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Electronic Contracts: Are They Enforceable?

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by

Diana D'Amico Juettner* and Roy J. Girasa

Introduction

The use of the Internet by consumers has increased dramatically since 1995. In June of 1995, there were less than 1.5 million users; however, one year later the number of users had grown to 20 million. The increase in the number of users has contributed to the growth of business to consumer sales on the Internet. By 1998, approximately 10 million households purchased a product online and the volume of sales was around \$66.4 billion. The volume of sales for 1999 has been estimated at \$66.4 billion with sales reaching \$177.7 billion by 2003.¹ This phenomenon has propelled the use of electronic contracts by those who provide computer-generated goods and services to those who wish to take advantage of the new technology. This expansion of electronic commerce is compelling changes in contract law.

There are two types of contracts that can be entered into online. The first type concerns the delivery of products or services outside the computer system, while the second type relates to subject matter that resides within one or more computer systems. These agreements, contracted for and performed online, are created through the use of electronic agents. Currently, contracts that relate to products deliverable outside the computer may be covered by the Uniform Commercial Code (UCC) while contracts that are completed totally by computer may not be covered. The major issue is whether computer contracts should be governed by the UCC or by some other uniform statute.² Other important issues that must be addressed include: whether an electronic contract satisfies the Statute of Frauds; whether the writing can be authenticated; and the validity of the use of digital signatures.

In this paper, we will consider: (1) the Statute of Frauds, authentication of the writing, and the use of digital signatures; (2) applicability of the UCC to electronic contracts, (3) Uniform Computer Information Transactions Act (UCITA), (4) the Electronic Signatures in Global and National Commerce Act of 2000, (5) the potential impact of the passage of these statutes on electronic contracts, and (6) Shrink-Wrap and Click Wrap licenses.

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⁶ Id.⁷ 25 Conn L. Repr. No. 9 305.⁸ 170 Conn. 327, 365 A. 2d.1210 (1976).⁹ 25 Conn. L. Rptr. No. 9, 305.¹⁰ Id.¹¹ *Willingham v. Mason Telegraph Publishing Co.* 507 F. 2d 1084 (5th Cir.).¹² 25 Conn. L. Repr. No. 9, 305.¹³ *Honan v. Dimyas*, 52 Conn. App. P.3, 133 (1999) and *Delaurentis v. New Haven*, 220 Conn 225, 266-267, 597 A 2d 807 (1991).¹⁴ 25 Conn.L.Rptr. No. 9, 305.¹⁵ N. Proso and W. Keeton, *Torts* (5th Ed. 1984 12 A 60). Quoted in, 42 Conn.Sup. 17, 20 (1991).¹⁶ 25 Conn. L. Rptr. No. 9 30, 6.¹⁷ *Morris v. Hartford Courant*, 200 Conn 672, 682 (1986).¹⁸ 25 Conn. L. Repr. No.9 306 quoting *Seery v. Yale New Haven Hospital*, 17 Conn. App. 532, 540 (1982).¹⁹ "Man Says Earring Cause of Firing," *Waterbury Republican*, Nov. 5, 1999 at A-2.²⁰ Amy Welch, "Fashion: Boys Catching Up with Age-Old Need to Impress," *Waterbury Sunday Republican*, Jan 16, 2000. At 3G.²¹ Id.

Our initial inquiries are: Whether electronic contracts are writings that satisfy the requirements of the Statute of Frauds? Can the writings be authenticated? Can the alteration of the document by the parties after it is executed be determined and prevented? What is the validity of the electronic signature to a contract?

Authentication & Electronic Signatures

There are justified concerns that sophisticated users may be able to change on-screen contracts and allege that the altered agreements are the real agreements entered into by the parties be relied upon. Encryption devices can be used to protect the integrity of the contents of a document and its signature.

What constitutes a "signature" has been broadly interpreted by many courts to encompass typed signatures, letterheads, indecipherable scribbling, and pre-printed signatures.³ It can be argued that electronic signatures may be more reliable rather than encompassing an impediment to the fulfillment of the Statute of Frauds. The use of encryption devices may provide *greater* security than one's written signature. Such devices would permit both the sender and receiver of a transmission to possess private numeric keys known only to them. Thus they would be able to authenticate the transmission without fear of a third party intrusion.⁴

Digital signatures permit the verification of the authenticity of a document sent through the Internet. Digital signatures operate in electronic commerce the way written signatures operate on typed documents. Neither can disown the signature absence proof of forgery. Digital signatures require use of two keys, one private and one public. The keys are issued by a Certification Authority [CA]. The private key is for the sender and messages are decrypted with the public key. A sender who signs a document with the private key can have his/her signature confirmed by use of the public key.

