

Electronic Signatures: How Will It Impact Real Estate?

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March 21, 2001 – 2001 Connecticut Housing Conference

- I. Legislation to enable electronic commerce.
 - A. Legal issues addressed by P.L. 106-229² (federal “eSign” legislation). Very similar to the Uniform Electronic Transactions Act (“UETA”)³ drafted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). UETA was already adopted by 24 states and is pending in 22 other states.⁴
 - B. The Connecticut Law Revision Commission recommended some changes to UETA and transmitted this draft to the Connecticut General Assembly at the beginning of the 2001 legislative session.
<http://www.cga.state.ct.us/lrc/Electronic%20Communications/ElectronicMain.htm>
 1. HB-5925⁵ was introduced on January 17, 2001 and referred to the Government, Administration and Elections committee of the Connecticut General Assembly.
 2. Testimony was heard on January 24, 2001 from a number of sources.
 3. The bill was reported out of committee on February 9, 2001 with slightly modified language.
 - C. An electronic document constitutes a writing (although a document being recorded on the land records must still be on paper for the time being). This does not prevent contracts for the conveyance of land from being formed electronically (they just can’t be recorded in that form).
 - D. An electronic signature is a valid signature. The court should consider the following factors when evaluating any signature, (which come from the UNCITRAL Model Law commentary):
 1. the sophistication of the equipment used by each of the parties;

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² http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s761enr.txt.pdf

³ <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>

⁴ http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ueta.htm

⁵ <http://www.cga.state.ct.us/2001/fc/2001HB-05925-R000015-FC.htm>

2. the nature of their trade activity;
 3. the frequency at which commercial transactions take place between the parties;
 4. the kind and size of the transaction;
 5. the function of signature requirements in a given statutory and regulatory environment;
 6. the capability of communication systems;
 7. compliance with authentication procedures set forth by intermediaries;
 8. the range of authentication procedures made available by any intermediary;
 9. compliance with trade customs and practice;
 10. the existence of insurance coverage mechanisms against unauthorized messages;
 11. the importance and the value of the information contained in the data message;
 12. the availability of alternative methods of identification and the cost of implementation;
 13. the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and
 14. any other relevant factor.
- E. An electronic document may be admitted to the court, although you may need to show what steps you took to preserve the document's integrity.

II. What can we expect to see?

- A. Real estate is already listed on-line
 1. Offers may be made on-line in the future.
- B. Loans
 1. Applications for loans are already on-line.
 2. Documents are already delivered on-line.
 3. Notes may be executed on-line in the future.
 4. The mortgage still has to be on paper.
- C. Transfers
 1. The deed still has to be on paper.
 2. The possibility of third parties holding title – will the land records stop being the official indicator of who really owns the property?
- D. Leases
 1. Leases are already delivered on-line.

2. Leases may be executed on-line in the future.
3. Notices of lease still have to be on paper for recording purposes.

III. Privacy concerns.

- A. January 9, 2001 CNN report on Egghead.com computer penetration.
- B. December 15, 2000 CNN report on copying of hospital patient files.
- C. December 13, 2001 CNN report on a hacker stealing 55,000 credit card numbers.
- D. November 15, 2000 CNN report of release of mortgage information.
- E. November 9, 2000 CNN report of release of bank information.
- F. Connecticut Computer Crime Law (P.A. 84-206).
- G. The FBI's Carnivore.
- H. Proposed federal medical privacy regulations (delayed implementation).
- I. Children's On-Line Privacy Protection Act.
- J. Gramm-Leach-Bliley Act (P.L. 106-102).

IV. Domain names-essentially the real estate of the internet.

- A. Existing "top level" domain names.
 1. .com
 2. .net
 3. .org
 4. .edu
 5. .gov
 6. .mil
 7. .int
- B. Brand new top level domain names (as of November 16, 2000 at 6:41 p.m. EST). Registrations are expected to start sometime in the summer of 2001.
 1. .biz
 2. .info
 3. .name
 4. .pro
 5. .museum
 6. .aero
 7. .coop
- C. There are country code top level domain names, although they are not commonly used in the US. A listing of the ccTLDs appears at <http://www.norid.no/domreg.html>.
 1. Some countries require a local presence.
 2. Some countries will allow only one domain name to an entity.
 3. The dispute resolution procedure for each country code differs.

4. The .re domain name is available; it is for Reunion Island (a french territory).
- D. There are currently approximately 139 domain name registrars for the .com, .net and .org domain names. Most country domain names are administered by a single registrar.
 - E. The next hot topic will be other character sets (and who controls the registration of domain names that use those character sets).
- V. ICANN's⁶ uniform dispute resolution policy. This policy allows the parties (under certain limited circumstances) to get expedited decisions regarding domain name disputes for the .com, .net and .org domain names.
- A. ICANN itself does not decide disputes. It merely developed the rules and accredited the organizations who administer the dispute resolution process. The currently accredited dispute resolution providers are:
 1. CPR Institute for Dispute Resolution
http://www.cpradr.org/ICANN_Menu.htm
 2. eResolution <http://www.eresolution.ca/services/dnd/arb.htm>
 3. The National Arbitration Forum
<http://www.arbforum.com/domains/>
 4. World Intellectual Property Organization
<http://arbiter.wipo.int/domains/>
 - B. The statistics to date⁷ have been very impressive. After about a year of operation (the starting date depending on who was the registrar), there have been:
 1. 3,076 cases involving 5,495 domain names were instituted.
 2. 2,202 cases involving 4,161 domain names have been decided.
 3. 585 cases involving 916 domain names remain pending.
 4. 289 cases involving 418 domain names were disposed of prior to a decision.
 5. About 79% of the cases were completely won by the plaintiff.
 - C. The cases are reported, which helps build a body of law. Reported decisions are referring to prior decisions more frequently.
<http://www.icann.org/udrp/proceedings-list.htm>

⁶ Internet Corporation for Assigned Names and Numbers.

⁷ February 23, 2001.

1. There is a monthly digest of cases that is available at <http://brownwelsh.com/recent.htm>
- D. A plaintiff needs to prove the following elements to prevail:
1. The respondent's domain name is identical or confusingly similar to a trademark or service mark in which the plaintiff has rights; and
 2. The respondent has no rights or legitimate interests in respect of the domain name; and
 3. The respondent's domain name has been registered and is being used in bad faith.
- E. Bad faith can be shown by:
1. circumstances indicating that the respondent has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the plaintiff who is the owner of the trademark or service mark or to a competitor of that plaintiff, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name; or
 2. the respondent has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct; or
 3. the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or
 4. by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to the respondent's web site or other on-line location, by creating a likelihood of confusion with the plaintiff's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's web site or location or of a product or service on the respondent's web site or location.
- E. A respondent can show the respondent's rights and legitimate rights:
1. before any notice to the respondent of the dispute, the respondent's use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
 2. the respondent (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
 3. the respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

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Mr. Lowry is a member of the Meriden, Connecticut law firm of Brown & Welsh, P.C. His first article on electronic commerce was published in 1979. Since then, he has assisted the United States government with its negotiations at the United Nations Commission on International Trade Law and the Free Trade Area in the Americas concerning electronic commerce, as well as assisting private clients. He is a member of the Legal Working Group of the United Nations Centre for Trade Facilitation and Electronic Business. He has both drafted documentation for and litigated computer related matters.

Mr. Lowry recently testified at the Connecticut General Assembly concerning the Connecticut version of the Uniform Electronic Transactions Act.