# Selected Legal Issues of E-Commerce

Edited by
Toshiyuki Kono, Christoph G. Paulus and Harry Rajak

Kluwer Law International

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# PREFACE

At a time when there are still a number of voices calling for the Internet to remain a law-free zone, a whole bundle of conflicts have already emerged, many of which have found their way to lawyers and the courts in a substantial number of different jurisdictions. It surely now cannot be doubted that the Internet, like any other place in the world where people come together and follow their own interests, needs, indeed cries out for rules to be developed for the handling of such conflicts. Lawyers are the experts for fabricating rules and it is, therefore, not surprising that they have already created a new area of law – commonly called "law of the internet" or "cyberlaw". This area, however, is still far from being strictly defined. It touches on many existing areas of law, but at the same time it deals with a wholly new medium – cybespace - which itself is subject to constant change and development. Under these circumstances, it is not surprising that in a number of cases the predictions as to how this law will look at some selected moment in the future are vague and uncertain.

This is particularly true for the commercial side of the Internet, for which the term "E-Commerce" has been coined. So rapid has been the development of E-Commerce, that it is now frequently said that this is the future of any commerce and that it carries the potential for enormous growth. Yet, this is but a forecast and one which is not without many question marks – at least for the present. E-Commerce, essentially comprises two major sections – business to consumer ("B2C") and business to business ("B2B") and a cautious assessment at this stage may be that while the B2C side of E-Commerce may never reach its predicted importance, it would appear likely that the B2B area will undergo massive further development. Thus, it is imperative that appropriate people, bodies, organisations, countries and indeed, international organisations prepare, draft and enact rules which are appropriate for a virtual and ubiquitous space which may well defy the traditional borderlines of sovereign states.

This volume contains articles based on presentations given at an international symposium held in late-July 2001 in Miyazaki, Japan. Those who participated work in one way or another in the study and analysis of cyberlaw and some are engaged occupations which are increasingly dependent on internet related activities. All are engaged in the endeavour of developing an appropriate and workable cyberlaw. They should not be read with the expectation of finding definite solutions. We are surely still a long way from resolving the enormous number of complications and tensions which come from the necessary involvement of many different legal systems and anticipated strong presence at an international dimension. The contributors here should rather be read as one collective voice in a huge chorus, which searches for the ideal of a universal consensus to a major new commercial challenge. We anticipate that this will be a search whose future will be a great deal longer than its past.

Toshiyuki Kono
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March 2002

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*T. Kono et al. (eds.), Selected Legal Issues of E-Commerce,* 1–12.

## A. PREFACE

My concerns are the sudden death of e-commerce companies. During the last year or so, companies which were regarded as the superior winners in the world, the titans of e-commerce seem to have been murdered at a stroke. On one view it may have been the law which caused the economic depression in ebusiness, but in my view, e-Commerce has been killed by the very nature of internet and network economy itself. Here, I am presenting my ideas in the form of a novel with some references to legal sources as hypertext in footnotes.[1] My short text is based on a novel written by Ryunosuke Akutagawa which was the literary source of Kurosawa's famous film "Rashomon".[2] It still has the form of a speech (with only a few footnotes) as it is meant to be published in a conference paper booklet.

## B. THE TESTIMONY OF A WOODCUTTER QUESTIONED BY A HIGH POLICE COMMISSIONER

Yes, Sir. Certainly, it was I who found the body. This morning, as usual, I used the road when I found the body in a grove. The exact location? Several meters off the road. The body was lying flat around, right beside the highway. No. The blood was no longer running. The wound had dried up, I believe.

## C. THE TESTIMONY OF A TRAVELLING BUDDHIST PRIEST QUESTIONED BY A HIGH POLICE COMMISSIONER

The time? Certainly, it was about noon yesterday, sir. The unfortunate man was on the highway to sell a variety of goods and services since several months. He was young, intelligent, dynamic and ambitious for the sake of his business. He struggled very hard to survive. First he was applauded by everybody. He got money, support, public interest. But then the journey got to be exhausting. He lost money. The profits were too low. Only a few people contacted him to make business. So, his journey became more and more hazardous. The name? He called himself "dotcom" so far as I remember.

