Doing Business on the Web: An Idea Whose Time Has Come

by Marc S. Friedman and Jonathan Bick

The Internet and the World Wide Web did not garner the attention of business until they could facilitate commerce. Like its electronic communication predecessors — the telegraph, telephone, and television — the Internet had limited commercial value without its own contracting, payment methodology and rules. Broadly speaking, “electronic commerce” or “e-commerce” is the area of law concerned with Internet contracting and payment techniques.

Businesses initially saw the Internet as an exciting place, but there was a large degree of justified skepticism with respect to electronic commerce. Later on, Internet shopping was seen as primarily an interest-building tool. The thought was that the Internet would be informational rather than sales oriented. Soon, credit card purchases on the Internet became a round-the-clock occurrence. Now, First Data Merchants Services is teaming up with IBM to build online storefronts through a package of e-commerce services. These services will enable vendors to accept payments over the Internet, process credit card transactions, coordinate shipping, calculate sales tax and handle all aspects of their transactions. Even traditional “hard copy” businesses like Barnes & Noble are moving certain aspects of their business on line.

The increase in e-commerce is astonishing. U.S. officials estimate that online retail spending could reach $30 billion by next year. According to a Louis Harris & Associates Inc. poll, 24 percent of consumers who go online actually make purchases.

When electronic commerce was introduced, it was compared to the lawless “Wild West.” In fact, the Los Angeles Police Department’s Computer Crime Squad had a sign in its office warning “There is No Law West of the Modem.” This may be changing. In a National White-Collar Crime Center survey of American households, almost 40 percent of respondents said they had been defrauded in some way in the last year. However, of those who complained, less than two percent said they had lost money through Internet credit card fraud. As e-commerce advances, it is likely that more attention will be paid to the security of Internet transaction, thereby reducing the chances of fraud, and that consumers will be more confident in shopping on the Internet.

E-commerce transactions and regular commercial transactions have at least two things in common. First, they both should be approached by lawyers in the same careful, methodical manner. Second, disclosure plays the same important role in both types of commercial transactions.

While it is nearly impossible for most attorneys to have a comprehensive knowledge of all the laws related to electronic commerce, the first step, as a rule of thumb, is to follow the traditional commercial laws. The Uniform Commercial Code (UCC), state consumer protection legislation, financial service statutes, and the laws on data and intellectual property protection will most likely govern your client’s e-commerce activities.
Like its electronic communication predecessors—the telegraph, telephone, and television—the Internet had limited commercial value without its own contracting, payment methodology and rules.

Electronic commerce results in novel disputes arising from the uniqueness of the Internet. Usually such novel disputes arise in two ways. The first way revolves around a feature of the Internet that has no prior precedent. In such a case, the legal problems frequently are so new that there are no tested answers. The other way revolves around a characteristic of the Internet that is common to other technologies, such as the ability to send low-cost or no-cost messages, but until now the scale of the misuse of that feature has never been a factor in the legal process. In both cases, a legal basis may exist for arguing that no contract formation had occurred. For example, contract formation in e-commerce may be conducted either with or without human intervention. In both cases, a legal basis may exist for arguing that no contract formation had occurred. For example, contract formation in e-commerce has been questioned in courts that a failure had occurred with respect to signatures and/or writing for the purposes of satisfying various statutes of frauds. The Federal Electronic Funds Transfer Act (EFTA) has also been invoked in order to attack an e-commerce contract.

As noted above, in addition to novel legal questions being raised due to the uniqueness of the Internet, other characteristics of the Internet have lead to other legal challenges. For example, the Internet can send messages like the telegraph. However, the Internet can send messages much faster and cheaper than the telegraph. While the law is settled regarding contracts created by telegraph, it is wholly unsettled in the area of contract formation on the Internet due to its huge scale.

To be more specific, the Internet's huge scale is three-dimensional. First, there is a multitude of different manifestations of e-offers. According to Restatement (Second) of Contracts Section 24, no specific form of communication of an offer is necessary to achieve contract formation if the offeror has manifested a willingness to enter into a bargain. Thus, the form of an electronic commerce offer may be an electronic mail message, a posted tile, the value in an electronic data interchange transaction, a "click acceptance" or any one of hundreds of new messaging transactions.

Second, the number of ways that an e-offer can be accepted is enormous. According to Restatement (Second) of Contracts Section 29, the offeror has the power of determining the acceptance. Like the number of potential forms of an e-offer, the number of potential forms of an e-acceptance is extremely large.

Third, the physical size of the Internet is vast. Both from a user and an equipment standpoint. From the perspective of contact formation, this results in a large number of instances of failure to satisfy the formation formalities.

Both the Internet and the telegraph may be used to form contracts. Contract formation legal principles traditionally hold a contract to be unenforceable until certain formalities are satisfied. Even if a contract made
on the Internet meets these formalities, that contract may be too expensive to enforce.

To be specific, in the context of the Internet, an offer is clearly made by the posting or sending of an electronic communication. Acceptance is clearly made by returning an electronic communication in the form of a message or a "click." However, how can you verify the identity of the purchaser? The cost of determining who sent an Internet message and the cost of determining that he or she has received and agreed to the contractual documentation, including any limitation of liability clauses, may be too high to warrant enforcement of the electronic contract.

A famous New Yorker cartoon showed two dogs in front of a computer screen. The description read "no one knows you're a dog when you are on the Internet." In short, because of the Internet's dihazard of disguising the identity of its users, while the legal principles of electronic contract formation may be clear, the cost of resolving the evidentiary issue of identity, which had never been an expensive task, may make it impractical to try to enforce the contract.

The serious and complex range of issues arising in e-commerce cannot be adequately treated in a short article. Indeed, it is difficult to grapple with this subject because new disputes and thorny issues seem to arise weekly. Despite the potential legal risks in these uncharted waters, most firms nevertheless are now doing business or planning to do business on the Net. Given the existing business environment, the real question is whether a business can afford not to be online? Through the assistance of competent counsel, most of the legal risk's associated with electronic commerce can be identified and appropriate measures taken to minimize a party's risks.

Endnotes

1. The Baltimore Sun, May 20, 1999 page C3 report a Harris poll that found that about 42 percent of American use the Web only to get information about products and services.

2. Sun-Sentinel, May 20, 1999, Pg. 3D, BUSINESS TOPICS


5. See the Uniform Commercial Code Section 2-201(1).


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