

Working Towards a New Set of Global Rules for Certain Satellite-Related Commercial Transactions in the Tradition of the Incoterms® Rules

Jordi Sandalinas

Attorney at Law, Lecturer, Open University of Catalonia,
jordisandalinas@gmail.com

Abstract

Due to the lack of a unitary and concise private contractual practice related to satellite data and imagery, some academics favour a remote sensing convention as the lack of regulation and system controls creates ambiguities and adaptation problems. In this article, the author suggests to the scientific community the creation of a legal base and a contractual paradigm, leading to the establishment of a new set of satellite and individual trade-related terms. Such terms would be applied uniformly to the satellite data and imagery of online transactions. A practical, fast and effective method would allow parties to close online transactions in a more legally secure manner, at least theoretically.

Keywords: Online contracts, Trade-Related Rules, Private, Consumer, Click-wrap, Shrink-wrap, Browse-wrap, Individual, Incoterms

* This work is licensed under the Creative Commons Attribution-Noncommercial Works 3.0 License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/3.0/> or send a letter to Creative Commons, 543 Howard Street, 5th Floor, San Francisco, California, 94105, USA.

DOI: 10.2902/1725-0463.2018.13.art17

1. INTRODUCTION

In the realm of the e-commerce era that we are living and working in, the rapid and unstoppable evolution of internet business platforms has defined electronic transactions as the most commonly used method of transferring satellite imagery and data rights to end-users. In private satellite data practice, there are contracts informally referred to as “ground station”, “data distribution”, “End-User License Agreements” (“EULA”) and “exclusive license” agreements, to name but a few. The preparation of such contracts requires a high level of expertise. Even though some of them are not available online, so-called EULAs are available by accessing the online store of every major satellite imagery and data distribution company. Some transactions are performed directly through the website of the satellite image provider; others, albeit more rarely, might be performed by signing a contract outside the online platform. One of the most interesting points to analyse from a theoretical perspective is related to “consent” and “bilateral drafting”. The study of the so-called “assent” delivered through electronic means and its role as a binding source of private law is essential to contract formation for a multitude of reasons (for instance, nullity and the binding effect). Bearing in mind that new forms of online contracts have arisen, namely “click-wrap”, “browse-wrap” and “shrink-wrap” agreements, a preliminary approach should combine both theoretical and practical perspectives as accurately as possible. “Click-wrap”, “browse-wrap” and “shrink-wrap” agreements originate from the activity of the licensee of the imagery or data, whereas so-called “click-wrap” agreements depend upon “the action of accepting” made by the web user (when pressing a button appearing on the computer screen), so-called “browse-wrap” agreements become real just by the mere fact of using and operating the website and by accessing its different pages, for example. This is a type of electronic contract where web users’ “tacit”, “quiet” or “non-invasive behaviour” may trigger the creation of controversial consumer-related issues. Indeed, such practices may be considered abusive from the point of view of certain laws primarily concerned with consumer protection.

Recital 92 of the case referred to as “Century 21 Canada Limited Partnership v. Rogers Communications Inc.” rendered by the Supreme Court of British Columbia in Canada stated that “a browse-wrap agreement does not require that the purchaser indicate their agreement by clicking on an ‘I Agree’ button. All that is required is that they use the product after being made aware of the product’s Terms of Use”. Therefore “using the product” should be enough, according to such a case. Current practice seems to show that web users agree to the cookie policy by clicking a pop-up add appearing when visiting a commercial website. Hence, the simple act of using the website entails the acceptance of all the terms and conditions. Therefore, as far as browse-wrap agreements are concerned,

