

2000

Annual Survey of Virginia Law: Technology Law

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Recommended Citation

John S. Jung, *Annual Survey of Virginia Law: Technology Law*, 34 U. Rich. L. Rev. 1051 (2000).

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TECHNOLOGY LAW

*John S. Jung**

I. INTRODUCTION

During the 2000 Session, the General Assembly considered eighty-one technology related bills, forty of which were enacted. This article summarizes the more significant technology bills enacted during this session. One of these bills, House Bill 719,¹ enlarged the Joint Commission on Technology and Science (“JCOTS”).² The 1997 Virginia General Assembly created JCOTS “as a permanent legislative agency” to “generally study all aspects of technology and science and endeavor to stimulate, encourage, promote, and assist in the development of technology and science in the Commonwealth and sound public policies related thereto.”³ JCOTS, which originally consisted of nine legislators—five delegates and four senators⁴—is now made up of twelve members—seven delegates and five senators.⁵ During the 2000 Session, JCOTS recommended and the members of JCOTS patroned fifteen technology related bills. Of these bills, eleven have been enacted.⁶

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1. H.B. 719, Va. Gen. Assembly (Ex. Sess. 2000) (enacted as Act of Apr. 19, 2000, ch. 1046, 2000 Va. Acts 2538) (codified as amended at VA. CODE ANN. § 30-86 (Cum. Supp. 2000)).

2. *Id.*

3. VA. CODE ANN. § 30-85 (Repl. Vol. 1997). For more information on JCOTS, see *id.* §§ 30-85 to -88 (Repl. Vol. 1997), or visit the official JCOTS Web site, *Joint Commission on Technology and Science* at <http://jcots.state.va.us.htm> (last visited on Aug. 8, 2000).

4. VA. CODE ANN. § 30-86 (Repl. Vol. 1997).

5. Va. H.B. 719.

6. See REPORT OF THE JOINT COMMISSION ON TECHNOLOGY AND SCIENCE, H. Doc. No. 105, at 2 (2000).

II. ELECTRONIC COMMERCE

For the better part of the 1990s, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") has been drafting Article 2B of the Uniform Commercial Code ("UCC 2B").⁷ This article would have covered electronic transactions of goods and services (i.e., transactions conducted through electronic means such as computers and computer networks) and transactions of computer information regardless of whether the transaction was conducted electronically or by using more traditional means.⁸ Instead of creating UCC 2B, however, in July 1999, the NCCUSL approved two new uniform acts: the Uniform Computer Information Transactions Act ("UCITA")⁹ and the Uniform Electronic Transactions Act ("UETA").¹⁰ UCITA covers transactions involving computer information, and UETA covers general electronic transactions.¹¹

Shortly after the NCCUSL's promulgation of UCITA and UETA, JCOTS reviewed both acts. After its review, JCOTS recommended that the General Assembly enact both UCITA and UETA,¹² and the members of JCOTS introduced House Bill 561,¹³ Senate Bill 372,¹⁴ and House Bill 499.¹⁵

A. *Uniform Computer Information Transactions Act*

The Uniform Computer Information Transactions Act ("UCITA") is designed to cover transactions involving computer information, which is defined as "information in electronic form

7. U.C.C. § 2B (Tentative Draft 1998).

8. *Id.* § 2B-103 (Tentative Draft 1998).

9. H.B. 561, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 996, 2000 Va. Acts 2228) (codified at VA. CODE ANN. § 59.1-501.1 (Cum. Supp. 2000)).

10. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 995, 2000 Va. Acts 2216) (codified as amended at VA. CODE ANN. §§ 1-13.32, 2.1-51.47, 13.1-604, 13.1-804, 13.1-1003, 17.1-258, 50-73.17, 50-73.83, 58.1-9 (Cum. Supp. 2000) and codified at VA. CODE ANN. §§ 59.1-501 to -520 (Cum. Supp. 2000)).

11. *See id.*

12. *See* INTERIM REPORT AND LEGISLATIVE RECOMMENDATIONS OF THE JOINT COMMISSION ON TECHNOLOGY AND SCIENCE, H. Doc. No. 82, at 5 (2000).

