

Electronic Document Legislation

A culture of paper

For centuries, paper has been the standard for business, legal, and government documents. Anyone who has ever stood in line in the National Archives to view the original Declaration of Independence understands the emotional importance we place in paper documents. But this importance is more than mere cultural tradition—staunch contract legislation has long dictated that a legally binding agreement must be set forth in a document printed on paper and signed in ink.

In the context of this discussion, a *document* and an *agreement* are considered as separate things. An *agreement* is a collection of carefully worded phrases indicating a desire by one or more people to establish a certain state of affairs. In contrast, a *document* is a means of recording the agreement so it can be retained and legally enforced.

The widespread use of computers, and the relatively recent importance of the Internet for business use, has led many people to change their thinking about documents and agreements. Electronic documents are overtaking paper documents as the standard in many areas of business and government. The development of certain technologies has allowed these “e-documents” to be—at the very least—as secure and reliable as their paper-based counterparts. But those promoting the use of e-documents have met resistance.

Perceptions as barriers

It’s not hard to understand the public’s reluctance to give e-documents equal status with paper documents. Anyone who has had to rewrite a letter or term paper because of a power outage or operating system crash understands the perceived “ethereal” nature of electronic information.

While it is true that systems *do* crash, and power *does* go out, paper documents have similar drawbacks. Countless records are lost every year to fire or flood—or are simply lost. Paper documents are expensive to copy, cumbersome to archive, and time-consuming to transport. E-documents can be effortlessly backed up on multiple media in secure locations, take up very little real “space,” and can be sent

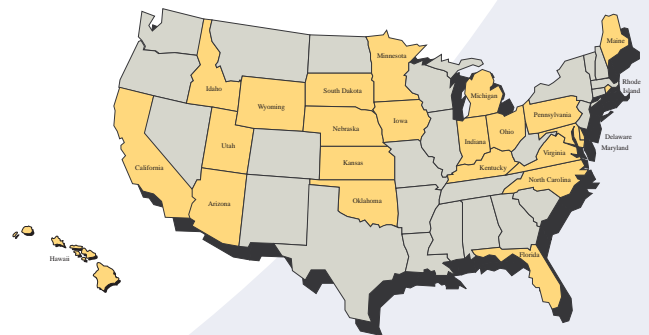
around the world in a matter of seconds. Most importantly, today’s security software allows e-documents to be at least as secure as anything printed on paper.

Perceiving the necessity of keeping American businesses and government agencies up-to-date with the latest document technologies, legislators have recently enacted laws that promote the use of e-documents by giving them the same status as their paper counterparts. The new laws give paper and digital contracts equal footing under the law, and allow digital signatures to replace “wet” signatures when appropriate. This area of legislation is still quite new, and will undoubtedly evolve as time goes on. Currently, there are two major bodies of e-document law:

- The Uniform Electronic Transactions Act (UETA)
- The Electronic Signatures in Global and National Commerce Act (E-SIGN)

Uniform Electronic Transactions Act (UETA)

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved UETA as a starting point for state legislation regarding electronic transactions. The NCCUSL is an organization of attorneys, judges, and law professors that drafts proposals for uniform legislation and works toward their enactment in state legislatures. As of March 2001, UETA had made it into the law books in the following states:



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| Arizona | California | Delaware | Florida |
| Hawaii | Idaho | Indiana | Iowa |
| Kansas | Kentucky | Maine | Maryland |
| Michigan | Minnesota | Nebraska | North Carolina |
| Ohio | Oklahoma | Pennsylvania | Rhode Island |
| South Dakota | Utah | Virginia | Wyoming |

In addition, UETA was being considered for adoption by twenty more states, the District of Columbia, and the U.S. Virgin Islands.¹

The main purpose of UETA is to promote interstate electronic commerce by establishing uniform legitimacy for electronic contracts and digital signatures. The proposed body of legislation removes legal barriers that have maintained paper as the sole standard for legal documents.

The objective of UETA is “to make sure that transactions in the electronic marketplace are as enforceable as transactions memorialized on paper and with manual signatures, but without changing any of the substantive rules of law that apply.”² Therefore, UETA alters the rules related to the medium by which transactions are recorded, transmitted, and stored. UETA does not infringe on laws concerning the transactions themselves. Here are some of UETA’s main provisions:³

- If a law requires a record to be in writing, an electronic record satisfies the law.
- If a law requires a signature, an electronic signature satisfies the law.
- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Note that none of these points *require* a document or witness (signature or notarized acknowledgement) to be electronic. UETA was not intended to force anyone to use electronic documents. Indeed, the laws require that all parties agree to conduct business electronically. If even one party decides to “opt out,” the transaction must be done on paper.

