

AMERICAN BAR ASSOCIATION  
SECTION OF BUSINESS LAW  
SECTION OF INTERNATIONAL LAW AND PRACTICE  
SECTION OF SCIENCE AND TECHNOLOGY

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- RESOLVED, that the American Bar Association: 1
1. Supports electronic commerce as an important means of commerce among nations; 2
  2. Supports commerce through electronic networks that are global in nature and require international communication and cooperation among all nations, including developing nations; 3  
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  3. Encourages discussion in open international forums to remove unnecessary legal and functional obstacles to electronic commerce; 5  
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  4. Encourages the private sector, governments, and international organizations to cooperate to establish a legal framework within which global electronic commerce can flourish in an environment that provides appropriate legal protection to the participants, while eliminating unnecessary legal and functional barriers to electronic commerce; and 7  
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  5. Encourages the private sector to develop self-regulating practices that will protect the rights of individuals and promote the public welfare. 11  
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## REPORT

Electronic commerce is critical to the expansion of international trade. Studies indicate that up to twenty-eight percent of the transaction costs for trade in durable goods result from the generation and movement of information on paper. The use of electronic networks can alleviate much of this cost. In addition, there is a virtually unlimited potential for commerce in information, technology, and other non-durable goods. Such commerce represents an increasing portion of business value. For example, in 1982, hard assets accounted for sixty-two percent of the average industrial company's market value; ten years later they made up only thirty-eight percent.<sup>1</sup> In both durable and non-durable goods, the ease, reduced cost, and speed of electronic communications can facilitate the dissemination of goods and services among all nations, including both developed and developing countries, to the mutual benefit of all.

Electronic networks such as the Internet thus feature prominently in all models for future international commerce.<sup>2</sup> The current legal framework impedes the realization of the potential of international electronic commerce. It includes:

- Paper filing requirements for commercial transactions
- Inconsistent and contradictory consumer protection and other laws that inhibit advertising and selling via electronic means
- Uncertain liability risks for network access and service providers
- Bank secrecy laws that interfere with the growing internationalization of financial transactions

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<sup>1</sup> FORTUNE (October 2, 1995).

<sup>2</sup> See, e.g., Jane C. Ginsburg, The Global Information Infrastructure, 42 J. COPYRIGHT SOC'Y. U.S.A. 318 (1995); Raymond T. Nimmer & Patricia Krauthouse, Electronic Commerce: New Paradigms in Information Law, 31 IDAHO L. REV. 937 (1995); Joel R. Reidenberg, Rules of the Road for Global Electronic Highways: Merging the Trade and Technical Paradigms, 6 HARV. J. LAW & TECH. 287 (1993); Jennifer L. Kraus, On the Regulation of Personal Data Flows in Europe and the United States, 1993 COLUM. BUS. L. REV. 59 (1993); Amelia H. Boss, The Emerging Law of International Electronic Commerce, 6 TEMP. INT'L & COMP. LAW J. 293 (1992); Jeffrey Ritter, Defining International Electronic Commerce, 13 NW. J. INT'L L. & BUS. 3 (1992). See also, the Digital Signature Guidelines (1996) of the Information Security Committee, Electronic Commerce Division, Section of Science and Technology and the Clinton Administration's draft electronic commerce policy entitled A Framework for Global Electronic Commerce.

- Encryption controls that limit the use of commercially accepted methods of protecting data
- Uncertainty with respect to application of national legislation across international boundaries and other issues of jurisdiction and choice of law
- Personal data protection laws that do not adequately accommodate electronic commerce including internationalization of credit, sales and insurance information and related transactions involving personal information records
- Intellectual property laws that do not address the needs of electronic commerce.

One theme recurs in this inadequate legal framework: the proliferation of domestic laws which set differing standards of rights and liability as the result of a lack of international coordination or cooperation. Two of the main problems in defining the legal framework regarding international electronic commerce are the issues of defining applicable law for an electronic transaction and establishing jurisdiction. Writing and signature requirements for contract formation and customs purposes provide an example.<sup>3</sup> While some countries allow contractual terms to be incorporated by reference, others require actual written and signed approval by the parties of such terms.<sup>4</sup> In some cases, the laws of various nations are antiquated, necessitating updates consistent with modern technological advances. For example, laws requiring actual writing and signatures fail to accommodate modern technologies for data messages and digital signatures.<sup>5</sup> In other cases, the laws may impose unnecessary restrictions given the amount of self-regulation that already occurs in the private sector.