A document is initially created as, e.g., a word document, which is sent to digital signature software to be processed. The processing or coding is done by means of a sender performing a mathematical computation on his document ("hash function"), which generates a string of code called a message digest. The message digest is based on the specific content of the original document so that any changes would give a different message digest. The algorithm may, e.g., create or count the number of letters or characters between two specific letters in the document. The hash function or result is exhibited as a series of numbers.

The sender encrypts the message digest with his private key, which is a password or number known by the sender only, attaches his signature to the end of the documents thereby signing it by means of a second algorithm, and sends it to the receiver. The receiver having access to the public key may now verify the sender's identity and integrity of the document. The signature is decrypted with the sender's public key and the

original message digest is revealed. The receiver performs the hash function by typing in a public key on his/her copy of the message digest. The public key performs its own algorithm on both the hash function and the signature. If it is identical, the receiver knows the message was not altered and knows that it could only have been encrypted with the sender's private key.⁵

Under the American Bar Association guidelines⁶, there are three participating parties: the sender, receiver and the certification authority. The sender or subscriber to the certification process creates a private and public key. A copy of the public key is given to the certification authority. The private key is kept secret by the subscriber. The certification authority acts as an intermediary between the sender/subscriber and the receiver. The certification authority confirms the sender's identity and validity of the key pair. Upon verification, the certification authority issues a certificate with the subscriber's name, identifying information, and the subscriber's public key. Once accepted by the subscriber, the party may then use the key pair to digitally sign the documents. All certificates issued by the authority are placed on-line for receivers so that they can access the subscriber.⁷

Digital signatures allow parties to authenticate and bind parties rendering enforceable online contracts and agreements. Signatures are valuable in furnishing evidence of agreement; they are hard to forge; the document is original and authentic; they constitute affirmation of the person signing to be bound; and they are efficient in indicating authorization of a transaction.

Digital signatures would satisfy the Statute of Frauds, which makes agreements not signed by the party to be charged with exceptions unenforceable. Companies and customers would feel more secure in doing business online knowing whom they are dealing with. Stock traders would feel more comfortable in selling to clients who may not be able to disclaim the purchase.⁸

Problems Raised by the Use of Encryption and Digital Signatures

A major problem is that encryption and digital signature capabilities are not free. It is costly to train representatives, create new institutions, establish accreditation procedures, and determine how to license and audit. There are costs of purchasing the software and keys. A second problem is the many differing laws governing the area. Unless a uniform system of law and regulation is agreed upon by all state authorities and global authorities, the use of such encryption systems may have limited application.⁹

Federal Digital Signature Legislation

Federal legislation is the solution to overcoming the multiplicity of state laws. On July 4, 2000, President Clinton signed the Electronic Signatures in Global and National Commerce Act. Some state laws give wide credence to digital signature use, while other are very restrictive. There is a need for a singular standard. Such legislation should

allow non-financial institutions to use electronic authentication services and should allow use of electronic signatures online.

The validity of electronic signatures, as set forth in § 101 of the statute states:

- (a) GENERAL RULE- With respect to any contract, agreement, or record entered into or provided in, or affecting, interstate or foreign commerce, notwithstanding any statute, regulation, or other rule of law, the legal effect, validity, or enforceability or such contract, agreement, or record shall not be denied—
- (1) on the ground that the contract, agreement, or record is not in writing if the contract, agreement, or record is an electronic record; or
 - (2) on the ground that the contract, agreement, or record is not signed or is not affirmed by a signature if the contract, agreement, or record is signed or affirmed by an electronic signature.

The statute does not require the parties to use electronic means for agreements nor does it deny them the right to choose the type or method of electronic record or signature to utilize (§101(b)). If a state statute requires a record be provided in writing to a consumer, an electronic record would suffice provided the consumer has consented to such methodology by means of a "conspicuous and visually separate" consent, has been informed of the hardware and software requirements for access and retention of electronic records, and has been otherwise advised of the obligation to provide notifications by electronic means (§ 101(b)(2)).

A state statute requiring that a contract, agreement, or record be retained will be met by an electronic record provided it is an accurate reflection of the information set forth in the written agreement and is accessible for the time required by state law. Requirements for the maintenance of originals, including checks, will suffice if the electronic record contains all of the relevant information (§101(2)(c)).

