

Electronic Commerce report 1997

ELECTRONIC COMMERCE REPORT

1. Since 1993 the Uniform Law Conference of Canada has been focussing on the impact of information technologies on Canadian law. In that year it resolved that no uniform statute should impose an unintended writing requirement, i.e. uniform laws should in principle be technology neutral. Since 1994 the ULCC has been working on a uniform statute on evidence of computer-generated records. The most recent work on that subject is at <http://www.law.ualberta.ca/alri/ulc/current/eelev.htm>. The Conference is expected to adopt a uniform statute in August, 1997.
2. Late in 1996 the Civil Section of the ULCC agreed that the next step should deal with "electronic commerce". The term is widely read to include most transactions using electronic means, such as filing with public bodies and dealings by governments and not-for-profit organizations. The project will look for ways to modernize and harmonize the law applicable both to the private and to the public sector.
3. That being said, the impact of information technology is so widespread these days that the topic risks becoming the "law of everything". The first order of business of the project team has been to set some priorities in order to make the work manageable. The project will not deal with regulating the Internet, nor with topics otherwise before the ULC, such as evidence and privacy.

Principles

4. As a general principle the law should not hamper the choice of medium in which one stores or transmits information. The law should in other words be technology neutral. This project will seek to establish that the form of information - electronic, written on paper, or converted from one to the other - should not influence the legal effect of that information.
5. This is not to say that the law should never require writing on paper. It is to say that such a requirement should be conscious; it should depend on something in the nature of the legal rule that goes beyond the form to the substance of the transaction it governs.
6. Perhaps the overriding goal of the project is to provide certainty that people engaging in electronic commerce will achieve the legal effects they are aiming at - or at least the law's hostility to or ignorance of electronic records will not prevent them from doing so.
7. The project should aim to change the general law as little as possible, while ensuring that electronic information and communications are legally effective. However, this principle may be more applicable to removing barriers to e-commerce than to supporting it or regulating it. An example is the Uniform Law Conference's project on "tiered holdings" of securities: it proposes to amend the law on settling transfers of securities to make clear the legal result of uncertificated securities or of the deposit of certificates underlying book-entry transactions by brokers. It does not purport to change how people buy and sell shares.
8. The project is also likely to affirm a wide freedom of contract. Parties to transactions may devise rules that will be effective in law between themselves. It has been

pointed out that many of the legal rules that have been adopted or proposed to govern electronic transactions have originated in principles that private parties worked out among themselves. Commercial practices will usually outrace the law, and their flexibility should not suffer unduly from "new" rules, since they may be the source of newer rules later.

Scope

9. A significant source of ideas for removing barriers to e-commerce is the United Nations Commission on International Trade Law's Model Law on Electronic Commerce. (<http://www.un.or.at/uncitral/texts/electcom/ml-ec>) The project may go beyond removing barriers, too, to provide positive support for e-commerce, by providing rules for attribution of communications and for certain kinds of transaction. Solving or supporting private solutions to questions of jurisdiction - choice of law and choice of forum - could also help participants in e-commerce.
10. The Uniform Law project will not concentrate on regulating e-commerce as such, but it has been suggested that some regulation may be needed to protect consumers, for example in the operation of e-cash systems like Mondex. Some elements of legislative support for digital signatures are regulatory, while others are simply enabling. There is no one model for such legislation.

Priorities

11. The working group will choose some of the most serious legal problems to e-commerce. This analysis can be combined with some estimation of the quickness of a potential fix for these problems. One aims at a practical and enactable set of legal rules that will attract support across the country, while being consistent with international standards.
12. Several criteria were proposed:
 1. The real need among those doing or wishing to do electronic commerce. In removing barriers to e-commerce, the seriousness of the barrier affects the priority given to removing it.
 2. The need for harmonization across Canada, federally and provincially. The desirability of harmonizing Canadian rules with existing or proposed international rules would be related to this.
 3. "Bang for the buck": impact on an assortment of problem areas, breadth of solution to problems. Industry-specific solutions may not attract as high priority.
 4. Conformity with prevailing principles in the field: what are the generally accepted means of dealing with these problems? This is not just a matter of harmonization, though it may relate to that criterion too. For example, media neutrality of legal rules seems a broadly accepted goal. One would prefer to solve problems in a way that did not depend on particular technologies. Part of the debate over legislative support for digital signatures focuses on this argument. In the absence of a solid consensus about approaches, a legal solution was unlikely to satisfy the market.
 5. Degree of controversy for any reason: This, along with need, will affect the enactability of any proposal for uniform legislation. Allocating liability for error could be controversial, especially if consumers or the unsophisticated are put

