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## **Comparative U.S. & (and) EU Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation**

### **Keywords**

Commerce, Commercial Law, Communications Law, Contracts, Electronic Commerce, Jurisdiction, Regulation, Signatures, Taxation, Computer Law

# COMPARATIVE U.S. & EU APPROACHES TO E-COMMERCE REGULATION: JURISDICTION, ELECTRONIC CONTRACTS, ELECTRONIC SIGNATURES AND TAXATION

*Christopher William Pappas\**

## INTRODUCTION

The beginning of the 21st century has brought with it explosive growth in a new medium for trade, namely: e-commerce as made practicable through the continued evolution of the Internet.<sup>1</sup> Because major businesses have entered the realm of e-commerce, most firms believe that they must cater to the desires of the consumer, and that means doing business online.<sup>2</sup> Increasingly, consumers are choosing to make purchases via the Internet and are skipping the trip to the store.<sup>3</sup> A modern consumer can purchase a compact disc, a couch, or a new car at four in the morning without having to leave her house, deal with traffic and salespeople, or even change out of her pajamas.<sup>4</sup> Furthermore, a consumer is no longer restricted to products available in one store, one town, or even one country because the Internet transcends boundaries and is accessible from anywhere in the world.

## MEASUREMENT OF E-COMMERCE

While it is difficult to accurately measure the impact of the Internet on

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1. See Larry J. Guffey, *What Advice Should You Consider Giving to Your Clients Regarding Them?*, 34 MD. B.J. 41, 43 (2001). See also William K. Slate II, *Online Dispute Resolution: Click Here to Settle Your Dispute*, DISP. RESOL. J. 8, 12 (2002).

2. See Walmart.com, [www.walmart.com](http://www.walmart.com) (last visited Feb. 10, 2003). See also GeneralMotors.com, [www.gm.com/flash\\_homepage](http://www.gm.com/flash_homepage) (last visited Feb. 10, 2003). See also Safeway.com, [www.safeway.com](http://www.safeway.com) (last visited Feb. 10, 2003).

3. See Dennis M. Kennedy, *Key Legal Concerns in E-Commerce: The Law Comes to the New Frontier*, 18 T.M. COOLEY L. REV. 17, 18-19 (2001).

4. See Yahoo! Shopping, [www.shopping.yahoo.com](http://www.shopping.yahoo.com) (last visited Feb. 10, 2003).

commerce, some estimates report that at the end of 1999, there were nearly 260 million, and by mid 2002, over 580 million Internet users worldwide.<sup>5</sup> By 2005, that number is estimated to reach more than 765 million.<sup>6</sup> The Internet has evolved into a significant and accepted business medium through which consumers and businesses come together in the buying and selling process. Department of Commerce statistics conservatively estimate that e-commerce transactions totaled seventeen billion dollars in the first three calendar quarters of the year 2000.<sup>7</sup> Even those estimates are much lower than individual company reports suggest.<sup>8</sup>

### THESIS

Growth in the use of the Internet has forced businesses to become familiar with, and understand the complexities of e-commerce.<sup>9</sup> Lawyers have played, and will continue to play, a significant role in helping these businesses learn about doing business online. For a lawyer to adequately represent her clients, she must, therefore, understand the complicated legal ramifications of doing business online.<sup>10</sup> Attorneys must understand and keep current with technology and business as well as legal developments.<sup>11</sup> This paper will analyze and compare the approaches to the regulation of e-commerce taken by the two historically largest and most developed economic markets of the world: the United States and continental Western Europe (as represented by the European Union). Generally, the European Union will be analyzed as one governmental body, although the difficulties of this presumption will be investigated.

The primary goals of this paper are to compare the broad policies behind U.S. and EU approaches to the regulation of e-commerce and the specific means of regulation adopted for four of the main issues that modern lawyers are facing in regards to e-commerce: (1) jurisdiction, choice of law, and consumer protection; (2) electronic contracts; (3) electronic signatures; and (4) taxation of e-commerce. This paper does not purport to serve as an exhaustive analysis of the issues involved in e-commerce, but rather, aims to provide a general comparison of the regulatory approach taken by two of the leading markets in the world today.

### TYPES OF E-COMMERCE

Traditional commerce occurs without the use of the Internet.<sup>12</sup> "Bricks and

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5. See Yahoo! Shopping, *supra* note 4. See also John C. Beck, *Get a Grip! Regulating Cyberspace Won't Be Easy*, BUS. L. TODAY, May/June 2001, at 14 [hereinafter *Get a Grip!*]. See also Nua Internet Surveys, [www.nua.ie/surveys/how\\_many\\_online/world.html](http://www.nua.ie/surveys/how_many_online/world.html) (last visited Feb. 10, 2003).

6. See Beck, *supra* note 5, at 14.

7. See Kennedy, *supra* note 3, at 19.

8. See *id.* at 19.

9. See generally Kennedy, *supra* note 3 (describing e-commerce law as one of the most focused upon and important areas of law today).

10. See *id.*

11. See *id.* at 34.

12. See Francesco G. Mazzotta, *A Guide to E-Commerce: Some Legal Issues Posed by E-Commerce for American Businesses Engaged in Domestic and International Transactions*, 24 SUFFOLK

mortar businesses," called such in reference to the bricks and mortar that are used to construct their businesses, have no Internet component.<sup>13</sup> There are few businesses remaining, most small and locally focused, that can be classified as true bricks and mortar businesses. Most firms have integrated e-commerce, defined for purposes of this analysis as "any business transaction that occurs over, or is enabled by, the Internet,"<sup>14</sup> at some level of their operations. Some are traditional companies that have incorporated the Internet into their business. American Airlines and L.L. Bean are examples of traditional brick and mortar businesses that are now classified as a "clicks and mortar" companies, because of their significant Internet presence.<sup>15</sup> Over the past few years, another category of business has become recognized in the marketplace. "Clicks," more commonly referred to as "Dot-coms" in reference to their website urls, are businesses that are only involved in e-commerce on the Internet and do not have a physical retail presence.<sup>16</sup>

There are several ways in which the Internet is used as a platform for commerce.<sup>17</sup> E-commerce transactions between two businesses are referred to as business-to-business e-commerce, or "B2B."<sup>18</sup> Government contracting between a business and a government falls under business-to-government e-commerce, or "B2G."<sup>19</sup> Transactions in which the government offers its services to consumers through the Internet are designated government-to-consumer transactions, or "G2C."<sup>20</sup> Lastly, the most familiar form of e-commerce takes place between businesses and consumers.<sup>21</sup> This paper will focus on these business-to-consumer transactions, referred to as "B2C."<sup>22</sup>

### *Business-to-Consumer (B2C)*

Many key issues that arise from B2C transactions have direct analogies to traditional consumer transactions. Other issues are unique to e-commerce transactions. Jurisdiction, an issue as old as law itself, has been brought to the forefront once again as questions regarding appropriate jurisdiction arise with every cross-border e-commerce transaction.<sup>23</sup> Nations want to be able to ensure the protection of local consumers and jurisdiction over e-commerce transactions is essential to effecting this protection.<sup>24</sup> Similarly, electronic signature issues are a

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TRANSNAT'L L. REV. 249, 273 (2001).

13. See Kennedy, *supra* note 3, at 20.

14. *Id.* at 17.

15. *Id.* at 20.

