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# Disparate Impact of Electronic Signature Legislation on Indigent Californians

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# Disparate Impact of Electronic Signature Legislation on Indigent Californians

Benjamin Channing Palmer\*

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## I. INTRODUCTION

Society has not yet equated an electronic signature with a binding contract,<sup>1</sup> while the law generally has.<sup>2</sup> The disparity between the legal and societal conceptions of agreements is most apparent with indigent persons who have not traditionally had access to electronic resources.<sup>3</sup> California's adoption of the Uniform Electronic Transactions Act ("UETA")<sup>4</sup> disparately impacts those in the indigent population who do not have access to electronic resources.<sup>5</sup> Increasingly, governmental and business services are providing online transactions, leaving behind those without access to the Internet.<sup>6</sup>

Commissioned by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), the UETA was completed in 1999.<sup>7</sup> The legislation was intended "to remove barriers to e-commerce by establishing the legal equivalence of electronically signed documents to manually signed paper agreements."<sup>8</sup> Numerous states enacted the UETA.<sup>9</sup> Congress subsequently enacted the Electronic Signature in Global and National Commerce Act ("E-SIGN") in 2000 to pre-empt state laws regarding electronic contracts that do not conform with the UETA.<sup>10</sup> California, the first state to adopt the UETA, enacted the model legislation with "very substantial amendments to the official text."<sup>11</sup>

The general effect of both E-SIGN and the UETA is to codify the legality of contracts made through electronic means.<sup>12</sup> Traditionally, certain social groups

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1. Jamie Lewis, *Law Alone Won't Pave Way for Digital IDs; It Takes Practice*, INTERNETWEEK, July 17, 2000 at 31, available at 2000 WL 8232850 (copy on file with the *McGeorge Law Review*).

2. See *infra* Part II.B (discussing the Uniform Electronic Transaction Act (UETA)).

3. See *infra* Part IV.C (discussing problems related to contract formation).

4. See Ian A. Rambarran, *I Accept, But Do They? . . . The Need for Electronic Signature Legislation on Mainland China*, 15 TRANSNAT'L. LAW. 405, 416 (2002) (discussing California's progress in enacting the UETA).

5. See *infra* Part III.A (discussing California's indigent population generally).

6. See *infra* Part III.B (discussing disadvantages of electronic signature legislation for indigent persons).

7. Kenneth M. Block & Jeffrey B. Steiner, *Electronic Closings: E-SIGN's Time Has Not Yet Come*, N.Y.L.J., Jan. 16, 2002 at 5, available at WL 1/16/2002 N.Y.L.J., (col. 2) (copy on file with the *McGeorge Law Review*).

8. *Id.*

9. Brad Biddle, *A Short History of "Digital Signature" and "Electronic Signature" Legislation*, in WEB SECURITY AND COMMERCE (2d. ed., O'Reilly ed., 2001) available at <http://bradbiddle.com/history.html> (Aug. 26, 2001) (copy on file with the *McGeorge Law Review*).

10. Block & Steiner, *supra* note 7, at 5.

11. Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA*, 56 BUS. LAW 293, 296 (2000).

12. See 15 U.S.C.A. § 7001(a)(1) (West 2004) (stating that a "signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form"); UNIF. ELEC. TRANSACTIONS ACT (UETA) § 7 (1999), at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.pdf> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*). The act states:

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

have lacked access to electronic resources.<sup>13</sup> As government agencies and businesses take advantage of the cost benefits relating to online business transactions, individuals within these groups will lack access to the electronic contracts available online. Additionally, these individuals, even if they were to access electronic contracts, may not possess the requisite intent to enter into these particular contracts since the individuals might not equate an electronic signature with its physical counterpart.<sup>14</sup> This may result in either individuals inadvertently binding themselves to electronic contracts or cause the contracts to fail due to lack of intent.

The current disparity between the legal idea of a signature or contract and that of society is at the root of this issue.<sup>15</sup> Society has shown its ability to quickly adapt its mindset in areas relating to the electronic realm.<sup>16</sup> Due to the prevalence of electronic contracting,<sup>17</sup> societal or personal experience is likely to remedy any disparity that does exist in the near future.

## II. BACKGROUND—ADAPTING TO A DIGITAL CONTRACT MEDIUM

Prior to the passage of either a version of the UETA by a state or the federal adoption of E-SIGN, “courts could not readily accept electronic signatures or computer transactions as binding contractual events in large part because of the limitations of the Statute [of Frauds].”<sup>18</sup> The Statute of Frauds, originating in Great Britain in 1677,<sup>19</sup> requires that certain agreements be in writing in order to

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(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

13. According to the August 2000 Census, only 19% of those households with an income under \$25,000 had access to the Internet while 79% of those with an income greater than \$75,000 had Internet access. ERIC C. NEWBURGER, U.S. CENSUS BUREAU, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES: AUGUST 2000, at 3, at <http://www.census.gov/prod/2001pubs/p23-207.pdf> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

14. See *infra* Part IV.C (discussing contract problems related to offer and acceptance).

15. See *infra* Part IV (discussing the idea that society does not equate a handwritten signature with an electronic signature).

16. See Part IV.D (discussing society’s change in behavior in response to the Kazaa lawsuits).

17. See Alex Pham, *Women Take Lead in Filling Online Carts as More Pick PCs Over Shopping at Malls*, L.A. TIMES, Jan. 7, 2004, at C1, available at 2004 WL 55884587 (copy on file with the *McGeorge Law Review*) (finding that “[i]n all of 2003, U.S. online retail sales grew about 28% to \$52.6 billion from \$41.2 billion in 2002. Analysts expect the double-digit growth rate of online retail sales . . . to continue for years”).

18. Michael Dessent, *Browse-Wraps, Click-Wraps and Cyberlaw: Our Shrinking (Wrap) World*, 25 T. JEFFERSON L. REV. 1, 2 (2002). This statement should be modified to include those states, such as California, that had previously adopted the UETA. See UNIF. ELEC. TRANSACTIONS ACT § 7 (1999), at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.pdf> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*) (stating that a “record or signature may not be denied legal effect or enforceability solely because it is in electronic form”).

19. Anne E. Melley et. al., *Statute of Frauds*, 72 AM. JUR. 2D *Statute of Frauds* § 1 (2001).

be enforceable.<sup>20</sup> The Uniform Commercial Code specifically codified the writing requirement for one of those contract forms,<sup>21</sup> and individual states have generally “[adopted] the statute . . . by . . . express re-enactment of some or all of its provisions, frequently with variations of language or wording.”<sup>22</sup>

#### A. Contracts Prior to the Uniform Electronic Transactions Act

Since traditional statutes did not expressly recognize electronic signatures for contracts,<sup>23</sup> individuals using these electronic means faced a degree of uncertainty<sup>24</sup> as to whether their contracts were enforceable.<sup>25</sup>

Several courts prior to the enactment of E-SIGN enforced “click-wrap contracts,”<sup>26</sup> as seen in *Hotmail Corp. v. Van\$ Money Pie Inc.*<sup>27</sup> Many of these cases focused on forum selection clauses in the click-wrap agreements.<sup>28</sup>

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20. RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981). Traditionally, the following contracts must be in writing:

1. “a contract of an executor or administrator to answer for a duty of his decedent”
2. “a contract to answer for the duty of another”
3. “a contract made upon consideration of marriage”
4. “a contract for the sale of an interest in land”
5. “a contract that is not to be performed within one year from the making thereof”
6. “a contract for the sale of goods for the price of \$500 or more”
7. “a contract for the sale of securities”
8. “a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond \$5,000 in amount or value of remedy”.

21. See U.C.C. § 2-201 (1999) (referring to “contract[s] for the sale of goods [with a] price of \$500 or more”).

22. Melley et. al., *supra* note 19, at § 2.

In some states, the statute is regarded as a part of the common law of the state or has been made effective in the state by reason of a state constitutional provision. However, elsewhere, the English statute is usually not considered as extending to this country and is of force here only by virtue of its adoption by the legislatures of the several states, directly or indirectly.

*Id.* (citations omitted).

23. See U.C.C. § 1-201(46) (1999) (stating that “[w]ritten’ or ‘writing’ includes printing, typewriting or any other intentional reduction to tangible form”).

24. This uncertainty is reduced by E-SIGN or the adoption in the respective state of the UETA.

25. Since an item qualifies as a writing under the U.C.C. if it can be “intentional[ly] reduc[ed] to tangible form,” whether the electronic contract/signature would be upheld depends on the interpretation of “tangible form” by the judge. U.C.C. § 1-201(46).

26. Click-wrap contracts “are formed online, usually by clicking the cursor on a box marked ‘I Agree.’ [They] often contain the same provisions as shrink-wrap licenses [and appear] when a consumer purchases a product over the Internet.” RICHARD RAYSMAN ET AL., *EMERGING TECHNOLOGY: FORMS & ANALYSIS* § 4.06 [3] (2003).

27. *Hotmail Corp. v. Van\$ Money Pie Inc.*, No. C-98 JW PVT ENE, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998); see also *Caspi v. The Microsoft Network, L.L.C.*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (upholding a forum selection clause contained in a click-wrap agreement because “in any sense that matters, there is no significant distinction [between electronic and paper agreements]”).

28. See, e.g., *Caspi*, 732 A.2d at 532 (stating that the medium, electronic versus print did not matter in terms of the selection clause since “plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement”).

