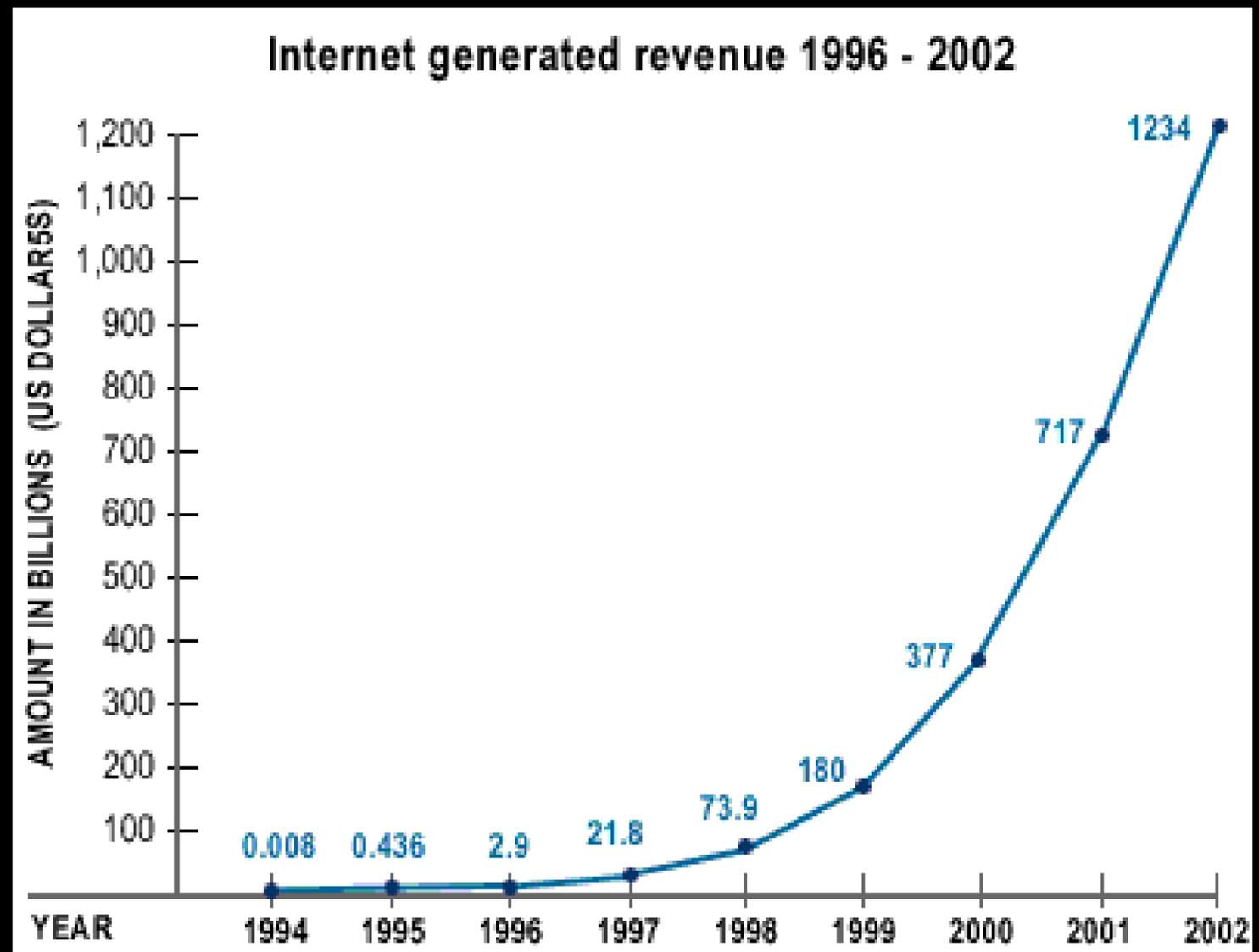


# E-Commerce Legal Issues

A Practitioner's Perspective

E-Commerce Implementation Meeting  
Baltimore, Maryland  
August 29, 2000  
Timothy J. Feathers