Of particular importance to our discussion is §102 of the Act concerning the right of a state to modify or supercede the within statute. The Act does permit a state to do so if the state statute, regulation, or rule of law:

- (1)(A) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as reported to the State legislatures by the National Conference of Commissioners on Uniform State Laws; or
- (B) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts, agreements or records; and

- (3) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

The state statute, if any, may not discriminate in favor of or against a specific technology for authentication of electronic records or specifies a specific type or size of entity engaged in business or is otherwise inconsistent with the Act.

Article 2B of the UCC and UCITA ("Uniform Computer Information Transactions Act")

The National Conference of Commissioners on Uniform State Law (NCCUSL) worked for about ten years to revise Article 2 of the UCC to cover electronic contracts. In March of 1988, the Permanent Editorial Board of the UCC and the (NCCUSL) appointed a study group to identify the problems that electronic exchanges were creating and to recommend possible revisions to the UCC. In December of 1991, a drafting committee was created by the NCCUSL to revise Article 2(Sales) to preserve freedom of contract in connection with electronic contracts. In order to achieve this task, the Drafting Committee considered various alternatives to address the scope of electronic contracts.¹⁰ Three of the alternatives are:

- (1) Defining the scope of Article 2 to include software license contracts in Article 2, making adjustments in Article 2 sections to encompass the intangibles character of the transaction, and adopting new sections in the 800 and 900 series to deal with applicable licensing issues.
- (2) Adopting an "hub and spoke" configuration for Article 2 in which Article 2 contains general principles applicable to all commercial contracts and have these apply to various sub-articles dealing with specific types of transactions such as 2A (leases), Article B (sales), Article 2C (licenses).
- (3) Taking software contracts out of Article 2 and develop a new article of the UCC:

Article 2B Licensing of Intangibles.¹¹

In July of 1995, the Executive Committee of the NCCUSL decided that the best way to revise Article 2 was to create a new article to address the issues involving digital information and related rights in intangible property. Accordingly, the American Law Institute and the National Conference of Commissioners on Uniform State Laws prepared a draft of an Article 2B of the Uniform Commercial Code, called "Software Contracts and Licenses of Information."¹² The groups spent many years working to develop Article 2B.

About ten years ago, a Subcommittee of the American Bar Association began studying whether there was a need for a statute that would address the licensing transactions of computer information. The Subcommittee concluded that there was a need to clarify these transactions and recommend to the NCCUSL that a uniform act be drafted. The NCCUSL agreed and appointed a Drafting Committee in the early 1990's.

Firstly, the UCITA Committee was merged into the UCC Drafting Committee for Article 2. In 1995, the UCITA Committee was removed as a separate drafting committee and in 1998 began drafting a separate uniform act.¹³

On April 7, 1999, the ALI and the NCCUSL announced that they would not recommend amending the UCC with Article 2B but were recommending the Uniform Computer Information Transactions Act (UCITA) for adoption by the states. They reached this conclusion because the Internet and Information Technology does not presently allow the kind of codification that is represented by the UCC.¹⁴ The first state to adopt UCITA was Virginia.

The Uniform Computer Information Transactions Act

UCITA applies to contracts to license or buy software, create computer programs online, access to databases and contracts to distribute information over the Internet. Proponents of UCITA assert that the statute:

- Provides for freedom to contract,
- Supports commercial expansion
- Permits federal intellectual property law to co-exist with state contract law, and
- Permits the parties to opt in or out of the statute.¹⁵

Statutory Definitions

A computer information transaction is "an agreement and the performance of that agreement to create, modify, transfer or license computer information or informational rights in computer information."¹⁶

Computer information is "information in electronic form that is obtained from or through the use of a computer or that is in digital or similar form capable of being processed by a computer." This term also includes an electronic copy of the information together with any documentation or packaging related to the copy.

Items Not Covered by UCITA

UCITA excludes the following:

1. Financial services transactions which are addressed by the Uniform Electronic Transactions Act (UETA)
2. Contracts related to television, music and motion picture industry
3. Compulsory licenses
4. Employment contracts
5. De minimus transactions.

Mixed Contractual Transactions and UCITA

UCITA will govern the entire contract if the primary purpose of the contract is computer information. When UCITA is not the primary purpose of the contract, UCITA will govern only the computer information portion of the agreement. UCITA does not apply to Articles 3, 4, 4A, 5, 6, 7, and 8 of the Uniform Commercial Code and Article 9 governs if there are conflicts between the two statutes.

