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Jane Kaufman Winn

University of Washington School of Law

Michael Rhoades Pullen

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Despatches from the Front: Recent Skirmishes Along the Frontiers of Electronic Contracting Law

By Jane Kaufman Winn and Michael Rhoades Pullen*

INTRODUCTION

In 1999, the volume of business conducted over the Internet and other computer networks continued to accelerate rapidly, while the volume of hype associated with electronic commerce accelerated at an even more astonishing pace. The amount of attention focused on “e-business” by business managers, lawmakers, and the mass media reached unparalleled heights, exacerbating a wide range of controversies regarding what changes, if any, need to be made in existing commercial laws to accommodate these innovations. Many of these issues have been debated for years, or even decades, among lawyers and managers confronting earlier generations of electronic commerce technologies. The migration of both paper and computerized business processes to new technologies such as the Internet, however, makes these debates suddenly seem very novel and very urgent.¹ Controversies surrounding law reforms to accommodate a new generation of “e-business” have unfolded within state legislatures in the United States,² the uniform law drafting projects sponsored by the

*Ms. Winn is an Associate Professor at Southern Methodist University School of Law, a member of the New York Bar, and co-author of *The Law of Electronic Commerce*. Copies of her recent publications on the law of electronic commerce are available from her web site at <<http://www.smu.edu/~jwinn>>. Mr. Pullen is an associate with Dibb, Lupton and Alsop in the firm’s Brussels, Belgium office, where he specializes in the law of the European Union (EU) and electronic commerce developments. The authors would like to thank Amelia Boss, Timothy Davis, John Gregory, Ian Grigg, Peter Weiss, Michael White, and William Woodward for their helpful comments on earlier drafts.

1. For an overview of how earlier generations of electronic commerce technologies and commercial law reform efforts differ from the current controversies surrounding Internet commerce, see Jane Kaufman Winn, *Open Systems, Free Markets, and Regulation of Internet Commerce*, 72 TUL. L. REV. 1177 (1998). For a more detailed discussion of many legal issues that first emerged in the discussion of electronic contracting in the 1980s that remain relevant to Internet electronic contracting, see generally BENJAMIN WRIGHT & JANE K. WINN, *THE LAW OF ELECTRONIC COMMERCE* (3d ed. 1998 & Supp. 1999).

2. For an annotated summary of state and federal legislation, as well as legislation outside the United States on electronic commerce and digital signature issues, see McBride Baker &

National Conference of Commissioners for Uniform State Laws (NCCUSL),³ the U.S. Congress,⁴ the United Nations Commission on International Trade Law (UNCITRAL),⁵ the EU,⁶ and many other national legislatures around the world.⁷

Coles, *Summary of Electronic Commerce and Digital Signature Legislation* (visited Aug. 22, 1999) <<http://www.mbc.com/ecommerce.html>>. For a general description of public key cryptography and digital signatures, see, e.g., WARWICK FORD & MICHAEL S. BAUM, *SECURE ELECTRONIC COMMERCE* (1997); SIMSON GARFINKEL WITH GENE SPAFFORD, *WEB SECURITY AND COMMERCE* 187-208 (1998); WRIGHT & WINN, *supra* note 1, § 3.06[D].

Legislation dealing with digital signatures often refers to certain roles played by parties using public key cryptography in different capacities. Public key cryptography uses two different, but inextricably related, encryption "keys" to encrypt and decrypt messages. An individual using a "private" key to digitally sign documents will normally ask a trusted third party to issue a certificate so that other individuals will have confidence that the digital signature accurately identifies that individual. The individual seeking a certificate will turn over the public key, retaining exclusive control at all times of the private key. The third party issuing the certificate that identifies the individual and contains a copy of that person's public key is often called a "certification authority" (CA). The signing party is often called a "subscriber" because he or she has subscribed to the CA's certification service by submitting identification information and a copy of his or her public key. A party who asks to see a digital signature certificate issued by a third party before relying on a digital signature is often called a "relying party." The environment within which individuals can rely on each other's digital signatures because of the trust created by the issuance of certificates by CAs is often called a "public key infrastructure" (PKI). See generally RSA's crypto FAQ <<http://www.rsasecurity.com/rsalabs/faq>> (providing information on public key cryptography).

3. Information about uniform law drafting projects addressing electronic commerce issues is available on NCCUSL's World Wide Web (web) site at <<http://www.nccusl.org>>. The texts of current and prior drafts of the Uniform Law Commissioners' (ULC) are available on a web site maintained by the University of Pennsylvania. See *Drafts of Uniform and Model Acts Official Site* (visited Sept. 5, 1999) <<http://www.law.upenn.edu/bll/ulc/ulc.htm>>. The electronic contracting provisions of the Uniform Electronic Transactions Act (UETA) and the Uniform Computer Information Transactions Act (UCITA) are discussed *infra* notes 10-132.

4. In August 1999, the Electronic Signatures in Global and National Commerce Act, H.R. 1714, 106th Cong. (1999), and the Third Millennium Electronic Commerce Act, S. 761, 106th Cong. (1999) were pending in Congress. These bills are discussed *infra* notes 133-48.

5. In 1995, the UNCITRAL Working Group on Electronic Commerce (WG-EC) completed a model law on electronic commerce and is currently preparing a model law on electronic signatures. Information about the deliberations of the WG-EC are available on the UNCITRAL web site. See *Recent Documents of UNCITRAL and its Working Groups: Working Group on Electronic Commerce* (visited Aug. 22, 1999) <http://www.uncitral.org/english/sessions/wg_ec/index.htm>. The work of the WG-EC is discussed *infra* notes 225-30.

6. Information about legal aspects of the electronic commerce initiatives of the Commission of the EU is available from its web site. See *Electronic Commerce and the European Union* (visited Aug. 22, 1999) <<http://www.ispo.cec.be/ecommerce/legal/legal.html>>. Proposed directives on electronic commerce and electronic signatures as well as proposed regulations governing jurisdiction over online consumer transactions are discussed *infra* notes 149-206.

7. See McBride Baker & Coles, *supra* note 2 (discussing developments in other countries).

This Article will provide a short overview of the current efforts in the United States and the EU to reform contract law to accommodate recent innovations in electronic contracting.⁸ Whether changes are needed to current contract law doctrines governing contract formation, effectiveness of contract terms, choice of law and forum provisions, special protections for consumers, and signature and writing requirements, revisions in these areas have all proved controversial. Even in those areas where a consensus may be emerging on whether law reform may be appropriate in some form, consensus is often still lacking with regard to the specific legislation needed to accomplish those reforms. The United States is not the only major arena where such reforms are being debated. The EU is addressing the same problems, but taking a markedly different approach. If the United States and EU commit themselves to divergent approaches to the regulation of electronic contracting, major obstacles will be placed in the paths of businesses hoping to exploit global electronic markets. Businesses may then be forced to design their electronic commerce systems to conform to multiple, incompatible legal standards, or face the prospect of being shut out of major markets for electronic commerce services altogether.⁹

UNIFORM LAW COMMISSION INITIATIVES

In 1988, the Permanent Editorial Board (PEB) of the Uniform Commercial Code (U.C.C.) appointed a study committee to determine whether revisions were needed to Article 2 of the U.C.C. In 1991, the ULC and the American Law Institute (ALI) appointed a drafting committee to begin revising U.C.C. Article 2, acting on the recommendations of the committee.¹⁰ In addition to other objectives, these revisions were supposed to

8. See Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931 (1998) [hereinafter Boss, *Electronic Commerce*]; Amelia H. Boss, *Searching for Security in the Law of Electronic Commerce*, 23 NOVA L. REV. 585 (1999); Jeff C. Dodd & James A. Hernandez, *Contracting in Cyberspace*, 3 COMPUTER L. REV. & TECH. J. 1 (1998); Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 J. MARSHALL J. COMPUTER & INFO. L. 211 (1996).

9. See, e.g., Department of State, Office of the Legal Advisor Memorandum Regarding International Electronic Commerce Projects, 4 Electronic Com. & L. Rep. (BNA) 472 (May 26, 1999). The use of electronic commerce regulatory standards as a form of non-tariff trade barrier has been widely debated in the context of the EU Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data and the determination by the EU that U.S. law does not currently provide adequate privacy safeguards to permit free transfers of data from the EU to the United States. See P. Amy Monahan, *Deconstructing Information Walls: The Impact of the European Data Directive on U.S. Businesses*, 29 LAW & POL'Y INT'L BUS. 275, 287 (1998); Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Council Directive 95/46/EC, 1995 O.J. (L 281) 31, available in <<http://www.europa.eu.int/comm/dg15/en/media/dataprot/news/925.htm>>.

10. See PEB Study Group, *PEB Study Group Report: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991).

remove impediments to electronic commerce found in Article 2, such as the current text of the Statute of Frauds provisions which could be interpreted as requiring the use of paper to constitute a writing. The Article 2 revision process originally included software licensing, but after the 1995 failure of the "hub and spokes" approach to revising Article 2, software licensing was removed from it and a separate U.C.C. Article 2B drafting committee was formed. A separate drafting committee was also established to make any changes needed to keep U.C.C. Article 2A, which governs leasing transactions, compatible with the revised Article 2 and the proposed Article 2B.

The revision of Article 2 and the drafting of Article 2B proved fairly controversial in some areas affecting electronic commerce. Article 2B encountered substantial criticism from: (i) consumer groups who believed the draft was too accommodating to the software industry,¹¹ (ii) the "copyright industries" who believed that the scope of Article 2B was too broad and who sought to have their industries excluded from its coverage,¹² and (iii) those who felt that Article 2B would disturb the current boundaries between state contract law governing licensing and federal law governing intellectual property rights in undesirable ways.¹³ Throughout 1998 and 1999, the Article 2B drafting committee made efforts to respond to the concerns of these and other groups with revisions to its text. In April 1999, when it became clear that Article 2B might not garner the support it needed to gain the approval of the ALI,¹⁴ the ULC announced its intention to change Article 2B into a freestanding uniform law outside the

11. *See, e.g.*, Letter from Steve Brobeck, Consumer Federation of America, Todd Paglia, Consumer Project on Technology, Linda Golodner, National Consumers League, Edmund Mierzwinski, U.S. Public Interest Group, to Charles Allen Wright, President of ALI, and Gene Lebrun, President of NCCUSL (Nov. 10, 1998), in <<http://www.cptech.org/ucc/sign-on.html>>.

12. *See, e.g.*, Letter from Vans Stevenson, Senior Vice President, Motion Picture Association of America, to Carlyle C. Ring, Jr., Chair, U.C.C. 2B Drafting Committee (Nov. 9, 1998), in <<http://www.2bguide.com/docs/mpaa1198.html>> [hereinafter MPAA Letter]. The copyright industries include the film, television, radio, music, and publishing industries.

13. *See, e.g.*, Amendment to Article 2B Uniform Commercial Code, Proposed by Harvey Perlman, Nebraska Commissioner on Uniform State Laws (visited Oct. 10, 1999), in <<http://www.2bguide.com/docs/2B-amend.html>>. This proposal was approved by the ULC at its annual meeting in July 1998.

14. In order for U.C.C. Article 2B to become part of the official text of the U.C.C., it requires the approval of both the ALI and the ULC at their respective annual meetings. At its December Executive Council Meeting, the ALI removed consideration of U.C.C. Article 2B from the agenda for its May 1999 annual meeting. Even if the ULC had approved U.C.C. Article 2B at its annual meeting in July 1999, U.C.C. Article 2B could not have been finalized before the ALI annual meeting in May 2000. In May 1999, the three ALI members of the drafting committee, David Bartlett, Amy Boss, and David Rice, declined to continue their participation in the drafting committee due to concerns over UCITA's suitability for enactment in its current form. *See* Memorandum from David Bartlett, Amy Boss, and David Rice, to the UCITA Drafting Committee (May 7, 1999), in <<http://www.2bguide.com/docs/50799dad.html>>.

U.C.C., the UCITA.¹⁵ At its annual meeting in July 1999, the ULC finalized UCITA over opposition from consumer groups,¹⁶ the entertainment and publishing industries,¹⁷ and some participants in the software industry.¹⁸

Revised Article 2 encountered substantial criticism from trade and industry groups, who were concerned with the increase in the uncertainty of business transactions,¹⁹ the lack of adequate justification for its changes to current law,²⁰ and the notion that the proposal tipped the current balance between merchant and consumer interests in favor of consumers.²¹ Throughout 1998 and 1999, the Article 2 drafting committee made efforts to respond to criticism from trade and industry groups with revisions to the text of revised Article 2. Following changes addressing these concerns, revised Article 2 was approved by the ALI at its annual meeting in May 1999, and like UCITA, was considered by the ULC at its annual meeting in July 1999. Although revised U.C.C. Article 2 enjoyed the support of consumer groups, it was still the subject of considerable criticism from a wide range of industry and trade groups. In the face of this concerted opposition, the text of revised Article 2 was withdrawn from consideration before it was put to a vote at the ULC annual meeting due to concerns that it would not achieve uniform enactment if it became final in its then current form. In August 1999, the ULC and the ALI announced that a new drafting committee had been formed to revise both U.C.C. Articles 2 and 2A.²² It was unclear when this new drafting committee was expected to complete its assignment.

