

Widgets to Windows: The “Webolution” of Commercial Sales

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I. FROM BRICKS TO CLICKS

Five years ago, a new “nation” developed unlike any other in history — it has no government, no political borders, no buildings, no army, no citizens, no elections, and no leader. But by all accounts, this nation has the most dynamic economic engine in history. Based on recent studies by the Center for Research in Electronic Commerce at the University of Texas at Austin (“CREC”),¹ if this nation were ranked by gross domestic product, its 2000 revenues of \$830 billion² would give it the twelfth largest gross domestic product in the world, ahead of Canada and behind Mexico.³ With an average

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1. CTR. FOR RESEARCH IN ELECTRONIC COMMERCE, at <http://cism.bus.utexas.edu> (last visited Jan. 29, 2002). The CREC publishes its data in *The Internet Economy Indicators*, at <http://www.internetindicators.com> (last visited Jan. 7, 2002).

2. *Internet Indicators Executive Summary*, at <http://www.internetindicators.com/execsummry.html> (last visited Jan. 7, 2002). The CREC study at Internet Indicators includes infrastructure, applications, intermediaries, and sales. See *The Internet Economy Indicators*, *supra* note 1; see also U.S. DEP’T OF COMMERCE, Monthly Retail Trade Survey: E-Commerce Sales 3rd Quarter Release, <http://www.census.gov/mrts/www/com.pdf> (Nov. 28, 2001).

3. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2001), available at <http://www.cia.gov/cia/publications/factbook/index.html> (last visited Jan. 7, 2002).

annual growth of over 50%,⁴ this nation could easily have a seat at a G-8 Summit by 2005.⁵ What is the name of this new nation? The Internet e-economy.

The growth of the Internet e-economy has substantially altered the U.S. economy.⁶ Although still primarily based on traditional sales of tangible goods, the U.S. economy is moving increasingly to a web-based e-economy with online sales of everything from automobiles⁷ to "info-goods" — products such as digital cameras, laptop computers, Palm Pilots, and wireless web-phones.⁸ Sales of goods requiring a few mouse clicks with an unattended electronic agent are now *de rigueur* in American commerce.

American law, however, has not kept pace with the exponential growth of this new e-economy. Like an old, rusty trestle, the traditional legal infrastructure of a slower Industrial Age is buckling under the weight of the e-economy. In response, legislators are scrambling to introduce new legislation such as the Uniform Electronic Transactions Act ("UETA"),⁹ which gives binding legal effect to electronic signatures and records. For example, the 2001

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4. See *Internet Indicators Executive Summary*, *supra* note 2.
 5. The G-8 (formerly G-7) nations hold annual meetings to deal with economic and political issues facing their domestic societies and the international community as a whole. Its members include France, the United States, Britain, Germany, Japan, Italy, and Canada and, since 1998, Russia (G-8). The G7/G8 Summit has consistently dealt with macroeconomic management, international trade, and relations with developing countries. See generally UNIV. OF TORONTO, G8 Information Center, at <http://www.g7.utoronto.ca> (last visited Jan. 7, 2002) and U.S. DEP'T OF STATE, *Economic and Business Affairs: Economic Summits*, at <http://www.state.gov/www/issues/economic/summit/index.html> (last visited Jan. 7, 2002). The most recent G-8 Summit was held in July 2001 at Genoa, Italy. See Genoa G8 Home Page, available at <http://www.genoa-g8.it/eng/index.html> (last visited Jan. 7, 2002).
 6. See *Internet Indicators Executive Summary*, *supra* note 2.
 7. See, e.g., <http://www.autobytel.com> (last visited Jan. 7, 2002).
 8. See, e.g., <http://www.bestbuy.com> (last visited Jan. 7, 2002).
 9. The final draft of the UETA was approved by the National Conference of Commissioners on Uniform State Laws at its Annual Meeting in July 1999 as a body of legislation validating the use of electronic records and electronic signatures. The approved draft is available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.pdf> (last visited Jan. 7, 2002). As of 2001, Alabama, Arkansas, District of Columbia, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming had adopted a version of the UETA as state law.

Texas Legislature passed Senate Bill 393 (the Texas UETA), which became effective January 1, 2002.¹⁰ A few states have also enacted the Uniform Computer Information Transactions Act ("UCITA"), which regulates the licensing of software and computer data.¹¹ And at the federal level, Congress has passed the Electronic Signatures in Global and National Commerce Act ("E-SIGN").¹² E-SIGN provides a federal legal framework for e-commerce, stating that in "any transaction in or affecting interstate or foreign commerce, a signature, contract, or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form."¹³ Most recently, the National Conference of Commissioners on Uniform State Laws approved a revised Uniform Commercial Code Article 2, which incorporates electronic contracting provisions.¹⁴

This paper presents relevant sections of revised Article 2, the E-SIGN Act, the UETA, and the UCITA and discusses how these provisions facilitate the webolution of contract formation in the new e-economy.