there is a tacit behaviour performed by the user, since there is no need to click on a button appearing on the screen. Simply browsing the website enacts not only the toleration of the website's terms and conditions but also the consent to these terms. For "shrink-wrap" contracts, it is well known that "shrink-wrap" is understood as an action according to which customers perform certain actions such as "unfolding or removing the seal of a package where the software is contained or makes use of the software acquired"; this moment is when the so-called shrink-wrap agreement becomes the consequence of the terms and conditions agreed to when "rights related to the intangible are acquired online". From a contractual point of view, there is a solid tendency to identify electronic transactions from a national perspective, regardless of other parameters. Authors such as William J. Condon, refer to "the righteous validity of an agreement regardless of its formation". Therefore, even though a contract has been closed (or agreed) through electronic means, it is, by all means, legally acceptable. Courts, in general, tend to be open to accepting contracts or agreements celebrated throughout the Internet. In *Forrest v. Verizon Communications* (2002), the court stated that "a contract is no less than a contract because it is entered into via a computer". Thus, online satellite data and imagery transactions deserve an accurate legal protection from many perspectives, especially the one referring to the customer, which is the weak party to a contract if provided unilaterally by the owner of a commercial website.

2. REGULATING THE EMERGING CONTRACTUAL PARADIGM: THE ROLE OF CONSENT IN CLICK-WRAP AGREEMENTS AND ONLINE COMMERCE RELATED TO SATELLITE IMAGERY AND DATA

Courts from all over the globe seem to recognise that click-wrap agreements are, within certain limits, in accordance with both their internal law and foreign law if applicable. Nevertheless, tribunals and law practitioners should work closely to develop a legal doctrine capable of ensuring a balanced paradigm as far as online contracts are concerned. Agreements reached through websites, electronic commerce platforms and embedded hardware containing satellite imagery and data should bring to law practitioners' attention future research strands. Moreover, the enactment of law instruments such as Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE), and the Regulation (EU) No 377/2014 of the European Parliament and of the Council of 3 April 2014 establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010, among other instruments, deserve close attention. Practitioners should discern which role "click-wrap agreements" play, and to what extent they can be integrated into a global private contract system. The legal role of "consent" delivered within the realm of online commercial practice should get the attention of law practitioners concerned with consumer rights and competition law. In this regard, one could question the method used by

some satellite related websites when certain terms are included in “an already delivered contract”. In this regard, consumers and web users should have, theoretically, the opportunity to discuss the terms of the contract before accepting any online transaction. Clauses such as the so-called “renounce to the domicile of the consumer” and terms related to the applicable jurisdiction should be revisited. Authors such as Perales Viscasillas (2001) refer to the existence and the “exchange” between offer and acceptance as two critical elements related to the formation of contracts. As far as online contracts are concerned, once the user of the website accepts the conditions included in the agreement, the contract becomes evidence to be used before the courts in case one of the parties does not comply with its content. Indeed, satellite contract practice should be solidified to guarantee rights to consumers and users in general. Thus, it is feasible to understand that a compilation of such clauses, in the style of the Incoterms® Principles, could be effectively used, for example, before the Courts or Arbitration Tribunals. One could distinguish either a new set of acronyms or abbreviations to suggest contractual clauses. As stated by the International Chamber of Commerce, the International Commercial Terms, or Incoterms® Rules, were first established to serve trade relations and have subsequently been implemented in contracts signed within current international trade practices. Even though the Incoterms® Rules can be used to regulate the trade of goods, satellite imagery and data could embrace similar regulation in spite of their intangible nature. Thus, the “new” satellite and individual trade-related rules proposed by the author could regulate the commercial relations between private parties.

One may wonder whether the World Trade Organization (WTO) would allow the free movement of satellite imagery and data and establish certain mechanisms to control these trade-related activities. However, a customary contract-specific method of practice would be commonly used in international commerce. Such practices would enable legal practitioners and commercial actors to adopt a “common infrastructure” to use within their professional realm. If applied, arbitration courts would be familiar enough with satellite contract practice to be able to deal with such cases and render a fair award. Moreover, fluency in the field of dispute resolution could be achieved at an enormous level due to the fact that there would be less room for doubt if both parties to the contract were informed of the magnitude and the legal effect of such clauses beforehand. Finding the framework applicable to satellite click-wrap agreements is a difficult task to achieve; whilst some contracts refer to the law where the satellite company has placed its headquarters, others refer to the law where the arbitration chamber is located, which corresponds, most of the time, to the place where the satellite company is domiciled.