A drafting committee was also appointed by the ULC in 1996 to begin work on a uniform law aimed at supplementing the U.C.C. in removing

15. See NCCUSL Press Release, NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act, ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of U.C.C. (visited Oct. 10, 1999), in <<http://www.nccusl.org/pressrel/2brel.html>>.

16. See, e.g., Letter from Gail Hillebrand, Consumers Union, to NCCUSL (June 21, 1999), in <<http://www.2bguide.com/docs/cu699.html>>.

17. See, e.g., MPAA Letter, *supra* note 12.

18. See, e.g., Letter from Barbara Simons, President of Association for Computing Machinery, to NCCUSL (July 12, 1999), in <<http://www.acm.org/usacm/copyright/usacm-ucita.html>>. The Association for Computing Machinery is one of the oldest and largest associations for computing professionals in the world.

19. See, e.g., Motion from William A. Worthington, to ALI (May 14, 1999), in <http://www.ali.org/ali/1999_worthington.htm>.

20. See, e.g., Motion from James J. White, to ALI (May 13, 1999), in <http://www.ali.org/ali/1999_White1.htm>.

21. See, e.g., Memorandum from the National Association of Manufacturers et al., to the U.C.C. Article 2 Drafting Committee (Jan. 29, 1999) (on file with *The Business Lawyer*, University of Maryland School of Law).

22. See NCCUSL Press Release, ALI and NCCUSL Announce New Drafting Committee for U.C.C. Articles 2 and 2A (visited Oct. 10, 1999), in <<http://www.nccusl.org/pressrel/ucc2a2.htm>>.

obstacles to electronic commerce in state laws.²³ In light of the volume of state laws enacted to address electronic commerce issues and the clear need for greater uniformity in state law in this area, this project was placed on a "fast track" by the ULC. Drafting began in 1997 and was completed in 1999, and the UETA was approved by the ULC at its annual meeting in July 1999.²⁴ Following the 1999 ULC annual meeting, both the UETA and UCITA were in final form and available for consideration by state legislatures, while revisions to U.C.C. Articles 2 and 2A (as well as revisions to U.C.C. Article 1) were still in the process of being drafted.

*UETA*²⁵

When work began on the UETA in 1996, the drafting committee reviewed various legislative models including the UNCITRAL Model Law on Electronic Commerce, the then current draft of proposed U.C.C. Article 2B, and various draft laws under consideration in different states. The scope of the project quickly became one of the most controversial issues the drafting committee would have to resolve.²⁶ A consensus eventually emerged that the UETA should be "procedural" in nature, merely creating an "overlay" of existing law that would keep changes in the underlying substantive law to an absolute minimum. This approach is very similar to that taken by the UNCITRAL Model Law on Electronic Commerce.²⁷ In order to aid individual state legislatures in the process of reviewing their existing laws for obstacles to electronic commerce, such as paper writing and manual signature requirements, the drafting committee developed a list of various existing state laws that might be excluded from the scope of the UETA.²⁸

23. See Uniform Electronic Transactions Act (Draft for Approval, July 23-30, 1999) <<http://www.law.upenn.edu/library/ulc/uecicta/etaam99.htm>> [hereinafter UETA Draft].

24. Uniform Electronic Transactions Act (Official Text Approved at NCCUSL Annual Conference, July 23-30, 1999) <<http://www.law.upenn.edu/bl/ulc/fnact99/1990s/ueta.htm>> [hereinafter UETA]. The UETA text is in its final version, but the UETA's Reporters are to submit the final Prefatory notes and comments at a later date. Thus, any citation to the UETA's Prefatory notes and comments will be to the Draft for Approval, July 23-30, 1999. See *supra* note 23.

25. Information about the UETA can be obtained from Carol A. Kunze, *A Forum for the Uniform Electronic Transactions Act* (visited Oct. 7, 1999) <<http://www.webcom.com/legaled/ETAForum>>.

26. UETA Draft, *supra* note 23, prefatory n.1.

27. See Boss, *Electronic Commerce*, *supra* note 8, at 1963-68; A. Brooke Overby, *UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw Be Uniform?*, 7 TUL. J. INT'L & COMP. L. 219, 224 (1999); see also *infra* text accompanying notes 207-24 (discussing the UNCITRAL Model Law on Electronic Commerce).

28. UETA Draft, *supra* note 23, § 103(b) n.2. The drafting committee was assisted in its consideration of scope issues by the NCCUSL. NCCUSL, Uniform Electronic Transaction Act, Task Force on State Law Exclusions Report (Sept. 21, 1998), in <<http://www.webcom.com/legaled/ETAForum/docs/report4.html>>.

While early drafts of the UETA included provisions dealing with contract formation using electronic media and presumptions associating legal consequences with the use of more secure authentication technologies for signature functions, these provisions were later removed as inconsistent with the “procedural” orientation of the statute.²⁹ The drafting committee also considered, and then rejected, suggestions that heightened legal protections should be given to electronic records and signatures, which have been created and “used in conformity with security procedures which demonstrate greater reliability.”³⁰

The removal of these provisions was quite controversial, as some observers at the drafting committee meetings felt very strongly that an electronic commerce enabling statute should address such questions regarding the rights and responsibilities of certificate authorities and parties relying on digital signature certificates.³¹ A common feature of technology-specific legislation is a provision that associates particular legal outcomes with the use of particular technologies, either through the use of evidentiary presumptions or through liability rules.³² The UETA avoids the use of either by providing that an electronic record or signature is attributable to a person only if it was in fact the act of that person.³³ The act of the person may be proven in any manner, including the showing of the efficacy of a security procedure used, but the party with the burden of proof enjoys no evidentiary presumption to facilitate the proof. The context and surrounding circumstances of the creation, execution, and adoption of an electronic record or signature should be taken into account in determining its effect.

The UETA did follow recent U.C.C. revisions in using the term “record” as a media-neutral alternative to the term “writing.”³⁴ Unlike the

29. One example of this general observation is § 113 of the UETA Draft, which would have validated contracts formed by the interaction of electronic agents. UETA Draft, *supra* note 23, § 113.

30. *Id.* prefatory n.1.

31. See *supra* note 2 (explaining certificate authorities, relying parties, and digital signature certificates).

32. One of the first detailed statements of the technology-specific approach is contained in the ABA *Digital Signature Guidelines*, published in 1996. INFORMATION SECURITY COMMITTEE, ABA SECTION OF SCIENCE AND TECHNOLOGY, DIGITAL SIGNATURE GUIDELINES (1996), available in <<http://www.abanet.org/scitech/ec/isc/dsgfree.html>>. For an overview of arguments supporting a more technology-specific approach, see Thomas J. Smedinghoff & Ruth Hill Bro, *Moving With Change: Electronic Signature Legislation as a Vehicle for Advancing E-Commerce*, 17 J. MARSHALL COMPUTER & INFO. L. REV. 723 (1999). For a critique of such provisions as unfair and economically inefficient, see Comment from Carl Ellison & Jane Kaufman Winn, to the Federal Trade Commission on Consumer Protection in the Global Electronic Marketplace (Mar. 26, 1999), in <<http://www.ftc.gov/bcp/icpw/comments/revwin1.htm>>.

33. UETA, *supra* note 24, § 9.

34. For example, in the 1999 revisions to U.C.C. Article 9, “record” is defined as “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” U.C.C. § 9-102(a)(69) (1999).

recent revision of U.C.C. Article 9³⁵ and UCITA,³⁶ however, the UETA does not define a new term "authenticate" to take the place of the traditional term "signature." The drafting committee concluded that the current U.C.C. definition of "signature"³⁷ and the common law definition of signature³⁸ are sufficiently flexible to accommodate the needs of electronic commerce without any modifications. Furthermore, efforts to nail down such an amorphous and multifaceted concept as "signature" in order to update it run the risk of being overinclusive or underinclusive, thus creating a substantive change in the law. The UETA, therefore, provides only a definition of "electronic signature,"³⁹ not a media-neutral restatement of the concept of "signature" in general. A determination as to whether an electronic signature exists would be made in light of all the surrounding circumstances.⁴⁰ The definition of "electronic signature" should be sufficiently broad to cover either an Internet click-through contracting process in which a person clicks on some element in the graphical user interface such as an "I agree" button in order to indicate an intent to be legally bound, or the use of a digital signature within a PKI.

The objective of the UETA is only to facilitate electronic commerce, not to mandate the adoption of new technologies by any party.⁴¹ The UETA applies "only to transactions between parties each of which has agreed to conduct transactions by electronic means."⁴² As with an electronic signature, the context and surrounding circumstances should be taken into account in determining whether there is an agreement to con-

35. For example, in the 1999 revisions to U.C.C. Article 9, "authenticate" means: "(A) to sign; or (B) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record." *Id.* § 9-102(a)(7).

36. Uniform Computer Information Transactions Act § 102(6) (Draft Approved at NCCUSL Annual Conference, July 23-30, 1999) <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm> ("Authenticate means to sign, or otherwise to execute or adopt an electronic symbol, sound, or process attached to, included in, or logically associated or linked with, a record or term, with the intent to sign the record or a record to which it refers.") [hereinafter UCITA]. Please note that all citations to UCITA are to the July 1999 draft unless otherwise specified.

37. U.C.C. § 1-201(35) (1995) defines "[s]igned" to include "any symbol executed or adopted by a party with present intention to authenticate a writing."

38. A signature is any mark or symbol affixed to a writing to manifest the signer's intent to adopt it as his or her own and to be bound by it. *See* *Just Pants v. Wagner*, 617 N.E.2d 246, 251 (Ill. App. Ct. 1993); *see also* Winn, *supra* note 1, at 1216-21 (discussing the U.S. common law of signatures).

39. UETA, *supra* note 24, § 2(8) (stating that "[e]lectronic signature" means "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record").

40. UETA Draft, *supra* note 23, § 102 n.7.

41. UETA, *supra* note 24, § 5(a) ("This [Act] does not require that a record or signature be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.").

42. *Id.* § 5(b).

duct transactions electronically.⁴³ Furthermore, even though a party may have agreed to conduct one transaction electronically, that party may still refuse to conduct subsequent transactions electronically, and this provision may not be varied by agreement.⁴⁴ With regard to government records, the UETA gives state legislatures the option of permitting each agency to determine under what circumstances electronic records will be created or accepted, or designating a single state officer to manage the conversion of paper to electronic processes and make such decisions.⁴⁵

The heart of the UETA is contained in section 7, which provides that “[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”⁴⁶ “A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.”⁴⁷ If a law requires a writing or a signature, then an electronic record or an electronic signature may satisfy that requirement.⁴⁸ In addition, an electronic record or signature may not be excluded from introduction into evidence in a legal proceeding merely because it is electronic.⁴⁹

The UETA provides that, subject to certain qualifications, whenever one party is required by other state law to furnish information in writing to another, and the parties have already agreed to conduct transactions electronically, then that requirement may be met by sending the information in an electronic record, as long as the information in the record is sent in a format that can be retained by the recipient.⁵⁰ If other state law requires that a record be posted, displayed, sent, or formatted in a certain manner, however, then the UETA does not overrule those other requirements.⁵¹ This means, for example, that where a statute now requires notice be sent by first class mail, the UETA does not affect that requirement.

43. *Id.* § 2(1) (defining “agreement” as “the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction”). The Reporter’s Notes explain that the definition does not specifically include usage of trade because to do so might result in an unintended substantive change in other law; however, the reference to “other circumstances” should be flexible enough to permit usage of trade to be taken into account in an appropriate context. UETA Draft, *supra* note 23, § 102 n.1.

44. UETA, *supra* note 24, § 5(c).

45. *Id.* §§ 17-19.

46. *Id.* § 7(a). The Reporter’s Notes explain that while a contract may be unenforceable, it may still have legal effects, such as when a purchaser of goods under a contract rendered unenforceable by the Statute of Frauds insures the goods against loss, and may not have its claim in the event of such loss denied by the insurer on the grounds that the contract of sale was unenforceable against the seller. UETA Draft, *supra* note 23, § 106 n.1.

47. UETA, *supra* note 24, § 7(b).

48. *Id.* § 7(c), (d).

49. *Id.* § 13.

50. *Id.* § 8(a).

51. *Id.* § 8(b).

Furthermore, if information in an electronic record is intended to meet a statutory writing requirement, it must not be sent by an information processing system that inhibits the ability to print or download the information in the electronic record.⁵² This would cover such situations as a webwrap contract interface where terms and conditions are displayed to the end-user, but the end-user has no way to print out on paper the terms and conditions being displayed in the Internet browser application, or otherwise save an exact copy of that which the end-user is being asked to agree.⁵³ The parties may not vary these requirements by agreement, except to the extent that such variation would be permitted by other law.⁵⁴

Many state laws currently set forth record retention requirements that either require, or might be interpreted as requiring, the retention of paper documents.⁵⁵ For example, it is common for state laws to require parties in various contexts to retain copies of canceled checks for a specified amount of time. The Federal Reserve Bank of Boston submitted to the UETA drafting committee a 1997 report based on information collected by all twelve Federal Reserve Banks that identified hundreds of state and federal statutes that currently require the retention of canceled checks.⁵⁶ The existence of such laws often has a very significant chilling effect on parties wishing to convert their current paper-based record-keeping systems to electronic systems, so the UETA contains provisions designed to facilitate substitution of electronic for paper records in satisfaction of statutory record retention requirements. Provided the electronic record accurately reflects the information set forth in the record in its original form, and remains accessible for later reference, electronic records may be retained in lieu of paper records.⁵⁷ Canceled checks are expressly included if they are required to be retained as records.⁵⁸

52. *Id.* § 8(c).