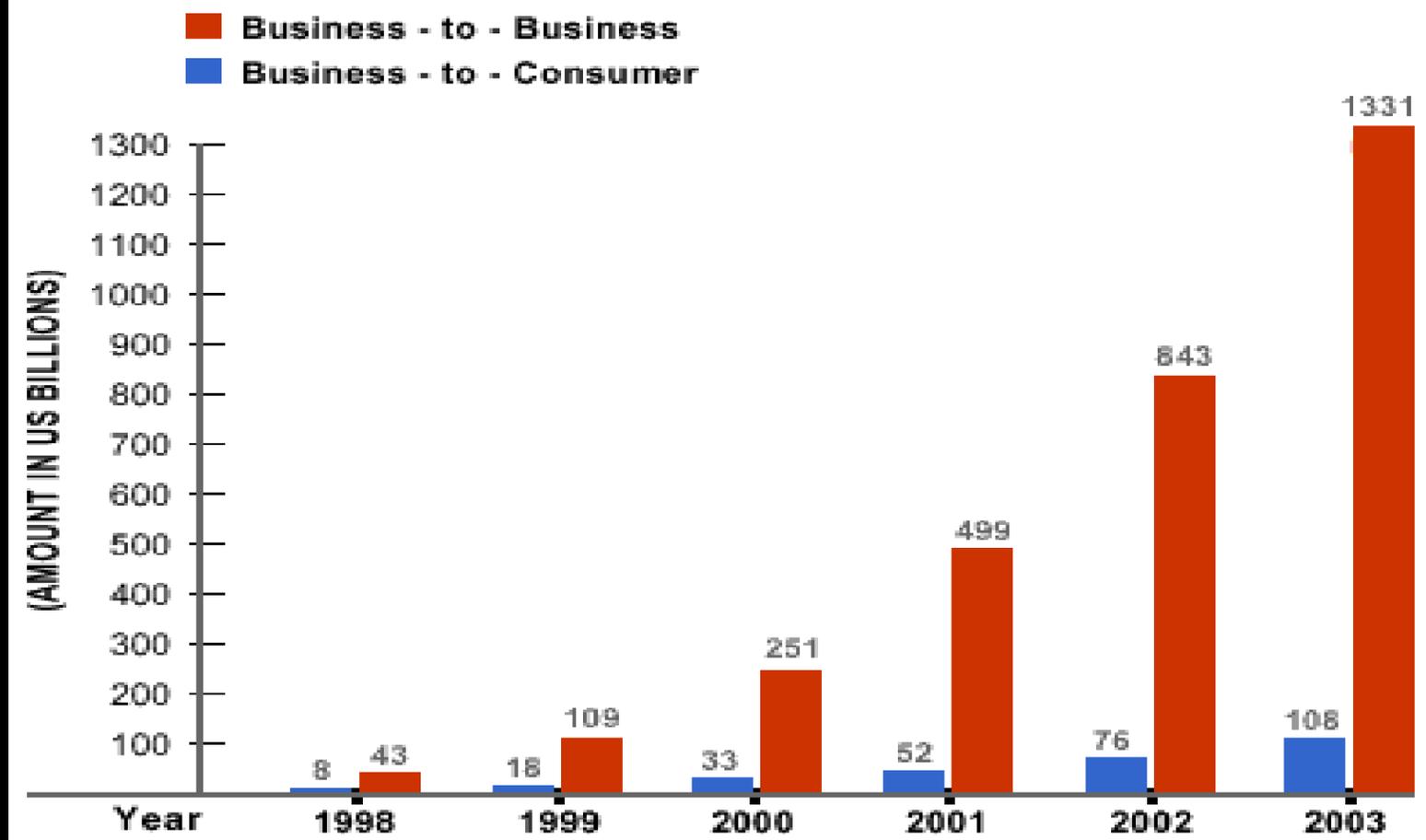
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Source: Forester Research, NUA

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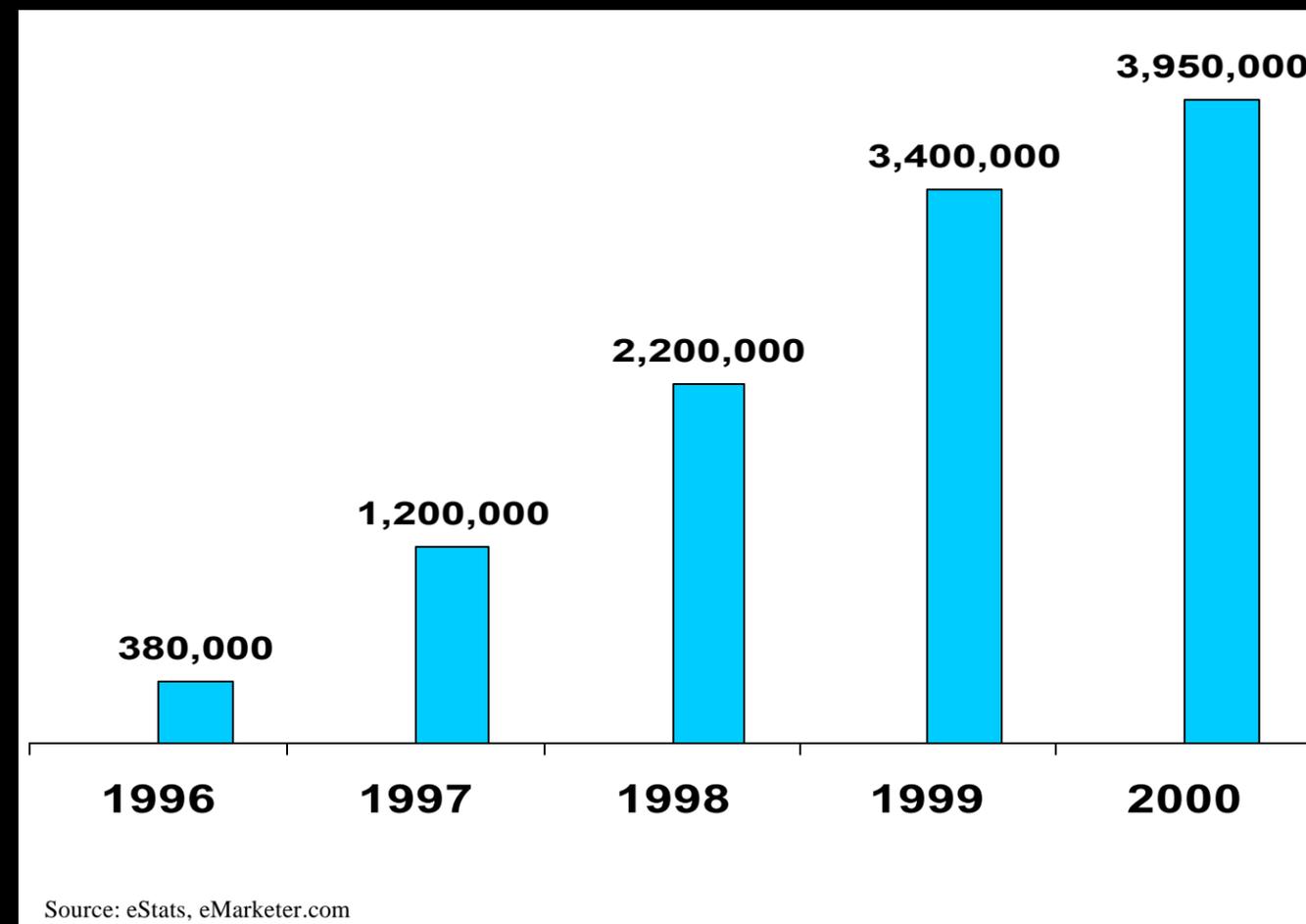
## US ECOMMERCE 1998 - 2003



