CHAPTER

11 The Role of Contracts

CONTRACTS ARE USED TO FORM RELATIONSHIPS between parties for the sale of goods and services. People enter into contracts every day. Most of us never even think about the terms of everyday contracts or the rules governing those contracts. You enter into a contract when you buy a cup of coffee at a local coffeehouse. Many people buy things online. The terms of those purchases are governed by a contract.

This chapter discusses contract law. It's important to understand the basics of traditional contract law. You can apply those concepts to online contracts. This chapter also discusses special types of online contracts. Finally, this chapter introduces some emerging information security issues in contracting for services in cyberspace.

Chapter 11 Topics

This chapter covers the following topics and concepts:

- What general contract law principles are
- How to contract online
- What special types of contracts in cyberspace are
- How these contracts regulate behavior
- What some emerging contract law issues are
- What some case studies and examples are

Chapter 11 Goals

When you complete this chapter, you will be able to:

- Describe traditional contract law principles
- Describe the main differences between contracting on paper and contracting online
- Describe shrinkwrap, clickwrap, and browsewrap agreements
- Describe end user license agreements
- Discuss why it's important to include information security provisions in contracts

General Contracting Principles

Contracts are used everywhere. A **contract** is a promise between people to sell goods or perform services. Some basic contractual principles apply to all contracts, no matter what the underlying transaction is. People use contracts to state the rules of their relationship. Contracts determine how parties will act with one another. They recite the promises that each party makes to the other. They also help describe what happens if the parties can't complete their contract.

A mixture of common law and code law governs contract formation and performance. Many states have enacted statutes that govern certain types of contracts. One law that many states have in common is the law addressing the sale of goods. Laws governing the sale of goods are part of the Uniform Commercial Code (UCC). The National Conference of Commissioners on Uniform State Laws (NCCUSL) wrote the UCC. The NCCUSL works to develop uniform state laws. It has been in existence since 1892.[1] Each state appoints commissioners to work on draft model laws. It took the NCCUSL 10 years to write the UCC.

The UCC is a model law that states can adopt. Every state has adopted all or parts of the UCC. Sometimes states may amend portions of the UCC when they adopt it. Article 2 of the UCC addresses the sale of goods. A "good" is a movable object like a computer, desk, or chair. States have enacted similar laws governing the sale of goods so that commerce between the states can be predictable and uniform. This helps encourage even more commerce and business.

> **NOTE**
> When reviewing contract laws in a particular state, it's important to study both the state's code law and its common law.

The UCC doesn't cover every aspect of contract law. Many parts of contract law are left to each state's common law.[2]

> **NOTE**
> The American Law Institute and the NCCUSL worked together to create the Uniform Commercial Code.

Common law contracting principles also are similar among the states. The Restatement (Second) of the Law of Contracts summarizes the common law rules. The Restatement is a treatise on common law contract rules. The American Law Institute (ALI) prepares it.[3] The ALI is a group of highly distinguished judges, lawyers, and legal scholars. They review cases on a certain type of law. They compile the principles in those cases into a series of rules. These rules are not binding authority on a court the way statutes or court rulings are. However, they do offer guidance on what the common law is.

This chapter discusses the basic rules that are applicable to all contracts. It also discusses how those rules apply to online or electronic contracts. This chapter doesn't discuss the special rules that apply to certain types of contracts such as real estate or securities transactions.

The general contract law rules are derived from the common law. It's important to keep in mind that the common law traditionally applies to contracts for services, while the Uniform Commercial Code applies to contracts for goods.

Contract Form

A contract is a legally binding agreement. It's enforceable in court. Contracts can be either oral contracts or written contracts. Oral contracts are contracts that parties don't write down. Written contracts are contracts that may have been negotiated verbally, but are then written down. An oral contract is just as enforceable as a contract that is written down. However, there are a few reasons why written contracts are best. They include:

> **NOTE**
> A lawyer's favorite line, "an oral contract isn't worth the paper it's written on," is attributed to Samuel Goldwyn. Goldwyn was a Hollywood producer who rose to fame in the 1920s.

- **Proof**—It's easier for a person to prove the existence of a written contract.
- **Terms**—It's easier for a person to prove the terms of a written contract.
- **Precision**—A written contract requires the parties to be more precise in defining their relationship.
- **Clarity**—A written contract is more likely to have terms that clarify what happens if a contract relationship fails.

Some types of contracts must be written down and the contracting parties must sign them. Otherwise the contemplated transaction cannot take place. These contracts must be written down to prevent fraud between the contracting parties. The rule that requires these contracts to be written down is called the **Statute of Frauds**. For example, contracts for the sale of land must be written down. Some contracts for goods that are valued over $500 also must be written down.[4] The law requires these contracts be written down and signed to provide proof of their existence.

No matter what the form of a contract, all contracts must have certain elements in order to be enforceable. Contracts must be made between parties that have the legal ability to enter into them. Parties can contract only for transactions that are legal and that don't violate basic societal principles.

Finally, the parties to the contract must show that they intended to enter into a specific transaction with specific terms. This is called mutual assent. Mutual assent is shown through the "offer" and "acceptance" process.

Capacity to Contract

The law assumes that almost anyone can enter into a contract. There are few exceptions to this rule. People who enter into contracts must be able to understand that they are negotiating for a relationship. They also must be able to understand that each party will have rights and obligations because of the parties' agreement.

A court won't find a contract enforceable if a person wasn't able to understand the consequences of entering into the contract at the time that it was formed. A person who is unable to understand the consequences of entering into a contract lacks **contractual capacity**.

> **NOTE**
> A person who lacks "contractual capacity" isn't bound by his or her contracts. Courts won't enforce contracts against a person who lacks contractual capacity.

The law recognizes that the following classes of people may lack contractual capacity:

- Children under the age of 18
- People who are mentally incompetent
- People who are intoxicated by drugs or alcohol

In most cases, courts won't enforce contracts against people in these classes. There are special rules for contracts for necessary items such as medical care. People who lack contractual capacity can be held responsible for contracts that they enter into for necessary items. These rules are applied subjectively. Courts look at the facts and circumstances of each case. The legal representatives for both children and mentally incompetent people may approve certain types of contracts on behalf of the people that they represent.

The contractual capacity of an intoxicated person requires special review. To avoid a contract based on intoxication, a person must be so intoxicated that his or her mental capacity is limited. Courts will look at objective measures of intoxication and the actions of the party. An intoxicated person's deliberate actions, such as writing contract terms on a napkin, might be used to show that a valid contract existed.