Some UCITA Provisions

UCITA permits the formation of electronic contracts by electronic agents if they engage in operations that confirm a contract. It can also be formulated if an individual takes an action and has reason to know that the action will cause the electronic agent to perform.

UCITA does provide(s) the following remedies for licensors of Shrink-wrapped software agreements if the licensee doesn't have the chance to read all the terms of the shrink-wrapped license contract before paying:

1. a full refund,
2. reimbursement of reasonable expenses related to return, and/or
3. payment for foreseeable losses caused by installation of the information.

The warranties provided under UCITA are similar to Article 2 as well as disclaimers that are permitted with certain limitations. They reflect typical computer information considerations such as infringement, integration, etc.

UCITA Remedies

The general rule is to give the aggrieved party the benefit of the contract if there is a breach; however, the aggrieved party must take reasonable measures to mitigate his/her damages. The most controversial of the remedies is electronic self-help.

Pros and Cons of UCITA

UCITA is supported by the large computer related corporations such as: Microsoft, Adobe, America Online and the Federal Reserve. Opponents of UCITA include small businesses, educational institutions, consumer advocates, attorneys general, library associations, and insurance companies.

Satisfying The Writing Requirement of the UCC

One benefit that was derived from the Article 2B proposals and incorporated into UCITA was the change in the definition of a writing to include the maintenance of an

electronic record.¹⁷ It gives legal recognition to electronic records as writings as well as digital and electronic signatures. This change helps to address the issues created when the Statute of Frauds is invoked by a party to an action in an electronic contract case.

Historically, oral contracts were enforceable under English law until 1677 when the *Statute of Frauds and Perjuries* was enacted by the British Parliament.¹⁸ In essence, the Statute provided that certain agreements had to be in writing, to wit:

- (1) promise to answer for the debt of another;
- (2) agreement that by their tenor cannot be performed within one year from the making thereof;
- (3) agreements made in consideration of marriage;
- (4) agreements concerning the sale of realty;
- (5) promise by an executor or administrator of a decedent's estate to pay estate indebtedness from his/her personal funds;
- (6) sale of goods whose price is \$500 or more; and
- (7) miscellaneous other agreements as provided by state law.

The difficulty presented by the Statute of Frauds is that a writing is required for all of the above contracts thus rendering agreements not in accordance therewith unenforceable. The writing must include the signature signed by the party to be charged. Does a digital signature conform to the Statute of Frauds? Without statutory amendments, digital signatures may not qualify. The Statute of Frauds says that the agreement, promise, or undertaking must be "subscribed by the party to be charged therewith, or by his lawful agent..."¹⁹

The Statute of Frauds requires a signature but the term "signature" is broadly interpreted. The test is whether the person seeking to enforce the contract reasonably believed that the other party intended to authenticate the writing. Thus, initials or other symbols may be sufficient. The sign or symbol can be anywhere on the document and not necessarily at the end thereto. The signature may be typed, stamped, or printed.²⁰ The UCC 1-201 (39) states that "signed" includes "any symbol, executed or adopted by a party with present intention to authenticate a writing."

In the absence of a broad interpretation by the courts as to admission of electronic terms and signatures under the Statute of Frauds, it would appear that amendments to existing statutory requirements would be necessary. The U.S. could follow English law which abolished the Statute of Frauds for most contracts that previously required a writing or the Statute can be amended to permit a statutory exception for electronic contracts. A modification of the Statute's requirements was instituted by the enactment of the Uniform Commercial Code, Article 2-201 which contains the requirement of a writing for the purchase or sale of goods \$500 or more also has a number of exceptions not applicable to the Statute's other sections.²¹

It appears from the exceptions created by the enactment of the UCC three centuries later that scholars are uneasy about rendering unenforceable contracts lacking

the requirements of a writing. Historically, prior to the 1677 Statute writings were unnecessary because most inhabitants were illiterate. With the post-World War II enactment of the Uniform Commercial Code, the addition of several major exceptions to the requirement of a writing indicated a desire by the drafters to be more in accord with the realities of the marketplace. The new realities of cyberspace and the multitude of contracts of purchase and sales now taking place illustrate the need to create a new regime for Internet contracts. One may seriously question whether the Statute protects against fraud or permits fraud by allowing a person wishing to avoid a contract to raise the lack of writing defense.²²

Another advantage of the provisions set forth in the suggested Article 2B may be found in a number of proposed sections thereto. For example, Section 2B-203A(a) would mimic Section 2-207(1) of the UCC Sales Article by permitting acceptance of an offer for Internet services "even if the acceptance contains terms that vary from the terms of the offer, unless the acceptance materially conflicts with material term of the offer or materially varies from the terms of the offer."²³ Section 2B-204 discusses the rules for automated transactions. It explicitly permits the formation of a contract if the interaction by the electronic agents "results in the electronic agents' engaging in operations that confirm or indicate the existence of a contract unless the operations resulted from electronic mistake, fraud and the like."