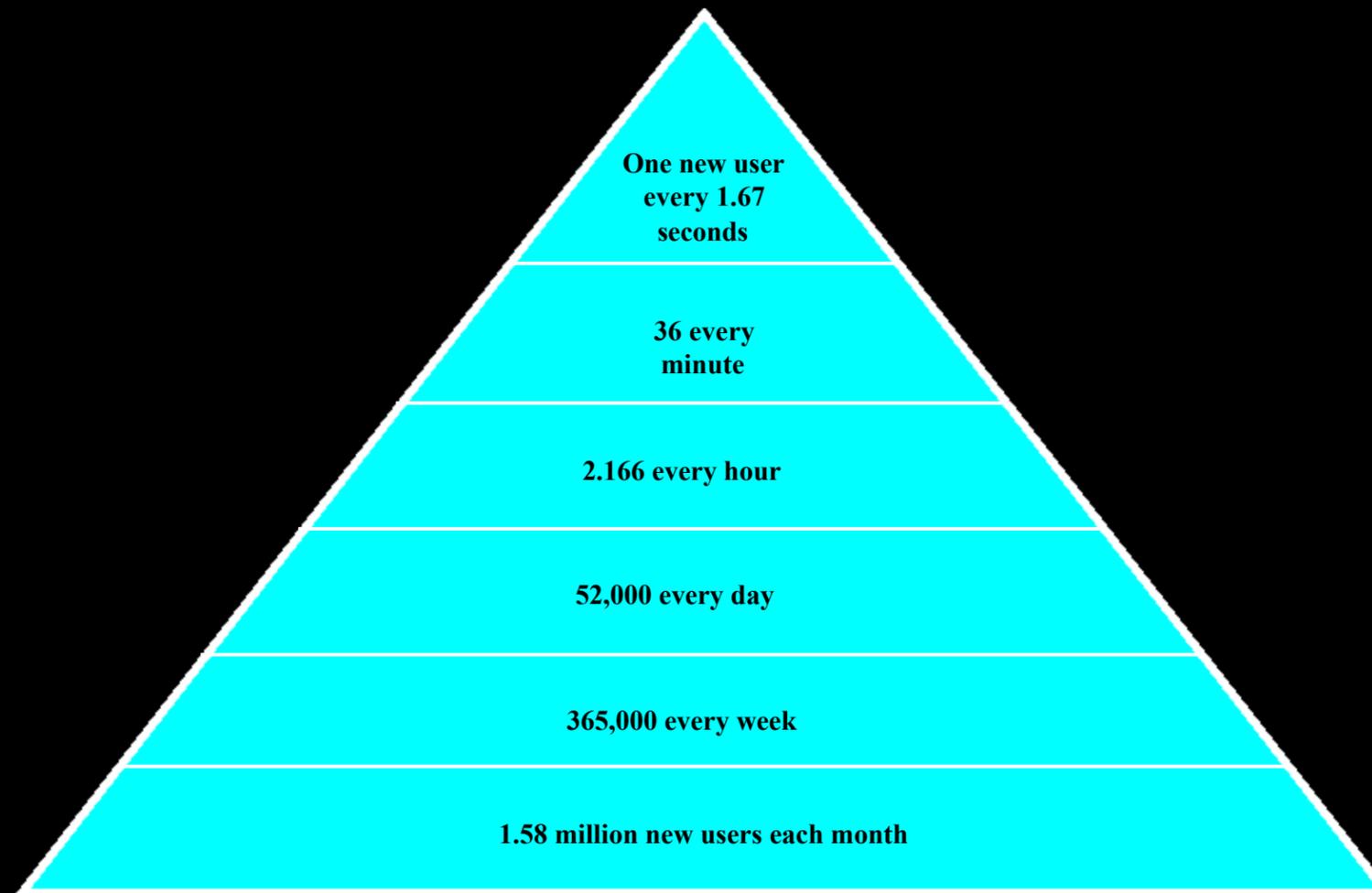
Source: Forester Research, NUA

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# Growth in Domain Names Registered as .com, .org or .net



