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"Alexa, Call My Lawyer!" Determining Liability For Unauthorized Purchases Made on Voice-Based Virtual Assistants

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**“ALEXA, CALL MY LAWYER!”
DETERMINING LIABILITY FOR UNAUTHORIZED
PURCHASES MADE ON VOICE-BASED VIRTUAL
ASSISTANTS**

*Dr. Mark Giancaspro **

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“Technology . . . is a queer thing. It brings you great gifts with one hand, and it stabs you in the back with the other.”¹

I. INTRODUCTION

In December 2018, a parrot residing in Blewbury, England cleverly mimicked his owner’s voice and ordered a variety of goods on Amazon through her in-home Amazon Alexa virtual assistant device.² Although the owner was fortunate enough to have noticed the purchases on her linked account and cancel them in time,³ the incident provoked a pertinent question with significant legal ramifications: who is responsible if a party other than the owner of the virtual assistant makes an unauthorized purchase on the device? As the number of voice-activated virtual assistants on the market and in people’s homes continues to grow exponentially, and in light of the ease with which security settings on many

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¹ J. M. VAN DER LAAN, NARRATIVES OF TECHNOLOGY 18 (2016) (quoting Anthony Lewis, *Dear Snoop Jackson*, N.Y. TIMES (Mar. 15, 1971), <https://www.nytimes.com/1971/03/15/archives/dear-scoop-jackson.html>).

² *Parrot Uses Alexa To Order Items, Play Music While Owner Is Away*, WTXL ABC27 (Dec. 17, 2018, 8:44 PM), http://www.wtxl.com/news/parrot-uses-alexa-to-order-items-play-music-while-owner/article_7c030686-0266-11e9-a066-9fdb12a1cfc4.html.

³ *Id.*

virtual assistant devices can be bypassed, this question will almost certainly be tested in court in the near future. The outcome could impact any number of contracts for the sale of goods purchased via virtual assistants where the purchases were not sanctioned. This article seeks to provide a basis for determining liability in the event of a dispute if—or rather *when*—the question arises.

Part II of this Article will briefly describe how an Amazon Alexa works and tell the story of the mischievous parrot in England whose escapades with Alexa generated the underlying controversy. Part II of this Article will then examine the Amazon terms of use and lay the foundation for the subsequent legal analysis. Section III.A of this Article will consider the issue of capacity that arises should animals or minors make purchases with Alexa or other virtual assistants. Sections III.B to III.D will then consider the doctrines of agency, mistake, and unconscionability respectively, and how these might affect what would otherwise seem to be a straightforward contractual allocation of responsibility to the Alexa device owner and Amazon account holder. This Article concludes that Alexa owners would have a good case to contend that contracts of sale made on their devices without their authorization are unenforceable.

II. BACKGROUND

A. *Rocco's Love Affair with Alexa*

The National Animal Welfare Trust, headquartered in Watford, England, was founded in 1971 and is one of the United Kingdom's leading animal welfare charities.⁴ It was at the National Animal Welfare Trust's Berkshire sanctuary, in late 2017, that employee Marion Wischnewski met Rocco the African grey parrot.⁵ Wischnewski kindly offered to adopt Rocco into her Blewbury (Oxfordshire) home when he was evicted for persistently using profanities and tossing his water bowl at passers-by.⁶ What she did not anticipate was that Rocco would befriend and subsequently exploit her Amazon Alexa virtual assistant device in her home while she was out working. To understand how the saga unfolded, it is essential to briefly describe the product and how it works.

⁴ *History*, NAT'L ANIMAL WELFARE TR., <https://www.nawt.org.uk/about-us/history> (last visited Sept. 8, 2020).

⁵ Amanda Kooser, *Cussing Rescue Parrot Forges Sweet Amazon Alexa Friendship*, CNET (Dec. 19, 2018, 9:32 AM), <https://www.cnet.com/news/cussing-rescue-parrot-forges-sweet-amazon-alexa-friendship/>.

⁶ *Id.*; *Parrot Uses Alexa To Order Items, Play Music While Owner Is Away*, *supra* note 2.

Amazon launched its "Alexa" voice-based virtual assistant technology in November 2014.⁷ It was introduced alongside the company's suite of smart "Echo" devices, oriented towards creating a "smart home" environment.⁸ Alexa works in conjunction with Amazon's Echo smart speakers which were "designed and developed to be kept in the living room of the user's home so that the user can ask it day-to-day queries about weather, food recipes, and jokes, or play interactive trivia games, set alarms, shop for day-to-day items, and much more."⁹ Alexa can also play music and audiobooks, stream podcasts, track posted packages, provide movie listings, access the latest news and sports results, and manage the user's calendar on command.¹⁰ The device responds to vocal commands from any persons in its audible range following utterance of the activation word, "Alexa."¹¹ Through integration with third-party apps, Alexa can also be trained to perform a whole range of even more complex and useful tasks.¹² Alexa is linked to the owner's online Amazon account, to which any purchases are charged without need for any input of financial details from the user.¹³ As such, the technology offers incredible convenience to the average consumer. It is little surprise, then, that more than 100 million Alexa-enabled devices have been sold worldwide to date.¹⁴ By the beginning of 2020, Alexa device sales had more than doubled.¹⁵

While this Article focuses upon the Alexa virtual assistant, it should be noted that there are now several such voice-based virtual assistants on the market including Apple's "Siri" (launched in 2011), Google's "Google Now" (2012) and Microsoft's "Cortana" (2014).¹⁶ The purpose and capabilities of each are relatively similar, though, as will be discussed later, there are subtle differences

⁷ Laura Lorenzetti, *Forget Siri, Amazon Now Brings You Alexa*, FORTUNE (Nov. 6, 2014, 4:23 PM), <http://fortune.com/2014/11/06/forget-siri-amazon-now-brings-you-alexa/>.

⁸ MADHUR BHARGAVA, ALEXA SKILLS PROJECTS: BUILD EXCITING PROJECTS WITH AMAZON ALEXA AND INTEGRATE IT WITH INTERNET OF THINGS 21 (Gebin George et al. eds., Packt Pub. English ed. 2018).

⁹ *Id.*

¹⁰ Overview of Alexa Voice Service, AMAZON, <https://developer.amazon.com/docs/alexa-voice-service/api-overview.html> (last visited Sept. 8, 2020).

¹¹ *Id.*

¹² See Alexa Skills Set, AMAZON, <https://developer.amazon.com/alexa-skills-kit> (last visited Sept. 8, 2020).

¹³ *Id.*

¹⁴ Abrar Al-Heeti, *Amazon Has Sold More Than 100 Million Alexa Devices*, CNET (Jan. 4, 2019, 3:51 PM), <https://www.cnet.com/news/amazon-has-sold-more-than-100-million-alexa-devices/>.

¹⁵ Ben Fox Rubin, *Amazon Sees Alexa Devices More Than Double in Just One Year*, CNET (Jan. 6, 2020, 6:00 AM), <https://www.cnet.com/news/amazon-sees-alexa-devices-more-than-double-in-just-one-year/>.

¹⁶ BHARGAVA, *supra* note 8, at 9–10.

which might impact a third party's capacity to make an unauthorized purchase on the device in question.

With an understanding of how Alexa works, we return to the story of Rocco the parrot and his owner, Wischnewski. Whenever Wischnewski leaves the home, Rocco routinely takes it upon himself to activate her Alexa device and commence ordering a number of treats for himself.¹⁷ His species is renowned for its ability to mimic human speech due to having a lower vocal range than other birds.¹⁸ Indeed, “[t]o the human ear, Grey parrot speech sounds almost indistinguishable from that of its trainers.”¹⁹ To date, Rocco has successfully purchased items such as fruit, vegetables, ice-cream, a kettle, light bulbs, and a kite.²⁰ Fortunately for Wischnewski, she was initially able to detect Rocco's activities on her Amazon account and cancel all of his purchases before it was too late; a practice she continues at time of writing.²¹ Had she not detected the illegitimate activity on her account, however, or assuming a human third party—visiting friend, resident child, or unwelcome burglar—opted to similarly make a purchase without authority, would she have been legally liable for the purchase? Would owners of voice-based virtual assistants be liable for an unauthorized purchase made on their devices? Given that the number of virtual assistant users worldwide is projected to reach 1.8 billion by 2021,²² and the fact that a party can enter into a contract of sale using these devices in a matter of seconds, it is essential we consider the answer to this question. Amazon Alexa will be the virtual assistant of choice for the purposes of analysis.

B. *A Starting Point: Terms of Use*

All contracts, and the obligations of the parties to them, are framed by their terms.²³ When individuals sign contracts, they are taken to have read and

¹⁷ *Parrot Uses Alexa To Order Items, Play Music While Owner Is Away*, *supra* note 2.

¹⁸ Michael Schindlinger, *Why Do Parrots Have the Ability To Mimic?*, SCI. AM. (Dec. 5, 2007), <https://www.scientificamerican.com/article/experts-parrots-mimic/>.

¹⁹ IRENE MAXINE PEPPERBERG, *THE ALEX STUDIES* 272 (Harvard Univ. Press rev. ed. 2009).

²⁰ Greg Evans, *Mischievous Parrot Befriends an Alexa Device and Keeps Ordering Items from Amazon*, INDEP. (Dec. 15, 2018, 4:15 PM), <https://www.indy100.com/article/parrot-rocco-alexa-amazon-orders-national-animal-welfare-trust-internet-shopping-8685086>; *Parrot Who Has Made Friends with Its Owner's Alexa Keeps Accidentally Ordering Things on Amazon . . . From Fruit and Veg to a Kite*, DAILY MAIL (Dec. 13, 2018, 8:53 PM), <https://www.dailymail.co.uk/news/article-6494365/Parrot-placing-orders-owners-Alexa-account-talking-Alexa.html>.

