subject to express terms of use, which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms.[92]

It is important to appreciate that such provisions do not extend the range of conduct that may operate as acceptance in a particular case. Nor do they alter the rule that for conduct to operate as assent it must be unequivocally referable to the proposed contract. So while the offeror as master of the offer[93] may stipulate the forms of conduct that may operate as acceptance, this

> means only that the offeror can rule out certain things as acceptance, i.e., that the offeror can limit the universe of things that will be regarded as acceptances, not that the offeror can expand 'acceptance' beyond the universe that a person in the offeree's shoes would believe to be acceptance.[94]

Or as Corbin puts it

> If A offers his land to B for a price, saying that B may signify his acceptance by eating his breakfast or by hanging out his flag on Washington's birthday or by attending church on Sunday, he does not thereby make such action by B operative as an acceptance against B's will. If B shows that he had no intent to accept, and that he ate his breakfast merely because he was hungry, or hung out his flag because it was his patriotic custom, or went to church to hear the sermon, no contract has been made even though A truly believed B meant to accept …[95]

Treitel likewise makes it clear that the rationale for prescribed methods of acceptance is to narrow, not extend the forms of conduct that may operate as acceptance, noting simply that

---

[91] <http://help.marksandspencer.com/support/company-website/terms-and-conditions#anchor2> (29 April 2014).

[92] By the third round of its long-running litigation with Tickets.com, this legend appeared on every page of the Ticketmaster website. Kunz (n 70) 286, fn 46.

[93] Farnsworth notes that 'The offeror is often described as "the master of the offer". Farnsworth (n 51) § 3.12.

[94] James J White and Robert S Summers, *Uniform Commercial Code* (Vol 1, 5th edn, West Group 2002) 91. See also Farnsworth (n 51) § 3.12 noting that the offeror's control over the method of acceptance means that 'The offeror enjoys "freedom *from* contract" except on the offeror's own conditions' (original emphasis). Thus, contrary to the interpretation suggested by Christina Kunz, in *Boomer v AT&T* the court rejected the claimant's argument that he had not accepted the new terms proposed by AT&T for use of their telephone services, *not* because AT&T said that use would signify assent but because Boomer had a reasonable opportunity to reject services offered with a clear expectation of compensation. *Boomer v AT&T* 309 E 3d 404, 409 (7th Cir 2002). Kunz (n 70).

[95] Corbin (n 36) para 73.

> Where an offer states that it can only be accepted in a specified way, the offeror is not, in general, bound unless acceptance is made in that way.[96]

Exceptionally, the effect of intimation of a prescribed mode of acceptance may be to create a liability in estoppel (though not to give rise to acceptance) where the offeree's conduct conforms to the mode of acceptance and creates a belief on the part of the offeror that the offer has been accepted.[97] However Treitel makes it plain that estoppel will only arise where there are special circumstances giving rise to an obligation on the part of the offeree to inform the offeror that contrary to the offeror's belief, he (the offeree) does not accept the offer.[98] None of those special circumstances are present in the context of the exchange between an open publicly accessible website and user. More to the point estoppel can only arise where the offeror acts in reliance on the offeree's conduct to his detriment.[99] In the context of the use by the user of information *already made available* there is no reliance on the part of the website and, where the user merely exercises his pre-existing rights or privileges, there is no detriment to the website.

IX.3.5 The implications of user rights or privileges in relation to the use of information that is publicly available

Where therefore assent must be implied from conduct, it is necessary to assess whether the conduct is referable only to the proposed contract or whether, rather, the conduct is equally referable to the user's rights or privileges.

Once information is publicly available, English law, in common with US law, imposes limited constraints on its use. Where those constraints have no application, the user holds a *privilege* (not a right) to use the information.[100] In those circumstances, where the information provider asserts that the use of the information is governed by a contractual licence, the taking of the benefit of use by the user may be said to flow *either* from a contract *or* from the exercise of the privilege: such conduct is not unequivocally referable to the contract. For as long as the user's conduct remains within the sphere of the privilege no inference of assent may be drawn.

Strong support for this approach is provided by the draft Opinion of Judge Parker.

As to the second stage benefit, the information made publicly available, Judge Parker notes that

---

[96] Treitel (n 57) para 2-040. See also Denis J Keenan and Kenneth Smith, *Smith and Keenan's English Law: Text and Cases* (15th edn, Pearson Longman 2007) 277; Laurence Koffman and Elizabeth MacDonald, *The Law of Contract* (OUP 2010) para 2.67; Taylor (n 82) para 2.7.1.

[97] Treitel (n 57) para 2-045.

[98] Treitel suggests that such special circumstances may be present if the parties had engaged in a course of dealing and as a result the offeror had reason to believe that a particular mode of acceptance was agreed, where the *offeree* represents certain conduct (even inaction) may be regarded as acceptance or by virtue of a custom of trade or business. Treitel (n 57) para 2-044.

[99] Treitel (n 57) para 2-045.

[100] To paraphrase Yochai Benkler, the significance of a privilege is that it represents 'the range within which we are negatively free' of legal constraints. Benkler states 'we must recognize that the range within which we are negatively free in our day-to-day behavior is the set of our activities that is privileged in the Hohfeldian sense.' Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 New York University Law Review 354, 393. Corbin uses the term 'privileged' to describe the freedom of the principal to use unsolicited information supplied by a real estate broker. Corbin (n 36) para 71.

Register.com did not 'own' the information.[101] He also recognises that the act of making information available to the public has consequences for the rights in relation to such information. Quoting Brandeis, he maintains that information that is publicly accessible is 'generally "free as the air to common use."'[102] He carries out an analysis of the residual protections for information that has been made publicly available, noting in particular that the information in issue was not capable of being protected by copyright.[103]

The following passages illustrate the significance Judge Parker attaches to these insights

> Verio (and every other end-user) may repeatedly submit WHOIS queries to Register.com based on an (accurate) understanding that Register.com does not own WHOIS information and that such information must be made freely and publicly available ... Viewed in this manner, Register.com's repeated proposals [as to terms] … could reasonably have been repeatedly rejected by Verio. *There is no basis to infer that Verio in fact assented to Register.com's mass marketing restriction.*
>
> Absent an ownership right in the information itself, which might allow some use restrictions despite disclosure, there is nothing to prevent an end-user from simply rejecting Register.com's proposed terms and then proceeding to use the information in any desired manner.[104]

In effect Judge Parker asks and answers this question: is the user's conduct unequivocally referable to the proposed contract and, in particular, do the benefits taken and said to be the subject matter of the proposed contract flow only from the contract or have a different source. In *Register.com*, since the information had to be (and was) made available, and since (in the absence of copyright protection) the applicable (US) law does not constrain subsequent use of the information, the user's conduct in taking the benefits was equally consistent with his accurate (and thus objective) understanding that he holds a (Hohfeldian) privilege to use the benefits.[105] Assent cannot be inferred.

Section IX.3.6 The second stage: a summary

For the benefit of a permission to use information that has been made publicly available to ground an inference of assent by virtue of the use of the information, both the permission and the use must extend beyond the scope of the user's existing legal privileges in relation to such information. In order therefore to ascertain the range of circumstances in which a contract will be

---

[101] *Register.com* (n 2) (draft Opinion of Judge Parker) 408, 418, 431, 432.
[102] *Register.com* (n 2) (draft Opinion of Judge Parker) 418, quoting from *Int'l News Serv v Associated Press*, 248 U S 215 (1918) (Brandeis, dissenting).
[103] *Register.com* (n 2) (draft Opinion of Judge Parker) 418. Under US law facts are not copyrightable. *Feist Publ'n, Inc v Rural Tel Serv Co, Inc,* 499 US 340 (1991).
[104] *Register.com* (n 2) (draft Opinion of Judge Parker) 432 (emphasis added).
[105] Raymond T Nimmer, while not engaging in detailed analysis, appears to approach the question of the contractual significance of the exchange between an open publicly accessible website and user in much the same way as Judge Parker. He comments 'By and large, open forum uses of information are non-contractual. They involve giving away information and a willingness not to assert rights, at least to some extent and under some conditions …The classic phrase "Take my wife-please" [sic-not a 'classic' in my neighbourhood] is one way of characterizing what an Internet user means when it posts to a list-serve or erects a website without placing contract-based restrictions on access to or use of the site. "Take my information-please."' Raymond T Nimmer, 'Breaking Barriers: The Relationship between Contract and Intellectual Property Law' [1998] Berkeley Tech LJ 827, 833.

inferred though use of the information, it is essential to understand the scope and limits of those privileges.

Section IX.3.7 The contractual implications of the two-stage model

I have shown that the provision by the website of a service consisting in making information available (the first stage benefit) can never give rise to a contract. On the other hand, in relation to the second stage benefit (a licence or permission to use the information), use of the information will give rise to a contract if and to the extent that the user uses the information in a manner that exceeds his legal rights and privileges and such use is within the scope of the licence.

Section IX.4 The results of the comparison between the contractual analyses according to the model suggested by Register.com and the two-stage model

The contractual analyses as to the exchange between open publicly accessible website and user on the model suggested by the majority in *Register.com* on the one hand and on the two-stage model on the other produce very different results.

On the *Register.com* model the exchange is invariably contractual. On the two-stage model the exchange is contractual only where both the licence granted under the Terms of Use and the use itself extend beyond the scope of the user's legal rights and privileges in relation to such information. In other words, the choice of model used to conceptualise the exchange has profound implications for the circumstances in which a Court may determine that a user is fixed with Terms of Use. It has profound implications for the scope of the public domain.

Section X Conclusion

In this Chapter I noted that *Svensson* provides two insights, namely, that the service provided by an open publicly accessible website consists in making information available, and that it is analogous to free to air broadcasting.

I argued that the second of these insights allows us to refine our analysis of the contractual status of websites by revealing that a website provides a user with two different benefits at different stages. Armed with this insight, I proposed a new conceptualisation of the exchange between open publicly accessible website and user based on a two-stage model.

I demonstrated the significance of the two-stage model by carrying out an analysis of the contractual implications of adoption of the model suggested by the majority in *Register.com* on the one hand and the two-stage model on the other. Comparison of the results demonstrates that while, under the first model, a contract will invariably be inferred from access to and use of the website, the two-stage model suggests that a contract will only be inferred if and to the extent that the user uses the information in a manner that exceeds his legal rights and privileges and such use is within the scope of the licence.

A comparison between the decision of the majority and the draft Opinion of Judge Parker reveals that as regards the US the choice between the two models has profound implications for the scope of the public domain in relation to the use of information on open publicly accessible websites. The task for the next Chapter is to assess the impact under English law.

Chapter IX

Mapping the Public Domain

I. Introduction

This Chapter examines the contours of the public domain conceived as a field of relations free from the constraints of law and contract, in relation to the use of information made available on open publicly accessible websites.

The process of mapping the public domain proceeds in stages. In Section II, I outline the user's pre-contract rights and privileges in relation to the use of information made publicly available. Such is the domain of freedom of constraint from law in relation to information on open publicly accessible websites.

In Section III I assess the public domain proper that is, the field of relations free not only from the constraints of law but also from contract. In the context of the second stage analysis I offer two accounts of the public domain, the first obtained in reliance on the model of conceptualisation of the service provided by website to the user suggested by *Register.com*, the second according to the two-stage model I have proposed. The alternative endings are not an exercise in postmodernist literature.[1] I make no bones about my preference: my preference is for the public domain on the latter model. At the same time the exercise of drawing the public domain according to both models reveals the importance of the secondary aim of this thesis, to examine how the benefit conferred by the website on the user might be conceptualised.

The maps of the public domain offered in Section III provide only an abstract vision of the field of relations free from the constraints of law and contract. No attention is paid to the 'on the ground' impact of contractual incursions into the public domain, whether in terms of particular provisions routinely incorporated in Terms of Use or the extent to which the state imposes constraints on the impact of such provisions by providing for the unenforceability of particular terms. This lack is addressed in Sections IV to VII.

Section IV addresses the kinds of terms that may be incorporated in Terms of Use. Sections V and VI deal with the enforceability of such terms under UK law. Section VII provides an overview of the extent to which UK legislation governing enforceability of contract terms makes a difference to the picture of the public domain according to the two different models.

Section II: The user's pre-contract rights and privileges in relation to information made available to the public

II.1 A survey of the user's rights and privileges

[1] As in, for example, John Fowles' novel 'The French Lieutenant's Woman' (Little, Brown 1969).

In addressing the scope of the user's rights and privileges it is necessary to distinguish between information that is unprotected by intellectual property rights and information protected by copyright or the database rights (these being the rights of most relevance to website content). The user's rights and privileges differ according to this distinction.

Where information made available to the public is unprotected by intellectual property rights the user holds a broad privilege to use the information.[2] In particular accessing and copying such information is squarely within the scope of the user's privileges.[3]

The scope of the user's privileges is narrower where copyright or the database right protects the information.[4] However, as in the case of unprotected information, the user holds a privilege of access, of looking at the information.[5] The user holds other privileges. In particular the user holds a privilege to carry out activities that do not infringe copyright or the database right either because the activity in question does not engage the right (insubstantial copying) or falls within the scope of an exception.[6]

II.2 A map of pre-contract rights and privileges

My map of the user's pre-contract rights and privileges, such as it is, suffers from all of the problems encountered by true map-makers: problems, in Jerry Brotton's words, of 'perception and abstraction to scale, perspective, orientation and projection'.[7] I focus on particular acts that the user is free or not free to carry out, namely the acts of looking and copying. I ignore questions of scale: how to measure the relative scope of freedom to look on the one hand and freedom to

[2] As regards use other than access or copying, the privilege is not wholly unrestricted. For example, use of the information in a manner that is defamatory, infringes trade marks, or involves passing off may trigger civil liability. The Metropolitan Police Service suggested that merely viewing a video might be an offence under legislation relating to terrorism though the suggestion was widely criticised as inaccurate. The Huffington Post UK, 'Islamic State Beheading Video Watchers Get Arrest Warning From Met Police' <http://www.huffingtonpost.co.uk/2014/08/20/watch-james-foleys-beheading-online-and-you-could-get-arrested_n_5694871.html> (accessed 26 July 2015). Nevertheless in broad terms, in the words of Brandeis, information that is not protected by copyright or other intellectual property rights is 'free as the air to common use'. *Int'l News Serv v Associated Press*, 248 US 215 (1918) (Brandeis, dissenting).

[3] The user holds a privilege by virtue of the fact that no person holds a right to exclude access to or copying of such information.

[4] The database right was introduced by Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L 077/20 (the 'Database Directive'). Hart and Allgrove suggest that 'most websites now contain some form of database' offering as examples 'compilations of text (such as newspaper articles, product catalogues, advertisements, hypertext links and website addresses), graphics, sound or video material.' Michael Hart and Ben Allgrove, 'Protecting website content: Intellectual property rights' <http://uk.practicallaw.com/2-107-4065#a515931> (accessed 27 June 2015). It is notoriously difficult to assess whether a database is likely to qualify for protection under the Database Directive since qualification for protection depends on the nature of the investment in the database. For example, Ryanair has been denied protection for pricing and flight information on its website in a number of jurisdictions. *Ryanair v Atrapalo*, Court of Appeal Barcelona, 15 December 2009; *CheapTickets v Ryanair* Regional Court of Hamburg, 26 February 2010, affirmed German Federal Supreme Court case no. I ZR 224 / 12, April 2014; *Ryanair v Vivacances* (Opodo), Tribunal de Grande Instance de Paris, 9 April 2010, affirmed Cour d'appel de Paris 23 March 2012; *Ryanair Ltd v PR Aviation BV* Court of Appeal, Amsterdam 13 March 2012.

[5] The lack of non-contractual constraints on access and looking is discussed extensively in Chapter V.

[6] For commentary on the copyright exceptions see Robert Burrell, Allison Coleman, *Copyright Exceptions: The Digital Impact* (CUP 2005). In relation to the scope of the exceptions under the database right regime see Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP 2009) 316, 317; Charlotte Waelde and others, *Contemporary Intellectual Property: Law and Policy* (OUP 2014) 218, 219.

[7] Jerry Brotton, *A History of the World in Twelve Maps* (Viking 2013) 13.

copy on the other? On the other hand I put looking at the centre of the map for if one cannot first access and look, how can one carry out any of the other acts that may fall within the scope of the user's rights or privileges? I distinguish between two different realms of information: information protected either by copyright or the database right on the one hand and information unprotected by intellectual property rights on the other, producing maps for each.

With these explanations the maps of the user's privileges in relation to the two realms of information are presented in Figures 9-1 and 9-2 below.