A contract may be formed in any manner showing agreement including by offer and acceptance, conduct of the parties, and/or operations of electronic agents recognizing the existence of a contract. Such agreement may be established even in the absence of the determination of when the agreement was entered into, or if one or more terms are left open but such terms can be reasonably ascertained. If there is a material disagreement in the absence of contrary conduct, then the contract is not formed.²⁴ Assent is manifested to a record or term in electronic contracts by authenticating the record or term, by conduct or statements indicating assent, or circumstances show assent by an electronic agent.²⁵ Shrinkwrap license agreements [discussed below] are enforceable under Section 2B-208(a) unless they are unconscionable or other unenforceable.²⁶

Damages in electronic contracts to a licensor by a licensee would include sums not to exceed the contract fee and the market value of other consideration required for performance under the contract. They include accrued and unpaid contract fees, the market value of other consideration earned but not received, consequential and incidental damages, and "damages calculated in any reasonable manner."²⁷

Does the Legal Reasoning Applicable to Click Wrap/Shrink-Wrap Licenses Control in Electronic Contracts?

Is the act of entering a credit card number and clicking acceptance of purchase sufficient to make a purchaser liable under terms and conditions set out on the screen in an unreadable form or which are declared after the purchase? Perhaps the legal

reasoning that was promulgated in deciding shrink-wrap license cases will provide a possible direction for electronic cases.

An on-going issue in which courts have decided in opposition to each other is the legality of shrink-wrap licenses. We are all familiar with the packages ensconced in clear plastic cellophane wrappers containing the familiar notice:

Before you open this package: Carefully read the following legal agreement regarding your use of the enclosed product. By the act of opening the sealed package, using the software or permitting its use, you will indicate your full consent to the terms and conditions of this agreement. If you don't agree with what it says, you may return the software package within 7 days of your receipt for a full refund.

Thereafter, a highly extensive, small print restrictive notice follows the warning. Such notice constitutes what is euphemistically called a "shrink-wrap" license or agreement.²⁸ It is on most software packages. The difficulty is that most consumers purchase the product often unaware of the restrictions being imposed upon them until they have unwrapped the package. The notice is often repeated on screen when the user inserts the CD-ROM unto the hard drive. How legal is it to compel purchasers and users of goods containing such notices to comply with the post-purchase restrictions?

At first blush such notices may be superfluous inasmuch as software programs are protected by the copyright laws that restrict users from unlawful copying and/or distribution of the programs. The leading cases discussing the issue are: *ProCD, Incorporated v. Matthew Zeidenberg and Silken Mountain Web Services, Inc.*²⁹ and *Step-Saver Data Systems, Inc. v. Wyse Technology and the Software Link, Inc.*³⁰

In *PROCD*, the plaintiff compiled a computer database containing some 3,000 telephone directories. The database is sold under the trademark label "SelectPhone" to users on CD-ROM discs. The license agreement is seen as soon as the packaging is unwrapped. A copyrighted application program permits the user to search the database for the telephone number of the person named by the user. The plaintiff spent some \$10 million to compile and keep current the database. The database costs about \$150 to purchasers thereof. The resale or other dissemination of the product was thus restricted by the licensing agreement when the package was opened as well as set forth on initial application of the software.

The defendant, Zeidenberg, bought the software and decided to ignore the restrictive notice by reselling the information under his corporation, Silken Mountain Web Services, Inc. The price charged was less than that charged by the plaintiff. When the plaintiff sued for an injunction and other relief, the lower court held that the license was not enforceable because the terms were not outside of the packaging.

The Court of Appeals reversed. Defendant's claim was that the package on the store's shelf was an offer that a person accepts by buying the product. It noted that the length of the license and other terms would preclude their exhibition on the box cover unless they were printed microscopically. A notice on the outside of the box that the sale is subject to a license with terms detailed on the inside with a right to return the purchase sufficed to protect the licensor. Purchases of goods before communication of detailed terms is made are common. For example, insurance purchases are made without a reading of the policy that follows after the purchase. Ditto for purchases of airline tickets. Tickets for shows have restrictions either on the rear of the ticket and/or at the theatre as to recording and use of cameras. Drugs and appliances have detailed warnings and other information within the box that is not opened until after the purchase.