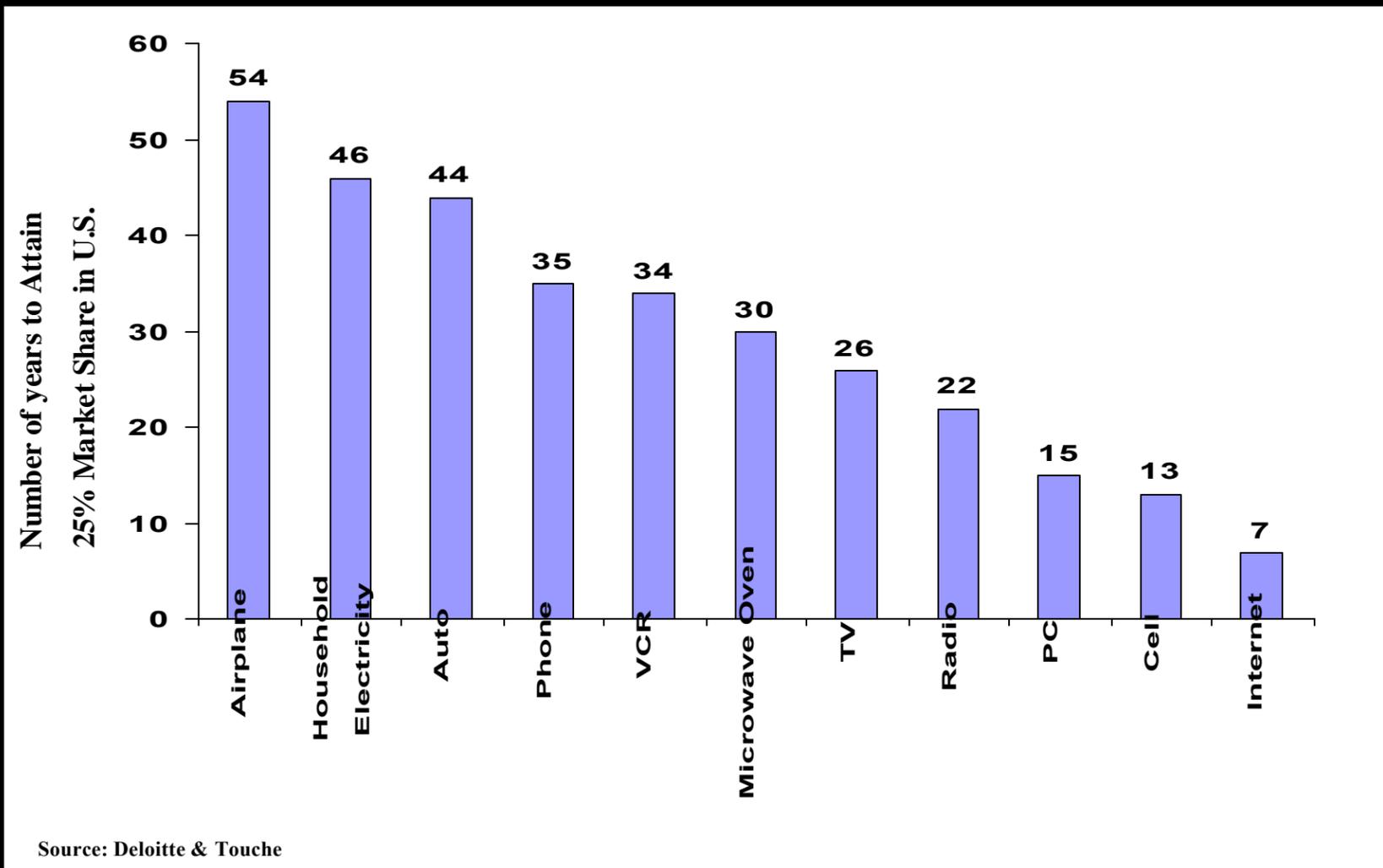
# Growth in Perspective



Source: eMarketer.com

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# Internet Adoption vs Other Technologies



## Opening Quote:

Just because we cannot see clearly the end of the road, that is no reason for not setting out on the essential journey. On the contrary, great change predominates the world, and unless we move with change we will become its victims.

- Robert F. Kennedy

## Pop Quiz

- Is there a difference between:
  - E-Business and E-Commerce?
  - Signature and Autograph?
  - Digital Signatures and Electronic Signatures?
  - A Writing and a Record?
  - E-mail and USPS (regular) Mail?

# A History of the Writing and Signature Requirements

- What is a signature? Signature may be defined as “any mark made with the intention of authenticating the marked document.”

(Digital Signature Guidelines, 1996 ABA Info Security Committee)

# Purpose of Writing Requirements

- Evidentiary Function
- Cautionary Function
- Objectifying Function
- Clarifying Function
- Archiving Function
- Authentication Function
- Legal Function

# Purpose of Signature Requirements

- To evidence a person's intent
- To identify the person signing
- To serve as evidence of the integrity of a document
- To prevent repudiation

# Electronic Signatures

Definition: a generic, technology-neutral term that refers to the universe of all of the various methods by which one can “sign” an electronic record.

Examples:

- A facsimile signature
- A name at the bottom of an e-mail message
- An e-mail origination header
- A PIN number or smart card
- A biometric method
- PenOp Technology
- A Digital Signature