13. Va. H.B. 561.

14. S.B. 372, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Mar. 14, 2000, ch. 101, 2000 Va. Acts 145) (codified at VA. CODE ANN. §§ 59.1-501 to -509.2 (Cum. Supp. 2000)).

15. Va. H.B. 499.

which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer."¹⁶ Therefore, UCITA primarily covers computer software and information databases processed by computers.¹⁷ Key points of UCITA include: (i) freedom to contract and relationship with other laws; (ii) licensing; (iii) mass-market licensing; and (iv) self-help.¹⁸

One of the key concepts of UCITA is the freedom to contract and UCITA's relationship to other laws. Unless the provisions of the contract are unconscionable¹⁹ or the contract violates fundamental public policy or other laws, parties are free to negotiate any contract terms they deem desirable or necessary.²⁰ For example, UCITA cannot provide for provisions usurping federal law, so it provides that any contract term violating federal law, such as the Copyright Act²¹ or the Patent Act,²² is not enforceable.²³ In addition to built-in consumer protection provisions, UCITA preserves consumer protection provisions established by other laws. For example, UCITA provides that if any part of UCITA conflicts with the Virginia Consumer Protection Act,²⁴ the Virginia Consumer Protection Act governs.²⁵

The core principle of UCITA is the recognition of software licensing. In a computer information contract, the parties may determine whether the ownership of the computer information passes to the user, thereby becoming a sale, or the title remains with the creator and the user merely pays for the usage of the computer information, thereby becoming a license. In negotiated contracts, for example, where a software company develops a particular software application for another company, the parties involved may agree to any terms desirable or necessary as long as they are within the boundaries discussed above. However, one of the controversies over UCITA stems from its recognition of non-negotiated contracts or mass-market licenses.

16. Va. H.B. 561.

17. *See id.* Information databases processed by computers includes Internet Web sites and databases providing information. *See id.*

18. Va. S.B. 372.

19. VA. CODE ANN. § 59.1-501.11 (Cum. Supp. 2000).

20. *Id.* § 59.1-501.5 (Cum. Supp. 2000).

21. 17 U.S.C. §§ 1-1101 (1994).

22. 35 U.S.C. §§ 1-376 (1994).

23. VA. CODE ANN. § 59.1-501.5 (Cum. Supp. 2000).

24. *Id.* § 59.1-196 (Repl. Vol. 1998 & Cum. Supp. 1999).

25. *Id.* § 59.1-501.5 (Cum. Supp. 2000).

Mass-market licenses are standard form contracts used in mass-market transactions.²⁶ In the information technology industry, mass-market licenses include “shrink-wrap” licenses and “click-on” licenses. Shrink-wrap licenses are standard license agreements included inside the software packaging so that the licensee can view the license only after he or she opens the package. Click-on licenses are standard license agreements that the licensee must first click on (“I agree” or “I accept”) before the licensee is granted access to the computer information or before the software will install on the licensee’s computer. Currently, in the information technology industry, most, if not all, consumer software programs are licensed, not sold. Programs that are distributed in mass come with mass-market licenses rather than individually negotiated licenses. The current trend of the courts is to uphold the validity of these licenses if the licensee had the opportunity to view the license soon after obtaining the software, but had not done anything to manifest rejection of the license.²⁷ These holdings are problematic in that software vendors will often refuse to accept returned software if the packaging has been opened. Thus, the burden is on the consumer to return the unwanted software, due to unwanted license terms, without any guaranty that he or she might obtain a refund. UCITA clarifies this uncertainty and provides additional consumer protection. UCITA provides that: (i) the licensee must be given an opportunity to review the terms of the license; (ii) the licensee has the right to return the software should he disagree with the license; and (iii) if the licensee does return the software, in addition to the cost of the software, the licensee is entitled to shipping costs and the costs of restoring his computer to a state prior to installing the software.²⁸

One of the most controversial parts of UCITA deals with electronic self-help. Self-help, such as repossession, “may be exercised without recourse to the courts, provided this can be done peaceably.”²⁹ The right of self-help is generally limited by breach of peace. That is, “[a]nything that might lead to a breach of the peace is forbidden.”³⁰ An uncertainty arises because electronic

26. *Id.* § 59.1-501.2(a)(43) (Cum. Supp. 2000).

