Chapter 5

Signalling Intentions and Obliging Behavior Online: An Application of Semiotic and Legal Modeling in E-Commerce

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Electronic commerce has the potential to deliver goods and services to customers more quickly, cheaply, and conveniently than ever before. But before performance the obligations have to be created. This paper explores the semiotic and legal aspects of online contracts. It reviews speech act theory from philosophers such as Austin and Searle to explain how words and actions can create legal obligations. It then examines English contract law and its requirements to find an abstract basis upon which contract creation can be modeled. Using semiotics and law, the paper thereafter creates a model of the contract creation process and applies it to electronic commerce in intangible goods. Since electronic commerce is so pervasive and extends beyond any particular jurisdiction, the need is destined to increase for high-level abstraction and for a model for comparison and cross-reference.

By establishing agreements and expectations regarding future actions, contracts enable business to be conducted in a stable context. For example, contracting parties know when to expect deliveries of raw materials, and can thus optimize their manufacturing processes, making gains in efficiency. In

This chapter appears in the book, Strategies for eCommerce Success by Bijan Fazlollahi.
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addition, if something goes awry and a party breaches the contract, the injured party can seek legal recourse.

In traditional commerce, people create commercial contracts in-person, and the courts and legislature have developed an extensive body of contract law to govern these transactions. Among the legal requirements are the four elements of any contract: offer, acceptance, consideration, and intent to create legal relations, as discussed in Part II. However, these requirements are not merely for the benefit of jurists and legal scholars. Merchants incorporate contract law into their standard business practices not only to satisfy the law, but also to conform with informal norms and to prevent misunderstandings with customers. The four elements of the legal contract derive largely from the fundamentals of any negotiating process. The law has merely formalised the elements and the process. Furthermore, businesses often use the ceremonial aspects of the contract creation process for their “cautionary effect, thereby deterring hasty, premature or ill-considered contracts from being made.” People understand that signing a document creates legal obligations and that it should not be taken lightly. However, rituals in the virtual world with similar significance have yet to be established.

The legal and social aspects of contracts have similarly important roles to fulfill in the new world of electronic commerce. Merchants need contracts not only to secure their legal rights, but also to prevent consumer misunderstandings. But contract law and standard business practices have had little time to adjust and develop to handle the virtual and ephemeral nature of cyberspace. Will the long-held traditions and principles of English contract law be flexible enough to accommodate this new commercial medium? Will on-line contracts be accepted and enforced by the courts?

Even more importantly, will contract law be consistent with commercial norms and practices and will consumers readily comprehend the meaning and consequences of their actions online? A mismatch between law and practice could result in misunderstandings, injustices, inefficiencies, and added costs. Even more so than mail order catalogue transactions, on-line transactions in intangible goods predominantly gain competitive advantage through lower prices from the reduction of distribution, intermediary, and overhead costs. Therefore, the margins in electronic commerce will most likely be razor thin and unable to absorb the costs of consumer misunderstandings, disputes, and particularly litigation. Electronic commerce will demand the utmost legal and commercial certainty in on-line contracts, otherwise its enormous potential will not be fully realized. This means that there will need to be certainty and understanding about the significance of online behaviour, both from the merchant and customer side.