16. See *id.*

17. See *id.* at 18.

18. See *id.*

19. See *id.*

20. See *id.*

21. See *id.*

22. See *id.*

23. See Carole Aciman & Diane Vo-Verde, *Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities*, 19 THE COMPUTER & INTERNET LAW., January 2002, at 16.

24. See Michael Geist, *Is There a There There? Toward Greater Certainty For Internet Jurisdiction*, 661 PL/PAT 561, 575 (2001).

new twist on a traditional area of law.<sup>25</sup> Lastly, the topic that has perhaps the greatest room for future evolution and adaptation is that of the taxation of B2C transactions.<sup>26</sup>

#### THE UNITED STATES GENERALLY

The United States is a free-market, capitalist economy.<sup>27</sup> This has become even more apparent as the U.S. attempts, through its role as the world's economic hegemon, to spread political and economic deregulation via treaties (both bilateral and multilateral), and its role in, and arguably control over, international organizations such as the United Nations, World Bank, and World Trade Organization.<sup>28</sup> As a free-market economy, the U.S. subscribes, in principle, to a hands-off, minimalist approach to the regulation of commerce.<sup>29</sup> The U.S. has attempted to implement this laissez-faire philosophy in the area of e-commerce as well.<sup>30</sup> The White House, under former President Bill Clinton, issued a Framework for Global Electronic Commerce that purports to guide U.S. regulation in accordance with this attitude.<sup>31</sup>

#### *U.S. Framework for Global Electronic Commerce*

This Framework lists five principles that the U.S., and other nations, should adhere to in attempting to regulate e-commerce: (1) "The private sector should lead,"<sup>32</sup> (2) "Governments should avoid undue restrictions on electronic commerce,"<sup>33</sup> (3) Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent, and simple legal environment for commerce,"<sup>34</sup> (4) Governments should recognize the unique qualities of the Internet,"<sup>35</sup> and (5) "Electronic Commerce over the Internet should be facilitated on a global basis."<sup>36</sup>

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25. See generally Raymond T. Nimmer, *Understanding Electronic Contracting: UCITA, E-Signature, Federal, State, and Foreign Regulations 2001*, 649 PLI/PAT 15, 40 (2001).

26. See David E. Hardesty, *Taxation of E-Commerce: Recent Developments*, 618 PLI/PAT 177 (2000).

27. See generally BARRY EICHENGREEN, *GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM* (1996) (providing a history of the international financial system over the last 150 years).

28. See *id.*

29. See *id.*

30. See Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 718 (2001).

31. See THE WHITE HOUSE, *A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE* (July 1, 1997), at <http://www.ta.doc.gov/digeconomy/framework.htm> (last visited Feb. 9, 2003) [hereinafter White House Framework].

32. *Id.* at 2.

33. *Id.* at 3.

34. *Id.*

35. *Id.*

36. *Id.*

The private sector should lead.<sup>37</sup> The expansion of the Internet has been primarily driven by the private sector.<sup>38</sup> Regulatory policy should, as in the traditional marketplace, allow the market to generate innovation, expanded services, broader participation, and lower prices.<sup>39</sup> As such, the government should welcome private sector participation as a formal part of the policy making process.<sup>40</sup> The general goal of e-commerce regulation should be to encourage industry self-regulation and support private sector organizations.<sup>41</sup>

Governments should avoid undue restrictions on e-commerce.<sup>42</sup> By the time government regulation is put into force, it is often outdated due to the continued evolution of the technology driving the Internet and e-commerce. The resulting unsuitable regulation is likely to hinder the essential evolution of business models as they adapt to best utilize the Internet.<sup>43</sup> As such, nations should refrain from unnecessary, restrictive involvement or intervention in e-commerce.

Where government involvement is necessary, its aim should be to support and enforce a predictable, minimalist, consistent, and simple legal environment for e-commerce.<sup>44</sup> The twin aims of consumer protection and e-commerce facilitation should be weighed.<sup>45</sup> Consumer protection should be realized through a predictable, contractual model.<sup>46</sup> E-commerce will be best facilitated by regulation designed to ensure competition, protect intellectual property and privacy, prevent fraud, foster transparency, support commercial transactions, and facilitate dispute resolution.<sup>47</sup> Because transactions based on contracts can ensure predictability and flexibility at the same time, this principle focuses on the appropriateness of the contractual model to the unique legal issues that arise from e-commerce.<sup>48</sup>

The Framework for Global Electronic Commerce also recommends that nations should recognize the unique qualities of the Internet.<sup>49</sup> Existing regulatory schemes designed to regulate traditional technologies and transactions may not be directly applicable to electronic commerce issues.<sup>50</sup> Therefore, existing laws should be adapted to reflect the complexities of e-commerce.<sup>51</sup> Where appropriate, new regulation may be necessary to address new issues raised by e-commerce. A recent example of this phenomenon at work is in the area of electronic signatures, where lawmakers approved new legislation regulating the use of electronic

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37. See White House Framework, *supra* note 31, at 2.

38. See *id.*

39. See *id.*

40. See White House Framework, *supra* note 31.

41. See *id.*

42. See *id.* at 3.

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

signatures in commerce.<sup>52</sup>

Lastly, electronic commerce should be facilitated on a global basis.<sup>53</sup> While the U.S. unquestionably desires to lead in the facilitation of e-commerce, it is obvious that the evolution of the Internet, and electronic commerce specifically, depends on international agreement.<sup>54</sup>

#### THE EUROPEAN UNION GENERALLY

The European Union faces unique difficulties in regulating e-commerce. At present, the EU is comprised of fifteen unique, sovereign, member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.<sup>55</sup> EU policy must necessarily address the concerns of its individual members, often resulting in an arduous process of negotiation and discussion before agreement is reached.

In 2000, the EU attempted to construct a basic framework for the future regulation of e-commerce.<sup>56</sup> This, along with other official initiatives and reports, gives insight into the basic philosophy followed by the EU in the regulation of e-commerce.<sup>57</sup> While the U.S. is attempting to drive the international marketplace into the Internet age, the EU approach appears to be more focused on growing the internal marketplace while protecting member state sovereignty and the rights of consumers.<sup>58</sup>

A prime objective of the European Union in regulating e-commerce is to establish an integrated European internal market with access as an important component.<sup>59</sup> The internal market in the U.S. is comprised of individual states that

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52. See White House Framework, *supra* note 31, at 3. See also E-Sign discussion, *infra* p. 349.

53. See White House Framework, *supra* note 31, at 3.

54. See Neal H. Luna, *Implications of Singapore's Income and Consumption Tax Policies on International E-Commerce Transactions of Digitized Products*, 10 PAC. RIM L. & POL'Y J. 717, 737 (2001).

55. The European Union at a Glance, at <http://europa.eu.int/abc-en.htm> (last visited Feb. 9, 2003) [hereinafter European Union Website].

56. See Council Directive 2000/31, 2000 O.J. (L 178) 1 [hereinafter Directive on Electric Commerce].

57. See Accelerating E-Commerce: EU Actions, at [http://europa.eu.int/information\\_society/eeurope/action\\_plan/stimulate/ecommerce/eu/targets\\_2000/index\\_en.htm](http://europa.eu.int/information_society/eeurope/action_plan/stimulate/ecommerce/eu/targets_2000/index_en.htm) (last visited Feb. 9, 2003). See also Communication From the Commission to the Council and the European Parliament: E-Commerce and Financial Services, COM(2001)yyy final at 2, at [http://europa.eu.int/comm/internal\\_market/en/finances/general/ecom\\_en.pdf](http://europa.eu.int/comm/internal_market/en/finances/general/ecom_en.pdf) (last visited Feb. 9, 2003) [hereinafter E-Commerce and Financial Services]; A European Initiative in Electronic Commerce: Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(97)157 at 4, at <http://www.cordis.lu/esprit/src/ecomcom.htm> (last visited Feb. 9, 2003) [hereinafter European Initiative].