> **NOTE**
> An intoxicated person can lack the capacity to contract through drug or alcohol use. A court can find contractual incapacity even if a person's drug or alcohol use was voluntary. It depends on the facts of the case.

A person who is trying to avoid a contract may claim that he or she lacked the capacity to enter into the contract. If a person raises this defense, then he or she bears the burden of proving the lack of contractual capacity.

Contract Legality

Some types of contracts simply aren't enforceable. This is because they are against public policy. Public policy refers to the principles that form the beliefs of a society. A contract that is contrary to those principles isn't enforceable.

> **NOTE**
> Courts won't enforce illegal contracts. An illegal contract is formed when parties try to enter into an agreement to commit a crime or other wrongdoing.

An example of an unenforceable contract is a contract for murder. It's against the law, and public policy, to murder another person. Therefore, a court will not enforce a contract where one party agreed to kill another party for a sum of money. This type of contract is called an illegal contract.

Contracts that aren't enforceable because of public policy reasons include:

> **NOTE**
> Contracts that are unfairly burdensome are called *unconscionable*. Unconscionable contracts aren't enforceable.

- Contracts that reduce commercial competition
- Contracts to commit a crime or other wrongdoing
- Contracts that are unfairly burdensome to one party
- Contracts that discriminate based on unchangeable characteristics such as race, color, religion, or disability

Form of Offer

> **NOTE**
> In contracts for the sale of goods, the offeror is called the seller. The offeree is the buyer.

An **offer** is an invitation to enter into a relationship or transaction of some kind.[5] The person who makes an offer is called an **offeror**. The offeror must put enough detail into the offer so that the other party knows what he or she is agreeing to. The other party is called an **offeree**.

The offer must contain enough terms and detail to describe the underlying transaction. In a bargain for the sale of goods, an offer typically would include terms describing goods, the quantity of goods available, and their price. That way, the offeree would know what and how much he or she gets for the contract price. These are material terms of the transaction. An offer has enough detail when the offeree knows what is part of the bargain.

To be valid, an offer must be communicated to the other person. For example, an offeror selling a couch must communicate the item to be sold, when the item is available, and the price for the item. They must communicate all of these terms in order to make a sufficient offer. An offer is valid as soon as the offeree receives it.

> **NOTE**
> Offers expire after a reasonable period of time. Courts determine what a reasonable period of time is by looking at the facts and circumstances surrounding a case.

An offeree must take action once an offer is communicated. An offer remains open until it's accepted, rejected, or retracted. An offer also can expire if too much time passes before an offeree accepts it. Sometimes offers say that they are valid only for a certain period. When that period ends, the offer expires. If an offer doesn't include a time period, then it expires after a reasonable period of time.

If an offeree doesn't agree to the terms of the offer, then it's rejected. An offeree also rejects an offer if he or she proposes terms that are different from the original offer. This is called a counteroffer. In this situation, the original offer is rejected when the counteroffer is proposed. The original offeror then has to decide whether to accept or reject the counteroffer. The parties can't go back to the original offer unless one of them proposes it again.[6]

An original offeror also can revoke an initial offer. This means that the offer is no longer available. If an offer is to be cancelled, this must be done before an offeree accepts it.

NOTE

Usually offers and counteroffers are made during the negotiation process. Verbal negotiations are very normal. Parties don't always write down the offers and counteroffers that they make during this process. Sometimes the only offers that are written down are the final, accepted offers. These end up becoming the contractual terms.

What Communications Constitute an Offer?

Courts frequently encounter questions about the types of communications that constitute an offer. The general rule is that a communication is considered an offer if an objective, reasonable person would consider it an offer.

Courts have long held that an advertisement can constitute a valid offer. The *Carlill v. Carbolic Smoke Ball Company* (1892) case is one of the most cited cases in this respect.[7] It's an old English contract law case. The Carbolic Smoke Ball was a flu and illness remedy. The manufacturer advertised in newspapers that it would pay Smoke Ball users a "reward" if they caught the flu after using the product.

The plaintiff in the case used the product and caught the flu. She asked the manufacturer to pay the "reward." The manufacturer declined to pay the reward. Eventually the case went to court. The English Court of Appeal held that the advertisement did indeed constitute a valid offer. It said that the plaintiff's actions in using the Carbolic Smoke Ball were a valid acceptance of that offer. The court found that the plaintiff acted reasonably in relying on the terms in the advertisement. The manufacturer needed to pay the reward that had been advertised.

Not all advertisements constitute a valid offer. In *Leonard v. Pepsico, Inc.* (S.D.N.Y. 1999), the plaintiff claimed that a Pepsi television advertisement showing that "Pepsi points" could be redeemed to claim a Harrier jet was a valid contractual offer.[8] The plaintiff claimed he accepted the offer when he submitted Pepsi points, cash, and a claim form for the jet to Pepsi. You can see the commercial at *http://www.youtube.com/watch?v=ZdackF2H7Qc*.

The court held that it was clear that Pepsi's "offer" of the Harrier Jet was a joke. It said that an objective, reasonable person wouldn't believe that the television advertisement constituted a real offer.

The best part about this case is the court's opinion. It's clear from the opinion that the judge had a sense of humor and dramatic flair. In discussing the commercial, the judge wrote, "Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny. Explaining why a joke is funny is a daunting task...." You can read the opinion at *http://www.kentlaw.edu/faculty/sharris/classes/contractsfall09/CourseDocs/2009Supplement.pdf*.

Form of Acceptance

An offer is accepted when the offeree agrees to the terms of the offeror's bargain. Traditionally, an acceptance had to have exactly the same words and terms as the original offer. This was called the **mirror image rule**. The mirror image rule meant that even a small change in terms or language between the offer and an acceptance served as a rejection of the original offer. The new terms in the acceptance then became a counteroffer. Parties had to be very careful in their negotiations to use the same terminology all the time to avoid the rule.

> **NOTE**
> A material term in a contract is one that is necessary to understanding the underlying transaction. Material terms include item, price, quantity, and time when the item is available for delivery.

Today there's less emphasis on the mirror image rule. An acceptance doesn't have to be identical to an offer to be enforceable. Under the more relaxed rule, an acceptance is viewed as a counteroffer only if the terms of the acceptance change a material term in the offer. If the acceptance doesn't alter material terms, then it's enforceable. The UCC follows the relaxed mirror image rule.[9]

The offeree must clearly communicate acceptance back to the offeror. This includes the use of words like "Yes" or "I accept." Acceptance of an offer also can be communicated through actions. One action that clearly communicates acceptance is paying money.

> **NOTE**
> An offeree's silence is not acceptance of a contract. An offeree usually has no legal obligation to respond to an offer.

