

## Regulating Electronic Commerce

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When it comes to money talking, electronic commerce is the hottest topic of conversation among venture capitalists in the Silicon Valley as well as among government officials in Washington, D.C. Internet companies remain the darlings of investors, attracting 72 percent of the nearly \$2 billion invested last year in start-up companies in the Silicon Valley.<sup>1</sup> And in Washington on Nov. 30, 1998, while awaiting his trial on impeachment charges, President Clinton was able to praise "the broad bipartisan coalition of members of Congress" that helped the administration move forward on its framework for global electronic commerce.<sup>2</sup>

In Wisconsin electronic commerce recently was given a boost by a court of appeals decision. In [Walgreen Co. v. Wisconsin Pharmacy Examining Board](#)<sup>3</sup> a pharmacy was censured by the Pharmacy Examining Board for accepting prescriptions by email. [Section 450.11\(1\)](#) of the Wisconsin Statutes<sup>4</sup> permits pharmacies to accept prescriptions from physicians in a writing signed by the physician or orally, over the phone. The pharmacy board concluded that an email transmission of a prescription is a writing and therefore must be signed. The court of appeals disagreed, based on the "simple facts of computer transmission." The court characterized the computer communication this way: "The prescription is put into a computer as text and the message is then electronically transmitted to the pharmacy's terminal, much as a telephone call - or a facsimile - would be." As such, it is more akin to a telephoned prescription and need not be signed. The court even noted the superiority of sending in prescriptions by email: "Computer transmission presents an advantage over an oral prescription order ... where the listener must record the order on paper - by greatly reducing the risk of misunderstanding because the prescription appears in written form on the pharmacy's terminal." As this case suggests, electronic commerce often provides an awkward fit under existing rules designed for other modes of commerce.



Electronic commerce has been variously defined, as this federal government definition acknowledges:

"Definitions of electronic commerce vary considerably, but generally, electronic commerce refers to all forms of commercial transactions involving organizations and individuals that are based upon the processing and transmission of digitized data, including text, sound, and visual images. It also refers to the effects that the electronic exchange of commercial information may

have on the institutions and processes that support and govern commercial activities. These include organizational management, commercial negotiations and contracts, legal and regulatory frameworks, financial settlement arrangements, and taxation, among many others. The goal of electronic commerce is the creation of a new kind of commercial environment in an electronic milieu, in which many of the separate 'steps' that normally intervene between a buyer and a seller in a commercial transaction can be integrated and automated electronically, thus minimizing transaction costs."<sup>5</sup>

The contemporary paradigm for e-commerce increasingly involves consumer transactions on the Internet, but older methods of electronic commerce also are included, such as electronic fund transfers and credit card transactions.

**It's the square peg in the round hole dilemma. Will we force technology to "fit" existing rules and regulations for conducting business, or create new rules?**

Electronic commerce has the potential to change the organizational framework for doing business. Smaller firms, perhaps organized in a less hierarchical fashion and using employees working from remote locations, may assume a larger role.

Information and communication services become even more central in the e-commerce economy than in the traditional economy. Capital costs are different. The skills sought in the workforce and the terms of workers' employment also may prove to be quite different. In short, e-commerce is likely to be different from business as we know it. And this, of course, has serious legal ramifications.

A recent survey discloses that more than half of consumers regard privacy and security in electronic commerce as their biggest concerns.<sup>6</sup> Businesses and governments also are concerned about how those issues will be addressed, technologically and legally. Other key legal issues include fraud (that is, authenticating the identity of parties to a transaction), taxation, the protection of intellectual property, jurisdiction of courts, and the regulation of electronic marketing (for example, "spam").

## Privacy

Electronic transactions create a more enduring record or trail than face-to-face cash transactions. Electronic records can be compiled to contain some of the most intimate details of a person's private life. They can be used (or transferred to others) for marketing or other purposes that may invade the consumer's privacy.

Unlike the European Union (E.U.), which comprehensively regulates the collection and use of personal data, our approach legally consists of a hodge-podge of industry-specific legislation, common law principles, and commercial codes of conduct. Electronic commerce is economically attractive, in large part, because information flows so freely. Many consumers, though, avoid electronic transactions because of a fear that their privacy will be inadequately protected, both as a matter of commercial practices and the inadequacy of legal protections.

## Authenticating the Identity of the Parties

When credit card transactions occur on the Internet, consumers need to know that they are providing their card numbers to someone they can trust, and sellers need to know that consumers are who they claim to be. The use of passwords and "PINs" provide some protection, but

because electronic communications can be illegally intercepted, most experts agree that greater protection is needed. Electronic authentication technologies, also called electronic (or digital) signatures, rely on various forms of encryption to establish the identities of transacting parties and provide heightened security.