²¹ *Parrot Who Has Made Friends with Its Owner's Alexa Keeps Accidentally Ordering Things on Amazon . . . From Fruit and Veg to a Kite*, *supra* note 20.

²² *The Rise of Digital Assistant Usage—Statistics and Trends*, GO-GULF (Apr. 27, 2018), <https://www.go-gulf.com/blog/virtual-digital-assistants/>.

²³ MARK GIANCASPRO & COLETTE LANGOS, *UNDERSTANDING CONTRACT LAW* 142 (Lexisnexis Butterworths AU ed. 2016).

understood the terms of that contract, even if they have not done so.²⁴ The resolution of any dispute as to liability under a contract for the sale of goods facilitated by a virtual assistant will therefore start with the terms as stipulated. Users of Alexa must subscribe to the Alexa Terms of Use ("ATO"),²⁵ the Amazon Conditions of Use ("ACOU") which govern voice purchasing through the device,²⁶ and the laws of the U.S.²⁷ The ACOU represents the substantial agreement between the parties and is the document to which the ATOU largely refers. The ACOU provide, under the heading of "Your Account," as follows: "You are responsible for maintaining the confidentiality of your account and password and for restricting access to your account, and you agree to accept responsibility for all activities that occur under your account or password."²⁸

The principles of contract interpretation differ slightly between the U.S. and Australia, however courts in both jurisdictions agree that the process of giving meaning to a contract begins with the plain language of the agreement.²⁹ The terms in question are interpreted not in isolation but within the context of the contract as a whole and the factual matrix in which it was made.³⁰ The ultimate goal is to determine the intentions of the parties at the time the contract was entered into.³¹

²⁴ Smith v. Standard Oil Co., 180 S.E.2d 691, 693–94 (Ga. 1971); Nunn v. C.C. Midwest, 151 S.W.3d 388, 402 (Mo. Ct. App. 2004), *superseded on other grounds by statute*, MO. REV. STAT. §§ 287.020.1, 287.043 (West 2020); *Toll (FGCT) Pty. Ltd. v Alphapharm Pty. Ltd.* (2004) 219 CLR 165, 185 (Austl.); *L'Estrange Graucob* [1934] 2 K.B. 394, 403 (Eng.).

²⁵ Alexa Terms of Use, AMAZON (June 30, 2020), <https://www.amazon.com/gp/help/customer/display.html?nodeId=201809740>.

²⁶ Alexa Conditions of Use, AMAZON (May 21, 2018), <https://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>.

²⁷ The ATOU provides that voice purchases carried out through Alexa are subject to the ACOU. Alexa Terms of Use, *supra* note 25. The clause within the ACOU entitled "Applicable Law" reads as follows:

By using any Amazon Service, you agree that the Federal Arbitration Act, applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.

Alexa Conditions of Use, *supra* note 26.

²⁸ Alexa Conditions of Use, *supra* note 26. This term will be referred to as the "responsibility term."

²⁹ *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Byrnes v Kendle* (2011) 243 CLR 253, 284 (Austl.).

³⁰ *Kenneth Reed Constr. Corp. v. United States*, 475 F.2d 583, 586 (N.Y. Ct. Cl. 1973); *Wilkie v Gordian Runoff Ltd.* (2005) 221 CLR 522, 529 (Austl.); *Austl. Broad. Comm'n. v Austl. Performing Rts. Ass'n. Ltd.* (1973) 129 CLR 99, 109 (Austl.).

³¹ *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971); *Austl. Broad. Comm'n. v Austl. Performing Rts. Ass'n. Ltd.* (1973) 129 CLR 99, 109 (Austl.). The American and Australian courts differ in terms of approach to establishing the parties' intentions. The Australian courts favor an objective assessment and ask what a reasonable person would

The series of agreements between Amazon and users of Alexa are clearly “standard form,” in the sense that they have been entirely prepared by Amazon and are presented to the consumer on a “take it or leave it” basis.³² As such, the tenor of the ACOU and attendant agreements unsurprisingly favor Amazon and reflect a desire for responsibility for any wrongdoing to vest with the Alexa owner. A straightforward reading of the responsibility term makes clear that the Alexa owner (i.e., the Amazon account holder) is responsible for any purchases made through the device, whether by the owner themselves or any other third party. That third party may be a visiting friend, resident child, or even an unwelcome burglar. Neither the responsibility term nor any other within the ACOU appears to allow for misuse of the Alexa device. There are, however, options to cancel the order or return the purchased product. It is critical, at this juncture, to consider the pertinent provisions relevant to cancellations and returns.

With respect to order cancellations, in the event of an unauthorized purchase being made on a person’s Alexa device, that person could simply cancel the order prior to the purchased product’s dispatch. Strangely, the ATOU and ACOU make no direct reference to this option in their terms, though the cancellation process is outlined in depth in the “Help & Customer Service” section of the Amazon website.³³ The website provides that users “can cancel items or orders that haven’t entered the shipping process yet by visiting the Order section” in the user’s Amazon account.³⁴ This is what Rocco the parrot’s owner was forced to do each time he placed an order for goods. This assumes, of course,

understand by the language in which the parties have expressed their agreement. *See Toll (FGCT) Pty. Ltd. v Alphapharm Pty. Ltd.* (2004) 219 CLR 165, 179 (Austl.). The subjective intentions of the parties are disregarded for the purposes of this assessment. That being said, the courts endeavor to interpret contracts so as to achieve their commercial purpose and not in such a way that an unjust or capricious result—which the parties would not themselves have ever desired—is achieved. *Austl. Broad. Comm’n. v Austl. Performing Rts. Ass’n. Ltd.* (1973) 129 CLR 99, 109–10 (Austl.); *Ecosse Prop. Holdings Pty. Ltd. v Gee Dee Nominees Pty. Ltd.* [2017] HCA 12, 16–17 (Austl.). The American courts, on the other hand, tend to endorse an approach which seeks to balance the subjective and objective approaches to construction of contract terms. *See* 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS §§ 24.5–24.6 (Joseph M. Perillo ed., West Publ. rev. ed. 1998). This approach is reflected in numerous provisions within the Second Restatement of Contracts and the relevant comments. *See* RESTATEMENT (SECOND) OF CONTS. §§ 201–202, 212 (AM. L. INST. 1981). The Restatement has no binding force, however it has frequently been cited with judicial approval and regarded as authoritative by the vast majority of jurisdictions within the U.S. *See* Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508 (1998).

³² *George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds Ltd.* (1983) 2 AC 803 (Austl.); GIANCASPRO & LANGOS, *supra* note 23, at 289.

³³ Amazon Help and Customer Service, AMAZON, <https://www.amazon.com/gp/help/customer/display.html> (last visited Sept. 8, 2020).

³⁴ How To Cancel Amazon Items or Orders, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=595034> (last visited Sept. 8, 2020).

that the purchase is detected by the Amazon account holder prior to shipping. If it goes unnoticed, the Alexa owner seemingly has two options: plead for clemency from Amazon and ask for the order to be cancelled retrospectively,³⁵ or await delivery and return the product pursuant to the Amazon Return Policy.

Both the ACOU and ATOU direct users to consult the Return Policy if they wish to return any product purchased through Alexa.³⁶ There are two provisions of pertinence in the Return Policy. The first provides that items shipped from Amazon "can be returned within 30 days of receipt of shipment in most cases" but caveats that some products "have different policies or requirements associated with them."³⁷ The second specifically refers to purchases made via Alexa:

Non-digital products purchased using Alexa are eligible for free returns. To return a product purchased using Alexa, process your return as normal in the Returns Center. . . . In addition, if you accidentally purchase a song or album from our Digital Music Store using Alexa, that purchase is eligible for return and refund if we receive your request within 7 days of the date of purchase. To request a refund, contact customer service.³⁸

Accordingly, for most purchases made through Amazon (whether by the Alexa owner or a third-party user), there will be the option of return within 30 days unless the particular product otherwise provides, or unless the product was made through a third-party service (such as a food order placed through a restaurant), in which case the return policy of the third-party provider applies.³⁹ This assumes, of course, that the purchases are detected by the Alexa owner at point of delivery and that the third party who has actually placed the order has

³⁵ The ACOU states: "Amazon reserves the right to . . . cancel orders in its sole discretion." See Alexa Conditions of Use, *supra* note 26.

³⁶ Alexa Terms of Use, *supra* note 25; Alexa Conditions of Use, *supra* note 26.

³⁷ Information About Amazon's Returns Policies, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=15015721> (last visited Sept. 8, 2020).

³⁸ *Id.*

³⁹ The ACOU provides:

When you use the Amazon Software, you may also be using the services of one or more third parties, such as a wireless carrier or a mobile software provider. Your use of these third-party services may be subject to the separate policies, terms of use, and fees of these third parties.

See Alexa Conditions of Use, *supra* note 26. The Amazon and Alexa Device FAQs page similarly states: "Amazon's return policies do not apply to purchases of non-digital products or services made through third-party Alexa skills (for instance, a food order placed through a restaurant's skill). Instead, the returns policy of the applicable skill developer applies." See Alexa and Alexa Device FAQs, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201602230> (last visited Sept. 8, 2020).

failed to conceal the purchased product from the owner. For purchases made by a third party that go unnoticed by the owner for more than the applicable time permitted for refund, the question of liability remains. Again, a plain reading of the responsibility term in the ACOU would suggest that owners would remain responsible despite the fact they were conned or that the purchase was otherwise unintended.