The Court then addressed whether UCC section 2-201 precluded the holding herein. The lower Court felt that inasmuch as a new UCC section 2-2203 has been proposed to validate shrink-wrap licenses, then the existing section would not so validate. The Court stated that those changes in wording did not necessarily change the meaning of the prior statute but may have fortified or clarified the statute. The Court distinguished three other shrink-wrap cases³¹ by stating that the issues therein concerned battle-of-the-forms and not the main issue in the within action.

The appropriate section according to the Court is UCC 2-204(1) which states that "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Thus, a vendor may invite acceptance by conduct and can interpose limitations on what constitutes acceptance. The UCC explicitly allows contracts to be formed in other ways. Such is the case at hand. The defendant was displayed the license agreement on opening the package and on viewing the screen.

Moreover, UCC section 2-206 governing acceptance further reinforces the plaintiff's position. It states that a buyer accepts goods by failing to make an effective rejection after having had an opportunity to inspect them. The defendant inspected the package, used the software, saw the license, and failed to reject the goods.

The Court disposed of the alleged contradictory holding of the U.S. Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*³² that held a single alphabetical telephone directory was not original and therefore was not entitled to copyright protection.³³ In the within case, the defendant was precluded by contract if not by the Copyright Law to duplicate the information contained in the CD ROM.

In the *Step-Saver* action, the Court of Appeals for the Third Circuit came to a different conclusion. In 1981, Step-Saver developed a program combining hardware and software to satisfy word processing and other purposes for use by physicians and attorneys based on the IBM personal computer system. It selected a program by the defendant TSL as the operating system and terminals manufactured by Wyse to

accomplish its purposes. After having done so, the Company received many complaints from customers and sued Wyse and TSL seeking indemnity with respect to lawsuits instituted against it by customers. The plaintiff, Step-Saver alleged breach of warranties by Wyse and TSL. The trial court dismissed as against TSL holding that the box-top license disclaimed all express and implied warranties.

The box-top licenses stated that the customer did not purchase the software but only a personal, non-transferable license to use the [program; that all expressed and implied warranties were disclaimed; that the sole remedy was to return the defective disk for replacement and that all damages were disclaimed; that the license was the final and complete expression of the parties' agreement' and that opening the package indicated an acceptance of the above terms and conditions. If the user did not agree, the purchase could be returned within fifteen days of purchase and all monies would be returned.

With respect to the effect of the box-top license that the plaintiff alleged did not become a part of the contract because it was a material alteration and that the license was not intended to be a final and complete expression of the terms of the agreement, the Court of Appeals stated that UCC section 2-207 was applicable. The section provides:

Additional Terms in Acceptance or Confirmation.

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (a) the offer expressly limits acceptance to the terms of the offer,
 - (b) they materially alter it, or
 - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such a case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of the Act."

The Court stated that Section 2-207 attempts to distinguish between standard terms in a form confirmation that a party wishes the Court to incorporate in the event of a dispute and the actual terms understood by the parties as governing the agreement. The burden is upon the party asking the court to enforce its form to determine that a particular clause was a part of the contract. In applying this test, the Court said that the consent by opening provision did not make Step-Saver's acceptance conditional. When a person has gone through the effort of making a purchase, "the purchaser has made a decision to buy a particular product and has actually obtained the product, the purchaser may use it despite the refund offer, regardless of the additional terms specified after the contract formed [at p. 34]." There was no evidence to show that TSL would have refused to sell if Step-Saver had not consented to the restrictive terms. The Court thus held that the box-top license did not contain the complete and final expression of the terms of the parties' agreement.

The difference in the two decisions may lie in the refusal of both courts to become parties to actions by defendants to evade responsibility for errant actions. In the ProCD case, the defendant converted the effort of the plaintiff in amassing data requiring the expenditure of millions of dollars and significant time to integrate telephone listing from many hundreds of sources. In the Step-Saver case, the defendant sought to prevent liability accruing to it for defective performances as to leave the plaintiff in the position of being responsible for its unsatisfactory performance. It would appear, however, that shrink-wrap licenses will be enforceable provided they are not unreasonable, particularly in consumer transactions.

Click-Wrap Agreements

Click-wrap agreements are similar to shrink-wrap licenses. The user generally opens a new program being installed on a computer or where the program was initially installed on a new computer and is faced with an agreement to which the user is given the choice of agreeing or not agreeing with the contents. The program will not open unless consent by clicking on the box containing the words "I agree" or similar wording to the terms on the agreement is given. The question again is whether such agreements are valid and enforceable against the user.