53. Some observers and members of the drafting committee experienced this problem and were unable to resolve it with the standard remedy in such circumstances. In order to print a copy of what is displayed on a screen even if there is no print function available in the application currently being used, the end-user can usually press the "Print Screen" button on the keyboard to transfer whatever is displayed on the screen into the operating system's "clipboard." The image in the clipboard can then be transferred to a different application and printed out or stored to disk. Some applications have apparently been written to preclude this form of copying from taking place.

54. UETA, *supra* note 24, § 8(d).

55. For a discussion of many record retention laws and the ability of parties to substitute electronic records for paper originals in satisfaction of those requirements, see WRIGHT & WINN, *supra* note 1, pt. III.

56. Patricia Allouise, Federal Reserve Bank of Boston, A Survey of Laws and Regulations Relating to Cancelled Checks (1997) (on file with *The Business Lawyer*, University of Maryland School of Law).

57. UETA, *supra* note 24, § 12(a).

58. *Id.* § 12(e). Checks that are still performing a payment function are not covered by this section. *See id.* § 16 (governing "transferrable records").

The UETA has some rather complex provisions governing the time and place of sending and receiving electronic records.⁵⁹ The UETA provides that an electronic record is received, even if no one is aware of its receipt.⁶⁰ An electronic record is sent when a properly addressed message leaves the control of the sender, or enters the control of the recipient.⁶¹ Receipt then takes place when the message is sent to the address designated by the intended recipient, or to a system that the recipient in fact uses to receive messages of this type.⁶² The UETA also provides, for conflict of laws purposes, that electronic messages shall be deemed to be received wherever the recipient actually conducts his principal business or resides, though this legal fiction for conflict of laws purposes has no effect on determining whether the message was "received" for purposes of UETA section 15.⁶³ Even if a message is received for purposes of the UETA, that does not establish that the content received corresponds to the content sent.⁶⁴

One noteworthy departure from the general principle that the UETA is only procedural and makes no changes in substantive law concerns the provisions governing transferable records.⁶⁵ A transferable record is an electronic record that would otherwise be a negotiable note under U.C.C. Article 3 or a negotiable document under U.C.C. Article 7 if written, and that the issuer has agreed is a transferable record.⁶⁶ The drafting committee was unwilling to accept a more broadly drafted provision permitting the creation of electronic negotiable instruments generally out of deference to the concern of regulators, such as the Federal Reserve Board, that the regulatory divide between electronic funds transfers and paper negotiable instruments must be maintained for bank regulators to be able to guarantee the safety and soundness of the U.S. payment system.⁶⁷ The transferrable record provisions of the UETA are drafted to permit industries such as the real estate mortgage industry to undertake pilot projects involving electronic negotiable notes, while the PEB considers whether revisions to U.C.C. Articles 3, 4, and 4A are needed to authorize the use

59. *Id.* § 15.

60. *Id.* § 15(e).

61. *Id.* § 15(a). If both sender and recipient use the same online service provider, for example, the message may not leave the control of the sender at all, so the operative event would be when the message had reached a part of the online service provider's system that the recipient could access, such as an email inbox. UETA Draft, *supra* note 23, § 114(e) n.2.

62. UETA, *supra* note 24, § 15(b).

63. *Id.* § 15(c), (d); UETA Draft, *supra* note 23, § 114 n.4.

64. UETA, *supra* note 24, § 15(f).

65. For a more complete discussion of the issues raised by these provisions, see R. David Whitaker, *Rules Under the Uniform Electronic Transactions Act for an Electronic Equivalent to a Negotiable Promissory Note*, 55 BUS. LAW. 437 (1999).

66. UETA, *supra* note 24, § 16(a).

67. See Memorandum from the Federal Reserve Bank of New York, to the ETA Drafting Committee (Feb. 1, 1999), in <<http://www.webcom.com/legaled/ETAForum/docs/frbny.pdf>>.

of electronic negotiable instruments generally. The UETA provisions governing control of transferrable records permit the creation of the functional equivalent of holder status under current law applicable to paper instruments or documents.⁶⁸

UCITA⁶⁹

UCITA is a major piece of legislation covering a broad spectrum of issues affecting licenses of software and computer information, including the formation, interpretation, performance, and enforcement of such contracts in new electronic commerce contexts. The statute contains 108 sections and, in its final form for approval with a prefatory note and reporter's notes, is over 300 pages long. It is beyond the scope of this Article to do more than suggest what are some of the major innovations in electronic contracting law contained in this statute.⁷⁰

Just as in the drafting of the UETA, the scope provisions of UCITA were among the most controversial provisions that the drafting committee addressed. As its name implies, it applies to "computer information transactions."⁷¹ In other words, UCITA is a contract law statute that covers transactions in computer software, multimedia interactive products, computer data and databases, and Internet and online information.⁷² In addition to provisions governing the licensing of software and other computer information, UCITA contains provisions governing electronic contracting processes used to execute transactions in software and computer information. UCITA addresses these electronic contracting issues because distribution of software and computer information in electronic form over computer networks is an important distribution mechanism for such products today, and is likely to become more important in the future. If a transaction for goods that contain no embedded software is conducted electronically, UCITA by its terms would have no application. Until revisions of U.C.C. Article 2 are complete, however, courts and others may

68. UETA, *supra* note 24, § 16(b), (c). The control provisions in UETA § 16 are modeled after the provisions of revised U.C.C. Article 9 governing electronic chattel paper. For an analysis of the concept of control of electronic chattel paper, see Jane K. Winn, *Electronic Chattel Paper Under Revised Article 9: Updating the Concept of Embodied Rights for Electronic Commerce*, 75 CHI.-KENT L. REV. (forthcoming 1999).

69. The following discussion is based on UCITA, *supra* note 36.

70. The ULC has posted on its web site a series of papers by Carlyle C. Ring, Jr., Chair of Committee to Draft UCITA, and Raymond T. Nimmer, Reporter of Committee to Draft UCITA, providing responses to recurring questions on UCITA. See Series of Papers on UCITA Issues (visited Oct. 8, 1999) <<http://www.nccusl.org/pressrel/UCITAQA.htm>>.

71. UCITA, *supra* note 36, § 103(a). A "[c]omputer information transaction" is defined as "an agreement and the performance of that agreement to create, modify, transfer, or license computer information or informational rights in computer information." *Id.* § 102(12).

72. See UCITA § 103 n.2 (Draft Comments to UCITA, Oct. 15, 1999) <<http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm>> [hereinafter UCITA Draft Comments].

look to UCITA for inspiration in analyzing electronic contracting issues. It is possible that some courts might even apply by analogy UCITA's electronic contracting provisions to transactions in goods if the transactions are executed electronically.

The application of UCITA to transactions involving both computer information and other subject matter is somewhat complex. In addition, the impact of UCITA may be expanded beyond the jurisdiction of any state that enacts it.⁷³ This provision was quite controversial in part because of possible revisions to the general choice of law provisions contained in U.C.C. Article 1.⁷⁴ Critics and proponents of UCITA alike share a perception that the "freedom of contract" principle in UCITA tends to favor more rigorous enforcement of form contracts that would otherwise be the case if the current version of U.C.C. Article 2 or the common law of contracts applied to a transaction.⁷⁵ Opponents of UCITA were con-

73. As a general rule, UCITA applies to transactions relating solely to computer information. See UCITA § 103(a) (Draft, Oct. 15, 1999) <http://www.law.upenn.edu/b11/ulc/ulc_frame.htm>. When a transaction involves subject matter other than computer information, UCITA provides two alternative tests for determining its applicability: the primary subject matter and material purpose tests, as provided in § 103(b):

(1) If a transaction includes computer information and goods, this [Act] applies to the computer information and informational rights in it. However, if a copy of a computer program is contained in and sold or leased as part of other goods, this [Act] applies to the copy and the computer program only if:

(A) the other goods are a computer or computer peripheral; or

(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a *material purpose* of transactions in goods of the type sold or leased.

(2) In all cases not involving goods, this [Act] applies only to the computer information or informational rights in it, unless the computer information and information rights are, or access to them is, the *primary subject matter*, in which case this [Act] applies to the entire transaction.

Id. § 103(b) (emphasis added).

74. The current default choice of law rule for the U.C.C. is contained in Article 1, which applies to any transaction within the scope of the U.C.C. if no more specific choice of law rule contained in one of the other articles applies. This choice of law rule currently requires that the transaction bear a reasonable relationship to the state whose law is specified by the parties in a contract; if the parties have not made a choice, the U.C.C. applies to transactions bearing an appropriate relationship to a state that has enacted the U.C.C. See U.C.C. § 1-105(1) (1995). During the U.C.C. Article 1 revision process, there has been consideration of removing the "reasonable relation" requirement to the contractual choice of law rule in Article 1. If Article 1 is revised to remove the "reasonable relation" requirement, and the forum state had adopted that version of Article 1, and had determined that the transaction was governed by the U.C.C., the forum state court would probably apply UCITA if that was what the parties had specified as the governing law of the contract even if the jurisdiction that had enacted UCITA bore no reasonable relationship to the transaction. See generally Amelia Boss, *The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum under Proposed Revisions to the U.C.C.*, 32 INT'L LAW. 1067 (1998).

75. See, e.g., Memorandum from Jean Braucher & Peter Linzer, to Members of ALI (May 5, 1998), in <<http://www.ali.org/ali/Braucher.htm>>; Memorandum from Micalyn S.

cerned that even though they might be able to block enactment of it in many state legislatures, the growing judicial recognition of the enforceability of choice of law and choice of forum provisions in contracts combined with widespread adoption by industry of choice of law provisions that point to jurisdictions that have enacted UCITA would give UCITA considerable effect even in those jurisdictions where it might have been rejected by the state legislature.⁷⁶ As a result, the final draft of UCITA contains provisions designed to assuage the concerns of such critics.⁷⁷

In mixed transactions involving both computer information and goods or some other subject matter, UCITA applies if the primary purpose of the contract revolves around the computer information.⁷⁸ If any provision of the U.C.C. applies to a mixed transaction, then generally UCITA does not apply to that extent.⁷⁹ If a mixed transaction involves financial services, entertainment or broadcast content, or an employment relationship, then UCITA does not apply at all.⁸⁰ This scope provision is in marked contrast with some of its earlier iterations in proposed U.C.C. Article 2B, which applied to "licenses of information and software contracts."⁸¹ Such a sweeping scope provision might have brought such diverse enterprises as the film, television, radio, music, publishing, financial services, research and development, and data processing industries within its terms, not to mention public libraries and professional services such as law, accounting, and consulting where information printed on paper is circulated subject to restrictions. The retrenchment of the scope provisions in UCITA represents a return to something approaching the original vision of proposed U.C.C. Article 2B, which started out in large part as a statute to validate shrink-wrap software contracts.

One provision in UCITA highlights the often indistinct and highly controversial boundary between copyright and other federal intellectual property law on the one hand, and the law of software licenses governed by UCITA on the other.⁸² This provision was added as a concession to groups

Harris, Winpro, Inc., to NCCUSL (July 19, 1999), in <<http://www.2bguide.com/docs/71999mh.html>>.

76. See *infra* notes 112-22 (discussing choice of law and forum provisions in UCITA).

77. Adoption of UCITA as the governing law of a contract cannot abrogate "an otherwise applicable rule [of law] that may not be varied by agreement . . . and in a mass market transaction, does not alter" either an applicable consumer protection statute or administrative rule, or any law requiring that information be provided in a tangible printed form. UCITA, *supra* note 36, § 103(e)(1).

78. *Id.* § 103(b).

79. *Id.* § 103(c).

80. *Id.* § 103(d).

81. U.C.C. § 2B-103(a) (Tenative Draft Nov. 1, 1997), in <<http://www.law.upenn.edu/bll/ulc/ucc2/2bnov97.htm>>.

82. UCITA, *supra* note 36, § 105(a) ("A provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption.").

who were concerned that without a formal statement that federal intellectual property law will preempt state contract law with regard to any matter within the scope of the federal law, the provisions of UCITA might be interpreted in a manner that would erode certain intellectual property rights such as fair use. In addition, UCITA provides that if a term of a contract "violates a fundamental public policy," the court may limit the enforcement of the contract as necessary to avoid any result contrary to public policy.⁸³ A court may, therefore, refuse to enforce, or limit as appropriate the enforcement of unconscionable contracts or terms governed by UCITA.⁸⁴

UCITA contains a provision that is virtually identical to those in the UETA and the UN Model Law on Electronic Commerce requiring that a record or authentication not be denied legal effect or enforceability merely because it is electronic form.⁸⁵ In keeping with the basic policy promoting freedom of contract, UCITA provides that nothing in it can be construed to require that a record or authentication be electronic.⁸⁶ Furthermore, a contract formed through the use of an electronic agent will be binding on the person using the agent, even if no one was aware of or reviewed the agent's operations or the results of the operations.⁸⁷

UCITA provides that in any transaction, a person may establish requirements regarding the type of the authentication or record acceptable to it.⁸⁸ This is similar to the very general enabling language used in the proposed federal legislation currently before Congress,⁸⁹ and is in marked

83. *Id.* § 105(b). Considerable concern was expressed during the drafting process that strong enforcement of information licenses would effectively put public libraries out of business in the near future when content is more likely to be delivered electronically than on the printed page. Erosion of the kind of rights in information embodied in the copyright doctrine of fair use are an example of a public policy that might lead a court to limit the enforcement of an information license. *See, e.g.*, Letter from David Bender, Special Libraries Association, Carol C. Henderson, American Library Association, Robert Oakley, American Association of Law Libraries, Duane E. Webster, Association of Research Libraries, to Carlyle Ring, Chair, U.C.C. 2B Drafting Committee (Oct. 8, 1998), in <<http://www.2bguide.com/docs/libr1098.html>>.

