

Recent Developments in E-Commerce Law



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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



- 1996: “[t]ransacting business via electronic means”
 - 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



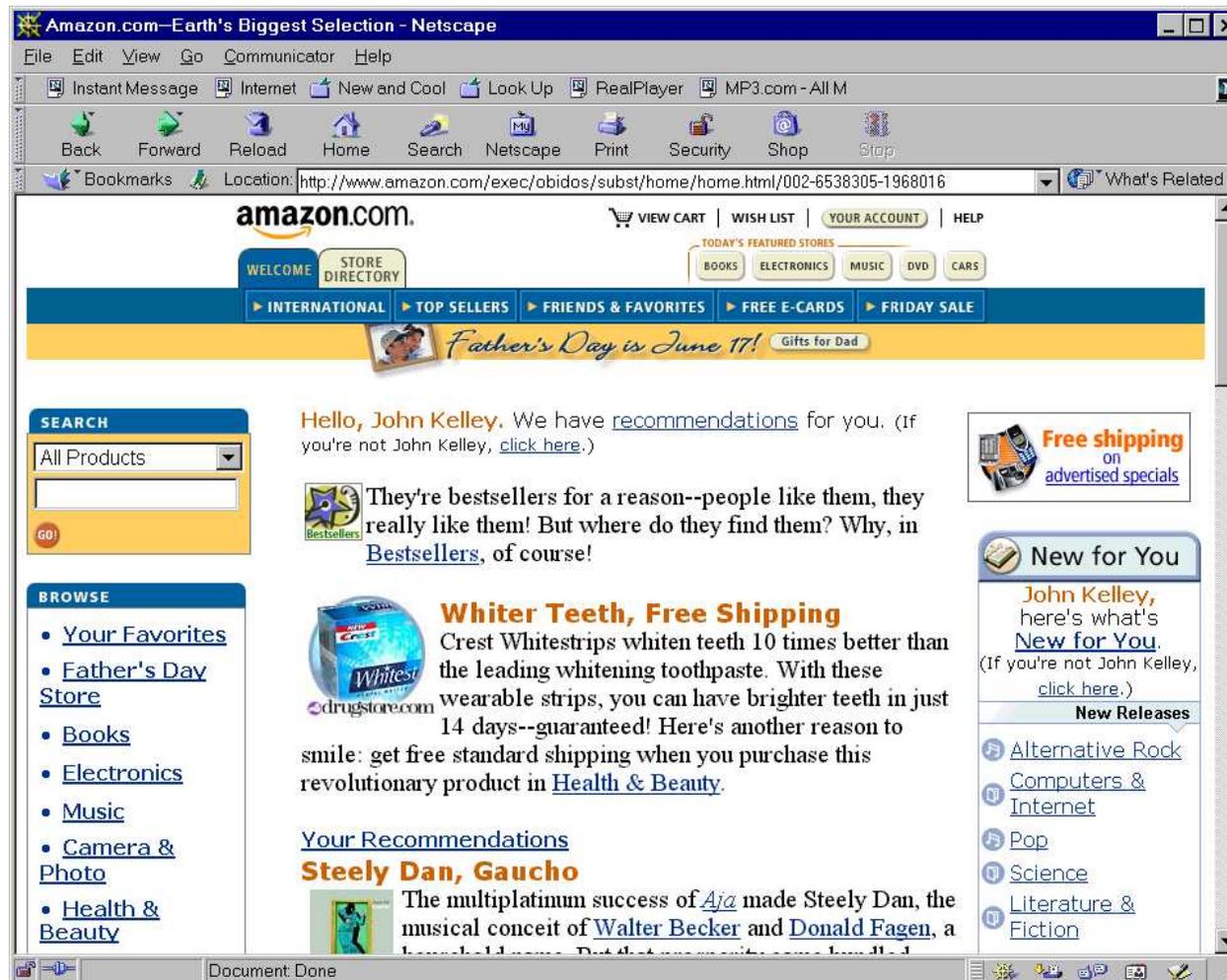
- "Business-To-Consumer" (B2C)
- "Consumer-To-Consumer" (C2C or C2B2C)
- "Business-To-Business" (B2B)

“Business-To-Consumer” (B2C)



- Direct sales to public
- www.amazon.com

EARTH'S BIGGEST BOOKSTORE®



“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



eBay item 1147394417 (Ends May-30-01 18:42:10 PDT) - 1990s TIGER WOODS Wheaties Titleist Promo!!!! - Netscape

File Edit View Go Communicator Help

Instant Message Internet New and Cool Look Up RealPlayer MP3.com - All M

Back Forward Reload Home Search Netscape Print Security Shop Stop

Bookmarks Location: <http://cgi.ebay.com/aw-cgi/eBayISAPI.dll?ViewItem&item=1147394417> What's Related

Description

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.....



