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INTRODUCTION TO *IDAHO LAW REVIEW* 2001 SYMPOSIUM

D. BENJAMIN BEARD*

In the last decade electronic commerce has exploded on the commercial scene. From electronic data interchange, to the common use of electronic mail, to purchases over the internet, commerce conducted through electronic, as opposed to traditional paper and ink media, becomes with each passing day more an accepted way of life. It is particularly fitting that this, the first symposium issue of the *Idaho Law Review* in the new millennium, should address the legal developments which will accommodate and encourage these revolutionary developments of the final decade of the last millennium.

While the manner and method by which commerce is conducted in the electronic arena may be considered revolutionary, the continued propriety of existing legal rules governing commerce has become more and more apparent to those trying to discern the legal needs for transactions conducted in this new medium. The Uniform Electronic Transactions Act ("UETA") was approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") for adoption by the states in July 1999. The UETA was drafted over two years and actually became known to those involved in the process as the "incredible shrinking statute," as it shrank from over 60 sections in three parts, to just 21 sections in one part. This reduction occurred as a result of the realization that existing legal rules governing commerce were effective in the electronic medium, if barriers to the use of the medium were removed.

In her article, Professor Fry, the Chair of the UETA Drafting Committee, discusses the general principles and policies which governed the drafting of the UETA. Professor Fry demonstrates that the approach taken in the UETA is the best designed to encourage the development of commercial business and practice in the electronic realm. By validating and effectuating the use of electronic media, the UETA removes the barriers to electronic commerce, while at the same time leaving in place the existing corpus of commercial and consumer law. More importantly, Professor Fry notes that the existing corpus of law is equally as efficacious when electronic media are used as it is when traditional paper and ink media are used. Finally, Professor Fry

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shows that the UETA, by effectuating and validating the use of electronic media in a procedural, unintrusive statute, removes the uncertainty regarding the efficacy of transactions conducted in the electronic environment. It is this elimination of this uncertainty that is so crucial to freeing electronic commerce to expand and grow.

Messrs Meehan and Beard address the impact on the UETA of the federal Electronic Signatures in Global and Electronic Commerce Act ("E-Sign"). They argue that the certainty, so adamantly sought and lobbied for by industry in seeking passage of this national law, may have been compromised by E-Sign's treatment of the issue of preemption of the UETA. The desire of industry for uniformity across the country is understandable. Enactment of the UETA on a state by state basis was considered unacceptable and far too time-consuming. Better, argued E-Sign's proponents, to have a single federal enactment. However, the traditional authority of states to address commercial matters was acknowledged. Congress acknowledged the benefits of the UETA, and indeed modeled (where they did not take verbatim) many provisions on the UETA. However, as Meehan and Beard point out, the method by which Congress sought to assure that inconsistent state laws would be preempted by E-Sign, actually may generate more litigation and uncertainty than had it been more precise and deferred to the UETA's provisions to a greater, or at least clearer, degree.

The UETA was not drafted in a vacuum. Professor Boss, a United States representative to the United Nations Commission on International Trade Law (UNCITRAL), during the preparation by UNCITRAL of the Model Law on Electronic Commerce, demonstrates that the Model Law served as a principle source for many of the provisions in the UETA. Even where the provisions diverge somewhat, Professor Boss shows that the outcome under the various provisions should generally be consistent. In addition, she shows that the influence of the Model Law in other countries has resulted in a broad level of consistency in the method and manner through which national legislation has validated and effectuated electronic commerce. As a result of the influence of the Model Law, there is hope that the rules adopted by nations governing electronic records, signatures and commerce will be construed consistently - to the great benefit of commerce.

Mr. Gregory compares the provisions of the UETA with the Uniform Electronic Commerce Act, promulgated by the National Law Conference of Canada, for adoption by the provinces and the federal government in Canada. Mr. Gregory demonstrates that even in those areas of seeming disparity between the two acts, the reasons behind the differing provisions demonstrate consistency in the approach of

each act to the validation and effectuation of electronic commerce. Mr. Gregory's article provides an insightful look at the law likely to govern electronic commerce throughout the United States' largest trading partner. His article provides an example of the consistency that is emerging among national legislation based on the Model Law.

Professor Winn's article argues persuasively that the minimalist, procedural approach taken by the UETA in validating and effectuating electronic records and signatures is the only viable model for legislation seeking to free electronic commerce from its paper bounds. Professor Winn demonstrates that the advent of public key infrastructure, dual-key encryption technology, which was widely ballyhooed as the answer to the need for strong, reliable electronic signatures, has failed as a signature and attribution technology. Acknowledging the validity of PKI technology for assuring accuracy and security, Professor Winn demonstrates that as a signature technology, PKI is too cumbersome. She further notes that PKI technology simply does not comport with existing business models to provide a reasonable and efficient signature technology. Rather, the open-ended, flexible approach of the UETA is best designed to allow business and commerce to develop the best mechanisms for assuring attribution and agreement.

Finally, Messrs Murray and Chorvat demonstrate that the minimalist provision in the UETA validating electronic evidence, does not go far enough. Though the UETA is a good first step, Messrs Murray and Chorvat demonstrate that adoption of the 1999 revisions to the Uniform Rules of Evidence is needed to avoid and remove all the barriers to the use and admissibility of electronic forms of evidence. Only by taking the additional step of adopting the revised rules of evidence will records in electronic form be treated by courts on an equal footing with paper based records and signatures.

The UETA has been adopted in 24 states as of this writing, and is currently pending in 22 additional jurisdictions. If successful in those new jurisdictions, the UETA may have one of the fastest enactment histories of any uniform law. As the articles in this Symposium demonstrate, these enactments cannot come too soon. Electronic commerce does not respect geopolitical boundaries, as is amply demonstrated in the United States, and throughout the world. Professor Boss and Mr. Gregory address directly the international aspects of electronic commerce. The perceived and real need for a national baseline was a driving force behind the enactment of federal legislation in the form of E-Sign. By establishing a baseline for validating and effectuating electronic records and signatures the UETA, as well as the Model Law and the Canadian UECA, all remove the barriers to commerce in an ever shrinking world.