In *Crispi v. Microsoft Network, L.L.C.*, 323 N.J. Super. 118 (N.J. App. Div., 1999), the New Jersey Appellate Court upheld the trial court's determination that such consent by a user becomes a binding contract. The Court also upheld the forum selection clause contained in the agreement that compels all lawsuits arising out of the contract to take place in Kings County, in the State of Washington. Thus, the result of the case is that a person purchasing and using Microsoft programs may have to travel to the State of Washington to sue or defend a lawsuit for an alleged breach of the agreement consented to which agreement becomes known only after one opens the program.

A similar result took place in *Geoff v. A.O.L.*, File No. C.A. No. PC 97-0331, 1998 (R.I. Sup. Ct., 1998), wherein the Court upheld an agreement that a subscriber to America Online's Internet service had to consent to before the service could be accessed. The Court said that a person who signs an agreement by clicking onto the "I agree" button cannot later complain that the agreement was not read or understood.

The Uniform Electronic Transfers Act

In July of 1999, the NCCUSL approved the Uniform Electronic Transfers Act ("UETA") for submission to the states for adoption. This process was underway for three years compared with the more than ten years that were spent working on the revisions to the UCC and ended with the adoption of UCITA about the same time.

The importance of the UETA is that congress specifically refers to the Electronic Signatures in Global and National Commerce Act as an exception to the Act's mandate. The key provision of the Act is Section 7, *Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts*, which states:

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.

The Act applies to electronic records and signatures relating to a transaction connected to a business, commercial and governmental affairs. It is broader than Article 2B and USCITA inasmuch as it is not limited to licensing agreements and covers the transactions in Article 2 of the UCC. By adopting the UETA, states need not be concerned with an expansive definition of a writing nor need it adopt the controversial Article 2B. Thus, it appears that states have a variety of choices in the legislative scheme they wish to adopt. The clear mandate is that an electronic record may no longer be denied legal effect.

CONCLUSION

The world of technology is transforming the marketplace (so as) to make global purchases as easy as going to a nearby shopping mall. In order to enable buyers and sellers of goods using the ever improving electronic marketing technology to engage in global purchases, the rules of the game have to keep pace. Contracts over the Internet are but one area of law that has to be greatly modified. Because the technology is changing at such a rapid pace, legal protections must be rapidly updated to keep current with the technology. Congressional enactments in diverse areas concerning the Internet have taken place as to

intellectual property rights, cybercrime and the like. Similar developments in cybercontracts are now taking shape. We have discussed a few of the issues being addressed at this time.

ENDNOTES

¹ Karle, Ted, "Information Supernova," Internet Guide/A Supplement to Government Technology, October 1999, p.13.

² Nimmer, Raymond T. "Electronic Contracting: Legal Issues," XIV Journal of Computer and Information Law, 211 (1996).

³ The UCC 1-201, Comment 39 states: "The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in this Act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing." See also *Merrill Lynch, Pierce, Fenner & Smith v. Cole*, 189 Conn. 518, 457 A. 2d 656 (1983).

⁴ Such transmissions may be made in accordance with the Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Secure Electronic Commerce.

⁵ For a visual illustration of the process, see Ron White, "How It Works: Digital Signatures," *PC Computing*, (March 2000), pp. 152-153.

⁶ (page 4) Digital Signature Guidelines, 1996 A.B.A. Sec. & Tech. Info. Security Committee 1.

⁷ For a detailed description of the process and the Guidelines, see Edward D. Kania, "ESSAY: The ABA's Digital Signature Guidelines: An Imperfect Solution to Digital Signatures on the Internet," 7 *CommLaw Conspectus* 297, particularly pp. 301-302.

⁸ See Kwan, *op. cit.*, pp. 463-468.

⁹ A number of states, such as Florida, Minnesota, Utah, and Washington have adopted the Guidelines and there is pending a bill before Congress known as the Electronic Financial Services Efficiency Act of 1997, but there are a number of alleged flaws with the Guidelines that have caused the legislators to withhold a federally mandated statute. Such flaws include the possibility of fraud because it is the subscriber who creates the key pair and may attempt to act in bad faith by altering digitally signed documents after they have been transmitted. Kania, *id.*, p. 308.

¹⁰ Szafran, Marc E., "Note: A Neo-Institutional Paradigm for Contracts Formed in Cyberspace: Judgment Day for the Statute of Frauds," 14 *Cardozo Arts and Ent. L.J.* 491, 498 (1996).