12/17

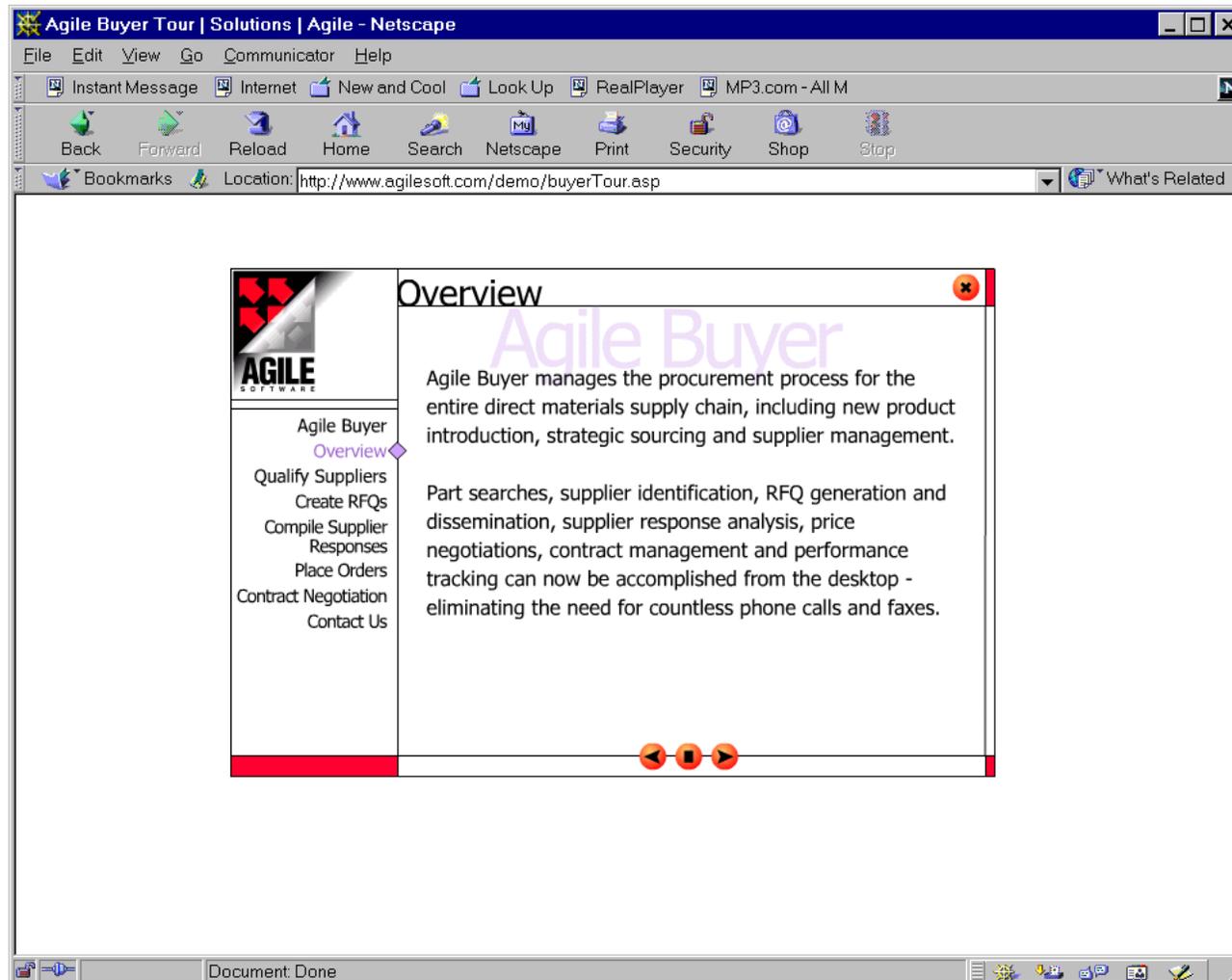
Document Done

“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 Agile Buyer™

Agile Buyer™



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



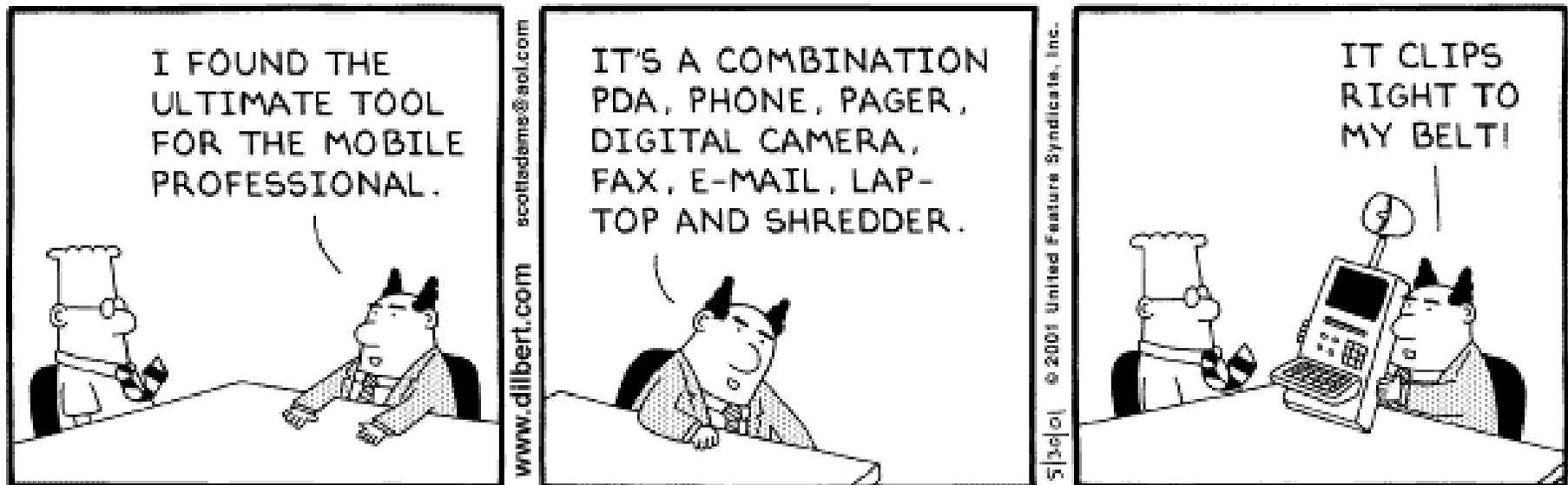
- What can be bought, sold, or traded via e-commerce?
- Few exceptions (babies and body parts)
- More local consumer services
- More specialized business services
- Worldwide reach of content
 - collections of Frege's works in German
 - highly specialized EE's from Bangalore

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



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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

The screenshot shows a Netscape browser window titled "Customize your Inspiron 8000 - Netscape". The address bar shows the URL: http://www.dell.com/html/us/segments/dhs/choose_insp8000.htm. The page content includes the Dell logo, "United States", and "HOME & HOME OFFICE". A navigation bar contains "Buy Online or Call 1-800-215-3355" and "Need Help Deciding?". The main heading is "CUSTOMIZE YOUR NOTEBOOK" for the "Inspiron 8000 Series". A list of features includes "Mobile Desktop", "15" Ultra XGA TFT and 15" & 14" Super XGA+ TFT Displays