Regarding the electronic medium, the court in *Caspi v. The Microsoft Network, L.L.C.* commented that the case differed in the “medium used, electronic versus printed; but, in any sense that matters, there is no significant distinction.”<sup>29</sup>

Additionally, “e-mail [was also used to form contracts], without apparent concern [over whether] these agreements could be invalidated purely because the transactions were not consummated through use of a formal paper document and handwritten signature.”<sup>30</sup> Concerns as to enforceability would lead “contracting parties to check the relevant statutes and jurisdictions to see if their electronic transactions will be considered valid,” undoubtedly expending time and money.<sup>31</sup> Essentially, this uncertainty relates back to the Statute of Frauds requirement that “a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties.”<sup>32</sup> A writing must also be “signed by the party against whom enforcement is sought or by his authorized agent or broker.”<sup>33</sup> The continued growth of the Internet furthers the demand for legislative or judicial action.

### B. *Uniform Electronic Transactions Act (UETA)*

Prior to introduction of the UETA, various states enacted their own electronic signature legislation in order to add certainty to online transactions within their respective states.<sup>34</sup> Legislatures initially employed two different approaches to deal with the problem of authenticating electronic agreements. The first solution, adopted by Utah in 1995, was technology-specific.<sup>35</sup> The second solution, advanced by the UETA and E-SIGN, was technology-neutral and allowed for later development of verification techniques.<sup>36</sup> Differing state

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29. *Id.*

30. Jeanne R. Ramage, *Slow to Sign Online*, PA. LAW., Sept.-Oct. 2001, at 32-33.

31. Sarah Wood Braley, *Why Electronic Signatures Can Increase Electronic Transaction and the Need for Laws Governing Electronic Signatures*, 7 L. & BUS. REV. AM. 417, 423 (2001).

32. U.C.C. § 2-201(1) (1999).

33. *Id.*

34. See UTAH CODE ANN. §§ 46-3-101 to -102 (1998) (containing Utah’s Digital Signature Act), accord MINN. STAT. ANN. §§ 325K.001,.02 (West 2004) (explaining the purpose and construction of Minnesota’s Electronic Authentication Act); WASH. REV. CODE ANN. § 19.34.010 (West 1999) (explaining the purpose and construction of the Washington Electronic Authentication Act).

35. “Technology-specific” refers to specific statutory requirements for proper digital signature verification. See JULIAN S. MILLSTEIN ET. AL., *DOING BUSINESS ON THE INTERNET: FORMS AND ANALYSIS* § 8.05[4][c][i].

Utah’s Digital Signature Act . . . provides for use of digital signatures that are based on public-key cryptography. In contrast, California’s digital signature law applies only to correspondence with public entities and, unlike the Utah digital signature law, does not prescribe a particular technology by which electronic messages can be signed or certified.

*Id.*

36. D. Benjamin Beard, *Removing Barriers to E-Commerce: The Uniform Electronic Transactions Act*, SF06 A.L.I.-A.B.A. 137, 143 (2000) (stating that the UETA was a minimalist approach, attempting to “[a]void

standards created difficulty for those electronically transacting business across state jurisdictions.<sup>37</sup>

### 1. History

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") "is comprised of lawyers, judges, legislators, and law professors, who are appointed by state governments . . . to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical."<sup>38</sup> Recognizing the need for uniformity across the states,<sup>39</sup> the NCCUSL approved the UETA in July 1999.<sup>40</sup> The UETA "is an electronic record and signature validation statute. It is an 'overlay' statute [that] leaves existing law in place while providing that records, signatures and contracts may be electronic."<sup>41</sup>

Since the UETA is merely advisory, state legislatures must enact specific legislation for it to gain effect.<sup>42</sup> While numerous state legislatures, including California,<sup>43</sup> passed a version of the UETA,<sup>44</sup> there was still a lack of federal uniformity. In an effort to remove confusion, Congress passed E-SIGN on June 30, 2000.<sup>45</sup> E-SIGN contains similar provisions to the UETA<sup>46</sup> and expressly pre-

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rules that assume a particular view of the future" by insuring that "[n]o rules [were] tied to a particular technology").

37. Jonathan E. Stern, *The Electronic Signatures in Global and National Commerce Act*, 16 BERKELEY TECH. L.J. 391, 394 (2001) (stating that "[a]lthough most states that . . . adopted . . . electronic signature statute[s] eventually implemented a technology-neutral approach, businesses wishing to execute electronic contracts continued to lack certainty that their contracts would be recognized nationwide").

38. National Conference of Commissioners on Uniform State Laws (NCCUSL), *NCCUSL Web*, NCCUSL, at <http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=1&tabid=9> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

39. See Beard, *supra* note 36, at 140 (citing statistics of current Internet users and their projected growth).

40. *Id.*

41. *Id.* at 141.

42. *Id.* at 140.

43. As discussed subsequently, California enacted the UETA with substantial changes. Consumer Union, *The California Exemptions to UETA*, at <http://www.consumersunion.org/finance/9991wc00.htm> (last visited Oct. 16, 2003) [hereinafter *California Exemptions*] (copy on file with the *McGeorge Law Review*).

44. Beard, *supra* note 36, at 139 (stating that at the time of publication the UETA had been "[e]nacted in 18 STATES: AZ, CA, FL, ID, IN, IA, KS, KY, ME, MD, MN, NE, OH, OK, PA, SD, UT, VA" and introduced in 10 others).

45. Nathan A. Huey, *E-Mail and Iowa's Statute of Frauds: Do E-Sign and UETA Really Matter?*, 88 IOWA L. REV. 681, 688 n.30 (2003) (citing a statement from Senator Abraham stating that "[t]he purpose of [E-SIGN] is to try to make all [electronic] agreements valid if they fit or meet some parameters, identical to the ones the States are moving toward; a uniform system. In short, we believe this bill will be an interim approach until the States have passed a model uniform act"). Additionally, promoters noted that "barring preemption, it could take many years before states independently enact uniform laws [concerning electronic contracts]." Stern, *supra* note 37, at 399.

46. See, e.g., 15 U.S.C.A. §7001(a)(1) (West 2004) (stating that "signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form"); compare UETA, *supra* note 12 (stating in Section 7 that "[a] record or signature may not be

empties state law concerning electronic signatures and contracts unless the state law “constitutes an enactment or adoption of the Uniform Electronic Transactions Act.”<sup>47</sup> Under these acts, an electronic signature is an “electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”<sup>48</sup> Differences continue to exist between the UETA and E-SIGN. For example, unlike the UETA, E-SIGN does not require a prior agreement to use electronic means.<sup>49</sup> The end result is that a version of either UETA or E-SIGN is in effect in every state. Thus, electronic agreements are enforceable throughout the country.<sup>50</sup>

## 2. California’s Adoption of the UETA

California, the first state to adopt the UETA, enacted the legislation with many exceptions.<sup>51</sup> Consumer advocates promoted the exemptions to protect consumers from the broad wording of the UETA.<sup>52</sup> As a result, it was more difficult for businesses to conduct electronic transactions.<sup>53</sup> The exemptions take three different forms. A general exemption is given for statutes requiring that specific text be separately signed.<sup>54</sup> Next, statutes requiring notice of cancellation must provide for the electronic delivery of both the notice and cancellation.<sup>55</sup> Finally, certain specific statutes are exempt because electronic notice is presumed to be less sufficient than a written notice.<sup>56</sup>

Because of these exemptions, some believe that E-SIGN partially preempts California’s version of the UETA.<sup>57</sup> There has been no case specifically holding

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denied legal effect or enforceability solely because it is in electronic form . . . [and] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation”).

47. 15 U.S.C.A. § 7002(a)(1) (West 2004).

48. *Id.* § 7006(5); *see also* UETA, *supra* note 12 (defining electronic signature as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record”).

49. Raymond T. Nimmer, *Electronic Signatures and Records: The New US Perspective*, 17 *COMP. & INTERNET LAW.* 8, 22 (2000).

50. Biddle, *supra* note 9 (stating that “the law that applies to all e-signatures . . . is either E-SIGN (in states that have not enacted UETA), or UETA (in states that have enacted conforming versions of UETA)”).

51. Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA*, 56 *BUS. LAW* 293, 296 (2000).

52. Consumer Union, *Uniform Electronic Transactions Act: Proposed Amendments to Protect Consumers*, at <http://www.consumersunion.org/finance/uetawc899.htm>. (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

53. Wittie & Winn, *supra* note 51, at 296.

54. *California Exemptions*, *supra* note 43.