58. See Accelerating E-Commerce: EU Actions, *supra* note 57; E-Commerce and Financial Services, *supra* note 57, at 2, 15; European Initiative, *supra* note 57, at 1, 4-5.

59. See E-Commerce and Financial Services, *supra* note 57, at 2, 15; European Initiative, *supra* note 57, at 4, 7-9.



are tightly joined in a federalist system.<sup>60</sup> There are few roadblocks between states. The EU is attempting, through regulation, to increase the cohesion in its markets.<sup>61</sup> This is especially true in the area of e-commerce, where many of the physical barriers to commerce are easily reduced to manageable degrees.<sup>62</sup> To best bring about the desired harmonious marketplace, the EU is placing special emphasis on access to the Internet as an essential element to the stimulation of economic growth and investment in e-commerce.<sup>63</sup> Similarly, the EU Directives guide regulation towards regional facilitation.<sup>64</sup> Current divergences in legislation cause uncertainty and make e-commerce less attractive.<sup>65</sup> Regulations that effect e-commerce should be coordinated in the same spirit as the EU Treaty with the internal market as the first priority.

### *EU Directives*

In respecting individual member state sovereignty, the EU Directives instruct that the goal of e-commerce regulation should not be to harmonize criminal laws.<sup>66</sup> Similarly, regulations concerning safety standards, labeling obligations, and liability for goods should be left to individual nations.<sup>67</sup> Some areas that act as obstacles to e-commerce such as electronic contracts, however, are appropriate for concerted regulation which should be coordinated through the EU.<sup>68</sup>

As mentioned above, the current primary focus of the EU is the unification of its member states, not interaction or competition with other markets.<sup>69</sup> As such, regulatory measures should be strictly kept to the minimum levels needed to achieve the objective of proper functioning of e-commerce within the internal market.<sup>70</sup> Regulation should be minimal, clear and simple, and predictable and consistent. While the goal is different, the means chosen by the EU to accomplish it are consistent with U.S. approaches to e-commerce regulation. Specifically, there are parallel desires for a minimalistic, simple, and consistent scheme for e-commerce transactions.

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60. See Lynne K. Law, *National Copyright Law v. Community Law: Which Law Is Controlling In Intellectual Property Derivative Market Products?*, 10 DICK. J. INT'L L. 333, 334-35 (1992).

61. See generally Accelerating E-Commerce, *supra* note 57 (providing an overview of steps taken by the European Union to develop e-commerce).

62. See *id.*

63. See Accelerating E-Commerce, *supra* note 57; Directive on Electronic Commerce, *supra* note 56, at art. 2.

64. See Accelerating E-Commerce, *supra* note 57; Directive on Electronic Commerce, *supra* note 56, at art. 3.

65. See Accelerating E-Commerce, *supra* note 57; Directive on Electronic Commerce, *supra* note 56, at art. 5.

66. See Accelerating E-Commerce, *supra* note 57; Directive on Electronic Commerce, *supra* note 56, at art. 8.

67. See Directive on Electronic Commerce, *supra* note 56, at 21.

68. See *id.* at art. 6.

69. See *id.* at art. 58.

70. See *id.* at art. 6.

## JURISDICTION, CHOICE OF LAW, AND CONSUMER PROTECTION

In the debate concerning the appropriate approach to jurisdiction over e-commerce transactions, two polar models have arisen.<sup>71</sup> Jurisdiction can be based on the country of origin of the product at issue.<sup>72</sup> For obvious reasons, this approach is preferred by businesses since it gives them certainty as to which laws will apply to their transactions. Conversely, consumer group advocates suggest another model where jurisdiction is based on a country of destination.<sup>73</sup> This approach would "allow consumers to easily know what rules apply."<sup>74</sup>

*U. S. Approach*

"At this point, the U.S. government has not taken a position on this issue."<sup>75</sup> However, the executive branch has acknowledged the necessity of international agreement.<sup>76</sup> The Clinton administration, through a government working group, reported its view on the future of e-commerce jurisdiction: "[The] global community must address complex issues involving choice of law and jurisdiction – how to decide where a virtual transaction takes place and what consumer protection laws apply."<sup>77</sup>

While the legislative and executive branches have refused to legislate e-commerce jurisdiction, U.S. courts have continued with business as usual. The U.S. Supreme Court has attempted to adapt traditional jurisdiction approaches to e-commerce transactions.<sup>78</sup> The basic premise of *International Shoe* governs personal jurisdiction in U.S. courts.<sup>79</sup> The 'minimum contacts' test sets forth the due process requirements that a defendant, not present in the forum, must meet in order to be subjected to personal jurisdiction: "He [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>80</sup>

Since *International Shoe*, however, the evolution of e-commerce has caused the number of forums with which a business is likely to have contacts to increase dramatically.<sup>81</sup> A company with an Internet presence has instant contacts with

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71. See Elliot Maxwell, *Electronic Commerce Policies for the Emerging Marketplace*, 7 B.U. J. SCI. & TECH. L. 195, 196 (2001).

72. See *id.* at 199.

73. See *id.*

74. *Id.*

75. See Maxwell, *supra* note 71 at 199.

76. See U.S. Government Working Group on Electronic Commerce, First Annual Report at 27 (11/98), at <http://www.law.wayne.edu/litman/classes/cyber/1998/E-comm.pdf> (last visited Nov. 4, 2002).

77. Nimmer, *supra* note 25, at 40.

78. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (expanding "minimum contacts" test to apply to e-commerce). See generally *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945) (discussing traditional, "minimum contacts" approach to jurisdictional analysis).

79. See *Int'l Shoe Co.*, *supra* note 78, at 316.

80. *Id.*

81. See generally, Aciman & Vo-Verde, *supra* note 23.

nearly every forum in the world.<sup>82</sup> Therefore, the question becomes: what level of contacts between an e-commerce defendant and a possible forum will fulfill the 'minimum contacts' test? For e-commerce businesses without physical contacts in a forum, their chances of being subject to jurisdiction increase with their electronic presence: "[These companies are] more likely to be subject to jurisdiction in the forum state if [their website is] interactive and there is a history of interaction with residents of the state."<sup>83</sup>

### *Zippo v. Zippo*

The leading case dealing with e-commerce jurisdiction in the U.S. is *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>84</sup> In this case, the Western Pennsylvania District Court expanded on the *International Shoe* 'minimum contacts test' by stating that personal jurisdiction for e-commerce companies should be dealt with on a 'sliding scale'.<sup>85</sup>

At one end (justifying jurisdiction) is a company that 'clearly does business over the Internet' such as 'entering into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files' and, at the other end (not subject to jurisdiction), is a purely passive website.<sup>86</sup>

For companies in the middle of the scale, jurisdiction should be determined by the "level of interactivity and commercial nature of the exchange of information that occurs on [their] Web site."<sup>87</sup> Factors such as online contracting (found on most e-commerce sites) can show a high level of interaction leading to the exercise of jurisdiction.<sup>88</sup>

### *EU Approach*

#### Brussels I

The application of traditional jurisdictional law to e-commerce transactions in the European Union poses more difficult challenges than in the United States. The European Union, as mentioned above, consists of 15 different sovereign nations.<sup>89</sup> Each government, while attempting to utilize the collective power of the EU, also has a desire to ensure the autonomy of its government and courts as well as the protection of its population. Attempts have been made, however, to converge

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82. See Aciman & Vo-Verde, *supra* note 23, at 16.

