

Preface

Traditionally, the pace of legal change was such that a lawyer or a business professional could learn the law as applied in the real world by referring to a book or other sources; the expectation was that the rules would remain stable and predictable for some time. With the advent of e-commerce, we saw a deluge of case law and new statutes and transactions, leading to the need for a new book explaining them and how they fit with existing principles. That need led to the publication of the first edition of *The Law of Electronic Commercial Transactions*.

The incredible pace of change that has continued in electronic commercial law has led to this second edition. Some of the areas that have seen the most significant changes are data protection/privacy, data security law, online copyright systems, changing concepts of property, and the continuing plethora of inconsistent state laws and regulations. We address these and other areas of ongoing change in this second edition, and we identify the considerations that attorneys and business professionals need to follow in practice.

The goal of this book is to provide an explanation and understanding of the rapidly developing law associated with the use of electronic (digital) systems in commerce and as a form of commerce. We take the new cases regarding electronic commercial transactions and juxtapose them to traditional law and transactions so that similarities and differences can be discerned. We explain brand new statutes and highlight potential problems, some of which can be solved and some of which cannot. In short, we seek to explain the law of electronic commercial transactions. In Chapter 1, we also seek to define emerging trends and patterns.

Electronic commercial law is here to stay and in fact is becoming an inherent feature of ordinary commerce. It is not a separate or distinct field that only a few lawyers or companies need pay attention to in their daily affairs. It is commerce and commercial law. This brings with it surprises and the need to think “electronically” instead of in traditional patterns. The simple word “writing” no longer means a piece of paper in a clause requiring that notice be given in a “writing.” Federal law converts that phrase to a requirement that notice be given in any record, electronic or nonelectronic. A statute of frauds requiring a “signature” no longer requires that signature to be on paper: it may be an electronic signature, and this has many impacts. Consider e-mails: those who have viewed them as an informal means of communication akin to a telephone conversation are learning that they can not only be signed writings but

also create new discoverable evidence. We discuss those issues in Chapter 13. In Chapter 4 we discuss federal and state laws that create an equivalency between electronic and nonelectronic transactions.

A driver of modern commerce is information, particularly computer information. That changes the face of commerce because most computer information is subject to principles of copyright and other intellectual property laws, as well as First Amendment and other principles governing information and its delivery that are not relevant to goods. There are only a few contract laws that have been fully updated and reconsidered to reflect that difference. One of them is the Uniform Computer Information Transactions Act (UCITA). In many states, however, electronic commercial transactions function in a “legislative void” where questions about drawing appropriate analogies and finding applicable law are complex. For example, what law governs a contract for access to a web site that provides information, services, and, perhaps, sales of goods? We discuss that in Chapter 8.

In Chapter 2 we discuss the basics of intellectual property law to provide a foundation for understanding the overlay imposed on commercial transactions by federal or other intellectual property laws. Intellectual property laws are not the whole story, however, so we discuss in Chapter 3 concepts such as electronic trespass and other legal principles that provide protection or rules irrespective of intellectual property laws. For example, factual data in a computer database is typically not protected by intellectual property laws in the United States, so besides moving to Europe where that data is protected, how would one protect facts compiled at enormous expense but susceptible on the Internet to robots of competitors programmed to gather those facts? We discuss that answer and others in Chapter 3. In Chapter 7, we discuss principles applicable to domain names, such as how to protect “YourCompany.com.”

In Chapter 5 we discuss principles relevant to the formation of contracts electronically. This has been a heavily litigated topic, although, ironically, the relevant principles are grounded in traditional law. Much of that law has been obscured over the years, however, by patterns of contracting that, because of longevity, have lured many into forgetting the basics. We explain those basics and how they are enunciated and applied in electronic transactions. On the other hand, it does little good to form a contract if the contracting parties cannot be identified. In other words, did the person you thought you were contracting with click the “I Agree” button, or was the “clickor” that person’s child, neighbor, or dog? That problem is one of attribution, and we discuss the approaches to solving it in Chapter 6.

The Internet is at the heart of many electronic transactions, and in Chapter 8 we discuss contracts for web sites, those ubiquitous “terms of use,” and the reasons for using, or not using, particular contract provisions. We also discuss application service provider (ASP) arrangements, which allow a customer essentially to rent access to software applications instead of obtaining the software for loading and maintaining at the customer’s own facilities. There are pros and cons of ASP arrangements that go beyond contract law, and we discuss them and provide information regarding pertinent provisions of ASP contracts. In Chapter 9, we discuss issues relating linking one site to another. Of all areas, this perhaps best illustrates the kinds of new concepts that lawyers and business professionals will encounter in modern commerce. Linking is not as simple as providing interested customers with directions to another store.

In Chapters 10 through 12 and 14, we discuss new and old areas of liability. New is the increasing impact of laws regarding the liability, or lack of liability, of those who provide information to others. We discuss that liability in Chapter 10.

We address the modern issues of personal data protection, privacy and personal data security. New is the proliferation of laws that affect what information can be collected from individuals and what can be done with it. In Chapter 12 we discuss those laws as well as how they fit with traditional approaches in the United States to privacy. In Chapter 16 we address data security obligations associated with personally identifiable information.

Old is consumer protection and the need to comply with consumer protection laws regardless of other legal principles. We discuss new consumer protection laws geared to electronic transactions in Chapter 11 and also list primary consumer laws that may affect e-commerce. Old is taxation. Chapter 14 contains a basic overview of how tax laws operate in e-commerce.

New laws, new ideas, and new applications of old laws proceed at a lightning pace in electronic commercial transactions. It is necessary, however, to make sense of them, and that is our goal.

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