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<sup>3</sup> The American Bar Association has already taken an active role in addressing the legal issues raised by the use of digital signatures in commercial transactions. See Information Security Committee, Electronic Commerce Division, Section of Science and Technology Digital Signature Guidelines (1996). For a current survey of state approaches to digital signatures and records see the Commonwealth of Massachusetts Information Technology Division home page at "<http://www.state.ma.us/itd/legal>".

<sup>4</sup> United Nations Commission On International Trade Law, Working Group on Electronic Data Interchange, Annex I: Incorporation by Reference, Note by the United Kingdom at 2 (1995).

<sup>5</sup> Compare United Nations Model Law on Electronic Commerce, completed by the United Nations Commission on International Trade Law, June, 1996; Information Security Committee, Electronic Commerce Division, Section of Science and Technology Digital Signature Guidelines (1996).

Elimination of much of the current legal framework without more, however, will not suffice as a solution. Important public interests that warrant governmental protection counterbalance the private sector's interest in an unregulated system of electronic commerce. For example, current writing and signature requirements reduce fraudulent use of both personal and business information by verifying the identities of the contracting parties. Such requirements protect consumers whose privacy rights might not otherwise be recognized in a system created exclusively by the private sector. The requirements also benefit businesses by avoiding losses from fraudulent transactions. Consequently, the private sector must recognize the need for some regulation and support legal rules that maintain minimum standards of conduct for the protection of the public interest.

Thus, in each case an effective resolution will depend on the participation and support of policy makers and users of the new electronic media. They include:

- Governments
- International organizations
- Hard goods vendors seeking to expand their markets internationally
- "Soft" goods vendors for whom the most natural channel of commerce is digital communication
- Internet and other electronic commerce access providers
- Consumers and consumer advocacy groups
- Bar associations and other professional organizations
- International and domestic trade organizations
- International and domestic intellectual property organizations
- Bilateral and multilateral trade negotiations
- Educational institutions

As one commentator noted several years ago, "[i]n the absence of legislative, judicial, and administrative recognition, validation and regulation of electronic commerce, and the corresponding absence of industry-wide customs or standards to guide conduct, those engaging in international electronic commerce may consider themselves to be entering unexplored, uncharted and ungoverned

areas."<sup>6</sup> There have been advances in standardization since that time, such as the efforts of the Internet Engineering Task Force (IETF) and the National Association of State Information Resource Executives (NASIRE). However, the American Bar Association recognizes that the complex nature of electronic commerce will not lend itself to a single set of solutions.<sup>7</sup> Rather, the various areas of law and commerce must be individually addressed with a consistent understanding of the cooperative roles of governments and the numerous actors in the private sector. Commercial and other private sector players need to have freedom to create and expand the marketplace and advance practical solutions through coordinated self-regulation. Governments' most important role will be to define uniform, minimally restrictive standards to protect individual rights and the community. The private sector must recognize this continuing role of the government.

The American Bar Association seeks to promote cooperation and concerted action among these private sector entities and governments. Specifically, the American Bar Association seeks to recognize that electronic commerce is an important means of commerce and an international concern by definition. Although every country has national interests to protect through national laws, the efficacy of such laws demand a harmonized and cooperative framework.

The American Bar Association encourages the establishment of open international forums. No single industry nor organization can address the broad scope of electronic commerce. Any call for increased communication and cooperation must be coupled with support for recognized, neutral venues in which problems and solutions can be developed and discussed by representatives of governments and private industry.

Several models already exist for common forums to harmonize the international practices of the global community. They include the United Nations Commission on International Trade Law, the International Chamber of Commerce, and the Working Party on Facilitation of International Trade Procedures. In fields such as encryption, privacy, and intellectual property, governments, including that of the United States, can play a leading role in promoting an international understanding that achieves the general goals of balance and predictability.<sup>8</sup> In addition,

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<sup>6</sup> Amelia H. Boss, Electronic Data Interchange Agreements: Private Contracting Toward a Global Environment, 13 NW. J. INT'L L. & BUS. 35 (1992).

<sup>7</sup> For a more detailed analysis and illustrative matrix discussing these areas see the Committee on the Law of Commerce and Cyberspace, Subcommittee on International Transactions, Eliminating the Legal Barriers to International Electronic Trade: An Analysis and Commentary (Working Paper April 19, 1996) (available at <http://www.abanet.org/buslaw/cyber>).