II. THE REVISED UCC ARTICLE 2: SALES

A. Current UCC Writing and Signature Requirements

Current commercial sales laws in most states require "real space" signatures and writings to enforce the sale of goods over \$500.¹⁵ The current

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10. TEX. BUS. & COM. CODE ANN. § 43.001.020 (Vernon Supp. 2002). The full text of Senate Bill 393 is available at Texas Legislature Online, at <http://www.capitol.state.tx.us/tlo/77r/billtext/SB00393F.HTM> (last visited Jan. 7, 2002). See discussion of the UETA, *infra* Section III.
 11. UNIFORM COMPUTER INFORMATION TRANSACTION ACT [hereinafter "UCITA"] (1999, amended 2000 and 2001), available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm> (last visited Jan. 7, 2002). Virginia has enacted the UCITA. VA. CODE ANN. §§ 59.1-501.1 through 59.1-509.2 (Michie 2000).
 12. Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. §§ 7001-7031).
 13. 15 U.S.C. § 7001(a)(1).
 14. The August 2001 draft of UCC Article 2 was approved by the National Conference of Commissioners on Uniform State Laws. See <http://www.law.upenn.edu/bll/ulc/ucc2/ucc0612.htm> (Aug. 10-17, 2001).
 15. For example, the Texas Business and Commerce Code requires a signed writing to enforce the sale of goods over \$500. TEX. BUS. & COM. CODE ANN. § 2.201(a) (Vernon 2000). In 1997, Texas modified this statute to include "digital signatures." See *id.* § 2.108.

UCC Article 2 defines a writing simply as a "printing, typewriting or *any other intentional reduction to tangible form*."¹⁶ And under section 2-201 of the current UCC, the writing must have either a signature¹⁷ or "any symbol executed or adopted by a party with present intention to authenticate a writing."¹⁸

The signature requirement dates back to the 1800s. For example, in 1869, a New Hampshire court held that a telegraphed acceptance to a contract was a signed writing under the Statute of Frauds only because the sender had sent his name as a signature.¹⁹ The holding was based on a written signature where the telegram was presented for transmission. As the court explained, "it makes no difference whether that operator writes the offer or the acceptance . . . with a steel pen an inch long . . . or whether his pen be a copper wire a thousand miles long."²⁰

The antiquated requirement of a signature on every contract ignores the reality of e-economy transactions. Today, the copper telegraph wire has largely been replaced by fiber optic cable connected to an Internet service provider that hosts an e-commerce website. Absent is a signature on paper at the origin or destination. Because of the Internet, contract formation will never be the same.

B. Sales Contracts Under the Revised UCC

Revised Article 2 lays the foundation for electronic transactions by introducing new concepts such as electronic contracting, records, authentication, and attribution, as well as digital signatures and electronic agents. The current section 2-201 requires that "a contract for the sale of goods for the price of \$500 or more" must have "some writing" to be valid and enforceable.²¹ Revised section 2-201(1), however, requires a contract for the sale of goods priced at \$5,000 or more to have "some *record* sufficient to indicate that a contract for sale has been made."²² Thus, the \$500 minimum jurisdictional amount would become \$5,000, and instead of a "writing,"²³ one would need only a "record,"

16. U.C.C. § 1-201(46) (1998) (emphasis added).

17. *Bartell v. Renard*, No. 98-7229, 1998 U.S. App. LEXIS 28279 (2d Cir. Nov. 6, 1998).

18. U.C.C. § 1-201(39) (1998).

19. *Howley v. Whipple*, 48 N.H. 487 (1869).

20. *Id.* at 488.

21. U.C.C. § 2-201(1) (1998).

22. U.C.C. § 2-201(1) (2001 draft) (emphasis added).

23. *Id.*

which is defined as any "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."²⁴ Thus, the term "record" is technology-neutral — covering anything from a writing in crayon to an e-mail message.

The signature concept in revised Article 2 is much broader than traditional notions of a signature under the current code. Under revised Article 2, a signature "includes any symbol executed or adopted with the present intention to adopt or accept a writing."²⁵ A familiar example of electronic signatures is the information entered in the ubiquitous "login" window, which asks for a username and a password. Digital signatures — such as those available at www.verisign.com and www.thawte.com — use public key cryptography, which employs an algorithm using two different, but mathematically related, keys. One key creates a digital signature and transmits data into a seemingly unintelligible form to the receiver. The other key verifies the digital signature and allows the message to be opened in its original form.²⁶ Revised Article 2 allows these symbols, marks, or acts to demonstrate a present intent to adopt the record or transaction, or to otherwise be bound.²⁷

C. Electronic Contracting: "Don't Call Me, Click My Agent"

A major innovation of the webolution is that contracts can be created and executed between a machine and a person or between two machines. The current version of Article 2 does not contemplate such possibilities. Revised Article 2, however, provides that a contract for the sale of goods may arise out of "the interaction of electronic agents, or the interaction of an electronic agent and an individual."²⁸ The first part of this provision allows for the formation of

24. *Id.* § 2-103(1)(l). This definition of "record" is identical to § 43.001(12) of Texas's new UETA law. See TEX. BUS. & COM. CODE ANN. § 43.001(12) (Vernon Supp. 2002).