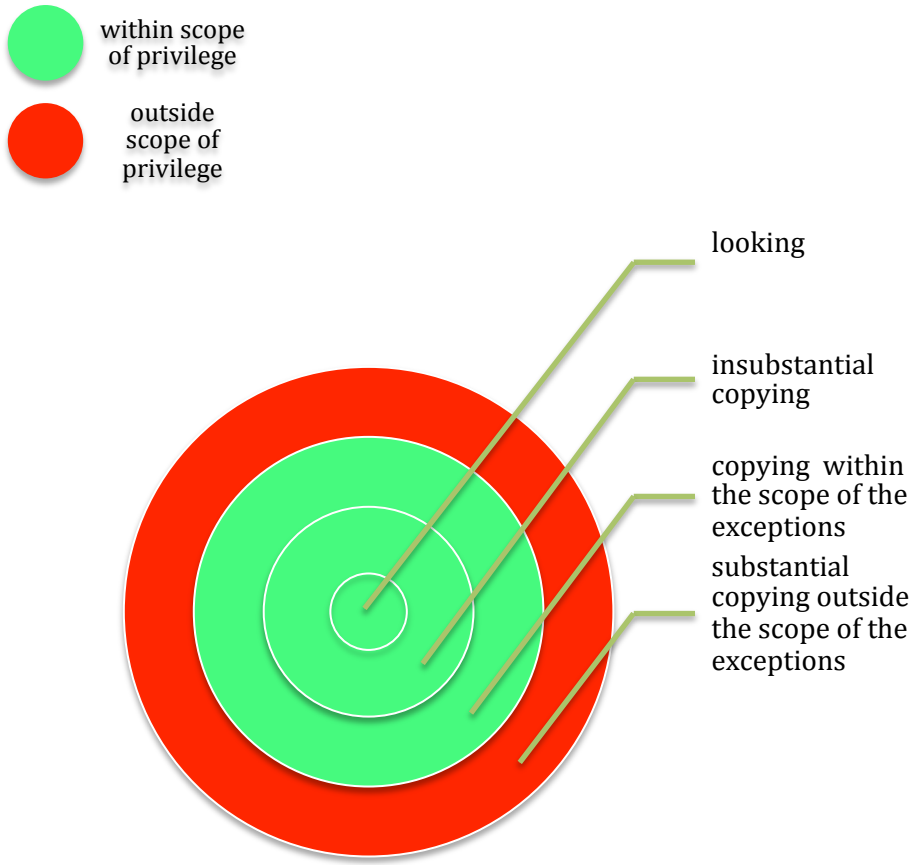

Figure 9-1: the scope of the user's privileges in relation to information protected either by copyright or the database right

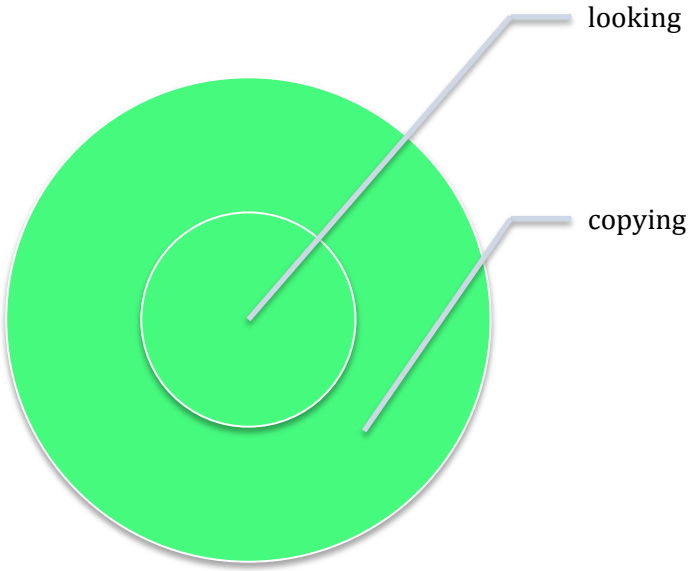

Figure 9-2: the scope of the user's privileges in relation to unprotected information

Notably, whether the information is protected by copyright or the database right, or is wholly unprotected by intellectual property rights, the scope of the user's privileges extends to looking.[8] It also extends to copying though in the case of protected works, the copying must be insubstantial[9] or fall within the scope of the exceptions.

II.3 The relevance of the user's pre-contract privileges for the public domain

The scope of the user's pre-contract privileges has a particular relevance for the public domain conceived as a field of freedom from the constraints of law and contract in relation to information appearing on open publicly accessible websites.

Under English law, where, as in the case of browse wrap Terms of Use, a contract can only be implied from conduct, the circumstances in which a contract may be implied depends on the user's existing rights and privileges.[10] To the extent that the user's conduct in taking the benefits conferred by the website are referable to his existing rights and privileges, no contract may be implied.[11] To the extent that his conduct is referable only to the purported contract incorporating the Terms of Use, that is, the benefits taken by the user flow from the contract and only from the contract, a contract will be implied (subject to the other requirements for a contract being met).[12]

[8] n 5.
[9] As to the test of substantiality in copyright see Case C-5/08 *Infopaq International A/S -v- Danske Dagblades Forening* (17 January 2012); *Newspaper Licensing Agency Ltd v Meltwater BV* [2011] EWCA Civ 890; Bently and Sherman (n 6) 188. The test of substantiality in relation to the database right is set out in Article 7(1) of the Database Directive. As to the application of that test see Case C-203/02 *British Horseracing Board Ltd v William Hill Organization Ltd* [2004] ECR I-10415, paras 69-71; Bently and Sherman (n 6) 313; Waelde (n 6) 215, 216. In relation to the exceptions see the works referred to at n 6.
[10] *The Aramis* [1989] 1 Lloyd's Rep 213. The situations in which assent may be implied from conduct are discussed extensively in Chapter III.
[11] ibid.
[12] ibid.

The implications of these rules of contract law concerning the circumstances in which a contract may be implied, vary according to the manner in which one conceptualises the benefit conferred by the website on the user.

Where the benefit is conceptualised as a service that is only delivered to the user in exchange for the user's promise set out in the Terms of Use, (the model suggested by *Register.com*), a contract will be implied. A contract is implied since on this model, unless and until a user accesses the website the website merely *offers* information to the user and communicates an expectation of a 'price' in the form of the promises set out in the Terms of Use. In these circumstances, the user holds no right or privilege to accept the profferred services without the implication of a contract.[13] His pre-contract rights and privileges in relation to publicly available information are of no avail since the receipt of the service triggers the contract.

Where on the other hand one treats the exchange between website and user as involving two separate benefits, conferred at different points in time, the position is more complicated. On this model (the two-stage model I propose) the website confers a gratuitous benefit on the user in making the website and its content available (the first-stage benefit) and a licence or permission to use the website and its contents (the second stage benefit). The gratuitous conferral of a benefit cannot ordinarily give rise to a contract under English law.[14] The recipient of the benefit is privileged to take it. As a result one must look to the second-stage benefit to determine whether a contract may be implied from conduct. So far as the second stage benefit is concerned, a contract may only be implied between the website and the user to the extent that the user uses the information in a manner that exceeds his legal rights and privileges and such use is within the scope of the permissions conferred by the Terms of Use.

The exercise of scoping the user's rights and privileges in relation to the use of information made available on open publicly accessible websites therefore serves two functions. It maps out the area of (pre-contract) freedom from the constraints of law. However it also plots the boundaries of the user's freedom from contract under the two-stage model.

Section III. Mapping the public domain

III.1 Mapping the public domain according to the competing models

On the two-stage model, the public domain conceived as a field of activity free not only from the constraints of law but from those of contract is responsive to the user's privileges in relation to information made publicly available: the pattern of activities within or outside the user's privileges (depicted in Figures 9-1 and 9-2) is the pattern of activities within or outside the public domain with this important qualification: once the user exceeds his privileges so that a contract

[13] The *Register.com* model requires us to accept that a website makes content available when the content is accessible to the user (in which case the rights and privileges in relation to publicly available information would seem to be relevant) but that there is room (even after the information has been made available and up to the point where the user accesses the information) for the website to offer to the user a different or possibly overarching service that consists in making available, or accomplishing making available.

[14] Edwin Peel and G H Treitel, *The Law of Contract* (13th edn, Sweet and Maxwell 2011) paras 3-001, 3-002. One exception is gratuitous transfers by deed, an exception with no relevance to browse wrap Terms of Use.

takes effect, the scope of the public domain rolls back. Once the contract takes effect it may apply to any and all activities just as in the *Register.com* model.

As a result, no contract may be implied where (a) the information is unprotected and the user only engages in looking or copying; or (b) the information is protected either by copyright or the database right, and the user merely looks, engages in insubstantial copying or copying within the scope of the exceptions. On the other hand (provided the Terms of Use grant a licence to this effect) a contract may be implied where the copying is substantial and outside the scope of the exceptions.

If on the other hand one adopts the *Register.com* model of service provision, a contract will be implied where the user carries out any of the activities of looking or copying. On this model, and in relation to information on an open publicly accessible website, the public domain conceived as a field of activity free not only from the constraints of law but from those of contract vanishes in its entirety.

Under the *Register.com* model, the public domain may therefore be represented graphically as follows

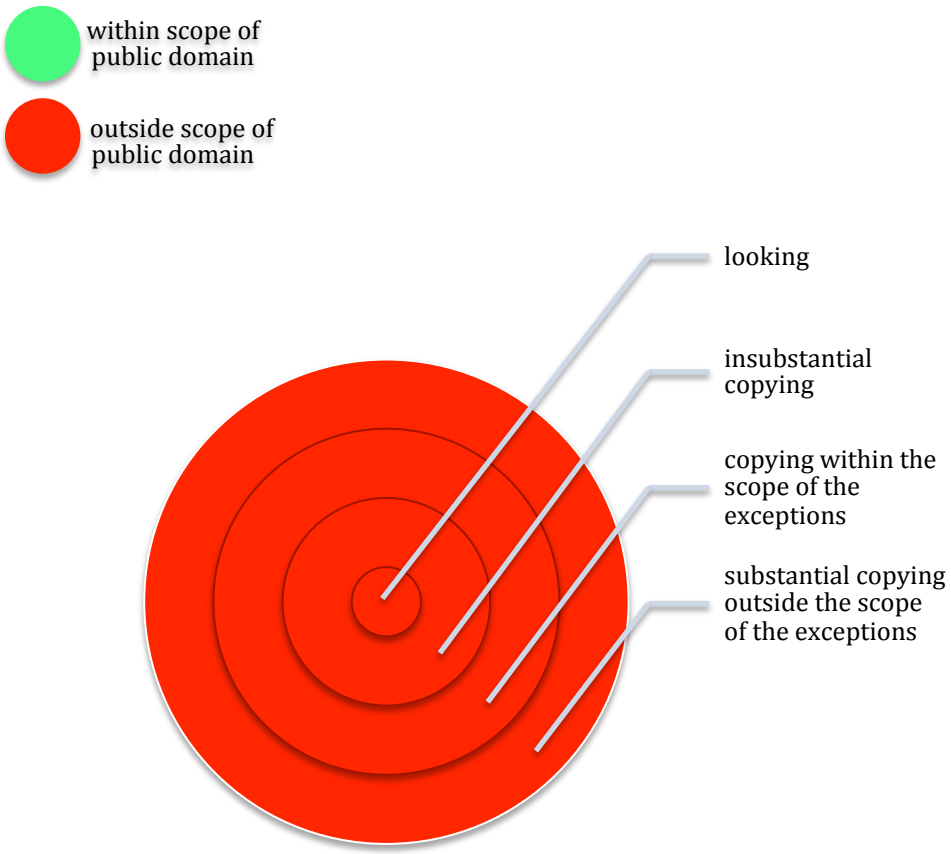

Figure 9-3: The public domain on the *Register.com* model in relation to information whether or not protected by copyright/database right

III.2 The implications for users

On the face of it, it matters a great deal which of the two models of conceptualisation of the benefit conferred by websites on users is adopted by the Courts.

Where the *Register.com* model is adopted an open publicly accessible website may impose contractually binding Terms of Use on users whether they look, copy or make any other use of the information appearing on the website.

Under the two-stage model these implications simply do not arise unless and until the user engages in conduct outside the scope of his privileges. The user can access, look, view, read, engage in insubstantial copying and copy within the scope of the exceptions, without being fixed with a contract at all. However, once the contract 'kicks in', that is, as soon as the user engages in use outside his privileges, the public domain rolls back such that the contract and all its terms and restrictions, including access and usage restrictions as well as boilerplate provisions apply from then onwards as under the *Register.com* model.[15]

Viewed in simple terms the difference is between a situation where no public domain exists in relation to the information and one where a broad public domain exists provided the user does not overstep the boundaries of his pre-existing rights and privileges.

III.3 Looking, contract and the public domain

Provided the *Register.com* model of service provision is apt, it is, in principle, appropriate to imply a contract between the user and an open publicly accessible website governed by browse wrap Terms of Use. The contract law requirement for exchange is satisfied. Contract law does not overreach its proper boundaries.

However, it is submitted that the two-stage model should be preferred for reasons of consistency and 'fit' with English law. If the two-stage model is apt, and provided that open publicly accessible websites do not possess a right to control access, it is not appropriate to accord contractual effect to browse wrap Terms of Use where the user merely engages in the activity of looking. The contract law requirement for exchange is not satisfied in those circumstances.

Absent the element of exchange, the enforcement of browse wrap contracts results in the arrogation by contract of that which belongs to the public domain. Looking is annexed by contract.

IV. The public domain 'on the ground': a closer look at the topography of the public domain

IV.1 From two dimensions to three

It might be observed that a two-dimensional account of the public domain provides a snap-shot of the scope of freedom from law and contract but it does not convey the depth of impact of the erosion of freedoms by contract. It reveals that under the *Register.com* model, and under the two-stage model (though only where the user exceed the scope of his privileges), constraints may be imposed on looking and copying but it does not reveal the extent of those constraints.

[15] The 'small print' of contracts that includes terms additional to the main terms of the contract is often referred to as 'boilerplate' since it very often incorporates variations of clauses adopted as standard by particular law firms.

Perhaps, it might be argued, the difference in the scope of the public domain under the two models may be more theoretical than real once one takes into account the added dimension of the nature of the terms typically imposed by way of Terms of Use and the ability of the Courts to direct that particular contracts or terms are unenforceable. Put another way, if either, those drafting Terms of Use exercise restraint in the terms they include, or the law provides a mechanism for cutting down unreasonable terms, does the impact of contract on the public domain much matter?

It does matter. It matters in much the same way as the scope and limits of constitutional power matters, though legislation introduced by successive Parliaments may be judged reasonable.[16] After all, the range of conditions that may be included in Terms of Use is unlimited. As Abruzzi puts it

> The specific conditions that a site imposes on users through its TOU are limited only by the imagination of the persons (usually lawyers) who draft them.[17]

It is time-consuming and costly to challenge particular terms through the Courts. Consumer protection bodies are insufficiently resourced to tackle every instance of unfair terms. Once Courts accept that browse wrap Terms of Use are prima facie valid and binding, the door is opened for all manner of terms.

Nevertheless it is useful to explore the additional dimension of the 'on the ground' impact of the scope and limits of the public domain on the two models by considering first, (at Section IV.2) a range of restrictions, real and hypothetical, that may be imposed where the user looks or copies information made available on open, publicly accessible websites and second, (at Sections V and VI) the scope for the Courts to direct that such terms are unenforceable. The exercise will provide another perspective on the differences in the public domain on the two models.

IV. 2 Contractual restrictions in Terms of Use

Restrictions in Terms of Use in relation to looking or copying may take two forms.

In drafting Terms of Use I might incorporate a wide variety of conditions that do not prohibit looking or copying or the mode of looking or copying but will apply whenever you look or copy or

[16] Litman, in an excoriating denunciation of a Draft Report prepared by the Information Infrastructure Task Force appointed by the Clinton administration, that according to Litman would have had the effect of introducing an 'exclusive right to read' for copyright owners, prefaced her article with this pointed quote from Antoine Exupery's *The Little Prince*: 'For what the king fundamentally insisted upon was that his authority should be respected. He tolerated no disobedience. He was an absolute monarch. But, because he was a very good man, he made his orders reasonable.' Jessica Litman, 'The Exclusive Right to Read' (1994) 13 Cardozo Arts & Ent LJ 29.

[17] Bradley F Abruzzi, 'Copyright, Free Expression, and the Enforceability of Personal Use-Only and Other Use-Restrictive Online Terms of Use' (2009) 26 Santa Clara High Tech LJ 85, 93 (fn omitted). Consider the provisions at issue in *Internet Archive v Suzanne Shell*: 'These terms include 'charging the user $5,000 for each individual page copied "in advance of printing," granting Shell a perfected security interest of $250,000 "per each occurrence of unauthorized use" of the website in all of the user's land, assets and personal property, the user agreeing to pay "$50,000 per each occurrence of failure to prepay" for use of the website, "plus costs and triple damages," and agreeing to waive numerous defenses in any claims by Shell against the user.' *Internet Archive v Suzanne Shell* 505 F Supp 2d 755, Civ. No. 06-cv-01726-LTB-CBS (D Colo, Feb 13, 2007).

do any of the activities that (depending on which model of conceptualisation of the benefit is adopted) may cause the Terms of Use to take effect. These might include conditions obliging you to grant indemnities and exclusions and limitations of liability in favour of the website, to agree choice of law or jurisdiction clauses or to submit to mandatory arbitration in the event of a dispute. I will call these 'indirect restrictions'.

I might also incorporate conditions prohibiting you from looking at or copying all or part of the website and its contents or imposing restrictions on the mode of looking or copying. I will call these 'direct restrictions'.

IV.2.1 Indirect restrictions on looking and copying

There is no uniformity of approach in drafting Terms of Use but it is common for Terms of Use to include indemnities, exclusions and limitations of liability and other pro-website terms.[18]

Apple's Terms of Use, for example, oblige users to indemnify Apple for third party claims arising from or in connection with use of their website.[19] Apple limit *their* liability for any claims against them to $100.[20] The limitation of liability is classic 'belts and braces' drafting since the terms provide that users also agree that their only relief against Apple in relation to the website and its contents is to stop using the website.[21] According to the Terms of Use the period within which a claim may be made under the Terms of Use is restricted to one year (far shorter than the usual limitation periods set by law) and, at Apple's option users must first submit to mediation.

John Lewis' website Terms and Conditions oblige users to indemnify John Lewis from all claims and losses arising out of use of their website, whether or not such use is in breach of the Terms and Conditions.[22] John Lewis on the other hand disclaims all liability for certain kinds of loss.

[18] Andrea M Matwyshyn 'Mutually Assured Protection: Development of Relational Internet Security Contracting Norms', in A Chander, L Gelman and MJ Radin (eds), *Securing Privacy in the Internet Age* (Stanford University Press, 2006); Marita Shelly and Margaret Jackson, 'Doing business with consumers online: privacy, security and the law' [2009] International Journal of Law & Information Technology 180; Ronald J Mann & Travis Siebeneicher, 'Just One Click: The Reality of Online Internet Retailing ' U of Texas Law, Law and Econ Research Paper No 104 <http://ssrn.com/abstract=988788> (accessed 19 September 2015). See also Dale Clapperton and Stephen Corones 'Unfair Terms In 'Clickwrap' And Other Electronic Contracts' (author version) <http://eprints.qut.edu.au/7650/1/7650.pdf> (accessed 29 July 2015).

[19] The Terms of Use provide 'You agree to indemnify and hold Apple, its officers, directors, shareholders, predecessors, successors in interest, employees, agents, subsidiaries and affiliates, harmless from any demands, loss, liability, claims or expenses (including attorneys' fees), made against Apple by any third party due to or arising out of or in connection with your use of the Site.' Apple, 'Terms of Use' <https://www.apple.com/legal/internet-services/terms/site.html> (accessed 25 July 2015). The effect of the indemnity is to make users liable for *all* direct and indirect losses flowing from such claims.

[20] The wording reads: 'If, notwithstanding the other provisions of these Terms of Use, Apple is found to be liable to you for any damage or loss which arises out of or is in any way connected with your use of the Site or any Content, Apple's liability shall in no event exceed the greater of (1) the total of any subscription or similar fees with respect to any service or feature of or on the Site paid in the six months prior to the date of the initial claim made against Apple (but not including the purchase price for any Apple hardware or software products or any AppleCare or similar support program), or (2) US$100.00.'