The timing of the acceptance is an important consideration under the common law of contracts. When parties are in the presence of one another, acceptance is communicated instantaneously. A contract is formed when the offeror receives the acceptance. It's formed automatically because the parties are clear on the terms of the offer and of the acceptance because they're in each other's presence. There's no break in communication that might indicate that the offer has been revoked.[10]

> **NOTE**
> The mailbox rule says that an acceptance is valid as soon as an offeree sends it. It applies only to acceptances. It doesn't apply to situations where the offeror revokes his offer. A revoked offer is valid once the offeree actually receives it.

The situation is different for delayed communications. For those communications, courts developed the **mailbox rule**. The mailbox rule means that an offer is deemed accepted for legal purposes as soon as an offeree puts a written acceptance into the mailbox. The mailbox rule developed because there was often a time lag in postal communications that could cause the parties to doubt whether a contract existed. The relationship between the parties is clear if a contract forms upon mailing the acceptance. Under the mailbox rule, an acceptance is valid as soon as it's dispatched or sent.

If an offeror specifies that an offer must be accepted in a certain way, then the mailbox rule won't apply. The mailbox rule also doesn't apply if an offeror states that a contract doesn't form until he or she receives the acceptance. Today, many offers specifically require receipt of the acceptance before a contract is formed. They do this to avoid the application of the mailbox rule.

Meeting of the Minds

It's a basic rule of contract law that the parties to a contract must agree to its terms. To determine whether the parties really did make a contract, courts look to see if there's mutual agreement. A court studies the parties' words and actions. A court looks for evidence that both parties acted as if they had entered into a contract with one another.

> **NOTE**
> Mutual agreement is a contract law principle that is used to describe how the parties intend to act with respect to a contract. It's also called *mutual assent* or *meeting of the minds*. One of the case studies at the end of this chapter reviews mutual assent.

The idea that contracts form when there's a meeting of the minds is a long-standing feature of American law. The United States Supreme Court held in *Baltimore & Ohio Railroad Co. v. United States* (1923) that a contract can be inferred from the conduct of the parties.[11] This is true even if no written contract exists.

Meeting of the minds is evidenced through words, such as saying "I accept" in response to an offer. It also can be shown through the actions of a party. If the parties behave in a way that suggests there's a contract, then courts likely will enforce some sort of agreement.

Consideration

In forming a contract, the parties must bargain for something of value. This is called consideration. **Consideration** is an essential contract element. It means that the parties have bargained for, and are exchanging, something of value. Every contract must be supported by consideration. If there's no consideration, the contract is not enforceable.

> **NOTE**
> Consideration is an exchange of money, goods, or a promise to perform a certain action.

Consideration is reciprocal. It means that both parties are promising to do something. For example, the offeror offers to develop a Web page for $50. The offeree accepts the offer. The offeror's consideration is developing the Web page. The offeree's consideration is paying $50 for the developed Web page.

In the United States, courts don't usually review the value of the consideration that the parties exchange. They leave it to the parties to determine the sufficiency of their own deals. As long as a party has the capacity to contract, they are free to bargain and enter into contracts. This is true even if they enter into contracts with terms that seem unwise. Courts will only review whether the consideration was truly bargained for and whether there was a mutual exchange of promises.

Some transactions don't have consideration. If there's no consideration, there can be no contract. For example, gifts don't involve consideration. In addition, there's no consideration when value is given for a service that a person has already performed. This is called *prior consideration*. Prior consideration can't be used to form a new contract.

In addition, there's no consideration when a person is already required to do something because of a preexisting obligation. For instance, you can't enter into a contract with a firefighter to save your burning home because the firefighter already has an obligation to fight the fire.

Performance and Breach of Contract

A contract must be performed in order to be complete. This means that each party must fulfill his or her promises to one another. If the parties complete all of their promises to one another, then they're discharged from any further obligation. *Discharged* means that each party is freed from their contract requirements.

> **NOTE**
> In the law, a party is discharged when he or she no longer has any responsibilities or obligations toward the other party.

There are three general types of contractual performance:

- **Complete performance**—When a party performs all of his or her contract promises this is called **complete performance.**
- **Substantial performance**—A party's performance of all material contract promises is known as **substantial performance.** Nonperformance of some terms results in a minor breach of contract.
- **Incomplete performance**—A party's failure to perform his or her contract promises constitutes **incomplete performance.** This kind of nonperformance results in a material breach of contract.

If one party doesn't fulfill all of their promises, then the other party may sue them for breach of contract. The non-breaching party may sue for both a minor breach of contract and a material breach of contract. Once a lawsuit is filed, a court reviews the parties' contractual performance. It then determines what remedies are available to the non-breaching party.

In contract law, a court may order a variety of legal remedies. It awards remedies depending upon the facts of the case. The available legal remedies in a contract law case include money damages, specific performance, contract rescission, and contract reformation.

The most common type of remedy in a breach of contract dispute is an award of damages. *Damages* refers to money that the court awards to the party that didn't breach the contract. For the most part, damages are used to make a party whole. They try to compensate a party and put them in the same position as if the breach never occurred. Under the law, a non-breaching party has a duty to avoid or reduce the total damages caused by the other party's breach of contract.

> **NOTE**
> A **remedy** also is called *legal relief*. Courts grant remedies in order to enforce the rights of the parties that appear before it. A winning party is usually the party that receives a remedy.

> **NOTE**
> A **duty to mitigate** is the non-breaching party's obligation not to aggravate the harm caused by a breach. A person may not allow their damages to rise if it is possible to keep their damages low. They must take reasonable actions to limit the amount of harm caused by the breaching party.

There are four types of money damages that can be awarded in a contract case:

- **Compensatory damages**—A money award that compensates a non-breaching party for the other party's breach is called **compensatory damages**. These damages place the non-breaching party in the same position he or she would have been in had the contract been fully performed. This is the most common type of damages that courts award.
- **Consequential damages**—A money award that compensates the non-breaching party for foreseeable damages that arise from circumstances outside of the contract. The non-breaching party can't mitigate these **consequential damages**.
- **Liquidated damages**—A contractual grant of money damages. The parties predetermine the amount of damages prior to entering into the contract. The contract specifically states the amount of damages that a non-breaching party is entitled to. Courts will approve **liquidated damages** as long as they're reasonable.
- **Nominal damages**—A money award to the non-breaching party even though they haven't suffered any financial loss because of a breach of contract. An award of **nominal damages** recognizes that a breach occurred, but nothing more.

NOTE

Punitive damages are damages that punish a party for bad or wrongful behavior. While punitive damages are usually available in tort law, they're generally not allowed in breach of contract cases.