By the way, Dotcom had a lady accompanying him on a horseback, who I have learned was his wife. A scarf hanging from her head hid her face from view. The lady's height?

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1 However, I strictly avoid any reference to literature as this paper is part of a book which represents conference papers.

2 I used, extensively, the English translation of the novel published in London 1997.

Oh, about four feet five inches. Since I am a Buddhist priest, I took little notice about her details.

Little did I expect that he would meet such a fate. Truly human life is as evanescent as the morning dew or a flash of lightning. My words are inadequate to express my sympathy for him.

## D. THE TESTIMONY OF A POLICEMAN QUESTIONED BY A HIGH POLICE COMMISSIONER

The man that I arrested? He was wearing a dark blue silk kimono. And he used a bow and strange arrows with hawk feathers – these were all in his possession I believe. The name of the villain? "Kindai ha no arikata". He claims to be innocent.

## E. THE TESTIMONY OF „KINDAI HO NO ARIKATA"

Now things have come to such ahead, I won't keep anything from you. By the way, I am an innocent man. I have never intended to kill the dotcoms. I even tried anything to support them.

How? Well, I used my arrows, the arrows of „kindai ho no arikata", of the modern law, as it should be. I tried everything to regulate e-commerce as extensively and effectively as possible. And I established within two years a new global framework on e-commerce law with clear-cut rules harmonized within Europe taking into consideration regulations on the UN and the US level. I did everything to supply dotcoms with all the necessary legal safeguards they needed.

First, I protected their trademarks against illegal use as part of a domain and gave them a clear-cut guideline how to create a domain without violating the rights of other persons. A company which enters the wide world of the internet needs a domain, more precisely a URL such as "http://www.cocacola.com". These domains are given to everybody who asks for their registration according to the principle "first come, first served". Registrars are private companies acting under the auspices of ICANN; the International Corporation for assigned Names and Numbers. I sharpened the rules of trademark law to protect rightholders against domain grabbing. As the registration and use of domains often violated trademark rights, it was appropriate that harmonized EU principles existed on

the protection of trademarks.[3] These rules have been interpreted by courts to apply effectively against the use of trademarks as part of a domain, even in the case of similar wording. This strategy was not only an issue of European regulators, but of the United States which enated their Anticybersquatting Act.[4] In order to get quick decisions in domain controversies, I allowed the establishment of a specific arbitration system based upon the UDRP, the Uniform Dispute Resolution Procedure.[5]

Secondly, I created a globally uniform set of rules in copyright law to protect digital content. I am responsible for at least three important EU directives. The Software Directive[6] maintains a common European standard for the copyright protection of software and grants a range of exploitation rights, including the loading of software in a working memory, the distribution of a computer program and its alteration. The Database Directive[7] provides for a two-fold protection of collections of data by copyight and by a new sui-generis protection system. The sui-generis-right includes the protection of the database producer against linking and meta-searchengines and is granted for at least 15 years. My last and most important work is the so-called InfoSoc Directive, the Directive on Copyright in the Information Society.[8] It contains a new internet exploitation right, based upon the WIPO Copyright Treaty the right of making available content to members of the public not presenting at the place where the act of making available originates. In addition the Directive solved the issue of limitations as it harmonizes the divergent structure of exemptions in the national copyright legislations by implementing an exhaustive mandatory list of possible exemptions. The Directive therefore provides for an exhaustive enumeration of exemptions to the reproduction right and the right of communication to the public. Especially it allows certain acts of temporary reproduction which are transient or incidental reproductions forming an integral and essential part of a technological process carried out for the sole purpose of enabling either efficient transmission in a network or a lawful use of a work.

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3 First Council Directive 89/104/EEC of 21 December 1998 to approximate the laws of the member states relating trade marks, OJ L 040, 11/0271989, p. 1. This directive is the basis for the harmonization of trademark law in the EU.

4 Anticybersquatting Consumer Protection Act, S. 1948, incorporated in HR 3194, Public Law Number 106-113, enacted on November 29, 1999.