84. UCITA, *supra* note 36, § 111(a). The parties may not disclaim their obligations of good faith, reasonableness, diligence, or care, although they may by agreement set standards for meeting those obligations if those standards are not manifestly unreasonable. *Id.* § 104(c)(1).

85. *Id.* § 107(a); UETA, *supra* note 24, § 7(a); *see also infra* notes 210-24 and accompanying text (discussing UNCITRAL Model Law). "Record" is a technology-neutral term that encompasses both paper and electronic writings; "[a]uthenticate" is a technology-neutral term that encompasses both manual and electronic signatures. UCITA, *supra* note 36, § 102(6), (58).

86. UCITA, *supra* note 36, § 107(b).

87. *Id.* § 107(d); *see also id.* §§ 202, 206 (regarding the legal effect of using electronic agents).

88. *Id.* § 107(c).

89. *See infra* notes 133-48 and accompanying text.

contrast with the more nuanced provisions in the UETA⁹⁰ and in the draft European Commission (EC or Commission) Directive on electronic commerce now under consideration in the EU.⁹¹ Abstract language affirming freedom of contract as a fundamental principle may appear neutral and even-handed on its face. When applied to transactions where one party is substantially more sophisticated than the other, has substantially more bargaining power, or in the electronic commerce context has control over the design of the interface, however, such a general statement may operate in fact as a license to sophisticated corporate transactors to impose inefficient or grossly inequitable terms on less sophisticated parties through contracts of adhesion. One way to temper the discretion of the electronic commerce merchant in drawing up its standard form contract and designing the user interface while preserving a meaningful exercise of freedom of contract by the consumer would be to require certain minimum procedural safeguards for consumers. For example, any agreement by a consumer to the use of electronic communications media or records might be denied effect unless it is given by the consumer using the same form of electronic media as that the consumer is agreeing to use in the future. Such procedural requirements would minimize the likelihood that, for example, consumers who do not have access to computers would find themselves deemed to have accepted notices contained in records posted to Internet web sites.⁹²

Some of the most important provisions of UCITA clarify the legal status of new forms of electronic contracting, such as clicking on an "I agree" icon displayed on an Internet browser. UCITA provides that authentication may be proven in any manner, including showing that a party

90. See *supra* notes 41-45 and accompanying text. For example, the UETA grants parties a non-waivable right to withdraw consent to the use of electronic media at any time, and requires that if the parties have agreed to conduct transactions electronically, and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is met by the use of an electronic record only if the information is in a format that the recipient can retain. UETA, *supra* note 24, §§ 5(c), 8(a).

91. See *infra* notes 154-75 and accompanying text; see also Commission of the European Communities, Amended Proposal for a Directive of the European Parliament and of the Council Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directives 97/7/EC and 98/27/EC, COM(99)385 final art.3a ¶ 1, available in <<http://www.europa.eu.int/comm/dg15/en/finances/consumer/disselen.htm>> [hereinafter Proposal Concerning Distance Marketing]; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19, art. 5, in <http://www.europa.eu.int/comm/dg24/policy/developments/dist_sell/dist01_en.html> (requiring that a supplier communicate contractual conditions in writing or in another durable medium available and accessible to consumer) [hereinafter Distance Selling Directive].

92. Proponents of UCITA might argue that UCITA does not require more specific procedural controls to protect consumers from such merchant overreaching because such merchant practices could be invalidated by a court under various provisions of UCITA, including those limiting enforcement for lack of good faith, unconscionability, or violation of a fundamental public policy. UCITA, *supra* note 36, §§ 104(c)(1), 105(b), 111(a).

made use of information or access that could only have been available if it engaged in conduct or operations that authenticated the record or term.⁹³ This provision will validate electronic contracting practices such as displaying screens that the end-user must click through before being granted access to certain functions on the vendor's system or being sold or licensed certain goods or services. Anecdotal evidence suggests that many online vendors using such an interface would be able to establish what content was displayed to the end-user, that the user had accessed successively the files containing the content, and that because of the graphical user interface design, unless the appropriate responses had been given by the end-user, the granting of access or delivery of goods or services would not have taken place. Many merchants using such contracting interfaces are apparently not preserving a separate copy of the content combined with some particular form of electronic signature for each transaction executed electronically.⁹⁴

A more general provision designed to reduce uncertainty about the legal efficacy of electronic contracting is found in the manifestation of assent provisions.⁹⁵ The term "manifest assent" is taken from section 19 of the *Restatement (Second) of Contracts*.⁹⁶ In UCITA, a party manifests assent to a record or term if the party has first had an opportunity to review its contents, and then either authenticates the record or term, or intentionally engages in conduct or makes statements calculated to make the other party believe the person is manifesting assent.⁹⁷ Opportunity to review means either the term or record was made available in a manner so that a reasonable person ought to have noticed it and understood its significance.⁹⁸ Comment 5 to UCITA section 112 provides two illustrations to clarify the

93. *Id.* § 107(d).

94. UCITA also retains a Statute of Frauds provision for contracts requiring payment of \$5000 or more, however, which such contracting practices would *not* seem to meet. It requires that "the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed and which reasonably identifies the copy or subject matter to which the contract refers." *Id.* § 201(a)(1).

95. *Id.* § 112.

96. RESTATEMENT (SECOND) OF CONTRACTS § 19 (1979). Section 19 concerning conduct as manifestation of assent provides:

- (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
- (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
- (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

Id.

97. UCITA, *supra* note 36, § 112(a).

98. *Id.* § 112(e)(i).

meaning of this provision in the context of Internet contracting.⁹⁹ In the first, the registration screen prominently states: “ ‘Please read the License. It contains important terms about your use and our obligations with respect to the information. If you agree to the license, indicate this by clicking on the ‘I agree’ button. If you do not agree, click ‘I decline.’ ”¹⁰⁰ In the second illustration, the first computer screen asks the potential licensee to enter a name, address and credit card number. After entering the information, and striking the “enter” key, the licensee has access to the data and receives a monthly bill. In the center of the screen amid other languages in small print, is the statement: “ ‘Terms and conditions of service; disclaimers’ indicating a hyperlink to the terms. The customer’s attention is not called to the sentence, nor is the customer asked to react to it.”¹⁰¹ The note indicates that in the first illustration, the licensee has “manifest[ed] assent to the license and adopts its terms,” but in the second illustration, the licensee has assented to a contract, but not to the “terms of service.”¹⁰²

If the term was only made available for review after a person becomes obligated to pay or begins its performance, it may nevertheless be enforceable provided: (i) a person has a right to a return for subsequently unacceptable disclosed terms, (ii) the record proposes a modification of the contract, or (iii) in a case other than a mass market transaction, the parties may have an opportunity to review a record or term in the contract.¹⁰³ These provisions affirm the holdings in the recent cases involving the Gateway 2000, Inc. (Gateway) computer company.¹⁰⁴ Consumer advocates and some legal academics felt these provisions nevertheless represented a departure from prior law regarding the post-sale disclaimers, and rather than preserving a consumer’s right to an opportunity to review, were tantamount to imposing on consumers an obligation to scrutinize all the terms of a merchant’s form contracts.¹⁰⁵

99. UCITA Draft Comments, *supra* note 72, § 112 n.5.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* § 112(e)(3)(A), (B), (D).

104. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (1998). In both Gateway cases dealing with post-sale disclosures, the courts upheld the validity of the form contracts that Gateway enclosed when shipping computers sold by telephone order because the purchaser had a right to return the computer within 30 days if the terms were not acceptable. *See Hill*, 105 F.3d at 1150; *Brower*, 676 N.Y.S.2d at 573-75. In *Brower*, however, the court held the arbitration clause unconscionable and therefore unenforceable. *Brower*, 676 N.Y.S.2d at 574-75.

105. *See, e.g.*, Letter from 45 Law Professors, to Gene Lebrun, President of NCCUSL (July 16, 1999), in <<http://www.2bguide.com/docs/799profs.html>>. One of the authors of this Article was among the 45 law professors who signed the July 16, 1999 letter. *See also* Letter from Professor Ray Nimmer, UCITA Reporter, in Response to 45 Law Professors (July 17, 1999), in <<http://www.2bguide.com/docs/rrn43.html>>.

With regard to the legal effect of attribution procedures,¹⁰⁶ UCITA now follows the technology neutral approach taken in UETA.¹⁰⁷ This change was made very shortly before UCITA was finalized. Prior to that last-minute change, UCITA followed a more technology specific approach designed to associate specific legal outcomes with the use of technologies believed to be particularly reliable.¹⁰⁸ Variations of this “technology specific” approach have already been accepted by several state legislatures in the United States, and is being considered in some form in the proposed EU Electronic Signature Directive, and in the draft UNCITRAL Uniform Rules on Electronic Signatures.¹⁰⁹

One provision in UCITA clarifies the enforceability of releases, a particular form of contract that is quite common in online environments, but which may appear to be fatally flawed under classical contract law doctrines of consideration.¹¹⁰ A party distributing information over the Internet may want to condition access to that information on an agreement from each party accessing it that the provider will not be sued if the accessing party is dissatisfied with or aggrieved by the content. For ex-

106. An “attribution procedure” is defined as

a procedure established by law, administrative rule, or agreement, or a procedure otherwise adopted by the parties, to verify that an electronic event is that of a specific person or to detect changes or errors in the information. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgment, or any other procedures that are reasonable under the circumstances.

UCITA, *supra* note 36, § 102(a)(5).

107. UCITA § 214 now provides:

(a) An electronic event is attributed to a person if it was the act of that person or its electronic agent, or the person is otherwise bound by it under the law of agency or other law. The party relying on attribution of an electronic event to another person has the burden of establishing attribution.

(b) The act of a person may be shown in any manner, including a showing of the efficacy of an attribution procedure.

(c) The effect of an electronic act attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties’ agreement, if any, and otherwise as provided by law.

Id. § 214.

108. See *supra* note 32 and accompanying text.

109. For an analysis of digital signature laws enacted by state legislatures in the U.S., see McBride Baker & Coles, *supra* note 2. For a discussion of the EU draft Electronic Signature Directive and the UNCITRAL Uniform Rules on Electronic Signatures, see *infra* text accompanying notes 176-78 and 225-30.

110. UCITA, *supra* note 36, § 207. This section provides in part: “A release is effective without consideration if it is: (1) in a record to which the releasing party agrees, such as by manifesting assent, and which identifies the informational rights released; or (2) enforceable under estoppel, implied license, or other rules of law.” *Id.*

ample, a party maintaining an Internet "chat room" might require anyone wishing to read the messages to release the chat room operator from any liability for the content of the messages. It may be hard to argue, though, that when the accessing party agrees not to sue the chat room operator, even if the content of messages posted in the chat room would otherwise be actionable, that should constitute the consideration offered by the accessing party, making the release a valid contract. While the chat room operator could still raise estoppel arguments if an agreement not to sue was found not to be consideration, the chat room operator may be concerned about the enforceability of the release agreement against the accessing party and the chat room operator may simply shut down the chat room.¹¹¹

The choice of law¹¹² and choice of forum¹¹³ provisions in UCITA would give merchants entering into electronic contracts greater certainty that they would not be forced to litigate disputed transactions in remote jurisdictions.¹¹⁴ UCITA provides that the parties may choose the applicable law governing their transactions without any limitation, such as requiring the jurisdiction whose law was chosen to bear a reasonable relationship to the transaction. It also provides, however, that this choice will not be "enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply . . . in the absence of the agreement" by the parties.¹¹⁵ In the absence of an enforceable choice of law term, access contracts¹¹⁶ or contracts for electronic delivery of a copy are governed by the law of the jurisdiction where the licensor is located, while a consumer contract involving delivery of a copy on a physical medium is governed by the law of the jurisdiction where the copy is delivered to the consumer. In all other cases, the law of the jurisdiction with the most significant relationship to the transaction governs.¹¹⁷ These rules clearly favor cer-

111. For a discussion of the importance to a certificate authority of conditioning access to information contained in a certificate revocation list on receiving an enforceable agreement from the accessing party not to sue the certificate authority for inaccurate information in the certificate, see Jane K. Winn, *The Hedgehog and the Fox: Distinguishing Public and Private Sector Approaches to Managing Risk for Internet Transactions*, 51 ADMIN. L. REV. 955, 972-73 (1999).

112. UCITA, *supra* note 36, § 109.

113. *Id.* § 110.