55. *Id.*

56. *Id.*

57. *See* Julie R. Caggiano, *Electronic Signatures—Esign of the Times*, 56 *CONSUMER FIN. L.Q. REP.* 142, 146 (2002) (“ESIGN generally preempts state law . . . [A] state cannot exempt from its enactment of the UETA specific state statutes, such as California did when it enacted a version of the UETA that departed significantly from the NCCUSL version of the UETA . . . California revisions to the UETA were a significant reason for ESIGN, and ESIGN overrides these California amendments by providing that the state’s enactment

that California's specific exemptions are pre-empted, and the California exemptions remain within the California Civil Code.<sup>58</sup> Contracting individuals must choose whether to comply with California's exemptions to the UETA, incurring added expense, or to follow E-SIGN under the presumption that California's UETA exemptions have been pre-empted.<sup>59</sup> Indigent persons face a similar concern whether or not to use E-SIGN.<sup>60</sup>

### 3. Cases Applying California Civil Code Section 1633 and E-SIGN

There are few published opinions that apply California's version of the UETA.<sup>61</sup> The only case<sup>62</sup> applying California Civil Code section 1633.7<sup>63</sup> arises out of a New York court applying California law to determine contract formation.<sup>64</sup>

*Specht v. Netscape Communications Corporation* was a class action suit brought by Netscape users alleging violation of the Computer Fraud and Abuse Act (18 U.S.C. §1030) on the part of Netscape's SmartDownload program, which sent private information about downloaded files back to Netscape.<sup>65</sup> The dispute concerned the validity of an arbitration agreement contained in a submerged license agreement. Users were invited to click "Download" to install SmartDownload, and "[t]he sole reference to SmartDownload's license terms . . . [were] located in text that would have become visible . . . only if they had scrolled down to the next screen."<sup>66</sup>

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of the UETA is preempted to the extent it is inconsistent with Titles I and II of E-SIGN."); Stephanie Lillie, *Will E-SIGN Force the States to Adopt the UETA?*, 42 JURIMETRICS 21, 30 (2001) (commenting that "California adopted more than fifty exceptions to the use of E-SIGNatures, thereby . . . frustrating the purpose of E-SIGN. Consequently, E-SIGN should preempt the California version of UETA").

58. See CAL. CIV. CODE. §§ 1633.1–17 (West Supp. 2004) (containing California's adoption of the UETA); Harry B. Endsley and Associates, *Comparing the California and Model Uniform Electronic Transactions Act (UETA)*, at [http://www.intlawyers.com/E-Commerce/ueta\\_comparison.htm](http://www.intlawyers.com/E-Commerce/ueta_comparison.htm) (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*) (displaying California's version of the UETA side by side with the Model UETA).

59. The added expense would result from the exemption forcing those contracting to use paper instead of an electronic format. For example, California's UETA states that an "electronic record may not be substituted for any notice that is required to be sent pursuant to Section 1162 of the Code of Civil Procedure." Individuals choosing to ignore this provision, which is an additional exception to the UETA, would take a calculated risk in testing whether the law has actually been pre-empted. CAL. CIV. CODE. § 1633.3(c) (West Supp. 2004).

60. Both California's version of the UETA and E-SIGN equate electronic signatures with binding contracts, the main focus of the subsequent discussions. The California provisions remain as markers in the development of electronic signature laws. See *infra* Part II.B.2 (discussing the application of California's electronic signature legislation).

61. Westlaw retrieval of California Civil Code section 1633.7, which codifies the "[l]egal effect or enforceability of electronic record, signature, or contract," shows two opinions from California's Attorney General and one actual case. CAL. CIV. CODE. § 1633.7 (West Supp. 2004).

62. Based on Westlaw search of cases citing to California Civil Code section 1633.7 as of February 8, 2004. At the time of publication, one additional case referenced section 1633.7. See *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed. Cir. 2005).

63. California Civil Code section 1633.7 states that electronic records and signatures satisfy traditional signature requirements. CAL. CIV. CODE § 1633.7 (West Supp. 2004).

64. *Specht v. Netscape Comm. Corp.*, 306 F.3d 17 (2d Cir. 2002).

65. *Id.* at 21–22.

66. *Id.* at 23.

The court held that if users are urged to “Download now,” reference to a license agreement on a “submerged screen is not sufficient to place consumers on inquiry or constructive notice.”<sup>67</sup> Thus, even though “California contract law measures assent by an objective standard that takes into account . . . what the offeree said, wrote, or did and the transactional context[.]” the end users were not held to the arbitration agreement.<sup>68</sup>

California’s Attorney General opinions provide some guidance for California Civil Code section 1633.7. Focusing on the lack of conflict between California’s UETA, federal E-SIGN and California Government Code sections, California’s Attorney General found that “[c]ounty recorders may not implement electronic recordation of documents in their respective jurisdictions other than in the counties of Orange and San Bernardino.”<sup>69</sup> The decision compared the general language of the UETA<sup>70</sup> with specific language in the California Government Code, which allows digitized images in the two counties.<sup>71</sup> Additionally, the Attorney General found no statutory conflict between E-SIGN and California Government Code sections.<sup>72</sup> Although not a court opinion, “formal legal opinions of the Attorney General have been accorded ‘great respect’ and ‘great weight’ by the courts.”<sup>73</sup>

There are few related cases from other states that apply or reference E-SIGN.<sup>74</sup> One reason for this is that “[t]he act does not purport to be applicable to transactions that occurred before its effective date, and, not being procedural . . . it is presumed not to apply retroactively.”<sup>75</sup> Jurisdictions generally hold e-mail contracts valid absent reliance upon E-SIGN or state statutes,<sup>76</sup> although these

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67. *Id.* at 32.

68. The result is interesting because, by Netscape’s perspective, the user had apparently assented to a license agreement. *Id.* at 30.

69. 85 OP. CAL. ATT’Y GEN. 181 (2002). The opinion limited electronic recordation to Orange and San Bernardino Counties due to California Government Code sections that allow electronic recordation in only those two counties. Nothing in E-SIGN or California’s UETA contradicted this limitation. *Id.* at 185.

70. See CAL. CIV. CODE. § 1633.3 (c) (West Supp. 2004) (containing the only reference in California’s UETA to a county recorder: “Nothing in this subdivision shall be construed to prohibit the recordation of any document with a county recorder by electronic means”).

71. CAL. GOV. CODE § 27279.1 (West 2004) (stating that “[t]he recorders of San Bernardino County and Orange County may accept, in lieu of a written paper document, a digitized image of a recordable instrument” contingent upon meeting certain conditions).

72. The court made no mention of whether California’s UETA was generally pre-empted by E-SIGN, but analyzing it under both statutes ensured a correct decision regardless of possible pre-emption. 85 OP. CAL. ATT’Y GEN. 181 (2002).

73. Office of the Attorney General, *Attorney General Legal Opinions*, at <http://caag.state.ca.us/opinions/> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

74. Westlaw search for 15 U.S.C.A. § 7001 (E-SIGN) shows a combination of six citing cases under “Notes of Decisions” and “Additional Citing Cases” as of the date of writing.

75. *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295 (7th Cir. 2002).

76. See *id.* at 296 (concluding “without having to rely on [E-SIGN] that the sender’s name on an e-mail satisfies the signature requirement of the statute of frauds”); *Roger Edwards, L.L.C. v. Fiddes & Son, Ltd.*, 245 F. Supp. 2d 251, 261 (D. Me. 2003) (finding that “an e-mail can fulfill the statutory requirements of a signature” based on Maine’s common law recognition that a binding signature may take any proper form so long as the

statutes add further strength and guarantee a decision validating electronic signatures.

### III. CALIFORNIA'S INDIGENT POPULATION AND ACCESS TO ELECTRONIC RESOURCES

Electronic contracts, now enforceable through California Civil Code section 1633.7 or E-SIGN, provide businesses and governments with an efficient means to transact with consumers.<sup>77</sup> By their nature, electronic transactions require access to a computer or related resources. For those lacking these electronic resources, there is no way to access the increasing number of available electronic agreements.<sup>78</sup>

#### A. Overview

Although there are other barriers to gaining access to electronic resources,<sup>79</sup> lack of financial ability to purchase the requisite equipment stands in the way of many indigent Californians.<sup>80</sup> Since the majority of electronic contracts occur via the Internet, ability to access the Internet is essential in order to take advantage of these agreements.

##### 1. Statistics

Disparities exist between different social and economic groups and their access to computers and the Internet.<sup>81</sup> According to the 2000 Census,<sup>82</sup> forty-two

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requisite intent is present); *but see* *Toghiyany v. Amerigas Propane, Inc.*, 309 F.3d 1088, 1091 (8th Cir. 2002) (finding that an "enforceable contract cannot be inferred from the writings supplied" because the various emails neither "contain the essential durational element nor are signed").

77. *See supra* Part II.B.2 (concerning California's adoption of the UETA); *see also* RAYSMAN ET. AL., *supra* note 26 (stating that recognition of "electronic signatures is . . . expected to reduce transaction costs"); Laura Bailey, *Small Biz Tentative about Testing Web Waters*, CRAIN'S DET. BUS., Mar. 3, 2003, at 29 (finding that "online transactions cost about 65 percent less than transactions by phone, fax or mail").

78. *See infra* Part III.B (discussing undergraduate applications and tax filing programs available on the Internet).

79. *See That's Life*, CHRISTIAN SCI. MONITOR, Feb. 18, 2004 at 13 (noting that rural residents "lag behind their urban counterparts" in accessing the Internet partly due to lack of choice in selecting an Internet provider).

80. *See id.* (discussing the number of indigent households online. Although rural areas may lack the opportunity to choose between Internet providers, Internet access is still a viable option).

