

WORKING PAPER

No. 01-06G

April 2001

“Electronic signatures Act-Federal Law of Contracts?”

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This paper analyzes the national legislation and compares it with the Uniform Electronic Transactions Act as a national standard for electronic signature legislation. This paper compares the Federal law with the earlier proposed model for state laws and suggests that Congress acted to speed up an otherwise slow process of state passage of an act that will result in more electronic commerce and the electronic storage of related documents and contracts.

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During the summer of 1999, the National Conference of Commissioners of Uniform State Laws adopted the Uniform Electronic Transactions Act as a national standard for electronic signature legislation. This paper compares the Federal law with the earlier proposed model for state laws and suggests that even national laws may be preempted by regional agreements concerning transactions over the global internet. The paper also explores the issue of the extent to which this law pushes federal jurisdiction into the traditional area of state jurisdiction.

Uniform Electronic Transactions Act

Many states enacted their own electronic signature or electronic transaction statutes.¹ The problem with state initiatives is that they differ making compliance a jurisdictional nightmare as the whole nature of the www is to permit and encourage worldwide transactions.

¹ For a complete listing of those statutes see McBride, Baker & Coles website at www.mbc.com.

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During the summer of 1999, the National Conference of Commissioners of Uniform State Laws adopted the Uniform Electronic Transactions Act as a national standard for electronic signature legislation.² The proposed act applies to electronic records and electronic signatures relating to a transaction.³ The Act provides for quite a few exceptions including laws governing the creation and execution of wills, codicils, or testamentary trusts, major portions of the Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2 and Article 2A (meaning that rules relating to signatures for banking (Articles 3 and 4), secured transactions (Article 9), warehouse receipts, investment securities, etc are not covered. The act does not apply to other laws identified by the State (which may include specific consumer protection statutes, for example). Otherwise, the act broadly states that electronic signatures are valid and electronically generated contracts satisfy the Statute of Frauds. The electronic signature is defined as any 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.⁴ The significance of this provision is that the authors were trying to anticipate current and future technological developments for voice prints and other forms of signatures beyond that of an electronic version of a handwritten signature. The key element of whether an electronic signature is valid is whether the electronic record is capable of being retained by the recipient at the time of receipt. If the sender or its information processing system can inhibit the ability of the recipient to print or store the electronic record, then the transmission is not an electronic signature. The term "electronic signature" includes facsimile, electronic mail, voice mail, audio, records, as well as internet transmissions both encrypted and nonencrypted. However, a critical

² Uniform Electronic Transactions Act was drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended for enactment in all the states at its annual conference, Denver, Colorado, July 23-30, 1999. The Act is posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

³ Uniform Electronic Transaction Act Section 3, Scope as posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

⁴ Uniform Electronic Transaction Act Section 2, Definitions (8), as posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

element is that the party intended to make the signature. A mere click on AI agree@ will suffice to show intent. Even typing ones= name on an email message may act as a valid signature or applying a biometric or encryption technology to a message with the intention to sign is sufficient. The Act does not require a transmission to replicate a handwritten signature. While this may sound radical, recall that the UCC provides that a stamp or mark may serve as a signature.⁵ Courts have also concluded that names on telegrams, names on telexes, typewritten names, names on Western Union Mailgrams and even names on letterhead may serve as signatures.⁶ The Uniform Electronic Transactions Act takes a very liberal approach as to what is a signature that is consistent with the UCC and court cases.

The Act deals with the issue of what happens if there is a change or error in an electronic record during the course of a transmission. If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure but the other party hasn=t, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may have the affect of the changed or erroneous electronic record. In the event that a third party Aelectronic agent@ is used, an individual may avoid the transaction if the electronic agent did not provide an opportunity for the prevention or correction of the error and if at the time that the individual learned of the error the individual promptly notified the other party that they did not intend to be bound by the electronic record, and they took reasonable steps to return or consideration received, and they have not already received any benefit or value from the consideration if any, received from the other person so long as they were created with intent.⁷ When a legal document requires notarization or acknowledgment, a notary may use an electronic signature along with any required language.⁸ The Act also provides

⁵ Uniform Commercial Code Section 1-201 (3) ASigned@ includes any symbol executed or adopted by a party with present intention to authenticate a writing.