Another remedy that courts can award is **specific performance**. Specific performance is a legal term that refers to situations where a court orders a party to complete their contractual duties. Courts don't usually award specific performance unless the underlying contractual transaction is unique. It's harder for courts to determine the damages amount when the underlying transaction is unique. If it's hard to determine damages, then it's more likely that a court will award specific performance.

NOTE

Specific performance is an equitable remedy. An equitable remedy forces a person to do (or not do) some act. Equitable remedies usually are awarded by courts only if legal remedies are inadequate. Legal remedies are requests for money damages.

Non-breaching parties usually don't ask for specific performance. This is because if people are forced to perform their contractual duties, they sometimes perform those duties poorly. Courts don't like to have to supervise performance to ensure that a party is performing properly. Non-breaching parties also have an interest in avoiding shoddy performance. Courts award specific performance only when no other remedy will compensate the non-breaching party.

Courts also can rescind a contract. This remedy undoes the contract. It puts the parties in the same position that they would have been in if there had been no contract at all. This remedy is often available if there's been a material breach of contract. In order to rescind a contract, the parties must return any consideration that they each received. For example, they must return the goods and money that they exchanged under the contract.

FYI

Sometimes a contracting party might sense that the other party has cold feet about a contract. This might lead to worry about an eventual breach even if repudiation hasn't yet occurred. Under the Uniform Commercial Code, a party concerned about repudiation can demand that the other party provide adequate assurance that they're not going to repudiate the contract.[12] If the other party fails to provide adequate assurance, then the first party can sue for breach of contract.

Finally, courts can reform a contract. In contract reformation, a court rewrites the contract to express the true intent of the parties to a contract. The parties are then expected to perform the contract as rewritten. Courts often use reformation to fix contracts that have obvious clerical errors. Contract reformation is an equitable remedy.

Contract Repudiation

Repudiation is a refusal to perform a contract duty. It occurs when one party either denies the existence of a contract or refuses to perform their contractual obligations. Repudiation also is called anticipatory breach of contract. Repudiation occurs when one party clearly communicates that he or she won't perform their contractual duties.

Under the common law, a nonrepudiating party can react in three ways to repudiation. First, this party can immediately consider the contract terminated. That is, the party doesn't have to perform any of his or her own contractual obligations. Second, the party can wait and see if the other party decides to perform his or her obligations after all. Third, the party can immediately sue the repudiating party for breach of contract.

If one party repudiates a contract, the party who is relying on the contract bears the burden of proving that the contract is indeed valid and enforceable. Usually this is the person who files a breach of contract action. The filer must prove that there was a legitimate contract between the parties.

Another aspect of repudiation has to do with how a contract is signed. This distinction becomes important later in this chapter. Under traditional legal principles, a party to a contract can always repudiate a contract on the basis that another person forged his or her signature on the contract.

NOTE

Nonrepudiation becomes an important issue in online contracts. Cryptography can be used to make sure that parties can't repudiate the contracts that they enter into.

If one party claims that the signature is not authentic, then the other party has the burden of proving that the signature is authentic. He or she has to present evidence that prevents the other party from repudiating the signature. The party presents this evidence because he or she wants a court to enforce the contract.

In traditional contract law, contracts are negotiated face-to-face. The parties know one another and would know if a signature was forged. Sometimes contracts are signed in front of witnesses. If witnesses watch the parties signing a contract, it's harder for one party to repudiate a signature. This is a way of assuring that a party can't repudiate a signature in traditional, paper-based contracts.

Contracting Online

The rise of the Internet and e-commerce has made online contracts very common. They're used every day. People enter into a contract when buying goods through online retailers, such as Amazon.com. They enter into auction contracts on eBay. A person agrees to terms-of-use contracts when using free wireless Internet at a local coffee shop. In many instances, you might not even be aware that you're entering into valid, enforceable contracts.

Online contracts are contracts that are entered into over the Internet or through a technological medium. There's nothing particularly special about these contracts other than the medium used to form the contract. The underlying transactions are the same for online contracts and traditional contracts.

While online contracts can make transacting business easier, they also present some unique challenges for the contracting parties and for the law. The law generally presumes that contracting parties at least know of one another prior to entering into a contract. That's not necessarily true for online contracts. When people contract over the Internet, it's unlikely that they're in the same state, geographical region, or even country. Parties that contract electronically give up certain rights when they contract online. They include:

- The contracting parties may not know the identities of one another.
- The contracting parties may have no real opportunity to bargain for the terms of their agreements.
- It may be difficult to determine the material terms of the contract if the parties exchanged multiple electronic communications.

It really has become obvious that people can indeed contract through online processes. The U.S. federal government has created legislation that states, for interstate commerce, that online or electronic contracts are just as valid as traditional, paper-based contracts.[14] States also have created their own laws. Forty-seven states have adopted the Uniform Electronic Transactions Act (UETA).[15] The UETA specifically states that its purpose is to "remove barriers to electronic commerce by validating" electronic contracts.[16]

NOTE
In 2011, U.S. retailers reported that e-commerce sales were $194 billion.[13]

NOTE
In this chapter, the term *traditional contracts* refers to written and oral contracts. *Online contracts* refers to contracts that are created through a technological communication process, such as via e-mail or the Internet.

NOTE
Jurisdiction is an important issue for online contracts. A complete discussion of jurisdiction is out of scope for this chapter. It's important to be aware that many online contracts contain clauses that require lawsuits about the contract to be litigated in certain places. This is an attempt by at least one party to control jurisdiction issues.

The Validity of Online Contracts: The UETA and E-SIGN Acts

The National Conference of Commissioners on Uniform State Laws created the Uniform Electronic Transactions Act in July 1999. UETA covers business and commercial transactions. It doesn't cover transactions between private parties.

The NCCUSL created UETA for a number of purposes. One of them was to legitimize electronic contracts. UETA recognizes that parties contract electronically because of speed and other economic efficiencies. It also recognizes that some rules, like the common law Statute of Frauds, can be a barrier to electronic contracts in some circumstances. The comments to UETA make it clear that it doesn't create new rules for online contracting. Instead, it recognizes that general contract law rules and principles apply to transactions that are conducted electronically.

The main benefit of the UETA is that it specifically states that electronic contracts are enforceable. It also states that an "electronic record" satisfies any common law requirements that a contract be in writing. This helps to soften the application of a rule like the Statute of Frauds for records that might exist only in electronic form in an information system. Under the UETA, an electronic record is any record that is stored in the memory of an information system.

