Recent Developments in E-Commerce Law

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Palo Alto, California

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Areas of Discussion

- What is e-commerce?
  - History
  - Contemporary examples
  - Future
- Law & the future growth of e-commerce
  - Selected statutes affecting e-commerce
  - Focus on digital signatures
- Questions/comments (your experience)
Defining E-Commerce

  - cf. telegraph

2000: “[b]roadly, [as] the buying and selling of goods and services on the Internet”
  - cf. bartering information
Historical Antecedents

- Telegraphs
- Telephones
- Teletypes
- Fax machines
- Electronic Data Interchange ("EDI")
  - Accredited Standards Committee X12
  - 275 transaction sets
- Our focus: transactions on the web
Contemporary Examples

- “Business-To-Consumer” (B2C)
- “Consumer-To-Consumer” (C2C or C2B2C)
- “Business-To-Business” (B2B)
“Business-To-Consumer” (B2C)

- Direct sales to public
- www.amazon.com
“Consumer-To-Consumer” (C2C or C2B2C)

- Sales from consumer to consumer (C2C)
- Possibly mediated through a business via online “market place” (C2B2C)
- [www.ebay.com](http://www.ebay.com)
I went back to the party last summer I met who ran a grocery store and had gotten the Tiger Woods promotional set of three Titleist Gold Balls each with Tiger Woods signature and Wheaties printed on the golf balls...this carton is in like new condition...two are shown. I don't know if I am going to sell my set...have only 4 that I may list...last year gave my youngest son a set...this allows you however to see the top and the design of Tiger Woods on two side panels...I could not find a date...but party thought they were from two to four years ago...YOU ARE BIDDING on just one box of 3...he raised his prices but my minimum is the same...they did go quite high last year...it is a fortunate find as the young man is an incredible golfer and this is early in his golfing legacy...successful bidder pays shipping and must insure these...priority mail safest way...
“Business-To-Business” (B2B)

- Sales from company to company
- Also through industry wholesalers or marketplaces
- Estimated 7% of world economy in 2004
- [www.agilesoft.com](http://www.agilesoft.com) Agile Buyer™
Agile Buyer™

Overview

Agile Buyer manages the procurement process for the entire direct materials supply chain, including new product introduction, strategic sourcing and supplier management.

Part searches, supplier identification, RFQ generation and dissemination, supplier response analysis, price negotiations, contract management and performance tracking can now be accomplished from the desktop - eliminating the need for countless phone calls and faxes.
Five Dimensions for Future Growth of E-Commerce

- Rapid growth of e-commerce
- Five dimensions of future growth
  - Participation
  - Content
  - Modality
  - Specificity
  - Augmentation
Dimension 1: Participation

- How many people and firms participate in e-commerce?
- Growth of participation
  - increased access
  - increased comfort with e-commerce
- Huge telecom and venture capital investments
  - wise investments?
  - money squandered?
Dimension 2: Content

- What can be bought, sold, or traded via e-commerce?
- Few exceptions (babies and body parts)
- More local consumer services
- More specialized business services
- Worldwide reach of content
  - collections of Frege’s works in German
  - highly specialized EE’s from Bangalore
Dimension 3: Modality

- What devices permit e-commerce?

- Today:
  - networked PC’s are primary tool
  - also portable tools (PDA’s, Blackberries, cell phones, etc.)
  - and today’s winner is...

- Trends: voice-based delivery and personalized, localized offers

- Tomorrow: “e-billboards” and “e-fridges”
Enhanced Modality in Action

I found the ultimate tool for the mobile professional.

It's a combination PDA, phone, pager, digital camera, fax, e-mail, laptop, and shredder.

It clips right to my belt!
Dimension 4: Specificity

➢ To what degree does an e-commerce transaction satisfy a particular need?
➢ Intelligent design permits greater customization
➢ Greater customization requires more information
  ➢ at least in short-term
  ➢ cf. ever more intelligent agents
➢ Towards customized mass production
Towards customized mass production - Dell
Towards customized mass production - Land’s End
Dimension 5: Augmentation

- To what degree is an e-commerce transaction negotiated by computers?
- Two ends of the spectrum
  - Minimal computer assistance -> communication conduit
  - Substantial computer assistance -> towards autonomous agents
- Augmentation for both buyer and seller
# Four Different States of Augmentation