Encryption technology and digital signatures are steadily achieving legal recognition. Recent legislation in Wisconsin establishes that if an electronic signature meets standards of uniqueness, security, and verifiability, it will be given legal recognition equivalent to a handwritten signature.<sup>7</sup> Many states have adopted comparable legislation.<sup>8</sup> As better electronic signature technologies and practices come into more common use, the problem of authentication may be substantially solved, at least for nonroutine transactions and transactions involving frequent trading partners.

## Encryption

Encryption also enhances the security of electronic communications. Currently, though, encryption is the subject of heated debate in political and legal circles. Many business concerns have joined with privacy advocates in criticizing Department of Commerce regulations that forbid "the transfer of certain encryption software outside the United States. Unless very difficult precautions are taken, posting software on the Internet is an export."<sup>9</sup> The purpose of these prohibitions is to impede access by terrorists and other criminals to communication software that would inhibit or destroy the government's ability to intercept and interpret communications. Strong encryption would enable criminals to conspire under the government's very nose. On the other hand, strong encryption also would permit individuals and businesses to engage in more secure electronic commerce. The challenge is to strike the right balance.

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### Taxation

The Internet Tax Freedom Act,<sup>[10](#)</sup> passed by Congress last fall, has these principal features, according to its sponsor:

**Three-year moratorium on special taxation of the Internet.** Bars state or local governments from taxing Internet access (that is, the \$19.95 or so that many Americans pay monthly to America Online, CompuServe, Erol's, or other similar services to access the Internet) from Oct. 1, 1998, until Oct. 21, 2001. A limited grandfather clause permits the handful of states already taking steps to tax Internet access - Connecticut, Wisconsin, Iowa, North Dakota, South Dakota, New Mexico, South Carolina, Tennessee, Texas, and Ohio - to continue to do so if they can demonstrate that their taxes had already been "generally imposed and actually enforced" on Internet access providers prior to Oct. 1, 1998.



**Three-year moratorium on multiple and discriminatory taxes on electronic commerce.** Bars state or local governments from imposing taxes that would subject buyers and sellers of electronic commerce to taxation in multiple states. Also protects against the imposition of new tax liability for consumers and vendors involved in commercial transactions over the Internet, including the application of discriminatory tax collection requirements imposed on out-of-state businesses through strained interpretations of "nexus." It also protects from taxation, for the duration of the moratorium, goods or services that are sold exclusively over the Internet with no comparable offline equivalent.

**Establish commission to study question of remote sales.** A temporary Advisory Commission on Electronic Commerce will study electronic commerce tax issues and report back to Congress after 18 months on whether electronic commerce should be taxed, and if so, how it can be taxed in a manner that ensures such commerce won't be subject to special, multiple, or discriminatory taxes. State and local elected officials will be given a prominent voice on this commission. Congress, of course, retains full authority to change or discard the commission's proposals.

**No federal taxes.** The sense of Congress is that there should be no federal taxes on Internet access or electronic commerce. Declares that the Internet should be a tariff-free zone. Calls on the Clinton Administration to work aggressively through the E.U. and World Trade Organization (WTO) to keep electronic commerce free from tariffs and discriminatory taxes. Asks Commerce Department to "report to Congress on barriers hindering the competitiveness of U.S. businesses engaged in electronic commerce abroad."<sup>[11](#)</sup>

Significant questions concerning foreign taxes and tariffs on electronic commerce also will have

to be addressed in the months and years ahead. The United States and European Union issued a Joint Statement on global electronic commerce that includes a commitment to "duty-free cyberspace."<sup>12</sup> The Internet Tax Freedom Act and U.S./E.U. Joint Statement reflect the administration's priority to encourage electronic commerce by protecting it from additional government-imposed costs.

## Jurisdiction

A growing number of cases have addressed the relationship between sponsoring a Web site through which electronic commerce is conducted and subjecting oneself to personal jurisdiction in states from which the site may be accessed. One federal court recently described the state of the law in these terms:

**The goal of electronic commerce is to create a commercial environment that electronically integrates and automates the 'steps' in a commercial transaction, thus minimizing transaction costs.**

"At one end of the scale are circumstances where a defendant 'conducts business' over the Internet with residents of the forum, allowing for the assertion of personal jurisdiction in most cases. In such situations, the assertion of jurisdiction is almost always proper. At the opposite end are situations where a defendant simply

posts information on a Web site which is accessible to users in the forum state as well as others. 'A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.' In the middle are situations where a defendant operates an interactive Web site, allowing a user to exchange information with the host computer. In such a case, a court must review the 'level of interactivity and commercial nature of the exchange of information' to determine whether jurisdiction should be exercised."<sup>13</sup>

## Electronic Marketing

Legal issues involving electronic marketing often are novel and complex. An excellent example is found in *Niton Corp. v. Radiation Monitoring Devices Inc.*,<sup>14</sup> in which the plaintiff alleged that the defendant designed its Web site so that efforts to find the plaintiff's Web site would result in the consumer being directed to defendant's Web site instead. Web sites are identified by keywords that provide a description for the site. Web browsers search out sites with keywords that match the consumer's inquiry. Niton Corp. alleged that the keywords used by Radiation Monitoring Devices (RMD) to describe several of its Web pages included the phrase, "The Home Page of Niton Corporation." On the basis of this and other evidence, District Judge Robert Keeton issued a preliminary injunction restraining RMD from such deceptive marketing strategies.