81. *See* Allen S. Hammond, *The Digital Divide in the New Millennium*, 20 CARDOZO ARTS & ENT. L.J. 135, 148 (2002):

[M]ajor disparities in computer ownership and Internet access [exist] in at least thirty-two percent of the nation's states . . . [including] substantial disparity between Americans earning \$ 25,000 per year and those earning more . . . single-female-headed households and other American households . . . dial-up access and broadband deployment in rural areas of the nation as compared to affluent urban and suburban areas . . . education and high-tech skill levels between African, Asian and Latino Americans on the one hand, and European Americans on the other.

percent of households nationwide had at least one member who accessed the Internet from home.<sup>83</sup> For those households with an annual income greater than \$75,000, approximately seventy-nine percent accessed the Internet from home.<sup>84</sup> In contrast, only nineteen percent of households with incomes below \$25,000 reported home Internet use.<sup>85</sup>

Similar disparities in computer and Internet access exist among different minority groups. Asian and Pacific Islander households, with fifty-six percent reporting access to the Internet, had the highest percentage of access among ethnic groups.<sup>86</sup> Only twenty-four percent of African American and Hispanic households reported access to the Internet, while forty-four percent of White households had such access.<sup>87</sup>

## 2. *Need for Basic Education and Literacy*

Lack of education combined with low household income further frustrates access to computers and the Internet.<sup>88</sup> Among the lowest percentages of Internet access rates are households where the level of educational attainment is at or below a high school diploma.<sup>89</sup> According to the California Department of Education, thirty-three percent of California children will not finish high school.<sup>90</sup> Assuming a correlation between educational level and earned income capacity, children in these categories are more likely to become part of California's indigent population.<sup>91</sup> If the statistics cited earlier<sup>92</sup> remain consistent

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82. Note that the following Census information relates to the nation as a whole and not particularly California. California is assumed to follow the general pattern seen nationwide in terms of disparity of resources. See generally NEWBURGER, *supra* note 13 (summarizing nationwide computer and Internet use in the United States).

83. *Id.* at 2.

84. *Id.*

85. *Id.*

86. *Id.* at 3.

87. The statistics should be noted in relation to the aforementioned national average of forty-two percent of households having Internet access at home. *Id.*

88. Both low income and low educational level are associated with lack of access to the Internet. See *supra* text accompanying notes 82-86; see also *infra* text accompanying notes 89-93.

89. Only twelve percent of households with an educational attainment of less than a high school diploma had Internet access at home; thirty percent of households with a high school diploma or equivalent as their highest educational level had similar access. NEWBURGER, *supra* note 13, at 3.

90. California Literacy, *Literacy Statistics*, at [http://www.caliteracy.org/resources/referrals/literacy\\_statistics/](http://www.caliteracy.org/resources/referrals/literacy_statistics/) (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

91. Such a link has been conventionally assumed, although some emphasize that the correlation does not indicate causation. See Dan Seligman, *The Story They All Got Wrong*, FORBES, Nov. 25, 2002 at 126 (stating that "we may not conclude that one of the events being measured is causing the other event . . . [L]egions of reporters [take] it for granted that the correlation between level of educational attainment and level of income is clear and obvious cause-and-effect").

92. See *supra* note 89 and accompanying text (referring to the twelve percent of households with an educational attainment of less than a high school diploma that report home Internet access).

over time,<sup>93</sup> these children will be less likely to have home Internet access, and therefore, likely will be unable to take advantage of online resources when they reach age of majority.

The Internet<sup>94</sup> is primarily a text-based medium that requires basic literacy skills to navigate. According to the National Adult Literacy Survey, “[t]wenty-four to [twenty-six] percent of . . . California [survey respondents] demonstrated skills in the lowest level of prose, document, and quantitative proficiencies.”<sup>95</sup> In order to attract users to the Internet, web developers need to accommodate these individuals by providing image-based web sites.<sup>96</sup> Unfortunately, image intensive websites require more bandwidth than traditional text-based sites; thus requiring a faster, more expensive Internet connection.<sup>97</sup> In a study by the Department of Commerce, “[a] significantly higher percentage of minority and low-income households reported that Internet access was cost prohibitive. [Additionally], cost ranked highest among reasons given by those who discontinued Internet use.”<sup>98</sup> Public assistance programs could ease this financial burden and help provide access to the Internet. Nonetheless, other problems may arise in regards to electronic agreements.<sup>99</sup>

#### B. *Direct Effect of the Electronic Signature Legislation on Indigent Californians*

Online individual and business uses have increased dramatically over the past 10 years.<sup>100</sup> Many large businesses and government entities now have an

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93. The statistics are unlikely to remain consistent however, due to the large rate of growth in Internet use among those in the lowest income bracket. See National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at <http://www.ntia.doc.gov/ntiahome/dn/html/Chapter2.htm> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*) [hereinafter *A Nation Online*] (finding that Internet use in households making under \$15,000 grew at a rate more than double that of households with income over \$75,000).

94. The terms "Internet" and "World Wide Web" are synonymous.

95. LYNN B. JENKINS & IRWIN S. KIRSCH, EXECUTIVE SUMMARY FROM ADULT LITERACY IN CALIFORNIA (1994), available at [http://nces.ed.gov/naal/pdf/state\\_summaries/California.pdf](http://nces.ed.gov/naal/pdf/state_summaries/California.pdf) (copy on file with the *McGeorge Law Review*).

96. See Amelia Newcomb, *The Backbone of High Tech: Literacy*, CHRISTIAN SCI. MONITOR, Feb. 13, 2001, at 11 (stating that “22 percent of US adults can’t read well . . . . [A] lot of people can’t negotiate a map, can’t peruse a paper. And they can’t read what’s on the Internet”).

97. Broadband Internet connections may prove to be too costly an investment for most indigent households. See National Telecommunications and Information Administration, *A Nation Online*, *supra* note 93 (finding that due to broadband being “more costly than dial-up services, the proportion of Internet users subscribing to these . . . services varies in expected ways, with individuals in high-income households . . . having higher subscribership rates than individuals in lower income households”).

98. DEPARTMENT OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE, PART III, July 8, 1999, at <http://www.ntia.doc.gov/ntiahome/ftn99/contents.html> (copy on file with the *McGeorge Law Review*).

99. See Part IV (discussing the disparity between legal and societal conception of signatures).

100. See Internet Systems Consortium, Inc., *ISC Internet Domain Survey*, at <http://www.isc.org/index.pl?/ops/ds/> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*) (documenting the growth of registered domain names from 2,217,000 in January 1994 to 233,101,481 in January 2004).

online presence, while smaller businesses lag behind due to initial costs.<sup>101</sup> As the initial costs decrease, more small businesses and organizations can be expected to utilize the Internet.<sup>102</sup> The impact of electronic signature legislation depends on which resources are available exclusively through the Internet.<sup>103</sup>

### 1. Online Resources that Disadvantage Those Without Internet Access

Beginning in Fall 2005, the University of California (“UC”) and California State University (“CSU”) “will require all undergraduate applicants to submit their applications online.”<sup>104</sup> The online application process is designed to reduce processing errors and promote efficiency.<sup>105</sup> The university systems will accept paper applications under limited circumstances; however, the paper application is more procedurally cumbersome.<sup>106</sup> Paper applications may be more susceptible to “errors . . . made by students or by admissions office employees who type information from [those] applications into computers.”<sup>107</sup> If transcription errors negatively affect the admission selection process, the negative impact would be greatest for applicants already less likely to attend higher education.<sup>108</sup>

In an alliance between government and private business, the Internal Revenue Service (“IRS”) has partnered with Free File Alliance, LLC to provide “[f]ree online tax preparation and online filing.”<sup>109</sup> The IRS has agreed not to develop its own free electronic filing program, so long as participating companies

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101. See Laura Bailey, *Small Biz Tentative About Testing Web Waters*, CRAIN’S DET. BUS., Mar. 3, 2003 at 29, available at 2003 WL 9533987 (copy on file with the *McGeorge Law Review*) (considering a cost of at least \$40,000 for a good interactive web site, “fewer than half of small businesses that launched Web sites enjoyed any revenue gains as a result”).

102. Companies such as Ebay are providing forums for small businesses to showcase their products without incurring the costs that would be associated with generating their own web site. See Elizabeth Doran, *Ebay Connects with SBA*, POST-STANDARD, July 27, 2003 at E2 (finding that “[s]mall-business owners and employees have a big presence on eBay. A recent survey . . . revealed that an [sic] about 20.4 million eBay users are employed in small businesses”).

103. Resources available only on the Internet are, by their nature, not available to those without Internet access.

104. University of California Office of the President, *CSU and UC Will Ask for Online Applications Next Year*, at <http://www.ucop.edu/news/archives/2003/sept15art1.htm> (Sept. 15, 2003) (copy on file with the *McGeorge Law Review*).

105. See *id.* (noting that “computer prompts and error checks help students complete applications online more accurately,” allowing more efficient application processing).

106. See *id.* (stating that “[s]tudents who are unable to apply online, can print a version of the application from the Web and submit it by mail; if they cannot print the application they can call CSU and UC admissions offices to request a printout”).

107. Stuart Silverstein, *Universities Pushing Online Applications; UC and Cal State Plan to Switch the Process to the Internet in 2005*, L.A. TIMES, Sept. 16, 2003, at B6.

108. This statement assumes that paper applications were used due to lack of electronic resources. Those without electronic resources are more likely to be in an economically or socially disadvantaged group. See Part III.A (discussing California’s indigent population’s access to electronic resources).