83. Jeffrey P. Cunard & Jennifer B. Coplan, *Developments in Internet and E-Commerce Law: 2001*, 678 PLI/PAT 935, 1090 (2001).

84. *Zippo Mfg. Co.*, *supra* note 78.

85. See *id.* at 1124.

86. Cunard & Coplan, *supra* note 83, at 1090.

87. *Zippo*, 952 F. Supp. at 1124.

88. See *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1260-61 (6th Cir. 1996) (discussing jurisdiction over defendant who entered into a clickwrap agreement with CompuServe via Internet).

89. See European Union Website, *supra* note 55.

jurisdictional approaches and offer a more consistent system to jurisdiction within the EU.<sup>90</sup> An amendment to the 1968 Brussels Convention, called Brussels I or the Brussels Regulation, went into effect in March of 2002.<sup>91</sup> Brussels I mandates that "online sellers be subject to suit in all fifteen EU states when they sell over the Internet."<sup>92</sup> It is intended to apply to consumer contracts that are concluded with the use of an interactive website that is accessible in the State where the consumer is domiciled.<sup>93</sup> Courts will be authorized to exercise jurisdiction over a merchant when he "pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State. . ."<sup>94</sup> Unlike EU Directives, which place an obligation on each member state to enact domestic legislation consistent with the Directives' provisions, treaties generally become the law of the land upon their adoption by signatory countries and are an historically recognized source of binding international law.<sup>95</sup> As a result of the Brussels Regulation, e-commerce companies will have to comply with the laws of each of the EU member states unless they can prevent consumers from a given forum from utilizing their websites.<sup>96</sup>

#### Yahoo! Inc.

Even prior to the Brussels I amendments going into effect, EU member states exercised jurisdiction over e-commerce companies without physical contacts in their forum.<sup>97</sup> In *Yahoo! Inc.*, the Paris Tribunal de Grande Instance exercised jurisdiction over Yahoo! Inc., an e-commerce company incorporated and physically located in the U.S.<sup>98</sup> The court ruled that its jurisdiction was appropriate due to the harm suffered in France from the attempted sale of Nazi paraphernalia through the Yahoo! Auction site.<sup>99</sup> The Paris Tribunal exercised jurisdiction under Art. 46 of the Nouveau Code de Procedure Civile.<sup>100</sup> The French court based its final ruling, in part, on expert testimony concerning the availability and practicality of Yahoo! using a 'blocking technology'.<sup>101</sup> The application of this type of technology, the court argued, would allow Yahoo! to

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90. See Nicole Goldstein, *Brussels I: A Race to the Top*, 2 CHI. J. OF INT'L L. 521, 521-23 (2001).

91. See *id.* See also Alastair Breward, *Structuring, Negotiating & Implementing Strategic Alliances 2000*, 1260 PLI/CORP. 391, 423 (2001).

92. Goldstein, *supra* note 90, at 521.

93. See Wendy Kennett, ed., *The Brussels I Regulation*, 50 INT'L & COMP L.Q. 725, 729 (2001).

94. Council Regulation No. 44/2001, art. 15(1)(c), 2001 O.J. (L 12) 1, 6.

95. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(b), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679. See also David Rainford, *European Harmony in the Digital Millennium*, 18 E-COMMERCE L. & STRATEGY 1 (Sept. 2001).

96. See Goldstein, *supra* note 90, at 523.

97. See L.I.C.R.A. & U.E.J.F. c/ Yahoo! Inc. & Société Yahoo France, T.G.I. Paris (May 22, 2000; Aug. 11, 2000; Nov. 20, 2000). See also *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1185-88 (2001) (quoting a certified translation of the French court's decree and providing an overview of the case).

98. *Yahoo!*, *supra* note 97, at 1184-85.

99. See *id.*

100. See *Cunard & Coplan*, *supra* note 83, at 1098-1099.

101. *Id.* at 1099-1100.

effectively block French nationals (or users based in the French territory) from accessing the sites involved.<sup>102</sup> While there is still some debate in U.S. courts over the enforceability of the French court's ruling in the U.S. and the practicality of blocking technology, *Yahoo! Inc.* is illustrative of the problems that arise for companies doing business via the Internet.<sup>103</sup>

### Distance Selling Directive

In addition to the Brussels I amendments, an EU directive has been utilized in an attempt to protect consumers who purchase goods and services online.<sup>104</sup> The Distance Selling Directive was adopted on May 20, 1997 and was to be implemented by June 4, 2000.<sup>105</sup> This directive, originally aimed at pyramid selling schemes, is only in force in ten of the fifteen member states including Austria, Belgium, Denmark, Finland, Germany, Greece, Italy, the Netherlands, and the UK.<sup>106</sup> The Distance Selling Directive applies to most contracts where the seller and consumer never meet face to face, including contracts that are formed via the Internet.<sup>107</sup> Requirements imposed on companies engaging in electronic transactions are intended to help to protect consumers.<sup>108</sup> This directive allows a consumer to withdraw from a distance contract (including an electronic contract) for up to 7 days after entering with some exceptions.<sup>109</sup>

### FUTURE OF JURISDICTION, CHOICE OF LAW, AND CONSUMER PROTECTION

The future of jurisdiction over e-commerce companies in the EU seems muddled at best. With sovereign nations desiring to remain as such, it is unlikely that they will submit to a scheme that reduces their ability to exercise jurisdiction over companies offering potentially harmful products to local consumers. The European Commission, for its part, envisions the future evolution of the EU system: "[The] European Commission envisions setting up a system of alternative dispute resolution procedures in each EU country, to which the commissioners hope consumers will resort rather than using expensive court litigation procedures."<sup>110</sup>

The result could be a more uniform dispute resolution system for all e-commerce lawsuits within the EU. Consumers would be better prepared to bring

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102. See Cunard & Coplan, *supra* note 83, at 1099-1100.

103. See *id.*

104. See generally Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19, available at [http://europa.eu.int/comm/consumers/policy/developments/dist\\_sell/dist01\\_en.pdf](http://europa.eu.int/comm/consumers/policy/developments/dist_sell/dist01_en.pdf) (last visited 3/1/03) [hereinafter Distance Selling Directive].

105. See Mark Owen, *International Ramifications of Doing Business On-line: Europe*, 661 PLI/PAT 627, 657 (2001).

106. See *id.*

107. See *id.* See also Distance Selling Directive, *supra* note 104, at annex. 1.

108. See Distance Selling Directive, *supra* note 104, at art. 14.

109. See *id.* at art. 6.

110. Goldstein, *supra* note 90, at 523.

claims in their local forum. E-commerce businesses would be able to predict where they could be summoned and make informed decisions regarding whether or not to utilize blocking technology (such as that suggested in *Yahoo!*) to reduce their likelihood of being hauled before a distant tribunal.