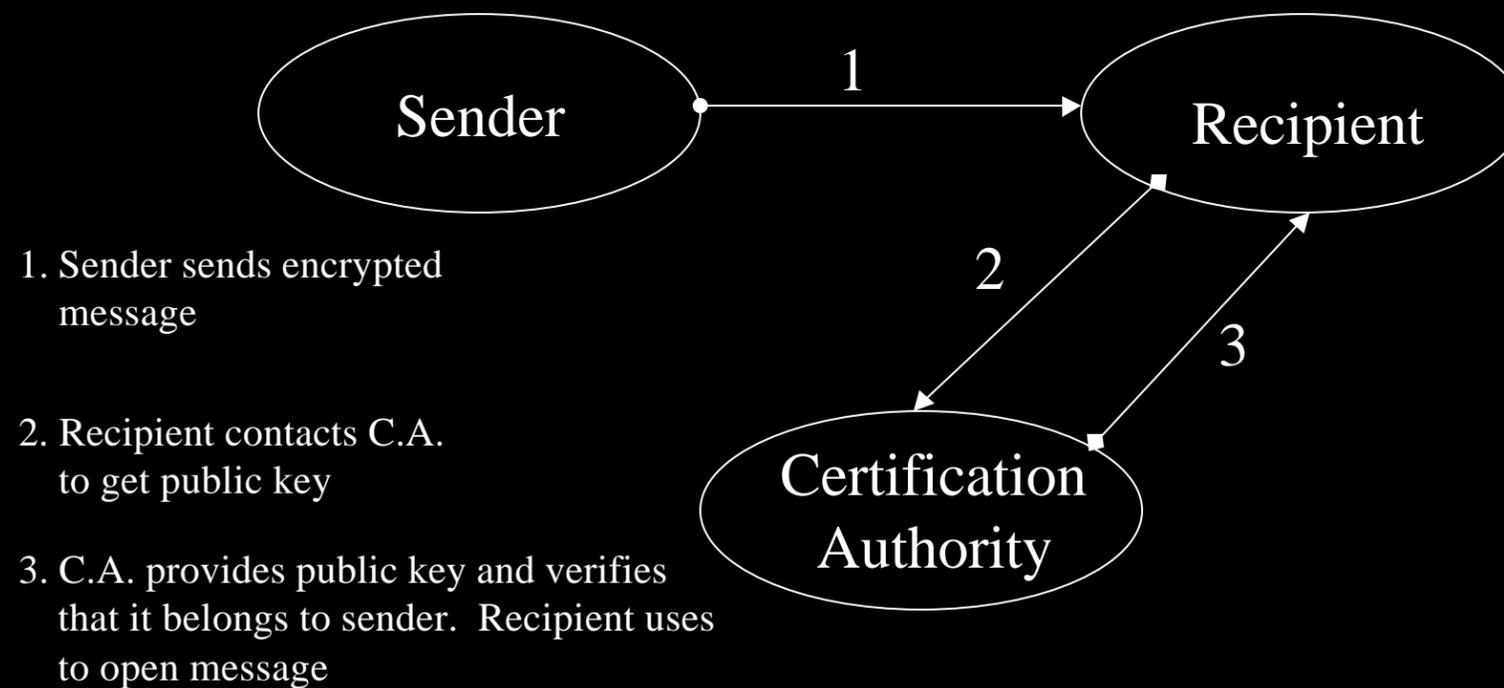
# Digital Signatures

Definition: a term for one technology specific type of digital signature using Public Key Cryptography. With public key systems, the users have software that generates two related keys--a public key and a private key. The fundamental characteristics of the key pairs is that only the public key can decrypt messages encoded with the private key, and likewise, only the private key can decode messages encoded with the public key.

# Formation of Binding Contracts Online:

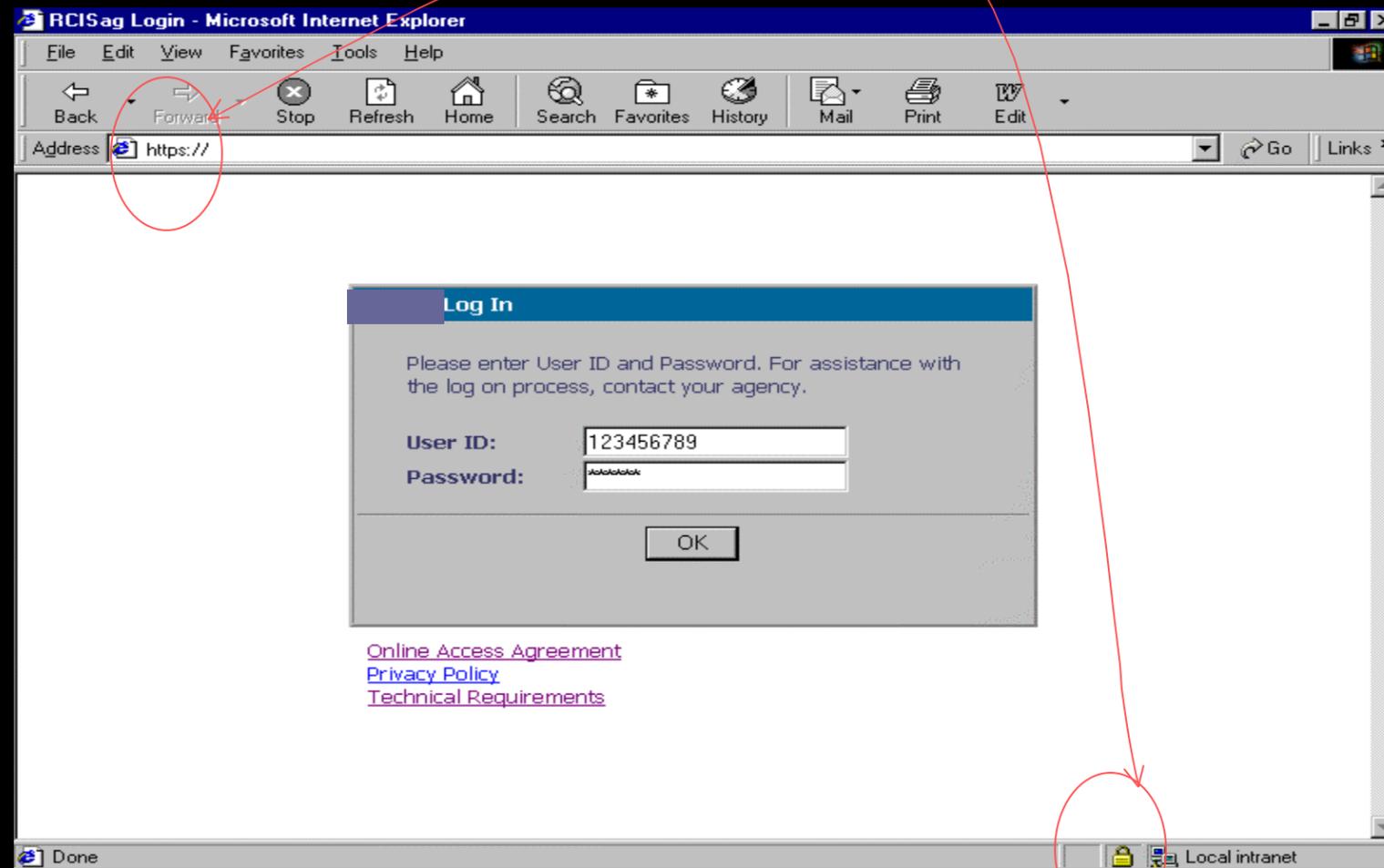
From signing documents to authenticating records

- The Technological Solution: Digital Signatures and Public/Private Key Encryption.