114. For an overview of how the choice of law provisions evolved during the U.C.C. 2B drafting process, see Boss, *supra* note 74 (discussing the jurisdiction of commercial law).

115. UCITA, *supra* note 36, § 109(a).

116. UCITA § 102(a)(1) defines "access contract" as "a contract to obtain electronically access to, or information from, an information processing system of another person, or the equivalent of such access."

117. *Id.* § 109(b)(3). If the application of this rule points to a foreign jurisdiction which does not provide substantially similar protections and rights to a party not located in that jurisdiction to those provided by UCITA, then the court may apply the law of the U.S. jurisdiction with the most significant relationship to the transaction instead. *Id.* § 109(c).

tainty on the part of merchants and, except in the case of mandatory consumer protection laws,¹¹⁸ shift the risk of learning the substance of the law applicable to the transaction from the merchant to the consumer. This approach is in marked contrast to the EU approach, which currently requires all Member States to revise their consumer protection laws to provide a standardized, comprehensive array of mandatory consumer protections that apply to electronic contracting to permit merchants to follow the law of their home country without depriving consumers of an adequate level of protection.¹¹⁹

The choice of forum provisions in UCITA¹²⁰ are even more favorable to merchants wishing to minimize the risk of being haled into court in a remote jurisdiction in connection with a contract executed electronically. Such a rule is consistent with some recent cases governing contractual choice of forum clauses, including those in consumer contracts, such as in *Carnival Cruise Lines, Inc. v. Schute*.¹²¹ As a practical matter, granting such broad discretion to the contract drafter without any limitation for its application to consumer contracts will effectively deprive many consumers in online transactions from any effective remedy in the event of a dispute. This approach is also in marked contrast with current proposals in the EU to revise the 1968 Brussels Convention to apply to contracts involving new forms of electronic communications media.¹²²

118. It is unclear how many consumer protection laws in the United States will be found to constitute mandatory consumer protections applicable to transactions within the scope of UCITA. Most U.S. consumer protection laws date from the 1960s and 1970s and as a result, may not regulate many of the special characteristics of "computer information transactions." *Cf. id.* § 103(a).

119. The Distance Selling Directive was promulgated in 1997, and legislation based on it must be enacted by the Member States by 2000. *See infra* notes 195-206 and accompanying text. Under the principle of country of origin regulation and mutual recognition of regulation by Member States, a merchant need only comply with the law where the merchant is established. Once all Member States have enacted legislation based on the Distance Selling Directive, this will nevertheless provide consumers with a uniformly high level of protection throughout the EU. EU Member States are also parties to the 1980 Rome Convention on Contractual Choice of Law, which follows UCITA in limiting the enforcement of contractual choice of law provisions where they conflict with a mandatory consumer protection law. *See* Convention on the Law Applicable to Contractual Obligations, June 19, 1998, 80/934/EEC, 1980 O.J. (L 266) 1, 19 I.L.M. 1942 (1980) [hereinafter 1980 Rome Convention]. It is unclear if the application of Member State law based on the Distance Selling Directive would constitute not providing "substantially similar protections and rights" to the merchant under UCITA § 109(c), and thus permit a U.S. court to apply U.S. law instead of the law of a Member State to a transaction involving a consumer in Europe.

120. UCITA § 110 provides "[t]he parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust [and that a] choice-of-forum term is not exclusive unless the agreement expressly so provides." UCITA, *supra* note 36, § 110.

121. 499 U.S. 585 (1991). In one case involving an arbitration clause in a Gateway computer form contract, the court upheld the provision. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997). In another, the arbitration clause was held to be unconscionable. *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 575 (1998).

122. *See infra* text accompanying notes 179-94.

UCITA contains several provisions that its proponents hail as important new consumer protections. The concept of "mass market" covers both consumer transactions and other transactions involving software or computer information offered to the general public under substantially identical terms.¹²³ Supporters of the software industry were critical of using the concept of "mass market" to define the scope of what would otherwise be protections limited to consumers because of the increased burdens this would impose on software developers licensing their products to business users.¹²⁴ Consumer representatives were uncomfortable with the substitution of the concept of mass market for consumer, in what would otherwise have been consumer protection provisions, due to concerns that the result would be to reduce the substance of the statutory protections provided to less sophisticated parties or parties with grossly unequal bargaining power to offset its wider coverage.¹²⁵ Although the notion of mass market was never removed from the text of UCITA, the drafting committee's enthusiasm for it waned as the drafting process continued, and some protections in the final draft that might have applied to mass market transactions apply only to consumers instead.¹²⁶

The general rule governing when a party will be deemed to have adopted specific terms of a contract is contained in section 29 of UCITA. The general rule states that if a party agrees to a record containing a term, by manifesting assent or otherwise, the party has adopted all the terms in the record, without regard to whether the party actually knew of or understood those terms, and without regard to whether the terms were only made available to the party after performance or use began under the agreement.¹²⁷ This rule formalizes a concept described in the reporter's

123. UCITA § 102(a)(46) defines a "mass-market transaction" as:

(A) a consumer contract; or (B) any other transaction with an end-user licensee if: (i) the transaction is for information or informational rights directed to the general public as a whole including consumers, under substantially the same terms for the same information; (ii) the licensee acquires the information or rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and (iii) the transaction is not: (I) a contract for redistribution or for public performance or public display of a copyrighted work; (II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee other than minor customization using a capability of the information intended for that purpose; (III) a site license; or (IV) an access contract.

UCITA, *supra* note 36, § 102(a)(46).

124. *See, e.g.*, Carol Kunze, *Hot Button Issue: Mass Market Licenses* (Mar. 13, 1999), in <<http://www.2bguide.com/hbimmvc.html>>.

125. *See, e.g.*, Memorandum from Gail Hillebrand, Consumers Union, to Uniform Law Commissioners (July 1997), in <<http://www.2bguide.com/docs/cun.html>>.

126. *See, e.g.*, UCITA, *supra* note 36, § 216 (governing consumer defenses to electronic errors that occur in automated transactions when no reasonable method to detect and correct the error has been provided).

127. *Id.* § 209.

notes as “layered contracting.”¹²⁸ The application of this general rule is modified slightly for mass market contracts by providing that a party will be deemed to have adopted a term in a mass market license only if the term was made available before performance or use began, or during the initial use or performance, and providing that the term is not unconscionable or in conflict with terms to which the parties expressly agreed.¹²⁹ In addition, if a party does not have an opportunity to review the terms of a mass market license before becoming obligated to pay and the party decides to decline the license after having actually reviewed the terms, the declining party is entitled to return whatever was provided and to be reimbursed for any reasonable expenses incurred in the return, including any expenses incurred in uninstalling software from the declining party’s computer and returning it to its original condition.¹³⁰ The declining party’s right to be reimbursed any expenses incurred in making the return is supposed to create market incentives for licensors to make the terms of mass-market licenses available before delivery.¹³¹ In general, consumer advocates have found the benefits provided by these sections to be outweighed by the harm caused by codifying recent case law in this area, which has frequently been unfavorable to consumers.¹³²

U.S. FEDERAL INITIATIVES

Federal legislators have been considering whether uniform federal law in this area might be warranted, given that Congress can often act more quickly than the states acting through the ULC, and with greater certainty as to the uniformity of the final outcome.¹³³ The variations among different state approaches to enabling the use of new electronic communications media are very substantial in number, even if they are ultimately found to be relatively limited in scope, or not to be very different in substance or application. Furthermore, a clear, consistent approach articulated by the federal government would permit the United States to speak with a single

128. UCITA Draft Comments, *supra* note 72, § 208 n.3 (citing case law support for the concept of rolling or layering contract processes: *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (stating that shrinkwrap terms were part of contract); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (1998)).

129. UCITA, *supra* note 36, § 210(a).

130. *Id.* § 210(b).

131. UCITA Draft Comments, *supra* note 72, § 210 n.4(c); *see also* UCITA, *supra* note 36, § 210(b).

132. *See, e.g.*, Letter from Professor Jean Braucher and Professor Mark Budnitz, Co-Chairs of the Working Group on Consumer Protection, American Bar Association Business Law Section, Cyberspace Law Committee, to NCCUSL (June 10, 1999), in <<http://www.2bguide.com/docs/jbmb699.html>>.

133. Philip S. Corwin, *Electronic Authentication: The Emerging Federal Role*, 38 JURIMETRICS 261, 262 (1998).

voice in its dealings with the EU. Such a unified position may be necessary to reduce the possibility that the EU approach to electronic contracting law would become the *de facto* global standard by virtue of its more uniform application over a unified economy that is now larger than the U.S. economy, which might harm the competitive position of U.S. firms offering electronic commerce products and services that do not comply with the EU standard.

Although federal reform of contract law to support electronic commerce may seem like a much simpler, more direct solution to the problems that the ULC and individual state legislatures have been grappling with for some time, it may also cause problems that could be avoided by reforming contract law through the uniform law process or individual state legislation. A great deal of contract law is still substantially defined by state law, whether in the form of state statutes such as the U.C.C. or in case law clarified by the first and second *Restatements of Contracts*. Federal intervention to minimize state law writing and signature requirements may have major, unintended consequences in many bodies of law beyond what is normally thought of as "contract law," including such bodies of law as negotiable instruments law, trusts and estate law, real property law and consumer protection law.¹³⁴

105TH CONGRESS

In the 105th congressional session, many bills were introduced dealing with electronic commerce issues, but the only significant bill to become law was the Government Paperwork Elimination Act,¹³⁵ which permits the federal government to accept digital signatures.¹³⁶ Among the bills that were not enacted were special interest legislation permitting regulated financial institutions to become major providers of online authentication services.¹³⁷ This bill included provisions that would establish a self-regulatory organization (SRO) to oversee providers of such services, similar to the role played by SROs such as the National Association of Securities Dealers in other financial services industries.

134. See, e.g., New Jersey Law Revision Commission, *New Jersey Law Revision Commission Opposes Federal 'e-Commerce' Preemption Bills H.R. 1714 and S. 761*, in <<http://www.lawrev.state.nj.us/sig/fedbills.htm>>.

135. It was enacted as part of the Omnibus Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681-2749 (codified as amended at 44 U.S.C. ch. 35).

136. Proposed guidelines for the implementation of the Government Paperwork Elimination Act were published on March 5, 1999. See Management of Federal Information Resources, 64 Fed. Reg. 10,896 (Mar. 5, 1999). The comment period on the proposed guidelines closed on July 5, 1999.

137. Digital Signature and Electronic Authentication Law of 1998, S. 1594, 105th Cong. (1998).

106TH CONGRESS

In 1999, two important bills that would apply to electronic commerce were introduced in Congress. House Bill 1714, the “Electronic Signatures in Global and National Commerce Act,”¹³⁸ and Senate Bill 761, the “Third Millennium Electronic Commerce Act.”¹³⁹ Both seek to create a level national playing field for electronic commerce by preempting outdated state laws requiring manual signatures and paper writings, and eliminating the bewildering array of different approaches taken by recent states to promote electronic commerce. Both congressional bills 1714 and 761 show the influence of the UNCITRAL Model Law on Electronic Commerce¹⁴⁰ and the UETA; however, both bills have been criticized by the ULC¹⁴¹ and the U.S. Department of Commerce¹⁴² as more radical than the UETA and as unworkable within a federal legal system. In light of the controversy surrounding the proposed federal legislation in 1999, it is unclear whether either bill is likely to be enacted in its current form.

The scope of both bills is wider than the UETA because they apply to commercial transactions affecting interstate commerce, and have much more limited exclusions.¹⁴³ Before enacting the UETA, state legislatures are encouraged to review various bodies of existing law to determine if the list of exemptions provided in the UETA is appropriate, or should be supplemented. Because these federal bills would preempt all state law in this area, there would be no such mechanism for fine-tuning the scope of the law at the state level. For example, the UETA excludes the U.C.C. from its scope in order to avoid disturbing conflating electronic funds transfers from negotiable instruments, or writing requirements that were written into statutes notwithstanding the availability of electronic alternatives.¹⁴⁴

138. Electronic Signatures in Global and National Commerce Act, H.R. 1714, 106th Cong. (1999) [hereinafter *Electronic Signatures Act*].

139. Third Millennium Electronic Commerce Act, S. 761, 106th Cong. (1999) [hereinafter *Third Millennium Act*].

140. See *infra* text accompanying notes 210-24.

141. See Letter from John McCabe, Legal Counsel, NCCUSL, to Interested Parties (July 6, 1999), in <<http://www.webcom.com/legaled/ETAForum/docs/7699jm.html>>; Letter from John McCabe, Legal Counsel, NCCUSL, to Members of the Commerce Committee, Congress of the United States (June 17, 1999), in <<http://www.webcom.com/legaled/ETAForum/docs/1714jm.html>>.

142. Letter from Andrew J. Pincus, Department of Commerce, to Representative Tom Bliley, Chairman, Committee on Commerce (Aug. 4, 1999), in <<http://www.civics.com/content/fedleg/doc-1714-opposed.htm>>.

143. While House Bill 1714 excludes wills, codicils, trusts, adoption, divorce, and family law matters, Senate Bill 761 excludes government transactions. *Electronic Signatures Act*, *supra* note 138, § 103; *Third Millennium Act*, *supra* note 139, § 4(8) (defining “[t]ransaction” as “an action . . . between 2 or more *persons*” (emphasis added)). Neither statute has an exception for land transactions.