The future of jurisdiction on a global scale, within the next five years, will likely result in an international agreement of some sort. A new multilateral treaty orchestrated through the United Nations would help to converge jurisdiction schemes regarding e-commerce. The Brussels Convention is an example of the value of such an agreement. Consumer protection issues are of enough importance that politicians will be forced to enter into such agreements in order to ensure the safety of their constituents.

The future of e-commerce jurisdiction, within the next fifteen years, will potentially see the evolution of a multinational forum for the resolution of e-commerce disputes. While the issues of sovereignty and cultural relativism are obvious stumbling blocks, as the Internet continues to evolve and offer the sale of goods and services throughout the world without regard for international borders, governments will likely recognize their inability to use domestic courts to effectively resolve all e-commerce disputes. Assent to an international forum will be seen as a necessary sacrifice of policy autonomy and regulatory and judicial sovereignty in order to retain a competitive edge and an ability to protect one's citizens in an increasingly globalized political economy.

#### ELECTRONIC CONTRACTS

One of the most significant legal issues in modern e-commerce is the ability of businesses and consumers to form contracts without ever touching a pen or shaking a hand.<sup>111</sup> "It is common practice for websites to require users to enter into 'clickwrap' or online contracts by requiring the user to click on a box marked 'I agree' or to otherwise subject users to a website's 'Terms and Conditions of Use.'"<sup>112</sup>

Electronic contracts can take the form of shrinkwrap agreements, clickthrough agreements, and browsewrap agreements.<sup>113</sup> For each of these types of contract, there are two principle issues.<sup>114</sup> The first concerns the consumer's acceptance or lack thereof.<sup>115</sup> The second is the enforceability of the contract.<sup>116</sup> While each of these issues is also significant in dealing with traditional paper-based contracts, electronic contracts introduce some unique difficulties.

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111. See Cunard & Coplan, *supra* note 83, at 1036.

112. *Id.*

113. See Kennedy, *supra* note 3, at 25. See also Cunard & Coplan, *supra* note 83, at 1036.

114. See Kennedy, *supra* note 3, at 25.

115. See *id.* at 25-26.

116. See Kennedy, *supra* note 3, at 25-26.

## U.S. APPROACH TO ELECTRONIC CONTRACTS – GENERALLY

Shrinkwrap agreements are the type of ‘electronic contract’ most analogous to traditional contracts.<sup>117</sup> These contracts are generally placed in retail software packaging.<sup>118</sup> They ‘inform’ the consumer of the rights and obligations that are agreed upon with the consumer’s acceptance.<sup>119</sup> The software purchaser generally is not furnished with the shrinkwrap agreement until the packaging is opened and acceptance is evidenced by beginning to use the software.<sup>120</sup>

U.S. courts have, in general, held these contracts to be binding.<sup>121</sup> The Seventh Circuit addressed the enforceability of shrinkwrap agreements in *ProCD, Inc. v. Zeidenberg*.<sup>122</sup> In this case, shrinkwrap agreements were determined to be enforceable, except where the “terms are objectionable on grounds applicable to contracts in general.”<sup>123</sup>

Clickthrough agreements introduce different problems.<sup>124</sup> These contracts appear on a computer screen as a consumer attempts to utilize a service or make a purchase.<sup>125</sup> They are similar to paper contracts except they are not physically on paper and acceptance is manifested by clicking on a symbol, generally the term “I accept.”<sup>126</sup>

U.S. courts have dealt with the acceptance and enforceability issues regarding clickthrough agreements.<sup>127</sup> In *Hotmail Corp. v. Van\$ Money Pie Inc.*, the Northern District Court of California held that the defendant accepted Hotmail’s “Terms of Service” through a clickthrough agreement.<sup>128</sup> In a similar decision, the Sixth Circuit ruled that a defendant had assented to jurisdiction through the acceptance of a clickwrap agreement.<sup>129</sup> In *In re Realnetworks, Inc.*, a court dealing with an arbitration requirement that the contract at issue be written went even further and ruled that the clickthrough agreement involved was of an “easily printable and storable nature . . . sufficient to render it ‘written’.”<sup>130</sup>

While it is clear that shrinkwrap and clickwrap agreements have generally been held as valid contracts in U.S. courts, browsewrap agreements present unique concerns.<sup>131</sup> Browsewrap agreements “require less definite manifestations of user

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117. See Nimmer, *supra* note 25, at 34.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996).

122. *Id.*

123. *Id.* at 1449.

124. See Kennedy, *supra* note 3, at 25-26.

125. See *id.*

126. See *id.* at 26.

127. See *Hotmail Corp. v. Van\$ Money Pie Inc.*, 1998 U.S. Dist. LEXIS 10729, \*17 (N.D. Cal. April 16, 1998).

128. See *Hotmail Corp.*, 1998 U.S. Dist. LEXIS 10729, \*17.

129. See *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1263-1269 (6th Cir. 1996).

130. *In re RealNetworks, Inc.*, 2000 U.S. Dist. LEXIS 6584, \*8 (N.D. Ill. May 8, 2000).

131. See *Cunard & Copland*, *supra* note 83, at 1036, 1041-43.

assent.”<sup>132</sup> Contrary to clickthrough contracts, these types of agreements are generally not binding.<sup>133</sup> Unlike shrinkwrap agreements, they are often placed on websites in places that are not obvious to the consumer and proving that the client even saw the agreement is difficult.<sup>134</sup> In this fast-growing area of interstate and international business sparked by the frictionless nature of e-commerce, it has become clear that some national legislation is necessary.<sup>135</sup>

### UCC

In the U.S., most electronic contracts are governed by traditional contract common law along with the Uniform Commercial Code (UCC).<sup>136</sup> Without any standard statutory scheme for the regulation of electronic contracts, these conventional and often inappropriate tools are used.

### UCITA

One attempt to create a standard statutory system that is more adequately suited to the unique issues that arise from virtual transactions is the Uniform Computer Information Transactions Act (UCITA).<sup>137</sup> UCITA, which originated as a proposal for a new UCC Article 2 and was approved as a legislative model by the National Conference of Commissioners on Uniform State Laws on July 29, 1999, has only been adopted by two states, Maryland and Virginia.<sup>138</sup> UCITA was authored with grand aspirations: “[UCITA was] designed to provide default rules, interpretations, and guidelines for transactions involving ‘computer information,’ including many, if not all, e-commerce transactions.”<sup>139</sup>

As such, its scope is limited to “computer information” transactions, which are defined as agreements involving “information in electronic form which [are] obtained from or through the use of a computer or . . . capable of being processed by a computer.”<sup>140</sup> Under UCITA, much of the doubt as to the enforceability of electronic contracts is removed. In dealing with these types of agreements, UCITA mandates that they are generally enforceable if certain criteria are met.<sup>141</sup> First,

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132. *Cunard & Copland*, *supra* note 83, at 1041.

133. *See* *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 594-96 (S.D.N.Y. 2001). *See also* *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. Lexis 4553, (C.D. Cal. 2000), *injunction denied*, 2000 U.S. Dist. Lexis 12987 (C.D. Cal. Aug. 10, 2000), *aff'd*, 2001 U.S. App. Lexis 1454 (9<sup>th</sup> Cir. Jan. 22, 2001); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000). *See also* *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. Oct. 17, 2000).

134. *See* *Specht*, 150 F. Supp. 2d at 594-595.

135. *See, e.g.*, BILL GATES, *BUSINESS @ THE SPEED OF THOUGHT: SUCCEEDING IN THE DIGITAL ECONOMY* (2000).