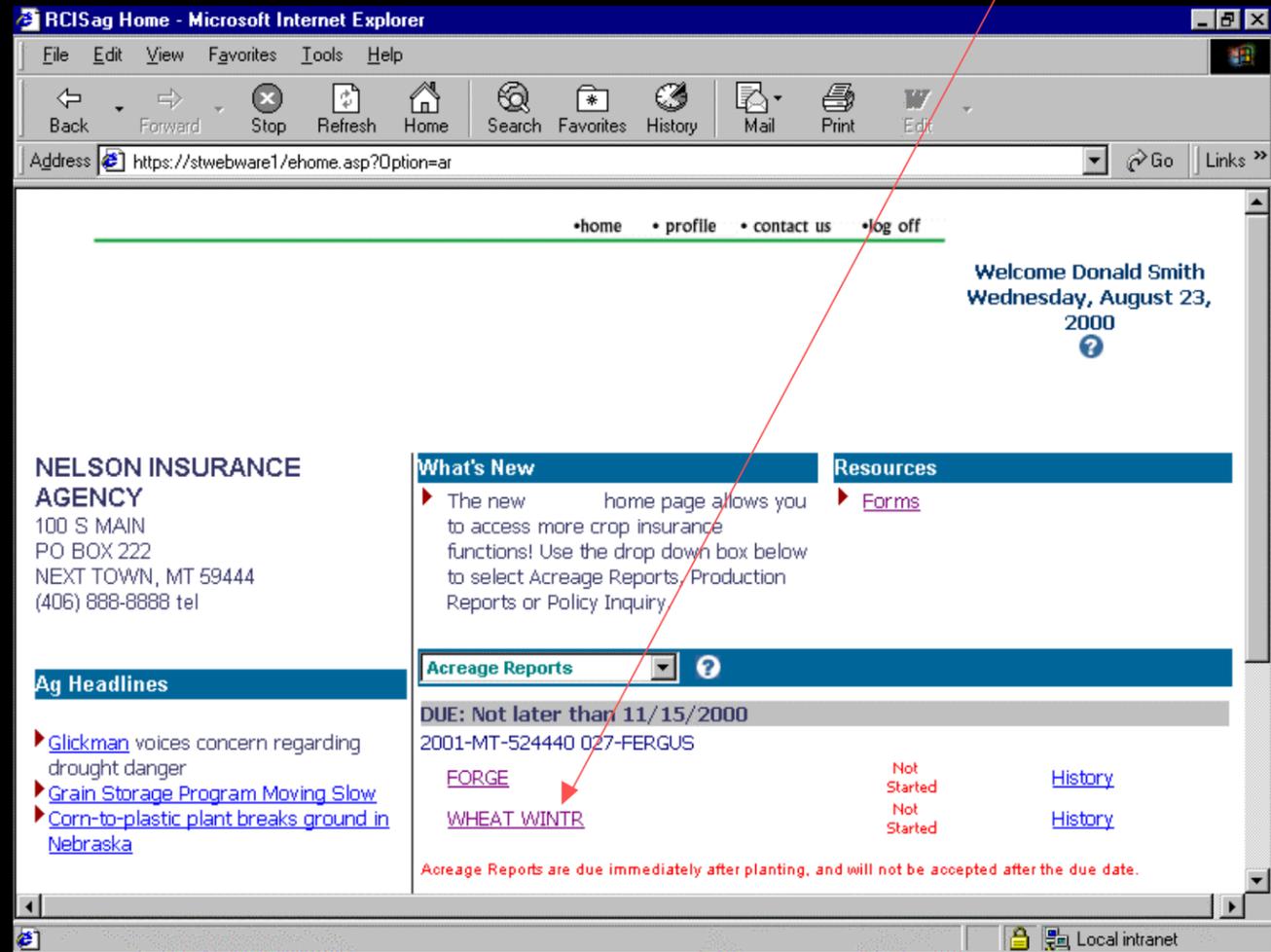
# E-Commerce Crop Insurance Example

Log in to a secure Internet site



# E-Commerce Crop Insurance Example

User selects policy to work on



# E-Commerce Crop Insurance Example

User fills in planting information

**Crop: WHEAT - APH** If you did not plant this crop for this year, check this box and save

#	Unit	Type	Practice	Sec	TWP	RNG	FSN	Shareholder	Farm Name	Share	Planted Acres	Date Planted
1	001-01-00	WINTR	SUMFW	21	022N	020E	171	STATE		1	0	
2	001-01-00	WINTR	CNTCR	21	022N	020E	171	STATE		.5	150	15 sept
3	002-01-00	WINTR	CNTCR	21	022N	020E	171			1	0	
4	002-01-00	WINTR	SUMFW	21	022N	020E	171			1	250	22 sept
5	002-03-00	WINTR	CNTCR	22	022N	020E	171			1	0	
6	002-03-00	WINTR	SUMFW	22	022N	020E	171			1	0	
7	002-05-00	WINTR	CNTCR	29	022N	020E	171			1	150	10/1/00
8	002-05-00	WINTR	CNTCR	32	022N	020E	171			1	0	
9	002-05-00	WINTR	SUMFW	29	022N	020E	171			1	0	
10	002-05-00	WINTR	SUMFW	32	022N	020E	171			1	0	
11	002-07-00	WINTR	CNTCR	30	022N	020E	171			1	0	
12	002-07-00	WINTR	SUMFW	30	022N	020E	171			1	0	

Number of new lines to add:

Notes to Agent:

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# E-Commerce Crop Insurance Example

User must accept disclosure statements in order to electronically sign

•home • profile • contact us •log off

Welcome Donald Smith  
Wednesday, August 23,  
2000

You may now electronically sign this document and submit it to your agency. By submitting this document, you are agreeing to the Federal Statements listed below. Please review and click OK at the bottom of the page to continue. (You may print the Federal Statements using the printer icon on your browser).