27. *See, e.g., Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

28. VA. CODE ANN. § 59.1-502.9 (Cum. Supp. 2000).

29. *Universal Credit Co. v. Taylor*, 164 Va. 624, 630-31, 180 S.E. 277, 280 (1935).

30. W. HAMILTON BRYSON, *BRYSON ON VIRGINIA PROCEDURE* 6 (3d ed. 1997).

self-help does not usually involve the normal characteristics of a breach of peace. Electronic self-help usually involves the licensor "shutting off" the licensed software from a remote location. The licensor need not enter the licensee's land, repossess the packages of software, nor gain physical access to the licensee's computer. For example, a licensor develops a software application for the licensee's network operations. After delivery, the licensee breaches the contract by failing to pay for the software. The licensor then, via network, transmits an electronic signal to the licensee's computer instructing the software to cease to function. This form of electronic self-help may not violate the traditional notions of breach of peace.

UCITA allows licensors to exercise electronic self-help, but strict requirements must be met. First, electronic self-help can be used only if it can be done "(1) without a breach of the peace; [and] (2) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information."³¹ Second, the licensee has to have previously assented to being subject to electronic self-help.³² Third, the licensor has to give a forty-five day notice,³³ which would allow the licensee to apply for an injunction against exercising electronic self-help.³⁴ Finally, if the licensor wrongfully exercises electronic self-help, the licensee is entitled to direct, incidental, and consequential damages.³⁵

The 2000 General Assembly made several compromises in enacting UCITA. First, UCITA will not become effective until July 1, 2001,³⁶ instead of the usual effective date of July 1 of the year of the session. Second, the General Assembly sent UCITA back to JCOTS for another review to determine UCITA's impact on Virginia's businesses, libraries, and consumers.³⁷ The General Assembly directed JCOTS to conclude its review of UCITA and re-

31. VA. CODE ANN. § 59.1-508.15(b) (Cum Supp. 2000).

32. *Id.*

33. *Id.* The original UCITA, as promulgated by the NCCUSL, provided for a fifteen day notice; however, the Virginia General Assembly changed this to forty-five days. *Id.* § 59.1-508.16(d)(1) (Cum. Supp. 2000).

34. *See id.* § 59.1-508.16(g) (Cum. Supp. 2000).

35. *Id.* § 59.1-508.16(e) (Cum. Supp. 2000).

36. H.B. 561, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 996, 2000 Va. Acts 2228) (codified at VA. CODE ANN. §§ 59.1-501.1 to -509.2 (Cum. Supp. 2000)).

37. *Id.*

port its findings and recommendations to the Governor and the General Assembly by December 1, 2000.³⁸

B. *Uniform Electronic Transactions Act*

UETA is designed to support the use of electronic commerce, primarily by establishing the legal recognition of electronic records, signatures, and contracts. UETA does not change any substantive contract laws. Instead, UETA provides procedural rules for conducting transactions by electronic means. Accordingly, the core of UETA can be found in section 7, titled "Legal recognition of electronic records, electronic signatures, and electronic contracts."³⁹

Section 7 of UETA provides four rules:

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (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, or provides for certain consequences in the absence of a signature, an electronic signature satisfies the law.⁴⁰

This section alleviates the uncertainty whether electronic transactions are legally enforceable contracts.

For example, if a consumer visits a merchant's Web site and orders merchandise via the Internet and the purchase price is more than \$500, the electronic transaction may run afoul of traditional contract law. The statute of frauds provides that "a contract for the sale of goods for the price of \$500 or more is not enforceable" unless the contract is in writing and is signed by the party to be charged.⁴¹ Although the order form on the Web site

38. *Id.*

39. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 995, 2000 Va. Acts 2216) (codified at VA. CODE ANN. § 59.1-507 (Cum. Supp. 2000)).