The UETA also requires that courts and contracting parties give an electronic signature the same effect as a handwritten signature. Under the UETA, an electronic signature is "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 electronic record."[17] Clicking on an "I agree" button on a Web page is an electronic signature under the UETA definition. Typing your name at the bottom of an e-mail also can be a valid, legal signature under the UETA as long as you intend it to serve as your electronic signature.

The UETA is not a digital signature statute. It doesn't define cryptographic or technology standards for digital signatures. It does acknowledge that electronic signatures that have certain security protections may provide additional reliability about the identities of contracting parties.

Forty-seven states have enacted UETA. They have codified it within their own laws. The states that haven't enacted it have created their laws regarding electronic contracts instead.

Congress enacted the Electronic Signatures in Global and National Commerce (E-SIGN) Act in June 2000. The E-SIGN Act validates the use of electronic records and signatures in interstate commerce. Like UETA, it's designed to facilitate and promote e-commerce. It also doesn't affect fundamental contract law principles. The E-SIGN Act contains provisions that are very similar to the UETA.

Like UETA, E-SIGN is technology neutral. In fact, it forbids any state or federal statute from requiring that a specific technology be used for electronic transactions in interstate commerce.

E-SIGN specifically states that it doesn't preempt state laws based on UETA. It also doesn't preempt state laws that are similar to the UETA. State laws that are significantly different from UETA and E-SIGN are preempted by E-SIGN.

For the most part, online contracts haven't changed fundamental contract law principles. There still must be offer, acceptance, and consideration. The parties still must reach a meeting of the minds. The E-SIGN Act and UETA recognize that basic contracting principles apply to all contracts, even online ones.

Courts have acknowledged this in case law as well. The Second Circuit Court of Appeals has said, "[While] new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[18] Even though courts apply the same basic contracting principles to online contracts, they sometimes reach inconsistent results. This is particularly noticeable in early cases reviewing clickwrap contracts and current cases reviewing browsewrap contracts. How courts treat these types of cases is still evolving. They're discussed later in this chapter.

This section describes some of the ways in which online contracting is different from traditional contracting. It's important to remember that this area of law is continuing to develop.

Legal Capacity Online

The rules for contractual capacity don't change depending upon the medium. Unfortunately, in online contracting it can be very difficult for parties to determine whom they are doing business with. Courts don't enforce contracts against a person who lacks contractual capacity. Therefore, it's critical for organizations conducting business on the Internet to know who their customers are.

Businesses must be concerned about children in particular. There are laws that protect children while they're on the Internet. The Children's Online Privacy Protection Act (COPPA) requires Web sites to get parental consent before collecting personal information from children. A business would need to collect personal information in order to enter into a contract with a consumer. Therefore, COPPA can potentially apply to any business that does business on the Internet. The Federal Trade Commission (FTC) oversees COPPA. The FTC can bring enforcement actions and impose civil penalties for COPPA violations.

Studies also show that children are online more than ever before.[19] The U.S. Census Bureau reported that 69 percent of children ages 3 to 17 used the Internet in 2012. In January 2010, a Kaiser Family Foundation study found that children ages 8 to 18 spend almost an hour and a half a day on the computer. Seven out of 10 children in this group go online every day.[20]

There are a number of ways that Web site operators can identify children. If a business Web site can properly identify children, then it can make sure that it doesn't enter into potentially unenforceable contracts with them.

Another issue in online contracts is verifying the identity and authenticity of the contracting parties. This is a separate issue from contracting with parties that have legal capacity. Digital signatures can be used to verify the identity of contracting parties. They are discussed later in this chapter.

Form of Offer and Acceptance

NOTE

Keep in mind that these discussions are academic. If all parties are performing their contractual duties without a problem, no one is concerned about when the contract was formed. Problems arise when a party claims that a contract didn't exist or when the parties can't agree on the terms of the contract. At that point, courts will analyze the entire contract formation process.

A person can enter into online contracts in a number of ways. Special types of contracts, such as clickwrap contracts, are discussed in a different section of this chapter. This section discusses contracts formed through direct electronic communications. Direct electronic communications include e-mail, text messaging, and instant messaging.

In contract disputes, timing is everything. It's sometimes critical to know when a contract forms. This is usually because an offeror is arguing that he or she revoked an offer, while an offeree is arguing that he or she accepted the offer in timely fashion. A court must determine which came first: revocation or acceptance. Electronic communications can complicate the analysis of these timing issues.

General contract law principles state that when parties are communicating instantaneously, a contract forms when the offeror receives an offeree's acceptance. Communications are instantaneous when there's no break in communications between offer and acceptance. The parties are, for the most part, clear on the terms of the contract. There's no doubt about the status of the offer and acceptance. Oral communications are clearly instantaneous communications. Courts also have held that fax and telephone communications are instantaneous.

NOTE

This section assumes that electronic communications between parties haven't been forged or intercepted.

These same general contract law principles say that where there's a delay in communication, the parties must follow the mailbox rule to determine when an acceptance is valid. In these situations, unless otherwise specified in an offer, acceptance is valid once it's mailed. This is so that parties can be clear on the status of a contract when communications aren't instantaneous. Communications that take place through U.S. mail are delayed communications. These communications must follow the mailbox rule.

Both of these principles can be implicated in electronic communications. Electronic communications processes blur the line between sending and receiving communications. They can make it hard for the parties, and courts, to determine when offer and acceptance occurred.

NOTE

E-mail can be nearly instantaneous if the parties are reading and responding to e-mails as they are received.

E-mail Communications. E-mail communications contain both instantaneous and delayed communication elements. Depending upon the nature of the e-mail transmission, there may be a delay from when the message is sent to when it's received. There also may be a delay in the receiving party's actual receipt of the e-mail if the party doesn't read the e-mail at the moment when it's received.

A contracting party has the option of printing the e-mails and storing them. A chain of e-mail messages, assuming that they're not altered, can be used to demonstrate that the contracting parties achieved a meeting of the minds. Parties also can use the e-mail chain to help determine the material terms of an offer and an acceptance.

> **NOTE**
> Keep in mind that the rules of evidence govern how parties use records as proof in a lawsuit. A discussion of the rules of evidence is outside of the scope of this chapter.

Questions about e-mail communications and timing arise if the status of the offer is called into question. Some commentators argue that the mailbox rule should apply to e-mail communications. That is, an acceptance is valid as soon as an offeree clicks on the "Send" button to e-mail their acceptance to the offeror. If an offeree receives the offeror's revocation after clicking on Send, it has no effect and the contract is formed.[21]

Other commentators argue that the mailbox rule should not apply to e-mail.[22] Since e-mail communications are nearly instantaneous, an offeror is free to revoke their offer any time before they receive the offeree's acceptance, regardless of when that acceptance is sent.