109. Internal Revenue Service, *Free File Home—Your Link to Free Online Filing*, at <http://www.irs.gov/efile/article/0,,id=118986,00.html> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

offer free filing for eligible taxpayers.<sup>110</sup> As with electronic university applications, electronic tax preparation and filing avoids “any errors . . . [IRS] personnel may make when processing forms.”<sup>111</sup> According to the IRS, “[t]he overall error rate for e-filed returns is less than [one] percent, versus [eighteen] to [twenty] percent for paper returns.”<sup>112</sup> Each electronic return must be signed with an electronic signature in order to facilitate regulation and enforcement by the IRS.<sup>113</sup> Each of the seventeen firms who have agreed to provide free electronic tax filing have different eligibility criteria.<sup>114</sup> Ironically,<sup>115</sup> firms like H&R Block “offer free filing to those earning \$34,000 or less.”<sup>116</sup> The goal of the IRS is to have eighty percent of taxpayers complete their tax returns electronically by 2007.<sup>117</sup> For those low-income tax payers without Internet access, free tax preparation and filing under the Free File Alliance program remains unavailable.<sup>118</sup>

At the state level, California’s Franchise Tax Board offers free state income tax filing for qualified California residents.<sup>119</sup> Single or married-but-filing-separately taxpayers must have an adjusted gross income of \$135,714 or less to qualify on the basis of income.<sup>120</sup> Otherwise qualified taxpayers may not be allowed to “e-file” if they have income from unusual sources, non-standard federal deductions, more than five deductions, or certain exemptions.<sup>121</sup> For those Californians who do not have Internet access, the Franchise Tax Board provides a free phone service called Telefile.<sup>122</sup> Telefile has more stringent requirements<sup>123</sup>

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110. Dan Mecoy, *IRS. Companies Team to Provide Free E-filing*, DAILY OKLAHOMAN, Feb. 2, 2003, at 1B.

111. Tami Lubby, *The Ease Of E-Filing/Millions of Taxpayers Prefer Filing by Computer to the Old-Fashioned Stamp*, NEWSDAY, Feb. 16, 2003, at F04.

112. *Id.*

113. See James Bryce Clark and Mara B. O’Connor, *Commercial Real Estate Financing 2003: What Borrowers & Lenders Need to Know Now*, 489 PRAT. L. INST. REAL EST. L. 169, 184 (2003) (stating that “since E-SIGN’s adoption, the U.S. Internal Revenue Service has been using simple Personal Identification Numbers (PINs) . . . [which] may be used to make the taxpayer’s official filings, and is deemed by the IRS to constitute a legal signature for all regulatory and enforcement purposes thereafter”).

114. Jennifer Corbett Dooren, *Ads Pop Up on Free Online Tax-Filing Services*, WALL ST. J., Apr. 3, 2003, at D2.

115. See Part III.A.1 (noting that those with lower incomes are less likely to be able to take advantage of the free filing opportunity due to their lack of resources).

116. Dooren, *supra* note 114, at D2.

117. *Id.*

118. Since Internet access is required to reach the members of Free File Alliance, LLC., lack of Internet resources results in lack of access to the Free File Alliance Program.

119. Unlike the Federal Government, the state itself is offering the free income tax filing and not a private company. See Franchise Tax Board, *Franchise Tax Board—2003 Netfile—Free e-file*, at <http://www.ftb.ca.gov/online/netfile/index.html> (last visited June 3, 2004) (copy on file with the *McGeorge Law Review*) (stating that it is “[d]esigned to allow millions of Californians to e-file their returns for free”).

120. *Franchise Tax Board—2003 Netfile Qualifications*, Franchise Tax Board, at <http://www.ftb.ca.gov/online/netfile/qualifications.html> (last visited June 3, 2004) (copy on file with the *McGeorge Law Review*).

121. See *id.* (listing the specific requirements for free electronic filing).

122. Franchise Tax Board, *Franchise Tax Board—Telefile*, at <http://www.ftb.ca.gov/individuals/Telefile/index.html> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

and is available only to those who “TeleFiled last year.”<sup>124</sup> For new taxpayers, the previous filing requirement prevents them from utilizing the free non-Internet tax filing service.<sup>125</sup> This requirement also demonstrates California’s general shift toward Internet-based services.<sup>126</sup> Additional California government services that are moving online include the services at Department of Motor Vehicles,<sup>127</sup> voter registration,<sup>128</sup> applications for unemployment insurance,<sup>129</sup> along with numerous others.<sup>130</sup>

Private businesses also utilize the Internet. Many businesses, such as Amazon.com, Buy.com and Overstock.com, have created only online storefronts.<sup>131</sup> Online travel websites, another group of businesses providing online only storefronts,<sup>132</sup> “give consumers direct access to bargains from airlines and online agencies.”<sup>133</sup> Once again, those low-income individuals who would

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123. See Franchise Tax Board, *Franchise Tax Board—Telefile General Information and Frequently Asked Questions*, at <http://www.ftb.ca.gov/individuals/Telefile/faq.html> (last visited June 3, 2004) (copy on file with the *McGeorge Law Review*) (listing the requirements to Telefile, which include income less than \$50,000 for those filing single, under age 65 and not blind, no adjustments to income, and income from one of four allowable sources).

124. *Id.*

125. New taxpayers would not have filed the previous year; therefore, access to Telefile would not be available. *Id.*

126. See *infra* text accompanying notes 127-30 (describing the California government services now available online). Since new taxpayers cannot participate in Telefile, along with those who did not file the previous year by Telefile, the number of persons eligible for Telefile can never increase and can only drop. *Id.*

127. See California Department of Motor Vehicles, *Online Services*, at <http://www.dmv.ca.gov/online/onlinevcvs.htm> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*) (listing available online services such as Vehicle Registration Renewal, Appointments and Online Traffic Payment).

128. California Secretary of State, *California Secretary of State—Elections Division—Online Voter Registration*, at <http://www.ss.ca.gov/elections/votereg1.html> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

129. Employment Development Department, *EDD—Notes on Browser Compatibility*, at <https://eapply4ui.edd.ca.gov/> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*).

130. The State of California’s home page currently contains a list of Online Services provided by the state. State of California, *Welcome to California*, at [http://www.ca.gov/state/portal/myca\\_homepage.jsp](http://www.ca.gov/state/portal/myca_homepage.jsp) (last visited May 10, 2005) [hereinafter *Welcome to California*] (copy on file with the *McGeorge Law Review*) (listing online services in the fields of Business; Consumers and Families; Education and Training; Environment and Natural Resources; Government; Health and Safety; Labor and Employment; Professional Licensing; and Travel and Transportation).

131. See Amazon.com, *Welcome*, at <http://www.amazon.com> (last visited Oct. 9, 2004) (copy on file with the *McGeorge Law Review*) (including no reference to an off-line storefront); Buy.com, *Over 2 Million Cool Products Direct to You*, at <http://www.buy.com> (last visited Oct. 9, 2004) (copy on file with the *McGeorge Law Review*) (including no reference to an off-line storefront); Overstock.com, *Save up to 80% very Day*, at <http://www.overstock.com> (last visited Oct. 9, 2004) (copy on file with the *McGeorge Law Review*) (including no reference to an off-line storefront).

132. Examples of online-only travel businesses include Expedia.com, Travelocity.com, Yahoo.com, Cheaptickets.com, and Priceline.com.

133. Michael Shapiro, *Booking Air Online With Ease; A Guide to Netting the Best Flights and Fares on the Web*, WASH. POST, Sept. 14, 2003, at P06.

appear to be most in need of bargains, may lack the Internet resources to access such Internet specials.<sup>134</sup>

## 2. Future Resources

As demonstrated by the State of California's main web page, California provides more and more traditional services in electronic form.<sup>135</sup> Select local courts currently provide online assistance for those filling out Family Law, Small Claims, Housing and Guardianship petitions.<sup>136</sup> The court's online system, called EZ Legal File, asks the appropriate legal questions and fills out relevant forms for the end-user.<sup>137</sup> Nonetheless, under EZ Legal File, the end user is required to print the forms and hand deliver physical copies to the courthouse.<sup>138</sup> Because other courts offer electronic filing of documents,<sup>139</sup> online submission of the completed forms appears to be the next logical step for EZ Legal File. There is no indication that the shift toward online transactions by government and private businesses will stop at any time.<sup>140</sup> As this shift continues, those without access to the Internet are deprived of these online resources.

## C. Solutions

To remedy the disparity in access to Internet resources among socio-economic groups, efforts must be made to provide low- and no-cost Internet access.<sup>141</sup> The Telecommunications Act of 1996<sup>142</sup> was designed to ensure that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas . . . have access to telecommunications and information services . . . that are reasonably comparable to . . . services provided in urban areas . . . at [reasonable] rates."<sup>143</sup> The Act requires telecommunications providers to "enhance . . . access to advanced telecommunications and information services for all

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134. See *supra* Part III.A.1 (noting that those in the lowest income bracket were least likely to report home Internet use).

135. See *Welcome to California*, *supra* note 130 (listing the current online services provided).

136. See Superior Court of California, County of San Mateo, *California Superior court EZ Legal File*, at <http://www.ezlegalfile.com/index.jsp> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*) (providing a list of legal areas from which to choose).

137. *Id.*

138. See *id.* (showing the steps in a diagram at the bottom of the web page).

139. Pacer Service Center, *PACER Service Center CM/ECF Home Page*, at <http://pacer.psc.uscourts.gov/cmecf/> (last visited May 10, 2005) (copy on file with the *McGeorge Law Review*) (listing among the current features the "[a]bility to file pleadings electronically with the court").