Another set of legal issues concerns email marketing strategies. Email marketing, often called "spam," can burden recipients and the email servers they rely upon by clogging up the system. Efforts to block spam have resulted in suits both by senders<sup>15</sup> and recipients.<sup>16</sup> Although legislative assaults on email marketing face considerable First Amendment hurdles, statutes designed to regulate such marketing have been enacted in a handful of states<sup>17</sup> and bills are pending in Congress and in many state legislatures.<sup>18</sup> In Wisconsin, Senate Bill 33 would significantly restrict email marketing and, as this is being written, the bill was passed

unanimously by the Senate and is pending before the Assembly.

## Conclusion

Electronic commerce fits more or less uneasily into legal rules designed for face-to-face, written (and signed) or voice communications. The court of appeals decision in Walgreen illustrates the problem. Email is neither a telephone/voice communication nor a written (and signed) communication, although it shares features with each. Yet the Walgreen court was forced by the statute before it to decide the case on the basis of which of these different forms of communication email resembled more. The court made its decision, which may have been a good one in that it fosters the development of electronic commerce. But the best solution is probably a rule that considers the strengths and weaknesses of transmitting prescriptions by email, rather than the strengths and weaknesses of analogies of email to other forms of communication.

The fact is, electronic commerce is here and the law is going to have to catch up.

## Endnotes

<sup>1</sup> "[Class of '98: A boom in e-commerce in record year](#)," *San Jose Mercury News*.

<sup>2</sup> The President's remarks are published at the White House [Web site](#). See "[A Framework for Global Electronic Commerce](#)," the government's strategy statement.

<sup>3</sup> [No. 97-1513](#) (Wis. Ct. App. 2/19/98).

<sup>4</sup> [Wis. Stat. § 450.11\(1\)](#). "Dispensing. No person may dispense any prescribed drug or device except upon the prescription order of a [physician]. All prescription orders shall specify the date of issue, the name and address of the patient, the name and address of the [physician], the name and quantity of the drug prescribed, directions for the use of the drug and, if the order is written by the [physician], the signature of the [physician]. Any oral prescription order shall be immediately reduced to writing by the pharmacist and filed."

<sup>5</sup> The definition is found at a [Web site](#) maintained by the Secretariat for Electronic Commerce, United States Department of Commerce.

<sup>6</sup> As reported on April 9, 1999, by [internet.com](#), which calls itself "the e-business and internet technology network". The concern of consumers about privacy is well documented in surveys conducted by Louis Harris & Associates and Alan F. Westin and reported in December 1998 at [PrivacyExchange](#), a Web site on consumer privacy, e-commerce, and data protection that serves as an online global information resource and forum.



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<sup>7</sup> 1997 Wis. Act 306.

<sup>8</sup> See [compilation](#) of state legislation.

<sup>9</sup> *Junger v. Christopher/Junger v. Daley*, 8 F. Supp. 2d 708 (N.D. Oh. 7/2/98) (upholding 15 C.F.R. 734.2(b)(9)(ii)(B) against challenges on First Amendment grounds).

<sup>10</sup> Public Law 105-277 (Oct. 21, 1998).

<sup>11</sup> Comments of Rep. Christopher Cox (R - Calif.) at his [Web site](#).

<sup>12</sup> See text of [Joint Statement](#).

<sup>13</sup> [Millenium Enterprises Inc. v. Millenium Music Inc.](#), Civ. No. 98-1058-AA (D. Ore. 1/4/99), quoting *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119, 1124 (W.D. Penn. 1997).

<sup>14</sup> [27 F. Supp. 2d 102](#) (D. Mass. 1998).

<sup>15</sup> *Hartford House Ltd. v. Microsoft Corp.*, CV778550 (Santa Clara Supr. Ct. 1/28/99); (see [description of litigation](#): "plaintiff alleged that Microsoft modified its Internet Explorer email software to filter plaintiff's competing electronic greeting cards, treating plaintiff's product as spam and sending it to the junk mail folder").

<sup>16</sup> See, e.g., *America Online Inc. v. LCGM Inc.*, 1998 U.S. Dist. LEXIS 20144 (E.D. Va. 11/10/98); (see [description of litigation](#): "defendants sent unsolicited bulk emails, used AOL computer systems in excess of their authority, harvested email addresses of AOL customers, and deceptively used 'aol.com' in its spam headers").

<sup>17</sup> [Including California, Maryland, Nevada, and Washington](#).

<sup>18</sup> John Marshall Law School Center for Information Technology & Privacy Law maintains a [Web site](#) that tracks such legislation.

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