5 Policy adopted on August 26, 1999. See http://www.icann.org/udrp/udrp.htm.

6 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122 of 17 May 1991, p. 42.

7 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077 of 27/03/1996, p. 20.

8 Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 of 22. June 2001, p. 10 ; http://europa.eu.int/eur-lex/de/oj/2001/l_16720010622de.html or http://europa.eu.int/eur-lex/en/oj/2001/l_16720010622de.html (English Version).

Thirdly, competition law issues have also been dealt with. I installed the EU Directive on certain legal aspects of e-commerce[9] which focuses on the country of origin principle. This principle formerly installed by the European Court of Justice leads to the application of an online marketing law of state where the online provider has his seat. By contrast, and to strengthen this principle, the rules of the countries where a homepage can be accessed cannot be applied any more. This rigid new principle has been promoted in favour of the online industry which only has to look for its home-country marketing laws. According to these principles, information society services should be supervised at the source of the activity in order to ensure an effective protection of public interest objectives.

Fourthly, I regulated e-contracting issues. In the E-Commerce Directive just mentioned I included rules providing that homepages are not a binding offer and that tools for the correction of typing errors have to be provided for. All national laws on written requirements have to be changed in order to increase online contracting. With the EU Signature Directive,[10] I enabled certification-service-providers to develop their cross-border activities with a view to increasing their competitiveness. Therefore, the directive states that certification-service-providers should be free to provide their services without prior authorisation and that the legal effectiveness of electronic signatures and their admissibility as evidence in legal proceedings should be recognised. Advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature creation device can be regarded as legally equivalent to hand-written signatures. And don't forget my EU Distance Selling System. The Distance Selling Directive[11] provided for a worldwide unique protection of consumers in eBusiness. The consumer shall be provided with several different kinds of information in good time prior to the conclusion of the distance contract; the information has to be made on durable medium. In addition, the consumer has at least a period of seven working days in which to withdraw from the contract without penalty and without giving any reason and if he or she has not received sufficient information on this withdrawal right, the period is extended to three months.

Fifthly, I have taken care of data protection where new legal tools for data mining and data warehousing became necessary. Personal data, for instance of customers, is of substantial value in e-commerce. This data can be easily recorded, transferred, combined with other data for an extensive personal profile of the customer. Data Mining and Data Warehouse became famous strategies for the dotcoms to survive in the hazardous world

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9 Directive 200/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178 of 17/07/2000, p. 1.

10 Directive 1999/93/EC of the European parliament and of the Council of 13 December 1999 on a Community Framework on electronic signatures, OJ L 13 of 19/01/2000, p.12,

11 Directive 97/66/EC of the European Parliament and of the Council of 20 May1997 on the protection of consumers in respect of distance contracts, Official Journal L 144, 04/06/1997, p. 19.

of global business. The EU Data Protection Directive[12] and the EU Directive on Privacy and Telecommunications[13] contain rules which guarantee the freedom of the person concerned to decide upon the use of his or her personal data. I used the most restrictive privacy tools of national legislators to build up an effective threshold. The UK idea of notification could be used to create a European system in which all processing of data needs to be notified to the data protection commissioner. I took the French concept that certain sensitive data can only be used with the express consent of the person concerned. I combined it with the German model that any processing of personal data is prohibited unless the person concerned has given his or her consent or a specific statutory provision allows the processing. In addition, I invented a new tool to restrict the exchange of data between Europe and Japan or the United States. According to the EU Data Protection Directive, the transborder data flow to non-EU countries is only lawful if the third state has an adequate level of data protection when compared to the EU standard.

As the sixth and final element, I solved the difficult issue of liability. In the E-Commerce Directive, horizontally structured rules on the liability of host, cache and access providers are included. A service provider can thus benefit from the exemptions for "mere conduit" and for "caching" when it is in no way involved with the information transmitted. The provider of an information society service, consisting of the storage of information, has to act expeditiously to remove or disable access to the information upon obtaining actual knowledge or awareness of illegal activities. And I redrafted the EU rules on the execution of civil court decisions. In addition, I abolished the old Brussels Convention on the recognition and enforcement of judgments in civil and commercial matters and replaced it by a somewhat different EU regulation.[14] This EU Regulation is a legal instrument which is binding and directly applicable.[15]

So – yes. I claim to be innocent. I have done nothing to kill that man. I even supported him to my utmost power.