40. *Id.*

41. VA. CODE ANN. § 8.2-201 (Repl. Vol. 1991 & Cum. Supp. 2000).

may bear letters, numbers, and symbols, the courts may not view the order form, a paperless electronic file, as a written record. Similarly, the signature requirement may not be met because the electronic document does not bear a handwritten signature. With the enactment of UETA, this electronic transaction would satisfy both the writing and the signature requirements under the statute of frauds. UETA defines electronic record as "a record created, generated, sent, communicated, received, or stored by electronic means."⁴² Electronic order forms used by most Web sites would meet the above definition of electronic record and therefore, would be legally enforceable. Second, most, if not all, electronic commerce businesses over the Internet require the buyer to click on the "I agree," "I accept," or "Order" button in order to complete the transaction. This clicking would qualify as an electronic signature under UETA, which defines an 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."⁴³ Alternatively, some Web sites require the buyer to type in his or her unique identifier, usually a user name and password, to complete or even begin a transaction. Under UETA, this process would also qualify as a valid electronic signature.

In addition to providing for validity of electronic records, signatures, and contracts, UETA provides rules for related issues. One such provision deals with automated transactions or machine-to-machine transactions.⁴⁴ This type of electronic transaction utilizes electronic agents. An electronic agent is "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual."⁴⁵ According to Section 14 of UETA, "[a] contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements."⁴⁶ This provision, on first glance, seems to defy traditional contract law, which requires a

42. *Id.* § 59.1-502(8) (Cum. Supp. 2000).

43. *Id.*

44. *See id.* § 59.1-541 (Cum. Supp. 2000).

45. *Id.* § 59.1-502(6) (Cum. Supp. 2000).

46. *Id.* § 59.1-514 (Cum. Supp. 2000).

meeting of the minds. Forming a legally enforceable contract without the parties ever knowing that the transaction occurred seems somewhat frightening. Automated transactions, however, is a natural progression of conducting business by electronic means. Indeed, a meeting of the minds does occur between the electronic agents. In automated transactions, the parties preset the parameters in which their computers (i.e., electronic agents) must operate, and the electronic agents then create the contract within those boundaries. In that aspect, this type of transaction is not much different than having two human agents creating a contract for their respective principals.

For example, a merchant purchases his inventory from several distributors. The merchant's and the distributors' inventory systems are automated and connected by a computer network. The merchant's inventory system is configured to order a particular item of merchandise from a distributor if the stock runs below a certain number. The system (i.e., the merchant's electronic agent) is also configured to order the merchandise at the lowest possible price. When the merchant's stock falls below the preset amount, the electronic agent logs onto the network. The electronic agent then connects to each distributor's inventory computer system. On that particular day, Distributor 3 has the lowest listed price for that merchandise. The merchant's electronic agent then sends an electronic order to Distributor 3's electronic agent. The order is processed and the merchandise is shipped to the merchant. When the transaction was made (i.e., when the merchant's electronic agent placed the order with Distributor 3's electronic agent and the order was accepted and processed by Distributor 3's electronic agent), there was no human involvement, knowledge, or awareness. This transaction, however, is a valid, legally enforceable contract under UETA.

If electronic records, signatures, and contracts will be given legal effect, the next step is to allow electronic communications. Again, UETA does not change any other law requiring certain notices to be sent. Instead, UETA allows for electronic communication if the parties previously agreed to using electronic communication.⁴⁷ For example, if the other law requires that the notice be sent in a certain manner, for example, certified or registered U. S. mail, then the notice must be sent pursuant to the other law in-

47. *Id.* § 59.1-508(a) (Cum. Supp. 2000).

stead of electronic communication.⁴⁸

UETA also provides procedural rules for sending and receiving electronic communications. To be sent, an electronic communication must: (i) be addressed properly; (ii) be in a form capable of being processed by that system; and (iii) leave the sender's system and enter the recipient's system.⁴⁹ To be received, an electronic communication must: (i) enter the system the recipient had designated; and (ii) be in a form capable of being processed by that system.⁵⁰ To summarize, in order for an electronic communication to be validly sent and received, the electronic communication must: (i) be correctly addressed to the electronic mail address the recipient had previously designated; (ii) be in a form that the recipient can retrieve and decipher; and (iii) actually be delivered to the designated electronic mail system.