144. UETA, *supra* note 24, § 3. See, e.g., U.C.C. Article 4A (1995) (regulating electronic funds transfers). U.C.C. § 4A-202(c)(ii) provides that a bank’s customer may be liable for an unauthorized funds transfer if “the customer expressly agreed *in writing* to be bound by any

Both bills would create pressure on state legislatures to adopt the UETA in order to avoid this kind of radical preemption of signature and writing requirements across a state's existing laws.¹⁴⁵

In addition, the proposed federal legislation does not exclude consumer transactions, and may have very serious negative consequences for consumers using electronic contracting technologies unless special provisions applicable to consumer transactions are added. The federal bills defer to party autonomy in very general terms,¹⁴⁶ with no specific qualifications to deal with situations where the parties have grossly disparate bargaining power.¹⁴⁷ This problem has been addressed in UETA and in EU legislation by providing certain minimum procedural safeguards for consumers in electronic contracting situations that prevent, for example, a merchant using a pre-printed standard form paper contract to secure a consumer's agreement to receive future notices electronically.¹⁴⁸

payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer." *Id.* § 4A-202(c)(ii) (emphasis added).

145. Electronic Signatures Act, *supra* note 138, § 102; Third Millennium Act, *supra* note 139, § 6. While it may be helpful to apply this kind of pressure to some states that may not have yet focused, mandating a very general enabling statute in the form of the UETA may not represent progress in all contexts. For example, in 1998, the New Jersey Law Revision Commission completed an intensive multi-year study of how to revise its laws to eliminate obstacles to electronic commerce. The commission came to the conclusion that the unintended consequences of a general overlay statute in the form of the UETA might offset the intended benefits, and proposed instead several minor changes in specific laws. See New Jersey Law Revision Commission, *Final Report Relating to Electronic Records and Signatures* (Oct. 1998), in <<http://www.lawrev.state.nj.us/sig/frpt.pdf>>.

146. House Bill 1714 provides that "[w]ith respect to any contract or agreement entered into in or affecting interstate or foreign commerce, the parties to such contract or agreement may establish reasonable requirements regarding the types of electronic records and electronic signatures acceptable to such parties." Electronic Signatures Act, *supra* note 138, § 101(b). Senate Bill 761 provides that "[t]he parties to a contract may agree on the terms and conditions on which they will use and accept electronic signatures and electronic records, including the methods therefore, in commercial transactions affecting interstate commerce. Nothing in this subsection requires that any party enter into such a contract." Third Millennium Act, *supra* note 139, § 6(b).

147. The same issue is raised with the very general language affirming the principle of freedom of contract in UCITA. See *supra* text accompanying notes 73-77.

148. For example, the federal bills have no provisions that correspond to a provision in UETA providing that even between parties who have agreed to communicate electronically, a legal requirement that information be provided in writing is only met if the information is provided in a format that the recipient can retain. UETA, *supra* note 24, § 8(a); see *supra* text accompanying notes 55-68. In the EU Distance Selling Directive, the merchant must provide certain information to consumers regarding contracts executed online in writing or another durable medium available and accessible to the consumer. Distance Selling Directive, *supra* note 91, art. 5; see *infra* text accompanying notes 195-206.

EU INITIATIVES

In 1997, the Commission announced its intention to create a coherent legal framework within Europe for electronic commerce by the year 2000.¹⁴⁹ As a result, various proposals to regulate different aspects of electronic contracting are currently pending in the EU. Even the most market-oriented of the proposals, the draft directive governing electronic commerce (draft EC Directive)¹⁵⁰ is more comprehensive, more regulatory, and more protective of consumers than any legislation currently pending in the United States. The draft electronic signature directive (draft ES Directive)¹⁵¹ is a highly technical statute aimed at regulating only selected aspects of electronic commerce and is not intended to amend national laws governing contract formation.¹⁵² Proposals to modify the 1968 Brussels Convention and the 1980 Rome Convention, which today govern the enforceability of contractual choice of law provisions, with a new Brussels Regulation and a new Rome Regulation would make the law of a consumer's jurisdiction the applicable law for electronic commerce transactions, and would make the consumer's home state the appropriate forum as well. The proposed Brussels Regulation could effectively nullify the effort in the draft EC Directive to guarantee that application of the country of origin and mutual recognition principles apply to the regulation of electronic commerce in Europe. The draft EC Directive would permit EU merchants engaged in electronic contracting within the EU to comply only with the applicable law of their home country, eliminating the need for such merchants to comply with the law of each Member State individually. This possible erosion of one of the fundamental premises of the EU Single

149. See *Electronic Commerce: Commission Presents Framework for Future Action* (visited Sept. 17, 1999), in <<http://www.europa.eu.int/comm/dg15/en/media/info/313.htm>>.

150. In November 1998, the Commission adopted the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM(98)586 final [hereinafter Draft EC Directive]. On September 1, 1999, in response to comments from the Parliament and the Economic and Social Committee, the Commission issued an Amended Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM(1999)427 final, available in <<http://www.europa.eu.int/comm/dg15/en/media/electcomm/com427en.pdf>>.

151. Proposal for a European Parliament and Council Directive on a Common Framework for Electronic Signatures, COM(98)297 final, available in <<http://www.ispo.cec.be/eif/policy/com98297.html>> [hereinafter 1998 Draft ES Directive]. On April 29, 1999, in response to comments from the Parliament, the Economic and Social Committee, and the Committee of the Regions, the Commission issued an Amended Proposal for a European Parliament and Council Directive on a Common Framework for Electronic Signatures, COM(99)195 final, available in <<http://www.europa.eu.int/comm/dg15/en/media/sign/signamen.pdf>>.

152. Political Agreement on a Common Position of the Council on a Framework for Electronic Signatures (Apr. 22, 1999), in <<http://www.europa.eu.int/comm/dg15/en/media/sign/composen.htm>> [hereinafter Political Agreement].

Market is all the more surprising in light of the recent enactment of a Distance Selling Directive,¹⁵³ which requires each Member State to revise its consumer protection law to provide special new protections to consumers making purchases online or by telephone.

PROPOSED ELECTRONIC COMMERCE DIRECTIVE

In November 1998, the Commission proposed a draft directive designed to create a legal framework for electronic commerce within the European Union in order to facilitate cross border electronic commerce transactions. The draft EC Directive incorporates the fundamental principles of the internal market, country of origin, and mutual recognition, as reaffirmed by the European Court of Justice (ECJ) in a number of cases involving the free movement of goods and services, beginning with the landmark *Cassis de Dijon* case.¹⁵⁴ The Commission is seeking to ensure that existing EU and national legislation is effectively enforced. The draft EC Directive would accomplish this through application of the principle of mutual recognition¹⁵⁵ and the development of codes of conduct at the EU level.¹⁵⁶ Furthermore, it aims to increase cross border cooperation between national regulatory authorities in the Member States and by setting up of an effective cross-border dispute resolution system.¹⁵⁷ The draft EC Directive, however, would not override the 1980 Rome Convention on Applicable Law for Contractual Obligations or the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements.¹⁵⁸ These conventions, together with the new Brussels Regulation and the proposed Rome Regulation, have the effect of undermining the country of origin and mutual recognition principles.

The draft EC Directive would govern much more than electronic contracting if it is enacted. It would regulate the establishment of electronic commerce Internet service providers (ISPs),¹⁵⁹ electronic commercial com-

153. Distance Selling Directive, *supra* note 91. In addition, the Commission has proposed a directive that would cover distance selling of financial services. See Proposal Concerning Distance Marketing, *supra* note 91. This proposal was amended on July 26, 1999.

154. Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, [1978-79 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8543 (Feb. 20, 1979).

155. Draft EC Directive, *supra* note 150, art. 3.

156. *Id.* art. 16.

157. *Id.* arts. 17-19.

158. *Id.* art. 1.

159. *Id.* arts. 4-5. The draft EC Directive would not only clarify the law, but would also make the operation of electronic marketplaces more transparent to prospective customers by requiring merchants doing business online to reveal the merchant's identity, physical location, email address, VAT number, and, where applicable, registration in a trade register and license to engage in a regulated trade. *Id.* art. 5

munications,¹⁶⁰ and the liability of intermediaries.¹⁶¹ The draft EC Directive also attempts to reduce the current legal uncertainty surrounding the issue of establishment by providing a definition of the state of establishment in line with principles established by the EU Treaty and the case law of the ECJ.¹⁶²

One important principle that the draft EC Directive would establish is that Member States may not impose any requirement of prior authorization on Internet electronic commerce activities.¹⁶³ The purpose of this Article is to reinforce the principle of freedom to provide services by facilitating access to the supply of services on the Internet. It constitutes a "right to a site," which can be exercised by any natural or legal person wishing to provide electronic commerce services over the Internet. This provision prevents Member States from maintaining and introducing any legislation requiring prior authorization or licensing before Internet sites can be set up for electronic commerce services. It does not override existing requirements for professional qualifications or authorizations by a professional body for the provision of services, however, which are not exclusively aimed at electronic commerce services.¹⁶⁴

Article 5 sets out the minimum information (e.g., the name, place of establishment and e-mail address, and VAT registration) which the ISP must give to consumers.¹⁶⁵ It supplements the information requirements that exist in the distance selling directive on the protection of consumers in relation to distance contracts. It also extends the provisions of the distance selling directive by obligating the ISP to provide the information, even where no contract is to be formed. The information in question must be easily accessible from the service being provided, for example, by clicking on an icon or a logo with hypertext link to the page containing the information which should be visible on all the pages of the web site. Prices, indicated in Euros, will meet the price information requirement laid down in this Article.

160. *Id.* arts. 6-7.

161. *Id.* arts. 12-15. These articles provide an exemption from liability for ISPs if they act as mere conduits for the transmission of information, authorize temporary storage of information through systems "caching" limits the liability of the ISP for content posted by others if the ISP is not aware of the illegal activity, and states that ISPs are under no general obligation to monitor third party content placed on their sites. *Id.*

162. The right of establishment is the right to set up agencies, branches, or subsidiaries by nationals of any Member State in the territory of any other Member State and is guaranteed by Article 43 of the Treaty establishing the European Community as amended by the Treaty of Amsterdam. Treaty Establishing the European Community, Mar. 25, 1957, art. 43 (ex. art. 52), available in 1 EUROPEAN UNION LAW GUIDE (Phillip Raworth ed., 1999). See, e.g., Case 2/74, *Reyners v. Belgian State*, 2 C.M.L.R. 305 (1974).

163. Draft EC Directive, *supra* note 150, art. 4, ¶ 1.

164. *Id.* art 4, ¶ 2.

165. *Id.* art 5.

The Commission believes that commercial communications, for instance advertising, sponsorship, direct marketing, and promotions, are a fundamental part of the majority of electronic commerce services.¹⁶⁶ Therefore, the draft EC Directive defines what constitutes "commercial communications"¹⁶⁷ and makes such communications subject to certain rules regarding transparency in order to ensure consumer confidence and fair trading. It establishes the principle that commercial communications must be clearly identifiable as such by consumers; for example, commercial communications should not be hidden in the form of an advertisement. The person on whose behalf the commercial communication is carried out must also be clearly identified.¹⁶⁸ For example, the banner could carry the company's name, icon, or logo with a hypertext link to the page containing this information. This link should be visible on all the pages of the site. In an effort to suppress "spamming," the draft EC Directive requires electronic commerce businesses to ensure that commercial communications by e-mail are clearly identifiable in order to prevent harmful intrusion into consumer privacy.¹⁶⁹ The draft EC Directive also states that regulated professions (e.g., lawyers and accountants) should be permitted to use commercial communications provided they comply with the professional codes of conduct drawn up by national professional associations.¹⁷⁰

The draft EC Directive states that Member States should amend their laws to ensure that contracts concluded electronically are genuinely and effectively workable in law and in practice.¹⁷¹ Member States will be required to repeal provisions that prohibit or restrict the use of electronic media for contracting, and refrain from preventing the use of certain electronic systems such as intelligent electronic agents for contracting.¹⁷² They must also refrain from creating a two-tier system which gives electronic contracts less legal effect than paper contracts, and repeal formal contractual requirements which cannot be met by electronic means or create ambiguities when applied to electronic contracts.¹⁷³ Merchants wishing to enter into contracts online must explain clearly and unequivocally prior to the formation of the contract what steps will be involved in concluding the contract, whether the contract will be accessible after it is effective and what procedures will be used for handling errors. Member States must take steps to ensure that electronic contracts are only formed after the

166. *Id.* pmbi., ¶ 10.

167. *Id.* art. 2(e).

168. *Id.* art. 6(b).

169. *Id.* art. 7.

170. *Id.* art. 8.

171. *Id.* pmbi., ¶ 13.