140. The above web sites contained no mention of reducing services available. No sources were found to indicate that businesses would abstain from Internet commerce in the future. See *supra* text accompanying notes 127-38 (detailing current Internet services).

141. This statement assumes that lack of access is related to cost of access.

142. 47 U.S.C.A. § 254 (West 2001).

143. *Id.* § 254(b)(3).

public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.”<sup>144</sup> By providing discount telecommunications rates for libraries and schools, those in impoverished areas may gain free access to the Internet through one of these public resources.<sup>145</sup> Programs such as the Telecommunications Act of 1996 may diminish the disparity in Internet access among indigent users.

As explored in Section IV, merely providing Internet access does not fully remove the disparity between socio-economic groups in the digital domain. Those who do gain access must be educated to equate digital actions with their physical counterparts.<sup>146</sup>

#### IV. DISPARITY BETWEEN LEGAL AND SOCIETAL CONCEPTIONS OF SIGNATURES

The general public has not yet adjusted to the digital medium and its related laws: “[S]ociety in general doesn’t understand digital signatures, so most people don’t equate them with written signatures . . . in the tried-and-true American way, it will take time and litigation to establish the necessary context for digital signatures.”<sup>147</sup> Because electronic signatures<sup>148</sup> and thus electronic contracts are now legally binding, problems will arise if society’s idea of a binding contract does not coincide with the legal reality.<sup>149</sup> For indigent persons, this phenomenon may be exacerbated due to lack of resources.<sup>150</sup> Furthermore, this lack of resources may impede full adaptation to current electronic signature legislation.<sup>151</sup>

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144. *Id.* § 254(h)(2)(A).

145. *See Id.* § 254(h)(1)(B) (stating that telecommunications carriers shall provide services to libraries and schools “at rates less than the amounts charged for similar services to other parties”).

146. *See infra* Part IV (discussing societal conceptions of electronic signatures).

147. Jamie Lewis, *The Law Alone Won’t Pave the Way for Digital IDs*, INTERNETWEEK, July 17, 2000 at 31.

148. “Electronic signatures” is an umbrella term that encompasses the “three types of electronic signatures: electronic signatures, digital signatures, and secure electronic signatures.” Electronic signatures themselves are imposed with no technical requirements to verify “the security, integrity or authenticity of such a symbol.” Digital signatures “use encryption technology to create a secure form of the electronic signature. Secure Electronic signatures are “simple electronic signatures with authentication attributes.” William A. Tannenbaum, *Using E-SIGNatures and Electronic Consumer Notices in E-Commerce*, 631 PLI/PAT 1093, 1097-98 (2001).

149. *See infra* Part IV.C (noting that the elements required for a valid contract may not be present if one party does not recognize that its electronic contract is equivalent to a traditional paper based document).

150. *See supra* Part III.A (detailing statistics finding that those in lower income groups are less likely to have access to Internet resources).

151. *See infra* Part IV.C (finding that absent electronic resources, indigent persons’ concept of electronic resources will remain paper based).

A. History of Signatures

The contracting process has performed a ritualistic function for thousands of years. Ancient Babylonians required: “1) a writing (usually on clay tablets); 2) sealing; 3) witnessing by two professional witnesses; 4) an oath[,] which accompanied the sealing[;] and 5) registration of the writing in a public office.”<sup>152</sup> Importantly, when the rituals became dysfunctional they would “be discarded first by the persons subject to the law and then by the law itself.”<sup>153</sup>

The early English legal system recognized the evidentiary problems posed by those attempting to enforce certain agreements<sup>154</sup> and introduced “An Act for Prevention of Frauds and Perjuries” to remedy the situation.<sup>155</sup> On April 16, 1677 the Statute of Frauds officially became part of English law.<sup>156</sup> The Statute of Frauds “ensure[d] that there be some written proof, other than oral testimony from interested witnesses, to substantiate a claim that a contract for the sale of goods had been formed.”<sup>157</sup>

Faced with the minimum writing requirements and a generally illiterate population, various methods of document authentication emerged. Although the printing press helped to speed literacy, those who remained illiterate were at the mercy of literate individuals.<sup>158</sup> Notaries first arose in the Roman Empire<sup>159</sup> “to draft and safeguard documentary items (such as contracts and wills)” for illiterate individuals in the population.<sup>160</sup> For those individuals, various forms of signature technology fulfilled the need of contracting individuals to authenticate the identity of parties and “legally bind the parties to the transmitted data.”<sup>161</sup>

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152. Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 *FORDHAM L. REV.* 39, 44 (1974).

153. *Id.* at 46.

154. Gegory E. Perry & Cherie Ballard, *A Chip by any Other Name Would Still be a Potato: The Failure of Law and its Definitions to Keep Pace with Computer Technology*, 24 *TEX. TECH L. REV.* 797, 825 (1993).

155. George P. Costigan, Jr., *The Date and Authorship of the Statute of Frauds*, 26 *HARV. L. REV.* 329, 336 (1912-1913).

156. *Id.* at 334.

157. Perry & Ballard, *supra* note 154, at 825.

158. Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 *CHI.-KENT L. REV.* 87, 92 (2001).

Reliance on the written word is a two-edged sword. On the one hand, it reduces the likelihood of dispute about what the agreement (or statute) really says. On the other, it empowers the party with the pen. When only one party to the transaction controls the document, the possibility arises that the drafter will take advantage of this leverage unfairly.

*Id.*

159. Michael L. Closen & Trevor J. Orsinger, *Family Ties that Bind and Disqualify: Toward Elimination of Family-Based Conflicts of Interest in the Provision of Notarial Services*, 36 *VAL. U. L. REV.* 505, 518 (2002) (“The first notaries had to be trusted, for they were literate at a time when most of the populace . . . were neither literate nor experienced in commerce or government, so those notaries were entrusted with the most significant public and private transactions.”).

160. Michael L. Closen & R. Jason Richards, *Notaries Public—Lost in Cyberspace, or Key Business Professionals of the Future?*, 15 *J. MARSHALL J. COMPUTER & INFO. L.* 703, 716-17 (1997).

161. Edward D. Kania, *The ABA’s Digital Signature Guidelines: An Imperfect Solution to Digital Signatures on the Internet*, 7 *COMMLAW CONSPECTUS* 297, 299 (1999).

Romans “placed hot wax in the signatory area on a document and then impressed it with a signet ring. The ring bore the emblem of the signer and was used to show that the document was trustworthy.”<sup>162</sup> Under King Philip II, the most important documents were stamped with a medallion worn by ministers while documents of lesser significance were signed by hand.<sup>163</sup> The seal underwent a metamorphosis over time from “impressed hot wax, to paper stickers, to scrolls and scrawls, to pad-form printed words such as ‘L.S.’ or ‘Seal.’”<sup>164</sup> As the majority of the population became literate, handwritten signatures gained predominance, because they “provide[d] superior evidence of genuineness.”<sup>165</sup> Modernly, most states have statutes which eliminate the distinction between sealed and non-sealed contracts.<sup>166</sup> In California, “[a]ll distinctions between sealed and unsealed instruments are abolished.”<sup>167</sup>

Authentication by signature serves three general purposes: it provides evidentiary support as to the existence of the contract in case of dispute;<sup>168</sup> it guards against undue haste (cautionary);<sup>169</sup> and most importantly, it “furnishes a simple and external test of enforceability.”<sup>170</sup>

In an example from early American jurisprudence, *Howley v. Whipple*, the New Hampshire Supreme Court held that absent additional corroboration, a document without a valid signature could not be admitted into court.<sup>171</sup> The legal definition of a signature both then<sup>172</sup> and now encompasses innumerable forms, so long as the reflected intent is to “adopt or accept a writing.”<sup>173</sup> For much of recent history, parties “have relied on a well-established technology for creating reasonable evidence of their deals: paper and ink.”<sup>174</sup> In the United States, the signature evolved

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162. Allan Keown & Vickie L. Willard, “Marks” as Signatures, 10 J. FORENSIC DOCUMENT EXAMINATION 73, 74 (1997).

163. *Id.*

164. Eric Mills Holmes, *Statute and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617, 622 (1993).

165. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 498 (1975).

166. Holmes, *supra* note 164, at 639-41.

167. CAL. CIV. CODE § 1629 (West 1985).

168. Lon. L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941) (stating that “the need for evidentiary security may be satisfied . . . by requiring a writing, or attestation, or the certification of a notary”).

169. *Id.* (finding that “[t]he affixing and impressing of a wax wafer . . . was an excellent device for inducing the circumspective frame of mind”).

170. *Id.* at 801.

171. 48 N.H. 487, 490 (1869).

172. *Id.* (stating that “it makes no difference whether [the telegraph] operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long”).

173. See U.C.C. §1-201(37) (1999) (defining *sign* as “includ[ing] . . . any symbol executed or adopted with present intention to adopt or accept a writing”).