**Collection Of Information and Data (Privacy Act)**

To the extent that the information requested herein relates to your individual capacity as opposed to your business capacity, the following statements are made in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a). The authority for requesting information to be furnished on this form is the Federal Crop Insurance Act, (7 U.S.C. 1501 et seq.) and the Federal Crop insurance regulations contained in 7 C.F.R. chapter IV.

Collection of the social security account number (SSN) or the employer identification number (EIN) is authorized by section 506 of the Federal Crop Insurance Act (7 U.S.C. 1506), and is required as a condition of eligibility for participation in the Federal crop insurance program. The primary use of the SSN or EIN is to correctly identify you, and any other person with an interest in you or your entity of 10 percent or more, as a policyholder within the systems maintained by the Federal Crop Insurance Corporation (FCIC). Furnishing the SSN or EIN is voluntary; however, failure to furnish that number will result in denial of program participation and benefits.

The balance of the information requested is necessary for the insurance company and FCIC to process this

Done Local intranet

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# E-Commerce Crop Insurance Example

Electronically signing attaches the user's private key and encrypts the document

Acreege Reporting Form - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit

Address <https://stwebware1/AcreegeReports/ARRReport.asp> Go Links >>

### Acreege Worksheet Approval

< Sign Acreege Report > < Cancel Signing > ?

68% 1 of 1

Preview

**2001 Acreege Reporting Form**

INSURED DON SMITH HC 11 BOX 11 MY TOWN, MT 55555 (406) 444-4444 <input type="checkbox"/> SSN <input checked="" type="checkbox"/> EIN	AGENT/AGENCY 25-1292 NELSON INSURANCE AGENCY 100 S MAIN PO BOX 222 NEXT TOWN, MT 59444-0000 (406) 888-8888	CROP YEAR: 2001 POLICY NO: MT. STATE: MT MONTANA COUNTY: 02? FERGIS
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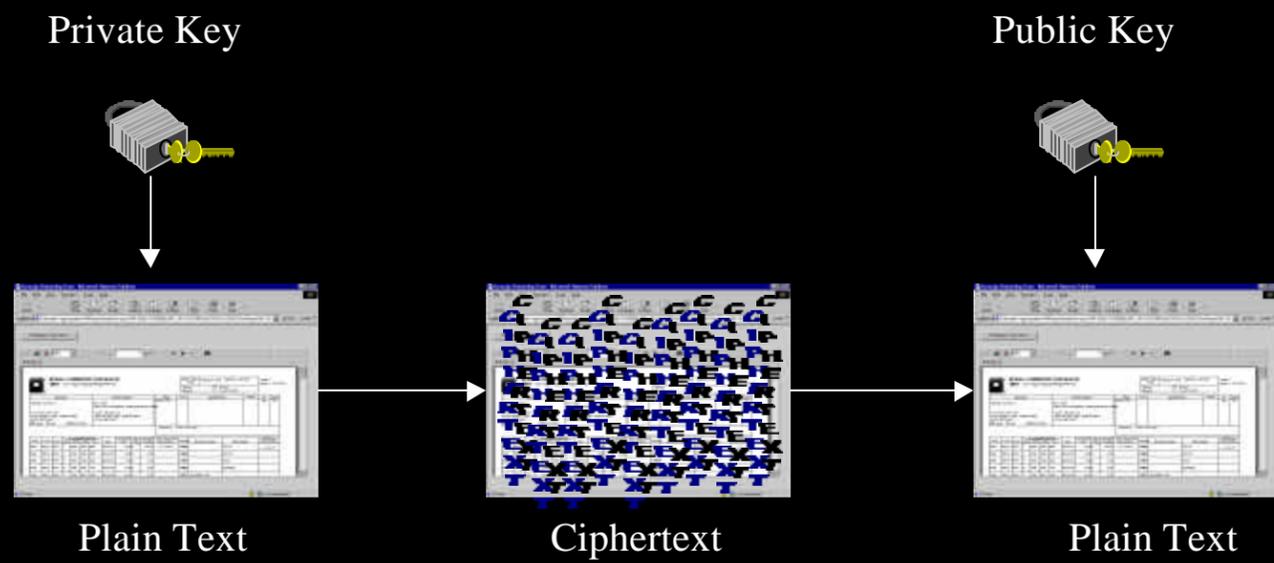
CROP	TYPE	DESCRIPTION	PRICE	%	LEVEL
WHEAT	APR			100	65

REMARKS:

CROP	TYPE	PRAC	SEC	TWP	RNG	RSN	UNIT	APPROVED YIELD	RISK AREA	INSURED ACRES	DATE PLANTING COMPLETED	SHARE	SHAREHOLDER	FARM NAME	ADDITIONAL INFORMATION
WHEAT	WINTR	SUMF	21	022N	020E	1T1	001-01 00	0.00		0.00		1.000	STATE		
WHEAT	WINTR	CATCR	21	022N	020E	1T1	001-01 00	0.00		150.00	9/15/2000	0.500	STATE		
WHEAT	WINTR	CATCR	21	022N	020E	1T1	002-01 00	0.00		0.00		1.000			

Done Local intranet

# Private and Public Key Pairs



## Security responsibilities for eBusiness and digital signatures

- **Company Responsibilities:**
  - Provide the digital signature infrastructure
  - Issue digital certificates to licensed agents and policyholders identified by the agent
  - Maintain a secure site using Secure Sockets Layer (SSL)
- **Agency/Agent responsibilities:**
  - Maintain security of all user ID/PW
  - Maintain security of digital certificate
  - Validate policyholders prior to activating them on the e-business web site
  - Revoke/de-activate user Ids when appropriate
- **Policyholder responsibilities:**
  - Maintain security of digital certificate
  - Maintain security of user ID and password

# Recently Enacted Digital Signature Legislation

- “Removal of barriers approach”
- UETA--approved by NCCUSL in July 1999 has already been adopted by approximately 20 states, and is pending in dozen more.
- Electronic Signatures in Global and National Commerce Act, or “E-Sign”--signed by President Clinton on June 30, and will become effective in October 2000.