172. *Id.* art. 9. Exceptions are made for contracts that require "the involvement of a notary," which must be "registered with a public authority" in order to be valid, which are "governed by family law," or "the law of succession." *Id.*

173. *Id.*

parties have given their full and informed consent to the contract.¹⁷⁴ In addition, the draft EC Directive clarifies the moment of the conclusion of a contract in certain cases, and requires that end-users of online contracting services must be provided with effective means of identifying and correcting errors and accidental transactions.¹⁷⁵

PROPOSED ELECTRONIC SIGNATURE DIRECTIVE

In May 1998, the Commission proposed an electronic signature directive to regulate the use of electronic signature technologies in Europe. The draft ES Directive was aimed at harmonizing the various approaches being taken by Member States to regulate electronic signature technologies. In 1998, the Commission found that several Member States had already started detailed legislative initiatives related to electronic signatures, and that the actual use of this technology might be hindered by the existence of multiple, inconsistent regulatory regimes within Europe.¹⁷⁶ The draft ES Directive is not intended to “apply to electronic signatures exclusively within closed systems,” such as those maintained by a corporation for its own internal network.¹⁷⁷

The draft ES Directive would establish a legal framework for certain certification services provided to the public.¹⁷⁸ It sets up common requirements for certification service providers (CSPs) to ensure cross-border recognition of signatures and certificates within the EU. It further attempts to maintain a technology-neutral perspective and does not mandate the use of any particular electronic signature technology. On the one hand, the draft ES Directive provides that CSPs should be able to enter the market for certification services without prior authorization to ensure that markets for these services develop freely. On the other hand, the Member States are authorized to establish voluntary accreditation schemes to promote the availability of responsible services to the public. In order to promote public confidence in these technologies, the draft ES Directive provides that CSPs shall be liable for the validity of the contents of certificates they issue.

174. *Id.* art. 10. This approach is in marked contrast with the more sweeping affirmations of the principles of party autonomy and freedom of contract contained in proposed U.S. federal legislation and UCITA. See *supra* text accompanying notes 73-77, 146.

175. *Id.* art 11. This article provides that if a contract is formed by an end-user giving assent to an offer through a technological means, such as clicking on an icon, the contract is concluded when the end-user receives an acknowledgment of receipt of that manifestation of assent from the other party.

176. Proposal for a European Parliament and Council Directive on a Common Framework for Electronic Signatures, COM(98)297 final, in <<http://www.europa.eu.int/comm/dg15/en/media/infso/com297en.pdf>>.

177. Political Agreement, *supra* note 152.

178. 1998 Draft ES Directive, *supra* note 151.

PROPOSED BRUSSELS AND ROME REGULATIONS

The EU first addressed the choice of law problem in international consumer contracts with the 1980 Rome Convention.¹⁷⁹ Under Article 3 of the Rome Convention, the parties to a contract are free to select the governing law; however, Article 5 provides that a choice of law provision in a consumer contract may not deprive the consumer of the benefit of mandatory consumer protection laws in effect in the consumer's country of habitual residence.¹⁸⁰ Such mandatory consumer protection laws include those prohibiting unfair contract terms, limiting the enforceability of standard for contracts, creating rights of cancellation during a "cooling off" period following the formation of the contract, or requiring that certain disclosures be made by the seller.¹⁸¹ These choice of law provisions have a dispute resolution counterpart in the 1968 Brussels Convention, which governs questions of judicial jurisdiction among various European countries. Article 13 of the Brussels Convention provides that while a consumer has the option to bring suit against a business in either the consumer's or the business' home country, the business may only bring suit against the consumer in the consumer's country.

In July 1999, the Commission adopted a draft Regulation on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters.¹⁸² When adopted by the Council of Ministers, this regulation will replace and update the 1968 Brussels Convention in order to take account of new forms of commerce that did not exist in 1968.¹⁸³ Article 15 of the draft Brussels Regulation provides that the courts of a consumer's country of habitual residence have jurisdiction over suppliers of goods and services located in other Member States of the EU.¹⁸⁴ Recital 13 of the proposed Brussels Regulation makes clear that any EU merchant who operates an electronic commerce web site that can be accessed by a consumer will be at risk of being haled into court in the country of the consumer's habitual

179. 1980 Rome Convention, *supra* note 119; see Matthew S. Yeo & Marco Berliri, *Conflict Looms Over Choice of Law in Internet Transactions*, 4 Elec. Com. & L. Rep. (BNA) 85, 86 (Jan. 27, 1999).

180. 1980 Rome Convention, *supra* note 119, art 3.

181. Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Sept. 27, 1968, O.J. C027 of 26/01/98 (498Y0126(01)) [hereinafter 1968 Brussels Convention]. The Convention applies to all EU Member States and, by the 1988 Lugano Convention, to the members of the European Free Trade Association.

182. Proposal for a Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, July 14, 1999, COM(99)348 final [hereinafter Proposed Brussels Regulation].

183. *Id.* The entry into force of the Amsterdam Treaty on May 1, 1999, obviates the need to have this regulation enacted as a convention agreed to by signatory nations. The subject matter of the convention is now within the competence of the Commission to address by regulations prepared for adoption by the Council of Ministers.

184. *Id.* art. 15.

residence in the event of litigation with the consumer.¹⁸⁵ This would be true even if the merchant operating the electronic commerce web site had not taken any steps beyond posting its home page on the Internet and had taken no more active steps to target consumers located outside the Member State where the merchant's business was established. This is a stricter standard than the one contained in Article 13 of the Brussels Convention, which provides that a merchant is subject to the jurisdiction of the courts of the consumer's country only if the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by purchasing advertising targeted at the country of the consumer's habitual residence, and the consumer took the steps necessary to conclude the contract from within the consumer's own country.¹⁸⁶

The Schlosser Report¹⁸⁷ (one of the two official reports on the Brussels Convention) states that the appropriate jurisdiction is the country where the consumer resides if the trader has taken steps to market his goods and services there.¹⁸⁸ Such steps cover, *inter alia*, mail order and doorstep selling. The trader must have taken action aimed specifically at that country, such as advertising in the press, on the radio or television, in the cinema, or by mailing catalogues, or he must have made a business proposal individually through an intermediary or representative, or by canvassing to qualify. The Schlosser Report expressly refers to the Report on the Obligations Convention, which gives the following example: If a German makes a contract in response to an advertisement published by a French company in a German publication, the contract will be covered by the special rules.¹⁸⁹ If, on the other hand, the German replies to advertisements in U.S. publications, even if they are sold in Germany, the rule does not apply unless the advertisements appeared in special editions of the publication

185. *Id.* pmb1., ¶ 13.

186. 1968 Brussels Convention, *supra* note 181, art. 13.

187. Peter Schlosser, Report to the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters and the Protocol on its Interpretation by the Court of Justice, Oct. 9, 1978, app. 1 (on file with *The Business Lawyer*, University of Maryland School of Law) [hereinafter Schlosser Report].

188. *Id.* ¶ 158.

189. Professors Giuliano & Lagarde, Report on the Obligations Convention, O.J. 1980 C282/4, quoted in STEPHEN O'MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PRACTICE 504 n.58 (1989) [hereinafter Report on the Obligations Convention]. "[S]pecial rules of jurisdiction" is defined as "directly designating the competent court without referring to the rules of jurisdiction in force in the State where such a court might be situated . . ." *Id.* For special rules to apply, there "must be a close connecting factor between the dispute and the court with jurisdiction to resolve it." See P. Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, app. 1, § 2, arts. 5, 6 (on file with *The Business Lawyer*, University of Maryland School of Law).

intended for European countries.¹⁹⁰ The Schlosser Report also argues that consumer contracts, other than those where the trader has taken steps to target the consumer in some way, should be subject to the special provisions only if there is a sufficiently strong connection with the place where the consumer is domiciled.¹⁹¹ It is clear from the above comparison of the provisions of Article 13 of the existing Brussels Convention and Article 15 of the proposed Brussels Regulation that much stricter rules are being imposed on electronic commerce transactions than were originally mandated for more traditional cross-border transactions.

The approach taken in the proposed Brussels Regulation is clearly at odds with the approach taken in the draft EC Directive. The proposed Brussels Regulation seems to indicate a lack of appreciation on the part of its drafters of the differences between establishing a passive Internet web site that may be accessed by individuals anywhere in the world, and a trader either purchasing advertising targeted at a consumer in the consumer's home or using the mail to solicit a consumer.¹⁹² Such efforts to preserve the rights of consumers shift the cost of litigating in a remote jurisdiction from the consumer to the merchant. While multinational corporations may be prepared to live with this risk, it may have a chilling effect on small and medium-sized enterprises considering the use of the Internet for marketing and contracting. The proposed Brussels Regulation's focus on preserving the consumer's right to litigate under the consumer's law and in the consumer's own courts does not seem to take into account the efforts underway to harmonize Member State consumer protection law through legislation based on the requirements of the Distance Selling Directive, and the alternative dispute resolution provisions of the draft EC Directive, which might reduce the expense of resolving disputes for both merchants and consumers.

The proposed Rome Regulation deals with non-contractual liability. Currently a Council Working Party, composed of experts from the Member States is discussing the Austrian President's proposal for the Rome Regulation. Of particular significance to electronic commerce is Article 6 of the Austrian Presidency's draft which deals with the applicable law in respect of unfair competition and unfair practices. This Article states that the law applicable to obligations arising from unfair competition or unfair practices shall be the law of the country where the competitive action or unfair practice affects competitive relations or collective consumer interest. If the provisions of Article 6 are adopted in their current form, it would mean that a United Kingdom (U.K.) company using the Internet to trade on a pan-European basis would not be able to take advantage of the principles of home country control and mutual recognition in the event a

190. Report on the Obligations Convention, *supra* note 189.

191. *Id.* ¶ 159.

192. *See supra* notes 189-91 and accompanying text.

claim for unfair competition or trade practices were made against the company. This could also be a significant factor undermining the willingness of small and medium-sized enterprises to undertake electronic commerce activities, because substantial variations remain in the competition and unfair trade practices laws of different Member States. For example, if a U.K. merchant were to use its Internet site to offer promotions or discounts on consumer purchases or the use of certain types of marketing techniques (for example, buy a packet of cornflakes and get the opportunity to win a holiday or purchase two pairs of shoes and get a third pair free), which are perfectly legal under English law, the provisions of Article 6 would mean that the trader could fall foul of the unfair competition laws of other Member States (for example, Germany) where such trading practices are illegal. While the costs of assuring that web site content conforms to the different competition and unfair trade practices laws of each Member State may not be prohibitive for multinational corporations, they might well be prohibitive for small and medium-sized enterprises. The proposed Rome Regulation is thus inconsistent with other actions being taken by the Commission, such as its stated commitment in the explanatory memorandum of the draft EC Directive to promoting electronic commerce among small and medium-sized enterprises,¹⁹³ and providing a high level of consumer protection in electronic commerce transactions through a variety of strategies in addition to reliance of special jurisdictional rules.¹⁹⁴

DISTANCE SELLING DIRECTIVE

In 1997, the EU adopted a directive (the Distance Selling Directive) on the protection of consumers in respect to distance contracts.¹⁹⁵ The Distance Selling Directive is supposed to promote online commerce by providing consumers with a guarantee that they will be protected by their own national consumer protection regime when they enter into distance selling contracts.¹⁹⁶ Distance selling is defined as the conclusion of a con-

193. Draft EC Directive, *supra* note 150, pmb., ¶ 2. It is ironic that on July 2, 1999, the Commission decided to bring proceedings against Germany in the ECJ in respect of its unfair competition law which severely regulates promotional offers, discounts and free gifts.

194. Explanatory Memorandum for the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market (Nov. 18, 1998), COM(98)586 final, in <http://www.europa.eu.int/comm/dg15/en/media/electcomm/com_586en.pdf>. The additional strategies include: lessening the risk of illegal activities, imposing information and transparency obligations on merchants so consumers have the information they need to make informed choices, guaranteeing fair contracting and error correction procedures, and promoting codes of conduct and alternative dispute resolution processes.

195. Distance Selling Directive, *supra* note 91. The Member States have until May 20, 2000, to enact national laws embodying the terms of the Distance Selling Directive. *Id.* art. 15.

196. *Id.* art. 12.

tract regarding goods or services whereby the contract between the consumer and the supplier takes place by means of technology for communication at a distance.¹⁹⁷ Consumers felt the need for special protections in this area because of the risks of invasions to individual privacy by aggressive marketing techniques, inadequate or improper information being provided to the consumer by the supplier, and risks of fraud or error in card payment services used to make payments under distance selling contracts. In addition, the rights granted consumers through the enactment of the Distance Selling Directive's provisions into national law may not be waived by the consumer.¹⁹⁸ The Distance Selling Directive contains an analog to the U.S. Federal Trade Commission's Mail Order Rule,¹⁹⁹ which requires that a transaction be completed within thirty days or notice must be sent to the consumer of the situation giving the consumer the option to cancel the transaction.²⁰⁰ The Distance Selling Directive covers most forms of direct marketing, including catalog mail order, telephone sales, direct response television sales, newspapers, magazines, and electronic communications such as e-mail.²⁰¹ The Distance Selling Directive requires that a consumer must be given certain minimum information, both at the time of contract solicitation and at or before the time of delivery.²⁰² Written confirmation of information must be received by the consumer in some form of "durable medium" accessible to the consumer.²⁰³ Consumers must, subject to certain exceptions, also be given a "cooling off" period of at least seven working days.²⁰⁴ Where the consumer exercises his or her right of withdrawal from the contract, the supplier is obliged to reimburse the consumer for any sums paid. Cold-calling of consumers by telephone, fax, or e-mail is not permitted unless the consumer has consented.²⁰⁵

In an effort to protect merchants from unreasonable burdens in consumer transactions, certain types of transactions are exempted from the coverage of certain Distance Selling Directive protections.²⁰⁶ For example, unless the parties have otherwise agreed, the consumer's seven-day right of withdrawal does not apply to contracts for the provision of services if performance has begun before the seven days are up; for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier; for the supply

197. *Id.* art. 2, ¶ 1.