25. U.C.C. § 1-201(b)(39) (2001 draft), available at http://www.law.upenn.edu/bll/ulc/ucc1/Ucc1_01am.htm (last visited Feb. 21, 2002).

26. American Bar Association, Digital Signature Guidelines Tutorial, at <http://www.abanet.org/yld/tyl/oct98/specialty.html> (last visited Jan. 29, 2002). Pretty Good Privacy's website allows downloads of the popular PGP® Freeware, which — while ensuring privacy and strong authentication — allows people to securely exchange messages and provides for secure files, disk volumes, and network connections. See <http://www.pgp.com/products/pgp-hmg/default.asp> (last visited Jan. 22, 2002).

27. U.C.C. § 1-201(b) (2001 draft).

28. *Id.* § 2-204(4)(b).

automated contracts using computer programs, while the second allows for quasi-automated contracts. These electronic contracts have the same formation issues and defenses as traditional contracts. This section surveys electronic contract formation and the new concept of attribution in revised Article 2.

1. Automated Electronic Contracts

Revised Article 2 allows for the formation of automated electronic contracts by "the interaction of electronic agents of the parties, *even if no individual was aware of*, or reviewed the electronic agent's actions or the resulting terms and agreements."²⁹ An electronic agent is a "computer program or an electronic or other automated means used to independently initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual."³⁰ Depending on preexisting contractual arrangements and the use of computers and software put in place by the parties, an electronic agent may have actual or apparent authority to form valid, enforceable contracts. Moreover, receipt of an electronic record can act as an acceptance, even though an individual is unaware of its receipt.³¹

Both in business-to-business ("B2B") transactions and in business-to-consumer ("B2C") transactions, e-commerce uses electronic agents to create a new logistical infrastructure that dramatically reduces costs, yet increases supply-chain, production, operation, inventory-control, and warehouse efficiencies. For example, Dell Computer Corporation's "direct" model involves both B2B and B2C transactions by using the Internet to create "virtual integration"³² of its suppliers and customers into Dell's production and sales operations.³³ According to Dell:

29. *Id.* § 2-204(4)(a) (emphasis added).

30. *Id.* § 2-103(h).

31. *Id.* § 2-213(1).

32. MICHAEL DELL, DIRECT FROM DELL: STRATEGIES THAT REVOLUTIONIZED AN INDUSTRY 101, 220 (1999). Virtual integration harnesses the power of the Internet to create a seamless, virtual company that is actually composed of legally and functionally separate companies integrated by an Internet network.

33. <http://support.dell.com/us/en/home.asp> (last visited Jan. 29, 2002).

"[D]irect" refers to the company's relationships with its customers, from home-PC users to the world's largest corporations. There are no retailers or other resellers adding unnecessary time and cost, or diminishing Dell's understanding of customer expectations The Internet, the purest and most efficient form of the direct model, provides greater convenience and efficiency to customers and, in turn, to Dell. Dell services are focused on enhancing computing solutions for, and simplifying the system buying decisions of, current and potential customers.³⁴

Dell's virtual integration website uses sophisticated, Internet-based inventory-control software and unattended electronic agents to buy computer components from Dell's suppliers.³⁵ The parts are then assembled into custom PCs as they are ordered. Dell's suppliers receive real-time feedback from Dell and its customers on a particular component's failure rate as well as suggestions on improving the component. Dell's use of unattended electronic agents creates economies of scale that benefit its customers, shareholders, and suppliers.

2. Quasi-Automated Electronic Contracts

Revised Article 2 also provides for the formation of quasi-automated contracts between an electronic agent and an individual. Under revised section 2-204, such a contract is formed if an individual "takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will: (i) cause the electronic agent to complete the transaction or performance; or (ii) indicate acceptance of an offer."³⁶

Quasi-automated contracts are perhaps the most common electronic contracts formed on B2C websites allowing consumers to order goods by interacting with an electronic agent. Section 2-204(4)(b) clearly contemplates the formation of an enforceable contract when a consumer clicks on an "I Accept" button or checks out from an e-commerce site. The actions recorded at the website will determine the buyer's intent when the buyer, with a reasonable opportunity to refuse, continues to click through to consummate the transaction.

34. http://www.dell.com/us/en/gen/corporate/vision_directmodel.htm (last visited Jan. 29, 2002).

35. <http://valuechain.dell.com> (last visited Jan. 29, 2002) (providing a secure, password-protected area where Dell shares real-time information with its suppliers on a range of topics, including customer feedback, product quality, and inventory).