[21] The provisions read 'YOUR SOLE REMEDY AGAINST APPLE FOR DISSATISFACTION WITH THE SITE OR ANY CONTENT IS TO STOP USING THE SITE OR ANY SUCH CONTENT.'

[22] The terms read 'You agree fully to indemnify, defend and hold us, and our officers, directors, employees, agents and suppliers, harmless immediately on demand, from and against all claims, liability, damages, losses, costs and expenses, including reasonable legal fees, arising out of any breach of the Conditions by you or any other liabilities arising out of your use of this Website, or the use by any other person accessing the Website using your shopping account and/or your Personal Information.' John Lewis, 'Terms and

Although the user may be a consumer based in a jurisdiction other than England, the Terms and Conditions provide that English law applies and the English Courts have exclusive jurisdiction over claims regardless of the user's place of residence. Sainsbury's Terms of Use contain similar provisions.

IV.2.2 Direct restrictions

Direct restrictions on use of the website and its contents are almost invariably incorporated in Terms of Use. Restrictions on copying are ubiquitous, but restrictions on access are also common.[23]

Access restrictions

Apple's Terms of Use, for example, contain limits on the manner and mode of access. Access by robots, other automated programs or devices or 'any similar or equivalent manual process' is prohibited as is access that

> imposes an unreasonable or disproportionately large load on the infrastructure of the Site or Apple's systems or networks, or any systems or networks connected to the Site or to Apple.[24]

Terms of Use very often contain express provisions that users in general or a particular user may be denied access to the website or part of the website for specified reasons or for none.[25]

Age restrictions on access are commonplace.[26] YouTube's terms prohibit access by

> a person who is either barred or otherwise legally prohibited from receiving or using the Service under the laws of the country in which you are resident or from which you access or use the Service.[27]

Conditions' <http://www.johnlewis.com/customer-services/information-about-our-terms-and-conditions> (accessed 25 July 2015).

[23] For examples see Viva Moffat, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41 (1) University of California, Davis Law Review 45; Abruzzi (n 17). See also Lucie Guibault, 'Wrapping Information in Contract: How Does it Affect the Public Domain?' in L Guibault, and PB Hugenholtz (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006) 104; Ian Rambarran and Robert Hunt, 'Are Browse-Wrap Agreements All They Are Wrapped Up to Be?' (2007) 9 Tul J Tech and Intell Prop 173; Michelle Garcia, 'Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum' (2014) 36 Campbell L Rev 31.

[24] Apple, 'Terms of Use' (n 19).

[25] See for example Sainsbury's 'Terms of Use' <http://www.sainsburys.co.uk/sol/iw_container_page.jsp?pageRef=sites/www/site_furniture/terms_and_conditions/Site_Usage_TC.page> (accessed 21 July 2015); New Look 'Terms and conditions' <http://www.newlook.com/furniture/help_centre_faq.jsp?pageName=Terms+%26+conditions> (accessed 21 July 2015); House of Fraser 'Legal - Terms & Conditions of Our Website' <http://www.houseoffraser.co.uk/Website+Terms+and+Conditions/WebsiteTCs,default,pg.html> (accessed 25 July 2015); Met Office, 'Terms and Conditions-Invent' <http://www.metoffice.gov.uk/invent/terms-and-conditions> (accessed 25 July 2015).

[26] This is especially true of websites promoting the sale of alcohol. See for example Chivas, 'Terms and Conditions' <http://www.chivas.com/en/gb/footer-pages/terms-and-conditions> (accessed 25 July 2015). However see also YouTube, 'Terms of Service' <https://www.youtube.com/t/terms> (accessed 25 July 2015) (restricting access to those 'of legal age to form a binding contract with YouTube').

[27] YouTube, 'Terms of Service' (n 26).

Walden recounts that in the early 1990s certain sites 'began placing messages … stating that "law enforcement officials are not permitted to enter the system"'.[28]

Restrictions on copying

Terms of Use ordinarily permit only 'personal' or 'non-commercial use'[29] and restrict copying, disregarding the scope of the user's copyright privileges. For example if I want to copy content on *The Times* website for teaching purposes, I find that its Terms and Conditions contain the following 'usage restrictions'

> you may use our services for personal, private and non-commercial purposes; and
> you must not commercially exploit, or sell any content appearing on our services …[30]

Use of the content of the website for the purposes of illustration for teaching (an activity expressly permitted under section 32 of the Copyright Designs and Patents Act 1988) meets the non-commercial criterion but it is neither personal nor private.

The Times' usage restrictions also have the effect of prohibiting other activities expressly permitted by virtue of the UK copyright exceptions including text and data mining, use for the purposes of parody, for criticism, quotation, review or news reporting. The restrictions apply to all content on the website: they are not restricted to material in which copyright or other rights subsist.

Additional concerns

Other restrictions may be imposed. Speaking of the 'interplay between contract law and copyright', Deazley alerts to the potential for contracts to embody 'all sorts of cultural or political censorial practices'.[31] Access or usage restrictions may suffice to do just that.

Section V: Constraints on the enforceability of indirect restrictions on looking and copying

Particular terms forming indirect restrictions on looking and copying may be open to challenge under the Consumer Rights Act 2015 ('CRA 2015') or the Unfair Contract Terms Act 1977 ('UCTA 1977').

The CRA 2015, now the main source of legislative protection for consumers, came into force on 1 October 2015. The CRA 2015 amended the UCTA 1977 such that the UCTA 1977 no longer governs consumer contracts but remains in force as regards non-consumer contracts. The CRA

[28] Ian Walden, *Computer Crimes and Digital Investigations* (OUP 2007) para 5.67.
[29] In *NLA v Meltwater* Mrs Justice Proudman noted that 'it is a term of all the websites that they cannot be used for commercial purposes without the relevant Publisher's express consent.' *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch), [2011] ECDR 10 [95].
[30] The Times and The Sunday Times, 'Terms and Conditions'<https://login.thetimes.co.uk/links/terms> (accessed 21 July 2015).
[31] Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006) 128.

2015 also replaced and updated the provisions of the Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR'). [32]

Unlike the CRA 2015, the UCTA 1977 only applies to specific contract terms, including exclusions or limitations of liability. Of these, only a handful will invariably be unenforceable, that is, exclusions or restrictions of liability for death or personal injury resulting from negligence and certain other exclusion clauses.[33] Such terms are referred to as 'blacklisted' terms. Blacklisted terms are, in practice, rarely seen: contracts lawyers are familiar with the UCTA 1977 blacklist.

Other terms controlled by the Act are unenforceable unless they meet a test of reasonableness. Factors that are relevant to the test of reasonableness are set out in Schedule 2 of the Act and include

> the relative strength of the parties' bargaining positions, whether the customer should have known of the existence and extent of the term, and whether the customer could have entered into a contract with an alternative supplier without having to accept a similar term.[34]

The CRA 2015 also contains provisions regarding terms that will always be unenforceable under the Act. The CRA 2015 'blacklist', like that of UCTA 1977, addresses terms that seek to exclude or restrict liability for death or injury caused by negligence, and exclusion or restriction of statutory rights and remedies in relation to the supply of goods. However, unlike the UCTA 1977, the CRA 2015 also 'blacklists' those terms that seek to exclude or restrict statutory rights and remedies in relation to paid for digital content[35] and services.[36]

The decision by the legislature to blacklist terms that exclude or restrict the consumer's statutory rights and remedies in relation to services has potential significance for terms included in browse wrap Terms of Use. While certain of the provisions of the CRA 2015 regarding consumer's rights and remedies in relation to services are not relevant for browse wrap Terms of Use, the provisions of sections 49, 54(7) and 57 are relevant. The combined effect of these provisions is to blacklist terms that have the effect of excluding or restricting the consumer's rights and common law remedies in relation to the service provider's obligation to provide the services with reasonable skill and care. These provisions may provide a basis for challenging the enforceability of certain of the terms incorporated in Apple's Terms of Use.

Of course the CRA 2015 'blacklist' for services contracts can only apply to browse wrap Terms of Use if the Courts and regulators consider that such contracts are truly contracts for services as opposed to 'access' contracts. Will the regulators be prepared to open that can of worms? It seems much more likely that the regulators will focus their attention elsewhere, leaving that issue for the Courts to resolve.

---

[32] SI 1999/2803.

[33] The others are exclusions by reference to manufacturer's guarantees, exclusions of statutorily implied terms in contracts for sale of goods or hire purchase and exclusions in contracts (other than sale of goods or hire-purchase) for liability for breach of terms similar to the statutorily implied terms. UCTA 1977, ss 5-7. See also Richard Stone, *The Modern Law of Contract* (8th edn, Routledge Cavendish 2009) 312.

[34] *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All ER (Comm) 1161.

[35] Only contracts for paid-for digital content are covered by the statutory rights set out in Chapter 3 of the CRA 2015. CRA 2015, s 33.

[36] CRA 2015, s 57.

Other terms included in a consumer contract are subject to the test of fairness (in contrast to the test of reasonableness under the UCTA 1977) in order to determine if the term is enforceable.[37] The test of fairness relates to the impact of the term and involves an assessment as to whether the term 'contrary to the requirement of good faith, … causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.'[38]

Guidance issued by the Competition and Mergers Authority ('CMA') comments that 'an unfair imbalance is likely to arise' where terms have the effect of 'restricting or excluding the consumer's normal legal rights', 'constraining the consumer from seeking the legal remedies to which their rights give rise', or 'imposing on the consumer additional obligations or risks which are not envisaged by law or unreasonably go beyond anything needed to protect the legitimate interests of the trader'.[39] These comments suggest that many terms commonly seen in browse wrap Terms of Use are potentially unenforceable under the CRA 2015. [40]

Other commentators have been less sanguine about the likely outcome of the application of the test of fairness. The 'good faith' element of the test is considered to give rise to uncertainty in application.[41] Chris Willett maintains that the 'open-textured' nature of the tests of fairness and reasonableness means that 'they can often only be given real practical meaning and direction by reference to some background ethic.'[42] He suggests that the Supreme Court has adopted an interpretative ethic of consumer self reliance, where fairness and reasonableness are largely secured by means of transparency of terms, as opposed to an ethic of protection of the consumer from the trader that might justify interferences with contract terms so as to secure substantive fairness.[43] The CMA itself observes that 'Where transparency is achieved, all kinds of terms are more likely to be fair.' Uncertainty as to the weight that may be accorded to transparency also gives rise to uncertainty as to the kinds of terms that may, in particular contexts, be treated as unfair.

It is beyond the scope of this thesis to provide a detailed view of the impact of the provisions of the UCTA 1977 and the CRA 2015. The writer's view is that many of the terms set out in browse wrap Terms of Use are unfair and are likely to be treated as such in the event of scrutiny by the Courts or regulators. Nevertheless, it is also the writer's view that in practice, the legislation is likely to have little or no effect on the scope of the public domain.

---

[37] CRA 2015, s 62(1).
[38] CRA 2015, s 62(4).
[39] CMA, 'Unfair Contract Terms: Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (CMA 37, 31 July 2015) para 2.17 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf> (accessed 14 October 2015).
[40] The Law Commissions expressed the view that exclusions of liability in browse wrap licenses 'are almost certainly void' under the UCTA 1977. Law Commission and the Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' <http://www.scotlawcom.gov.uk/files/3113/6361/9437/Unfair_Terms_in_Consumer_Contracts_Advice.pdf> (accessed 29 July 2015) para 7.21.
[41] Copyright Law Review Committee'Copyright and Contract' <http://www.austlii.edu.au/au/other/clrc/2/> (accessed 27 July 2015) para 5.49.
[42] Chris Willett, 'General clauses and the competing ethics of European consumer law in the UK' (2012) 71(2) CLJ 412. Generally as to the consumer protection regime, see Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate 2007).
[43] ibid.

First, the legislation has as its aim the control of unfair contract terms. Unlike the contract override provisions of the Copyright Designs and Patents Act 1988 (discussed below) neither the UCTA 1977 nor the CRA 2105 aims to ensure that specified acts remain contract free.

Second, the legislation is geared towards challenge of individual terms,[44] appearing in a particular context,[45] rather than a generic class of terms that might feature in a spread of situations.[46] Given the variance in the wording of terms incorporated in Terms of Use, even the best efforts of the Courts and regulators will barely scratch the surface of the range of terms deployed. The UTCCR 1999, on which the unfair terms provisions of the CRA 2015 are modelled, appears to have had no appreciable effect on the content of Terms of Use.[47]

Furthermore, cases involving challenges by consumers to contract terms on grounds of unfairness come before the Courts only infrequently. Usually, in litigated cases, the monetary stakes are sufficiently high to warrant the costs of litigation. There is no realistic prospect of the Courts, in effect, micromanaging, on grounds of fairness, the terms that appear in browse wrap Terms of Use.

In addition, the twin factors of finite resources, coupled with the enforcement policies of the CMA and other regulators present significant impediments to regulatory control of terms incorporated in browse wrap Terms of Use.[48] The CMA, which has the 'lead role in relation to unfair terms law'[49] states that it 'will act strategically, being selective about which cases it chooses to take on.'[50] Its statement of 'prioritisation principles' strongly suggests that it will concentrate its resources on securing competition in the market.[51] Since the services (if any) relevant to browse wrap Terms of Use are not paid for by the user, the prioritisation principles are not obviously geared to interventions in relation to browse wrap Terms of Use. Likewise, the statement by the CMA that it is committed to securing 'direct financial benefits to consumers of at least ten times our relevant costs to the taxpayer' suggests that problems presented by consumer contracts

[44] Under the UCTA 1977 the test of reasonableness is directed at the particular term in issue. UCTA 1977, s 11. Likewise under section 62(5) of the CRA 2015, the assessment of fairness is directed to the term that is subject to challenge.
[45] UCTA 1977, s 11; CRA 2015, s 62(5).
[46] The regulators do have power to seek an injunction relating not only to the term in issue but terms with similar effects. CRA 2015, Sch 3, para 5. However any such injunction relates only to the person against whom the injunction is awarded.
[47] Consider the examples of Apple's Terms of Use (n 19) and those of John Lewis (n 22).
[48] The CMA shares its enforcement powers with other regulators, notably Trading Standards Services. The scheme of division of responsibility is opaque. See Freshfields Bruckhaus Deringer, 'A new consumer landscape' (April 2012) <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/A%20new%20consumer%20landscape.pdf> (accessed 14 October 2015).
[49] CMA (n 39) para 6.1.
[50] CMA, 'Consumer Protection: Guidance on the CMA's approach to use of its consumer powers' (CMA 7, March 2014) para 1.6 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288624/CMA7_Consumer_Protection_guidance.pdf> (accessed 14 October 2015).
[51] CMA, 'Prioritisation principles for the CMA' (CMA 16, April 2014) para 1.2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf> (accessed 14 October 2015).

where the consumer makes no monetary payment are, if not out of scope, then at least a low priority.[52]

Thus while, on paper, the CRA 2015, in particular, is an important tool for restraining unfair terms, in practice the felt effects of the legislation in relation to browse wrap Terms of Use are likely to be modest indeed.

Section VI: Constraints on the enforceability of direct restrictions on looking and copying

VI.1 The 'contract override' provisions of the CDPA 1988

In 2014 the UK Government made significant changes to the UK's copyright regime by way of secondary legislation.[53] It added new copyright exceptions and modified the scope of some existing exceptions.[54] Most significantly for present purposes it introduced controversial provisions designed to ringfence the operation of certain of the exceptions so as to make it impossible to override those exceptions by contract.[55]

Prior to the introduction in 2014 of changes to the UK's copyright regime, terms restricting access and copying (including copying otherwise permitted under the copyright regime) were, in principle, enforceable.[56] The new provisions of the copyright regime provide a basis for challenge. In the following sections I explore what these changes mean in the context of the 'on the ground' impact of the public domain

The contract override provisions have been tacked on to several of the exceptions within the Copyright Designs and Patents Act 1988. By way of example, section 29, which sets out exceptions in respect of research and private study now contains a new subsection 29(4B), comprising the relevant contract override provisions the text of which is as follows

> To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

Much is condensed into this short text. There are, I suggest, four key points for analysis. The first relates to the context in which the section applies, the second, the acts that may in principle be

[52] ibid para 1.4.

[53] Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372; Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356; Copyright and Rights in Performances (Disability) Regulations 2014, SI 2014/1384; Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861; The Copyright (Public Administration) Regulations 2014, SI 2014/1385.

[54] For an overview of the changes see Intellectual Property Office ('IPO'), 'Exceptions to Copyright: An Overview' (October 2014). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448269/Exceptions_to_copyright_-_An_Overview.pdf> (accessed 26 July 2015).

[55] The Secondary Legislation Scrutiny Committee singled out the contract override provisions as deserving of special attention by the House of Lords. Secondary Legislation Scrutiny Committee, *Forty-First Report: Draft Copyright and Rights in Performances Regulations 2014* (HL 2013-14, 180). The provisions provoked lively debate in the House of Lords. See for example HL Deb 14 May 2014, vol 753 cols 1885-1903.

[56] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (CUP 2005) 69. See also Deazley (n 31) 129.

affected by the provisions, third, the nature of the terms struck at by the section and fourth, the effect of the section on such terms.

VI.1.1 Context

Read in isolation the contract override provisions set out in section 29(4B) would suggest that whenever a term in a contract seeks to prevent or restrict the doing of any act within the scope of the relevant copyright exception, that term will be unenforceable. However the effect of the exceptions is circumscribed by section 28(1) which provides

> The provisions of this Chapter specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright; they relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts.

It is not entirely clear how the contract override provisions fit with the provisions of section 28(1). If the exceptions only concern the question of infringement of copyright, can the contract override provisions extend any further? If, as would seem to be the case, the exceptions have nothing to say about the impact of rights or obligations outside the realm of copyright, can it have been intended that a contractual restriction imposed by virtue of such other right or obligation be rendered unenforceable by the contract override provisions of the copyright regime? The stated purpose of the contract override provisions was to 'ensure that, where the law provides for an exception to copyright, people are able to rely on that law'.[57] That stated limitation of purpose coupled with the provisions of section 28(1) would seem to leave room for the argument that where the term of the contract restricts the doing of an act that on the one hand is permitted under the copyright exceptions, but on the other may be restricted by reference to other rights or obligations, that term remains enforceable insofar as the restriction is underpinned by some right or obligation unrelated to copyright.