Not only does UETA affect commercial transactions, but UETA also has a significant impact on government record keeping practices as well. Section 17 of UETA allows public bodies of the Commonwealth to create and retain electronic records, as opposed to paper records, and to convert paper records into electronic records.⁵¹ Thus, in addition to using electronic records exclusively, public bodies may convert existing paper records by electronically scanning them without violating the Virginia Freedom of Information Act.⁵² Section 18 of UETA provides that public bodies may (i) accept electronic filing, (ii) prescribe the methods of utilizing electronic filings and records, and (iii) specify the type of electronic signature used.⁵³ Accordingly, House Bill 499 repeals the existing electronic signatures law.⁵⁴

III. ELECTRONIC GOVERNMENT

A. *Electronic Filing of Documents*

During the 1999 Session, the General Assembly modified the

48. See *id.* § 59.1-508(b) (Cum. Supp. 2000).

49. *Id.* § 59.1-515(a) (Cum. Supp. 2000).

50. *Id.* § 59.1-515(b) (Cum. Supp. 2000).

51. *Id.* § 59.1-517 (Cum. Supp. 2000).

52. See *id.* §§ 2.1-340 to -346.1 (Repl. Vol. 1995 & Cum. Supp. 1999).

53. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 995, 2000 Va. Acts 2216) (codified at VA. CODE ANN. § 59.1-518 (Cum. Supp. 2000)).

54. See VA. CODE ANN. §§ 59.1-467 to -469 (Repl. Vol. 1998).

Virginia Code to allow government agencies to receive filings electronically.⁵⁵ To maintain the autonomy and integrity of the courts, however, the General Assembly provided that “[u]nless otherwise provided for in the Code of Virginia, electronic filing in the courts of this Commonwealth shall be governed by the Rules adopted by the Supreme Court of Virginia.”⁵⁶ Article 4 of Chapter 2 of Title 17.1 provided that the clerks of circuit courts may provide for electronic filing of documents, including via the Internet, if digital signatures⁵⁷ were used.⁵⁸ House Bill 725⁵⁹ modifies Article 4 by providing that the security procedures outlined in UETA may be used and will satisfy the security procedures required under Article 4.⁶⁰

B. *Electronic Notification*

House Bill 498⁶¹ permits the Virginia Department of Taxation to send assessments via electronic mail or facsimile.⁶² Before doing so, however, the taxpayer must have previously assented to receiving assessments via electronic mail or facsimile.⁶³

Though it does not cover government agencies directly, House Bill 854⁶⁴ addresses electronic notices transmitted by a heavily regulated industry—insurance.⁶⁵ House Bill 854 provides that notice of cancellation or refusal to renew may be sent to the lienholder via electronic mail if the insurer and the lienholder have previously agreed to utilize electronic mail.⁶⁶ House Bill 854 does

55. *See id.* § 2.1-7.4 (Cum. Supp. 1999).

56. *Id.*

57. A digital signature is a type of electronic signature and is considered to be the safest and most complex form of electronic signature currently available.

58. VA. CODE ANN. §§ 17.1-255 to -258 (Repl. Vol. 1999).

59. H.B. 725, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 800, 2000 Va. Acts 1692) (codified as amended at VA. CODE ANN. §§ 17.1-255, -256, -258 (Cum. Supp. 2000) and codified at VA. CODE ANN. § 17.2-258.1 (Cum. Supp. 2000)).

60. *Id.*

61. H.B. 498, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 4, 2000, ch. 402, 2000 Va. Acts 625) (codified as amended at VA. CODE ANN. § 58.1-1820 (Cum. Supp. 2000)).

62. *Id.*

63. *Id.*

64. H.B. 854, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 6, 2000, ch. 529, 2000 Va. Acts 941) (codified as amended at VA. CODE ANN. §§ 38.2-231, -2113, -2208 (Cum. Supp. 2000)).

65. *See id.*

66. *Id.*

not modify the notice requirements between the insurer and the insured where the insured is not the lienholder.⁶⁷

Senate Bill 235⁶⁸ and House Bill 1440⁶⁹ authorize posting procurement notices and advertisements on the Internet.⁷⁰ Virginia Code section 11-41 provides that “[a]ll public contracts with non-governmental contractors . . . shall be awarded after competitive sealed bidding, or competitive negotiation.”⁷¹ Though the Virginia Public Procurement Act⁷² provides some exceptions, generally, governmental procurements for goods and services above \$30,000 must utilize competitive sealed bidding or competitive negotiation.⁷³ Section 11-37 requires that “[p]ublic notice of the Invitation to Bid” on competitive sealed bidding shall be “post[ed] in a designated public area or publi[shed] in a newspaper of general circulation, or both,” and that “[p]ublic notice of the Request for Proposal” for competitive negotiation be given “by posting in a public area normally used for posting of public notices and by publication in a newspaper or newspapers of general circulation”⁷⁴ Senate Bill 235 and House Bill 1440 amended these two provisions, along with subsections D and E of section 11-37, that address notices of awards, to provide that “notice may also be published on the Department of General Services’ central electronic procurement Web site and other appropriate Web sites.”⁷⁵ In addition, effective July 1, 2002, posting of notices requesting bids or proposals “on the public Internet procurement Web site designated by the Department of General Services shall be required.”⁷⁶