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12 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23/11/1995, p. 31.

13 Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, OJ L 24 of 30/01/1998, p. 1.

14 Council Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 12 of 16/01/2001, p. 1.

15 See the brief explanation of European Union legislative capacity in the contribution to this volume by Professor Rajak.

## F. THE TESTIMONY OF „KINDAI HO NO ARIKATA"

Oh, wait a minute. No torture can make me confess what I don't know. Your long inquiries, your tortuous questions have, though, made me reconsider my former statements. And I must confess, I might perhaps have caused the death of Dotcom. I did forgot to regulate aspects which may, perhaps, have caused the death of Dotcom.

Firstly, the domain question: My Uniform Dispute Resolution Procedure can only be applied for generic top level domains, such as "com", "net" and "org".[16] Country-based top level domains are mostly not subject of the UDRP (with the exception of states like Coke Island or Antigua). The UDPR is furthermore based on the dubious principle of "bad faith" which is, at least in the light of EU law, to be regarded as irrelevant for granting injunctions. Further problems are caused by the fact that ICANN, the international organisation responsible for organising the assignment of domain names, has just granted new top-level domains, such as "biz" or "info", and this might cause further trademark law conflicts. Finally, trademark is based upon the idea of territoriality, on the concept of nation-based effectiveness of intellectual property rights which leads, inevitably, to insoluble problems where cross-border disputes on domains arise.

I am dissatisfied with my own results in copyright as well. The Software Directive is full of lacunas, such as the difficult regulation on reverse engineering and the somewhat mandatory provision on the use rights for the intended purpose of a computer program. The Sui Generis Right created within the Database Directive has caused a lot of distress with the United States where people fear that this right might include a monopolistic protection of information as such. The InfoSoc Directive has not solved the issue whether the transmission of content in small, internal networks can be classified as a "making available to the public". Furthermore, it hasn't solved the issue of exemptions insofar as EU member states are free to maintain their divergent traditional exemptions for the sake of non-digital free usage. And apart from these details, the reference of copyright to the concept of territoriality causes major problems in cross-border cases. This principle implies that copyright is violated in every state where the homepage can be accessed. Every e-commerce company has to check any regulation on intellectual property law of every state throughout the world which is of course an impossible task. I knew that this requirement might kill e-commerce but I thought that the application of the territoriality principle wouldn't lead to much harm.

I am sorry to say that I even failed to solve the competition law needs. Yes, I have installed the country of origin concept, but due to national fears I had to allow so many exceptions and derogations from that principle that the effect of the concept remains

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[16] See for further questions related to ICANN the presentation of Yoshihisa Hayakawa.

dubious.[17] Consumer protection has been taken out to a similar extent as criminal law, public health, the delivery of goods, insurance business or copyright. Only minor areas of marketing law remain subject to the country of origin idea. But even there it is unsettled how "country of origin" fits with principles of private international law. For problems of marketing law the concept of the intended marketplace has been established. The law of every country, to which the homepage is purposefully directed, applies. This seemed to be a good limitation to the very general idea of the seat of the user, but even this principle proved to be doubtful. It became unclear how the direction of a homepage, its intended marketplace, could be determined. In addition, the Directive states in the preamble that private international law remains untouched and to the same extent shall not interfere with country of origin ideas. But that's not all. I have forgotten third, non-EU countries like Japan. They cannot profit from the home-state vision; targeting their business globally they have to take care of all the different marketing laws in Europe. This might violate WTO law – an aspect which I didn't consider at all.