Though at this point the transaction may be complete, it is not necessarily irrevocable nor legally valid. Particularly in the case of mischievous animals or children making purchases on Alexa, the question of capacity arises.

III. DISCUSSION

A. *An Issue of Capacity—Animals and Children*

It is well-established law that only parties with legal capacity can enter into contracts.⁴⁰ Capacity in this sense refers to one's ability to freely and rationally exercise this and many other fundamental legal rights.⁴¹ The commonly cited categories of parties lacking capacity are minors, the intoxicated, and the mentally incapacitated; in all other cases, capacity is presumed at law.⁴² The astute reader will note that animals (other than humans) are not among the categories for which consent is presumed to be lacking. Despite this, it has never been the case that the law regards animals (such as Rocco the parrot) as being capable of entering into contracts. Indeed, animals have traditionally been considered the property of humans and therefore devoid of legal capacity.⁴³ This perspective is underpinned by libertarian ideologies as to the defining characteristics of legal personhood.⁴⁴ Only the "moral agent"—one who acquires qualities such as self-consciousness, intellectual activity, freedom and moral sense, as well as the abilities to understand, to will, and to evaluate and express consent and legal entitlement—can be considered a

⁴⁰ RESTATEMENT (SECOND) OF CONTS. § 12 (AM. L. INST. 1981).

⁴¹ PETER MACDONALD EGGERS, VITIATION OF CONTRACTUAL CONSENT 38 (Informa Law from Routledge illustrated ed. 2016).

⁴² *Fineland Investments Ltd. v Pritchard* [2011] EWHC 113, 82 (Austl.); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 8-1 (3d ed. 1987).

⁴³ Gary L. Francione, *Animals, Property & Personhood*, in PEOPLE, PROPERTY OR PETS? 77 (Marc D. Hauser et al. eds., 2006); Steven White, *Animals and the Law: A New Legal Frontier?*, 29 MELB. UNIV. L. REV. 298, 300 (2005). In *Saltoon v Lake* (1978) 1 NSWLR 52 (Austl.), for example, it was held that horses amounted to "property" for the purposes of a stock mortgage. This is not to say that animals have been devoid of any legal *rights*, which is plainly inaccurate. Animal welfare legislation exists in both the U.S. (at both the state and federal level) and Australia (at the state level) and has for some time.

⁴⁴ Laura Palazzani, *Person and Human Being in Bioethics and Biolaw*, in LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE & THE UNBORN 106, 108 (Visa A. J. Kurki & Tomasz Pietrzykowski eds., 2017).

“person” and assume legal capacity to enter into contracts.⁴⁵ Animals such as Rocco the parrot, for all their intelligence, are not human beings and simply cannot satisfy these criteria. As explained by Judge Jaffe in *In re Nonhuman Rights Project, Inc. v. Stanley*,⁴⁶

[a]nimals, including chimpanzees and other highly intelligent mammals, are considered as property under the law. They are accorded no legal rights beyond being guaranteed the right to be free from physical abuse and other mistreatment, and the right to humane living conditions, although they may be included in orders of protection.⁴⁷

The consequence of this is that animals other than human beings lack contractual capacity. Again, in a select number of unique cases where a party lacks capacity—minors, the intoxicated, and the mentally incapacitated—the contract that party enters into may merely be “voidable.”⁴⁸ In all other cases, presumably including those where an animal is privy to the contract, it will have no legal effect.⁴⁹

It should be stated that there is no known litigated case involving an animal entering or attempting to enter into a contract.⁵⁰ Indeed, before Rocco discovered Alexa, there were very few ways in which an animal capable of speech could conceivably have done so. Most litigation involving aggrieved animals has occurred in the context of animal welfare legislation and been initiated by humans on behalf of said animals.⁵¹ This is analogous to the manner

⁴⁵ *Id.*

⁴⁶ 16 N.Y.S.3d 898 (2015) (internal citations omitted); *see also Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), where the U.S. Court of Appeals for the Ninth Circuit ruled that a crested macaque—a species of monkey—could not possess copyright in a photograph of itself that it had taken, and which was subsequently published by the owner of the camera in a wildlife book to critical acclaim. The court held the monkey had no standing to sue for royalties under the Copyright Act. *Naruto*, 888 F.3d at 420.

⁴⁷ *In re Nonhuman Rts. Project, Inc.*, 16 N.Y.S.3d at 912.

⁴⁸ For example, some contracts entered into by minors, the intoxicated, or the mentally incapacitated may be enforceable in certain circumstances. *See GIANCASPRO & LANGOS*, *supra* note 23, at chapter 3.

⁴⁹ *Bruton v. London & Quadrant Hous. Tr.* [1999], 3 WLR 150, 159 (Can.).

⁵⁰ Even animal rights advocates acknowledge the difficulty in recognizing an animal’s right to contract. In constructing a hypothetical framework of the rights of animals, Favre proposes that there are two general types of contracts involving animals: those involving an animal’s bailment for care or treatment, and those involving its use as part of a service. In either case, the animal is effectively the beneficiary of the contract between its human owner and the counterparty; it “does not have the capacity to enter into a contract independent of the owner of the animal.” David S. Favre, *Living Property: A New Status for Animals Within the Legal System.*, 93 MARQ. L. REV. 1021, 1070 (2010).

⁵¹ “As with other criminal laws, subject to the legislative provision that creates the offence, any person can commence a prosecution if the breach of law is of a public nature. However, this

in which the rights of children or the mentally incompetent are enforced through representatives.⁵² In *Cetacean Community v. Bush*,⁵³ the U.S. Court of Appeals for the Ninth Circuit considered it “obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being.”⁵⁴ While such may be “obvious” to the Ninth Circuit, there is otherwise no controlling or directly analogous legal precedent to conclusively invalidate the various contracts of sale that Rocco entered into with Amazon. However, applying the common law capacity rules in a straightforward manner suggests that those contracts have no legal effect being made by a non-human party acting without the authority of the human owner of the Alexa device. Amazon’s attempted enforcement of the responsibility term may therefore be rejected by a court, should Rocco’s owner ever launch a legal challenge. Amazon’s lawyers might, however, have another prong of attack in the doctrine of agency, as will be discussed shortly.

What, then, of a mischievous or playful child who makes an order via Alexa or another virtual assistant? The situation is less complicated but still not entirely clear. For a start, children clearly have personhood but are presumed to lack capacity in light of the fact they cannot feasibly comprehend the significance of legal relations nor offer informed and meaningful consent to a bargain.⁵⁵ Under both American and Australian contract law, however, minors (i.e., persons under 18 years of age)⁵⁶ may still enter into certain forms of legally binding

right can be taken away by the express words of the statute.” See LEXISNEXIS BUTTERWORTHS ONLINE, *Standing To Enforce Animal Cruelty Legislation*, in HALSBURY’S LAWS OF AUSTRALIA 20–85; see also, e.g., *Animal Liberation Ltd. v Nat’l Parks & Wildlife Serv.* [2003] NSWSC 457 (Austl.) (stating that Plaintiff organization successfully sought an injunction restraining the proposed aerial shooting of wild goats in a national park on the basis it contravened the relevant animal welfare legislation).

⁵² George Seymour, *Animals and the Law: Towards a Guardianship Model*, 29 ALT. L.J. 183, 185 (2004).

⁵³ 386 F.3d 1169 (9th Cir. 2004).

⁵⁴ *Id.* at 1176.

⁵⁵ See the court’s interesting discussion of “free will” in *Johnson v. Clark* [1908] 1 Ch 303 (Nigeria). This theory has been disputed in light of psychological evidence that “the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally appears in a child somewhere between the ages of 11 and 14” and given the economic reality that “young people do have disposable income and are increasingly entering into commercial agreements.” LINDY WILLMOTT, SHARON CHRISTENSEN, DES BUTLER & BILL DIXON, *CONTRACT LAW* 362 (Oxford Univ. Press 5th ed., 2018).

⁵⁶ Under the common law of old, 21 was the age of majority in both jurisdictions. *Gastonia Pers. Corp. v. Rogers*, 172 S.E.2d 19 (N.C. 1970); *King v Jones* (1972) 128 CLR 221 (Austl.). However, legislation in each Australian state and territory, such as the *Age of Majority (Reduction) Act 1971* (SA) (Austl.), has lowered the age of majority to 18. In the U.S., all states but three regard 18 as the age of majority (in Alabama and Nebraska it is 19, while in Mississippi it is 21). Eliss Suh, *The Age of Majority (and the UTMA Account Distribution Age) in Every State*, POL’Y GENIUS (Dec. 13, 2019), policygenius.com/retirement/age-of-majority-by-

agreement. One example of relevance here is contracts to purchase "necessaries"—those things which are "obviously requisite for the maintenance of existence" or social or educational development,⁵⁷ such as food, clothing, shelter, and education. Being a relative concept, the courts naturally consider the particular child's social position and situation in life when determining whether something is "necessary" or not. The position is similar under Australian law.⁵⁸ As such, should a child order goods such as food or clothing using Alexa, they may be bound to those contracts and required to pay a *reasonable price* for them.⁵⁹ If the child were to purchase luxury items such as electronics or toys, however, the courts would undoubtedly decline to regard those items as "necessaries."⁶⁰ The contracts would therefore likely be deemed voidable at the minor's option.⁶¹

B. Agency

Assuming any capacity issues are overcome, and that the court does not consider the responsibility term to hold the Alexa device owner accountable, where a third party makes a purchase on said device, it might be possible for Amazon to argue that the law of agency imputes the acts of the third party to the owner. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."⁶² This unique legal relationship

state/#:~:text=Every%20state%20sets%20their%20own,most%20places%2C%20except%20the%20states.