available", and "Intel® Pentium® III processors". A "1. Intel Pentium III Processor" section has a dropdown menu with options: "Pentium III processor 850MHz", "Pentium III processor 1GHz", "Pentium III processor 900MHz", "Pentium III processor 850MHz", and "Pentium III processor 700MHz". A "2. Mic" section is partially visible. The browser's taskbar at the bottom shows "Document Done" and various system icons.

Customize your Inspiron 8000 - Netscape

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Bookmarks Location: http://www.dell.com/html/us/segments/dhs/choose_insp8000.htm What's Related

Instant Message Internet New and Cool Look Up RealPlayer MP3.com - All M

Dell.com United States My Cart

DELL HOME & HOME OFFICE

Buy Online or Call
1-800-215-3355

CUSTOMIZE YOUR NOTEBOOK

Inspiron 8000 Series

- Mobile Desktop
- 15" Ultra XGA TFT and 15" & 14" Super XGA+ TFT Displays available.
- Intel® Pentium® III processors

Select the options below and then select [Configure this system](#).

1. Intel Pentium III Processor [Learn More](#)

2. Mic [Learn More](#)

Pentium III processor 850MHz
Pentium III processor 1GHz
Pentium III processor 900MHz
Pentium III processor 850MHz
Pentium III processor 700MHz