Text and Instant Messages. Sometimes electronic communications do look more like face-to-face communications. For example, text messaging and instant messaging (IM) communications are instantaneous. In this way, these communications are very much like oral conversations. Oral conversations are considered instantaneous. It can be argued that the common rules regarding instantaneous communications should apply here. That means that contracting parties can enter into enforceable contracts through text and instant messaging. The mailbox rule wouldn't apply.

> **NOTE**
> By their very name, instant messages are instantaneous communications.

Contracts made through text and instant messages suffer the same problems as oral contracts. Like oral contracts, the parties might agree to terms too quickly and then have second thoughts. The parties can easily repudiate such contracts, especially if there's no log of the conversation. It can be hard for parties to prove the existence of these contracts and their terms later when the contract is disputed. Unless a contracting party saves these messages or prints them out, it can be difficult for courts to determine the contractual terms.

Twitter and Other Social Networking Sites. Consumer use of social networking sites is growing. Twitter reports, as of this writing, that it has 241 million monthly active users.[23] Facebook reported 945 million monthly active users in December 2013.[24] Most social networking sites, including Facebook and Twitter, allow users to give periodic updates on what they're doing. The user's friends and followers can respond to the user's posts. These sites exist to facilitate online communication between parties.

> **NOTE**
> Twitter limits updates to 140 characters. It calls these updates *Tweets*.

FYI

It's clear that agreements can be violated via Facebook communications. In 2014 a Florida appellate court held that a court-approved confidentiality agreement was violated by a post on Facebook. In that case, two parties entered into a confidentiality agreement that protected the terms of a settlement agreement between the parties. The daughter of one of the parties posted a derogatory term about the other party immediately after the settlement was reached. The posting also included confidential information about the settlement agreement. The appellate court held that the posting violated the terms of the settlement agreement. It also held that the settlement agreement didn't have to be honored.[25]

Since Facebook and Twitter both contain mechanisms for conversation exchange, it's entirely possible that parties can enter into a contract using these mechanisms. It will be interesting to see how courts review offer, acceptance, and mutual assent criteria using social network site postings. It might be easier to prove that a contract exists with Facebook, as Facebook pages can contain the contents of the parties' contract negotiations. It might be more difficult to prove the existence of a contract, and the contract's material terms, when it's made through a service such as Twitter.

Legal commentators continue to argue about whether the mailbox rule should apply to electronic transactions such as e-mail. Courts skirt around the issue of the exact moment that a contract forms in electronic transactions. They routinely recognize that electronic communications do create valid contracts. To do this, they review the conduct of the parties to determine if the communications and the parties' actions show an offer, acceptance, or meeting of the minds.

To ensure that online contracts are enforceable, the best course of action is for contracting parties to state when acceptance takes place. Language such as "a contract is formed when I confirm that I have received your reply" can be added to e-mail negotiations to make sure that parties understand when an enforceable contract is formed.

Existence and Enforcement

As with traditional contracts, parties to an online contract must perform their obligations to be discharged. If a party doesn't fulfill their contractual obligations, they're in breach of contract. The non-breaching party can sue them.

NOTE

Sometimes the law comes down to common sense. Contracting parties should take steps to preserve the electronic communications that show a contract's material terms.

In the online environment, it can be difficult for a party to prove the existence of a contract. This is because there's often no hard copy of the contract in existence, such as a contract agreed to via text or instant message. It also can be difficult to prove the terms of the contract because they may have changed over time, such as through a long-running e-mail conversation. In some ways, online communications and contracts present some of the same proof problems as oral contracts.

Contracting parties must keep a paper or electronic record of the transactions that they enter into. These records are necessary to prove the existence of a contract. They also prove its material terms and conditions. They show the date the parties entered into the contract. It's also important to save these records in case one party argues that the contract was improperly modified.

A party can save hard copies of contract terms by printing screen shots or e-mail confirmations. They also can save an electronic record of the transaction. Under the UETA, information stored in information processing systems is an electronic record. It's a valid way to memorialize a contract.

Online contracts are enforced the same way as traditional contracts. If a court hears a case about a contract dispute, it must be able to determine if there has been a valid offer, acceptance, and mutual agreement. It will review the actions of the parties in order to make this determination.

> **NOTE**
> The UETA specifically recognizes that agreements can be found through the actions of parties to a contract. This codifies the common law rule.

Authenticity and Nonrepudiation

There's generally no real difference between traditional contracts and online ones other than the method of entering into the contracts. The traditional legal principles and methods that courts use to resolve contract disputes can be applied to online contracts in most instances with few modifications.

One area in which there's a notable difference, however, between traditional contracts and online ones are the issues of authenticity and nonrepudiation. Authenticity refers to the problem of attributing an electronic message to the person who allegedly sent it. Nonrepudiation ensures that a party can't dispute the validity of their message. In the online environment, authenticity and nonrepudiation can be assured with technology processes.

It's important to distinguish between repudiation and nonrepudiation. Repudiation is a legal term. It refers to a party's ability to deny the existence of a contract. Nonrepudiation is a technical term. It refers to a process that is used to make sure that a party can't repudiate, or deny the existence of, a contract.

Even though nonrepudiation is a technical term, it can be demonstrated in nontechnical ways. Assume that a traditional written contract is signed in front of witnesses. By signing the document in front of witnesses, the parties are taking steps to make sure that neither party can repudiate, or deny, their signatures. The use of witnesses is a nontechnical nonrepudiation process.

Nonrepudiation becomes an important issue in online contracts. Without a way to demonstrate nonrepudiation, parties that contract electronically might be able to deny that a valid contract exists. Cryptography can be used to make sure that parties can't repudiate the contracts that they enter into. Contracting parties can use digital signature technology, which uses a cryptographic process to create and verify electronic communications, to provide assurance of their identities. Digital signature technology also can be used to verify that the contract exists and that it's unmodified.

> **NOTE**
> Digital signatures, digitized signatures, and electronic signatures are all different. A digital signature uses a cryptographic process to ensure authenticity and nonrepudiation. A digitized signature is a digital version of a handwritten signature. An electronic signature is any mark that a person uses with the intent to sign an electronic record.

The law recognizes that the use of digital signature technology adds a new element to contract law analysis. Under the UETA, digital signature technology is considered a security procedure.[26] A security procedure is a procedure or process used to:

- Verify that an electronic signature belongs to a specific person
- Detect changes or errors in the information in an electronic record

The use of a security procedure strengthens reliance on an electronic communication. For information security purposes, use of a digital signature creates a presumption that the signature is valid. The party that wants to argue that the signature is invalid bears the burden of proving that it's invalid. This is different from the burden of proof for signature repudiation in traditional contracts.