The question has practical significance. The content of websites may be protected not only by copyright but the database right.[58] Although I have argued that English law does not provide websites with a right to control access the decision in the Canadian case, *Century 21*, indicates the potential for judicial activity on that front.[59] A website may claim a 'right' (truly a Hohfeldian privilege) to withhold the provision of a service to users. How might the contract override provisions of the CDPA 1988 affect contracts incorporating restrictions grounded in any of these 'rights'?

Assume for the moment that a right to control access exists and that in reliance on that right the website imposes Terms of Use on the user containing all manner of restrictions, *direct and indirect*, on access, copying and use. What might be the effect of the contract override provisions of the CDPA 1988 on such terms?

Section 28(1) in effect states that the contract override provisions 'do not affect any other right or obligation restricting the doing of any of the specified acts.' The import of these provisions has

[57] HL Deb 29 July 2014, vol 755, col 1575.
[58] Michael Hart and Ben Allgrove, 'Protecting website content: Contractual measures' <http://uk.practicallaw.com/4-107-4149> (accessed 27 June 2015).
[59] *Century 21 Canada Limited Partnership v Rogers Communications Inc* 2011 BCSC 1196.

not been explored in case law. Is the reference to a 'right or obligation restricting the doing of any of the specified acts' a reference only to a right conferred by law, or might it refer to a right conferred by contract where the contract is underpinned by a right other than copyright? That is, if the website holds a right other than copyright, is there a 'cascade effect' so that contract terms underpinned by that right are brought within the scope of 'other rights or obligations' for the purposes of section 28(1)?

Continuing with the scenario of the interplay between the provisions and a right to control access, if section 28(1) treats contractual obligations imposed by virtue of a right to control access as within the scope of 'other rights and obligations' the contract override provisions of the CDPA 1988 can have no effect on *any* terms (whether direct or indirect restrictions on looking, copying or other use) included in Terms of Use that are imposed on the user by virtue of such right.

If on the other hand the 'other rights and obligations' referred to in section 28(1) must be read narrowly so as to exclude contractual rights and obligations flowing from rights other than copyright, that is, ignoring the 'cascade effect', then arguably the contract override provisions may rein in the effect of particular terms, notwithstanding the fact that the contract is based on another right. This would seem to leave the website in the situation where it could only enforce its right to control access by means of injunction or other civil remedy but not through enforcement of its contract terms. Can this really have been what was intended?

There is reason to suppose that it was not. While the question of the application of the contract override provisions of the copyright regime has not been tested in the Courts, the 'mirror image' problem of the reach of the contract override provisions relating to the database right has been raised in the Court of Appeal.

NLA v Meltwater involved a dispute between the claimant licensing body (the Newspaper Licensing Agency) along with the publishers it represents, and the defendant organisations that are involved in the provision of media monitoring services.[60] The defendants obtained a licence from the NLA to access the publishers' websites. The claimants maintained that the licence did not extend to use by the defendants' clients (the 'end-users' of the content on the websites) and that such end-users required to obtain a separate licence. The principal argument before the Courts involved whether, in the absence of a licence, the activities of end-users in merely viewing the websites infringed copyright. However the defendants also advanced a secondary argument concerning the enforceability of particular terms set out in the terms and conditions of use of the publishers' websites.

The terms and conditions contained the following restriction

> (i) any end-user will be bound by such terms and conditions and (ii) an end-user is only permitted to access the website for personal and/or non-commercial use.[61]

The appellant defendants argued that even if such terms were otherwise contractually valid, they were unenforceable by virtue of regulation 19(2) of the Copyright and Rights in Databases

[60] *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890, [2012] Bus LR 53.
[61] ibid [9].

Regulations 1997.[62] Regulation 19(2) renders unenforceable terms that prohibit the extraction and re-utilisation of insubstantial parts of the contents of the database provided that the user has lawful access to the database. The Court of Appeal gave short shrift to the argument on the basis that the access was not lawful (though it did not say why) and so the provisions irrelevant but its comments reveal how contract override provisions might be approached.[63] The Court observed

> First the effect of regulation 19(2) is to invalidate the contractual condition only 'insofar as' it precludes a person from extracting or re-utilising insubstantial parts of the contents of the database. Accordingly it could not be, as submitted, wholly void. The contractual condition must be valid insofar as it prevents the extraction and re-utilization of a substantial part. Second, the article and regulation are concerned only with what would otherwise be an infringement of the database right. *They do not cover acts which would be infringements of copyright in a literary work on the database.*[64]

The Court does not say in so many words that the contractual condition at issue must, despite the contract override provisions of the database right regime, be valid in relation to acts that would be infringements of copyright but that appears to be the implication.

Of course if, as I maintain, no right to control access exists in the UK, this might be dismissed as a false dilemma. However the dilemma is surely a live one in relation to the interplay between the contract override provisions and the database right (the exceptions under the database right being considerably fewer than those under the copyright regime) and (though only in the case of 'closed' websites) rights in relation to confidential information.[65] If the provisions of section 28(1) also extend to the 'right' to withhold the provision of a service save in exchange for consideration the interaction between such 'right' and copyright also needs to be resolved

Where therefore section 28(1) abjures any impact on 'any other right or obligation restricting the doing of any of the specified acts' it is crucial to know whether it guarantees only the survival of other rights granted by law or also preserves such contractual obligations as are underpinned by such rights.

I do not propose to exhaustively explore this issue here but only to flag up the possibility that as regards content appearing on open publicly accessible websites the impact of the contract override provisions may be constrained by virtue of section 28(1) where the contractual restrictions in issue are grounded in the existence of rights other than copyright.

VI.1.2 The acts that may in principle be affected by the contract override provisions

The impact of the contract override provisions is tethered to the exceptions to which the provisions relate. The provisions relate only to acts which, by virtue of the relevant copyright exception, (that is, an exception onto which contract override provisions are tacked), would not infringe copyright.

[62] Copyright and Rights in Databases Regulations 1997, SI 1997/3032.
[63] *Newspaper Licensing Agency Ltd* (n 60) [43].
[64] ibid (emphasis added).
[65] For discussion of rights in relation to confidentiality see Bently and Sherman (n 6) 1003-1007.

Contract override provisions have been tacked on to the exceptions concerning research and private study,[66] text and data analysis,[67] quotation,[68] caricature, parody or pastiche,[69] various provisions concerning accessibility of content for disabled persons,[70] illustration for instruction,[71] copying by librarians[72] and the recording of broadcasts for archival purposes.[73]

All of the exceptions to which the contract override provisions apply permit copying subject to specified conditions. Some including section 29 (research and private study) extend beyond copying so as to permit any of the acts restricted by copyright insofar as such acts constitute fair dealing with the work.

However the exceptions address only those acts that would otherwise infringe copyright.[74] The exceptions have no relevance to works in which copyright does not subsist. They have no relevance to acts of copying that involve copying of an insubstantial part of a copyright work since such copying is not infringing. It follows that the contract override provisions cannot apply to acts in relation to works in which copyright does not subsist or to acts of insubstantial copying: the contract override provisions expressly relate to acts 'which *by virtue of [the relevant] … section*, do not infringe copyright'.

Crucially, none of the exceptions apply to access as such since access to a work is not an act restricted by copyright.[75] This is true both of access to the work once it appears on the user's screen (the form of 'access' considered by Lord Sumption in *PRCA v Newspaper Licensing Agency* on appeal to the Supreme Court)[76] and access as the outcome of the process by which a website returns a webpage or other content to a user in response to a request from the user's browser.

The implications of the inapplicability of the contract override provisions to access are not limited to acts of access. Since in the nature of things one must have access before copying, since looking is central, it will only be possible to rely on the contract override provisions to secure the ability to lawfully copy where one already has access.

Was that the intention? It seems likely that it was. It leaves unaltered the ability of galleries, cinemas, theatres, museums (and, for that matter, Royal Archives) to deny access to copyright works to particular persons or classes of person for any reason or for none.[77] It is an outcome that is consistent with the statement made in a letter from Viscount Younger of Leckie, Minister for Intellectual Property at the Department for Business, Innovation and Skills to Lord Goodlad,

[66] CDPA s 29.
[67] CDPA s 29A.
[68] CDPA s 30(1ZA).
[69] CDPA s 30A.
[70] CDPA s 31F.
[71] CDPA s 32.
[72] CDPA ss 41 and 42.
[73] CDPA s 75.
[74] Bently and Sherman (n 6) 200.
[75] n 5.
[76] *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18, [2013] 2 All ER 852.
[77] Following revelations about footage of a Nazi salute by the Queen there were calls for greater access to the Royal Archives. Jamie Doward and Tracy McVeigh, 'Royals told: open archives on family ties to Nazi regime' <http://www.theguardian.com/uk-news/2015/jul/18/royal-family-archives-queen-nazi-salute> (accessed 26 July 2015).

Chairman of the Secondary Legislation Scrutiny Committee, concerning the impact of the contract override provisions.[78] In particular Viscount Younger refers to the Government's guidance that

> Once the law has changed, you cannot be made to comply with existing licensing terms that would stop you copying material, as long as you are copying for the right purpose and obey the conditions set out in this guidance. *However, all other terms of your contract that are unrelated to copyright - including those covering how much material you can access - will be unaffected*.[79]

Viscount Younger speaks of 'how much' may be accessed but the same point may be made about restrictions addressing who, when, by what means and why you might access material.

How significant is the access caveat?

Consider a scenario presented by Ronan Deazley. Deazley, writing before the contract override provisions were introduced, imagines a situation where a gallery holds a collection of copyright images.[80] An art correspondent approaches the gallery seeking permission to review the work. The gallery agrees but imposes restrictions: 'Of course you can review the work … but only if you write for the Daily Mail'.[81] This is an example of an access restriction that has the effect of making it impossible for the reviewer to carry out the acts permitted by copyright in relation to criticism and review. It is not vulnerable to contract override. I do not imagine that anyone expected that it would be.

Transposing Deazley's scenario into the context of an open publicly accessible website the Terms of Use might say 'Please do access our website … but not for the following purposes … review, criticism, parody …'. Are these usage restrictions in the guise of access restrictions? Yes. Drafted as usage restrictions would they be vulnerable to contract override? In principle, yes, subject to the caveats about the effect of the contract override provisions on contractual limitations underpinned by rights other than copyright. As access restrictions are they vulnerable to contract override? They are not. Access, looking, is beyond the reach of the copyright regime.

The example is not fanciful. Consider these provisions set out in YouTube's website terms of use

> you agree not to access Content or [sic] any reason other than your personal, non-commercial use solely as intended through and permitted by the normal functionality of the Service, and solely for Streaming.[82]

The provisions deny effect to most of the copyright exceptions protected by contract override since YouTube has elected to frame the restrictions as restrictions on access as opposed to restrictions on use.

---

[78] Secondary Legislation Scrutiny Committee, *42nd Report - Work of the Committee in Session 2013-14* (HL 2013-14, 186) Appendix 3.
[79] ibid (emphasis added).
[80] Deazley (n 31) 128.
[81] ibid.
[82] YouTube, 'Terms of Service' (n 26). 'Content' is defined to include 'the text, software, scripts, graphics, photos, sounds, music, videos, audiovisual combinations, interactive features and other materials you may view on, access through or contribute to the Service.' These terms of use, adopted in 2010, cannot have been drafted with an eye to the UK's contract override provisions.

In the case of websites, as in the case of the galleries and other institutions, the contract override provisions leave unaltered the ability to incorporate access restrictions that effectively preclude the exercise of the copyright exceptions. In the case of content housed in galleries and other institutions, this is no doubt in line with expectations. Why would the copyright regime subvert rights in heritable property? Was this also the expectation in relation to information contained in open publicly accessible websites? There are some indications that it was not.[83]

VI.1.3 The nature of the terms struck at by the contract override provisions

The contract override provisions apply only to the extent that a contract term

> purports to *prevent or restrict the doing* of any act which, by virtue of … [the appropriate section incorporating the exception], would not infringe copyright.[84]

The reference to 'the doing' of an act is no doubt intended to distinguish between contractual provisions that merely attach conditions to the carrying out of an act within the scope of an exception and those that prohibit or otherwise interfere with the carrying out of the act per se. It is only 'the doing' of the act that is protected: the contract override provisions are not concerned with other conditions attached to the carrying out of the act. In particular the contract override provisions do not affect *indirect* restrictions on looking and copying (indemnities, exclusions of liability, choice of law and choice of forum provisions, arbitration clauses and such like) that do not impact on the ability to do the act.

Indeed the guidance issued by the Government goes further and suggests that even those terms that might impact on the *manner* in which the relevant act is carried out will not be affected by the contract override provisions unless the term 'unreasonably restricts' the 'ability to benefit from the exception'.[85] 'Unreasonably' is the IPO's gloss: it does not feature in the legislation. The IPO offers the example of terms incorporating restrictions on download speeds or frequency of access in the context of text or data mining.[86] The gist of the guidance is that terms that prohibit or make it *practically impossible* (my version of the IPO's gloss) to carry out the acts permitted by the exceptions are struck at but other terms will be unaffected.

---

[83] For example, in evidence submitted to the Business Innovation and Skills Committee of the House of Commons, the British Library made a strong case for a text and data mining exception (now implemented). The British Library anticipated that such an exception would allow for text and data mining of websites (it observes there are 'billions of websites') but appears to assume that securing lawful access to websites for those purposes will not be an issue. Business, Innovation and Skills Committee, *1st Report-The Hargreaves Review of Intellectual Property: Where next?* (HC 2012-13, 367-I) Ev 67. Lawful access is not an issue for the British Library by virtue of the extension of the legal deposit regulations to websites but the evidence from the BL relates to the wider interests of 'innovators and creators'. See also Ross Mounce, 'The right to read is the right to mine: Text and data mining copyright exceptions introduced in the UK' <http://blogs.lse.ac.uk/impactofsocialsciences/2014/06/04/the-right-to-read-is-the-right-to-mine-tdm/> (accessed 25 July 2015) (suggesting that with the text and data mining exception in place researchers 'need not abide by the terms of any text and data mining licence that publishers may wish to impose upon researchers').

[84] CDPA s 29(4B).

[85] IPO, 'Exceptions to Copyright: Research' (October 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375954/Research.pdf> (accessed 26 July 2015) 8.

[86] ibid.

VI.1.4 The effect of the contract override provisions on terms struck at by those provisions

The contract override provisions have the effect of rendering unenforceable a term that conflicts with the exception to which the contract override provisions apply.[87] The contract as a whole is not affected nor is the term rendered void. Presumably this approach was intended both to preserve contractual arrangements and allow for flexibility: the term remains in place so that it may be enforced insofar as there is no conflict with the relevant exception.

VI.2 The contract override provisions: a summary

I have reservations about whether the contract override provisions will have any impact on Terms of Use underpinned by 'rights' other than copyright. However, even assuming that they do the impact of the contract override provisions is strictly limited. The contract override provisions will have no impact on contract terms that do not directly prevent or restrict the doing of the acts permitted by the relevant exceptions. They will have no impact on insubstantial copying, or copying in relation to works or information in which copyright does not subsist. They will have no impact on indirect restrictions such as indemnities or exclusions of liability. Most significantly they will have no impact on restrictions on access. Their impact is strictly limited to terms that directly affect the ability to carry out the acts permitted by the exceptions.

VI. 3 The impact of the contract override provisions on the public domain

If my reservations about the relevance of the contract override provisions where the website can point to other rights are well-founded, the contract override provisions may have no appreciable effect on the public domain in relation to the use of information on open publicly accessible websites.[88]

However, assuming the provisions will have bite even where the website can point to other rights that underpin its Terms of Use, the 'on the ground' impact of the contract override provisions on the public domain according to the *Register.com* model might be represented diagrammatically as follows

[87] See for example CDPA, s 29(4B).

[88] I am not prejudging the extent to which, in the case of websites, particular uses will implicate both copyright and the database right. I suspect however that the apparent complexity of the overlap between the two regimes may dampen enthusiasm for litigation.

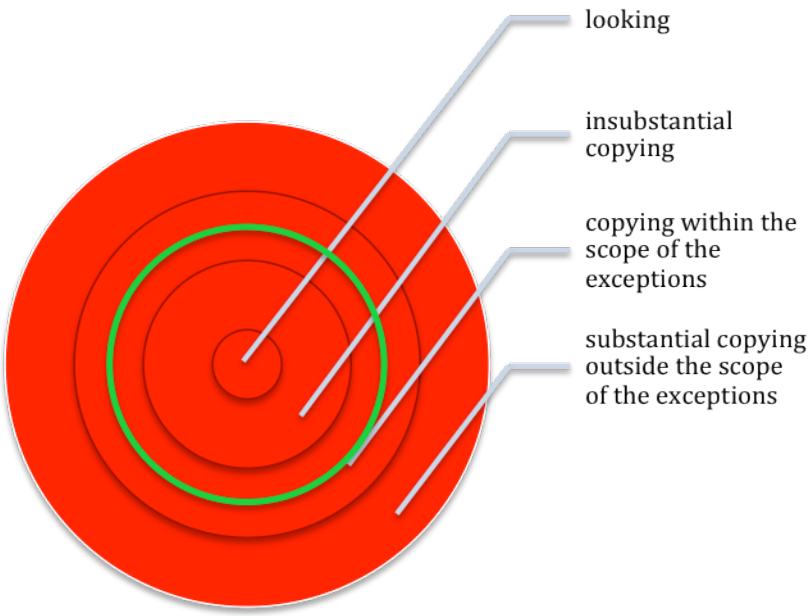

Figure 9-4

The thin green line represents the extent to which the contract override provisions may claw back the public domain from the reach of contract by rendering particular terms unenforceable. It represents the field of activity consisting *solely* in the acts restricted by copyright that are permitted by exceptions supported by contract override provisions. Where Terms of Use contain restrictions directly restricting those acts they will be unenforceable. However the website remains free to impose access restrictions including access restrictions that may in practice make it impossible for a user to exercise the copyright exceptions without breaching the Terms of Use.

VII. The 'on the ground' impact of legislation concerning the enforceability of contract terms: a summary

In the event, the 'on the ground' impact of statutory provisions that might render particular contract terms unenforceable is limited.

The UCTA 1977 and the CRA 2015 may serve to render particular provisions contained in browse wrap Terms of Use unenforceable. However, the open-textured tests of fairness and reasonableness, coupled with uncertainty as to whether a website provides a service or merely access, create difficulties for the application of the legislation to browse wrap Terms of Use save where the terms fall within the narrow scope UCTA blacklist. In addition, as regards consumers, the enforcement policy adopted by the CMA suggests that significant regulatory intervention in relation to browse wrap Terms of Use is unlikely so that the impact of the legislation may remain largely untested.