And as for my e-contracting regulations, please just forget them. Let me only use the example of my favourite regulations on distance selling to illustrate why.[18] These regulations proved to be ineffective. The Directive contains too many exemptions. Owing to extensive lobbying, an exemption for financial services had to be made, an exemption which could not be justified by any argument. The EU Commission tried to close this gap by drafting a separate directive on distance marketing of consumer financial services; but this draft was and will never be accepted by the Member States. Discussion on this draft stopped in June 2001, so that banking and insurance business will be without specific consumer protection laws when doing e-business.[19] Furthermore, the requirement of the "durable medium" caused severe problems. A homepage is not durable; an e-mail is not durable. "Durable" is electronic information if it is stored on the computer of the consumer. But how could we prove that the consumer really received the message? As that proved to be nearly impossible, most companies simply refrained from adapting the distance selling regulations.

Finally, the withdrawal right led to bizarre situations. For instance, the question arose: how could you give back a car which you ordered via internet? If the car had been used for seven working days, it is no longer a new car any more and cannot be sold as such. Does the trader really have to bear this loss? Or what is happening with books ordered at Amazon? No exceptions from the withdrawal right have been foreseen for books and, as a result, Amazon, an online bookshop in the past, has now become a free public lending library owing to the Distance Selling Directive. My specific concern however is the

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17 This aspect has been considered in detail by Prof. Dr. Alexander Trunk.

18 As to further problems in econtracting related to internet auctions cf. the paper presented by Prof. Dr. Toshiyuki Kono.

19 For the consequences in regulating securities and exchange see the papers prepared by Dr. Harald Baum and Sadakazu Osaki.

question of private international law. The principle of the seat of the user has been traditionally applied in consumer protection law where the needs of consumers overrule the interests of traders. Take Art. 12 of the Distance Selling Directive. A consumer shall not lose the protection granted by the Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States. However, which company acting worldwide in the internet can take account of all the consumer protection laws in the world?

With data protection, I have problems, as well. Again, the strength of my new tool was undermined by several trends. First, the EU closed agreements with the United States to solve the issue of transborder data flow. Both states agreed upon the so-called safe-harbour principles, a kind of model contract which has to be used between EU and US companies and which contains the contractual obligation of the US company to implement EU data protection principles. However, these principles were not worth the paper on which they were written. The biggest problem was George Bush, the new US president who rigorously stopped the whole safe harbour discussion in March 2001. Therefore, everyday, EU companies are violating EU regulations by sending personal data to the States but nobody seems to worry – a great victory for Bush and against privacy.

Yes, you are right: Even my liability considerations have proved to cause international problems. The US has integrated a different concept, the notice and take down concept, in their Digital Millenium Copyright Act.[20] The concept is better than mine, I have to admit that. My focus on "knowledge" of a host provider doesn't clarify to what extent and when the necessary knowledge has been obtained by the provider and what is happening if the provider deliberately does everything to avoid knowledge. And, yes, what of my efforts in the area of internal civil procedure law? This is well-suited for solving intra-EU issues. But as to Japan or the US, they just don't work. There has been a long-lasting discussion on a draft for a new Hague Convention on the Execution of Civil Court Decisions.[21] However, the inclusion of provisions on the exclusive competence of certain courts in intellectual property law matters led to major controversies, as did the question of the enforcement of punitive damages decisions. Therefore, the whole Hague discussion stopped in June 2001; it remains uncertain whether it will lead to major results.

Let me finish my confession: I have killed that man. But it was not my intention to do that; it was mere negligence. Therefore, I hope not to be punished too harshly by you.

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20 See the paper presented by Prof Dr. Anthony J. Sebok on „The Invisible Borderlines of Tort on the Internet".

21 See the presentation of Prof. Masato Dogauchi on this matter.

## G. THE CONFESSION OF A WOMAN WHO HAS COME TO THE SHIMIZU TEMPLE

This man laughed mockingly as he looked at my bound companion. How horrified my husband must have been. But no matter how hard he struggled in agony, the rope cut into him all the more tightly. In spite of myself I ran stumblingly to his side. Or rather I tried to run toward him, but the villain instantly knocked me down. "Who are you?" he cried in my face, "Who are you, accompanying this man?". My heart burning, I screamed and told them:

> "I am the spirit of the internet.[22] The Net has a nature, and its nature is liberty. The Internet was born at universities in the United States. The first subscribers were researchers, but as a form of life, its birth was its link to the university and university life. The internet is by its nature anarchic, open, free. The real Internet users are weary of governments. They are repulsed by the idea of the placing of something as important as the Internet in the hands of governments. Policy-Making should be taken away from government and placed with a non-profit organization devoted to the collective interest of the Internet."