36. U.C.C. § 2-204(4)(b) (2001 draft).

E-merchant sites include express terms and conditions, which are generally listed on a website under "Terms of Service" or "Terms of Use." Clicking on "I Accept" means more than just agreeing to the invoice presented at check-out. It also indicates an acceptance of the merchant's terms and conditions, which may include choice of law, venue, and methods of dispute resolution. These terms and conditions apply even though the buyer may not have reviewed them. Indeed, they apply even if the buyer has received only a notice of their existence with a hyperlink (usually unused) that provides access to them. For example, as a condition of ordering from PC Connection, a popular online PC seller, the buyer agrees that:

All sales shall be deemed made in the State of New Hampshire, USA, regardless of the location of the Customer . . . [and] any dispute . . . arising out of the Customer's purchase from PC Connection, Inc. shall be brought by the Customer exclusively in the state or federal courts situated in the State of New Hampshire³⁷

Similarly, Amazon.com's website contains a "Conditions of Use" page that includes the following:

If you visit or shop at Amazon.com, you accept these conditions. Please read them carefully.

....

By visiting Amazon.com, you agree that the laws of the state of Washington . . . will govern these Conditions of Use

....

Any dispute relating in any way to your visit to Amazon.com or to products you purchase through Amazon.com shall be submitted to confidential arbitration in Seattle, Washington Arbitration under this agreement shall be conducted under the rules then prevailing of the American Arbitration Association.³⁸

37. PC CONNECTION, *Terms and Conditions*, at <http://www.pcconnection.com/scripts/about/caveat.asp> (last visited Jan. 29, 2002).

38. AMAZON.COM, *Conditions of Use*, at <http://www.amazon.com/exec/obidos/tg/browse/-/508088/103-6033755-9664626> (last visited Jan. 29, 2002).

These conditions become part of a purchase at Amazon.com, whether or not the buyer reads them. Thus, under revised Article 2, a customer's purchase at Amazon.com creates a valid, enforceable contract governed by the laws of Washington with binding arbitration as the sole remedy for breach of contract.³⁹

3. Electronic Contracting and Attribution

The electronic contracting provisions of section 2-204 are expressly conditioned on the application of section 2-212, which introduces the concept of attribution. An electronic record is attributable to a person "if the record was created by or the signature was the act of the person or the person's electronic agent or the person is otherwise bound by the act under the law."⁴⁰ In the following scenarios, for example, an act or record would be attributable to the person:

- The person types his or her name as part of an e-mail purchase order.
- The person's employee, acting with the person's authority, types the person's name as part of an e-mail purchase order.
- The person's computer — programmed to order goods upon receipt of inventory information within particular parameters — issues a purchase order that includes the person's name (or other identifying information) as part of the order.⁴¹

A person's act or the act of his or her electronic agent is attributable to that person. These acts include traditional actions such as a signature as well as actions by an electronic agent, whether a mouse click or otherwise, as if done in a "paper medium."⁴² In electronic contract formation, Revised Article 2, however, does not restrict the use of equitable defenses such as fraud or mistake.⁴³ But the injured party bears the burden of proving that the person or the person's agent did not generate the record or signature.

39. U.C.C. § 2-204(a) (2001 draft).

40. *Id.* § 2-212.

41. *See id.* § 2-212, preliminary cmt. n.3.

42. *Id.*

43. *Id.* § 2-204, preliminary cmt. n.6.

4. "Shrink Wrap" Contracts Under Revised Article 2

In a typical web-based transaction, a consumer orders a product — such as a computer — from an "e-tailer." The package arrives, but the consumer cannot discover any potential defects in the product until after opening the shrink-wrap. Yet opening the shrink-wrap commonly binds the consumer to the manufacturer's terms and conditions included in the box and to the contract accompanying the product — *even if the buyer has not read them*.⁴⁴ Does this create a valid and enforceable contract? Authorities are split. In *Hill v. Gateway 2000*,⁴⁵ the Seventh Circuit held that the terms of Gateway's arbitration clause contained in the packaging were enforceable against the purchasers only after having a reasonable opportunity to reject the product.⁴⁶ Revised Article 2 does not provide an express answer on this issue and is silent on whether courts should follow the *Gateway* reasoning.⁴⁷

III. THE E-SIGN ACT AND THE UNIFORM ELECTRONIC TRANSACTIONS ACT ("UETA")

Today, there is no question about the validity of electronic signatures and electronic records of contracts. E-SIGN, which became federal law in October 2000, provides that both electronic signatures and electronic records create a valid contract to the extent that federal law governs the contract.⁴⁸ In addition,

44. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448-49 (7th Cir. 1996).

45. 105 F.3d 1147 (7th Cir. 1997) (relying on *Zeidenberg*, 86 F.3d at 1449, which held that consumers who open the shrink-wrap package are bound by the terms inside the software package only after a reasonable opportunity to read the terms and reject them by returning the product).

46. *Hill v. Gateway 2000*, 105 F.3d at 1150.