<sup>8</sup> The United States has already begun this process by convening an interagency working group composed of high-level representatives of a number of cabinet agencies for purposes of developing a "framework for global electronic commerce." The current draft may be viewed at [gii@al.eop.gov](mailto:gii@al.eop.gov).

intergovernmental organizations and regional trading associations will continue to be essential forums for the development of international agreements and trade practices.

The American Bar Association encourages governments, with the aid of the private sector and other non-governmental entities, to eliminate existing laws which unnecessarily hinder the ability of industry to create and expand the electronic marketplace. As an example, in the United States, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute have undertaken revision of the Uniform Commercial Code to accommodate electronic commerce, including the addition of Article 2B, governing the licensing of information. NCCUSL also has undertaken revision of state contract law to support electronic commerce. The private sector's responsibility is to inform and educate governments and to serve as a resource for the identification of existing legal and structural barriers. Private sector participants include industry and non-profit and educational organizations. Governments are also encouraged to establish an international legal framework of minimum standards that promote global electronic commerce while protecting the public interest. Legal frameworks should be consistent, uniform, simple, predictable, and reliable across international boundaries. Balance and legal predictability are the keys to successful exploitation of the full commercial potential of digital information exchanges such as the Internet. Finally, the American Bar Association recognizes that limited access to information technologies may be a functional barrier to the deployment of a comprehensive global information infrastructure.

In addition, the American Bar Association suggests a standard for international leadership by the private sector. The private sector is the catalyst for present and future development of legal standards and business practices concerning electronic commerce. Through self-regulatory practices, the private sector should seek concurrently to protect the community and individual rights mitigating the necessity for governmental intervention. With responsible industry leadership, governments can, therefore, assume a more limited role in setting the standards of growth and development. In this context, the private sector can assume a complementary role with government in facilitating electronic commerce and balancing interests.

Several models exist for the regulatory framework recommended by this resolution, in which governments establish minimum standards and the private sector develops responsible business practices within those standards subject to the approval of the governments involved. The recommendations promulgated by the International Chamber of Commerce are examples of private sector initiatives or contributions to governmental regulations. Specifically, versions of the European International Code of Advertising Practice developed by the International Chamber of Commerce have been adopted by several European governments, including Germany and France. Such a system could also be reversed, wherein governments would establish the initial rules and private organizations such as the International Chamber of Commerce could develop appropriate guidelines for carrying out the rules.

Transnational rules could also replace the more stringent national writing and signature requirements. At present, these requirements persist, making it virtually impossible for businesses

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to take full advantage of the speed and flexibility of electronic communications. To remedy this situation, governments should cooperate to define requirements for effective electronic and legally binding record keeping.

Thereafter, the market can be relied upon to create software and hardware tools that meet the government requirements.

Respectfully submitted,

George S. Frazza  
Chair  
Section of Business Law

August 1997

## GENERAL INFORMATION FORM

Submitting Entity: Section of Business Law

Submitted By: George S. Frazza, Chair

1. Summary of Recommendation.

The Recommendation recognizes that electronic commerce is increasingly important and global in nature, requiring international communication and cooperation. The Recommendation therefore encourages international discussion and cooperation by the private sector, governments, and international organizations to remove unnecessary legal and functional obstacles to electronic commerce, to establish a legal framework within which global electronic commerce can flourish, and to develop self-regulating practices by the private sector that will protect the rights of individuals and promote the public welfare.

2. Approval by Submitting Entity.

Approved at a regularly scheduled meeting of the Section Council on April 6, 1997.

3. Previous submission to the House or relevant Association position.

None.

4. Existing Association Policies Affected by this Recommendation.

None.

5. Need for Action at this Meeting.

Action is desirable at this meeting because of the current international interest in legal issues affecting electronic commerce.

6. Status of Legislation. (If applicable)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs)

None.

8. Disclosure of Interest. (If applicable)

Not applicable.



9. Referrals.

Association Sections

International Law & Practice - April, 1997, agreed to co-sponsor  
Science & Technology - April, 1997, possible co-sponsorship under active consideration.

International Associations

International Bar Association - April, 1997

Standing Committee on World Order Under Law

10. Contact Persons Prior to Meeting.

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11. Contact Person who will Present the Report to the House.

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12. Contact Person Regarding Amendments to this Recommendation.

Same as Number 10 above.

consideration.

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