The contract override provisions of the Copyright Designs and Patents Act 1988 may have some bite but even then the impact on the public domain as the field of activity free from the constraints of law and contract is limited and may be defeated through the adoption of terms restricting access rather than use.

The exercise of exploring the public domain by reference to the additional dimension of the 'on the ground' impact of Terms of Use confirms that the difference between the public domain according to the *Register.com* model on the one hand and the two-stage model on the other is not altered to a material extent. It still very much matters to the reach of the public domain which of the two models is adopted.

IX. Conclusion

The choice of model of conceptualising the benefit conferred by website and user has significant implications for the scope of the public domain.

On the two-stage model I propose, all those acts in relation to publicly available information that are within the scope of a user's (pre-contract) privileges may be carried out without triggering contractual effect for browse wrap Terms of Use. In particular this means that the user can access, look at and copy information (including information protected by copyright or the database right provided the copying is within the scope of the exceptions) without browse wrap Terms of Use having effect. Browse wrap Terms of Use only come into effect by way of implication of assent by virtue of the user's conduct where the user exceeds the scope of his privileges. If he does, the browse wrap Terms will kick in and apply to all acts undertaken by the user, including looking.

On the *Register.com* model by contrast, the website can control access, looking, copying and all other forms of use by means of browse wrap Terms of Use.

The impact of the statutory constraints on particular contract terms makes little difference to the overall picture of the variance in the scope of the public domain according to the two different models. It remains the case that under the two-stage model most uses of information not protected by copyright or the database right may be carried out contract free, while, in relation to information protected by copyright or the database right, looking, insubstantial copying and copying within the scope of the relevant exceptions may be carried out contract free. Under the *Register.com* model the public domain looks very different: there is no public domain to speak of save to the extent that the CDPA 1988 allows the Courts to cut down terms that directly restrict the doing of permitted acts protected from contract override. Even then, since the CDPA 1988 does not control restrictions on access, in practice it may prove impossible to carry out the permitted acts without breaching ostensibly enforceable access restrictions.

In the case of information appearing on open publicly accessible websites, therefore, the ability to look, and engage in non-infringing copying without being subject to contract terms imposed through browse wrap Terms of Use depends on the adoption of the two-stage model as opposed to the Register.com model. Failing that, users must rely on websites to exercise restraint, in the manner of a benign ruler, in incorporating restrictions including access restrictions in their Terms of Use.

Chapter X

Conclusion

I. Summary and Review

I attempted to address two research questions in this thesis, namely the scope of the public domain, conceptualised as freedom from law and contract, in relation to information made available on open publicly accessible websites and relatedly, the proper characterisation of the benefit conferred by the website on the user.

The exercise reveals that the answer to the first is inextricably linked to the second.

I concluded that where the benefit is conceptualised as consisting in the delivery of a service complete only at the point of user access to the website or its contents (the *Register.com* model), browse wrap Terms of Use will have contractual effect whenever the user accesses the website. Where, on the other hand, the benefit is conceptualised as a service that consists in making available, coupled with a permission for use of content (the two-stage model) browse wrap Terms of Use will have contractual effect only when the user exceeds his existing rights and privileges in relation to the content and not otherwise.

This conclusion is subject to one proviso: the example of retail websites may constitute a special case where it may be said (regardless of the choice of model) that browse wrap Terms of Use will not bind the user where the user merely accesses and looks at the website since the requirement for consideration is not met.

Subject to this proviso, the shape of the public domain is therefore dictated by the choice of model, specifically the choice made in relation to the characterisation of the request/response process as within or outside the scope of the service provided by the website to the user.

The selection of the *Register.com* model results in the complete absence of a public domain in relation to the use of information made available on open publicly accessible websites, while the selection of the two-stage model points to a broad public domain enabling the user to access, look at, and copy (provided such copying is within scope of the exceptions afforded under the copyright and database right regimes) the content without being fixed with a contract.

The key difference in the scope of the public domain according to the two models relates to the ability to access and look at content free from the constraints of law and contract. Under the *Register.com* model looking is not free from contractual restraints though it would otherwise be free from the constraints of law. The two-stage model on the other hand is responsive to the user's privileges in relation to information: no contract results from mere looking.

There are normative reasons to be sure for preferring a broad or a narrow public domain: the writer's preference is for a public domain that at a minimum preserves freedom to look at, learn from and act on information that has been made available. Normative underpinnings for such a public domain are supplied by arguments, such as those of Breakey, as to the significance of such freedom for human flourishing. However, within the interpretative framework adopted in the

thesis, the reasons for preferring the public domain according to the two-stage model relate to the extent to which the elements of the model (and in particular the first-stage, service element) proceed from and are consistent with English law in its European context. Thus the analysis of the service element as consisting in making available is consistent with the Information Society Directive, the ruling of the CJEU in *Svensson*,[1] and the case law of the CJEU suggesting that making available, rather than access by the user, has economic significance. Moreover, by making it clear that the act of making content available on websites occurs before the user initiates the request/ response process the ruling in *Svensson* lends itself to the argument that, having regard to the technical process by which content is transmitted to the user, no benefit in the nature of a service is conferred on the user by virtue of the response process. Rather, the second-stage benefit consists in the grant of permission by the website to make use of the information that has been made available.

The comparison between the two-stage model and the model suggested by *Register.com* offers additional reasons to prefer the two-stage model on an interpretative approach. The thesis argues that the alternative model requires one to accept that a website can simultaneously make content available and withhold that content. The apparent logical inconsistency poses problems for an interpretative account that makes sense of the exchange between the website and the user and threatens to upset the distinction, reflected in existing legal norms, concerning information that is made available and that which is not.

A detailed review of findings is set out in Section II.

II. Detailed review

II.1 The Public Domain

Following a brief introductory Chapter setting out the aims and scope of the thesis, I set out and developed, at Chapter II, the conception of the public domain employed in this thesis. The conception draws on Lon Fuller's vision of a 'field of human intercourse freed from legal constraints' implying not only freedom from state-imposed law but privately imposed contracts.

For Fuller, freedom *from* contract is concerned with and secured through the rules of contract formation. The conception of the public domain that I have proposed likewise proceeds on the basis that freedom from contract is shaped by those rules and is concerned with the presence or absence of exchange between persons.

I provided an overview of other, mainly copyright-centric, conceptions of the public domain and suggested that while the conception of the public domain as freedom from law and contract is only one of many possible variants of the public domain construct, it fulfills a function that differentiates it from other such constructs. It addresses the role of the rules of contract formation in securing or diminishing the scope of users' freedoms in relation to information made available on open publicly accessible websites.

In this respect the thesis addresses a gap in the literature. For while there is a body of commentary on the relationship between contract and copyright, and the extent to which

[1] C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014).

contract may prohibit uses of information that would otherwise be privileged, such commentary is largely concerned with the 'second-order' question of enforceability of particular contract terms. By contrast, my conception of the public domain is primarily concerned with the implications of the first-order question of contract formation for uses of information.

II.2 A Contract-Oriented Conception of the Public Domain

At Chapter III I focused on the freedom from contract aspect of the conception of the public domain and sought to flesh out that aspect by reference to the contract formation rules of English law.

I provided an overview of the requirements for mutual assent, evinced by offer and acceptance, intention to create legal relations and consideration.

I suggested that the key to uncovering the scope of the public domain lies in the requirements as to acceptance and consideration.

Bearing in mind that in the context of open publicly accessible websites featuring browse wrap Terms of Use, the users' acceptance of the offer is not express but may be implied from conduct, I explored the factors that, under English contract law, are relevant to the implication of assent. In particular I reviewed the authorities relevant to the test of necessity of implication. I demonstrated that the test involves triangulating the user's pre-contract rights and privileges, his post-contract rights and privileges and the terms of the purported contract in order to determine whether the user's conduct unequivocally signals assent.

I described various facets of the doctrine of consideration, including the rule to the effect that past consideration, involving the transfer of a benefit otherwise than in the context of an exchange, does not qualify as consideration.

I argued that the requirements as to assent and consideration may be distilled to provide a methodology for determining whether a contract exists between website and user. The methodology proposed consists in carrying out the following tasks

1. Identify the benefit.
2. Consider whether it has economic value.
3. Determine whether or not it is a benefit that the user only gets via the contract.
4. For the purposes of (3) compare the benefit purportedly transferred with the user's existing suite of rights and privileges.
5. Consider the timing of conferral of the benefit so as to determine whether it is truly given only in the context of an exchange or rather given gratuitously in advance of any purported contract.
6. Assess, given the context, whether the benefit would have been conferred regardless of the user's promise.

I argued moreover that if either (a) questions 2 or 3 must be answered in the negative; or (b) question 6 must be answered in the affirmative; or (c) the answer to question 5 is that the benefit is given gratuitously in advance of any contract, then no contract exists between website and user. In that case the public domain, being the field of free-remaining relations, free that is both

from the constraints of law and contract is the field of the user's rights and privileges identified as part of task (4).

II.3 Conceptualisation of the Benefit

At Chapter IV, and with an eye to the first of the tasks suggested by the methodology produced in Chapter III, I considered how the benefit conferred by an open publicly accessible website on a user might be conceptualised. The review is the first of its kind within common law jurisdictions.

I noted that both in case law and commentary the benefit is variously and sometimes interchangeably conceptualised as involving access to the website or the information, a service consisting in the provision of access or information or use of the website or its contents. In order to determine whether the benefits were different in substance or only in name I provided a fresh assessment of the benefits conferred by the website on the user.

The assessment identified a range of benefits that might be brought under the headings of 'access', 'service' and 'use'. By means of a diagram plotting relationships between the benefits, I suggested that it is possible to reveal patterns of connections between the differently labeled benefits.

In particular, I argued that it is possible to identify two key sets of benefits involving access to the server and access to an information resource. All such benefits, I suggested, were linked by two features: (first) the fact that access to the server implies access to an information resource and vice versa, and (second) the fact that in either case access is secured by uploading the information to a server that is connected to the internet and configured as open and publicly accessible, and by means of the request/response process. I suggested that these processes are central to an understanding of the benefits conferred by the website on the user and that the inconsistent use of the language of access, service and use to describe the benefits conferred by the website on the user may reflect a struggle to make sense of the technical processes within a legal framework.

I outlined the approach adopted in later Chapters to the conceptualisation of the benefit. The approach entailed assessment of the benefit by reference to the categories of access, service and use, (the category of 'use' being reserved for use of content in ways that extend beyond access, or looking), with no consideration being given to services (such as search tools, chatrooms or email updates) that are in the nature of additional services.

II.4 Access

At Chapter V I explored the contractual significance under English law of the benefit of access to open publicly accessible websites.

I tackled this question with the aid of Hohfeld's scheme of jural relations. Relying on Hohfeld's scheme I argued that for permission to access to qualify as a benefit that is apt to clothe browse wrap Terms of Use with contractual effect the website must possess a right to exclude.

I carried out an assessment as to whether the website may be said to possess a right to exclude either in relation to the server where the website is stored or in relation to the content. I addressed this question from various angles.

I considered first whether it is possible to extrapolate a right to exclude (and thus a power to control access) from the rights or interests possessed by the website. In particular I reviewed whether, as Jane Ginsburg suggests, a right to control access may be conferred by the copyright regime; whether the database right might confer a right to control access and whether, under English law, a right to control access may be derived from the law of trespass to chattels or unjust enrichment.

I concluded that none of these regimes confers a right to exclude and concomitant power to control access on the website.

I reviewed the decision by the Supreme Court of Canada in *Century 21* in which the Court appears to give credence to the notion that a website possesses a right to control access. I suggested that the decision is flawed since, while not purporting to create a new right, it fails to locate the basis for any such right in existing law. I suggested that the decision relies over-heavily on decisions from the US and that the decision, while relevant, is unlikely to be followed in England.

I also considered the provisions of the UK's Computer Misuse Act 1990 that expressly refers to 'entitlement to control access' to data. I criticised the legislation on account of its failure to identify the basis on which it might be said that a person possesses 'entitlement to control access' to data. The legislation is not creative of new rights. It does not purport to confer rights on any person. I argued that despite the terminology adopted in the legislations it does not creates or give rise to any broad general 'entitlement to control access' to information that has been made publicly available.

In the absence of a right to exclude and thus a power to control access, the grant of permission for access cannot clothe browse wrap Terms of use with contractual effect. I argued that the analysis supports the conclusion that where the benefit is conceptualised as 'access' it appears that access and looking are within the scope of the public domain. However the conclusion, I suggested, must remain provisional since the contractual significance of the benefit must also be assessed according to the 'service' conceptualisation.

II.5 Services

At Chapter VI I explored the contractual significance of the benefit conferred by the website on the user where the benefit is conceptualised as a service.

I pointed out that the analysis in Chapter VI suffers from certain constraints, that is, it is limited to an analysis by reference to the nature of the benefit, not its mode of supply. The analysis takes account of the benefit 'statically conceived' rather than the dynamics of its transfer. As a result the analysis is confined to an assessment of the contractual significance of the benefit by reference to the rules of the doctrine of consideration, in particular the requirement that the benefit must possess economic value.

I explored whether the benefit provided by the website to the user has economic value by reference to the EU jurisprudence of services. I concluded first, that the fact that the benefit is badged as a service does not mean that it necessarily possesses economic value and second, that

the EU jurisprudence of services points to a category of services that may be regarded as without economic significance owing to their ancillary character.

In order to give content to the scope of the 'service(s)' provided by the website to the user I considered the categories of service suggested by the Information Society Directive. I argued that the Directive suggests three broad categories of service provided by a website to a user, namely services consisting the sale of goods or services, services giving rise to online contracting and services consisting in the supply of information. I suggested that the first two categories are invariably ancillary within the meaning of the EU jurisprudence of services and lack economic value. However, as regards the third category, I suggested that such a service would ordinarily possess economic value for users save possibly where the information supplied is in the nature of advertising.

I considered various challenges to the argument that the supply of information in the nature of advertising lacks economic value and concluded that it is impossible to resolve the question by reference to the EU jurisprudence of services.

Taking a different approach, I considered the implications of the rule, under the doctrine of consideration, that the benefit conferred must be one that would not have been conferred save in exchange for the other's (here, the user's) promise. I made a case for the argument that in the case of retail websites, where the benefit is conceptualised as a service consisting in the provision of information, the benefit is one that (having regard to commercial realities) would be conferred regardless of the user's promise and so cannot qualify as consideration. The mere supply of the information does not give rise to a contract.

II.6 *Svensson*

At Chapter VII, I explored the ruling of the CJEU in *Svensson* and argued that the ruling points to a different way of conceptualising the benefit conferred by the website on the user. In particular I argued that *Svensson* suggests that the service element of the benefit may consist in making information available, and provides a means of addressing not merely the nature of the benefit but the dynamics of its supply.

I provided a review of the ruling, setting it in the context of the provisions of the Information Society Directive and conflicting accounts of the significance of the 'making available' right. I argued that the CJEU was right to conclude in *Svensson* that content is 'made available' by acts that fall short of transmission of content, and regardless of whether or not the user accesses the content.

Svensson does not engage in detailed analysis of the acts that are necessary and sufficient to make content available on websites. With a view to exploring the links between the nature of the acts that constitute making available and the scope of the service provided by the website to the user, I considered first whether the activity of making available consists in a single act or series of acts. I was not able to reach a clear conclusion on this point and so adopted a different tack in order to assess the link between the scope of the acts encompassed in 'making available' and the nature of the service provided.

I reviewed case law of the CJEU concerning the application of the communication to the public right (the 'parent' of the making available right) in the context of broadcasting services. I argued that the case law suggests a link between the acts that implicate the communication to the public right and the nature of the service provided by the alleged infringer. The case law indicates that the relevant service, the act that has economic significance, consists in making content available, not in transmission of the content.

I considered whether this understanding of the nature of the service might carry over into the context of websites. I noted that broadcasting services are distinguished from websites on account of the fact that the latter but not the former are interactive. I explored the significance of the distinction by reference, first, to the manner in which the Information Society Directive addresses the requirement that information society services (a term that includes websites) should be interactive.

I argued that while the Information Society Directive addresses the requirement for interactivity by specifying that for a service to qualify as an information society service the recipient of the service must make a request for transmission of the content, it in no way suggests that the transmission of content from the website to the user forms part of the information society service. The Information Society Directive, I argued, is consistent with the categorisation of the service provided by website to user as making available, excluding subsequent transmission.

I also considered the significance of the website's role in handling the user's request for a webpage and handing over the data to the network for transmission for the scope of the service. I argued that the website's role in these processes does not form part of the service, that the website's response is essentially passive, a view implicitly endorsed by the CJEU in *Svensson* in suggesting that the user merely 'avails himself' of the content of the website.

I concluded that *Svensson* shifts the conceptualisation of the benefit provided by the user to the user from one concerned with the supply of content to one concerned rather with making content available.

II.6 A New Model for Conceptualisation of the Benefit provided by website to user

At Chapter VIII, and drawing on the insights from *Svensson*, I set out a novel model for conceptualisation of the benefit provided by the website to the user.

I argued that *Svensson* suggests a two-stage process by which the website confers separate benefits on the user. At the first stage it provides a service that consists in making available. At the second stage it may offer a permission for use of the content that has been made available.

I explored the novelty and utility of the two-stage model, including the fact that it flags up the significance of the view adopted as to the relevance of the request/response process for the conceptualisation of the scope of the service provided by the website to the user.

I demonstrated the distinguishing characteristics of the two-stage model by contrasting the two-stage model with the model of benefit suggested by *Register.com.* I suggested that *Register.com*, in contrast to the model I propose, suggests that the service provided by the website to the user

is only complete at the point when the user accesses the website and the relevant content and not before.

I considered the implications of the adoption of each of the two models for the contractual significance of the exchange between the website and the user.

I suggested that if the majority in *Register.com* were right to suppose that the service delivered by the website to the user is complete only when the user accesses the content, the majority was right to consider that the delivery by a website of a service consisting in the provision of access to information is contractual in character. I argued moreover that the same would be true under English law.

On the other hand I argued that if the nature and mode of supply of the benefits conferred by the website on the user is accurately captured by the proposed two-stage model, the position would be very different. On this account, the delivery of the first stage benefit, the service consisting in making available, could never be contractual in character. The delivery of the second stage benefit would only be contractual in character to the extent that the user made use of the content made available in a manner that exceeded his existing rights and privileges.

I concluded that the choice between the two models has profound implications for the scope of the public domain.