<table>
<thead>
<tr>
<th>Buyer: Low Computer Negotiating Assistance</th>
<th>Seller: Low Computer Negotiating Assistance</th>
<th>Buyer: High Computer Negotiating Assistance</th>
<th>Seller: High Computer Negotiating Assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Mom and Pop” Web storefront</td>
<td>Simple <a href="https://www.amazon.com">Amazon</a> transaction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(simple order form transmitted through the web and is processed manually)</td>
<td></td>
<td>Buyer’s program stock trading system automatically places order with automated brokerage system.</td>
<td></td>
</tr>
</tbody>
</table>
Buyer Uses
Simple Order Form

California Pizza Kitchen
531 Cowper St.
Palo Alto
CA 94301

Monday - Thursday: 11:30am - 10pm
Friday & Saturday: 11:30am - 11pm
Sunday: 12noon - 10pm

### Appetizers

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Price</th>
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<tbody>
<tr>
<td>90</td>
<td>FOCACCIA WITH CHECCA</td>
<td>$3.79</td>
</tr>
<tr>
<td>91A</td>
<td>TORTILLA SPRING ROLLS - THAI CHICKEN, BAJA CHICKEN OR BANGKOK BBQ CHICKEN, NO MORE MARGHERITA 500</td>
<td>$5.49</td>
</tr>
<tr>
<td>92</td>
<td>SPINACH ARTICHOKE DIP (W/CHIPS) - SERVED HOT WITH BLUE AND WHITE CORN TORTILLA CHIPS</td>
<td>$5.99</td>
</tr>
<tr>
<td>93</td>
<td>TUSCAN HUMMUS</td>
<td>$4.49</td>
</tr>
<tr>
<td>99</td>
<td>SESAME GINGER CHICKEN DUMPLINGS</td>
<td>$4.99</td>
</tr>
<tr>
<td>155</td>
<td>SINGAPORE SHRIMP ROLLS</td>
<td>$6.49</td>
</tr>
</tbody>
</table>

### Special Orders

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Price</th>
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<tbody>
<tr>
<td>342</td>
<td>KID MENU SPAGHETTI W/ROLOGNESE SAUCE</td>
<td>$3.99</td>
</tr>
<tr>
<td>888Z</td>
<td></td>
<td>$0.01</td>
</tr>
</tbody>
</table>
Computer Helps Buyer Identify Best Offer
Global Factors Affecting Five Dimensions of Growth

- Security and privacy concerns
  - can limit participation
  - can restrict content
  - can impede use of new modalities
  - can hinder greater customization
  - can cast doubt on augmentation

- Important concerns that need to be addressed at every level of e-commerce
Law & The Future
Growth of E-Commerce

- Remove obstacles
  - e.g. statutes of frauds
- Facilitate transactions
  - e.g. legitimate acts of computer agents
- Establish standards
  - e.g. test for acceptability of digital signatures
- Continue to recognize other social goals
  - e.g. consumer protection
Selected Statutes: Focus on Digital Signatures

- California Uniform Electronic Transactions Act (California UETA)
- Electronic Signatures in Global and National Commerce Act (E-Sign)
- Uniform Computer Information Transactions Act (UCITA)
- Electronic Securities Transactions Act
California UETA - Background

- Adopted in 1999
- Based on the Model UETA Act crafted by National Conference of Commissioners on Uniform State Laws (NCCUSL)
- Model Act adopted in 29 states, District of Columbia, and U.S. Virgin Islands
  - Sometimes modified
- California UETA differs from the Model Act in several ways
Key Provisions of California UETA

- Rules that apply when parties voluntarily elect to transact business electronically
- If the parties have so agreed, then:
  - A record or signature cannot be rejected solely because it is in electronic form
  - A contract cannot be rejected because an electronic record was used in its formation
  - Electronic records satisfy laws that require that a contract be in writing
  - Electronic signatures satisfy laws that require a signature
Legitimates Automated Transactions

- A contract may be formed by the interaction of electronic agents of the parties, even without the parties’ review or approval of all terms.
- A contract may be formed by the interaction of an electronic agent and an individual.
- The terms of the contract are determined by the substantive law applicable to it.
Exceptions to California UETA

Several exceptions to the applicability of the California UETA:

- Wills, codicils, testamentary trusts
- Most of U.C.C. other than Division 2 (sales)
- Laws requiring specifically identifiable text or disclosures in a record or a portion of a record be separately signed or initialed
- Numerous specified California statutes, including consumer statutes (e.g., C.C. § 3071.5 re release by legal owner of vehicle)
Some Differences Between California UETA & Model Act

- Numerous additional exceptions to the scope of the model act (e.g., consumer statutes)
- Special limitations on the means of agreeing to conduct a transaction electronically (e.g., limits on use of form contracts to obtain consent)
- Different standards for when an e-record has been sent or received.
- Failed to adopt § 16 dealing with “transferable records” (e.g., a note under Div. 3 of U.C.C.)
Proposed Changes to the California UETA

- State Senator Byron Sher has introduced S.B. 97 which proposes to:
  - substantially revise California’s exceptions to the scope of the California UETA
  - introduce new rules for transferable records
Electronic Signatures in Global and National Commerce Act

- Electronically signed by President Clinton on June 30, 2000
  - two kinds of signatures
  - poor security ("Buddy")
- Sets federal e-commerce standards
- Affects UETA, especially California UETA
- Describes U.S. position on possible future international standards
Key Provisions of E-Sign Act

- Generally does not mandate use of electronic signatures (government contracts exceptions)
- However, broad statement of application
  - signatures, contracts, or other records can not be denied legal effect solely because they are electronic
  - unlike UETA, no general voluntariness requirement
- Specific exceptions for consumer disclosures
  - consent, notice, and other requirements
Key Provisions of E-Sign Act (continued)

- Exceptions, including, but not limited to:
  - court orders, notices, documents
  - utility terminations
  - default, eviction etc. re residence of an individual
- Electronic agents can form contracts
- Application to transferable records (e.g., notes)
- Promotion of principles internationally
  - encourage use of electronic signatures
  - permit parties to choose technologies (cf. PKE)
- Complex preemption rules
Can One Opt Out of the E-Sign Act?

- Interaction between § 7001(a)(1) and § 7001(b)(2)
- no opting out: too little weight to § 7001(b)(2)
- consent required: too little weight to § 7001(a)(1)
- parties can probably opt out of E-Sign only if there is an express, mutual agreement to do so
- however, a reviewing court might apply different presumptions or no presumptions
Uniform Computer Transactions Information Act

“provides a comprehensive set of rules for licensing computer information, whether computer software or other clearly identified forms of computer information...”

(www.ncusl.org/uniformact_summaries/uniformacts-s-ucita.htm)

- A model act completed by NCCUSL in 1999
- Originally Article 2B of the U.C.C.
- Only adopted in Virginia and Maryland and introduced to Arizona, Illinois, Maine, New Jersey, and Texas to date
- Groups opposed to UCITA have formed AFFECT
  - American Library Association, Sun Microsystems, Inc., C.F.A.
- Groups supporting UCITA have formed DCC
  - AOL Time Warner, Intel, Microsoft
Electronic Securities Transaction Act

- Proposed amendment to Securities Exchange Act of 1934 and Investment Advisers Act of 1940 in 106th Congress
- Registered brokers, dealers, etc. could
  - Rely upon electronic signatures
  - Use such signatures in conducting business
- Co-sponsors Senators Lott and McCain
- Not enacted into law
Contract Provisions for E-Commerce

Four special concerns for California parties:
- Jurisdictional
  - Does the California UETA or the E-Sign Act apply?
- Choice of Law
  - Explicit choice of law? California or other?
  - If other, has other state adopted a “clean” version of the UETA?
  - Is the other party in Maryland or Virginia? Will UCITA apply?
- Dispute Resolution
  - By federal courts, state courts, private judges, or arbitrators?
- Contractual Statute of Frauds
  - Do the parties want a contractual statute of frauds?
  - If E-Sign applies, can the parties opt out of it?
  - What happens if a court, private judge, or arbitrator fails to enforce a contractual statute of frauds?
An Example of How To Try To Opt Out of the E-Sign Act

This Agreement shall not be amended or modified except in writing by means of a tangible printed or paper document personally signed by hand by each of the parties; the parties specifically agree that Ch. 96 of Title 15 of the United States Code, Electronic Signatures in Global and National Commerce, is not applicable to this Agreement or to any amendment or modification of this Agreement.