Edition

Document Done

Towards customized mass production - Land's End

The screenshot shows a Netscape browser window displaying the Lands' End website. The browser's address bar shows the URL: <http://www.landsend.com/spawn.cgi?target=MVMSPLASH1000&sid=0991275099736>. The website's navigation menu includes links for Store, Overstocks, Help, Your Account, Shopping Bag, Checkout, and Corporate Sales. The main content area features a large heading: "Welcome to My Virtual Model™". Below this, a text block reads: "My Virtual Model for Men and Women: To start creating your model, or to access one you have previously built, just click on the 'My Model' button here." A "My Model" button is positioned below the text. To the right, a 3D virtual model of a woman is shown next to a control panel with various clothing options like "WOMEN'S REGULAR CASUALS", "WOMEN'S REGULAR CASUALS", "WOMEN'S REGULAR PLAIN LEG", and "WOMEN'S REGULAR". A "My Model" button is also visible on the control panel. A sidebar on the left contains a search bar, a "Catalog quick order" section, and a "Services" section with links for "Sign up for our What's New email", "Join our Affiliate program", "Gift Certificates", "Track your Order status", and "Request our Catalog". The browser's status bar at the bottom indicates "Document Done".

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

| | Seller: Low Computer Negotiating Assistance | Seller: High Computer Negotiating Assistance |
|--|---|--|
| Buyer: Low Computer Negotiating Assistance | <p><u>"Mom and Pop"</u> Web storefront</p> <p>(simple order form transmitted through the web and is processed manually)</p> | Simple <u>Amazon</u> transaction |
| Buyer: High Computer Negotiating Assistance | Buyer compares offers through <u>MySimon.com</u> and then places order with "Mom and Pop" Web storefront | Buyer's program stock trading system automatically places order with automated brokerage system. |

Buyer Uses Simple Order Form

Waiters On Wheels - California Pizza Kitchen Menu - Netscape

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Bookmarks Location: <http://www.waitersonwheels.com/tpl/menu2.tpl?RestId=PA%3AR018> What's Related

Instant Message Internet New and Cool Look Up RealPlayer MP3.com - All M

Waiters on Wheels®
Your Favorite Restaurant Now Delivers™

California Pizza Kitchen
531 Cowper St.
Palo Alto
CA 94301

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

Appetizers

| | | | |
|--|--------|--|--------|
| <input type="checkbox"/> 90. FOCACCIA WITH CHECCA | \$3.79 | <input type="checkbox"/> 93. TUSCAN HUMMUS | \$4.49 |
| <input type="checkbox"/> 91A. TORTILLA SPRING ROLLS-THAI CHICKEN, BAJA CHICKEN OR BANGKOK BBQ CHICKEN. NO MORE MARGHERITA 5/00 | \$5.49 | <input type="checkbox"/> 99. CHICKEN DUMPLINGS | \$4.99 |
| <input type="checkbox"/> 92. SPINACH ARTICHOKE DIP (W/ CHIPS)-SERVED HOT WITH BLUE AND WHITE CORN TORTILLA CHIPS | \$5.99 | <input type="checkbox"/> 155. SINGAPORE SHRIMP ROLLS | \$6.49 |

Special Orders

| | | | |
|--|--------|---|--------|
| <input type="checkbox"/> 342. KID MENU SPAGHETTI W/ROLOGNESE SAUCE | \$3.99 | <input type="checkbox"/> 888Z. <<<<<<>>>>>>>> | \$0.01 |
|--|--------|---|--------|

Document Done

Computer Helps Buyer Identify Best Offer

The screenshot shows a Netscape browser window titled "mySimon: Handhelds & PDAs - Netscape". The address bar contains a search URL for a Palm V PDA. The page layout includes a header with logos for mySimon, Intel Inside, and Gateway. A navigation bar includes links for Home, Your Account, Great Deals, About mySimon, Help, and Sign In. A breadcrumb trail reads "Home > Computers > PDAs > Search Results > Where to Buy".

The main content area is titled "where to buy handhelds & PDAs" and features a "refine your search" sidebar on the left. The sidebar includes a "Maximum Price" field, "Merchant Services" checkboxes (Visa, Mastercard, American Express, Discover, Overnight, International, No Restock Fee), and a "Refine" button. The main listing area shows a product from "Palm, Inc. - Palm V" with specifications: "68328, 16 MHz, 2 MB, Palm OS 3.0/Palm OS 3.1, LCD passive matrix, 4", 2-bit (4 gray levels)". A "Track Search" button and a "write a review!" link are also present.

| Sort by | Sort by | Sort by | Sort by | |
|-------------------------------|-----------------------------|---|--------------|----------|
| Merchant | Gómez Merchant Review | Description | Availability | Price |
| Beach Camera Merchant Info | ☆☆☆ | 68328, 16 MHz, In Stock 2 MB, Palm OS 3.0, LCD passive matrix, 4", 2-bit (4 gray levels) | In Stock | \$269.00 |
| Shop 4 Digital | ☆☆☆ | 68328, 16 MHz, Available | Available | \$279.95 |

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.