Another important facet of UETA is its technological neutrality. The code doesn’t specify what technologies must be used to create and process e-documents. File formats and security schemes (including standards for digital signatures) are discussed in broad language—leaving government

agencies and private companies free to pick and choose from the options that are currently available, and that will be available in the future.

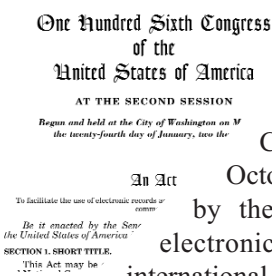
Finally, it is worth pointing out that there are a number of exceptions, specific cases where electronic documents are not allowed to replace paper documents. Some of these exceptions include wills, codicils, testamentary trusts, legal notices, and all but a few documents covered under the Uniform Commercial Code.

Electronic Signatures in Global and National Commerce Act (E-SIGN)

On June 30, 2000, President Clinton signed the Electronic Signatures in Global and National Commerce Act, generally referred to as “E-SIGN.” This bill was approved by both houses of Congress, and was in full force as of October 1. E-SIGN represents an effort by the federal government to promote electronic transactions in interstate and international commerce. The law’s main goals were to give correctly prepared electronic contracts, records, and signatures the same validity and legal weight as those created on paper.

Under E-SIGN, any qualifying agreement—along with any pertinent signature, witness, and notarized acknowledgement—“may not be denied legal effect, validity or enforceability solely because it is in electronic form.”⁴ Like UETA, E-SIGN validates the use of electronic documents without requiring them.

One of the strengths of E-SIGN is its rules regarding electronic signatures. The code takes a technology-neutral stance, “permit[ting] parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced.”⁵ This means that simple agreements could be executed by a person typing his or her name in the text of an email message—as long as both parties agree that this is sufficient. Simple password and click-through schemes could also serve as signatures. On the other end of the security spectrum is public key cryptography, which uses special encryption “keys” to identify signers and verify an electronic document’s



authenticity and validity. The open-ended nature of the language also allows for the future use of technologies that have yet to be developed.

E-SIGN provides considerable protection for individuals, with more than 30 consumer protection clauses. Foremost is the requirement that a person affirmatively consent to using an electronic method to complete a transaction, with the possibility to opt out at any time. An additional measure prevents consumers from waiving specific safeguards provided by the law. Like UETA, E-SIGN applies only to specific types of transactions. However, E-SIGN has more exceptions—many of which involve consumer-oriented documents. Some documents that will still need to be on paper include wills, trusts, court orders, utility and insurance cancellation notices, default notices, foreclosure and eviction notices, hazardous material documentation, and product recalls.

A comparison of UETA and E-SIGN

UETA and E-SIGN have many similarities. This is not surprising, since much of the language in E-SIGN was copied directly from the UETA legislation. But there are many differences, too. The problem is that E-SIGN includes “complex and somewhat ambiguous provisions giving states limited authority to modify or supersede E-SIGN.”⁶ In addition (and ironically), several states have altered various sections of UETA, making the state-level implementation of that legislation considerably less than uniform. The result is “the possibility of some degree of continuing non-uniformity”—especially in states where the UETA code was significantly modified before adoption.⁷

E-SIGN is more specific than UETA to the degree that it protects individual consumers from manipulation and exploitation of the e-document medium. UETA doesn’t put as much emphasis on this protection. Here are a few examples:⁸

- E-SIGN requires that consumers explicitly consent to using electronic documents for notices that are required by law to be in writing. UETA requires agreement, but doesn’t set any standard for proving that an agreement occurred.
- E-SIGN prevents the use of recorded oral agreements as a substitute for written notices. UETA allows a taped or computerized voice recording to serve as an “electronic record,” which can replace a written agreement.
- UETA allows consumers to sign a paper agreement to receive future written notices in electronic form, and

does not stipulate that electronic notices must be readable by the consumer. These loopholes would allow a person or company to send notices to a dormant e-mail account, or to send notices in proprietary or foreign file formats. E-SIGN prevents this from happening.