⁵⁷ *Int'l Text-Book Co. v. Connelly*, 99 N.E. 722, 725 (N.Y. 1912).

⁵⁸ *Chapple v. Cooper* (1844); 153 Eng. Rep. 105.

⁵⁹ This is an established common law rule in the U.S. *Sceva v. True*, 53 N.H. 627 (1873). In Australia, the requirement for the minor to pay a reasonable price and not the full contract price of the goods has been enshrined in legislation. *Sale of Goods Act 1954* (ACT) s 7; *Sale of Goods Act 1923* (NSW) s 7; *Sale of Goods Act* (NT) s 7; *Sale of Goods Act 1896* (Qld) s 5; *Sale of Goods Act 1895* (SA) s 2; *Sale of Goods Act 1896* (Tas) s 7; *Sale of Goods Act 1958* (Vic) s 7; *Sale of Goods Act 1895* (WA) s 2.

⁶⁰ D. J. Harland, *The Contractual Capacity of Minors—A New Approach*, 7 SYDNEY L. REV. 41, 61 (1973). Although, the argument could be made, in today's digitally connected era, that items such as computers or accessories should be more readily recognized as necessities. See GIANCASPRO & LANGOS, *supra* note 23, at 103–04. The line will always be difficult to draw, particularly because one person's luxury may be another's necessity in light of their personal circumstances. See ROGER LEROY MILLER & GAYLORD A. JENTZ, *BUSINESS LAW TODAY* 262 (3d ed. 2011).

⁶¹ 7 JOHN D. CALAMARI & JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* §§ 27.2–27.4 (W. Grp. rev. ed. 1998).

⁶² RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006). The agency relationship has also traditionally been regarded as fiduciary in nature under the law of Australia. *Parker v. McKenna* (1874), LR 10 Ch App. 96, 118 (UK).

is underscored by a number of associated common law duties, broadly requiring that agents act only in the principals' interests and within the scope of their instructions with due care, skill, and diligence.⁶³ Among the many powers an agent may enjoy is the authority to enter into contracts on the principal's behalf.

The question that arises here is whether an Alexa owner's resident relative, friend, or pet might be regarded as his or her agent for the purposes of entering into sales contracts with Amazon via Alexa. If so, the actual purchaser is taken to be the Alexa owner's legal representative, validating the transactions. The first step here is to establish a relationship of agency between the Alexa owner and the party using the device. Agency may arise from an express oral or written agreement between the principal and the agent,⁶⁴ or may be implied from the conduct of the parties and the circumstances in which the agency was alleged to have arisen.⁶⁵ Where the Alexa owner offers no authority for a friend, relative, or pet to order goods for them, clearly no express agency relationship can be created.⁶⁶ The transactions will be unauthorized. Moreover, given that section 1.01 of the Restatement (Third) of Agency (US)⁶⁷ (cited above) specifically applies to *persons*, it is clear that pets would not be legally capable of being agents for their owners under U.S. law. Whether an agency relationship can arise *by implication* is another matter and requires consideration of the circumstances in which the parties found themselves at the time the contract was entered into, and their conduct at all relevant times.⁶⁸

The fact that a relative or pet is a resident and living in the Alexa owner's property may support an inference that they have the presumed authority to act on the Alexa owner's behalf when using the device.⁶⁹ It might be considered analogous to answering the door and signing to receive packages delivered by the postal service, allowing utility or other service providers to access the property, or donating a cup of sugar to the neighbors. In each of these situations, it is almost certain that the homeowner would not object to the "agent's" actions

⁶³ *Provincial Ins. Austl. Pty. Ltd. v Consol. Wood Prods. Pty. Ltd.* (1991) 25 NSWLR 541, 555 (Austl.); *Beal v S. Devon Ry. Co.* (1864) 3 H & C 337, 341 (Austl.); RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. L. INST. 2006).

⁶⁴ *Gosling v. Gaskell* [1897] AC 575 (UK); RESTATEMENT (THIRD) OF AGENCY § 3.01 (AM. L. INST. 2006).

⁶⁵ *Pola v Commonwealth Bank of Austl.* [1998] Aust Torts Report ¶¶ 81–460 (Austl.); *Hook v Day* (1971) 2 SASR 440 (Austl.); RESTATEMENT (THIRD) OF AGENCY § 3.03 (AM. L. INST. 2006).

⁶⁶ Naturally, the Alexa owner would not authorize a burglar to enter their home and make purchases.

⁶⁷ RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

⁶⁸ *Keytrade USA, Inc. v. M/V AIN TEMOUCHENT*, No. CIV.A. 01-1617, 2003 WL 122312 (E.D. La. Jan. 10, 2003); *Field v Shoalhaven Transp. Pty. Ltd.* (1970) 3 NSW 96, 103 (Austl.).

⁶⁹ Again, in the case of pets, such inference would not be possible under U.S. law given the wording of § 1.01 of the Restatement (Third) of Agency. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

and it could be said that they impliedly authorized this behavior. However, making a purchase on Alexa involves pledging the homeowner's *credit*, which is a far more significant proposition. An agency relationship has in the past been presumed to exist between parties by virtue of their cohabitation (for the purposes of committing the principal to expenditure), though in the relevant cases the parties were husband and wife.⁷⁰ Implied agency has also been determined to arise where a principal has, to a third party's knowledge, previously authorized the "agent" to enter into similar transactions with the third party.⁷¹ This may be more applicable in a home setting.

While parties living with owners of an Alexa device might previously have been allowed to use it to make purchases, the circumstances would need to demonstrate that they had invariably done so with ample discretion. This is very unlikely to be the case, particularly with respect to resident children and pets, or visiting guests.⁷² These parties may have been allowed to make purchases once or twice as a novelty, but it is extremely improbable that they would be deemed to have a general authority to make purchases on the owner's behalf. It is even less plausible that they would have the authority to make purchases for themselves, an activity which is clearly in their own interests and contrary to the essence of agency.⁷³ In any event, Amazon would have no way of knowing about any such authority, meaning, on leading authority at least, that agency could not be implied purely by virtue of a previous history of dealings. Therefore, unless

⁷⁰ See, e.g., *Bergh v. Warner*, 50 N.W. 77 (Minn. 1891); *Ryan v. Sams* (1848) 12 QB 460 (Eng.); *Scots Church Adelaide Inc. v Fead* [1951] SASR 41 (Austl.). The doctrine of agency, insofar as it arises out of the marital relationship, has been abolished expressly by statute in many Australian jurisdictions and has also impliedly been superseded by provisions under the *Family Law Act 1975* (Cth) governing spousal maintenance rights and obligations. See G. E. DAL PONT, *LAW OF AGENCY* 154–55 (Butterworths 2001).

⁷¹ *Lynch v. Helm Plumbing & Elec. Contractors, Inc.*, 108 S.W.3d 657, 659–61 (Mo. Ct. App. 2002); *Utley Lumber Co. v. Bank of the Bootheel*, 810 S.W.2d 610, 613–14 (Mo. Ct. App. 1991); *Dodsley v. Varley* (1840) 12 A & E 632 (Eng.); *Aishcome v. Le Hundred de Spelholme* (1690) Hold KB 460 (Eng.). A famous English case on point is *Hely-Hutchinson v. Brayhead Ltd.* (1968) 1 QB 549 (UK), which has been applied and approved by numerous Australian courts. See, e.g., *Poulet Frais Pty. Ltd. v Silver Fox Co. Pty. Ltd.* (2005) 220 ALR 211 (Austl.); *Frank v Brown* (2000) 10 BPR 18, 199 (Austl.); *Cousens v Grayridge Pty. Ltd.* [2000] VSCA 96 (Austl.). In *Pola v Commonwealth Bank of Austl.* [1997] FCA 1476 (Austl.), Judge Sundberg noted that "agency may . . . be implied from prior habits or from a course of dealing between the parties where the agent has repeatedly been permitted to perform similar acts in the past."

⁷² Naturally, it would not be the case with respect to uninvited burglars. In the case of pets, § 1.01 of the Restatement (Third) of Agency would again exclude the possibility of them being agents for their human owners under U.S. law. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

⁷³ *Hurstanger Ltd. v. Wilson* (2007) 4 All ER 1118 (UK); RESTATEMENT (THIRD) OF AGENCY §§ 8.01–8.02. As Judge Dixon remarked in *Press v Mathers* [1927] VLR 326, 332 (Austl.), "in any ordinary case the question whether one person authorized another to do an act or series of acts on his behalf is best answered by considering for whose benefit or in whose interest it was intended it should be done."

Amazon has knowledge that the purchaser has, on several prior occasions, been authorized to make voice purchases, it will be difficult to establish implied agency and validate the transactions.

Perhaps conclusively, Amazon's agency case may also fail on the basis that a third party making purchases on an Alexa owner's device without authorization is clearly not acting under the direction of the owner (principal). At law, an agent must act only within the scope of their authority and comply with all lawful instructions from the principal.⁷⁴ In the absence of clear instructions, agents are required to exercise honest and sound judgment in determining whether particular conduct is in the interests of their principals and would be sanctioned by them on the basis of their manifested intentions or authority.⁷⁵ Should someone in an Alexa owner's home make a purchase on his device without his knowledge and in circumstances where they would surely not approve, it is obvious that the purported agency relationship breaks down. In the vast majority of cases, given the ease with which vast quantities of high-value goods can easily be purchased, one would expect the device owner (and Amazon account holder) to formally approve a voice purchase on Alexa. Making purchases in the absence of such authority and without the knowledge of the device owner (principal) is deviant and can scarcely be regarded as the product of honest judgment as to what the principal would want. Unless the circumstances gave rise to the most liberal of agency relationships where the purchasers (agents) have *carte blanche* to buy as they please, the doctrine of agency is not likely to assist Amazon in holding the Alexa owners accountable for the third parties' transactions.