136. *See* U.C.C. § 2-102 (2001).

137. *See* *Cunard & Coplan*, *supra* note 83, 1045-1046.

138. *See id.* at 1046

139. *Kennedy*, *supra* note 3, at 27.

140. Uniform Computer Information Transactions Act, § 102(a)(10) (1999), *available at* <http://www.ucitaonline.com/ucita.html> (last visited 2/13/03) [hereinafter UCITA].

141. *See id.* at §§ 112, 209. *See also* UCITA, *supra* note 140, Prefatory Note at 1-3.



there must be "manifest assent."<sup>142</sup> Assent can be evidenced by "intentionally engag[ing] in conduct."<sup>143</sup> Finally, the assenting party must have been given an "opportunity to review" the terms of the contract at issue.<sup>144</sup> UCITA recognizes the appropriateness of following industry standards and allowing for future changes in e-commerce: "[A] party may meet its evidentiary burden by developing 'commercially reasonable' internal procedures to create a reproducible record of terms, along with a record of user's response to those terms."<sup>145</sup> In addition, UCITA applies to "computer information," which allows for its continued application as future technologies adapt.<sup>146</sup>

#### EU APPROACH TO ELECTRONIC CONTRACTS – GENERALLY

##### *E-Commerce Directive*

The EU has progressed in its regulation of electronic contracts and e-commerce in general. The Electronic Commerce Directive (Directive 2000/31/EC) (e-Commerce Directive) required that all EU members be in compliance with its provisions by January 17, 2002.<sup>147</sup> This directive "aims to bring some basic legal clarity and harmony to EU e-commerce laws."<sup>148</sup> To accomplish this, the Directive mandates its application to all consumer transactions.<sup>149</sup> The e-Commerce Directive governs contract formalities not governed by the Electronic Signatures Directive (discussed *infra*).<sup>150</sup> Upon acceptance of an electronic contract, an acknowledgement of the order must be transmitted by electronic means without undue delay.<sup>151</sup> Users must be given the ability to view and check all information prior to completing their order.<sup>152</sup>

Another applicable directive that has been used to regulate electronic contracts is the Distance Selling Directive (as mentioned above).<sup>153</sup> This directive imposes several requirements on businesses forming electronic (and other distance) contracts.<sup>154</sup> Article 4(1) mandates that consumers be given information concerning the supplier, the goods or services being purchased, the price, and the

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142. UCITA, *supra* note 140, at § 209(a).

143. *Id.* at § 112(a)(2).

144. *See id.* at § 112 (b).

145. Cunard & Coplan, *supra* note 83, at 1047 (emphasis added). *See* UCITA, *supra* note 140, at §§ 102(a)(5), 108.

146. *See* UCITA, *supra* note 140, at § 103(a). *See also* Raymond T. Nimmer, *Materials on UCITA: What is It and Why is so Much Misrepresented About the Statute*, 670 PLI/PAT 591, 594 (2001).

147. *See* Directive on Electronic Commerce, *supra* note 56, at art. 22.

148. Breward, *supra* note 91, at 422.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See* Breward, *supra* note 91, at 422.

153. *See* Distance Selling Directive, *supra* note 104.

154. *See id.*

method of payment before the contract is made.<sup>155</sup> In addition, Article 4(2) requires that all information be provided in a "clear and comprehensible manner . . . with due regard . . . to the principles of good faith. . ."<sup>156</sup> Confirmation must be sent via durable medium to the consumer by the time of delivery.<sup>157</sup> Vastly pro-consumer (as mentioned above), the Distance Selling Directive permits consumers to withdraw from distance contracts for up to 7 days after closing with some exceptions for services, perishable goods, and custom made goods.<sup>158</sup>

#### FUTURE OF ELECTRONIC CONTRACTS

The future of electronic contracts will see an increased focus of legislation dealing with enhancing the reliability and appeal of e-commerce. As governments continue to see the advantages of a frictionless economy where purchases are made with great speed and ease, they will begin to realize that electronic contracts hold the key to the sustained growth of e-commerce. Legislative attention will be focused on protecting consumers while attracting business to domestic firms with the implementation of homogenized criteria for the formation of electronic contracts. While not e-commerce specific legislation, the Distance Selling Directive's 7-day cooling off period is the type of regulation that attracts consumers. As nations see consumers fleeing to economies that offer more protections like these, perhaps a regulatory 'race to the top' could result in increased safeguards for consumers with less transactional friction.

#### ELECTRONIC SIGNATURES

##### *U.S. Approach to Electronic Signatures*

##### UCITA & UETA

One key concern pertaining to electronic contracts is the ability to assent to a contract electronically. Electronic signatures "encourage confidence in e-commerce as a means of trade" and ensure that on-line agreements are effective.<sup>159</sup> In the U.S., UCITA regulates electronic signatures. Given that UCITA has only been adopted in two states to date, other legislation is necessary as well.<sup>160</sup>

The federal Uniform Electronic Transactions Act (UETA) governs electronic signatures, as well as other e-commerce transactions that are not covered by, or in

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155. See Distance Selling Directive, *supra* note 104, at art. 4(1).

156. *Id.* at art. 4(2).

157. See Owen, *supra* note 105, at 658.

158. See *id.* at 658-659.

159. Owen, *supra* note 105, at 653.

160. This gap is at least partially filled via the Uniform Electronics Transactions Act. See Uniform Electronic Transactions Act ('UETA'), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uet99.htm> (last visited Jan. 2, 2003).

states that have not adopted, UCITA.<sup>161</sup> UETA allows for the formation of a contract where an electronic signature can be attributed to a party "if it can be shown in any manner, including use of a reliable security procedure, that it was the act of that person."<sup>162</sup> As of March, 2001, UETA is widely accepted, having been adopted by the District of Columbia and some 36 states.<sup>163</sup> In 2000 and 2001, nine other states introduced UETA legislation: Colorado, Connecticut, Illinois, Massachusetts, Missouri, New Jersey, Oregon, Vermont and Wisconsin.<sup>164</sup> UETA differs from UCITA in that the former governs all electronic "transactions" and, therefore, does not deal directly with the substantive issues involved with electronic contracts.<sup>165</sup> UCITA, as discussed above, does deal with the substantive contractual issues involved in computer information. Furthermore, UETA only applies if the parties agree to use electronic commerce with regard to the transaction in question.<sup>166</sup> UCITA automatically applies unless the parties expressly opt.

### E-Sign

Another piece of legislation also deals with electronic signatures.<sup>167</sup> The Electronic Signatures in Global and National Commerce Act (E-Sign) was signed into law on June 30, 2000 and went into effect on October 1, 2000.<sup>168</sup> E-Sign mandates that all electronic contracts relating to transactions in or affecting interstate or foreign commerce be given the same legal force as if they were written: "A signature, contract, or other record may not be denied effect, validity or enforceability solely because it is in electronic form."<sup>169</sup>

While E-Sign is an example of Congress' application of its broad powers under the Commerce Clause of the U.S. Constitution, it does not pre-empt state laws (e.g., UCITA and UETA) that can modify, limit, or even supercede its provisions.

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161. See Cunard & Coplan, *supra* note 83, at 1049-1050.

162. *Id.* at 1049. UETA, *supra* note 160, at § 9.

163. The 36 states are: Alabama, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming. See Cunard & Coplan, *supra* note 83, at 1050.