In traditional contract law, the party that relies on a contract has the burden of proving that a handwritten signature is authentic. In the electronic realm, the party that wants out of a contract has the burden of proving that a digital signature is invalid. This shifting burden of proof illustrates one way in which traditional contract law principles must adjust for online contracts.

The American Bar Association recognizes that the use of digital signature technologies can have profound implications for contract law analysis. It has created digital signature guidelines to help lawyers understand the use of digital signatures. You can read about the guidelines at *http://www.americanbar.org/groups/science_technology/digital_signatures.html.*

Special Types of Contracts in Cyberspace

People encounter special types of online contracts every day. When you download software over the Internet, you likely enter into a contract with the software developer regarding your use of that software. If you create a new online social networking profile, you enter into a contract with the social networking platform provider. It's fair to say that most people don't read the "terms of use" or "terms of service" documents before clicking on "I agree" in order to access an online product or service.

Such a contract is called a **contract of adhesion**. An offeror drafts these types of contracts for its own benefit. The offeree has little opportunity to negotiate the terms of the contract. In order to use the underlying product or service, the offeree must accept all the terms of the contract. It's a "take it or leave it" contract. In this type of contract, the offeror has all of the bargaining power. The underlying question in these types of contracts is whether there's agreement between the parties over the contract terms. Do the parties truly have a meeting of the minds?

FYI

Take a moment to look at the terms of service documents for common online services. You can read the Google Terms of Services document at *http://www.google.com/policies/terms/*. The Facebook terms of service document, called "Statement of Rights and Responsibilities," is available at *https://www.facebook.com/legal/terms*.

Contracts of adhesion sound bad, but they're sometimes necessary. This is especially true for e-commerce transactions. E-commerce could be substantially slowed if merchants had to negotiate the terms of every sale with a consumer. Thus, they create form contracts for multiple uses. These forms expedite commerce.

Contracts of adhesion also are called "form" contracts or "boilerplate" contracts. This is because they're presented as standard forms. They contain standard terms that are used regardless of where the transaction takes place. These terms typically favor the offeror. For instance, they might have terms that limit a person's rights if the offeror breaches the contract. They also may require any lawsuits about the contract be filed in the offeror's home state.

> **NOTE**
> In the law, *boilerplate language* is any standard language that a person or entity can reuse in multiple contracts with few edits.

In the online environment, end user license agreements are the most encountered contracts of adhesion. An **end user license agreement (EULA)** is a contract between the manufacturer or distributor of a piece of software or a service, and the end user of the application. It states how the software or service can be used.

EULAs are particularly important in the software context. This is because they help protect the software owner's copyright in their product. Computer software can be protected by copyright laws. Software owners traditionally license their products rather than selling them. This helps them protect their copy and distribution rights. In many instances, it even gives them more control over their products than copyright law allows. The EULA specifies how consumers use software and places limitations on that use.

> **NOTE**
> A license is a grant of permission to use a product or service in certain situations. It's not a sale of the underlying software.

Depending on the nature of the underlying transaction, a EULA also might be called a "terms of use" or a "terms of service" agreement. A EULA is traditionally used for products like software that a user purchases or downloads. "Terms of service" is used for online services, such as search engine or social networking services. The phrase "terms of use" might be used for both products and services.

It doesn't matter what the document calls itself. It's important to understand that all of these documents try to create a contract between the software owner and the person who uses the software. This chapter uses the generic term EULA to refer to software licenses.

The generic terms of service will be used to refer to contracts where the underlying transaction provides online services. There are a number of different forms of these generic contracts for software and online transactions. They include:

- Shrinkwrap contracts
- Clickwrap contracts
- Browsewrap contracts

Shrinkwrap Contracts

The term **shrinkwrap contract** almost exclusively refers to software license agreements. It specifically refers to software license agreements that are included within a box of physical-media software. This term doesn't refer to software that consumers purchase and download online.

> **NOTE**
>
> Shrinkwrap licenses grew in popularity in the 1980s. Software developers used them to protect their exclusive rights granted under copyright law. They also used them to state their software warranties and to limit their liability for software failures. This helped them avoid some UCC warranty provisions.

These types of EULAs are called shrinkwrap contracts because software manufacturers put them in a software box, underneath the shrinkwrap cellophane and packaging. Consumers don't actually see the terms of the EULA until after they buy the software. They then become bound to the terms of the agreement when they break the shrinkwrap and open the packaging. The agreement usually creates a software license between the consumer and the software developer.

At first courts viewed these types of contracts with suspicion. They tended to interpret the terms of the contract against the software manufacturer. Courts didn't rule on whether these contracts were valid; instead, they looked at the terms in the contract. They would hold that some provisions of the contracts were unenforceable.

Today courts generally hold that shrinkwrap contracts are valid. There's an offer and acceptance, which is shown by the manufacturer offering the software for sale, and the purchaser buying and installing it. These contracts also are supported by consideration. The consideration is the exchange of a product for money, and a consumer's affirmative act of installing the software.

Courts tend to favor shrinkwrap contracts where the consumer receives the terms of the contract in multiple ways. A shrinkwrap contract is more likely to be enforceable when the agreement is printed on paper in the box and presented again to the consumer on the computer screen when the software is being installed. A shrinkwrap contract that allows a consumer to return the software without using it if they reject its terms also is more likely to be enforceable. Meeting of the minds is shown through the actions of the consumer with respect to either installing the software or returning it.

Enforceability of Shrinkwrap Contracts: *ProCD Inc. v. Zeidenberg*

The most famous case involving shrinkwrap contracts is *ProCD Inc. v. Zeidenberg* (1996).[27] This was the first time that a federal court of appeal looked at a shrinkwrap case. The Seventh Circuit Court of Appeals decided this case. The Seventh Circuit covers Illinois, Indiana, and Wisconsin.

ProCD sold a software product that was a searchable telephone directory database. It distributed its program and database on CD-ROM. ProCD spent more than $10 million to develop its product and to keep the database of telephone directory information current.

ProCD had both commercial-use and noncommercial-use versions of the product. The commercial-use product was more expensive. The noncommercial-use, or consumer, product was cheaper. Businesses that bought the commercial version could use it to create mailing lists of potential customers and for other marketing purposes. ProCD didn't allow this in the consumer version of the product.

ProCD had to keep businesses from buying the consumer product and using it for commercial purposes. It didn't do this through technological solutions. Instead, ProCD turned to contract law. People who bought the consumer version of the software were prohibited from using it for commercial purposes because of the license agreement that was included with the product.