47. U.C.C. § 2-207, preliminary cmt. n.5 (2001 draft) —

Amended Article 2 takes no position on the question whether a court should follow the reasoning in *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to these cases; the "rolling contract" is not made until acceptance of the seller's terms after the goods and terms are delivered) or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (contract is made at time of oral or other bargain and "shrink wrap" terms or those in the container become part of the contract only if they comply with provisions like Section 2-207).

48. 15 U.S.C. § 7001(a)(1)-(2).

most states (including Texas) have adopted a version of the UETA, which applies the E-SIGN rules to electronic signatures and electronic contracts governed solely by state law. To the extent that the E-SIGN rules apply, whether directly or through UETA, they parallel and elaborate on the proposed changes to the UCC.

A. The Federal Law of Electronic Signatures and Electronic Contracts

E-SIGN section 7001 provides the basic new rule for electronic signatures and electronic contracts.⁴⁹ This section applies notwithstanding any other statute, regulation, or rule.⁵⁰ To the extent that federal law applies:

- (1) a signature, contract, or other record relating to such a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
- (2) a contract relating to such a transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.⁵¹

E-SIGN contains additional provisions addressed specifically to consumers and consumer transactions.⁵² For example, it requires that vendors: (1) inform consumers of their rights concerning electronic transactions; (2) require affirmative consent of a consumer before use of electronic signatures and records for a single transaction or for all later transactions; (3) permit consumers to withdraw consent to engage in electronic transactions; (4) describe procedures to be used to withdraw consent; and (5) describe procedures consumers must use to secure a copy of an electronic record and any charges for the copy.⁵³ These provisions override prior statutory requirements for verification, acknowledgement, or receipt of records to the extent that they conflict with E-SIGN.⁵⁴

49. 15 U.S.C. § 7001.

50. *Id.* § 7001(a).

51. *Id.* § 7001(a)(1)(2).

52. *Id.* § 7001(c).

53. *Id.* § 7001(c)(1)(B).

54. *Id.* § 7001(c)(2)(B).

The requirements for the retention of contracts and records are logical and straightforward. Any method may be used as long as it is accurate and accessible.⁵⁵ That is, the method must accurately reflect the information set forth in the contract or record and must ensure that the record remains accessible to people entitled to see it.⁵⁶ If the accuracy and availability requirements are met, then the record meets E-SIGN qualifications for an electronic original.⁵⁷

Section 7003 limits the applicability of E-SIGN to UCC Articles 2 and 2A and UCC sections 1-107 and 1-206.⁵⁸ Nevertheless, several provisions provide a blueprint for modifying other sections of the UCC. For example, an electronic record on the front and back of checks works to meet the statutory and regulatory requirements for check retention.⁵⁹ Similarly, Section 7021 states that an electronic record of a financial instrument is enforceable if the parties agree to it.⁶⁰

In addition, an electronic instrument must meet requirements for proving control of the transferable record — specifically, that there is a single authoritative copy and that it identifies the person exercising control.⁶¹ Like their paper ancestors, copies or revisions that add to or change an identified assignee of an electronic instrument cannot be made without the consent of the person asserting control.⁶² A holder, which is defined as the person having control of a transferable record, has the same status as a holder of an equivalent written instrument.⁶³ Consistent with the rules for determining holders of financial instruments, an electronic signature of the authorized party satisfies the requirements for notarization and for the acknowledgement of signatures and documents as long as the signature of the notary and other required information logically relates to the notarized signature or record.⁶⁴

55. *Id.* § 7001(d).

56. *Id.* § 7001(d)(1)(A)(B).

57. *Id.* § 7001(d)(3).

58. *Id.* § 7003(a)(3).

59. *Id.* § 7001(d)(4).

60. *Id.* § 7021.

61. *Id.* § 7021(c)(1)-(3).

62. *Id.* § 7021(c)(4).

63. *Id.* § 7021(d).

64. *Id.* § 7001(g).

Specific language in section 7001 makes contracts negotiated between electronic agents lawful:

A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.⁶⁵

Exceptions to the use of electronic signatures are narrow. For example, the statute does not apply to following areas: (1) wills, codicils, and testamentary trusts;⁶⁶ (2) family-law matters, including divorce and adoption;⁶⁷ (3) UCC provisions other than section 1-107, section 1-206, Article 2, and Article 2A;⁶⁸ (4) court orders, notices, and documents;⁶⁹ (5) any notice of cancellation of utility services;⁷⁰ (6) default, acceleration, repossession, foreclosure, or eviction under a credit agreement secured by a primary residence or under a rental agreement;⁷¹ (7) termination of health or life insurance;⁷² (8) product recalls;⁷³ or (9) documents required to accompany hazardous materials.⁷⁴

B. The Unclear Limits of E-SIGN for Non-UETA States

E-SIGN expansively provides that a state may modify, limit, or supersede the provisions of section 7001, but only if the state adopts the UETA.⁷⁵ The Act provides that any exception to the scope of a state-enacted version of section

65. *Id.* § 7001(h).