3. LEGAL INITIATIVES REGARDING PRIVATE CONTRACT PRACTICE WITHIN THE EU

There have been remarkable efforts to unify the formation criteria of contracts within the EU, some of which would be defined as “soft law”; that is to say, they are not binding unless otherwise agreed by the parties to the contract. Firstly, instruments such as the Principles on European Contract Law (PECL; 2002) were created to harmonise contract practices within the EU. Such rules were enacted after the formation of the so-called “Lando Commission” (1982), promoted by Ole Lando, a Danish attorney. The role of the PECL is similar to that performed by the Principles of International Commercial Contracts of UNIDROIT (The International Institute for the Unification of Private Law), published in 1994. It would be interesting to review the role of the PECL as far as online transactions are concerned due to their enormous potential. The PECL does not include any direct reference to transactions made through electronic commerce, however: PECL Section 3, Article 1:301 (ex art. 1.105) para (6) related to “Terminology and Other Provisions”, defines the phrase “written statements”, but includes a reference to “communications made by electronic mail and other means of communication”, as far as Internet communication is concerned. In this regard, Article 1:301 (ex-art. 1.105) para (6) does not directly refer to click-wrap agreements, but mentions the preliminary steps to provide “evidence of a prospective future transaction”. Satellite imagery and data provided to users through click-wrap agreements are commonly performed throughout commercial websites, as one will refer to the following lines. The position of the 2001 Communication from the Commission to the Council and the European Parliament on European contract law is clear about electronic commercial transactions, literally referring in Point 3.2 Recital 25 to “technical developments, such as the possibilities offered by the Internet for electronic commerce” (Communication from the Commission to the Council and the European Parliament on European contract law /* COM/2001/0398 final */) have enabled transactions between parties from different countries to happen”. There are more law instruments that refer to electronic commerce in their respective fields. Nevertheless, we would like to focus on real situations and the relationship between offer and acceptance in the field of European contract law.

4. DEFINING “CLICK-WRAP”: EMERGING ISSUES FROM A THEORETICAL LEGAL PERSPECTIVE

The term “click-wrap” refers to “the way consent is shown” by the consumer (or the user) before performing an online transaction. Such transactions are normally made by the “website” of the satellite company offering satellite imagery and data to the visitors. Therefore, by clicking on the pop-up screen showing the word “accept”, the user agrees to a general set of rules and conditions as far as click-wrap agreements are concerned. Other online contracts known as “browse-wrap

contracts” do not even require such action. Thus, web visitors are deemed to accept the terms and conditions of a website just by “browsing” or “moving around” the page. On the other hand, some agreements can be closed if the user clicks on the “accept” button or by acting in a tacit manner; that is to say, “just checking the website”. In the view of the author of the present study, there is much more than a simple acquisition happening, rather there exists a compendium of obligations and rights that are agreed upon, and the user must be aware of these. These contracts (established unilaterally) could be compared to the “adhesion contracts”, as historically known in contract law. In such contracts, users are not allowed to change any line of the terms and conditions of the contract; moreover, if the user does not agree with the content announced by the website, then they will not acquire the rights of the satellite image. Other options would consist of contacting the customer service department of the image provider and negotiating a new set of terms.

Such practices might entail a loss of opportunity for the user if negotiating important clauses such as the ones related to “jurisdiction” or “applicable law”. Hence, it would be desirable to allow consumers space (at least from a lobbying perspective) to choose which clauses should apply. Therefore, clauses such as “jurisdiction” or “arbitration submission” would not refrain users or customers from starting proceedings in a competent court according to its domicile, bearing in mind that the notion of consumer shall be regulated by the 44/2001 Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, p. 1–23). Recitals (13) and (14) to the Council Regulation 44/2001 refer to consumer contracts, where the consumer is considered to be the “weak party” and, therefore, deserves the protection of the most applicable favourable framework “to his interests than the general rules provide for”. Hence, the so-called “autonomy of the parties to a contract” shall be respected unless it relates to a consumer, insurance or labour contract. Some satellite contracts contain the stipulation that users acquiring rights to the image intervene as professionals in order to avoid the application of some “consumer orientated” rules. Article 15 of Council Regulation 44/2001 related to the jurisdiction over consumer contracts shall be applied if the person acts “outside his trade or profession”.