67. *See id.*

68. S.B. 235, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 8, 2000, ch. 692, 2000 Va. Acts 1354) (codified as amended at VA. CODE ANN. §§ 11-37, -41 (Cum. Supp. 2000)).

69. H.B. 1440, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 8, 2000, ch. 647, 2000 Va. Acts 1205) (codified as amended at VA. CODE ANN. §§ 11-37, -41 (Cum. Supp. 2000)).

70. VA. CODE ANN. §§ 11-37, -41 (Cum. Supp. 2000).

71. *Id.* § 11-41 (Cum. Supp. 2000).

72. *Id.* §§ 11-35 to -66 (Cum. Supp. 2000).

73. *See id.* § 11-41 (Cum. Supp. 2000). The 2000 General Assembly amended section 11-41 of the Virginia Code so that procurement of goods and services (other than professional services) for amounts between \$30,000 and \$50,000 may be done so by informal bidding of at least four bids, but is otherwise exempted from competitive sealed bidding and competitive negotiation. S.B. 626, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 8, 2000, ch. 664, 2000 Va. Acts 1276) (codified as amended at VA. CODE ANN. §§ 11-41, -55 (Cum. Supp. 2000)).

74. VA. CODE ANN. § 11-37 (Repl. Vol. 1999).

75. *Id.* § 11-37 (Cum. Supp. 2000).

76. *Id.*

C. *Internet Privacy Policy*

House Bill 513⁷⁷ requires all public bodies that maintain Web sites to develop and post an Internet policy statement.⁷⁸ House Bill 513 can be traced to a similar mandate by the federal government. On June 2, 1999, the Office of Management and Budget (“OMB”) issued a memorandum directing all federal departments and agencies to post Internet privacy policies on their Web sites.⁷⁹ The memorandum requires that “[e]ach policy must clearly and concisely inform visitors to the site what information the agency collects about individuals, why the agency collects it, and how the agency will use it.”⁸⁰ On July 23, 1999, the Governor issued Executive Order 51,⁸¹ requiring executive agencies to develop privacy policies under the guidelines developed by the Secretaries of Technology and Administration, and to post such policies on their Web sites.⁸² House Bill 513 expands the Internet privacy policy requirement to every public body of the Commonwealth.⁸³

House Bill 513 directs every public body having an Internet Web site to develop an Internet privacy policy (“Policy”) and an Internet privacy policy statement (“Statement”) by December 1, 2000.⁸⁴ The Policy shall be consistent with the requirements of the Privacy Protection Act of 1976⁸⁵ and be tailored to reflect the individual public body’s information practices.⁸⁶ The Statement, which explains the Policy, must be posted on the public body’s Web site in a conspicuous manner by January 1, 2001.⁸⁷

77. H.B. 513, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 4, 2000, ch. 405, 2000 Va. Acts 627) (codified as amended at VA. CODE ANN. § 2.1-380 (Cum. Supp. 2000)).

78. *Id.*

79. See Jacob J. Lew, *Memorandum for the Heads of Executive Departments and Agencies*, available at <http://www.cio.gov/docs/web/privl.htm> (last modified June 2, 1999).

80. *Id.*

81. Exec. Order No. 51 (99) (July 23, 1999), available at <http://www.the.digital-domain.com/press/eorder/eorder51.cfm>.

82. *Id.*

83. VA. CODE ANN. § 2.1-380(B) (Cum. Supp. 2000).

84. *Id.*

85. VA. CODE ANN. §§ 2.1-377 to -386 (Repl. Vol. 1995 & Cum. Supp. 1999).

86. *Id.* § 2.1-380(B) (Cum. Supp. 2000).