⁶ Smedinghoff, Thomas J. & Bro, Ruth Hill AMoving With Change: Electronic Signature Legislation as a Vehicle for Advancing E-Commerce@ 17 J. Marshall J. Computer and Info. L. 723.

⁷ Uniform Electronic Transaction Act, Section 10 Effect of Change or Error, as posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

⁸ Uniform Electronic Transaction Act, Section 11, Notarization and Acknowledgment, as posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

that if a law requires that a record be retained, that requirement may be satisfied by retaining an electronic record of the information so long as the record remains accessible for later reference and so long as the information set forth in the record accurately reflects the information set forth in the record after it was first generated. The Act even provides that when the law requires an original, the electronic record will fulfill that requirement.⁹ A State agency may set additional requirements for the retention of a record under their jurisdiction. Such electronic signatures are admissible in evidence.¹⁰

The Act does not change the mailbox rule but it does set out the rules as to when a message is sent and when it is received. A message or electronic signature is considered sent when it is addressed and enters the electronic processing system outside the control of the sender or if it enters the region of the information processing system designated or used by the recipient which is under the control of the recipient.¹¹ An electronic message is deemed to be received when it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record and it is in a form capable of being processed by that system. The Act clearly contemplates transmission either within a corporate intranet system or through the internet whereby the message is actually transmitted in packets passing through a number of host servers. Noteworthy is the provision that a message is deemed to be received even if the recipient is unaware of its arrival. While many email systems permit a sender to receive confirmation that the message arrived, the Act acknowledges that such a notice does not indicate whether the contents sent correspond to the content received. The act permits state law to determine the legal outcome when a party is aware that an electronic record purportedly sent

⁹ Uniform Electronic Transaction Act, Section 12, Retention of Electronic Records; Originals, as posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

¹⁰ Uniform Electronic Transaction Act, Section 13, Admissibility in Evidence, as posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

¹¹ Uniform Electronic Transaction Act, Section 15, Time and Place of Sending and Receipt, as posted at www.law.upenn.edu/bll/ulc/finact99/1990s/ueta.htm

or purportedly received was not actually sent or received.¹² The act also permits State agencies to determine whether they will create and retain electronic records and grants state agencies the right to prescribe the system and manner of sending electronic reports and signatures and encourages state agencies to develop consistent and standardized regulations concerning record submissions.¹³ Overall, the Act broadly defines electronic signatures and liberally permits state agencies to prescribe their own systems or procedures for the electronic submission of reports with electronic signatures. The Act is therefore quite neutral in its effect on the rules of contracts except to encourage a system whereby contracts made over the internet will be binding upon a showing of intent of the parties to create an enforceable contract. The Act makes it fairly easy to create an indication of consent through clicking on a box that says AI agree@ and leaves open the precise mechanism whereby a party would establish that they had requisite intent to form a contract.

The Uniform Computer Information Transactions Act

The Uniform Computer Information Transactions Act is a much more controversial proposal because it encompasses specific contractual rules relating to the behaviors of parties to a contract. Some perceive the proposal as being Aanti-consumer.@¹⁴ The Act not only confirms the use of electronic signatures, but actually defines contract formation and terms, sets forth rules on construction of contracts, warranties, transfer of interests and rights, defines performance and breach of contract and specifies remedies. Those familiar with the existing Uniform Commercial Code in defining relations between merchants will be comfortable with the specific provisions of the Act, while those who tend to look at transactions from the consumer viewpoint will be uneasy with the lack of specific consumer protections. Like the UCC, the Uniform Electronic Transactions Act defaults to state law for specific consumer protections. The Act was originally written as section 2b of the Uniform Commercial Code and therefore follows the UCC format.¹⁵

¹² Ibid.