"You have to suffer as well, but in a different way", the robber cried. And he struck me severely in my face. I called out in spite of myself and fell unconscious. In the course of time I came to, and found that the robber was gone. I saw only my friend still bound to the root of the cedars. I felt that I had changed, that I had lost something precious, my innocence. "Hey", I said to him, "since things have come to this pass, I cannot live with you. I'm determined to die, ... but you must die, too. You saw my shame. I can't leave you alive as you are." This was all I could say. I took my small sword and raised it over my head. One more I said, "Now give me your life. I'll follow you right away." When he heard these words, he moved his lips with difficulty. At a glance I understood his words. Defying me, his looks said only "Kill me". Again at this time I must have fainted. By the time I managed to looked up, he had already breathed his last – still in bonds. Gulping down my sobs, I untied the rope from his dead body. And ... and what has become of me since I have no more strength to tell you. Anyway, I hadn't the strength to die. I stabbed my own throat with the small sword, I threw myself into a pond at the foot of the mountain, and I tried to kill myself in many ways. Unable to end my life, I am still living in dishonour (A lonely smile) Whatever can I do? Whatever can I ... I ... (Gradually, violent sobbing).

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22 The following quotes are taken froim Lawrence Lessig, Code and other laws of cyberspace, New York 2000.

## H. THE STORY OF THE MURDERED MAN, AS TOLD THROUGH A MEDIUM

While the criminal talked, my wife raised her face as if in trance. She had never looked so beautiful as at that moment. What did my beautiful wife say in answer to him while I was sitting bound there? I am lost in space, but I had never thought of her answer without burning with anger and jealousy. Truly she said, ."Then take me away with you wherever you go." This is not the whole of her sin. If that were all, I would not be tormented so much by the dark. When she was going out of the grove as if in a dream, her hand in the robber's, she suddenly turned pale, and pointed at me tied to the root of the cedar, and said nothing. She just sat in front of the tree where I was almost dying. She could have helped me; but she remained silent as if she had gone crazy. I looked at her, and immediately she understood. She came to me and whispered: I cannot help you. This would violate my ideals. Take for instance your desire, finally to get an instrument for proving electronic orders, the electronic signature. The lawyers did everything to provide you with a clear framework for digital signatures.[23] But I made this device useless, not purposefully, but negligently. You remember, network economy involves the co-operation of all branches of industry. The more people engage, the higher the network effect works. But as to electronic signature nobody wanted to start.

The banking industry was asked to develop and distribute signature units on the banking cards; but they refused. That has to do with the different technical standards within the banking community ranging from E-Cash to SET. Furthermore, the banks were unwilling to finance signature tools in favour of other industrial branches. The state, itself, also refused the nationwide implementation of signature tools as there is no money in the state budget. The user, himself, refused to buy signature-reading devices as there are no reasonable advantages for him to justify such an investment. As a matter of fact, there is no reason why somebody should buy chip cards with a digital signature if he is now bound by a contract whose formation he could deny without such a signature. So, nobody is using digital signatures, at least in Europe; this technique is dead before it has even been borne.

Similar network effects can be traced back to the discussion on Ecash, one of the fashionable topic in 2000, but now dead. That has nothing to do with law, as the legal framework on Ecash was lucidly structured by EU and US regulations.[24] But nobody wanted to bear the risk of losing ecash and getting no equitable refund. The banking institutions wanted to shift all risks to the traders and the customers; but both groups – simply by ignoring the new technology – did not co-operate in absorbing all the risk.

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23 An overview of Japanese regulations on electronis signature and form requirements can be found in the paper of Prof. Hideki Kanda.

24 This topic has been dealt with by Prof. Dr. Mads Andenas in his speech.