164. See *id.*

165. See Nimmer, *supra* note 146, at 619.

166. See UETA, *supra* note 160, Prefatory Note at 2.

167. See Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq. (2000) [hereinafter E-Sign].

168. See Cunard & Coplan, *supra* note 83, at 1051.

169. E-Sign, *supra* note 167, at § 7001(a)(1).

## EU APPROACH TO ELECTRONIC SIGNATURES

*Electronic Signatures Directive*

The EU Electronic Signatures Directive (Directive 1999/93/EC) marks the EU's approach to the regulation of electronic signatures.<sup>170</sup> The stated aim of this directive is to "create a harmonised and appropriate legal framework for the use and legal recognition of electronic signatures within the EU."<sup>171</sup> The Directive requires that member states enact legislation that affords legal recognition to "electronic signatures that are based on a 'qualified certificate'" so long as they were "created by a 'secure-signature-creation device. . .'"<sup>172</sup> While a contract that fulfills Article 5 is *per se* valid, other contracts are not necessarily invalid.<sup>173</sup> The EU Directive deals with future technologies in the same way as UCITA (as mentioned above). The EU Directive does not require a specific type of technology, but allows for technological adaptation that fulfills the secure-signature-creation requirement.<sup>174</sup> Certification Service Providers (CSPs) will provide the service of fulfilling this requirement. In turn, "CSPs will be liable to anyone who relies upon an issued certificate."<sup>175</sup>

## FUTURE OF ELECTRONIC SIGNATURES

The future treatment of electronic signatures regulation is likely to continue on the same track as current trends. That is, technology has taken the lead over legislation further than legislation has restrained or guided technology. The EU Electronic Signature Directive is an example of this relationship. The Directive utilizes the technology available, while remaining flexible to accept future technologies, to ensure that electronic contracts can be given the same evidentiary standing as traditional contracts. Technologies such as secure-signature-creation and the forethought to allow commercial CSPs to turn electronic contract verification into an industry are signs of future legislation. The type of adaptation that UCITA and the EU Directive explicitly allow for will provide room for future, more secure, and reliable technologies. While the EU Directive allows for non-EU CSPs to offer their services within the EU, there are no international agreements for global acceptance of such electronic contract verification. A multilateral convention or international consortium outlining standards for the global recognition of CSPs would support e-commerce growth on a larger international

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170. See EU Electronic Signatures Directive, 1999/93/EC of the European Parliament and the Council of the European Union (Dec. 13, 1999), available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999L0093&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999L0093&model=guichett) (last visited Jan. 3, 2003) [hereinafter Electronic Signatures Directive].

171. Owen, *supra* note 105, at 654.

172. Cunard & Coplan, *supra* note 83, at 1053. See Electronic Signatures Directive, *supra* note 170, at art. 5.

173. See Electronic Signatures Directive, *supra* note 170, at art. 5.

174. See Breward, *supra* note 91, at 422.

175. Owen, *supra* note 105, at 655.

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### E-COMMERCE TAXATION

A consumer pays taxes when she purchases goods from a traditional retail outlet. States can generally levy taxes on interstate activity if such taxes only have an indirect burden on interstate commerce.<sup>176</sup> They can easily justify collecting these taxes when the purchase was made within the governmental entity's jurisdiction. But, what happens when a Colorado resident visiting New Mexico purchases a good from Amazon.com? Furthermore, what are the tax consequences when a consumer from London sitting in an a Japanese airport purchases a pair of Italian shoes from a French company via a web-site that is hosted in Spain, and the shoes are to be shipped from Portugal? There are several options available to governments in assessing the appropriate tax regimes.

### U.S. APPROACH TO E-COMMERCE TAXATION

#### *ITFA and ITNA*

Currently, the U.S. has in place a moratorium on new or discriminatory Internet taxation.<sup>177</sup> The Internet Tax Freedom Act (ITFA), which mandated a three-year moratorium on new Internet taxes, was set to expire in October, 2001.<sup>178</sup> Following the terrorist attacks on the U.S., Congress rushed to extend ITFA and the Internet Tax Nondiscrimination Act (ITNA) was passed in November of 2001.<sup>179</sup> ITNA extended ITFA until November 1, 2003.<sup>180</sup> While the federal government has adopted a wait-and-see approach in regards to Internet taxation, state governors have explicitly lobbied for the power to tax e-commerce transactions. Forty-two governors had sent letters to Congress opposing ITNA or its equivalent as of September, 2001.<sup>181</sup> States fear that they will lose sales tax revenues as consumers choose to purchase goods via the Internet and avoid paying state sales taxes.<sup>182</sup> Currently, Internet transactions are taxed in the same manner as catalog sales – based on physical presence.<sup>183</sup> This has motivated corporations like Amazon.com to locate, and in some instances *relocate*, distribution centers to states with small populations like Delaware, Georgia, Kansas, Kentucky, Nevada, and North Dakota.<sup>184</sup> Many traditional companies with a physical presence in each

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176. See, e.g., *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 326 (1918).

177. See Cundard & Coplan, *supra* note 83, at 1069.

178. See Internet Tax Freedom Act, 47 U.S.C. §§ 151, 1101(a) (1998).

179. See Internet Tax Nondiscrimination Act, Pub. L. No. 107-75 (2001).

180. See *id.*

181. See P. Greg Gulick, *The Internet's Impact on State Tax Systems*, 33 URB. LAW. 479, 495 (2001).

182. See Anita Horn, *Internet Transaction Taxes: The Need for Jurisdictional Integration*, 9 COMMLAW CONCEPTS 29 (2001).

183. See generally *Get a Grip!*, *supra* note 5.

184. See *id.*

state where they generate transactions are losing ground to low-overhead, non-tax-burdened, e-commerce firms.<sup>185</sup> "Governments can hardly expect bricks-and-mortar companies to continue to pay taxes on the same sort of transactions that go untaxed with e-commerce companies."<sup>186</sup>

*Quill v. North Dakota & the Uniform Act*

The Supreme Court, in *Quill v. North Dakota*, reaffirmed its position on state taxation: "[i]n the absence of some nexus of the vendor to the taxing state, no state can *compel* collection of its sales tax by an out of state vendor without authorization from Congress."<sup>187</sup>

While a state cannot *compel* out of state firms to collect its sales tax, vendors can voluntarily do so.<sup>188</sup> The Uniform Sales and Use Tax Administration Act (Uniform Act) is an attempt to motivate out of state companies to collect state sales tax.<sup>189</sup> One incentive proposed in the Uniform Act is the use of "certified service providers" or "trusted third parties."<sup>190</sup> Another incentive is that states would pay to have these entities, which would automatically collect and remit appropriate taxes, incorporated into a vendor's e-commerce system.<sup>191</sup> A further proposed enticement is to grant participating firms immunity from sales and use tax audits arising prior to participation.<sup>192</sup>

*Streamlined Sales Tax Project*

An additional attempt by states to entice out of state vendors to collect sales taxes for e-commerce transactions with in-state consumers is the Streamlined Sales Tax Project (SSTP).<sup>193</sup> Over thirty states have agreed to join the SSTP, which undertakes to simplify state sales tax systems and make it easier for e-commerce companies to collect taxes through the use of available technology.<sup>194</sup> As with the Uniform Act, states would pay for the implementation of tax-collection systems.<sup>195</sup>

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185. See *Get a Grip!*, *supra* note 5, at 18.