¹³ Ibid.

¹⁵ The Uniform Computer Information Transactions Act, AUniform Commercial Code Article 2B@ American Law Institute and National Conference of Commissioners on Uniform State Laws, February 1, 1999.

The American Law Institute withdrew its support of the legislation so the proposed legislation does not carry the UCC title.¹⁶ The Uniform Computer Information Transactions Act does not alter any of the transactions involving the sale of goods or the leasing provisions of the UCC. It addresses only those transactions involving the licensing of software, the use of internet-based data bases or distribution of information on the Internet.¹⁷ Specifically excluded are transactions that would involve the transmission of pay for view television over the internet, music downloading, and other multi-media entertainment and programs.¹⁸ The Act provides that parties may opt for having their contract treated under UCITA if they have had opportunity to indicate their consent after proper disclosure. Such consent may be included in software whereby an AI agree@ button is provided at the end of a licensing or contractual agreement. In the case of shrink wrapped contracts, the provisions are a bit more controversial in that a customer may find that they have assented to the UCITA rules after they have purchased the software. UCITA provides a partial remedy in that the customer has the right to return the software or program for a full refund if they do not wish to be held under the UCITA rules.¹⁹ Critics of UCITA note that the FTC=s model for most state consumer disclosure laws requires that the merchandisers of shrink-wrapped software provide stronger disclosure when after-purchase contract terms are to be part of a contract than UCITA=s rather liberal definition of the term Aconspicuous.@ UCITA describes >conspicuous= as a term so written, display or presented that a *reasonable person* (emphasis mine) against which it is to operate ought to have noticed it. The Act suggests that conspicuous terms include Aa heading in capitals in a size equal to or greater than or in contracting type, font or color, to the surrounding text....@²⁰

¹⁶ Shah, Patrik, AThe Uniform Computer Information Transactions Act@ *15 Berkeley Tec. L.J.* 85, - Annual Review of Law and Technology. See also Ed Foster, AWhat is UCITA?@ Last modified August 30, 1999) [[http://www.infoword.com/cgi-bin/displayStory.pl.?features/990531 ucital.htm](http://www.infoword.com/cgi-bin/displayStory.pl.?features/990531%20ucital.htm)].

¹⁷ *Ibid.*

¹⁸ UCITA 103 (d)(2) (Oct. 15, 1999 Draft). See also ftn 17.

¹⁹ UCITA 209 (b) and Comment notes.

²⁰ *Id.* 102 (a)(14).

Electronic Signatures in Global and National Commerce Act

The Electronic Signatures in Global and National Commerce Act (E-sign Act), signed by President Clinton on June 30, 2000 established the validity of electronic signatures throughout the United States. Like similar acts, the E-sign Act defines electronic signature as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”²¹ What the E-sign Act achieves is making the use of electronic contracting through the internet have the same legal effect as hardcopy contracts. The validity of electronic contracts may be challenged in the same manner as hardcopy contracts. Electronic contracts may be challenged as to authenticity or identity of one of the signors, or fraud. A party may challenge an electronic contract on the basis that an electronic signature is a forgery, or made without authority, or invalid for any reasons that would invalidate the effect of a traditional written signature.²² Not all transactions must be done electronically under the E-sign Act. For states that require hardcopy documents, the exceptions include: the creation and execution of wills, codicils, or testamentary trusts; adoption and divorce actions; court orders or notices or official court documents (including briefs, pleadings and other writings required to be executed in connection with court proceedings. The Act does not apply to the cancellation or termination of utility services (including water, heat, and power); default acceleration, repossession foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; cancellation or termination of health insurance or benefits or life insurance benefits; or recall of a product; or any document required to accompany any transportation or handling of hazardous materials.²³

The Act does not require the use of electronic signatures nor does it permit businesses from forcing consumers to contract electronically – it merely provides that no state shall enact laws that will limit or defeat the treatment of electronic signatures and contracts as being equivalent to hardcopy. The Act does support state regulations concerning retention of contracts

²¹ P.L. 106-229 [S. 751], 106 (5).