## UETA and E-Sign

Provide legal recognition of contracts executed electronically between two agreeable parties. The legislation provides legal recognition to the electronic records, electronic signatures, and electronic contracts.

## UETA Sec. 7 E-Sign Sec. 101

- (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 the law requires a signature, an electronic signature satisfies the law.

## Some Differences Between UETA and E-Sign

- UETA has provisions dealing with attribution.
- UETA has provision saying when something has been sent or received.
- UETA provides that admissibility cannot be denied just because electronic.

## UETA, E-Sign Preemption

E-Sign provides that state law may modify or limit the e-commerce provisions of E-Sign by specifying alternative procedures or requirements for the use or acceptance of electronic records or signatures so long as they “do not require, or accord greater legal status or effect” to the application of a specific technology for creating, communicating or authenticating electronic records or signatures.

## Prior Law on “Writing” Requirements

It makes no difference whether the offer or acceptance is written with a steel pen an inch long . . . or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.

- *Howley v. Whipple*, 48 N.H. 487 (1869).

# “Click-Wrap” Agreements.

## Manifesting Assent (UCITA 112)

(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having and opportunity to review the record or term or a copy of it:

- (1) authenticates the record or term with intent to adopt or accept it; or
- (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.

## “Click-Wrap” Agreements (cont.)

(b) Conduct or operations manifesting assent may be proved in any manner . . . including a showing that . . . a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to do so.

## Click-Wrap Practice Pointers:

- Draft fair consent procedures
- Tell users what conduct will mean
- Give users a chance to see terms of contract
- Give users a chance to not engage in conduct

## Sample Click-Wrap Language:

By clicking “I Agree” below you represent and warrant that you have had an opportunity to review the \_\_\_\_\_ Agreement, and if you are entering into this Agreement on behalf of your employer or other principal that you are duly authorized to form legally binding contracts on behalf of such person or entity, and that on behalf of yourself or such person or entity you hereby agree to the terms and conditions of the \_\_\_\_\_ Agreement. If you are not authorized, or do not agree to the terms and conditions, click “I Do Not Agree.”

# Document Retention Policies

- Purposes of Electronic Document Retention Policies
  - Ensure you keep the records you need for as long as you need them
  - Allow you to delete those you don't need any longer
  - Avoid inference that documents were destroyed to hide information
  - To help establish retained records as “business records” for purposes of admissibility
  - Document destruction must cease for relevant documents whenever litigation or agency inquiry becomes imminent.
  - Demonstrate what procedures were in place on website at point in time.

# Issues to address in Document Retention Regulations

- The quality of the storage material
- The quality and precision level of duplication and retrieval techniques
- The physical storage of the storage material
- Means of access by the public and others
- Measures for verification, certification and security of the records

## NAIC Approach

- “Records required to be retained . . . may be maintained in paper, photographic, micro-process, magnetic, mechanical or electronic media, or by any other process which accurately reproduces or forms a durable medium for the reproduction of a record. A company shall be in compliance with this section if it can produce the data which was contained on the original document. In cases where there is no paper document, a company shall be in compliance if it can produce information or data which accurately represents a record of communications between the insured and the company or accurately reflects the transaction or event.”

## Other E-Commerce Legal Issues:

- Domain Name and Advertising Issues
  - Domain Names and Trademarks
  - Sweepstakes on the Net
  - Key-word advertising
  - Metatags

## Other e-Commerce Legal Issues:

- Privacy Issues
- Jurisdiction Issues
- Taxation Issues
- Linking and Framing Issues
- Disclaimers and Terms of Use of Site

## Contents of the Disclaimer/Legal Notice Section

- Privacy Statement
- Terms and Conditions of Use
- Ownership of all data submitted
- Restrict uses of Web Site materials
- Limit liability for damages
- Disclaim responsibility for errors/omissions
- Disclaim all implied warranties
- Disclaim responsibility for material posted at linked sites
- Choice of forum clause
- Copyright and trademark notices
- Disclaim duty to update

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Address [http://www.moheck.com/e\\_biz\\_update.htm](http://www.moheck.com/e_biz_update.htm) Go Links AvantGo AutoChannel

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In today's changing market, speed to market and building convergent end to end systems are keys to a successful e-business. Morrison & Hecker is committed to serving growing companies by providing the E-Biz Update, an alert published weekly by our team of e-commerce attorneys, to keep our clients up-to-date on emerging trends in technology as well as changes in the law.

Current E-Biz Update

**June 1, 2000 United States' Privacy Agreement Endorsed by the European Union**

Following several months of negotiations (See e-Biz Updates for April 6 and March 15), the 15 E.U. member states on Wednesday unanimously approved the U.S. data protection agreement that ultimately will provide U.S. businesses a safe harbor when transacting business in the E.U. The

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Start Novell-delivered Applicatio... Morrison & Hecker L.L.... 9:55 AM

## Closing Quotes

- I think there is a world market for maybe five computers. - *IBM Chairman Thomas Watson, 1943*
- Computers in the future may have only 1,000 vacuum tubes and perhaps weigh only 1-1/2 tons. - *Popular Mechanics, 1949*
- There is no reason anyone would want a computer in their home. - *Ken Olson, President, Chairman, and founder of Digital Equipment Corporation, 1977*
- 640K ought to be enough for anybody. - *Microsoft Chairman Bill Gates, 1981*

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