87. *Id.*

IV. CRIMINAL LAW

A. *Attorney General*

One of the difficulties in prosecuting computer crimes is that local attorneys for the Commonwealth often do not have the technical resources nor the expertise to prosecute crimes committed online. To remedy this situation, the Office of the Attorney General created the Computer Crimes Strike Force.⁸⁸ The Computer Crimes Strike Force is charged with prosecuting computer related crimes over which the Attorney General has original jurisdiction, such as distribution of child pornography over the Internet, and aiding attorneys for the Commonwealth and law enforcement agencies in combating computer crimes.⁸⁹ House Bill 1362⁹⁰ amended the jurisdiction of the Attorney General.⁹¹ The Attorney General now has concurrent jurisdiction with the local attorneys for the Commonwealth over the crimes covered under the Virginia Computer Crimes Act.⁹²

B. *Harassment by Computer*

One of the computer crimes over which the Attorney General will have concurrent jurisdiction is harassment by computer. House Bill 1524⁹³ makes it a Class 1 misdemeanor “[i]f any person, with the intent to coerce, intimidate, or harass any person shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act”⁹⁴

88. Press Release, Office of the Attorney General, Attorney General Earley Launches Computer Crimes Strike Force (July 22, 1999) available at http://www.oag.state.va.us/media%center/Current%20AG%20News%20Releases/07229_computer_crimes_unit.htm.

89. *Id.*

90. H.B. 1362, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 2, 2000, ch. 239, 2000 Va. Acts 359) (codified as amended at VA. CODE ANN. § 2.1-124 (Cum. Supp. 2000)).

91. *See id.*

92. *See id.*; VA. CODE ANN. §§ 18.2-152.1 to -152.14 (Repl. Vol. 1996 & Cum. Supp. 1999).

93. H.B. 1524, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 849, 2000 Va. Acts 1801) (codified at VA. CODE ANN. § 18.2-152.7:1 (Cum. Supp. 2000)).

94. *Id.*

C. *Identity Fraud*

Though not listed as a computer crime, identity fraud or identity theft is often committed by using computers or computer networks. House Bill 373⁹⁵ criminalizes obtaining, without authority or permission, with the intent to defraud, (i) identifying information not available to the general public, (ii) goods or services by using another person's identifying information, and (iii) identification documents in another person's name.⁹⁶ House Bill 373 also criminalizes using another person's "identification documents or identifying information of another to avoid summons, arrest, prosecution, or to impede a criminal investigation."⁹⁷

Identifying information includes:

(i) name; (ii) date of birth; (iii) social security number; (iv) driver's license number; (v) bank account numbers; (vi) credit or debit card numbers; (vii) personal identification numbers (PIN); (viii) electronic identification codes; (ix) automated or electronic signatures; (x) biometric data; (xi) fingerprints; (xii) passwords; or (xiii) any other numbers or information that can be used to access a person's financial resources, obtain identification, act as identification, or obtain goods or services.⁹⁸

D. *Unlawful Electronic File or Mail; Immunity from Liability*

During the 1999 Session, the General Assembly modified Virginia Code section 18.2-391 and criminalized selling, renting, or lending to minors, or publicly displaying for commercial purpose so that minors may examine and peruse electronic files or mails containing materials harmful to juveniles.⁹⁹ *PSINet v. Gilmore*,¹⁰⁰ the first lawsuit to challenge the constitutionality of this legislation, was filed in the Alexandria Division of the United States District Court for the Eastern District of Virginia.¹⁰¹ The district court dismissed this case in November 1999 for a procedural rea-

95. H.B. 373, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 349, 2000 Va. Acts 497) (codified at VA. CODE ANN. § 18.2-186.3 (Cum. Supp. 2000)).

96. *Id.*

97. *Id.* § 18.2-186.3(B) (Cum. Supp. 2000).

98. *Id.* § 18.2-186.3(C) (Cum. Supp. 2000).