²² Dorney, Maureen “Electronic Signatures in Global and national Commerce Act as found in GrayCary.Technology’s Legal Edge™ at www.graycary.com

²³ P.L. 106-229 [s. 761] Section 103 Specific Exceptions

or documents, or records by providing that such records must be retained as required under law. The significance of E-Sign Act is that paper copies are no longer required – companies may store such documents electronically provided that they are accessible.²⁴ This means that the electronic version becomes the original. If state law requires that a copy of a check be retained with the contract, an electronic record of the information on the front and back of the check would be sufficient.²⁵ However, E-Sign Act requires that the company that stores the documents must make them available to the signors and that each party should be able to download and print such files. Congress was apparently concerned that some files connected as attachments can be difficult or impossible to open so they drafted the law to provide that the party storing the documents may specific equipment available and warrant that the documents are accessible.²⁶ Other consumer protections include the provision that consumers must affirmatively consent to the use of electronic notices, records, and contracts. Prior to consenting, consumers must be given notice of their rights.²⁷

The E-Sign Act directs the Secretary of Commerce to conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared with delivery of written records via the U.S. Post Office and express private mail services. The Secretary of Commerce and the Federal Trade Commission are directed to submit a report to Congress evaluating the benefits of the electronic contracting procedures, a description of burdens imposed on electronic commerce by the requirement of notification and assent and whether the benefits outweigh the burdens.²⁸

One feature of the E-Sign Act is that it is technologically neutral. The Act does not specify any particular method of creating, notifying, or retaining electronic signatures and related documents. Congress deliberately avoided using terminology in the legislation that would require certain type of technology so that frequent revisions would be unnecessary.

²⁴ P.L. 106-229 101 (d) (3)

²⁵ P.L. 106-229 101 (d) (4)

²⁶ White House Press Release “Eliminating Barriers to Electronic Commerce While Protecting Consumers: The Economic Signatures in Global and National Commerce Act” June 30, 2000 at <http://clinton4.nara.gov/WH/New/himl/20000630.html>

²⁷ *Ibid.*

²⁸ P.L. 106-229 [S.761] Section 105 (b) Studies

Commentators suggest that federal intervention was desirable because the process of state ratification of UETA takes so much time.²⁹ The European Commission has also issued directives which also promote the use of digital signatures and electronic contracts so that legislation in the United States and the European Union are very similar.³⁰ The E-sign Act does not mean that states will necessarily abandon consideration of UCITA because that proposed legislation deals specifically with the contracting over software and computer services. What Congress did, was move to preempt state law requiring hardcopy, conventional signatures on scores of transactions while leaving states with discretion on a wide variety of paperwork where authenticity may become more of an issue (such as in wills, codicils, etc). As reflected by this analysis, the federal law parallels the major provisions of UETA. While commentators seem to dwell on the consumer protection issues, the significant transactions in terms of dollar amounts will be found in the business to business realm of the internet. Prior to the E-Sign Act, companies would sign paper contracts (trade agreements) indicating that future transactions would be by means of electronic contracts or ordering. The passage of E-Sign Act eliminates the issues of whether such agreements are enforceable within certain jurisdictions. Over the course of the next year, it will be interesting to see what the Secretary of Commerce and Federal Trade Commission report to Congress.

The E-Sign Act does not resolve the most basic issues of how courts will view electronic signatures or in how high technology companies may innovate to create more certain technologies for authenticating one's identity than that mere clicking of "I agree." As the dollars transacted over this medium increase, one can be sure that hackers will attempt to invade e-commerce portals and create interesting mischief. But the sheer practicality of storing documents and files electronically over the hardcopy storage should provide sufficient savings so as to create new technologies to deter fraud.

²⁹ Poggi, Christopher "NOTE: Electronic Commerce Legislation – An Analysis of European and American Approaches to Contract Formation, 41 *V.J.Int'l L.* 224, Fall 2000.

³⁰ *Ibid.*