II.7 Mapping the Public Domain

At Chapter IX, by stages I produced a map of the public domain in relation to information made available on publicly accessible websites according to the *Register.com* model on the one hand and the two-stage model on the other.

First, I outlined the user's pre-contract rights and privileges in relation to the use of such information. Second, in order to assess the scope of the public domain, being the field of relations free not only from the constraints of law but of contract, I took account of the implications of the contractual significance of the conferral of benefits according to the competing models.

The exercise in mapping the public domain according to the two models reveals that whereas, under the *Register.com* model, there is no public domain in relation to information made available on open publicly accessible websites, on the two-stage model, the user may access, look at and use the content on the website within the scope of his existing rights and privileges without risking contractual incursion into the domain of freedom from constraint. On the other hand where he exceeds his existing rights and privileges, browse wrap Terms of Use will have contractual effect and will operate to restrict any and all use of the content as in the *Register.com* model.

I explored whether the difference in the scope of the public domain according to the two models might be ameliorated by the effect of legal restrictions on the enforceability of particular contract terms. In particular I explored the significance of the legislative provisions relating to unfair contract terms as well as the contract override provisions of the Copyright Designs and Patents Act 1988. I concluded that neither makes a significant impact on the overall scope of the public

domain and in particular that neither operates so as to constrain contractual restrictions on access and looking.

III. Review of conclusions and lines of further inquiry

In the introduction to this thesis I gave liberty the role of working out the public domain associated with the use of information on publicly accessible websites. In that role, liberty identified that it is possible to produce two very different maps of the public domain, depending on one's perspective as to the character of the exchange between website and user.

Having performed that task she may put on her usual garb and as Liberty review her conclusions, the implications for freedoms and the options for further inquiry. Armed with the knowledge gained from her labours, she may do so from the perspective of one who holds a deep understanding of how those questions relate to the existing legal framework.

Liberty may first observe that since freedom to look remains a limited privilege, that is, a privilege that applies only in relation to information that is or has been made available, the notion of making available is key to the scope of the freedom. She might wonder how it happens that, in the context of open publicly accessible websites, there is not greater certainty concerning when information is made available rather than merely on offer, when it is 'sent' or merely made ready for sending. She might suggest a need for the international legal community to explore whether it is possible to achieve harmonisation on this issue not merely within the framework of copyright but beyond.

Looking is central to human experience and learning. Special attention, Liberty may argue, should be paid to the freedom to look. More generally, Liberty might consider that privileges are treated as the poor relations of rights, and invite inquiry as to whether (without reconstituting privileges as rights, so encroaching on other freedoms) greater status may be afforded to privileges.

Liberty may wonder whether the choice that must be made pits two freedoms against each other, namely the freedom to look at information that is available on the one hand and the freedom to contract on the other. She may muse upon whether the freedoms are genuinely opposed or whether this is a false opposition engendered by the notion that content on a website may at once be available but only offer. She may nevertheless invite assessment of the relative weight to be accorded to each of the freedoms, asking whether it may be possible to establish a hierarchy of privileges or a method for balancing their competing claims.

The inquiries suggested by Liberty's review point to a need for normative, policy-oriented research concerning the scope of, and weight to be accorded to freedom to look.

However the conclusions of the thesis also point to the desirability of further research concerning the relationship between intellectual property rights and contract. Within this broad field the following opportunities for further research may be identified:

1. There is much scope for theoretical and empirical research concerning the implications and (in time) the felt effects of the recently introduced 'contract override' provisions of the Copyright Designs and Patents Act 1988. The relative importance of contract, on the one hand, and the copyright regime on the other in controlling uses of information might

be tested by means of empirical analysis of the reported effects (including the economic effects) of the contract override provisions. Empirical research might usefully address not only whether the contract override provisions cause online content providers to alter their terms and conditions (including those set out in browse wrap Terms of Use), but also whether users are emboldened to exercise the copyright exceptions covered by the contract override provisions.

2. Relatedly empirical research as to user's experiences of seeking to exercise the copyright exceptions so far as protected by contract override may provide an indicator of the extent to which websites seek to limit uses permitted by the exceptions by reference to contractual restrictions on access.
3. Research might usefully address the concerns expressed by practitioners about the interface between intellectual property rights and contract. Suitable research topics might include whether Terms of Use are relevant in determining the scope of the public to whom communication of a copyright work is authorised by the rightholder;[2] whether the effect of the ruling of the CJEU in *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* is to render unenforceable certain terms imposed on end users;[3] and the extent to which contractual restrictions are compatible with the database right.[4]
4. Policy-oriented research might address how law and policymaking directed at information use could better reflect the symbiotic relationship between contracts and intellectual property rights, taking account of the implications of each field for the other. In this context, consideration might be given to the extent to which the fragmented approach is caused or contributed to by the division of competences between EU law on the one hand and domestic law on the other.

These issues suggest not only a need for further research but also for cross-disciplinary collaboration. The debate about policy directions in the field of information law must reach beyond the field of intellectual property, with its especial focus on copyright, and recognise the potential for contract to control information use. Decisions to alter or adhere to the status quo should proceed not only on the basis of normative judgments as to the optimal shape of the public domain but on the basis of a clear understanding of the implications of the effects of the existing law that applies in a particular jurisdiction. Efforts to achieve information policy solutions that take account of the effects of intellectual property rights and contract may require to address challenges presented by the constitutional framework of the EU.

[2] Graham Smith, 'Copyright and Hyperlinking: Svensson, free to link or link at your risk?' <https://inforrm.wordpress.com/2014/02/23/copyright-and-hyperlinking-svensson-free-to-link-or-link-at-your-risk-graham-smith/> (accessed 10 February 2016); The IPKat, 'Post-Svensson stress disorder #2: What does "freely available" mean?' <http://ipkitten.blogspot.co.uk/2014/03/post-svensson-stress-disorder-2-what.html> (accessed 10 February 2016).

[3] Tony Ballard, 'PRCA v NLA (the Meltwater case) and the communication to the public right' <http://www.harbottle.com/prca-v-nla-meltwater-case-communication-public-right/> (accessed 10 February 2016).

[4] IPKat, 'BREAKING: CJEU says that owner of an online database not protected by copyright or sui generis right may restrict its use by contract' <http://ipkitten.blogspot.co.uk/2015/01/breaking-cjeu-says-that-owner-of-online.html> (accessed 10 February 2016).

IV. Concluding remarks

Liberty has revealed the character of the choice that English law must make in order to determine the territorial reach of the public domain in relation to information on open publicly accessible websites. The choice concerns the conceptualisation of the interaction between the website and the user; it concerns whether the website can consistently be said to make content available, yet, at the same time only offer access to content. This thesis supplies reasons for preferring to characterise the interaction between the website and the user in such a way as to favour a broad public domain, one that makes room for freedom to look. There is scope for further inquiry to be sure. Nevertheless, for as long as the canons of contract law preserve the requirement for exchange, a choice by the Courts as to the scope of the public domain must commence with an analysis that tracks the approach in this thesis.

In 1765 Lord Camden declared that 'the eye cannot by the law of England be guilty of a trespass'.[5]

Asserting that

> … it has never been an infringement, in either English or EU law, for a person merely to view or read an infringing article in physical form …[6]

Lord Sumption recently chose to extend freedom to look in an analogue context to encompass freedom to look where looking takes place through the medium of computers. This thesis not only demonstrates that the question of enforceability of browse wrap Terms of Use impacts on the reach of freedom to look, but also provides the Courts with reasons to favour the denial of contractual effect. Will the English Courts follow their US brethren and acquiesce in the deployment of browse wrap Terms of Use or will they instead preserve freedom to look by refusing to grace such arrangements with contractual effect? The answer will determine the shape of the public domain.

[5] *Entick v Carrington* (1765) 19 State Trials 1029, 1066.
[6] *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18, [2013] 2 All ER 852 [36].

Bibliography

Abruzzi BF, 'Copyright, Free Expression, and the Enforceability of Personal Use-Only and Other Use-Restrictive Online Terms of Use' (2009) 26 Santa Clara High Tech LJ 85

Abu-Akeel AK, 'Definition of Trade In Services Under The GATS: Legal Implications' (1999) 32 Geo Wash J Int'l L & Econ 189

Adams J, and Brownsword R, 'Contract, Consideration and the Critical Path' (1990) 53 MLR 536

ALAI, 'Report and Opinion on the Making Available and Communication to the Public in the Internet Environment—Focus on Linking Techniques on the Internet' (16 September 2013) <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf> (accessed 21 June 2014)

Allgrove B, 'Linking: looking past Svensson' (2 June 2014) <http://www.iam-media.com/blog/detail.aspx?g=EAA9E5F9-2119-4CB4-B9C9-EF685652F0CC> (accessed 9 February 2016)

Allgrove B, and Ganley P, 'Search engines, data aggregators and UK copyright law: a proposal' (2007) 29(6) EIPR 227

Anthony S, 'Why Netflix streaming is getting slower, and probably won't get better any time soon' (23 February 2014) <http://www.extremetech.com/computing/177073-why-netflix-streaming-is-getting-slower-and-probably-wont-get-better-any-time-soon> (accessed 29 July 2015)

Aplin TF, and Davis J, *Intellectual Property Law: Text, Cases, and Materials* (OUP 2013)

Aplin TF, *Copyright in the Digital Society* (Hart Publishing 2005)

Apple, 'Terms of Use' <https://www.apple.com/legal/internet-services/terms/site.html> (accessed 25 July 2015)

Arnull A, Wyatt D, and Dashwood A, *Wyatt and Dashwood's European Union Law* (Hart 2011)

Arthur R, 'Federal Circuit v. Ninth Circuit: A Split Over the Conflicting Approaches to DMCA Section 1201' (2013) 17 Intellectual Property L Rev 265

Ashurst,'Spread-betting contracts: child's play?' July 2012 <www.ashurst.com/doc.aspx?id_Content=8042> (page accessed 23 February 2014)

Atiyah PS, *Essays on Contract* (Oxford Clarendon Press 1990)

Baggio R, and Corigliano MA, 'On the Importance of Hyperlinks: A Network Science Approach' in Höpken W, Gretzel U, and Law R, *Information and Communication Technologies in Tourism 2009: Proceedings of the International Conference in Amsterdam, the Netherlands* (Springer 2009)

Bagwell K, 'The Economic Analysis of Marketing' in Armstrong M, and Porter R (eds), *Handbook of Industrial Organization: Volume 3* (Elsevier/North Holland 2007)

Bainbridge DI, *Intellectual Property* (7th edn, Pearson Longman 2009)

Baker A, 'Case Comment: EU Copyright Directive: does internet browsing require copyright licences? Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd (C-360/13) (the Meltwater case)' (2014) 25(7) Ent LR 257

Balganesh S, 'Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass' (2006) 12 Mich Telecomm Tech L Rev 265

Balganesh S, 'Property along the Tort Spectrum: Trespass to Chattels and the Anglo- American Doctrinal Divergence' (2006) 35 Comm L World Rev 135

Ballantine SB, 'Computer Network Trespasses: Solving New Problems with Old Solutions' (2000) 57 Wash & Lee L Rev 209

Banjo S, and Fitzgerald D, 'Stores Confront New World of Reduced Shopper Traffic' The Wall Street Journal 16 January 2014

<http://online.wsj.com/news/articles/SB10001424052702304419104579325100372435802?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304419104579325100372435802.html> (copy kindly supplied by WSJ as access to the article is subscription only)

Barnard C, and Peers S, *European Union Law* (6th edn, CUP 2014)

Barnett C, 'Convening Publics: The parasitical spaces of public action' in Cox KR, Low M, and Robinson J, (eds), *The SAGE Handbook of Political Geography* (Sage Publications Ltd 2008)

Beatson J, Burrows A, Cartwright J, *Anson's Law of Contract* (29th edn, OUP 2010)

Bechtold S, 'Information Society Dir, art 3' in Dreier T and Hugenholtz PB, *Concise European Copyright Law* (Kluwer Law International 2006)

Beijnum I van, 'Playing chicken: ISP depeering a high-school lovers' quarrel' (21 March 2008) <http://arstechnica.com/uncategorized/2008/03/isps-disconnect-from-each-other-in-high-stakes chicken-game/> (accessed 3 October 2015)

Benkler Y, 'Free As The Air To Common Use: First Amendment Constraints On Enclosure Of The Public Domain' (1999) 74 New York University Law Review 354

Benkler Y, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (YUP 2006)

Bently L, and Sherman B, *Intellectual Property Law* (OUP 2009)

Berlin I, *Two Concepts of Liberty* (OUP 1958)

Beyleveld D, and Brownsword R, *Consent in the Law* (Hart 2007)

Bigwood R, *Exploitative Contracts* (OUP 2003)

Blount S, *Electronic Contracts: Principles from the Common Law* (LexisNexis Butterworths 2009)

Blum B, *Contracts: Examples and Explanations* (4th edn, Aspen Publishers 2007)

Bouchard GN, 'Canada' in Kinsella SN, and Simpson AF, (eds), *Online Contract Formation* (Oceana Publications 2004)

Boyle J, 'Foucault In Cyberspace: Surveillance, Sovereignty, and Hard-Wired Censors' (1997) 66 University of Cincinnati Law Review 177

Boyle J, 'The Second Enclosure Movement and the Construction of the Public Domain' (2002) 66 Law and Contemporary Problems 33

Boyle J, *The Public Domain* (YUP 2008)

Breakey H, *Intellectual Liberty: Natural Rights and Intellectual Property* (Ashgate 2012)

Brotton J, *A History of the World in Twelve Maps* (Viking 2013)

Brudner A, 'Reconstructing Contracts' [1993] University of Toronto Law Journal 1

Burk DL, 'The Trouble with Trespass' (2000) 4 J Small & Emerging Bus L 27

Burrell R, Coleman A, *Copyright Exceptions: The Digital Impact* (CUP 2005)

Business, Innovation and Skills Committee, *1st Report-The Hargreaves Review of Intellectual Property: Where next?* (HC 2012-13, 367-I)

Cahir J, ' The Public Domain: Right or Liberty' in Waelde C, and MacQueen HL, (eds), *Intellectual Property: The Many Faces of the Public Domain* (Edward Elgar 2007)

Calamari JD, and Perillo JM, *Contracts* (2d ed, West Publishing 1977)

Cameron GDL, 'Consensus in Dissensus' 1995 SLT (News) 132

Carrier M, and Lastowska G, 'Against Cyberproperty' (2007) 22 Berkeley Tech LJ 1485

Carter I, 'Positive and Negative Liberty' in Zalta EN, (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2012 edn, Stanford University), <http://plato.stanford.edu/archives/spr2012/entries/liberty-positive-negative/> (accessed 7 January 2015)

Carty H, 'The Common Law and the Quest for the IP Effect' [2007] IPQ 237

Casamiquela RJ, 'Contractual Assent and Enforceability: Cyberspace' (2002) 17 Berkeley Tech L J 475

Chalmers D, Davies GT, and Monti G, *European Union Law* (3rd edn, CUP 2014)

Chambers R, Mitchell C, and Penner J, *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009)

Chang EW, 'Bidding on Trespass; eBay, Inc v. Bidder's Edge and the Abuse of Trespass Theory in Cyberspace-law' (2001) 29 AIPLA Q J 445

Chao SY, 'District Court for the Central District of California Holds that a Web- Wrap Site License Does Not Equate to an Enforceable Contract,'(2001) 54 SMU L Rev 439

Chen-Wishart M, "'A Bird in the Hand': Consideration and Contract Modification" in Andrew Burrows and Edwin Peel, eds, *Contract Formation and Parties* (OUP 2010)

Chiplin B, Sturgess B, and Dunning J, *Economics of Advertising* (Holt, Rinehart and Winston with the Advertising Association 1981)

Chitty J, and Beale HG, *Chitty on Contracts* (28th edn, Sweet and Maxwell 1999)

Chitty J, and Beale HG, *Chitty on Contracts* (31st edn, Sweet and Maxwell 2012)

Clapperton D, and Corones S, 'Unfair Terms In 'Clickwrap' And Other Electronic Contracts' (author version) <http://eprints.qut.edu.au/7650/1/7650.pdf> (accessed 29 July 2015)

Clark CE, 'The Restatement of the Law of Contracts' (1933) 42 Yale Law Journal 643

Clough J, 'Data Theft? Cybercrime and the Increasing Criminalization of Access to Data' (2001) 22 Criminal Law Forum 145

CMA, 'Consumer Protection: Guidance on the CMA's approach to use of its consumer powers' (CMA 7, March 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288624/CMA7_Consumer_Protection_guidance.pdf> (accessed 14 October 2015)

CMA, 'Prioritisation principles for the CMA' (CMA 16, April 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf> (accessed 14 October 2015)

CMA, 'Unfair Contract Terms: Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (CMA 37, 31 July 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf> (accessed 14 October 2015)

Commission, 'Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee concerning regulatory transparency in the internal market for information society services' COM(96) 392 final

Commission, 'Explanatory Memorandum to Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society of 10 December 1997' COM(1997) 0628 final, OJ C108/6, 7 April 1998 (the 'Explanatory Memorandum to the Initial Proposal')

Commission, 'Legal analysis of a Single Market for the Information Society' (SMART 2007/0037) (November 2009) <http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037> (accessed 1 January 2014)

Commission, 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market' COM (1998) 586 final

Commission, 'Public Consultation on the review of the EU copyright rules' <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm> (accessed 3 July 2014)

Commission, 'Vade-Mecum to Directive 98/48/EC which introduces a Mechanism for the Transparency of Regulations on Information Society Services' (Standards And Technical

Regulations Committee) Doc S-42/98 - EN (Def)) and the explanatory memorandum accompanying the proposal for the Ecommerce Directive

Commission, *Free Movement of Goods - Guide to the Application of Treaty Provisions Governing Free Movement of Goods* (Publications Office of the European Union 2010)

Copyright Review Committee, 'Copyright and Contract' (2002) <http://www.austlii.edu.au/au/other/clrc/2/> (accessed 23 October 2015)

Corbin AL, *Corbin on Contracts* (West Pub Co 1952)

Council of Europe, *Programme Sponsorship and New Forms of Commercial Promotion on Television* (Council of Europe, 1991)

Da Cruz Vilaça JL, 'On the Application of Keck in the Field of Free Provision of Services' in Andenas MT, and Wulf-Henning R, (eds), *Services and Free Movement in EU Law* (OUP 2002)

Davidson D, 'Click and Commit: What Terms are Users Bound to When They Enter Web sites?' (2000) 26(4) William Mitchell Law Review 1171

De Gaetano PM, 'Intel Corp v Hamidi: Private Property, Keep Out - The Unworkable Definition of Injury for a Trespass to Chattels Claim in Cyberspace' (2004) 40 Cal W L Rev 355

Deakin SF, Johnston AC, and Markesinis B, *Markesinis and Deakin's Tort Law* (Clarendon Press 2008)

Deazley R, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006)

Derclaye E, and Favale M, 'User Contracts ('Demand Side')' paper in Kretschmer M, and others, 'The Relationship Between Copyright and Contract Law' (Project Report, Strategic Advisory Board for Intellectual Property Policy 2010) <http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf> (accessed 30 July 2015)

Derclaye E, *The Legal Protection of Databases: A Comparative Analysis* (Edward Elgar 2008)

Dickson J, 'Interpretation and Coherence in Legal Reasoning' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition) <http://plato.stanford.edu/archives/sum2014/entries/legal-reas-interpret/> (accessed 10 February 2016).