According to Cormier (2007), the click-wrap agreement comes together with consumer references, an issue that seems wholly unavoidable. Cormier refers to “click-wrap” agreements as contracts celebrated online entailing a set of rules and conditions by clicking on a concrete button or by performing certain actions on the webpage of the company or supplier offering its services. One would like to stress that the moment of acceptance usually happens before the purchase is completed, due to the fact that the user must be aware beforehand of the terms

and conditions he is getting involved in; otherwise, this practice would cause a lack of protection towards the client or user. For some practitioners, click-wrap agreements might seem unfair to users; in such cases, therefore, consumer laws may be conflicting, if the country where the user is domiciled is concerned about consumer rights. However, mandatory norms cannot be changed or altered by any means, otherwise one could seize the competent court according to the perspective of the consumer and demand the nullity of such an agreement.

5. COURT TRADITIONS SURROUNDING CLICK-WRAP AGREEMENTS

Cormier (2007), refers to the case of *Dix v. ICT Group Inc* to give an example of the profound possibilities of enforcing certain click-wrap agreements; however, this obviously depends on the internal laws (court rules, contract rules and jurisdictional rules) applied to the case. In the aforementioned judgment, the tribunal found that the US Consumer Protection Act had to be respected and so the forum selection clause was declared invalid. Furthermore, Cormier highlights *Case i.LAN Systems, Inc. v. Netscout Service Legal Corp* as far as the potential enforceability of a click-wrap license clause is concerned. In that case, the Court rendered a judgment stating that “by clicking on the button referenced as ‘I agree’ and the fact that i.LAN had observably agreed to the terms and rules of the website, thus the assent performed by the party did not void the commercial operation consisting of an online purchase”.

The European Court of Justice (ECJ) does not question click-wrap agreements, on the contrary; in this regard, in *Jaouad El Majdoub v. CarsOnTheWeb* (Case C-322/14: Judgment of the Court (Third Chamber) of 21 May 2015 (request for a preliminary ruling from the Landgericht Krefeld — Germany) — *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* OJ C 236, 20.7.2015, p. 19–19), the ECJ applies article 23 (2) of Council Regulation 44/2001 to click-wrap contracts by stating that “Article 23(2) must be interpreted as meaning that the method of accepting the general terms and conditions of a contract for sale by ‘click-wrapping’, such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement...”. Moreover, the ECJ in *Content Services v Bundesarbeitskammer* (Judgment of the Court (Third Chamber), 5 July 2012. *Content Services Ltd v Bundesarbeitskammer*. ECLI identifier: ECLI:EU:C:2012:419) ruled that distant contracts and hyperlinks were “durable mediums”. Thus, the ECJ ruled that “Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts must be interpreted..... a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that

information is neither 'given' by that undertaking nor 'received' by the consumer.... and a website such as that at issue in the main proceedings cannot be regarded as a 'durable medium' within the meaning of Article 5(1)". Recitals 18, 27 and 33 of the aforementioned jurisprudence are important to consider when attempting to understand that the "right of withdrawal" should be visible to the consumer, who needs to act in this regard. As the author of the present study has shown, issues related to consumer rights could appear within satellite image and online data transmissions. The international scope of the transaction, the economic effect and the potential benefits to the user when the image is "sold", as well as the hypothetical damages if "the wrong file is served by the company", could immediately transform satellite commercial transactions into difficult cases if not performed carefully, within a secure (online) environment.