¹¹ See Nimmer, Raymond et al. "License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal," 19 *Rutgers Computer and Technology Law Journal* 281, 283 (1993).

¹² For a lengthy examination of Article 2B, see Jody Storm Gale, "NOTE: Service Over the "Net": Principles of Contract Law in Conflict," 49 *Case W. Res.* 567 (Spring, 1999).

¹³ Dively, Mary Jo Howard & Carlyle C. Ring, Jr. "Overview of Uniform Computer Information Transactions Act, p.3. Paper written by the Advisor to Drafting Committee and Chair of UCITA Drafting Committee respectively. <http://www.law.upenn.edu/bll/ulc/ucita/htm>

¹⁴ Press Release of the National Conference of Commissioners on Uniform State Laws, April 7, 1999, Chicago, Illinois.

¹⁵ Dively, Mary Jo Howard. Overview of the Uniform Computer Information Transactions Act. Paper presented at the Conference on Electronic Commerce: Exploring the Legal and Business Interface at Georgetown University School of Law, Washington, D.C., December 8-10,1999.

¹⁶ UCITA, Section 102(12)

¹⁷ Article 2B-102(37). See also 2B-207.

¹⁸ For a discussion of the Statute of Frauds, see any standard basic business law text such as Ronald A. Anderson, Ivan Fox, David B. Twomey, and Marianne M. Jennings, *Business Law and the Legal Environment*, (17th ed., (West Publishing Company: 1999), pp. 300-304. The Statute of Frauds in New York can be found in *General Obligations Law, McKinney's Consolidated Laws of New York Annotated*, Book 23 A, section 5-701. See, also, the Uniform Commercial Code, section 2-201 for the sale of goods provision of the Statute of Frauds.

¹⁹ See *McKinney's*, *id.* 5-701(a).

²⁰ See E. Allan Farnsworth, *Contracts*, 2d ed. (Little, Brown and Company, 1990), pp. 434-435, citing *Southwest Engr. Co. v. Martin Tractor Co.*, 205 Kan. 684, 473 P. 2d 1276 (4th Cir.) where the seller's trademark on sales brochures was a signature. In *Merrill, Lynch, Pierce, Fenner & Smith v. Cole*, 189 Conn. 518, 547 A. 2d 656 (1983), a letterhead or billhead was sufficient for statutory requirements under UCC 2-210.

²¹ Section 2-201 provides: "(2) Between merchants if within a reasonable time a writing in confirmation of the contract is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received. (3) A contract which does not satisfy the requirements of subsection (1) [requirement of a writing for sale of goods of \$500 or more] but which is valid in other respects is enforceable (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or © with respect to goods for which payment has been made and accepted or which has been received and accepted..."

²² For an in depth discussion of the Statute of Frauds and its applicability in today's world, see Shawn Pompian, *Note: Is the Statute of Frauds Ready for Electronic Contracting?*, 85 Va. L. Rev. 1447 (Oct. 1999).

²³ Like Article 2, as between parties either or both of whom are not merchants, then the terms of the original offer hold, nonmaterial added terms are treated as proposals for added terms and, as between merchants, the proposed added terms become part of the contract unless the offeror gives notice of objection before or with in a reasonable time after notice of the said added terms.

²⁴ Section 2B-202.

²⁵ Section 2B-111(a).

²⁶ Section 2B-208(a) provides: "A party adopts the terms of a mass-market license for purposes of Section 2B-207 only if the party agrees to the license, by manifesting assent or otherwise, before or during the party's initial performance or use of or access to the information." Section 2B-207 states that a party adopts the proposed license agreement by assenting to it initially or even later if the party knew the whole of it would be presented at a subsequent time.

²⁷ Section 2B-708-2B-709.

²⁸ For a more detailed discussion of this issue, see David A. Einhorn, "Shrink-Wrap Licenses: The Debate Continues," *IDEA: The Journal of Law and Technology*, 38 IDEA 383-401.

²⁹ *F. 2d* (U.S.C.A. 7th Cir., 1996).

³⁰ 939 F. 2d 91 (U.S.C.A. 3d, 1991).

³¹ *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F. 2d 91 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F. 2d 255, 268-70 (5th Cir. 1988); and *Arizona Retail Systems, Inc. v. Software Link, Inc.*; 831 F. Supp. 759 (D. Ariz. 1993).

³² 499 U.S. 340 (1991).

³³ Section 301(a) preempts any "legal or equitable rights...that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in sections 102 and 103."