Doward J, and McVeigh T, 'Royals told: open archives on family ties to Nazi regime' <http://www.theguardian.com/uk-news/2015/jul/18/royal-family-archives-queen-nazi-salute> (accessed 26 July 2015)

Ducoffe RH, 'Advertising Value and Advertising the Web' Journal of Advertising Research'(1996) 36 (5) Journal of Advertising Research 21

Dusollier S, 'The protection of technological measures: Much ado about nothing or silent remodeling of copyright' in Rochelle Cooper Dreyfuss and Jane C Ginsburg, *Intellectual Property at the Edge: the contested contours of IP* (CUP 2014)

Edelman J, 'The Meaning of Loss and Enrichment' in Chambers R, Mitchell C, and Penner J, *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009)

eDigitalResearch, 'Comparing comparison sites Price comparison website mystery shopping report for Consumer Focus' <http://www.consumerfocus.org.uk/files/2013/01/Comparing-comparison-sites.pdf> (accessed 17 March 2014)

Eechoud MMM van, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer Law & Business 2009)

Efroni Z, *Access-right: The Future of Digital Copyright Law* (OUP 2011)

Elkin-Koren N, 'Copyright Policy and the Limits of Freedom of Contract' (1997) 12 Berkeley Tech LJ 93

Elkin-Koren N, 'Copyrights In Cyberspace - Rights Without Laws?' (1998) 73 Chicago-Kent Law Review 1155

Elkin-Koren N, and Salzberger EM, *The Law and Economics of Intellectual Property in the Digital Age* (Routledge 2013)

Epstein RA, 'Cybertrespass' (2003) 70 The University of Chicago Law Review 73

Erickson K, and Kretschmer M (eds), 'Research Perspectives on the Public Domain' CREATe Working Paper 2014/3 (February 2014) <http://www.create.ac.uk/wpcontent/uploads/2014/02/CREATe-Working-Paper-2014-03.pdf> (accessed 1 August 2015)

European Copyright Society, 'Opinion on The Reference to the CJEU in Case C- 466/12 *Svensson*' (15 February 2013) <http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf> (accessed 21 June 2014)

European Parliament, 'Report on Towards a Digital Single Market Act' (2015/2147(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0371&format=XML&language=EN> (accessed 12 February 2016).

Fafinski S, 'Access denied: computer misuse in an era of technological change' (2006) 70 J Crim L 424

Farnsworth EA, 'Ingredients in the Redaction of the "Restatement (Second) of Contracts"' (1981) 81(1) Columbia Law Review 1

Farnsworth EA, *Farnsworth on Contracts* (3rd edn, Aspen Publishers 2004)

Ficsor M, 'Copyright for the Digital Era: The WIPO Internet Treaties' 1997 Columbia-VRA Journal of Law and the Arts 197

Ficsor M, 'Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument' in Hugenholtz PB, and Dommering EJ, *The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium Organized by the Royal Netherlands Academy of Sciences (KNAW) and the Institute for Information Law* (Kluwer Law International 1996)

Ficsor M, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (OUP 2002)

Fitzgerald B, and others, *Internet and E-commerce Law: Technology, Law, and Policy* (Lawbook Co 2007)

Fitzgerald BF, and Gamertsfelder L, 'Protecting informational products (including databases) through unjust enrichment law: an Australian perspective' (1998) 20 EIPR 244

Footer ME and George C, 'The General Agreement On Trade In Services' in McCrory P, Appleton A, and Plummer M, (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005)

Forrester, 'The State Of Retailing Online: Key Metrics And Initiatives 2014:Why read this report' <http://www.forrester.com/The+State+Of+Retailing+Online+Key+Metrics+And+Initiatives+2014/fulltext/-/E-RES111401> (page accessed 27 February 2014)

Fraser S, 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure' (1997) 15 J Marshall J Computer & Info L 759

Freshfields Bruckhaus Deringer, 'A new consumer landscape' (April 2012) <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/A%20new%20consumer%20landscape.pdf> (accessed 14 October 2015)

Fuller LL, 'Consideration and Form' (1941) 41 Colum L Rev 799

Fuller LL, 'Freedom as a Problem of Allocating Choice' Proceedings of the American Philosophical Society, Vol 112, No 2, Law and Liberty (Apr 15, 1968) 101

Fuller LL, 'Freedom: A Suggested Analysis' (1955) 68(8) Harvard Law Review 1305

Fuller LL, 'Some Reflections on Legal and Economic Freedoms--A Review of Robert L. Hale's "Freedom through Law"' (1954) 54 (1) Columbia Law Review 70

Fuller LL, 'Williston on Contracts' (1939) 18(1) North Carolina Law Review 1

Fuller LL, *The Morality of Law* (YUP 1964)

Gao Y, 'Consumer Attitude in Electronic Commerce' in Pagani M, *Encyclopaedia of Multimedia Technology and Networking* (Idea Group Reference 2005)

Garcia M, 'Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum' (2014) 36 Campbell L Rev 31

Ginsburg JC, 'From Having Copies To Experiencing Works: The Development of an Access Right in U.S. Copyright Law' 50 J Copyright Soc'y USA 113

Ginsburg JC, 'News From the EU: Where Does the Act of 'Making Available' Occur?' (October 29, 2012) <http://www.mediainstitute.org/IPI/2012/102912.php> (accessed 1 July 2014)

Goff R, Goff of Chieveley, and others, *The Law of Unjust Enrichment* (Sweet & Maxwell 2011)

Goldman E, 'Cairo v Crossmedia Services' (12 April 2005) <http://blog.ericgoldman.org/archives/2005/04/cairo_v_crossme.htm> (accessed 14 October 2014)

Goldman E, 'Craigslist Wins Routine But Troubling Online Trespass to Chattels Ruling in 3Taps Case' (20 September 2013) <http://blog.ericgoldman.org/archives/2013/09/craigslist_wins_1.htm> (accessed 24 October 2015)

Goldstein P, Hugenholtz B, *International Copyright* (3rd edn, OUP 2013)

Gordley J (ed), *The Enforceability of Promises in European Contract Law* (CUP 2001)

Gordon K, 'Online Is Where It's At for U.K. Retailers' The Wall Street Journal 16 January 2014 <http://online.wsj.com/news/articles/SB10001424052702304149404579324220716000030?KEYWORDS=stores+footfall&mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304149404579324220716000030.html%3FKEYWORDS%3Dstores%2Bfootfall> (copy kindly supplied by WSJ as access to the article is subscription only)

Gordon WJ, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory' (1989) 41 Stanford Law Review 1343

Gordon WJ, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia Law Review 149

Gordon WJ, 'Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship' (1990) 57(3) The University of Chicago Law Review 1009

Gormley LW, 'Two Years After Keck' (1995) 19(3) Fordham International Law Journal 866

Goudreau M, 'Protecting Ideas and Information in Common Law Canada and Quebec' (1994) 8 IPJ 189

Grantham R, and Rickett C, 'On the subsidiarity of unjust enrichment' [2001] LQR 117

Greaves R, 'Advertising restrictions and the free movement of goods and services' [1998] European Law Review 305

Guibault L, 'Wrapping Information in Contract: How Does it Affect the Public Domain?' in Guibault L, and Hugenholtz PB, (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006)

Guibault L, and Hugenholtz PB, (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006)

Guibault L, and Wiebe A, 'Safe to be open: Study on the protection of research data and recommendations for access and usage' (Universitätsverlag Göttingen c/o SUB Göttingen 2013)

Guibault L, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002)

Hancock WA, 'Website Terms of Use' (2003) 19(1) Corporate Counsel's Quarterly 36

Harrington J, 'Information society services: what are they and how relevant is the definition?' (2001) Computer Law & Security Report 174

Hart M, and Allgrove B, 'Protecting website content: Contractual measures' <http://uk.practicallaw.com/4-107-4149> (accessed 27 June 2015)

Hart M, and Allgrove B, 'Protecting website content: Intellectual property rights' <http://uk.practicallaw.com/2-107-4065#a515931> (accessed 27 June 2015)

Hatzopoulos V, Do TU, 'The case law of the ECJ concerning the free provision of services: 2000-2005' (2006) 43(4) Common Market Law Review 923

Headdon T, 'An epilogue to Svensson: the same old new public and the worms that didn't turn' [2014] Journal of Intellectual Property Law & Practice 4

Hedley S, 'Implied contract and restitution' [2004] Cambridge Law Journal 435

Hedley S, 'Keeping Contract in Its Place: Balfour v Balfour and the Enforceability of Informal Agreements' (1985) 50 Oxford Journal of Legal Studies 391

Hedley S, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Cavendish 2006)

Heide T, 'Access Control and Innovation under the Emerging EU Electronic Commerce Framework' (2000) 15 Berkeley Tech LJ 993

Heide T, 'Copyright in the EU and US: What "Access-Right"?' (2001) 48(3) Journal of the Copyright Society of the USA

Heuston RFV, Buckley RA, and Salmond JW, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell 1996)

HL Deb 14 May 2014, vol 753 cols 1885-1903

HL Deb 29 July 2014, vol 755, col 1575

HL DEB, 19 November 2014, vol 757, col 515

Hoeren T, 'Copyright Dilemma: Access Right as a Postmodern Symbol of Copyright Deconstruction?' in Becker E, Buhse W, Günnewig D, Rump N (eds), *Digital Rights Management: Technological, Economic, Legal and Political Aspects* (Springer-Verlag 2003)

Hoffmann GM, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing' (2000) 9 Tex Intell Prop L J 97

Hogg MA, 'Competing Theories of Contract: An Emerging Consensus?' in DiMatteo L, and others (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013)

Hohfeld WH, and Cook WW, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, And Other Legal Essays* (YUP 1923)

Hörnle J, 'Country of origin regulation in cross border media: one step beyond the freedom to provide services?' [2005] International & Comparative Law Quarterly 89

Hugenholtz PB, 'Database Dir., art. 8' in Dreier T and Hugenholtz PB, *Concise European Copyright Law* (Kluwer Law International 2006)

Hunter D, 'Cyberspace as Place and the Tragedy of the Digital Anticommons' (2003) 91 Cal L Rev 439

Husovec M, 'The End of (Meta) Search Engines in Europe?' 14 Chi Kent J Intell Prop (forthcoming) <http://ssrn.com/abstract=2411917> (accessed 16 May 2015)

Huston G, 'Carriage vs Content' (July 2012) <http://www.potaroo.net/ispcol/2012-07/carriagevcontent.html> (accessed 29 July 2015)

IPKat, ‘Airfield v Sabam: just when you thought the Kats forgot ... ’ (Thursday, 17 November 2011) <http://ipkitten.blogspot.co.uk/2011/11/airfield-v-sabam-just-when-you-thought.html> (accessed 25 June 2014)

IPKat, ‘Post-Svensson stress disorder #2: What does "freely available" mean?’ <http://ipkitten.blogspot.co.uk/2014/03/post-svensson-stress-disorder-2-what.html> (accessed 10 February 2016)

IPO, ‘Exceptions to Copyright: An Overview’ (October 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448269/Exceptions_to_copyright_-_An_Overview.pdf> (accessed 26 July 2015)

IPO, ‘Exceptions to Copyright: Research’ (October 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375954/Research.pdf> (accessed 26 July 2015)

IPO, ‘Trade Marks Manual’ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406241/Manual_of_trade_marks_practice.pdf> (accessed 1 June 2015)

Jawahitha S, and Chikhaoui E, ‘The adequacy of Malaysian law on e-contracting’ (2007) 13(4) Computer and Telecommunications Law Review’ 121

John Lewis, ‘Terms and Conditions’ <http://www.johnlewis.com/customer-services/information-about-our-terms-and-conditions> (accessed 25 July 2015).

Jones MA, Dugdale AM, Clerk JF, and Lindsell WHB, *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014)

Jones S, ‘Forming electronic contracts in the United Kingdom’ [2000] 11(9) ICCLR 301

Joubish MF and others, ‘Paradigms and Characteristics of a Good Qualitative Research’ (2011) 12 World Applied Sciences Journal 2082

Justia, ‘California Civil Jury Instructions (CACI) 305. Implied-in-Fact Contract’ <https://www.justia.com/trials-litigation/docs/caci/300/305.html> (accessed 2 July 2015)

Kaczorowska A, *European Union Law* (Routledge 2011)

Kaldor N, ‘The Economic Aspects of Advertising’ (1950) 18 The Review of Economic Studies 1

Kapczynski A, ‘Access to Knowledge: A Conceptual Genealogy’ in Grigorian G, and Kapczynski A, *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010)

Keenan DJ, and Smith K, *Smith and Keenan’s English Law: Text and Cases* (15th edn, Pearson Longman 2007)

Kelsen H, *Pure Theory of Law* (University of California Press 1967)

Kennedy D, ‘From The Will Theory To The Principle Of Private Autonomy: Lon Fuller’s “Consideration And Form”’ (2000) 100 Colum L Review 94

Kerr OS, ‘Cybercrime's Scope: Interpreting 'Access' and 'Authorization' in Computer Misuse Statutes’ (2003) 78(5) NYU Law Review 1596

Kessler F, ‘Arthur Linton Corbin’ (1969) 78(4) Yale Law Journal 517

Ketteley S, ‘The E-Commerce Directive — Thoughts on Issues Raised During the Government's Recent Consultation, Conducted Prior to the Implementation of the E-Commerce Directive’ (2002) 18 (3) Computer Law & Security Report 172

Kim NS, ‘The Duty to Draft Reasonably and Online Contracts’ in DiMatteo LA, and others (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013)

Kim NS, *Wrap Contracts: Foundations and Ramifications* (OUP 2013)

Koffman L, and MacDonald E, *The Law of Contract* (OUP 2010)

Kunz CL, and others, ‘Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements’ (2003) 59(1) The Business Lawyer 279

Kurose JF, and Ross KW, *Computer Networking: A Top-Down Approach* (6th edn, International edn, Pearson 2013)

Law Commission and the Scottish Law Commission 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' <http://www.scotlawcom.gov.uk/files/3113/6361/9437/Unfair_Terms_in_Consumer_Contracts_Advice.pdf> (accessed 29 July 2015)

Law Commission and the Scottish Law Commission 'Unfair Terms in Consumer Contracts: a new approach? Appendices A to D (25 July 2012)' <http://www.scotlawcom.gov.uk/files/4313/4313/4086/unfair_terms_in_consumer_contracts_appendices_A-D.pdf> (accessed 29 July 2015)

Law Commission, *Computer Misuse* (Law Com No 186, 1989)

Lemley M, 'Beyond Preemption: The Law and Policy of Intellectual Property Licensing' (1999) 87 Cal L Rev 111

Lemley MA, 'Place and Cyberspace' (2003) 91 California Law Review 521

Lemley MA, 'Terms of Use' (2006) 91 Minnesota Law Review 459

Lessig L, *Code Version 2.0* (Basic Books 2006)

Lester S, Mercurio B, Davies A, *World Trade Law* (2nd edn, Hart Publishing 2012)

Lipton J, 'Mixed Metaphors in Cyberspace: Property in Information and Information Systems' (2003) 35 Loy U Chi L J 235

Litman J, 'The Exclusive Right to Read' (1994) 13 Cardozo Arts & Ent LJ 29

Litman J, 'The Public Domain' (1990) 39 Emory L J 965

Litman J, 'The Tales that Article 2B Tells' (1998) 13 Berkeley Tech LJ 931

Liu JP, 'Paracopyright-a peculiar right to control access' in Dreyfuss RC, and Ginsburg JC, *Intellectual Property at the Edge: the contested contours of IP* (CUP 2014)

Lodder AR, and Kaspersen H (eds), *eDirectives: Guide to European Union Law on E-Commerce* (Kluwer Law International 2002)

Loebbeke C, 'Digital Goods: An Economic Perspective' in Bidgoli H, (ed), *Encyclopedia of Information Systems* (Academic Press 2002)

Loos MBM, 'Towards a European Law of Service Contracts' (2001) 9(4) European Review of Private Law 565

Loos MBM, and others, *Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Contracts* (University of Amsterdam, Centre for the Study of European Contract Law, Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE) 2011)

Loren LP, 'Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse' (2004) 30 Ohio Northern University Law Review

Lubbock M, and Krosch L, *E-Commerce: Doing Business Electronically* (TSO 2000)

Macdonald E, 'When is a contract formed by the browse-wrap process?' (2011) 19 IJL & IT 285

MacQueen HL, 'Copyright and the Internet' in Edwards L, and Waelde C, *Law and the Internet: A Framework for Electronic Commerce* (Hart Publishing 2000)

Madison M, 'Legal-Ware: Contract and Copyright in the Digital Age' (1998) 67 Fordham L Rev 1025

Madison MJ, 'Rights of Access and the Shape of the Internet' (2003) 44 BCL Rev 433

Maggs GE, 'Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law' (1988) 66 Geo Wash L Rev 508

Magnus U, and Mankowski P (eds), *Brussels I Regulation* (Sellier European Law Publishers 2012)

Mann RJ and Siebeneicher T, 'Just One Click: The Reality of Online Internet Retailing' (2007) U of Texas Law, Law and Econ Research Paper No 104 < http://ssrn.com/abstract=988788 > (accessed 19 September 2015)

Matwyshyn AM, 'Mutually Assured Protection: Development of Relational Internet Security Contracting Norms' in Chander A, Gelman L, and Radin MJ (eds), *Securing Privacy in the Internet Age* (Stanford University Press 2008)