174. James Bryce Clark & Maura B. O’Connor, *Commercial Real Estate Financing 2003: What Borrowers & Lenders Need to Know Now*, 489 PLI/REAL 169, 173 (2003).

from the impression of a seal upon wax, subsequent reduction to a scribble, and finally to the “letters ‘L.S.’ pre-printed on a blank document.”<sup>175</sup>

The Internet has become a catalyst for signatures to enter into a new phase, away from handwritten signatures and back toward symbolic acts,<sup>176</sup> which makes handwritten signatures only a brief phase in the evolution of signature technology. Online contracts now provide business incentives such as reduced paper costs, employment needs and physical overhead.<sup>177</sup> Unsuspecting parties may be bound by “click[ing] on the ‘accept terms and conditions’ box instead of signing a contract.”<sup>178</sup> Parties must adapt to this new electronic environment or the integrity of electronic contracts may be suspect.<sup>179</sup>

### B. Prior Problems of Society Adapting to New Signature Technology

Electronic signatures are in their infancy and require further litigation to build a reliable foundation of jurisprudence.<sup>180</sup> Examination of prior adaptations may be helpful to predict the future success of digital signature laws.

As the UETA and E-SIGN set up guidelines for certain types of contracts, so too did the Statute of Frauds. The purpose behind the Statute of Frauds was to “prevent fraud and perjury with respect to certain agreements by requiring for enforcement the more reliable evidence of some writing signed by the party to be charged.”<sup>181</sup> After enactment of the Statute of Frauds, society had to adapt to the new requirements or risk difficulty in enforcement of these agreements.<sup>182</sup> The judicial system eased the transition through its reluctance to apply the statute, “believing that the strict application of the statute would be the consummation of an act of injustice.”<sup>183</sup> This

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175. See Perillo, *supra* note 152, at 47 (1974-1975) (noting that “the ritual of sealing had lost its grasp on the psyches of contracting parties and reduced the legal consequences of the presence or absence of a seal”).

176. Previously, symbolic acts were in the form of affixing wax seals; modernly, they take the form of clicking a button. Recent cases have held online agreements entered with a mouse click (“click-wrap agreements”) to be enforceable. See generally *Forrest v. Verizon Comm., Inc.*, 805 A.2d 1007, 1010-11 (D.C. 2002) (stating that “[a] contract is no less a contract simply because it is entered into via a computer” in referring to a forum selection clause found in an electronic DSL subscriber’s agreement); *Caspi v. The Microsoft Network*, 732 A.2d 528, 532 (N.J. Sup. Ct. App. Div. 1999) (upholding a forum selection clause in the MSN membership agreement while finding that “there is no significant distinction” between electronic and non-electronic mediums).

177. Robert M. Kossick, *International Law and Technology: The Emerging Disharmony of Electronic Commerce Legislation in Latin America*, 9 TUL. J. INT’L & COMP. L. 387, 401-02 (2001).

178. Sarah Wood Braley, *Why Electronic Signatures Can Increase Electronic Transactions and the Need for Laws Governing Electronic Signatures*, 7 L. & BUS. REV. AM. 417, 419 (2001).

179. See *infra* Part IV.C (discussing the application of contract principles to digital contracts; absent valid offer and acceptance, the electronic contract itself is invalid).

180. Lewis, *supra* note 147, at 31.

181. 73 AM.JUR.2D *Statute of Frauds* § 425 (2003).

182. *Id.* (referring to writing requirements for certain contracts).

183. JOHN W. SMITH, A TREATISE ON THE LAW OF FRAUDS AND THE STATUTE OF FRAUDS 344 (1907).

same judicial deference has not yet been seen for electronic contracts, at least in terms of enforcing click-wrap agreements.<sup>184</sup>

When surveyed about writing requirements, “[p]eople [were] generally aware of the need for a writing and, in fact, many believe[d] all contracts must be in writing in order to be enforceable.”<sup>185</sup> The source of this view is debatable and may not be linked with the Statute of Frauds itself but instead with standard business practices.<sup>186</sup> Unfortunately, the survey was “not intended to be statistically representative”<sup>187</sup> and may contradict other evidence demonstrative the lack of understanding of the Statute of Frauds.<sup>188</sup> Society’s adaptation to the Statute of Frauds is debatable; individual versions of the statute continue to persist despite calls for repeal.<sup>189</sup>

### C. Contract Problems Relating to Offer and Acceptance

Indigent persons without regular access to electronic resources are likely unaware of the consequences of their online practices. Absent access to electronic resources, indigent persons’ concepts of contracts will remain paper based.<sup>190</sup> Electronic resources may become available through assistance programs. Upon acquiring access to such resources, indigent persons may not possess the requisite intent to validate electronic contracts.

Valid contracts require an offer, acceptance and consideration.<sup>191</sup> “Ordinary principles of offer, acceptance, mutuality, and consideration apply to contract formation in the computer and online industries.”<sup>192</sup> The key ingredient to the valid contract is the “meeting of the minds” or manifestation of intent by the parties.<sup>193</sup> Outward expressions of intent are sufficient if the party “believes or

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184. See, e.g., *Forrest v. Verizon Comm., Inc.*, 805 A.2d 1007, 1010-11 (D.C. 2002) (enforcing a forum selection clause in a click-wrap agreement); *Caspi v. The Microsoft Network*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (upholding a forum selection clause in a MSN user agreement).

185. Jerry W. Monroe, *An Appraisal of the Utah Statute of Frauds*, 9 UTAH L. REV. 978, 996 (1964-65).

186. See *id.* at 997 (stating that “it is possible that the average person’s impression that certain contracts must be in writing is not attributable to the existence of the statute but to a general reverence toward the written word”). However, if the source of the belief is deemed to be business practices, the practices themselves could be due to the evidentiary requirements imposed by the Statute of Frauds. *Id.* at 996 n.123-29.

187. *Id.* at 996.

188. See *infra* note 200 and accompanying text (discussing the prevalence of modern cases raising Statute of Frauds as found on Lexisnexis).

189. William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, in 673 PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 195, 283-84 (Practicing Law Institute ed., 2001) (considering “whether to repeal the statute of frauds”) quoting PERMANENT EDITORIAL BD. FOR THE UNIF. COMMERCIAL CODE, P.F.B. STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT 52 (1990).

190. This assumes that one’s idea of a contract and signature is based on experience; absent factors to override personal experience, concepts of contract and signature will be based on the available paper forms. See Lewis, *supra* note 1, at 31 (noting that “society in general doesn’t understand digital signatures, so most people don’t equate them with written signatures”).

191. Shawn E. Tuma & Christopher R. Ward, *Contracting Over the Internet in Texas*, 52 BAYLOR L. REV. 381, 391 (2000).

192. RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY §7.41 (West 2003).

193. Commented on by the Restatement, Second of Contracts: “Many contract disputes arise because

has reason to believe that the promisee will infer that intention from his words or conduct.”<sup>194</sup>

The typical online transaction commences after one party (“offeror”) makes an offer. The acceptance, usually an automated response by an authorized agent of the other party (“offeree”), is then transmitted to the offeror.<sup>195</sup> There is no real question of intent on the part of the offeree to enter into such a contract in this instance;<sup>196</sup> the problem that arises concerns the offeror’s intent.<sup>197</sup> The individuals may not equate digital signatures with a binding contract. The subsequent problem that arises for the offeree is that the offeror’s external actions manifest an intent to be presently bound even though there is no meeting of the minds. The enforceability of the contract then depends on whether the offeror “believes or has reason to believe that the [offeree] will infer that intention from his words or conduct.”<sup>198</sup> For one who is new to electronic contracting, this intent may be difficult to prove. This could pose problems for businesses, since “it simply does not make business sense to enter into a contractual relationship where practical questions regarding the ease of enforcement exist.”<sup>199</sup>

#### *D. Effect on Digital Contracts if Parties Do Not Equate Digital Signatures with Handwritten Signatures*

The fact that many cases have raised the Statute of Frauds<sup>200</sup> may reflect that certain members of society’s idea as to what constitutes a binding contract differs from the legal definition.<sup>201</sup> This disparity between societal and legal concepts is mirrored in digital signature legislation.<sup>202</sup>

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different people attach different meanings to the same words and conduct . . . [a] promisor manifests an intention [to be presently bound] if he believes or has reason to believe that the promisee will infer that intention from his words or conduct.” RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).

194. *Id.*

195. Tuma & Ward, *supra* note 191, at 396 (stating two reasons why electronic acceptances are binding: first, “a party unaware that a communication was prepared by an electronic agent should be able to rely on the objective manifestations of assent;” second, “electronic agents are agents of the principal”).

196. *See id.* (assuming the acceptance is by automatic electronic agent).

197. It is important to note that this applies to online transactions where the offeror is the remote user; the parties are reversed in click-wrap contracts where the offeror is the remote agent and the offeree becomes the end user. In those cases the intent of the offeree is in question. *See generally* Forrest v. Verizon Comm., Inc., 805 A.2d 1007, 1010 (D.C. 2002) (providing an example of defining the offeror as remote agent and offeree as end user).

198. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).

199. Tuma & Ward, *supra* note 177, at 390.

200. A search of the LexisNexis database of “Federal and State Cases, Combined” with the phrase (“statute of frauds” /s raised) resulted in more than 3000 results.

201. Presumptively, parties would not make a contract that is not enforceable. Creating oral contracts where written contracts are required may reflect lack of legal knowledge and not lack of desire to create a binding agreement. Tuma & Ward, *supra* note 191, at 391-99 (discussing the general requirements for a legally binding contract).