6. BROWSE-WRAP AND SHRINK-WRAP CONTRACTS

There are other types of online agreements that may put click-wrap agreements into perspective at the present time. Browse-wrap and shrink-wrap agreements originate from the activity of either the user or the client, respectively. Whilst so-called click-wrap agreements depend upon "the action of accepting" performed by the web user (pressing a button appearing on the computer screen), so-called browse-wrap agreements become real just by the mere fact of using and operating the website and by accessing its different pages, for example. This is a type of electronic contract where the users' "tacit", "quiet" or "non-invasive behaviour" may create controversial consumer-related issues. Indeed, such practices may be considered abusive from the point of view of certain laws concerned with consumer protection. Thus, it would be important to analyse these newcomers in the field of electronic commerce transactions, which may be included and founded expressly or tacitly when reading the terms or conditions of a satellite imagery supplier contract or the terms of use of a website.

Authors such as Gupta (2012) have studied browse-wrap and shrink-wrap agreements. Gupta recalls the case known as *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, rendered by the Supreme Court of British Columbia in Canada. Recital 92 of the Judgment of Case *Century 21*, states (*Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 (CanLII)) that: "A browse-wrap agreement does not require that the purchaser indicate their agreement by clicking on an 'I Agree' button. All that is required is that they use the product after being made aware of the product's Terms of Use". "Using the product" should, therefore, be enough. In the context of browse-wrap agreements, there is a tacit behaviour performed by the user, since there is no need to click on a button appearing on the computer screen. Simply moving around or browsing the website enacts not only the toleration of the website's terms and conditions but also the user's consent to these terms. Therefore, it is only a matter of how the website transmits or notifies the user of

the link to the webpage providing such conditions. In addition, in the case known as *Register.com, Inc. v. Verio, Inc.* (*Register.com, Inc. v. Verio, Inc.* 356 F.3d 393 (2d Cir. 2004).), the website featured “their Terms of Use which stated that if the user accessed the database then the user agreed to the terms”. In this regard, the United States Court of Appeals for the Second Circuit found that “Verio had notice of the terms because of its numerous daily queries and the presence of the Terms of Use after each query”. Thus, we are facing an ever-evolving discipline, and so the courts shall decide to what extent consumers or users are aware of the terms and conditions or, on the contrary, to what extent they ignore them. On the other hand, as far as shrink-wrap agreements are concerned, one can stick to the same statements previously made.

It is well known that “shrink-wrap” is understood as a term according to which “customers perform certain actions such as unfolding or removing the seal of a package where software is contained or makes use of the software acquired”; this is when the so-called shrink-wrap agreement becomes the consequence of the terms and conditions agreed when “rights related to the intangible are acquired online”. In this regard, one could deduce that consumers or users accept this condition by the continuous use of the acquired product. Therefore, one understands that there is a clear intention to become bound by the conditions to the agreement if parties perform such actions. PECL Article 2:101 (ex art. 5:101) indirectly refers to the unnecessary requirement of reinforcing such an agreement in writing or witnessing. As far as satellite imagery supplied online, the coexistence of the three types of “online wrapping agreements” is feasible if certain limits and guarantees are established. Such limits and conditions must be established at both a European level from an EU perspective and according to EU laws to show that EU laws are taken into consideration “before the problem arises”. The term “consumer” does not appear in the wording of the INSPIRE Directive, nor in Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ L 345, 31.12.2003, p. 90–96). Another debate would discern whether the inclusion of such a term is necessary if the intention of the legislator was not to enter into a debate in this regard.

7. WORKING TOWARDS A NEW SET OF SATELLITE AND INDIVIDUAL TRADE-RELATED SYSTEM OF RULES

First and foremost, it is crucial to state that a new set of satellite and individual trade-related rules is potentially viable. Bearing in mind that there is also an applicable set of “Maritime Incoterms® rules”, the International Chamber of Commerce could easily adopt a new set of “Satellite Incoterm Rules”. Although the International Chamber of Commerce is not a part of the UN’s formal intergovernmental structure, it does provide an established dispute resolution system utilising mediation and arbitration. Furthermore, there is a backup

convention, the 1958 New York Arbitration Convention (Done at New York, 10 June 1958; Entered into force, 7 June 1959 330 U.N.T.S. 38 (1959)), that enables the recognition and enforcement of awards in case there is a failure to comply with that award. Conversely, the mediation agreements constitute valid evidence before the courts, either local or arbitrary, when seized; hence, the aforementioned statement is distinguished. This issue would liberate courts from their massive workload and facilitate increasingly fluent commercial online transactions to be established. Furthermore, the present proposal allows the adoption of a uniform set of systems regarding satellite imagery contract clauses in the style of Incoterms® Rules, which could be validated by the United Nations Commission on International Trade Law (UNCITRAL). This is because the Electronic Communications Convention (United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), adopted on 23 November 2005 but entered into force on March 2013) is a law instrument that deserves very close attention.