McGowan D, 'The Trespass Trouble and the Metaphor Muddle' Minnesota Legal Studies Research Paper No. 04-5. <http://ssrn.com/abstract=521982> (accessed 15 April 2015)

McGowan D, 'Website Access: The Case for Consent' Loyola-Chicago Law Journal (forthcoming) <http://ssrn.com/abstract=420620> (accessed 11 May 2015)

McIntyre J, 'Using PAM to restrict access based on time' (12 October 2000) <http://www.techrepublic.com/article/using-pam-to-restrict-access-based-on-time/> (accessed 30 July 2015)

McIntyre TJ, 'Ryanair screenscraping: Irish court accepts jurisdiction, rules on enforceability of website terms of use' (1 March 2010) <http://www.tjmcintyre.com/2010/03/ryanair-screenscraping-irish-court.html> (accessed 15 September 2015)

Megarry R, and others, *The Law of Real Property* (8th edn, Sweet and Maxwell 2012)

Merges RP, 'The End of Friction? Property Rights and Contract In the "Newtonian" World of On-Line Commerce' (1997) 12 Berkeley Tech LJ 115

Moffat V, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41 University of California, Davis Law Review 45

Møgelvang-Hansen P, 'The Binding Effects of Advertising' in Schulze R, (ed), *New Features of Contract Law* (European Law Publishers 2007)

Mokhtarian PL, 'A conceptual analysis of the transportation impacts of B2C e-commerce' (2004) 31(3) Transportation 257

Moringiello JM, 'Signals, Assent and Internet Contracting' (2004) 57 Rutgers L R 1307

Morrison MJ, 'I Imply What You Infer Unless You are a Court: Reporter's Note to Restatement Second of Contracts § 19 (1980)' (1982) 35 Oklahoma Law Review 707

Mounce R, 'The right to read is the right to mine: Text and data mining copyright exceptions introduced in the UK' <http://blogs.lse.ac.uk/impactofsocialsciences/2014/06/04/the-right-to-read-is-the-right-to-mine-tdm/> (accessed 25 July 2015)

Nagurney A, Dong J, and Mokhtarian PL, 'Teleshopping Versus Shopping: A Multicriteria Network Equilibrium Framework' (2001) 34 Mathematical and Computer Modelling 783

New Media Knowledge, 'Marks and Spencer expands e-commerce practice with impressive results' (11 January 2012) <https://www.nmk.co.uk/article/2012/1/11/marks-and-spencer-expands-e-commerce-practice-with-impressive-results> (accessed 17 March 2014)

Ngan K, 'Internet and the Law: Enforceability of browse-wrap terms and conditions' 4 April 2013 <http://www.simpsongrierson.com/ezine-enforceability-of-browse-wrap/> (page accessed 26 February 2014)

Nimmer D, Brown E, and Frischling GN, 'The Metamorphosis of Contract into Expand' (1999) 87 Cal L Rev 1761

Nimmer RT, 'Breaking Barriers: the Relation Between Contract and Intellectual Property Law', (1998) 13 Berkeley Technology Law Journal 827

O'Rourke M, 'Common Law and Statutory Restrictions on Access: Contract, Trespass, and The Computer Fraud and Abuse Act' [2002] Journal of Law, Technology & Policy 295

O'Rourke M, 'Property Rights and Competition on the Internet: In Search of an Appropriate Analogy' (2001) 6 Berkeley Tech L J 561

Ofcom, 'Extending Premium Rate Services Regulation to 087 Numbers (Statement 5 February 2009)' <http://stakeholders.ofcom.org.uk/binaries/consultations/087prs/statement/statement.pdf> (accessed 29 May 2015)

Olswang S, 'Accessright: an evolutionary path for copyright into the digital era?' (1995) 17 EIPR 215

Olswang, 'Like taking candy from a baby? Spreadex v Cochrane' 09 July 2012 <http://www.olswang.com/articles/2012/07/like-taking-candy-from-a-baby-spreadex-v-cochrane/> (page accessed 23 February 2014)

Oracle, 'Sun Java System Web Server 6.1 SP11 NSAPI Programmer's Guide: How the Server Handles Requests from Clients' <http://docs.oracle.com/cd/E1985701/8207655/abvah/index.html> (accessed 26 May 2014)

Out-Law.com, 'The UK's E-Commerce Regulations' <http://www.out-law.com/page-431> (accessed 8 June 2015)

Passa J, 'The Protection of Copyright on the Internet' in Pollaud-Dulian F, (ed), *The Internet and Authors' Rights* (Sweet & Maxwell 1999)

Peel E, and Treitel GH, *The Law of Contract* (13th edn, Sweet and Maxwell 2011)

PhonepayPlus, 'What are premium rate numbers?' <http://www.phonepayplus.org.uk/for-the-public/what-are-premium-rate-numbers> (accessed 10 June 2015)

Pollock F, *Principles of Contracts* (8th ed, Stevens and Sons 1911)

Pollock J, Gringras C, and Todd E, *Gringras and Todd: The Laws of the Internet* (4th edn, Bloomsbury Professional 2013)

Porcuna F, 'RYANAIR: screen scrapers, databases, free-riding and unfair competition in Spain' <http://screenscrapingservices.blogspot.co.uk/2013/05/ryanair-screen-scrapers-databases-free.html> (page accessed 22 February 2014).

Princeton University, 'Restricting Access to Web Pages' <https://csguide.cs.princeton.edu/publishing/restrict> (accessed 30 July 2015)

PWC, 'Achieving Total Retail: Consumer expectations driving the next retail business model' February 2014 <http://www.pwc.com/en_GX/gx/retail-consumer/retail-consumer-publications/global-multi-channel-consumer-survey/assets/pdf/achieving-total-retail.pdf> (page accessed 27 February 2014)

Quilter L, 'The Continuing Expansion of Cyberspace Trespass to Chattels' (2002) 17 Berkeley Tech L J 421

Radin M, 'Boilerplate Today: The Rise of Modularity and the Waning of Consent' (2006) 104 Mich L Rev 1223

Radin MJ, 'Regulation by Contract, Regulation by Machine' (2004) 160 Journal of Institutional and Theoretical Economics 142

Rambarran I, and Hunt R, 'Are Browse-Wrap Agreements All They Are Wrapped Up to Be?' (2007) 9 Tul J Tech and Intell Prop 173

Reed C, 'Controlling World Wide Web Links, Property Rights, Access Rights and Unfair Competition' (1998) 6(1) Indiana Journal of Global Legal Studies 167

Reed C, 'Information "Ownership" in the Cloud' (March 2, 2010) Queen Mary School of Law Legal Studies Research Paper No 45/2010, 1 <http://ssrn.com/abstract=1562461> (accessed 18 May 2015)

Reed C, *Internet Law* (2nd edn, CUP 2004)

Reichmann JH and Franklin JA, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information' (1999) 147 University of Pennsylvania Law Review 875

Reinbothe J and von Lewinski S, *The WIPO Treaties 1996* (Tottel Pub 2007)

Restatement (Second) of Contracts (1981)

Restatement (Second) of Torts

Riefa C, and Hörnle J, 'The Changing Face of Electronic Consumer Contracts' in Edwards L, and Waelde C, (eds) *Law and the Internet* (3rd edn, Hart Publishing 2009)

Rogers WVH, Winfield PH, Jolowicz JA, and Winfield PH, *Winfield and Jolowicz on Tort* (Sweet & Maxwell 2006)

Ross A, 'Case Comment: Football Dataco Ltd v Sportradar GmbH' (2013) 24(2) Ent LR 64

Ryanair, 'Strategy' <https://www.ryanair.com/doc/investor/Strategy.pdf> (page accessed 7 February 2014)

Samuelson P, 'Challenges in Mapping the Public Domain' in Guibault L, and Hugenholtz PB (eds), *The Future of the Public Domain: identifying the commons in information law* (Kluwer Law International 2006)

Samuelson P, 'Enriching Discourse on Public Domains' (2006) 55 Duke Law Journal 101

Samuelson P, 'Information As Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?' (1989) 38 Cath U L Rev 365

Sánchez CAH, 'The Meaning Of The Information Society Services In The E-Commerce Directive' (Master Information Communication and Technology, University Of Oslo 2005)

Schauss M, 'Description of Teleshopping Services' in Poullet Y, Vandenberghe GPV, and Kaspersen HWK, *Telebanking, Teleshopping and the Law* (Kluwer Law and Taxation Publishers 1988)

Scheurman WE, 'Global Law in our High Speed Economy' in Appelbaum RP, Felstiner WLF, Gessner V, (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Pub 2001)

Schütze R, *European Constitutional Law* (2nd edn, CUP 2016)

Schütze R, *European Union Law* (CUP 2015)

Scottish Law Commission, *Computer Crime* (CM No 68, 1986)

Scottish Law Commission, *Computer Crime* (Scot Law Com No 106, 1987)

Secondary Legislation Scrutiny Committee, *42nd Report - Work of the Committee in Session 2013-14* (HL 2013-14)

Secondary Legislation Scrutiny Committee, *Forty-First Report: Draft Copyright and Rights in Performances Regulations 2014* (HL 2013-14).

Shelly M, and Jackson M, 'Doing business with consumers online: privacy, security and the law' [2009] International Journal of Law & Information Technology 180

Smith F, and Woods L, 'A Distinction Without a Difference: Exploring the Boundary Between Goods and Services in The World Trade Organization and The European Union' [2005] 12 (1) Columbia Journal of European Law 1

Smith GJH, and Boardman R, *Internet Law and Regulation* (4th edn, Sweet and Maxwell 2007)

Smith H, 'Intellectual Property as Property: Delineating Entitlements in Information' (2007) 116 The Yale Law Journal 1742

Snell J, and Andenas M, 'Exploring the Outer Limits: Restrictions on Free Movement' in Andenas MT, and Wulf-Henning R, (eds), *Services and Free Movement in EU Law* (OUP 2002)

Snell J, and Care D, 'Use of Online Data in the Big Data Era: Legal Issues Raised by the Use of Web Crawling and Scraping Tools For Analytics Purposes' (August 28, 2013) <http://www.bna.com/legal-issues-raised-by-the-use-of-web-crawling-and-scraping-tools-for-analytics-purposes/> (accessed 5 February 2016)

Sookman BB, 'Technological protection measures (TPMs) and copyright protection: the case for TPMs' (2005) 11 CTLR 143

Speidel RE, 'Restatement Second: Omitted Terms and Contract Method' (1982) 67 Cornell Law Review 785

Starke JG, 'Contract - offer and acceptance - acceptance of offer implied from conduct and taking of benefit by "offeree."' (1989) 9 Australian Law Journal 642

Stigler G, 'The Economics of Information' (1961) 69 Journal of Political Economy 213
Stoll E, 'Hot News Misappropriation: More Than Nine Decades after Ins v. AP, Still an Important Remedy for News Piracy' (2011) 79 U Cin L Rev 1239
Stone R, *The Modern Law of Contract* (8th edn, Routledge Cavendish 2009)
Sunstein C, *Republic.com2* (Princeton University Press 2007)
Sydnor T, 'The U.S. Making-Available Right: Preserving the Rights "To Publish" and "To Perform Publicly"' (April 25, 2014) <http://ssrn.com/abstract=2421724> (accessed 27 June 2014)
Tang ZS, *Electronic Consumer Contracts in the Conflict of Laws* (Hart 2009)
Tasker T, and Pakcyk D, 'Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements' (2008) 18 Alb LJ Sci & Tech 69
Taylor R, and Taylor D, *Contract Law Directions* (5th edn, OUP 2015)
Technollama, 'National Portrait Gallery Copyright Row' (July 19, 2009) <http://www.technollama.co.uk/national-portrait-gallery-copyright-row> (accessed 5 February 2016)
Telser LG, 'Supply and Demand for Advertising Messages' (1966) 56 The American Economic Review 457
The Huffington Post UK, 'Islamic State Beheading Video Watchers Get Arrest Warning From Met Police' <http://www.huffingtonpost.co.uk/2014/08/20/watch-james-foleys-beheading-online-and-you-could-get-arrested_n_5694871.html> (accessed 26 July 2015)
Torremans P, *Holyoak and Torremans Intellectual Property Law* (7th edn, OUP 2013)
Towse R, *Advanced Cultural Economics* (Edward Elgar 2014)
Tracy JJ, 'Browsewrap Agreements: Register.com, Inc v Verio, Inc' (2005) 11 BU J Sci & Tech L 164
Triaille, JP and others, *Study on the Application of Directive 2001* (European Commission 2013) <http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf> (accessed 21 June 2014)
Troupson TM, 'Yes, It's Illegal to Cheat a Paywall: Access Rights and the DMCA's Anticircumvention Provision' (2015) 90 NYUL 325
Turner M, and Traynor M, 'Electronic Commerce (EC Directive) Regulations 2002 – Worth The Wait?' [2002] Computer Law & Security Report 396
TV Licensing, 'Why do I need a TV licence?' <http://www.tvlicensing.co.uk/about/foi-legal-framework-AB16> (accessed 3 October 2014)
UK Patent Office, 'Consultation on UK Implementation of Directive 2001/29/EC on Copyright and Related Rights in the Information Society: Analysis of Responses and Government Conclusions' <http://www.ipo.gov.uk/copydirect.pdf> (accessed 21 June 2014)
United Nations Statistics Division, 'CPC Ver.2 Detailed structure and correspondences of CPC Ver.2 subclasses to ISIC Rev.4 and HS 2007' 100 <http://unstats.un.org/unsd/cr/registry/cpc-2.asp> (accessed 1 January 2014)
United Nations Statistics Division, 'International Standard Industrial Classification of All Economic Activities, Rev.4' <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=27> (accessed 2 January 2014)
US Copyright Office, 'Public Roundtable on the Right of Making Available' (Monday May 5, 2014) <http://www.copyright.gov/docs/making_available/public-roundtable/transcript.pdf> (accessed 15 September 2015)
USPTO, 'Trademark Manual of Examining Procedure April 2014' <http://www.uspto.gov/trademark/guides-and-manuals/trademark-manual-examining-procedure-april-2014> (accessed 1 June 2015)
Valcke P, and Dommering E, 'Directive 2000/31/EC 'e-commerce' Directive (eCD)' in Castendyk O, Dommering E, and Scheuer A, *European Media Law* (Wolters Kluwer 2008)

w3schools.com, 'HTTP Methods: GET vs. POST' <http://www.w3schools.com/tags/ref_httpmethods.asp> (accessed 7 October 2015)
Waelde C, and MacQueen HL, (eds), *Intellectual Property: The Many Faces of the Public Domain* (Edward Elgar 2007)
Waelde C, and others, *Contemporary Intellectual Property: Law and Policy* (OUP 2014)
Walden I, *Computer Crimes and Digital Investigations* (OUP 2007)
Walden MD, 'Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions' (2001) 58 Wash & Lee L Rev 1625
Walker DM, *The Law of Contracts and Related Obligations in Scotland* (Butterworths 1979)
Walter MM and von Lewinski S, *European Copyright Law* (OUP 2010)
Wasik M, 'The Computer Misuse Act 1990' [1990] Crim LR 767
Watt R, 'Economic Theory of Copyright Contracts', paper in Kretschmer M, and others, 'The Relationship Between Copyright and Contract Law' (Project Report, Strategic Advisory Board for Intellectual Property Policy 2010) <http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf> (accessed 30 July 2015)
Weber RH, and Burri M, *Classification of Services in the Digital Economy* (Springer 2013)
Weinrib EJ, 'The Structure of Unjustness' (2012) 92 Boston University Law Review 1067
Weinstein S, 'Contractual Aspects of Electronic Commerce' in Wild C, and others, *Electronic and Mobile Commerce Law: An Analysis of Trade, Finance, Media and Cybercrime in the Digital Age* (University of Hertfordshire Press 2011)
Westkamp G, 'Author's Rights and Internet Regulation: The End of the Public Domain or Constitutional Re-Conceptualization?' in Pugatch MP (ed), *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Edward Elgar 2006)
Westkamp G, 'Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law' (2004) 36 Geo Wash Int'l L Rev 1057
White JJ, 'Autistic Contracts' (2000) 45 (4) Wayne L Rev 1693
White JJ, and Summers RS, *Uniform Commercial Code* (Vol 1, 5th edn, West Group 2002)
Whiteside HE, 'Williston on Contracts', (1938) 23 Cornell L Rev 269
Whittier CB, 'The Restatement of Contracts and Mutual Assent' (1929) 17 Cal L Rev 441
Wikipedia, 'Paywall' <https://en.wikipedia.org/wiki/Paywall> (accessed 30 July 2015)
Willett C, 'General clauses and the competing ethics of European consumer law in the UK' (2012) 71(2) CLJ 412
Willett C, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate 2007)
Willis HE, 'Rationale of the Law of Contracts' (1936) 11 Ind L J 227
WIPO, 'Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference' (the 'Basic Proposal for the Treaty') CRNR/DC4 (30 August 1996). <http://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_4.pdf> (accessed 22 June 2014)
WIPO, Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996, Concerning Article 8 <http://www.wipo.int/treaties/en/text.jsp?file_id=295456> (accessed 1 October 2015)
WIPO, Sirinelli P, *Notions Fondamentales Du Droit D'auteur: Recueil de jurisprudence* (WIPO, July 2002) <http://www.wipo.int/export/sites/www/freepublications/en/copyright/844/wipo_pub_844.pdf>(accessed 1 July 2014)
Wolfe NA, 'Using the Computer Fraud and Abuse Act to Secure Public Data Exclusivity' (2015) 13

Nw J Tech & Intell Prop. 301

Wong MWS, 'Cyber-trespass and 'Unauthorized Access' as Legal Mechanisms of Access Control: Lessons from the US Experience' (2006) 15 International Journal of Law and Information Technology 90

Woods L, and Watson P, *Steiner and Woods EU Law* (12th edn, OUP 2014)

Woods L, *Free Movement of Goods and Services within the European Community* (Ashgate 2004)

Wragge Lawrence Graham and Company, 'Ryanair flying high at the CJEU' (29 January 2015) <http://www.wragge-law.com/insights/ryanair-flying-high-at-the-cjeu/> (accessed 8 February 2016)

Xia L, and Suharshan D, 'Effects of Interruptions on Consumer Online Decision Processes', (2002) 12 J Consumer Psych 265

Younger Committee, *Report of the Committee on Privacy* (Cmnd 5012, 1972)

Zynda T, 'Ticketmaster Corp. v Tickets.com, Inc.: Preserving Minimum Requirements of Contract on the Internet' (2004) 19 Berkeley Law Journal 495