66. *Id.* § 7003(a)(1).

67. *Id.* § 7003(a)(2).

68. *Id.* § 7003(a)(3).

69. *Id.* § 7003(b)(1).

70. *Id.* § 7003(b)(2)(A).

71. *Id.* § 7003(b)(2)(B).

72. *Id.* § 7003(b)(2)(C).

73. *Id.* § 7003(b)(2)(D).

74. *Id.* § 7003(b)(3).

75. *Id.* § 7002(a).

7001 is preempted to the extent that the exception is inconsistent with Title 15 of the U.S.C.⁷⁶

Notwithstanding the broad language of E-SIGN, it remains unclear whether a state could pass a statute inconsistent with E-SIGN but applicable only to contracts not reached by federal law. For example, courts hold that most contracts affecting real estate are matters of state rather than federal law. Similarly, state courts resolve more contract adjudications than federal courts. It is unclear, however, whether E-SIGN will apply to such state proceedings.

To the extent that parties agree on choice-of-law provisions, a particular state's law normally applies to a contract. Similarly, contracting parties may agree to apply a particular federal law to a contract otherwise governed by a conflicting state law. Because many states have not adopted the UETA, incorporating E-SIGN into the choice-of-law provision and electing to make the contract subject to the law of a state that *has* passed the UETA is prudent, even though the validity of such an incorporation is not certain.

C. The Texas Version of the UETA

Texas conformed to E-SIGN requirements by adopting a version of UETA, codified as Chapter 43 of the Texas Business and Commerce Code. The Texas UETA, which became effective on January 1, 2002, grants the same right to use electronic signatures and writings as does the federal statute. The general guidelines are clear:

- (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.⁷⁷

As required for a valid transmission under E-SIGN, the Texas UETA requires that the recipient be capable of retaining, printing, and storing the

76. *Id.*

77. TEX. BUS. & COM. CODE ANN. § 43.007(a)-(d) (Vernon Supp. 2002).

transmission.⁷⁸ In addition, while parties may agree not to use electronic documents or signatures, they cannot contract out of the requirement that recipients must be able to store and retrieve transmissions.⁷⁹

Like E-SIGN, the Texas UETA provides that an "individual must have the opportunity to avoid the effect of an electronic record that resulted from an error made by the individual in dealing with an electronic agent of another person if the agent does not provide an opportunity" to prevent or correct the error.⁸⁰ The individual who learns of the error must promptly notify the other party, take reasonable steps to correct the problem, and not receive a benefit from the transaction.⁸¹ Texas UETA contains exceptions to electronic records and signatures also found in E-SIGN.⁸² As long as the electronic record is retained and remains accessible, it meets the Texas UETA retention requirements.⁸³ Electronic records and signatures also meet the requirements for evidentiary, audit, or like purposes.⁸⁴ In addition, the Texas UETA permits two automated agents to form contracts subject to the same rules.⁸⁵

The Texas UETA, however, changes the mailbox rules for electronic records. Delivery occurs when a properly addressed message "enters a region of the information processing system designated or used by the recipient which is under the control of the recipient."⁸⁶

Texas maintenance rules for single authoritative copies of transferable records also follow E-SIGN rules.⁸⁷ Similarly, acceptance and distribution of electronic records by government agencies parallel the federal rules for permissive application.⁸⁸ But Texas UETA modifies the filing requirements applicable to filings with local governments. For example, the Texas UETA amends the local government code by permitting county clerks to accept electronic records and to electronically record the record of transactions under

78. *Id.* § 43.008(a).

79. *Id.* § 43.008(d).

80. *Id.* § 43.010(c).

81. *Id.* § 43.010(c)(1)-(3).

82. *Id.* § 43.020.

83. *Id.* § 43.012.

84. *Id.* §§ 43.012, 43.013.

85. *Id.* § 43.014.

86. *Id.* § 43.015.

87. *Id.* § 43.016.

88. *Id.* § 43.017.

rules to be developed by the county.⁸⁹ Documents filed with county clerks are filed when received unless rejected under the rules that the county develops.⁹⁰

IV. THE UCITA: LICENSING OF INFORMATION

A. The New Paradigm

Unlike revised Article 2, the UCITA⁹¹ is a completely new uniform code created for the new e-economy. Put simply, the UCITA is a cyberspace commercial transaction law. Unlike Article 2 of the UCC, which addresses the sale of goods, UCITA governs "computer information transactions," defined as "agreements that deal with the creation, modification, access to, license, or distribution of computer information,"⁹² including computer software, computer databases, multimedia products, and the sale and distribution of information over the Internet.⁹³

In its attempt to regulate computer information transactions, the UCITA adapts traditional contract principles and commercial practices to cyberspace information transactions. Traditionally, the purchase of goods generally provides for the exclusive rights of use and possession of those goods. But consider the purchaser of a CD-ROM that contains computer software. The purchaser owns the CD itself (the container) but is only a licensee of the CD's information, subject to the information owner's rights in the agreement. That agreement typically limits both the information's use and the extent to which the information may be distributed.