at increased risk of damage. The United States is seeing that problem in the current proposed drafts of Article 2B of the Uniform Commercial Code. The ULCC's project might benefit by some "quick wins", useful uncontroversial legislation to give credibility to the project as a whole.

Projects

13. jurisdiction: Where do things happen on the Net? whose laws apply? how does one enforce civil or criminal rules against a party in electronic commerce? and the other side of this: to what rules is one exposed in electronic commerce? Are transactions done on Web sites different from other Net transactions or from closed-system transactions? Is it worth having a pan-Canadian solution to these questions even if our influence over foreign jurisdictions is small? Should we change our rules on the enforcement of foreign judgements, or on service out of the province?
14. security: This may involve authentication and integrity questions. It is broader than digital signatures, but includes legal questions about digital signatures and how to support them, such as by creating a public key infrastructure. The project team may split into subgroups to handle the variety of issues, e.g. authentication, integrity, structure of PKI, role and responsibilities of trusted third parties, and several others.
15. adaptation of existing rules: This is the "Model Law on Electronic Commerce" category. What kinds of rules of law (common law, statute, regulation) impede electronic commerce now, and what can we do about it? Is the Model Law a good guide to a solution? The Model Law also deals with contract formation and attribution of messages. These issues could be stated or explored.
16. webwrap/shrinkwrap licences: What kinds of agreements does one find on the Web or in shrinkwrap? How do the Webwrap ones work? What are the barriers to their enforcement? What are current rules on contracts of adhesion? Are there limits to incorporating unseen terms and conditions by reference into what one sees on a screen? (enforcement across boundaries of legal systems is not part of this issue; it's in Jurisdiction.) Consumer issues separable from the general ones here?
17. electronic money: e.g. legal functioning of stored-value cards or access cards, security issues, consumer issues, state issues (money supply control?), tax issues.
18. public filing, public records: what are the implications of electronic records on filing requirements, reproduction of electronic files. The issues overlap with those in other categories, such as authentication.
19. civil liability: who may be liable to whom, and for what, and where? Will this question be answered by the answers to the other questions?

Links and sources

- For general information on electronic commerce, including some legal perspectives, see the reports of the Information Highway Advisory Committee at <http://strategis.ic.gc.ca/SSG/ih01015e.html>. U.S. material appears in the President's report on the Global Information Infrastructure <http://www.whitehouse.gov/WH/New/Commerce/>
- The American equivalent of the ULCC, the National Conference of Commissioners on Uniform State Laws (NCCUSL), has a parallel project on the law of electronic contracting. Its early materials can be found at NCCUSL's

site, <http://www.law.upenn.edu/library/ulc/uecicta/ecomemo.htm>, and <http://www.law.upenn.edu/library/ulc/uecicta/ecom.htm>.

- Interesting material in support of the NCCUSL project can be found at the ABA site, <http://www.abanet.org/buslaw/cyber/nccusl.html>. More material on electronic commerce is at the Law of Commerce in Cyberspace subcommittee's home page, same address to /cyber/home.html. Other relevant ABA materials are in the Science and Technology Section's Electronic Commerce material at <http://www.abanet.org/scitech/ec/home.html>.
 - NCCUSL has also been revising the Uniform Commercial Code to account for electronic commerce. The Upenn Web site has drafts of articles 1, 2, 2B and 9. Earlier work has revised articles 5 and 8 and created 4A on electronic funds transfers.
 - The United Nations Working Group on Electronic Commerce is working on digital signatures. The report of the last meeting, held in February 1997, is available only on paper so far.
20. Other work is being done in other countries, including the United Kingdom, Germany, Denmark, Japan and Singapore. International organizations such as the OECD, the European Union, and the International Chamber of Commerce are also active - August 1997