VIRTUAL CONTRACTS: DON'T POINT AND CLICK YOUR WAY INTO A LAWSUIT

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From the October '97 issue of *WWWiz Magazine*

With the advent of the Web as the new commercial medium, merchants and consumers alike should be aware of some basic principles of contract formation and how they apply to Web transactions. For the most part, the tried-and-true rules of contract continue to hold up in a purely electronic exchange between parties to an agreement. The law does, however, draw the line at certain kinds of transactions which must be manifested in signed hard-copy. The electronic marketplace also calls for a few practical precautions to assure that "virtual contracts" are enforceable in a court of law.

Basic Principles of Contract Formation

Generally, an enforceable contract is formed when a party unequivocally communicates its intent to be bound by the terms set out in the other party's offer. Although this principle seems simple enough, whether or not a party really intended to be bound by the terms of an offer has been the subject of litigation in contract cases for centuries, and is sure to arise again in virtual business deals. First, the terms of the offer must be complete and clear enough so that the accepting party, or "offeree," understands the rights and obligations it is accepting. In the area of commerce, this means that the offer must contain at least the subject matter of the agreement, price, and time and manner for performance. Issues frequently arise when the offeree attempts to accept an offer by changing the terms. Technically, if an offeree states, "I accept your offer except for..." then there is no deal. The acceptance must be a "mirror image" of the offer. The offeree's alteration of the terms constitutes a counteroffer, and now the ball is in the court of the party who originated the offer in the first place to accept what is deemed a whole new offer. Only when one party has unequivocally manifested its assent to be bound by the exact terms as set out in the original offer is a binding contract formed. A few other rules come into play that may arise in virtual contracts on the Web.

For example, the Statute of Frauds is a relatively old rule of common law that requires a signed writing for contracts: (1) for sale of real property; (2) that cannot be performed within one year's time; and (3) for the sale of goods valued in excess of $500. The "Mailbox Rule" may also come into play in the exchanges of offers, counteroffers, and acceptances in an email environment. The Mailbox Rule is another rule of common law which states that an offer is accepted upon dispatch or placement in the mailbox (postal), regardless of whether or not the offering party has actually received notification of the acceptance. In other words, the offering party may not withdraw its offer if the offeree has already sent notification of its acceptance of the agreement, even if the offering party is not aware of that acceptance.

Old Rules Applied to Point-and-Click and Email Deals

Typically, point-and-click agreements on the Web call for an offeree to manifest his or her unequivocal acceptance of the terms of the agreement, as stated, simply by pointing and clicking on an icon labeled "YES," or "AGREED." Even at this early stage of virtual contracting, potential legal issues arise. If, for example, the user accidentally clicks on the wrong icon, the offering party would naturally deem this an acceptance of the agreement and proceed to perform its terms. Merchants should therefore require their online customers to confirm their acceptance of the agreement to avoid the defense of "accidental acceptance." A customer may, for example, be asked to click on a second icon or to type in certain information as part of the acceptance process. Of course, the agreement should be clear and complete, and contain standard boilerplate terms and conditions whether online or in hard copy. If a user fails to exercise his or her right, indeed duty, to read the terms of the agreement before accepting it, the customer is nevertheless bound by its terms under rules of common law.

With regard to email exchanges, the parties should keep track of the final exchanges in the negotiation process to ensure that they understand each other's intent. It is not unusual for parties to engage in protracted negotiations and exchanges before finally arriving at a common ground. Applying the rules of contract formation, however, only the final offer that is unequivocally accepted will create the binding agreement. Accordingly, unless the "last shot" email transmission by the offering party is complete in all of the terms discussed beforehand, a dispute may arise as to just which terms were accepted by the offeree.

Furthermore, a court might be required to divine a single agreement by referring to several or many email transmissions. If a court finds that there was no communication of assent to a common set of terms, it will rule that no contract was formed. If, on the other hand, the court's cut-and-paste exercise reveals a so-called "meeting of the minds" as to material terms, then the court will recognize and enforce the contract. When one considers the legal inquiries necessary in reviewing virtual contracts, either by point-and-click or by email, the necessity of keeping complete and accurate electronic records becomes obvious.