- E-SIGN prevents critical consumer-related documents (such as eviction or health insurance termination notices) from being sent electronically. UETA has no such protection.

This means that, in states where UETA has been modified, it may be necessary for lawmakers to further modify state legislation—either by adding new protections or by explicitly allowing E-SIGN’s provisions to supersede UETA’s—in order to achieve the level of protection provided by E-SIGN alone.⁹ Obviously, consumers and businesses alike should familiarize themselves with the differences between E-SIGN and their state’s particular laws governing electronic documents.

In spite of the differences between state and federal laws, and minor perceived problems with both, UETA and E-SIGN are significant because they open the door for electronic documents in mainstream business and government affairs. Our world has run on paper for a long, long time. UETA and E-SIGN represent a turning point—a legal validation of new technologies that will help us do business more quickly, more efficiently, and more safely.

NOTES:

¹ National Conference of Commissioners on Uniform State Laws. [2000]. A Few Facts about the Uniform Electronic Transactions Act. *Uniform Law Commissioners*. 21 March 2001 <http://www.nccusl.org/uniformact_fact-sheets/uniformacts-fs-ueta.htm>.

² National Conference of Commissioners on Uniform State Laws. [2000]. Summary: Uniform Electronic Transactions Act. *Uniform Law Commissioners*. 21 March 2001 <http://www.nccusl.org/uniformact_summaries/uniformacts-s-ueta.htm>.

³ National Conference of Commissioners on Uniform State Laws. 1999. Uniform Electronic Transactions Act. *Uniform Law Commissioners*. 21 March 2001 <<http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uet a99.htm>>.

⁴ United States. Cong. *Electronic Signatures in Global and National Commerce Act* 106th Cong., 2nd sess. S-761. Washington: GPO, 2000: 1.

⁵ United States 12.

⁶ Wittie, Robert A. and Jane K. Winn. [2000]. E-Sign of the Times. *Cyber Securities Law*. 21 March 2001 <<http://www.cybersecuritieslaw.com/KL/wittie3.htm>>.

⁷ Wittie and Winn.

⁸ Saunders, Margot and Gail Hillebrand. [2000]. E-Sign and UETA: What Should States Do Now? *National Consumer Law Center*. 21 March 2001 <http://www.consumerlaw.org/e_sign.html>.

⁹ Saunders and Hillebrand.

GLOSSARY

agreement: A collection of carefully worded phrases indicating a desire by one or more people to establish a certain state of affairs. There are numerous type of agreements, including contracts, purchase orders, letters of intent, and powers of attorney.

document: A means of recording an agreement so it can be retained and enforced. A document can be recorded on a *hard* medium (such as paper, parchment, vellum, or stone), or in a *soft* medium (such as a computerized text or image file).

electronic document: Also *e-document*, an agreement recorded in a soft medium, usually as a text (or marked text) file.

Electronic Signatures in Global and National Commerce Act (E-SIGN): A federal law, passed in 2000 by both houses of Congress, which enables the use of electronic documents and digital signatures for interstate business, in international trade, and by the federal government.

National Conference of Commissioners on Uniform State Laws (NCCUSL): An organization of more than 300 attorneys, judges, and law professors that drafts proposals for uniform state legislation. The NCCUSL is a non-profit unincorporated association that can only propose laws; their proposals do not become state law until adopted by state legislatures.

Uniform Electronic Transactions Act (UETA): A body of recommended legislation drafted in 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), for adoption by state legislatures. UETA allows electronic documents and digital signatures to stand as equals with their paper counterparts.

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532 North Kays Drive • Kaysville, Utah 84037

Voice: (801) 497-0383 • Fax: (801) 497-0334 • Toll Free: (866) 388-9635

E-mail: info@ingeo.com • www.ingeo.com

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- Digital Certificates & Certificate Authorities
- The Three Levels of Electronic Recording

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- Glossary of Electronic Recording Terms

About Ingeo

Ingeo is a leader in the electronic document industry. The Utah-based company helps businesses and government agencies do business with digital documents, providing tools and infrastructure to automate the filing and recording of real estate and other legal records.

Lenders and title companies use Ingeo's **ePrepare** product to prepare and submit legal documents, handling digital signatures and notaries right from users' desktops. County offices rely on Ingeo's **eRecord** system to receive and process these documents so they are recorded legally and efficiently.

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