

Emerging Trends in CyberLaw: Electronic Signatures, Click Agreements and Jurisdictional Pitfalls

Presented by

Christian J. Henrich, Esq.

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Introduction

- Subjects to be Covered
 - Electronic Signatures
 - Click Agreements
 - Jurisdictional Issues
- Summary - It's still the Wild West but at least there's a Marshal in town . . .

Introduction

- A Few Caveats
 - “What I’m not saying . . .”
- For the Luddites, consider . . .
 - Costs
 - Self protection
 - Industry norms

Electronic Signatures

- Current State of the Law
 - NY Electronic Signatures and Records Act (ESRA)
 - Federal: Electronic Signatures in Global and National Commerce Act (E-SIGN)
 - NY Office for Technology
(www.irm.state.ny.us/index.htm)
 - A modest amount of case law

Electronic Signatures

- Definition: Electronic Signature
 - “an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record”
- Definition: Electronic Record
 - “information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being produced in forms perceptible by human senses”

Electronic Signatures

- Paradigmatic Examples
 - Software Download
 - Master Service Agreement - Product Purchase
 - Real Estate Purchase Contract

Electronic Signatures

- First Paradigm: Software Download
 - Register.com v. Verio, Inc.

Electronic Signatures

- Second Paradigm: Master Service Agreement
- Product Purchase

Electronic Signatures

- Third Paradigm: Real Estate Purchase Contract
 - Rosenfeld v. Zerneck, Supreme Court NY Kings County
 - Statute of Frauds

Electronic Signatures

- A Few Types of E-Signatures
 - Click Through Agreement
 - Passwords or PINS
 - Digitized Signatures
 - Signature Dynamics
 - Shared Private Key
 - Public/Private Key
 - Biometrics

Electronic Signatures

- Signature Functionality
 - Intentionality through formality
 - Authentication
 - Statute of Frauds

Electronic Signatures

- What does this mean for your business?
 - Potentially expedite and automate the contracting process
 - Treat email like letterhead
 - Consider using standard disclaimers to avoid contracting
 - Litigation discovery will have additional targets of opportunity - the

Click Agreements

- Definition: Agreements entered into on a website that require the online user to take affirmative action such as clicking an “I Agree” button to indicate their assent to the terms of an online agreement.
- Distinguished from Web-wrap or Browse-wrap agreements

Click Agreements

- Paradigmatic Examples
 - Software Download
 - Service Contract
 - Banking or Financial Services Relationship

Click Agreements

- Current State of the Law
 - Click Agreements are generally enforceable
 - At least 6 decisions treating the issue comprehensively
 - Courts are drawing many analogies to shrink-wrap
 - Key is “intentionality”, “formality”, and “good procedures”
 - Contracts of Adhesion - courts are VERY alert to coercive terms

Click Agreements

- Basic Contract Primer
 - Offer: Meeting of the minds
 - Acceptance: Communicated and Unequivocal
 - Consideration: Legal Detriment
 - No Defenses
 - Capacity
 - Illegal
 - Coercive
 - Statute of Frauds

Click Agreements

- Legal Concerns
 - Meeting of the Minds/Intent to be Bound
 - Not negotiated
 - Was it read?
 - Potentially Fewer Formalities
 - Does Signator know he/she is in the process of contracting?
 - Legal Subject Matter
 - Legal Capacity
 - With whom are we contracting
 - Authority to Contract

Click Agreements

- Best Practices
 - Risk/Reward analysis
 - Representation that person executing has legal capacity
 - Subsequent communications “subject to _____ agreement”
 - Explain that a legal document is about to be executed and is binding
 - Advise person to obtain counsel
 - Contracting Room

Click Agreements

- Best Practices (cont.)
 - Make agreement easy to read - clear
 - Do not overreach - no unreasonable terms
 - Offer an “out” period
 - Confirm execution with subsequent communications
- You must balance benefits of procedures w/ cost (i.e., setup, time, administrative burden, “making it harder to say yes”, etc.)

Jurisdictional Issues

- Jurisdictional matters come in two flavors :
(i) Subject matter and (ii) Personal jurisdiction.
- In on-line transactions, personal jurisdiction is the principal concern.
- The “doing business test” or “traditional notions of fair play and substantial justice” (minimum contacts) is the test for whether a party is able to be subject to the laws

Jurisdictional Issues

- Paradigmatic Examples (Sliding Scale)
 - Passive websites
 - home page
 - advertising
 - Interactive middle ground
 - Information exchanges
 - email exchanges off of websites
 - solicitation of donations
 - Doing business - buying and/or selling
 - Download Software
 - Online Gambling

Jurisdictional Issues

- Passive Websites

- New York: generally will not result in personal jurisdiction; New York Courts have likened websites to advertising.
- BUT, Connecticut, District of Columbia, and Virginia have each held that personal jurisdiction can result from a passive website

Jurisdictional Issues

- Interactive Websites
 - Sliding Scale
 - Advertising with limited response to survey may not be enough
 - Transacting business (selling a product, etc.) is likely enough

Jurisdictional Issues

- Extraterritorial Application of Non-U.S. Law to U.S. Citizens
 - A Horror Story
 - It's still the Wild West
 - Only a few decisions of note
- Hit Box Software v. AOL
- Action Asia Publishing v. Taylor
- Licra v. Yahoo

Jurisdictional Issues

- Several International Protocols are now being debated by the Hague and the European Union
- Are you vulnerable to an “international cyber stick- up”?
- Are your personnel vulnerable to be detained or worse?

Jurisdictional Issues

- Review:
 - The countries in which you travel or do business
 - The types of products or service you offer - might they offend?
 - The amount of dollars exposed internationally at any one time
 - Make your best risk assessment - there are no clear cut answers

Conclusion



Questions & Answers



Christian J. Henrich

**298 Main Street
1000 Cathedral Place
Buffalo, New York 14202-4096**

chenrich@damonmorey.com

(716) 856-5500

#843032

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