89. TEX. LOC. GOV'T CODE ANN. § 195.002 (Vernon Supp. 2002).

90. *Id.* § 195.009.

91. UCITA, *supra* note 11.

92. *Id.* § 103 n.2 cmt.; *see id.* § 102(a)(10) (defining "computer information" as "information in a form directly capable of being processed by, or obtained from, a computer and any copy, associated documentation, or packaging").

93. UCITA, *supra* note 11, § 103 n.2 cmt.

B. Scope of UCITA

UCITA applies to: (i) transactions involving "computer information,"⁹⁴ (ii) "mixed" transactions,⁹⁵ and (iii) transactions involving "info-goods."⁹⁶ Thus, the Act applies to transactions in which computer information is the "primary subject matter,"⁹⁷ but it excludes transactions involving motion pictures, television programming, and printed media such as newspapers and magazines.⁹⁸

1. Section 103(a): Computer Information Transactions

The UCITA expressly and exclusively applies to computer information transactions — those in which the buyer purchases a license. Such a license gives the purchaser a right to use computer information, along with any documentation or packaging accompanying the licensed copy.⁹⁹ The information's tangible delivery mechanism (e.g., the packaging or container) is irrelevant or separable from the computer information.¹⁰⁰

Unlike a buyer of goods under Article 2, a licensee¹⁰¹ of computer information under the UCITA has little or no use for the container other than its function as an information holder. When a consumer buys a CD-ROM that contains Windows98, the CD is arguably a good under Article 2. But the subject matter of the purchase is the Windows98 operating system, not the CD itself. Microsoft licenses its Windows98 software through its End-User License Agreement ("EULA"), which the user must accept to install the software. Microsoft's agreement includes the following provision:

94. *Id.* § 103(a).

95. *Id.* § 103(b)(1); *see id.* § 103 n.4 cmt. (stating that a computer information transaction "may involve computer information and other subject matter").

96. UCITA, *supra* note 11, § 103(b)(1).

97. *Id.* § 103(b)(3).

98. *Id.* § 103(d)-(f). But online versions of a newspaper and magazine would be governed by the Act.

99. *Id.* § 103 n.2 cmt.

100. *Id.*

101. *Id.* § 102(a)(42) (defining a "licensee" as a "person entitled by agreement to acquire or exercise rights in, or to have access to or use of, computer information under an agreement to which this [Act] applies").

By installing . . . or otherwise using the SOFTWARE PRODUCT, you agree to be bound by the terms of this EULA. If you do not agree to the terms of this EULA, Manufacturer . . . [is] unwilling to license the SOFTWARE PRODUCT to you. In such event, you may not use or copy the SOFTWARE PRODUCT, and you should promptly contact Manufacturer for instructions on return of the unused product(s) for a refund.¹⁰²

The EULA governs the relationship between the licensor and the licensee. Once the information is loaded onto a computer, the CD, except for contingency use, is basically worthless. The Act also applies to those software installation transactions that do not involve a tangible container because the information is downloaded from the Web.

The UCITA also governs access contracts for online text, databases, software, and pictures.¹⁰³ Such contracts, which are common in the information economy, are typically called "software license agreements." These contracts are usually found in the "conditions of use" section of a website or a software application installation wizard. Netzero, Inc., a company that provides free Internet access, includes the following license agreement in its installation process: "By clicking on the 'Accept' button and downloading and/or using Netzero services, you agree to be bound by all of the terms of this License Agreement. If you do not agree to these terms, you should click on the 'Decline' button and the installation process will not continue."¹⁰⁴

But the mere fact that computer information is involved does not necessarily trigger the UCITA's application. Consider the online purchase of a shirt from Lands' End.¹⁰⁵ Although the transaction involves an access contract and computer information, UCC Article 2 controls because the subject matter of the transaction — the shirt — is a good, not information. Similarly, the UCITA does not govern the purchase of an "e-ticket" for air travel because the subject matter of the transaction is transportation service.¹⁰⁶

102. Microsoft End User License Agreement (EULA), in *WINDOWS 98 SECOND EDITION* (2001).

103. UCITA, *supra* note 11, § 611; *see also id.* § 102(a)(1) (defining "access contracts").

104. <http://www.netzero.net> (last visited Jan. 8, 2002).

105. <http://www.landsend.com> (last visited Jan. 29, 2002).