If the Alexa owner is not caught by the responsibility term in the ACOU, and the third party that makes the voice purchases on the owner's device lacks capacity or cannot be deemed the owner's legal agent, Amazon will need to think laterally about how to impute responsibility for unauthorized voice purchases to the device owner. This will be made difficult by the fact that there is potentially another string to the Alexa owner's bow in the form of the doctrine of mistake.

C. Mistake

The doctrine of mistake is, unsurprisingly, concerned with situations where one or more of the parties to a contract make an error which can be regarded as negating genuine consent to the agreement.⁷⁶ Seddon has described the law relating to mistake as "old, arcane, uncertain in application, complex and

⁷⁴ *Option Invs. (Austl.) Pty. Ltd. v Martin* [1981] VR 138, 142 (Austl.); RESTATEMENT (THIRD) OF AGENCY § 8.09 (AM. L. INST. 2006).

⁷⁵ *Jones v Canavan* (1972) 2 NSWLR 236, 242 (Austl.); *Chown v. Parrott* (1863), 32 L.J. (C. P.) 197 (Eng.); RESTATEMENT (THIRD) OF AGENCY § 8.09 cmt. B (AM. L. INST. 2006).

⁷⁶ See RESTATEMENT (SECOND) OF CONTS. § 151 (AM. L. INST. 1981).

controversial."⁷⁷ This is putting it lightly. Nonetheless, there is one subcategory of mistake which might avail disgruntled Alexa owners seeking to escape liability for unauthorized purchases made on their devices: unilateral mistake. The doctrine of unilateral mistake encompasses mistakes made by only one party to the contract.⁷⁸ Although rare, it is plausible for parties to be mistaken about whom they are contracting with. In the modern era of globalized technology, this is particularly likely given a great number of transactions occur online and without any personal interaction at all.

The question of whether or not a contract can be avoided on the basis of unilateral mistake is not easily answered in light of the complicated body of case law that has developed in this area. Neither American nor Australian law offers a simple answer. In the U.S., section 153 of the Restatement (Second) of Contracts (US) specifically addresses situations where the mistake of one party renders a contract voidable. This section provides:

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

- (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
(b) the other party had reason to know of the mistake or his fault caused the mistake.⁷⁹

Applying this provision to our hypothetical scenario of a third party making an unauthorized purchase on a person's Alexa device is problematic. The language of the provision presupposes that the mistaken party has themselves willingly entered into the agreement, though under some form of misapprehension. In actual fact, where third parties utilize Alexa, they are forging a contract between the owner of the device (and Amazon account holder) and Amazon. The relevant "mistake" arises from the fact that Amazon is unaware of the fraud and assumes it is simply dealing with either the Alexa owner or another party authorized by the owner. In reality, the purchase is not authorized and is, in the absence of simple error, fraudulent. This scenario is seemingly not anticipated by the Restatement. For practical purposes, if the court were to impute the third party's actions to the Alexa owner so as to apply the mistake doctrine, the owner would need to prove that the mistake has had a *material effect*

⁷⁷ Nick Seddon, *Contract: Mistake Mistake*, 80 AUST. L.J. 92, 95–96 (2006). Newnes M. endorsed this view in *Errichetti Nominees Pty. Ltd. v Paterson Grp. Architects Pty. Ltd.* [2007] WASC 77, 50 (Austl.).

⁷⁸ See RESTATEMENT (SECOND) OF CONTS. § 153 (AM. L. INST. 1981).

⁷⁹ *Id.*

upon the transaction and that either enforcement would be unconscionable or that Amazon knew of or caused the mistake through its own fault.

It is essential, first, to consider what “materiality” means in the context of section 153 of the Restatement (Second) of Contracts, the comments to which provide little guidance.⁸⁰ The Oxford English Dictionary defines “material” in adjectival form as meaning “of or relating to matter or substance.”⁸¹ This implies that the “effect” in question must have some significant impact upon the transaction in a way that is not trivial or lacking consequence. This view is supported by the case law. In *First Baptist Church v. Barber Contractor Co.*,⁸² the Court of Appeals of Georgia noted that where a mistake goes to “the substance of the consideration” under the agreement, it will be regarded as material.⁸³ There, the court evaluated a miscalculation in a bid for the construction of a recreational facility.⁸⁴ Not only did the tenderer know of the mistake, it amounted to approximately 7% of the entire bid, making it unconscionable for the agreement to have been enforced against the mistaken bidder.⁸⁵ Further, comment c to section 152 of the Restatement (Second) of Contracts, though speaking in the context of common or mutual mistakes, provides some clarity:

[The mistaken party] must . . . show that the mistake has a material effect on the agreed exchange of performances. It is not enough for him to prove that he would not have made the contract had it not been for the mistake. He must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out. Ordinarily he will be able to do this by showing that the exchange is not only less desirable to him but is also more advantageous to the other party In such cases the materiality of the effect on the agreed exchange will be determined by the overall impact on both parties.⁸⁶

More recently, the Fifth District Court of Appeal of Florida observed that “the effect of the mistake on the viability of the transaction usually involves consideration of several factors, including the nature of the error, the cause of the error, its materiality to the transaction, the timing of its discovery, and the parties’

⁸⁰ See *id.* § 151 cmts. a–c.

⁸¹ *Material*, OXFORD ENGLISH DICTIONARY (3d ed. 2001).

⁸² 377 S.E.2d 717 (Ga. Ct. App. 1989).

⁸³ *Id.* at 721.

⁸⁴ *Id.* at 718.

⁸⁵ *Id.* at 721.

⁸⁶ RESTATEMENT (SECOND) OF CONTS. § 152 cmt. c (AM. L. INST. 1981).

conduct upon learning of the mistake.”⁸⁷ Thus, materiality of a mistake can be highlighted as much by the *cause* of the error as by its importance to the parties.

From a consumer’s perspective, in situations where a third party purchased goods on that consumer’s Alexa device without authority, it could scarcely be argued that the fact an unauthorized party committed them to a contract of sale was immaterial. This is certainly so where the value of the good(s) purchased is high, though a court might regard a trivial sale of low-priced goods as being of little consequence. In some cases, as Corbin rightly notes, identity may be irrelevant to a great many transactions: a mistake as to a person’s “name, weight, age, features, parentage, family life, position in business, reputation in the community, or reported financial responsibility”⁸⁸ is clearly of no relevance to contracts of sale with Amazon, which presuppose that anyone using an Alexa device to make purchases has the authority to do so. Where this assumption is wrong, however, identity is clearly of greater importance to the device owner and the mistake in question undermines the hallowed principle of mutual assent that underlies all bargains under American and Australian contract law. To countenance illegitimate activity on a consumer’s Amazon account merely because the company is an online retailer with global reach and cleverly worded contracts is to ignore the very purpose of the mistake doctrine. As the Supreme Court of Minnesota observed in *Jorgensen Chevrolet Co. v. First National Bank*,⁸⁹ buyers have the right to choose the goods they purchase.⁹⁰

Assuming materiality can be established, the Alexa owner would then have to prove either that enforcement of the contract would be unconscionable or that Amazon knew of or caused the mistake. Comment g to section 153 of the Restatement (Second) of Contracts makes specific reference to situations of mistaken identity:

The identity of the other party, as distinguished, for example, from his financial standing (*see* Comment b to § 152), is usually a basic assumption on which a contract is made. If the other party knows that he is not the intended offeree, he cannot accept an offer. That case is governed by § 52. If, however, he accepts

⁸⁷ *Governing Bd. of the St. Johns v. Cont’l Aerial Survs., Inc.*, 827 So.2d 304, 307 (Fla. Dist. Ct. App. 2002).

⁸⁸ JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28.31 (W. Publ. rev. ed. 2002). Age may be relevant where a minor (or, indeed, some aged under 21) attempts to purchase goods such as alcohol from Amazon. The ACOU states, “Alcohol listings on Amazon are intended for adults. You must be at least 21 years of age to purchase alcohol or use any site functionality related to alcohol.” Alexa Conditions of Use, *supra* note 26.

⁸⁹ 14 N.W.2d 618 (Minn. 1944).

⁹⁰ *Id.* at 623.

without knowing that he is not the intended offeree, a contract may result. *See* Comment b to § 52.⁹¹

Whether that contract is voidable by the offeror on the ground of mistake is governed by the rule stated in this section. The contract is voidable by the mistaken party, under the rule stated in subparagraph b, if the other party has caused a mistake as to his identity or if he had reason to know of the mistake, as long as it has a material effect on the agreed exchange of performances.⁹² Otherwise it is not voidable unless enforcement of the contract would be unconscionable, under the rule stated in subparagraph a.⁹³ In some transactions the identity of the other party is of sufficient importance that he will be able to show unconscionability, but often he will not.

It is beyond doubt that Amazon would have no way of knowing that it was dealing with anyone other than the Alexa owner in any given transaction. Again, for all the company knows, that party could well have been permitted to make the purchase. There is simply no feasible way for Amazon to be able to detect fraud in this regard, ruling out section 153(b) of the Restatement (Second) of Contracts. The Alexa owner would therefore instead have to demonstrate unconscionability. “The reason for this additional requirement is that, if only one party was mistaken, avoidance of the contract will more clearly disappoint the expectations of the other party than if he too was mistaken.”⁹⁴

As comment g above makes clear, it will often be difficult to prove that identity was of sufficient importance to a transaction to make its enforcement unconscionable. Where a third party falsifies authorization to make a purchase, however, the case is far stronger. In *Cundy & Bevington v. Lindsay*,⁹⁵ a rogue placed an order with a linen manufacturer (Lindsay) purporting to be a well-known and reputable business on the same street. The rogue then sold the goods on to an innocent third party, Cundy & Bevington, before fleeing.⁹⁶ Lindsay alleged that the contract with the rogue was void for mistake and sued Cundy & Bevington in the tort of conversion.⁹⁷ The House of Lords held in favor of Lindsay, agreeing that the contract was void on the basis Lindsay had no intention whatsoever of dealing with the rogue and intended only to deal with the company he pretended to be.⁹⁸ The fact the purchaser lied about his identity

⁹¹ RESTATEMENT (SECOND) OF CONTS. § 153 cmt. g (AM. L. INST. 1981).