202. Society does not yet equate a digital signature with a binding contract while it is legally sufficient under California’s Adoption of the UETA. CAL CIV. CODE § 1633.7 (West Supp. 2004) (stating that “[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form”).

When there is disparity between society's views and the laws which govern its conduct, in general one must give way. The Statute of Frauds has been in existence since 1677 in some form and has generally survived attempts at repeal.<sup>203</sup> The triumph of the Statute of Frauds over societal pressures may be partially due to the principle of *stare decisis*.<sup>204</sup> However, in more recent examples, societal pressures have trumped the law on issues such as gender equality<sup>205</sup> and abortion.<sup>206</sup>

Society must adapt as the courts apply legal principles grounded in physical realities to the electronic realm. For example, peer-to-peer file swapping programs such as Kazaa and Grokster "[enable] consumers to reproduce and distribute unauthorized copies of a work on a large scale."<sup>207</sup> At any given time, thousands of users are connected to these networks sharing collections of potentially copyrighted material.<sup>208</sup> Additionally, "[f]ile-sharing is obviously mass dissemination of copyrighted material, and therefore an infringement on private property."<sup>209</sup> Society has not yet equated downloading copyrighted material with the physical equivalent of stealing private property, and as a result many persons "steal" copyrighted material online but do not consider it a moral wrong.<sup>210</sup>

203. The Statute of Frauds was repealed in England in 1954 by the Law Reform Act "based on the conclusion that the statute of frauds . . . was no longer the need for a writing to protect [parties] from the perjured testimony of third persons." 72 AM. JUR. 2D *Statute of Frauds* § 1 (2001). "Despite its repeal in England . . . the Statute of Frauds has enjoyed a position of prominence in Anglo-American jurisprudence for three centuries and remains firmly entrenched in American law." Mark S. Dennison, *Sufficiency of Description of Property as Affecting Enforceability of Real Estate Contract*, 62 AM. JUR. 3D *Proof of Facts* 347 §3 (2003).

204. Courts are bound by their previous precedents and if the "statute served no purpose, then the Legislature should repeal it, but [the] Court should not make inroads upon it to achieve our sense of justice in a given case." *Hackford v. Snow*, 657 P.2d 1271, 1279 (Utah 1982).

205. See Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 739 (2002) (commenting that "constitutionalizing American women's equality [required] creative interpretation of the Equal Protection Clause . . . Led with inventiveness and strategic brilliance . . . women's rights advocates persuaded the Court to read guarantees of sex equality into the Equal Protection Clause by analogizing sex discrimination to race discrimination").

206. See Richard W. Bourne, *Abortion in 1938 and Today: Plus Ça Change, Plus C'est la Meme Chose*, 12 S. CAL. REV. L. & WOMEN'S STUD. 225, 255-56 (2003) (stating that "[i]n the middle of the twentieth century . . . American writers emphasized the divergence between Americans' publicly articulated attitude toward abortion and their privately executed behavior, which rendered ineffective enforcement of the anti-abortion statutes").

207. Jennifer Norman, Note, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J. L. & ARTS 371 (2003).

208. *Song-Sharing: Record Industry Sues*, CIN. ENQUIRER, Sept. 10, 2003, at 6 [hereinafter *Song-Sharing*] (finding that "20 percent of Americans already are downloading music").

209. Chris Collins, Editorial, *The RIAA is Right*, BALT. SUN, Nov. 14, 2003, at 17A.

210. *Id.* (referring to an August 2003 Gallup Poll which "found that only 18 percent of 13- to 17-year-olds considered cheating on a test morally acceptable. However, 83 percent of those same teens did not have a problem with downloading music for free").

Interestingly, this view may be in a state of flux due to several rounds of lawsuits by the Recording Industry Association of America (“RIAA”) aimed at offending users.<sup>211</sup> Nearly seventy percent of the twelve to twenty-two year olds surveyed by Forrester Research said they would stop downloading music if there was a “serious risk” of being fined or jailed.<sup>212</sup> The threat of lawsuits caused use of Kazaa to drop forty-one percent during the summer of 2003.<sup>213</sup> Online legal music distribution programs, such as Apple’s iTunes, appear to be gaining popularity even though they charge a minimal fee.<sup>214</sup> The end result seems to be that more people are respecting copyright laws and recognizing the moral implications of online piracy. Although there still is a large volume of online copyright infringement occurring, the trend appears to be declining as a result of high-profile lawsuits.<sup>215</sup> If this trend is due to a public shift in perception toward acceptance of digital theft as the moral equivalent of physical theft, then it demonstrates a relatively quick change in public attitudes over time.<sup>216</sup> Although it is important to note that the RIAA lawsuits may only directly effect a small portion of the public,<sup>217</sup> due to the large amount of publicity, the average person is now likely to be aware of the implications of online music theft.<sup>218</sup>

The file sharing analogy is relevant on several points. It demonstrates that the public generally has not fully equated actions in the electronic world with those in the physical world.<sup>219</sup> The Kazaa example demonstrates that given sufficient stimulus, public behaviors may quickly change to comply with legal demands.<sup>220</sup> Using the Statute of Frauds and the RIAA litigation as predictors for the fate of

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211. *Song-Sharing*, *supra* note 208, at 6 (stating that the “record industry made good on its recent promise to go after individuals who share copyrighted music online . . . [The RIAA] filed lawsuits against 261 high-volume users of “file-sharing” software such as Morpheus and KaZaA”).

212. Jon Healey & Jeff Leeds, *Tone Deaf to a Moral Dilemma? Millions Download Songs Illegally but Don’t Feel Guilty. The Industry Wants to Shake Up Their Consciences. Targeting Parents is One Tactic*, L.A. TIMES, Sept. 2, 2003, at A1.

213. Scott Mervis, *Downloading Goes Legit Record Industry Crackdown Steers Music Fans to Pay-Per-Song Online Services*, PITT. POST-GAZETTE, Nov. 12, 2003, at E1.

214. Kate Bulkley & Paul Sexton, *Maestro Tries to Lose His Label of Music Pirate*, FIN. TIMES, Nov. 11, 2003, at 13 (commenting on the “huge success of Apple’s iTunes Music Store service, which [had] sold 10m downloaded songs by September, just four months after launching in the US”).

215. See *supra* text accompanying notes 213-14 (discussing the decrease in Kazaa use and increase in use of legitimate methods of acquiring material).

216. Fast Track technology upon which Kazaa and Morpheus are based came into existence in 2000. Kelly Truelove & Andrew Chasin, *Morpheus Out of the Underworld*, available at <http://www.openp2p.com/pub/afp2p/2001/07/02/morpheus.html> (last accessed Sept. 27, 2004) (copy on file with the *McGeorge Law Review*).

217. See *Song-Sharing*, *supra* note 208, at 6 (finding that “20 percent of Americans already are downloading music”).

218. *Money & Markets, RIAA Cancels Clean Slate Program*, (CNN television broadcast Apr. 20, 2004) (according to Allen Wastler, “most people know now that downloading music illegally could get them sued”).

219. See *supra* text accompanying notes 210-16 (discussing the prevalence of music use and opinions as to the morality of downloading music online).

220. See Mervis, *supra* note 213, at E1 (demonstrating that presumably in response to threats of lawsuits, use of Kazaa dropped 41 percent).

digital signatures, digital signature legislation will continue to succeed. The Statute of Frauds illustrates the legal perseverance of new requirements for binding agreements.<sup>221</sup> The decrease in use of Kazaa to distribute copyrighted material shows that society can learn to equate digital actions with their physical counterparts.<sup>222</sup>

## V. CONCLUSION

By recognizing electronic signatures as equivalent to their handwritten counterparts, the UETA and E-SIGN allow electronic contracts to replace virtually any traditional contract.<sup>223</sup> The Internet likely catalyzed the shift from traditional handwritten signatures to an electronic form.<sup>224</sup> This transition is just another natural step in the evolution of the seal.<sup>225</sup> As government and businesses begin utilizing the benefits of electronic contracts, attention must be paid to minimizing the effect upon those without access to these new contracts.<sup>226</sup> Society must also equate their actions in the digital world with their physical counterparts. Absent this cognition of physical counterparts, as seen in the Kazaa litigation, individuals may face consequences for failing to realize the reality of their actions.<sup>227</sup> Due to society's ability to adapt, time will rectify most of the current issues related to electronic signatures.<sup>228</sup>

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221. See Dennison, *supra* note 203, at § 3 (2003) ("Despite its repeal in England, in 1956, the Statute of Frauds has enjoyed a position of prominence in Anglo-American jurisprudence for three centuries and remains firmly entrenched in American law").

222. See Collins, *supra* note 209, at 17A (remarking on the author's realization that distribution of copyrighted works was morally wrong).

223. See *supra* Part II.B.1 (describing the UETA and E-SIGN).

224. See *supra* Part III.B (noting the dramatic increase in online presence of businesses. These businesses would be unable to conduct business if electronic contracts were not upheld).

225. See *supra* Part IV.A (chronicling the evolution of the signature).

226. See *supra* Part III.A.1 (noting statistics as to home Internet access among different groups).

227. See *supra* Part IV.D (describing the Kazaa litigation and problems with not equating electronic actions to their physical counterparts).

228. See *supra* Part IV.B-D (describing society's change in behavior in response to the Kazaa litigation and possibly to comply with the Statute of Frauds).

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