The advantages of the new system are massive: if accepted, this regime would allow commercial satellite practices to overcome any hurdle created by the current system of enforcing judgments from an overseas perspective. Public policy exceptions would rarely be invoked, and so this would reinforce the ability to re-address disputes through mediation or even to settle conflicts through an enforceable award rendered by the Permanent Court of Arbitration, covered by the 1958 New York Arbitration Convention. A new system has already been envisioned from a public perspective, but from a private field there is still a very long way to go; however, *de lege ferenda* a new direction has to be taken as quickly as possible to foster a global commercial reality.

8. INSPIRE AS AN INCOTERMS® RULE MODEL?

From a public perspective, INSPIRE constitutes a stepping stone and a solid instrument to reinforce the spatial infrastructure of Member States. INSPIRE sets out a common terminology structure capable of identifying different situations under a single umbrella. If the Incoterms® Rules constitute an initiative from a legal commercial perspective (as stated by the International Chamber of Commerce), “INSPIRE” sets an infrastructure for spatial information in Europe to support community environmental policies, mainly from a governmental and public perspective. Therefore, if public authorities are bound by INSPIRE, and INSPIRE is the law instrument commonly agreed upon, according to the community framework, there is no reason why private commerce cannot adopt a structure both to comply with INSPIRE and to provide for new contractual clauses in the style of the Incoterms® Rules derived from legal and commercial practice by private operators. Thus, INSPIRE would be the first of many steps to justify and legitimise the present theory from a theoretical level to be applied to real satellite practice. Any questioning from satellite operators could easily be justified

because controversy is always found in commerce, even the enactment of the Space Assets Protocol has encountered controversy from the private sector.

The existing 2010 Incoterms® Rules regime is comprised of several clauses enacted by the International Chamber of Commerce. Such clauses are applicable to any mode of transport, none of which would be relevant to satellite imagery or data commerce. Although some Incoterms® rules, such as “Sea and inland waterway transport”, might be useful, none of them would be applicable in private satellite data and imagery trade. Nevertheless, if the notion of “spacecraft” would substitute the notion of “vessel” contained therein, it would be interesting to study as a case. The rights related to intangible assets, unless saved in a storage device, would need to be protected by such clauses in case they formed part of a payload carried to the International Space Station but, again, the technological situation nowadays allows data transfer from the International Space Station to Mission Control or from any orbiting operational satellite online or by other means than stored in a USB stick. In this regard, the International Space Station counts on NASA’s laser to emit high-speed data to the receiving station at NASA. .

At the moment, some trade related rules could refer to digital content, but the inclusion of such terms would need a specific commission of legal experts and practitioners in which the most sensitive “consumer orientated” issues could be highlighted. As far as geospatial data (primary and processed data) is concerned, some of these terms would not be necessary since primary and processed data are not traded with end users. Therefore, the acquisition of rights related to satellite imagery deserves more attention.

9. NEW TRADE-RELATED RULES

Unifying satellite contract terms in the style of the Incoterm® Rules would foster private satellite data commerce; many combinations could be possible. To reach such a conclusion, one must analyse the existing duality between *de lege lata* vs *de lege ferenda*. Such duality highlights the difference between the current legal scenario and how it should be from the perspective of the author of the present article. The legal reasoning behind the next figure is expressed using the dichotomy (the reality vs. the desired goal, as in “Equation 1”).