Given the fact that merchants and customers alike must resort to the courts for enforcement of their agreements, the ability to generate hard copy in virtual deals is paramount. A litigant will have to prove the exchange of communications regardless of whether a contract is sought to be enforced, interpreted or avoided. While hard copy documentation is not absolutely necessary, a party's reliance solely on oral testimony as to communications and conduct will create evidentiary problems, and surely be rebutted in an adversarial environment. Anyone doing business on the Web should therefore maintain electronic records of point-and-click and email communications that can be converted to hard copy. The use of hard-copy evidence of electronic dealing will require testimony of the authenticity of data in terms of date of entry, manner of entry and method of retrieval. Hard copy generated from email exchanges will carry more weight if the data is stored by a third party and contains electronic safeguards against alteration or deletion of messages.

A Checklist for Virtual Merchants on the Web

Based on the foregoing, anyone doing business on the Web should consider the following safeguards for assuring the enforceability of commercial agreements:

1. Ensure that all terms and conditions are displayed in clear, simple and straightforward language that can be understood by the consumer public.

2. Use page-by-page prompts requiring the customer to scroll through the terms and conditions by clicking on an icon at the bottom of each page.

3. State as a term of the agreement that the online display is the sole, exclusive and final agreement between the parties.

4. Offer the customer an opportunity to telephone a designated representative to discuss any terms or conditions that the customer does not understand.

5. Include a written statement or "warranty" that the person indicating acceptance has the authority to do so on behalf of his or her institution or company. Consider issuing identification codes to persons at the institution who are authorized to enter into agreements, or purchase goods or services on an ongoing basis.

6. Establish systems for storing complete and accurate records of all agreements and pre-contract negotiations, assuming the necessity of generating hard-copy versions at a later date.

7. In agreements involving transactions in goods in excess of $500, or agreements that cannot be performed within one year, obtain a fax-back signature.

8. Enter into a conventional hard-copy master contracting agreement with customers or vendors with whom you will be doing business on a long-term or repetitive basis.

The Web is no doubt the marketplace of the twenty-first century. As the free market goes virtual, however, it must continue to conform to fundamental principles of contract law and the Law Merchant. By implementing a few procedural safeguards which are mostly intuitive to experienced business people, the law will accommodate the future. It will also, no doubt, adopt its own new principles and procedures as virtual contracting issues find their way through the courts.

Legal Paradoxes Loom

Notwithstanding the versatility of the common law to adapt with time, some curious problems are bound to arise in the not-too-distant future. For example, the Statute of Frauds mentioned above requires certain transactions to be documented in a signed "writing." But what is a "writing" under the law? Does this mean hard copy? Will the courts really enforce the Statute of Frauds strictly enough to avoid liability under electronic contracts as the Internet proliferates? Until recently, the signature requirement would have seemed to be an irreconcilable aspect of the Statute of Frauds. However, now that the Cross Pen Computing Group has developed handwriting software and peripherals as an alternative to the keyboard input, the signature requirement of the Statute of Frauds may no longer be an issue.

And what about the three-day right of rescission afforded consumers in certain transactions in California? For example, home solicitation contracts may be rescinded within three days of formation of the contract. These agreements are the result of solicitations by vendors at the consumer's home. The consumer must be provided with a hard-copy form that simply requires his or her signature and mailing within the three day period to void the contract. This "change of mind" provision may or may not apply to solicitations on the Internet if received on a PC at home. But perhaps they should. Likewise, seminar sales solicitations also allow a three-day right of rescission under different provisions of the California Civil Code.

And what about the Mailbox Rule? If contracts are accepted upon dispatch, does the sending of email cut off the right of an offeror to withdraw his or her offer notwithstanding the fact that the emailed acceptance has not yet been received? And what if the offeror sends his or her withdrawal of the offer before the acceptance is emailed, but the withdrawal is not received until after dispatch of the acceptance? Issues such as these must be addressed within the context of a technology that causes email delivery to be unpredictable and delivery records to be easily manipulated.

The solution to these issues may be dealt with on a case-by-case basis as the specific fact patterns surface in the courts. This writer suggests, however, that the more efficient approach would be legislative committee research and formulation of a set of commercial statutes that will accommodate virtual contracts before litigation proliferates. Legislatures need not be visionaries to anticipate and resolve the inadequacy of present-day commercial law. The "Internet Commercial Code" would facilitate the free flow of commerce in the new medium and avoid the unnecessary burden of what is now foreseeable litigation. Indeed, an organization called the National Conference of Commissioners of Uniform State Laws is already working on a revised Uniform Commercial Code that will accommodate the new legal issues created by virtual contracts. The full text of the new proposed Internet commerce law (http://www.law.upenn.edu/library/ulc/ucc2/ucc2b597.htm) may be found online. Ralph Nader's objections to the shrink-wrap provisions of the proposed law can be found in his letter (http://www.circumtech.com/news/ralph.html) to Bill Gates.

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