⁹² *Id.* § 153(b).

⁹³ *Id.* § 153(a).

⁹⁴ *Id.* § 153 cmt. c.

⁹⁵ (1878) 3 App. Cas. 459 (UK).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

and entered into the contract with the false authority of the company was critically material to the transaction.⁹⁹ As such, "there was no consensus of mind which could lead to any agreement or any contract whatever."¹⁰⁰

The same court similarly invalidated a contract on the basis of unilateral mistake in the more recent case of *Shogun Finance Ltd. v. Hudson*,¹⁰¹ where a rogue purchased a motor vehicle from a dealership on loan finance using someone else's driver's licence.¹⁰² Again, identity was regarded as material given that it was "essential to the checking of the credit rating of the applicant borrower" and preceded the formation of any consumer credit contract at all.¹⁰³ A final case example from the U.S. is *Fifer v. Clearfield & Cambria Coal & Coke Co.*¹⁰⁴ Fifer, through his agent, contracted to purchase coal from the defendants.¹⁰⁵ The defendants did not realize that the actual purchaser was not a corporation with paid up capital and legal status, as they had been led to believe, and refused delivery.¹⁰⁶ The court found that the agreement had been vitiated by virtue of the defendants' unilateral mistake as to the plaintiff's identity.¹⁰⁷ Identity was critical as the seller wished only to deal with an incorporated, legally recognized entity with capacity to repay debts.¹⁰⁸

By extension, an Alexa owner might argue on the basis of the foregoing authorities that Amazon must be taken to intend only to deal with the authorized account holder or other *authorized* third parties and that any contracts forged by unauthorized parties are therefore invalid on the basis of unilateral mistake. If it were otherwise then the company might be said to have constructive knowledge of potential unlawful transactions being made on customers' accounts. Conversely, Amazon would counter that it has no particular desire to deal *solely* with the account holder. Indeed, so much is clear from the wording of the

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 465. Lord Cairns stated,

Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.

Id.

¹⁰¹ (2004) 1 AC 919 (UK).

¹⁰² *Id.*

¹⁰³ *Id.* at 942.

¹⁰⁴ 62 A. 1122 (Md. 1906).

¹⁰⁵ *Id.* at 1122.

¹⁰⁶ *Id.* at 1123.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 1122.

responsibility term, which clearly anticipates third-party use of Alexa devices by persons other than their true owners. The device is marketed as being for in-home use and depicted through advertisements as being accessible to all. The responsibility term and all other terms are agreed to by the Amazon customer at time of account registration. Though the owners are the unfortunate victim of accident or fraud, and it is unconscionable to enforce the sale contract from their perspective, the company could argue with equal merit that it is unconscionable for it to even begin to attempt to determine which of the two million customers who make voice purchases on Alexa¹⁰⁹ actually meant to do so.

Finally, section 153 of the Restatement (Second) of Contracts provides that section 153 will not apply if section 154 does. Section 154 relates to the allocation of risk of mistakes. It reads:

A party bears the risk of a mistake when
 (a) the risk is allocated to him by agreement of the parties, or
 (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
 (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.¹¹⁰

As such, if the Alexa device owner is taken to bear the risk under section 154, then the mistake exception in section 153 cannot be applied. Perhaps the most relevant provision here is section 154(a). As mentioned earlier, the responsibility term contained in the ACOU seeks to hold the user responsible for “all activities that occur under [the user’s] account or password.”¹¹¹ Comment b to this provision clarifies that the question of whether the agreement places the risk on the mistaken party is “to be answered under the rules generally applicable to the scope of contractual obligations, including those on interpretation, usage and unconscionability.”¹¹² The relevant principles as to interpretation were discussed earlier and will not be repeated here, save to say that the process is very much one of attempting to discern the intentions of the parties by examining the plain language of the agreement and the contract as a whole. The responsibility term is unambiguous: it seeks to hold the owner responsible for any voice purchases made on his or her Alexa device. The owner signs up for

¹⁰⁹ In an article published in August 2018, Alaimo noted that 2% of consumers who own Alexa devices make purchases on them. See Dan Alaimo, *The Information: Only 2% of Alexa Users Reportedly Purchase off the Devices*, RETAIL DIVE (Aug. 8, 2018), <https://www.retaildive.com/news/the-information-only-2-of-alexa-users-reportedly-purchase-off-the-devices/529608/>. Scaling for the 100 million units now sold worldwide, this equates to approximately 2 million consumers.

¹¹⁰ RESTATEMENT (SECOND) OF CONTS. § 154 (AM. L. INST. 1981).

¹¹¹ Alexa Conditions of Use, *supra* note 26.

¹¹² RESTATEMENT (SECOND) OF CONTS. § 154 cmt. b (AM. L. INST. 1981).

this at the point of creating a linked Amazon account. Reading this term on its face plainly deems the Alexa owner responsible, even in the event that a relative, friend, pet, or burglar is the one who makes the disputed purchase.

In any event, Amazon would surely argue in the alternative that the court should allocate responsibility to the consumer under section 154(c). Consumers are ultimately responsible for the possessions in their homes. Just as we impute liability for the actions of aggressive pets that injure others to their human owners,¹¹³ so too should the owners of smart devices be held accountable for the actions of their smart devices, particularly where the owner has equipped the device to process voice purchases from *anyone* who can communicate with it. The Alexa owners have numerous security options at their disposal and must be at least partly to blame for not utilizing any of them. For one, they can take advantage of the setting which only authorizes voice purchases when the unique numerical confirmation code is uttered.¹¹⁴ Of course, this measure is rendered futile if a third party hears the code, and so the other feasible option is to deactivate voice purchasing capability when they are not able to supervise the device.¹¹⁵ If consumers willingly leave voice purchasing on when the device is unsupervised, they must be taken to accept the potential consequences.

The Australian courts have over time developed a complex body of principle relevant to unilateral mistakes which differentiates between cases where the parties deal with one another face-to-face compared to those where they do so at a distance. Given the nature of Alexa and how it works to process purchases remotely using internet connectivity, the relevant cases are those addressing contracts formed at a distance. *Cundy* (mentioned earlier) is a foundational case on point. This case has been approved by American courts and

¹¹³ At the time of writing, 36 U.S. states have legislation allocating liability for dog attacks to the dog's owners. Rebecca F. Wisch & Diamon Conley, *Table of Dog Bite Strict Liability Statutes*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/topic/table-dog-bite-strict-liability-statutes#:~:text=Summary%3A%20Approximately%2036%20states%20have,and%20exceptions%20under%20the%20law> (last visited Sept. 8, 2020). All states and territories in Australia have statutes or by-laws doing the same. *Domestic Animals Act 2000* (ACT); *Companion Animals Act 1998* (NSW); *Animal Management (Cats and Dogs) Act 2008* (Qld); *Dog and Cat Management Act 1995* (SA); *Dog Control Act 2000* (Tas); *Domestic Animals Act 1994* (Vic); *Dog Act 1976* (WA). In the Northern Territory, local by-laws in each council district regulate animal attacks.

¹¹⁴ Require a Voice Code for Purchases with Alexa, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GAA2RYUEDNT5ZSNK> (last visited Sept. 8, 2020).

¹¹⁵ Some rival voice-based virtual assistants on the market, such as Google Home, offer individual voice recognition capability. Link Your Voice to Your Devices with Voice Match, GOOGLE ASSISTANT HELP, <https://support.google.com/assistant/answer/9071681?co=GENIE.Platform%3DAndroid&hl=en> (last visited Sept. 8, 2020). However, as Rocco the parrot has aptly demonstrated, even this measure will not protect the device owner where the third-party purchaser can capably imitate the owner's voice with sufficient precision to trick Alexa.

applied against the backdrop of the Restatement (Second) of Contracts.¹¹⁶ Although Australia has no such Restatement, the basic question in situations of unilateral mistake is the same: was the mistake so material or fundamental to the transaction that it cannot be said that the parties had reached mutual consensus?¹¹⁷

For the reasons previously discussed, it is at least arguable that the Australian courts would be sympathetic to an Alexa owner who has been deceived by an unauthorized third party. This sort of irregularity goes to the very heart of the transaction, as it did in both *Cundy* and *Shogun Finance*. The fact that the owner of the Alexa device—the official “party” to the contract of sale with Amazon—has no knowledge of the transaction he has been forced to enter against his will must surely be “material” in the eyes of a reasonably impartial court.