198. *Id.* art. 12.

199. 15 U.S.C. § 45(g) (1994).

200. Distance Selling Directive, *supra* note 91, art. 7.

201. *Id.* annex I.

202. *Id.* art. 4.

203. *Id.* art. 5.

204. *Id.* art. 6.

205. *Id.* art. 10.

206. *Id.* art. 6, ¶ 3.

of goods made to the consumer's specifications or clearly personalized, or which are likely to deteriorate or expire rapidly; for audio or video recordings or computer software, which were unsealed by the consumer; for the supply of newspapers, periodicals, or magazines; or for gaming or lottery services.

UNCITRAL INITIATIVES

UNCITRAL²⁰⁷ is an organization based in Vienna, Austria which develops model laws and standard documents meant to facilitate international commercial transactions. Among its undertakings, UNCITRAL has produced the Vienna Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on International Commercial Arbitration, and the UNCITRAL Arbitration Rules.²⁰⁸ The global scope of electronic commerce makes UNCITRAL an obvious and logical forum for developing a consensus regarding what reforms in existing contract law are appropriate to facilitate the continued expansion of electronic contracting. The first UNCITRAL project to address electronic contracting directly was the Model Law on Electronic Commerce (Model Law), which took a rigorously media-neutral approach. The current UNCITRAL project addressing electronic contracting is the Draft Uniform Rules on Electronic Signatures (Uniform Rules), which is more technical and regulatory in its approach.²⁰⁹

ELECTRONIC COMMERCE MODEL LAW

The Model Law was completed by UNCITRAL in June 1996,²¹⁰ and was approved by the United Nations General Assembly in December

207. UNCITRAL was created in 1966 by General Assembly Resolution 2205 (XXI), and is primarily charged with oversight of international commercial law. A list of its projects may be found at *UNCITRAL* <<http://www.uncitral.org>>.

208. See Richard Hill & Ian Walden, *The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions*, 13 *COMPUTER LAW*. 18 (1996).

209. A list of recent documents produced by UNCITRAL's WG-EC, includes progress reports on the Draft Uniform Rules on Electronic Signatures. See *UNCITRAL* (visited Oct. 10, 1999) <http://www.uncitral.org/english/sessions/wg_ec/index.htm>.

210. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), U.N. Doc. A/CN.9/SER.A/1996, in <<http://www.uncitral.org/english/texts/electcom/index.htm>> [hereinafter Model Law]. The Model Law and its accompanying Guide to Enactment were also published in *Uncitral Model Law: UNCITRAL Model Law on Electronic Commerce*, 7 *TUL. J. INT'L & COMP. L.* 237 (1999). As adopted by the Commission in 1998, Article 5 *bis* on incorporation by reference provides, "[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message." Model Law, *supra*, art 5.

1996, by non-vote resolution.²¹¹ The Model Law has been enacted in Singapore and the Republic of Korea, and has influenced legislation in many jurisdictions, including the United States, the state of Illinois, and the UETA.²¹²

The Model Law applies only to data messages used in commercial transactions, and does not override consumer protection laws.²¹³ Data message includes “information generated, sent, received or stored” in electronic form, including EDI messages, e-mail, or facsimiles.²¹⁴ The heart of the Model Law is found in Article 5, which provides that “information shall not be denied legal effect, validity or enforceability solely on the grounds that it is [in the form of a data message].”²¹⁵ A data message may meet a legal requirement of a writing provided that the data message is in a format that may be accessed for subsequent reference.²¹⁶ A data message meets a legal requirement of a signature if a method is used to identify a person and indicates the person’s approval of the contents of the message, and that method is as reliable as is appropriate under the circumstances.²¹⁷ A data message may also meet a legal requirement that an original document be “presented or retained.”²¹⁸ Data messages shall not be excluded from evidence in a legal proceeding solely on the grounds that it is electronic or “it is not in its original form.”²¹⁹ Record retention requirements may be met by retention of data messages provided that the information they contain: may be accessed for subsequent reference, can be “demonstrated to represent accurately the information” that was stored, and if possible, the provenance of the data message can be demonstrated.²²⁰

Attribution of a data message to its purported originator is permitted if the originator in fact sent it, if it was sent by someone who had authority to bind the originator, or if the originator is responsible for the programming that automatically originated the message.²²¹ The Model Law goes on to provide that “an addressee is entitled to regard a data message as being that of the originator . . . [i]f . . . the addressee properly applied a

211. Richard Field, *1996: Survey of the Year's Developments in Electronic Cash Law and the Laws Affecting Electronic Banking in the United States*, 46 AM. U. L. REV. 967, 974-75. (1997).

212. UNCITRAL, *Status of Conventions and Model Laws* (Oct. 1, 1999), in <<http://www.uncitral.org/english/status/status.pdf>>; see Boss, *Electronic Commerce*, *supra* note 8 (discussing UNCITRAL's impact on UETA); Overby, *supra* note 8 (same).

213. Model Law, *supra* note 210, art. 1.

214. *Id.* art. 2(a).

215. *Id.* art. 5 *bis*.

216. *Id.* art. 6(1). This is similar to UETA, *supra* note 24, § 7 and UCITA, *supra* note 36, § 107(a). See also *supra* notes 50-54, 88-92 and accompanying text.

217. Model Law, *supra* note 210, art. 7(1).

218. *Id.* art. 8.

219. *Id.* art. 9.

220. *Id.* art. 10(1).

221. *Id.* art. 13; see UETA, *supra* note 24, § 9.

procedure previously agreed to by the originator,” or the message “resulted from the actions of a person” who was able to send the message because of its relationship with the originator.²²² These additional provisions are derived from the UNCITRAL Model Law on International Credit Transfers, which in turn was drawn in substantial measure from the attribution procedures of U.C.C. Article 4A governing funds transfers.²²³ This type of provision was debated extensively during the drafting of the UETA, and ultimately not included in that statute in the interest of avoiding the substantive reform of contract and other bodies of law by importing standards developed in the highly specialized context of high value electronic funds transfers.²²⁴

ELECTRONIC SIGNATURE UNIFORM RULES

In 1996, the WG-EC “was requested to examine the desirability and feasibility of preparing uniform rules on [digital signatures and CAs].”²²⁵ It was agreed that these Uniform Rules should address such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers, and third parties using certification techniques; the specific issues of certification through the use of registries; and incorporation by reference. Although the Uniform Rules are substantially focused on a single technology, i.e., digital signatures deployed in a PKI, the Uniform Rules are supposed to be consistent with the media-neutral approach taken with the Model Law and are not supposed to favor one authentication technology at the expense of others. The WG-EC is supposed to limit the scope of its project in deference to the role of party autonomy in establishing market-based standards for electronic commerce, although it remains unclear if this will be achieved.

By 1999, it appeared that the WG-EC might be unable to forge a consensus with regard to uniform rules to govern the use of electronic signatures.²²⁶ The work of the WG-EC was faulted for excessive emphasis on digital signatures, and not sufficiently recognizing the business need for

222. Model Law, *supra* note 210, art. 13.

223. *Id.* pt. II, art. 13, remarks ¶ 83; UNCITRAL Model Law on International Credit Transfers, art. 5 (1992), available in <<http://www.uncitral.org/english/texts/payments/mliclct.htm>>; see U.C.C. §§ 4A-201 to -203 (1995).

224. See, e.g., UETA, Reporter’s Notes (Proposed Official Draft, Mar. 19, 1999) (regarding the deletion of former § 107), in <<http://www.law.upenn.edu/library/ulc/uecicta/eta399.htm>>.

225. UNCITRAL Working Group on Electronic Commerce, *Draft Uniform Rules on Electronic Signatures*, thirty-fifth session, U.N. Doc. A/CN.9/WG.IV/WP.82 (June 26, 1999), in <http://www.uncitral.org/english/sessions/wg_ex/wp73.htm> [hereinafter Uniform Rules].

226. *Id.* introduction ¶¶ 6-7.

flexibility in adopting new authentication technologies. There was uncertainty whether any legislation beyond the Model Law would even be necessary to promote continued innovation in electronic commerce. Notwithstanding these reservations, however, the WG-EC's mandate to produce Uniform Rules was not withdrawn. This was due in part to the fact that so many national governments around the world were in the process of preparing legislation to deal with digital signatures and PKI issues such as the regulation of certificate authorities. It was felt that some guidance from UNCITRAL might help produce more appropriate legislation in this area.²²⁷

In the June 1999 draft of the Uniform Rules, the basic approach taken was still quite technology specific, notwithstanding various efforts by the WG-EC to soften the effect of rules that tend to favor digital signature technologies and associate specific legal consequences with their use. On the one hand, the scope section had been rewritten to limit the application of the Uniform Rules to commercial transactions, and to expressly provide that they would not override any consumer protection law.²²⁸ On the other hand, the Uniform Rules still distinguish between electronic signatures, which is not a technology-specific term, and enhanced electronic signatures, which must meet a higher standard of reliability described in terms consistent with digital signature technology²²⁹ and associate the use of enhanced electronic signatures with specific legal consequences.²³⁰

CONCLUSION

In 1999, the message that every business needed an "e-business" strategy was ubiquitous. As managers in businesses across the economy struggled to come to terms with the implications of electronic commerce for business operations, one issue among many that managers had to confront was the enforceability of contracts entered into using new communications media. Although the current version of the U.C.C. and the common law of contracts provide clear answers to a limited number of electronic contracting issues, the application of current law to many more issues produces ambiguous or unfavorable results. While it is unlikely that any client wants to hear his or her attorney say, "That's an interesting question," in response to the client's query about the legal effect of some new e-business

227. The next meeting of the WG-EC was scheduled for September 1999.

228. Uniform Rules, *supra* note 225, art. 1.

229. *Id.* art. 2.

230. If an enhanced electronic signatures is used, it will be presumed to meet any legal requirement of a signature. *Id.* art. 6, variant A. While the Uniform Rules also provide that reliance on an enhanced electronic signature can only be determined by evaluating the context within which that reliance takes place, they also establish a duty on the part of the signature holder to prevent its misuse. *Id.* arts. 9, 10; *see supra* note 32 and accompanying text (discussing the pros and cons of technology specific electronic signature laws).

undertaking,²³¹ the current rush to revise contract law through legislation may produce even more unfavorable results. A considerable body of opinion among lawyers and managers in the United States supports “media-neutral” approaches to the reform of contract law that minimizes the magnitude of substantive changes in the law. The constituencies that favor either “technology-specific” or “electronic commerce enabling” legislation that deliberately changes the substantive rules of contract in order to promote a particular vision of electronic commerce are numerous and powerful, however, and it is unclear that the “media-neutral” approach will garner the political support it needs to counteract lobbying by specific industries to achieve more targeted revisions in contract law.

The current struggles in the United States to define the legislative agenda for electronic contracting law reforms cannot be viewed in isolation from the actions of other governments in the same arenas. The EU economy now represents a larger single market than the U.S. economy in terms of population, and while EU utilization rates for new electronic commerce technologies such as the Internet currently lags behind that of the United States, this may not be the case indefinitely. The EU currently seems to be just as divided as the United States in its efforts to define a coherent, feasible legislative agenda in this area, but almost any possible outcome of the current EU debates is likely to be more regulatory and more protective of consumers than almost any possible outcome of the current U.S. debates. As a result, the possibility of future trade disputes between the United States and EU over “non-tariff” barriers to electronic contracting may arise, just as conflicts now exist between the United States and EU over the EU’s higher standards for data privacy.

Yet hasty legislation by national governments rushing to avoid losing a competitive advantage in the global electronic marketplace may not support the development of electronic commerce at all. Poorly thought out legislation may instead create unnecessary inefficiencies in contracting practices if governments fail to correctly anticipate future developments in electronic commerce. Given the difficulty that entrepreneurs have in correctly anticipating future developments in this area, it seems almost inevitable that technology-specific or highly regulatory approaches by national legislatures will not be successful in predicting the future, either. In the face of the torrent of innovation taking place in the commercial prac-

231. The American Bar Association Section of Business Law’s Cyberspace Law Committee’s Electronic Contracting Practices Working Group has a project currently underway to build a “clause bank” for electronic commerce contract terms. See ABA Cyberspace Law Committee (visited Oct. 8, 1999) <<http://www.abanet.org/buslaw/cyber/ecommerce/ecommerce.html>>. The working group plans to assemble and annotate electronic contracting clauses on its web site that could be used to update standard form contracts. See ABA Cyberspace Law Committee’s Contracting Practices Working Group, *Electronic Contracting Practices Resources Page* (visited Oct. 8, 1999) <<http://www.newlaw.com/site/e-contract.htm>>.

tices through the application of new technologies and the limited resources available to national legislatures to understand and respond to that innovation, many clients may learn to prefer the "That's an interesting question" response from their attorneys when they learn what the alternatives are.