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e-commerce news

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DEVELOPMENTS: ELECTRONIC SIGNATURES

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E-commerce deals are often made by a single mouse click (e.g., when a consumer submits a book order to Amazon.com) or without any human interaction at all (e.g., when a manufacturer's computer automatically orders widgets from a parts supplier's computer). Such "signatures" lack the formalities that accompany the signing of a paper contract and, unlike fax signatures, do not bear a resemblance to written contractual acknowledgements. The absence of traditional manifestations of intention and authenticity has called into question whether an "electronic signature" qualifies as a "signed writing" within the meaning of the Uniform Commercial Code ("UCC") and, more fundamentally, whether an electronic signature can express the intent necessary to create a valid, binding contract.

Background

Agreements predicated on electronic signatures are probably binding even under traditional contractual rules. The UCC provides that any "symbol" may be used to "sign" a "writing" so long as it is "executed or adopted by a party with present intention to authenticate a writing." Courts have long held, or assumed, that faxed signatures, typewritten signatures, telexes, and telegrams manifest sufficient intent to qualify as "signed writings" within the meaning of the UCC. A signature at the end of an email, or the submission of a name and credit card number to Amazon.com, or a widget order placed using an identifiable customer number, is a "symbol" that could be used to "authenticate" an intention to enter into a contractual agreement. Each such electronic signature is comparable to other non-handwritten signatures previously accepted by courts.

New Legislation Announced

Nonetheless, with billions (and, one day, trillions) of dollars on the line, any doubt as to the validity of electronic transactions creates insecurity and threatens to retard the development of e-commerce. To date, the states have been slow to implement measures to allay these insecurities. Virtually every state has passed or is considering legislation to make some kinds of electronic signatures binding for certain kinds of transactions – but fewer than ten

states have enacted legislation confirming that any electronic signature is a valid, binding expression of intention for most (if not all) agreements. Recently, however, national legislation has been announced that may address these concerns.

On July 29, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") – the same organization that drafted and now updates the UCC – approved a proposed Uniform Electronic Transactions Act ("UETA") that generally establishes the equivalency of electronic signatures and hand-written signatures for most business, commercial, or governmental activities. Under UETA, electronic transactions or signatures are no less legal or enforceable than their paper counterparts; electronic documents or records are the same as "written" documents or records for all legal purposes (including the rules of evidence); and electronic signatures satisfy all legal requirements for a signature or "signed writing." UETA codifies what was implicit in the UCC: **any symbolic representation, expression, or manifestation of intent, in any medium, satisfies the requirement of a "signed writing."**

The scope of UETA extends to all aspects of electronic commerce. UETA broadly defines an "electronic signature" to be "an electronic sound, symbol, or process attached to or logically associated with an electronic record or adopted by a person with the intent to sign the electronic record"; "electronic" in turn is defined to relate to "technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." Thus, an email is an electronic signature – and so is a fax, a pager message, an ICQ message (or another "instant message"), a post in an electronic chat room, an electronic bid on eBay, a mouse click confirming a purchase on an e-commerce website, an automated data exchange between two computers, or even the tone that sounds when a button on a touch-tone phone is pushed.

UETA's approach is intended to resolve uncertainties relating to writing and signature requirements by affirming the use of electronic signatures and records as authorized "signed writings." UETA says that electronic signatures can be valid, but does not address how to prove the authenticity and integrity of a given electronic signature or record. This question has been left open to be resolved in accordance with traditional contract law principles.

UETA takes an approach that is different from many of the earlier state efforts. The first wave of state electronic signature statutes often provided that certain kinds of electronic signatures and records – usually those that relied on sophisticated encryption techniques to tie a given message to a particular author – would be presumed to be authentic and unaltered. But in granting preferred types of electronic signatures the benefit of a presumption of validity, those statutes both called into question the legality of less secure types of electronic signatures (such as email) and required rigor that has never been required of paper writings. UETA's minimalist approach, by contrast, confirms the legality of millions of undisputed transactions while recognizing that, in the case of a contract dispute, more secure electronic signatures will be easier to substantiate under existing rules of law.

The states are under no obligation to embrace the approach taken by NCCUSL. Congress is, however, contemplating legislation that would strongly encourage the states to pass UETA. Immediately after NCCUSL approved UETA, the relevant Senate and House committees each reported bills (S. 761 and H.R. 1714) that adopt UETA's central provisions and definitions almost word-for-word. Like UETA, both bills establish the general validity of electronic records and signatures, and provide that electronic signatures will satisfy any legal requirement that a contract or agreement be signed or in writing. Both bills expressly preempt contrary state law unless a state adopts UETA (to which both bills refer by name). Congress is expected to consider the two bills, which are largely identical, during the fall of this year.

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MONTHLY UPDATE

Congress is in recess until Wednesday, September 8.

Cybersquatting. On August 5, the Senate passed a bill (S. 1461) prohibiting bad faith and abusive conduct in the registering of domain names by persons who seek to profit unfairly from the good will associated with existing trademarks. Registration of names that are "identical to, confusingly similar to, or dilutive of a trademark or service mark of another that is distinctive at the time of registration of the domain name without regard to the goods or services of the parties therewith" will be subject to civil penalties of up to $100,000.

Database protection. On August 5, the House Commerce Committee approved legislation (H.R. 1858) (see, generally, E-Commerce News of February 1999) to provide copyright protection to online databases to prevent online theft of original databases by setting civil penalties for selling copied information, such as stock market quotes.

Electronic signatures. On August 5, the House Commerce Committee approved legislation (H.R. 1714) (discussed in this edition of E-Commerce News) that would make electronic signatures as legally binding as written ones and prohibit states from denying the validity of contracts signed electronically.

Internet access. On July 28, Rep. Earl Blumenauer (D-OR) introduced a bill (H.R. 2637) to protect consumer and community choices in access to Internet providers. More specifically, the bill: paves the way for local communities to ensure that consumers can access the ISP of their choice over the cable platform without having to pay twice; allows the FCC to resolve any interconnection, technical or logistical standards that may arise as a result of localities requiring open access; allows ISPs access to a cable platform through existing leased access requirements; and clarifies that telecommunications services offered by cable operators should be regulated as telecommunications services.

Privacy/financial information. The Financial Institutions Subcommittee of the House Banking Committee held two hearings during the week of August 9 focusing on financial privacy. On the first day of hearings, financial institutions representatives discussed a range of concerns about the privacy provisions in H.R. 10. The President of the ICBA said the bill's opt-out provision would discriminate against community banks by allowing consumers to block financial institutions from sharing their personal financial information with third parties but not with holding company affiliates. In day two of the privacy hearings, Comptroller of the Currency John Hawke testified that allowing consumers to block their financial institutions from sharing personal information with third parties but not affiliates is "untenable." The Comptroller said he does not think that customers will make a distinction between affiliates and third parties, and that not giving an opt out choice regarding information-sharing with all entities could undermine consumers' trust in the banking system.

Working group. On August 9, President Clinton announced the creation of a new working group on unlawful conduct on the Internet. Many federal agencies will participate in the working group, which is to make recommendations in four months concerning ways to combat illegal online activity (including child porn and the sale of guns, drugs, and explosives).

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