106. UCITA, *supra* note 11, § 103 n.2 cmt.

2. Section 103(b)(1): Mixed Transactions

In transactions involving both a good and computer information (such as the purchase of a computer and bundled software), the UCITA applies to "the part of the transaction involving computer information, informational rights in it, and creation or modification of it."¹⁰⁷ The computer hardware is a good covered by Article 2, while the software bundled with it is subject to the UCITA.¹⁰⁸ A comment to the UCITA further demonstrates the intent that both Article 2 and the UCITA will govern mixed transactions:

If a transaction involves goods and computer information (e.g., a computer and software), the general rule is that Article 2 or 2A [of the UCC] applies to the aspect of the transaction pertaining to the sale or lease of goods, but this Act [UCITA] applies to the computer information and aspects of the agreement relating to the creation, modification, access to, or transfer of it. Section 103(b)(1). Each body of law governs as to its own subject matter.¹⁰⁹

Like the UCITA, revised section 2-103 of the UCC distinguishes computer information from a computer program.¹¹⁰ The UCITA, however, defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result."¹¹¹ The UCITA applies when a computer program is either: (i) contained within or sold with a computer¹¹² or computer peripheral,¹¹³ or (ii) a "material purpose" of the transaction.¹¹⁴ The UCITA does not apply to mixed transactions if the material purpose is not the use or access of a computer program or information. Thus, to the extent that an instrument used for taking notes and looking up addresses

107. *Id.* § 103(b)(1).

108. *Id.*

109. *Id.* § 103 n.4(b)(1) cmt.

110. U.C.C. § 2-103(f)-(g) (2001 draft).

111. UCITA, *supra* note 11, § 102(a)(12).

112. *Id.* § 102(a)(9). Under the UCITA, a "computer" is more than a PC; it is any "electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions."

113. *Id.* § 103(b)(1)(A).

114. *Id.* § 103(b)(1)(B).

contains a computer program incidental to the note-taking and address storage, the product is classified as a good subject to Article 2 and not UCITA.

Article 2, rather than the UCITA, governs the sale of other products containing computer programs, such as television sets, DVD players, and VCRs.¹¹⁵ In addition, the UCITA does not apply to the sale of automobiles, even if the automobiles contain computer programs that control the air bags, air-conditioning, and brake systems.¹¹⁶ Thus, the UCITA will not cover a product whose material purpose is not the use of or access to computer programs or information.

3. Section 103(b)(2): Info-Good Transactions

Does the UCITA apply to the sale of a Palm Pilot? Is the sale of the Palm Pilot like the sale of a computer peripheral containing software? Or is it more like the sale of a VCR — a tangible good governed by Article 2? Since the software that a Palm Pilot uses to interface with a computer is not merely incidental to the Palm Pilot, the software is subject to the UCITA. And because the Palm Pilot is something more than a container incidental to delivery of the software, it is subject to the UCC, just like a computer.

Accordingly, Article 2 applies except to the extent that computer information, informational rights, or access to them is the primary subject matter.¹¹⁷ This distinction is analogous to that between the ownership of a copy of a copyrighted book and the ownership of the copyright itself.¹¹⁸ Both the UCC and copyright law co-exist in the same object — the copyrighted book — just as the UCC and the UCITA co-exist to govern the sale of a Palm Pilot.

V. CONCLUSION

Revised Article 2, the E-SIGN Act, the UETA, and the UCITA will have a significant impact on the way American companies do business. Attorneys with clients engaged in B2B or B2C e-commerce should review existing corporate e-document retention policies, website “terms of use” agreements, and contracts between clients and suppliers. Counsel should also suggest changes anticipating the enactment of revised Article 2 and the UCITA model

115. *Id.* § 103 n.3 cmt.

116. *Id.*

117. *Id.* § 103(b)(1).

118. *Id.*

codes to ensure that their clients' electronic contracts remain enforceable in the new e-economy.

In states that adopt revised Article 2 and in situations in which companies use electronic communications to consummate agreements, attorneys should advise their clients to manage legal risks by modifying existing policies and contracts to anticipate issues concerning: (1) electronic mistakes; (2) attribution or verification of the client's identity; (3) inconsistent or additional terms in an electronic record (the battle of the "e-forms");¹¹⁹ and (4) what constitutes "receipt," *i.e.*, whether receipt is valid: (i) when deposited in the client's e-mail server without the recipient's knowledge, *or* (ii) after the recipient actually reads the acceptance).¹²⁰ Proving an e-mistake or e-fraud at trial will require creative legal strategies and client e-document retention policies (including backups of e-mails and databases) that comply with discovery rules.

The provisions discussed here provide the legal infrastructure that re-defines, with technology-neutral language, traditional notions of writings, signatures, and records. This infrastructure will facilitate growth of the new e-economy and the webolution of commercial sales.

119. U.C.C. § 2-207 (2001 draft). Under section 2-202, if a contract is "confirmed" by a record that "contains terms additional to or different from those in the contract being confirmed, the terms of the contract are . . . : (a) terms that appear in the records of both parties; (b) terms, whether in a record or not, to which both parties agree; and (c) terms supplied or incorporated under any provision of this Act."

120. *Id.* § 2-213(2) (stating that "receipt of an electronic acknowledgment of an electronic communication establishes that the communication was received but, in itself, does not establish that the content sent corresponds to the content received").