186. *Id.*

187. *Cunard & Coplan*, *supra* note 83, at 1070 (emphasis added). See also *Quill v. N. Dakota*, 504 U.S. 298 (1992).

188. See *Cunard & Coplan*, *supra* note 83, at 1070 (emphasis added). See also *Quill*, *supra* note 187, at 298.

189. See *Cunard & Coplan*, *supra* note 83.

190. *Id.*

191. See *id.*

192. See *id.*

193. See Structure and Operating Rules, Streamlined Sales Tax Project, *adopted* March 30, 2000, available at <http://www.streamlinedsalestax.org> (last visited Feb. 26, 2003). See also Hardesty, *supra* note 26, at 199.

194. See List of Participating States, Streamlined Sales Tax Project, *adopted* March 30, 2000, available at <http://www.geocities.com/streamlined2000/participatingstates.html> (last visited Feb. 26, 2003).

195. See Multistate Tax Commission, *Public-Private Sector Study of Cost of Collecting State and Local Sales and Use Taxes*, available at <http://www.mtc.gov/XPYRSVS/Cost%20of%20Collection.pdf> (last visited Feb. 26, 2003).

One SSTP proposal that could have a place in the solving of the international taxation question is the use of a centralized registration system. Vendors would register in each state, leaving states to allocate appropriate funds to each municipality within the state helping to minimize the 7,500 tax municipalities in the U.S. alone.<sup>196</sup>

### *Bumpers' Bill*

While *Quill* bars states from requiring out of state vendors to collect sales and use taxes without Congress' authorization, and it appears that the only options discussed so far rely primarily on the generosity of e-commerce companies, there is hope. After *Quill*, "Congress, is now free to decide whether, when, and to what extent the States may" make such regulation.<sup>197</sup> Senator Dale Bumpers introduced the Tax Fairness for Main Street Business Act of 1994 (the Bumpers' Bill): "[t]he Bumpers' Bill authorized the states to require interstate use tax collection, protected affected companies against unreasonable compliance burdens and insured that state governments distributed the appropriate amount of resulting revenues to their local jurisdictions."<sup>198</sup>

While Congress failed to pass the Bumpers' Bill, it is an example of possible future legislation that would create a more level playing field.

### EU APPROACH TO E-COMMERCE TAXATION

Taxation in the European Union introduces unique issues. With 15 different nations, there are 15 different theories on the proper role of taxation in the political economy.<sup>199</sup> For example, states such as France and Sweden are heavily entrenched in a welfare state system requiring large amounts of funding which is supplied in the form of taxation.<sup>200</sup> Other nations are based on less welfarist regimes. In Europe, a Value Added Taxation (VAT) scheme is the norm.<sup>201</sup> At nearly 25%, the tax rate is much higher than normal U.S. sales taxes, promising to cause difficulty for any attempt at tax rate convergence.

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196. See Hardesty, *supra* note 26.

197. Quill, *supra* note 187, at 318. See generally Tracey A. Kaye, *Show Me the Money: Congressional Limitations on State Tax Sovereignty*, 35 HARV. J. ON LEGIS. 149, 174 (1998) (quoting Congressional Power to Proscribe Certain State Taxes, State Taxation of Nonresidents' Pension Income: Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong. 99, 100, 102 (1993)).

198. Horn, *supra* note 182, at 44.

199. See European Union Website, *supra* note 55.

200. See THE ROBERT GORDON UNIVERSITY, AN INTRODUCTION TO SOCIAL POLICY: THE WELFARE STATE, available at <http://www2.rgu.ac.uk/publicpolicy/introduction/wstate.htm> (last visited Jan. 2, 2003).

201. See Xuan-Thao Nguyen, *European E-Commerce Developments From A U.S. Perspective*, 649 PLI/PAT 639, 656-59 (2001).

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EU vendors of electronically delivered goods and services are required to affirmatively collect VAT.<sup>202</sup> Until recently, non-EU companies, were not required to register and collect this tax.<sup>203</sup> Instead, business purchasers have been required to 'self-assess' their tax burden while non-business buyers were not required to pay VAT for electronically delivered goods and services at all.<sup>204</sup> The result was similar to that of the Internet moratorium in the U.S. and, as in the U.S., many government officials and traditional firms have plead for a leveling of the playing field. Under a new set of rules applicable to the European VAT system, a revised comprehensive definition of services includes those delivered electronically and, as such, many non-EU companies have begun to collect VAT, as they will be required to do starting in July, 2003.<sup>205</sup> The taxation of goods delivered by traditional means are already "governed by the existing import regime, under which VAT is collected when goods are imported into an EU country from outside the EU."<sup>206</sup>

## FUTURE OF E-COMMERCE TAXATION

Nations have competed for direct investment and trade since before World War I. Recent trends toward an increasingly globalized political economy have increased awareness of the need to remain competitive in order to successfully fend off capital flight. Nations have lowered environmental standards, labor regulations, and taxation levels. A regulatory race-to-the-bottom is underway. As with environmental and labor standards, taxation levels will need to be artificially sustained through international agreement. "Countries must unify conflicting tax laws to effectively tax e-commerce."<sup>207</sup> An international taxation consortium is appropriate to ensure "international equity, efficiency, neutrality, international acceptance, and simplicity."<sup>208</sup> The initial stages of such a system will probably be seen within the EU, or even between the U.S. and the EU, and will likely take the form of a multilateral convention on taxation or international tax consortium to collect and disperse taxes.

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202. See Horn, *supra* note 182. See also Maxwell, *supra* note 71; Statement by Treasury Deputy Secretary Stuart E. Eizenstat, June 7, 2000, available at <http://www.ustreas.gov/press/releases/l5687.htm> (last visited Feb. 26, 2003).

203. See Arthur J. Cockfield, *Transforming The Internet Into A Taxable Forum: A Case Study In E-Commerce Taxation*, 85 MINN. L. REV. 1171, 1254-55 (2001).

204. See *id.*

205. See Cockfield, *supra* note 203. See also VAT ON BROADCASTING AND ELECTRONICALLY SUPPLIED SERVICES – NEW UK RULES – PART 1, available at <http://www.ecommercetax.com/doc/052503.htm> (last visited June 18, 2003).

206. Cunard & Coplan, *supra* note 83, at 1071.

207. Richard Doernberg, et al., *Electronic Commerce and International Taxation*, 24 SUFFOLK TRANSNAT'L L. REV. 233, 245 (2000).

208. *Id.*



### THE FUTURE

Speculation on the future of e-commerce is difficult, and even more so, foolish. Legislation that attempts to restrict its continued development is futile as that very development will circumvent the regulation. Much more wisely, regulation should allow and foster continued growth of e-commerce. As pertaining to U.S. and EU regulation of electronic commerce, differing approaches have emerged in some areas while surprisingly similar schemes have been the rule in others. Both should work together to ensure that a regulatory race to the bottom does not ensue. In forging future international arrangements, the U.S. and EU should continue to weigh political autonomy and ideals of sovereignty with the need to remain competitive and protect their citizens in an increasingly globalized political economy. As such, jurisdictional, electronic contract, electronic signature, and e-commerce taxation issues will be best dealt with in concert. Multinational organizations like the United Nations are well suited to take on some of these concerns, while newly-formed consortiums with specialized knowledge, skill, and tools are more appropriate for technically complex issues, such as e-contracts and taxation.