One of the key difficulties for an aggrieved Alexa owner to overcome under Australian law is the fact many of the influential English cases that the courts apply tend to involve situations where the purchaser *consciously* entered into the contract of sale but was misled as to the seller’s identity. This was the situation in *Cundy*, *Shogun Finance*, and the related case of *Boulton v. Jones*,¹¹⁸ where a customer mistakenly sent an order for goods addressed personally to a trusted seller who had recently sold his business and which was fulfilled by the new vendor.¹¹⁹ In the bizarre case of Alexa being misused by Rocco the parrot or other unauthorized third parties, the Alexa owner (from whose account payment is made) is the actual party to the agreement with Amazon without knowing it. It is not a case of that owner being mistaken as to who is selling to them, but rather a party representing to Amazon that it is the owner of the relevant Alexa device or an authorized third party. The “mistake” manifests in the fact the transaction was never between the account holder and Amazon—the true parties to any contract of sale facilitated by Alexa—but rather between a rogue and Amazon. The materiality of this mistake lies in the fact that there is a fundamental misunderstanding as to who is contracting, and therefore, no actual meeting of the minds between buyer and seller has occurred.

¹¹⁶ See, e.g., *Fay v. Hill*, 249 F. 415 (8th Cir. 1918); *Fifer v. Clearfield & Cambria Coal & Coke Co.*, 62 A. 1122 (Md. 1906); *Jorgensen Chevrolet Co. v. First Nat’l Bank*, 14 N.W.2d 618 (Minn. 1944).

¹¹⁷ See, e.g., *Salib v Gakas* [2010] NSWSCR (Eq) 505 (Austl.); *Porter v Latec Fin. (Qld) Pty. Ltd.* (1964) 111 CLR 177 (Austl.).

¹¹⁸ (1857) 2 H & N 564 (UK).

¹¹⁹ The purchaser was unaware that the previous vendor—their trusted seller—had sold his business, and that the order had been fulfilled instead by Boulton as the new vendor. *Id.* The Court of Exchequer held that the purchaser was not liable to pay for the goods under the contract of sale with Boulton due to a fundamental mistake as to identity. *Id.* The purchaser intended only to deal with the previous vendor as he had dealt with him previously and had a set-off upon which he had intended to rely. *Id.*

While the facts may be distinguishable, it is submitted that the interests of justice favor extension of the central premise of these cases to situations where the unilateral mistake as to identity arises from a rogue contracting on the Alexa owner's behalf. Amazon presumably does not intend to contract with criminals, mischievous pets, unauthorized minors, or other unapproved parties, just as Alexa owners do not intend to be forced into contracts of sale about which they have no knowledge whatsoever. There is no *consensus ad idem* where a rogue has used someone else's Alexa to make purchases. It is analogous to situations of credit card fraud, for which banks typically offer protective guarantees. Such a mistake is material and should, in appropriate cases—such as Marion Wischnewski's—offer relief for the aggrieved party.

A notable difference under Australian law (compared to American law) is that the effect of a unilateral mistake as to identity is to render the contract *void* and not voidable.¹²⁰ As such, if an Alexa owner were to successfully challenge an unauthorized purchase on the basis of unilateral mistake under Australian law, the contract would be unenforceable and the owner would not be liable to pay the purchase price of the goods in question. That being said, where such contract is merely voidable under American law, the aggrieved owner will likely elect to vitiate the agreement and thereby achieve the same result.

D. Unconscionability and Unfair Terms

If an Alexa owner unsuccessfully argues that a contract he or she has been forced into via a rogue's actions is voidable or void for mistake, or to dodge the application of the doctrine of agency, he or she might instead argue that the responsibility term or the transaction as a whole was unconscionable. A useful starting point once more is the Restatement (Second) of Contracts section 208 of which applies to "unconscionable contracts or terms." The provision reads:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.¹²¹

Unconscionability is a concept that derives from the courts of equity, which developed in England from around the 14th century and sought to alleviate the injustices caused by the rigid common law system that had evolved in the wake of the Norman Conquest of 1066.¹²² The doctrine has traditionally been

¹²⁰ *Porter v Latec Fin. (Qld) Pty. Ltd.* (1964) 111 CLR 177 (Austl.); *Roache v Australian Mercantile Land & Fin. Co. Ltd.* [1965] NSW 1015 (Austl.).

¹²¹ RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

¹²² T. F. Bathurst & Sarah Schwartz, *The History of Equity from Ancient Rome to the Judicature Acts*, 41 AUSTL. BAR REV. 204 (2016).

regarded as encompassing notions such as unfairness, dishonesty, and injustice and is one which seeks to invalidate bargains which affront any “sense of decency” and which no reasonable person would make.¹²³ As Corbin explains, cases in which the American courts have deemed a contract (or part thereof) to be unconscionable have typically involved “gross overall one-sidedness or gross one-sidedness of a term disclaiming a warranty, limiting damages, or granting procedural advantages.”¹²⁴

Might there be an argument that Amazon’s responsibility term is so unfair as to be regarded as unconscionable? Comment a to section 208 of the Restatement (Second) of Contracts notes that the determination as to whether a contract or particular term is unconscionable “is made in the light of its setting, purpose and effect.”¹²⁵ The comment goes further, stating that factors relevant to this assessment include “weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes” and also involves consideration of public policy.¹²⁶ The responsibility term is one of many in a standard form contract proffered by Amazon. The term specifically holds Alexa users responsible for *all activities* occurring under their account or password. The surrounding terms in the ACOU do not appear to provide for situations where an Alexa user has been the victim of reasonably unavoidable criminal activity or otherwise unauthorized activity. The same can be said of the ATOU.

The effect of the clause is to ensure that all purchases made via Alexa are deemed final, short of eligibility for returns under the Amazon Return Policy. According to the ACOU, device owners are expected to accept responsibility for “maintaining the confidentiality of [their] account and password and for restricting access to [their] account.”¹²⁷ This task is made difficult by the limited security options available to ensure only those parties with authority are permitted to make voice purchases on Alexa.

Cumulatively, it is arguable that the responsibility term—or perhaps even the ACOU generally—is unconscionable for failing to provide any form of relief to Alexa owners in situations where their devices have been “hijacked” and used without authorization. Many commercial contracts provide for legally frustrating events through *force majeure* clauses,¹²⁸ and it could be argued that criminal activity is an unforeseeable supervening event which radically affects

¹²³ *Hume v. United States*, 132 U.S. 406 (1889); *Gimbel Bros., Inc. v. Swift*, 62 Misc.2d 156 (N.Y. Civ. Ct. 1970). It is well established that equity does not enforce unconscionable bargains. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

¹²⁴ CALAMARI & PERILLO, *supra* note 61, at §§ 27.2–27.4, 29.4.

¹²⁵ RESTATEMENT (SECOND) OF CONTRS. § 208 cmt. a (AM. L. INST. 1981).

¹²⁶ *Id.*

¹²⁷ Alexa Conditions of Use, *supra* note 26.

¹²⁸ GIANCASPRO & LANGOS, *supra* note 23, at 331.

the obligations of the parties and therefore may serve to discharge the contract.¹²⁹ Of course there will be issues of proof, but where the unauthorized purchase can be verified (for example, by police report or sworn evidence), it is arguable that the Alexa owner should be excused. Enforcement of the agreement in such situations would strike as unjust and place all Alexa users at the mercy of Amazon. There is obviously a strong commercial interest in ensuring that the countless contracts of sale Amazon enters into with consumers on a daily basis are not each dragged into court every time purchasers allege they did not intend the sale to go ahead. However, it seems grossly unfair to hold consumers to contracts they have been unwittingly committed to by unauthorized third parties without their consent or knowledge. It is arguable there is no more unconscionable a bargain than this.

An Alexa owner in such situations would likely have an even stronger case under Australian law. Australia has a common law (equitable) doctrine of unconscionability and has also enshrined the same in federal legislation.¹³⁰ The same legislation also proscribes a form of "statutory" unconscionability¹³¹ and contains a specific set of provisions addressing unfair contract terms in standard form consumer or small business contracts.¹³² Assuming Australian law governed the agreement between Amazon and Alexa device owners, the latter would enjoy compelling prospects of successfully challenging enforcement of the responsibility term where an unauthorized party made purchases on their account.

An Alexa owner might first allege that the responsibility term or broader contract with Amazon are unconscionable under the common law (equitable) doctrine reflected in section 20 of the Australian Consumer Law.¹³³ However, this would be futile for two reasons. First, the doctrine requires both that the aggrieved party be under some "special disadvantage or disability" (such as illiteracy, infirmity of mind, etc.) and that the other party—Amazon—knew or should have been aware of the same and took unconscientious advantage of it.¹³⁴

¹²⁹ See RESTATEMENT (SECOND) OF CONTS. § 265 (AM. L. INST. 1981) ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."). Some Australian authorities, however, have considered the theft of ordered goods to be insufficient to frustrate a contract. See *NSW Leather Co. Pty. Ltd. v Vanguard Ins. Co.* (1991) 25 NSWLR 699 (Austl.). For a European example, see *Ministerio delle Finanze v Esercizio Magazzini Generali S.p.A* [1983] ECR 2951 (It.).

¹³⁰ *Competition and Consumer Act 2010* (Cth) sch 2, s 20 (Austl.). The Australian Consumer Law is contained in Schedule 2 to the Act.

¹³¹ *Id.* at s 21.

¹³² *Id.* at sch 2, pts 2–3.

¹³³ See *Competition and Consumer Act 2010* (Cth) sch 2, s 22 (Austl.).

¹³⁴ See *Com. Bank of Austl. Ltd. v Amadio* (1983) 151 CLR 447 (Austl.); *Blomley v Ryan* (1956) 99 CLR 362 (Austl.). Numerous decisions of the Australian High Court have confirmed that

Not only will it be statistically unlikely for an average consumer to be suffering from a sufficiently “special” disadvantage or disability,¹³⁵ there is no logical way for Amazon to know of this condition nor any suggestion it is conscientiously taking advantage of the same. Secondly, section 20 does not apply to conduct captured by section 21 of the Australian Consumer Law,¹³⁶ which may be more viable as will now be explained.