Equation 1: Abstract description

The X¹ vs the X² paradigm (Algorithm)

- X¹ the current existing satellite data contract practice (de lege lata)*
- X² the hypothesis propounded by the author of the present thesis (de lege ferenda)*

This new “contract formula” would be foreseeable and could consist of what the author of the present article has named the “seed contract” and the “beacon contract”. Such a formula could extend the current EULA or “end user license consumer agreement”. In this regard, different terms could be chosen or “granted” by the parties if agreed to. The following table details some of these (as in Figure 1).

Figure 1: Example

- The Rights Granted (by order of appearance)

RS	Re-selling (data in general)
RU	Re-using (data in general)
ELR	Exclusive license rights
NELR	Non-exclusive license rights
VAPCLr	Licensor retains the copyright (economic rights)

Thus, clauses referring to the right to re-sell (RS) or re-use (RU) data would form, alongside terms related to the exclusivity (ELR) or non-exclusivity (NELR) of the licensed rights, an immense set of terms capable of being “used” by contracting parties to the transaction of “satellite intangibles”. Images, data, songs and any “untouchable asset” are considered movable property because they are not fixed in a concrete place on Earth, as with immovable property (real estate). Ergo, movable is capable of being moved and intangible is incapable of being touched; however, both can be created. Tangible assets are goods arising from the creativity of humans. Other species and machines can also create intangibles;

however, they require a regulatory effort to determine their authorship and to recognise whether the non-human creator may hold such rights. Therefore, intangible goods such as images and data are relevant to remote satellite sensing commercial transactions since they are the object of such commerce. These goods are a product of the activity of the human mind, either directly or through man-made machinery; this consists of a set of remote sensing technology inventions following a set of pre-determined parameters given by humans who capture the Earth's data from outer space. In this regard, clauses where the licensor retains the copyright of the Value Added Products (VAPCLr) or otherwise would entail different paradigms. The exploitation of such rights and the re-supply to third parties would exhaust the capacity of the copyright holder to ban or impede imports of the satellite imagery or data assets to the country of his domicile.

10. CONCLUDING REMARKS

From the study of real practice cases, the author of the present article insists on a negotiated approach during the creation of the satellite contract. However, if this is not feasible, certain mechanisms should be enacted in advance to gather all the contracting parties implied in the form of a lobby or association under the umbrella of the European Union. Such measures would provide, at least temporarily, for a framework until a private international or European commercial remote sensing law arrives in the shape of a directive, regulation, convention, international treaty or any other jus cogens law. A successful technological evolution should entail a wide range of theoretical legal possibilities, as long as these do not interfere with major law topics such as criminal law, consumer protection clauses and other law violations. Therefore, the real transcendence of satellite contracts has to be put into perspective. From the present perspective, this effort is only the beginning of a wide research area that needs further investigation.

One shall conclude by stating that, indeed, a private set of standard satellite contractual terms and conditions in the style of Incoterms® Rules is perfectly capable of forming part of *lex mercatoria*. Moreover, where the consent is freely given, it is safe. Hence, private commercial satellite practices involving satellite imagery and data shall be protected from uncertainty. Nevertheless, the author of the present article propounds a bottom-up solution based on creating a new code of conduct around the new satellite and individual trade-related rules, as explained.

REFERENCES

Abdulrahim, Dr. Walid, *State Territory and Territorial Sovereignty*, <https://sites.google.com/site/walidabdulrahim/home/the-present-studies-in->