The defendant, Matthew Zeidenberg, purchased the consumer version of the product. He then formed his own company and reposted the information on the Internet. He offered the information for sale at a price that was lower than ProCD's price for either its consumer or commercial product.

ProCD sued Zeidenberg. It argued that Zeidenberg breached the terms of the license agreement that was included in the ProCD software box. Zeidenberg argued that only the text written on the outside of the package containing the ProCD product was part of his contract with ProCD. He claimed that the license agreement that was inside the box was additional contract terms. He argued that they weren't enforceable under various provisions of the Uniform Commercial Code.

The district court agreed with Zeidenberg. ProCD appealed the decision of the district court to the Seventh Circuit Court of Appeals.

The Seventh Circuit held that the license agreement inside the box was an enforceable contract. In reviewing the case, the court noted that ProCD offered a full refund to a purchaser who didn't agree with the terms of the shrinkwrap contract and returned the product without using it.

One fact that also helped the court reach the decision that the shrinkwrap contract was enforceable was that Zeidenberg had multiple opportunities to read it before he installed the software. It was printed on paper inside the box, and it was displayed on the computer screen during the software installation process. Zeidenberg could not install the software without specifically clicking on an acceptance box that contained the terms of the contract. The court found that all these opportunities to read the contract put Zeidenberg on notice of it. Through his actions, he showed that he agreed with those terms. This included the term forbidding commercial use of the product.

The court's reasoning in *ProCD v. Zeidenberg* is used as the basis for validating other types of end user license agreements such as clickwrap agreements.

You can read the court's opinion *http://heinonline.org/HOL/LandingPage?handle=hein.journals/berktech13&div=9&id=&page=*.

Clickwrap Contracts

> **NOTE**
>
> A distinction between shrinkwrap and clickwrap contracts is that a user has an opportunity to read a clickwrap contract before purchasing a product or using a service. A user also must affirmatively agree to the contract before getting access to a product or service.

A **clickwrap contract** is a variation of the shrinkwrap contract. A clickwrap contract is usually presented to a user when purchasing software via the Internet. These agreements aren't used just for software purchases. Vendors use them for any type of product or service purchase that's conducted over the Internet or online.

These types of contracts usually appear on a user's computer screen before installation of a product or use of a service. They may be displayed in a separate pop-up dialogue box or on the main browser screen. A user has to click on an "I agree" or "I accept" button located on the same screen as the contract (or in the same pop-up window) before downloading and installing a product or using a service.

Courts have generally held that clickwrap contracts are enforceable. These cases are highly dependent on how the clickwrap contract is presented to the consumer. In many cases, these types of contracts are enforceable if the agreement is prominently displayed. A consumer also must affirmatively agree to the contract before receiving a product or service. Clicking on the "I agree" or "I accept" buttons is evidence of the consumer's agreement.

Browsewrap Contracts

> **NOTE**
>
> A browsewrap contract is similar to a clickwrap agreement without the "click" requirement.

Browsewrap contracts describe the situation where terms of use or service documents are listed on a Web page. In these situations, a user doesn't have to make an affirmative action to accept the terms of the contract, such as clicking on a button. A browsewrap agreement assumes that a contract is entered into when a user merely visits a Web page or downloads a product.

Terms of use and terms of service documents are browsewrap contracts when they don't require a user to affirmatively agree to the terms contained in the document. They are clickwrap contracts if a user must click on a button to show their agreement with the terms.

Many popular Web pages use browsewrap contracts to display their terms of use or service provisions. For example, the CNN Web page at *www.cnn.com* has a "terms of service" link listed in small type at the bottom of their home page. Users navigate to CNN's Service Agreement when they click on that link. That agreement sets forth the terms and conditions for use of the CNN Web page. The agreement states that users who don't agree to the terms of service shouldn't access or use *CNN.com*.

Courts often are slow to find that browsewrap contracts are enforceable. One reason for this is that consumers may not know about these contracts. Terms of use or service links on Web pages are typically in very small type and located at the bottom of Web pages. Consumers aren't conditioned to look for these agreements or read them. If consumers don't know about the contract and haven't read it, how can they agree to its terms?

Courts review the facts of browsewrap cases very closely. For instance, in *Specht v. Netscape Communications Corporation* (2002), the Second Circuit Court of Appeals didn't enforce a browsewrap contract. In this case, the consumer downloaded software. The consumer didn't have to click on any buttons to show agreement with a license prior to downloading the software. The consumer had to click on several embedded links to read the terms of the agreement. They weren't eye-catching links. The Web site didn't display the license agreement in a separate window and it didn't "pop up" at the consumer. The court held there wasn't enough notice to the consumer about the terms of the contract. It held that the contract wasn't enforceable against the consumer.

NOTE

Web sites that use browsewrap agreements will want to make sure that the embedded links to those agreements are noticeable to a consumer.

It's possible that courts will start enforcing browsewrap contracts as e-commerce and Internet use continues to grow. This is particularly true if Web pages do more to make a user aware of the browsewrap contract. For instance, a court might be more inclined to enforce a browsewrap agreement when its terms are specifically referenced during the course of a transaction.

A Missouri court recently upheld a browsewrap agreement requiring a user to click on a "Submit" button that had the following language written next to it: "By submitting you agree to the Terms of Use."[28] The text included a link to the terms of use language. The court held that the user was on notice that the terms of use governed the transaction. It also found that the user had the opportunity to read those terms.

How Do These Contracts Regulate Behavior?

End user license agreements, terms of use, and terms of service agreements attempt to regulate user behavior. They state how a consumer can and can't use certain products or services. They tend to severely limit a consumer's rights and give the owner or vendor of the product or service many rights. If a consumer fails to follow the terms of these agreements, an owner can try to sue for breach of contract. If a consumer follows the terms of these contracts, then they are regulating their behavior in a manner that's most likely advantageous to the owner or vendor of the product or service.

Consumers need to take the time to read these types of agreements. They're not all created equal. It would be a mistake to think that these agreements simply govern the intellectual property rights of the owners of a product or service. While many EULAs and terms of service do this, some also have unexpected terms. Some of these terms include language that would allow the vendor to install additional software onto a consumer's computer system. The additional software could be used to learn the consumer's Internet habits in order to supply targeted advertisements. These types of contracts also can have terms about additional licensing fees or deeply buried upgrade, support, or maintenance fees.

NOTE

A 2010 study reported that more than half of the study's participants spent only eight seconds reviewing EULAs.[29] The study concluded that most people weren't actually reading them.