99. VA. CODE ANN. § 18.2-391 (Cum. Supp. 1999).

100. No. 99-1497 (E.D. Va. filed Oct. 6, 1999).

101. *Id.*

son and PSINet filed a new case in the Charlottesville Division of the United States District Court for the Western District of Virginia.¹⁰²

During the 2000 Session, the General Assembly amended Virginia Code section 18.2-391 again to provide for immunity for Internet Service Providers ("ISP"s).¹⁰³ House Bill 1492 provides that "if a person uses services of an Internet service provider or an electronic mail service provider in committing acts prohibited under this subsection, such Internet service provider or electronic mail service provider shall not be held responsible for violating this subsection."¹⁰⁴ This provision clarifies that the person who actually commits the acts prohibited by section 18.2-391 is criminally liable, not the Internet or the electronic mail service providers. In response to House Bill 1492, U. S. District Judge Michael ordered the parties of *PSINet* to file briefs on how this new immunity would affect the case.¹⁰⁵ Upon consideration of the parties' briefs and arguments, and despite the amendments made by House Bill 1492, the court held that Virginia Code section 18.2-391 violates the First Amendment and Commerce Clause of the United States Constitution.¹⁰⁶

V. CIVIL LAW

As discussed above, House Bill 1492 deals with criminal liability of the ISPs. House Bill 1269,¹⁰⁷ on the other hand, deals with ISPs' civil liability.¹⁰⁸ House Bill 1269 prohibits the provider or user of an interactive computer service on the Internet from being treated as the publisher or speaker of any information provided to it by another information content provider.¹⁰⁹ House Bill 1269 states that:

102. *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000).

103. H.B. 1492, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 1009, 2000 Va. Acts 2378) (codified as amended at VA. CODE ANN. §§ 18.2-373, -391 (Cum. Supp. 2000)).

104. *Id.* § 18.2-391(A) (Cum. Supp. 2000).

105. *See PSINet*, 180 F. Supp. 2d at 614.

106. *Id.* at 624-27.

107. H.B. 1269, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 930, 2000 Va. Acts 2015) (codified at VA. CODE ANN. § 8.01-49.1 (Cum. Supp. 2000)).

108. *Id.*

109. *Id.*

No provider or user of an interactive computer service shall be liable for (i) any action voluntarily taken by it in good faith to restrict access to, or availability of, material that the provider or user considers to be obscene, lewd, lascivious, excessively violent, harassing, or intended to incite hatred on the basis of race, religious conviction, color, or national origin, whether or not such material is constitutionally protected, or (ii) any action taken to enable, or make available to information content providers or others, the technical means to restrict access¹¹⁰ to information provided by another information content provider.

These provisions, nearly identical to federal law,¹¹¹ provide two forms of immunity for ISPs. First, ISPs are not to be treated as the publisher or speaker of any information provided on the ISP if another person or entity has provided such information.¹¹² For example, an ISP may host a client's Web site on its network. If the client posts defamatory materials on the Web site, the ISP is immune from any liability because it neither served as a speaker nor as a publisher. Furthermore, recent federal cases interpreting the corresponding federal legislation have held that under these provisions, the ISPs are immune from distributor liabilities as well.¹¹³

Second, if an ISP voluntarily prevents its clients from accessing "inappropriate" contents, the ISP does not incur any liability.¹¹⁴ Although provisions of the Communications Decency Act¹¹⁵ prohibiting indecent speech were struck down by the United States Supreme Court, the provisions of the Communications Decency Act providing for ISP immunity for prohibiting access to similar materials have not been ruled upon.¹¹⁶

VI. CONCLUSION

Technology is one of the fastest growing areas of the law. Virginia has been on the forefront in the area of technology law. The

110. VA. CODE ANN. § 8.01-49.1(A) (Cum. Supp. 2000).

111. See 47 U.S.C. § 230(c) (Supp. 1998).

112. VA. CODE ANN. § 8.01-49.1 (Cum. Supp. 2000).

113. See, e.g., *Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

114. See VA. CODE ANN. § 8.01-49.1 (Cum. Supp. 2000).

115. Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended in scattered sections of 18 U.S.C. (Supp. 1998) and 47 U.S.C. (Supp. 1998)).

116. See *Reno v. ACLU*, 521 U.S. 844 (1997).

Joint Commission on Technology and Science has been reviewing and recommending technology related legislation since its creation in 1997. JCOTS will continue to review and sponsor technology related legislation in the future to ensure quality service and sound public policies for the citizens of Virginia.