- [english/6-state-territory-and-territorial-sovereignty](#) [Accessed August 2016].
- Alfred, Charlotte, *Satellite Images Show Vast Tent Cities Sheltering Displaced After Nepal Earthquake*, http://www.huffingtonpost.com/2015/04/28/nepal-earthquake-satellite-photos_n_7161356.html. [Accessed April 2015].
- Century 21 Canada Limited Partnership v. Rogers Communications Inc., 2011 BCSC 1196 (CanLII), www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1196/2011bcsc1196.html, [Accessed January 2017].
- Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels*, 11.07.2001 COM(2001) 398 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0398&from=EN>. [Accessed January 2017].
- Condon Jr, William J., *Electronic assent to online contracts: do courts consistently enforce click-wrap agreements?*, Regent University Law Review (vol. 16:433 heinonline -- 16 regent u. l. rev. Page 433 to 457 2003-2004)
- Content Services Limited v Bundesarbeitskammer*, Judgment of the Court of (Third Chamber) 5 July 2012, Case C-49/11, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0049:EN:HTML> [Accessed September 11, 2015].
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. [Accessed January 2017].
- Cormier Anderson, Rachel, *Enforcement of Contractual Terms in Click-wrap Agreements*, 3 Shidler J. L. Com. & Tech. 11 (Feb. 14, 2007), https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/395/vol3_no3_art11.pdf?sequence=1, [Accessed January 2017].
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Official Journal L 012 , 16/01/2001 P. 0001 – 002, Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML> [Accessed January 2017].
- Craglia, M. and A. Annoni (2003). *The Spatial Impact of European Union Policies*, EUR 20121 EN, Ispra: European Communities.

- Dix v. ICT Group, Inc.*, 125 Wash. App. 929 (Wash. App. Div. 3, 2005), petition for cert. granted, *Dix v. ICT Group, Inc.*, 155 Wash.2d 1024 (Wash. Nov, 30, 2005) (No. 77101-4). <http://caselaw.findlaw.com/wa-supreme-court/1181220.html>. [Accessed January 2017].
- ExtremeTech*, June 9, 2014, available at <http://www.extremetech.com/extreme/183876-nasa-installs-space-laser-on-the-iss-uses-it-to-transmit-high-speed-data-back-to-earth>. [Accessed January 2017].
- Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002).
- Gupta, Indranath, *Are websites adequately communicating terms and conditions link in a browse-wrap agreement?*, *European Journal for Law and Technology*, Vol. 3, No. 2, 2012, ejlt.org/article/view/47/239#sdendnote1anc. [Accessed January 2017].
- Hayes, David L., Esq. fenwick & west llp, March 1997, *The Enforceability of Shrinkwrap License Agreements On-Line and Off-Line*, Institute for eCommerce, Carnegie Mellon University, <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ShrinkwrapFenwick.pdf>. [Accessed September 11, 2015].
- i.LAN Systems, Inc. v. NetScout Service Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002).
- Judgment of the Court (Third Chamber) of 21 May 2015. *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, Case number = C-322/14, Jaouad El Majdoub v. CarsOnTheWeb, <http://curia.europa.eu/juris/liste.jsf?&num=C-322/14>. [Accessed September 11, 2015].
- International Chamber of Commerce, *The Incoterms® rules*, available at <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>. [Accessed September 11, 2015].
- Operative part of the Judgment of the Court (Third Chamber) of 5 July 2012 (reference for a preliminary ruling from the Oberlandesgericht Wien - Austria) - Content Services Ltd v Bundesarbeitskammer (Case C-49/11)*. Available in, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126514&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=299814>. [Accessed September 1st, 2015].
- Perales Viscasillas, Maria del Pilar, *The Formation of Contracts & the Principles of European Contract Law*, 13 Pace Int'l L. Rev. 371 (2001) Available at:

<http://digitalcommons.pace.edu/pilr/vol13/iss2/5>. [Accessed September 1st, 2015].

Principles of European Contract Law
https://en.wikipedia.org/wiki/Principles_of_European_Contract_Law.
[Accessed September 1st, 2015].

Reference for a preliminary ruling - Oberlandesgericht Wien - Interpretation of Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) - Information concerning the contract made available to the consumer via a hyperlink to the supplier's website - Right of the consumer to receive that information in a durable medium - Interpretation of the notion of 'durable medium', available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126514&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=299814>. [Accessed September 1st, 2015].

Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (Dist. Court S.D.N.Y. 2000), aff'd 356 F.3d 393 (2d Cir. N.Y. 2004),

Spanish Civil Code. *Real Decreto de 24 de julio de 1889*, Published in the Spanish Official Journal, núm. 206, de 25/07/1889.