Section 21 prohibits unconscionable conduct in trade or commerce in connection with the supply or acquisition of goods or services to or from a person.¹³⁷ This provision would be a more natural fit where a person made a purchase from Amazon via Alexa. Unlike section 20, section 21 is *not* limited to the meaning of unconscionable conduct as understood at common law, meaning there is no need to prove special disability or disadvantage, or exploitation of the same by Amazon.¹³⁸ Instead, unconscionability is determined by reference to the list of factors contained in section 22.¹³⁹ Some of the relevant factors include: the relative strengths of the bargaining positions of the supplier and the customer,¹⁴⁰ the terms and conditions of the contract (and the conduct of the parties in complying with them),¹⁴¹ whether the customer was required to comply with terms not reasonably necessary to protect the legitimate interests of the supplier,¹⁴² and the extent to which the supplier and the customer acted in good faith.¹⁴³

It goes without saying that Alexa users who have been deceived by third parties into making purchases they knew nothing about are clearly in a weaker bargaining position when compared to Amazon. Amazon is a \$1 trillion company whose contracts with consumers are not negotiable.¹⁴⁴ Being an online company, there is no physical premises for consumers to take their grievances.¹⁴⁵ Instead,

Section 20 of the Australian Consumer Law captures only those categories of unconscionable conduct established in the unwritten law. See GIANCASPRO & LANGOS, *supra* note 23, at 278–81.

¹³⁵ It is not sufficient for the innocent party to merely have a disability or disadvantage; the disability or disadvantage must be *special* in that it “seriously affects the ability of the innocent party to make a judgement as to his own best interest.” *Com. Bank of Austl. Ltd. v Amadio* (1983) 151 CLR 447, 462 (Austl.).

¹³⁶ *Competition and Consumer Act 2010* (Cth) sch 2, s 20(2) (Austl.).

¹³⁷ *Id.* at s 21.

¹³⁸ *Id.*

¹³⁹ *See id.* at s 22.

¹⁴⁰ *Id.* at s 22(1)(a).

¹⁴¹ *Id.* at s 22(1)(j).

¹⁴² *Id.* at s 22(1)(b).

¹⁴³ *Id.* at s 22(1)(l).

¹⁴⁴ Brad Tuttle, *Amazon Just Became the Second Company To Reach \$1 Trillion*, MONEY (Sept. 4, 2018), <http://money.com/money/5386380/amazon-1-trillion-jeff-bezos-net-worth/>.

¹⁴⁵ Though there is a physical headquarters in Seattle, Washington. *Amazon Headquarters Tours*, AMAZON, <https://www.aboutamazon.com/amazon-hq-tours> (last visited Sept. 8, 2020).

the consumer's options are limited either to returns under the company's Return Policy or to pleading the company to exercise its "sole discretion" under the ACOU to cancel any unauthorized orders made.¹⁴⁶ As discussed earlier, Amazon clearly has a legitimate business interest in ensuring its many contracts are concluded efficiently and that each one is not contested whenever an unauthorized purchase is made via Alexa. However, the responsibility term or the broader ACOU could still protect this legitimate interest by requiring firm and proper evidence of illegitimate activity on the affected consumer's account in order for transactions made via Alexa to be invalidated. It would surely be contrary to any notions of "good faith" to enforce a contract of sale where Alexa has been used without authority by a relative, friend, pet, or criminal.

One other option under Australian law would be to argue that the responsibility term contained within the ACOU is "unfair" under section 23 of the Australian Consumer Law,¹⁴⁷ in which case it would be void. This law applies to "consumer contracts," meaning one for a supply of goods or services (or sale or grant of an interest in land) to an individual "whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption."¹⁴⁸ As such, most contracts entered into by Alexa users with Amazon would be classified as consumer contracts under this law. The law applies only to "standard form contracts," described earlier¹⁴⁹ as being those which are typically pre-prepared by one of the parties to the agreement and not negotiable, save perhaps for minor details such as price payable. Section 27(2) of the Australian Consumer Law provides criteria for determining whether a contract is standard form or not, such as whether one of the parties has all or most of the bargaining power relating to the transaction,¹⁵⁰ whether the contract was prepared by one party prior to any discussion with the other party,¹⁵¹ and whether the terms (other than those which define the subject matter, are legally mandatory, or prescribe the upfront price payable)¹⁵² were negotiable or not.¹⁵³ There is no doubt the agreement entered into between Alexa users and Amazon would be classified as a standard form contract.

¹⁴⁶ Alexa Conditions of Use, *supra* note 26.

¹⁴⁷ See *Competition and Consumer Act 2010* (Cth) sch 2, s 23 (Austl.).

¹⁴⁸ *Id.* at s 23(3). These unfair contract terms provisions also apply to "small business contracts," which are those for a supply of goods or services (or sale or grant of an interest in land) involving at least one party who is a small business employing fewer than 20 people and an upfront price payable of less than \$300,000 (or \$1 million if the contract has a duration of more than 12 months). See *id.* at s 23(4).

¹⁴⁹ See GIANCASPRO & LANGOS, *supra* note 23.

¹⁵⁰ *Competition and Consumer Act 2010* (Cth) sch 2, s 27(2)(a) (Austl.).

¹⁵¹ *Id.* at s 27(2)(b).

¹⁵² *Id.* at s 26(1).

¹⁵³ *Id.* at ss 27(2)(c)–(d).

The final question, then, is whether the responsibility term might actually be regarded as “unfair” under this law. Pursuant to section 24(1) of the Australian Consumer Law,

[a] term of a consumer contract or small business contract is *unfair* if:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.¹⁵⁴

The responsibility term can be seen as causing a significant imbalance in the rights and obligations under the agreement between Amazon and the Alexa user. Whereas Amazon enjoys full discretion to approve a return under its Return Policy¹⁵⁵ (or otherwise at its sole discretion),¹⁵⁶ Alexa users are responsible for any purchases made on their accounts, whether by them or a third party including, presumably, one who lacks any authority to do so. The case law tells us that where a term is “so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in [its] favour,” this can give rise to a significant imbalance within the meaning of unfair contract terms law.¹⁵⁷ Requiring consumers to absorb responsibility for purchases made on their account which were unavoidable and unintended clearly tilts the scales in favor of Amazon.

For the reasons described earlier, it is also arguable that Amazon could protect its legitimate interests in other ways, such as deeming all contracts of sale final *except* where firm and proper evidence of illegitimate activity on the affected consumer’s account was provided. This would eliminate cases where Alexa users were merely careless in giving a third party authority to use their device and subsequently committed to purchases beyond what they reasonably anticipated. Amazon’s greatest interest arguably lies in maintaining and growing a loyal clientele, an objective that would be damaged by arbitrary and rigid adherence to unfavorable terms of its service contracts.

¹⁵⁴ *Id.* at s 24(1).

¹⁵⁵ Information About Amazon’s Returns Policies, *supra* note 37.

¹⁵⁶ *See id.*

¹⁵⁷ *Dir. Gen. of Fair Trading v First Nat’l Bank PLC* [2002] 1 AC 481, 494 (UK). This case addressed The Unfair Terms in Consumer Contracts Regulations SI 1999/2083 (UK), largely upon which the Australian unfair contract terms law was based. *See also Dir. of Consumer Affs. Victoria v Trainstation Health Clubs Pty. Ltd.* [2008] VCAT 2092 (Austl.); *Dir. of Consumer Affs. v AAPT Ltd.* [2006] VCAT 1493 (Austl.).

Finally, the detriment that arises from Amazon's reliance upon the responsibility term arises most clearly in situations where an unauthorized third party makes a purchase on a consumer's Alexa device. Given that owners will be deemed responsible for illegitimate activity on their account, they face the prospect of potentially substantial financial liability. In Rocco the parrot's case, he racked up a considerable bill for his owner, who was fortunate enough to see and cancel the orders in time. She was fortunate, but others may not be so lucky. An innocent and playful child, or a deviant criminal, could easily manipulate Alexa and place orders worth hundreds or even thousands of dollars, and the transactions could go unnoticed or even be hidden from the account holder.

On the basis of the foregoing analysis, it is at least strongly plausible that if the scenario described occurred and contracts formed with Amazon via Alexa were governed by Australian law, a consumer would have a mildly strong basis to argue that the responsibility term is "unfair" within the meaning of the Australian Consumer Law, or that its enforcement would be unconscionable under section 21 of the same.

IV. CONCLUSION

Rocco the parrot's seemingly harmless love affair with Alexa did more than provide an amusing story for the press: it generated a potentially significant legal question that is bound to confront the courts in the near future. As the number of voice-activated virtual assistants on the market and in peoples' homes continues to grow exponentially, so too does the likelihood that a device will be misused by an unauthorized party to the detriment of its owner. It is then we must ask who should bear responsibility for the purchases made. If the owner in these situations has legal recourse along the lines hypothesized in this Article, then any number of contracts for the sale of goods purchased via virtual assistants could be subject to challenge. The economic consequences for Amazon and other retailers whose virtual assistants are equipped with voice purchasing capability could be far-reaching.

Until the issue is addressed by courts, there is no sure way of knowing how the ACOU will be interpreted or how other doctrines may affect its application, but it is worthwhile to hypothesize. While issues of capacity will arise in the case of animals, minors may still forge valid contracts for certain necessities. No such issues arise in the case of other unauthorized adults, including criminals. Amazon would likely lean upon the agency doctrine to deem the account holder (and Alexa owner) responsible for the actions of these parties, however the latter might have a relatively strong case to argue that the contracts are unenforceable due to mistake or for the fact they are unconscionable. One thing is for sure, it is perhaps safest to shop personally in store or online than trust a virtual assistant.

Alexa, spread the word.

