

Morgan Lewis

Electronic Contracting:
Update on Agreements, Encryption and
Digital Signatures

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Internet Law Update
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Introduction

- Two Functions of Electronic Communications
 - Delivery Service
 - Electronic Contracting

Delivery System

- Advantages
 - Speed
 - Ease of Modification
 - Drafting Tools

Delivery System

- Disadvantages
 - Hidden changes -
 - *“Is this the signed copy?”*
 - Technical problems
 - Formatting

Delivery System

- Disadvantages
 - Metadata
 - Word '03
 - Confidentiality
 - cc/bcc
 - Forwarding

Delivery System

- Solutions
 - Signed hard copies
 - PDF files
 - Comparison programs

Electronic Agreements

- Examples
 - Electronic Data Interchange (EDI)
 - Web Wrap
 - (Click-through)
 - E-mail
 - Site Use Terms

Electronic Agreements

- Applicable Contract Law
 - UCC (Goods)
 - Informal
 - Missing Terms
 - Common Law (Licenses)
 - Historical - telex, fax, etc.

Electronic Agreements

- State Variances
 - *AOL v. Booker* (Fla.2001) (enforce VA choice of law)
 - *AOL v. Williams* (Mass.2001) (no enforcement of VA choice of law)

Electronic Agreements

- State Variances

- *Brower v. Gateway 2000 (NY 1998) (enforce arbitration provision)*
- *Klocek v. Gateway (Kansas 2000) (no enforcement of arbitration provision)*

Electronic Agreements

- Offer/Acceptance
 - Web Advertising vs. E-commerce
 - Spiders/Agents

Electronic Agreements

- Battle of Forms
 - Traditional
 - UCC
- Enforceability
 - Forms
 - Shrink Wrap/Click Wrap

Electronic Agreements

- Enforceability - Unsigned Forms
 - *ProCD v. Zeidenberg*
(7th Cir. 1996)
 - Lessons
 - Legends - Click-wrap
 - Agreement Terms

Electronic Agreements

- Enforceability - Click-Wrap Agreement
 - *Softman Products v. Adobe* (D. Cal. 2001) (no enforcement for distributor that did not install / click)
 - *i.Lan v. Netscout* (D. Mass. 2002) (enforcement for distributor that installed / clicked)

Electronic Agreements

- Enforceability - Terms and Conditions
 - *Register v. Verio*, (N.Y.2000) (terms and conditions enforceable - use and knowledge)
 - *Boomer v. AT&T*, (7th Cir. 2002) (mailed terms and conditions enforceable if continue using service)

Electronic Agreements

- Recent Cases

- Non-click license term unenforceable
Specht v. Netscape (S.D.N.Y. 2001) (aff'd. 2d.Cir. 2002)
- *Ticketmaster v. Tickets.com (D. Cal. 2003) (possible enforcement - use and knowledge)*

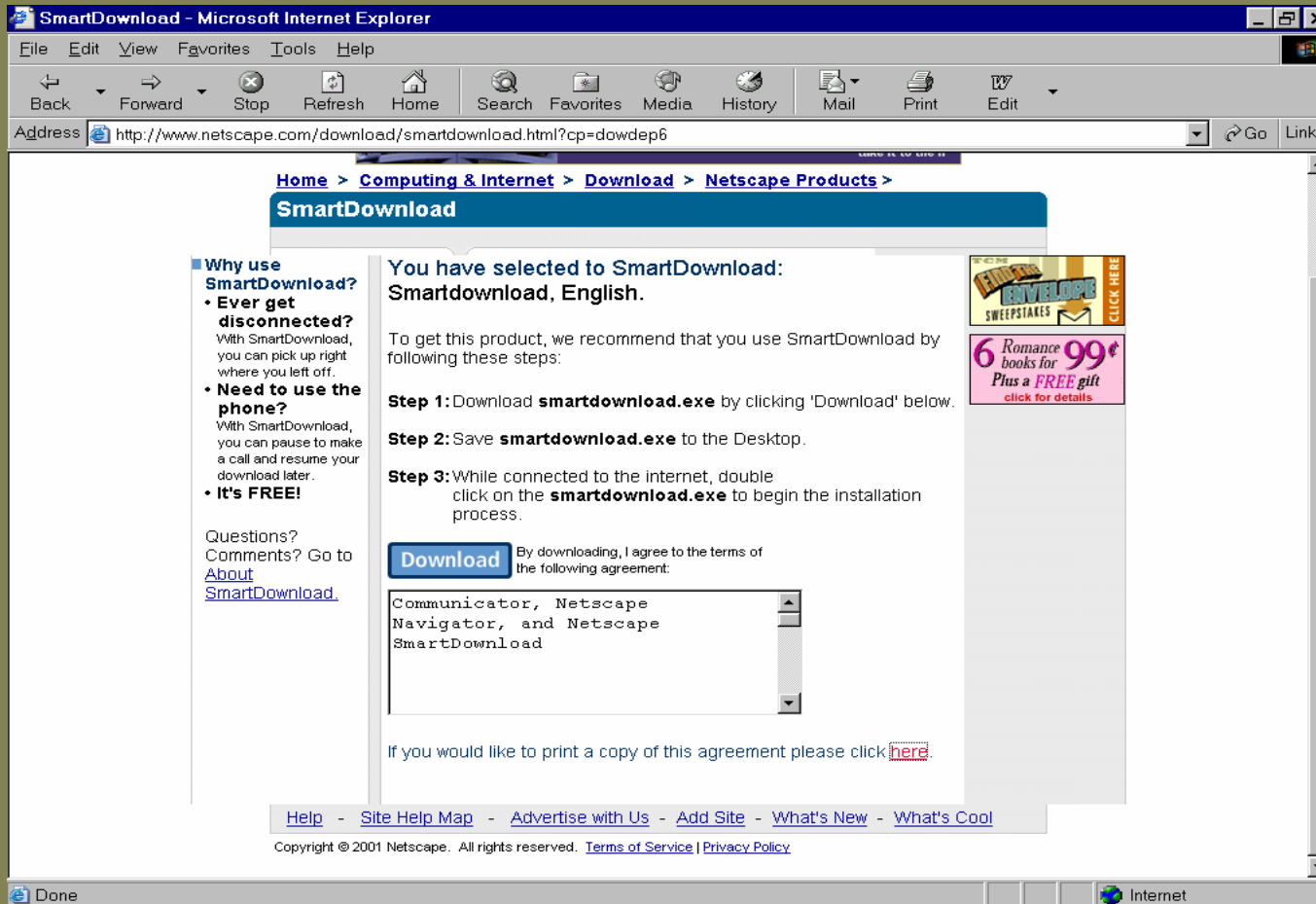
Electronic Agreements

- Recent Cases
 - Comb v. PayPal (Cal. 2002) (class-action, arbitration terms)
Unconscionable terms unenforceable

Electronic Agreements

- Drafting issues
 - Clear disclosure of terms
 - Verify affirmative consent (“I Accept”)
 - Marketing issues

Electronic Agreements - Netscape



Electronic Agreements - Netscape

The screenshot shows a Microsoft Internet Explorer browser window displaying the Netscape Client Software End User License Agreement. The address bar shows the URL: <http://home.netscape.com/download/client.html>. The page features a navigation menu with links for Home, Computing & Internet, Download, Netscape Products, and License Agreements > Client. The main content area is titled "Client Software End User License Agreement" and includes a sidebar with links for Departments (SmartUpdate, Plug-Ins, My Sidebar, etc.) and Download Information (Install Instructions, etc.). The main text contains the following sections:

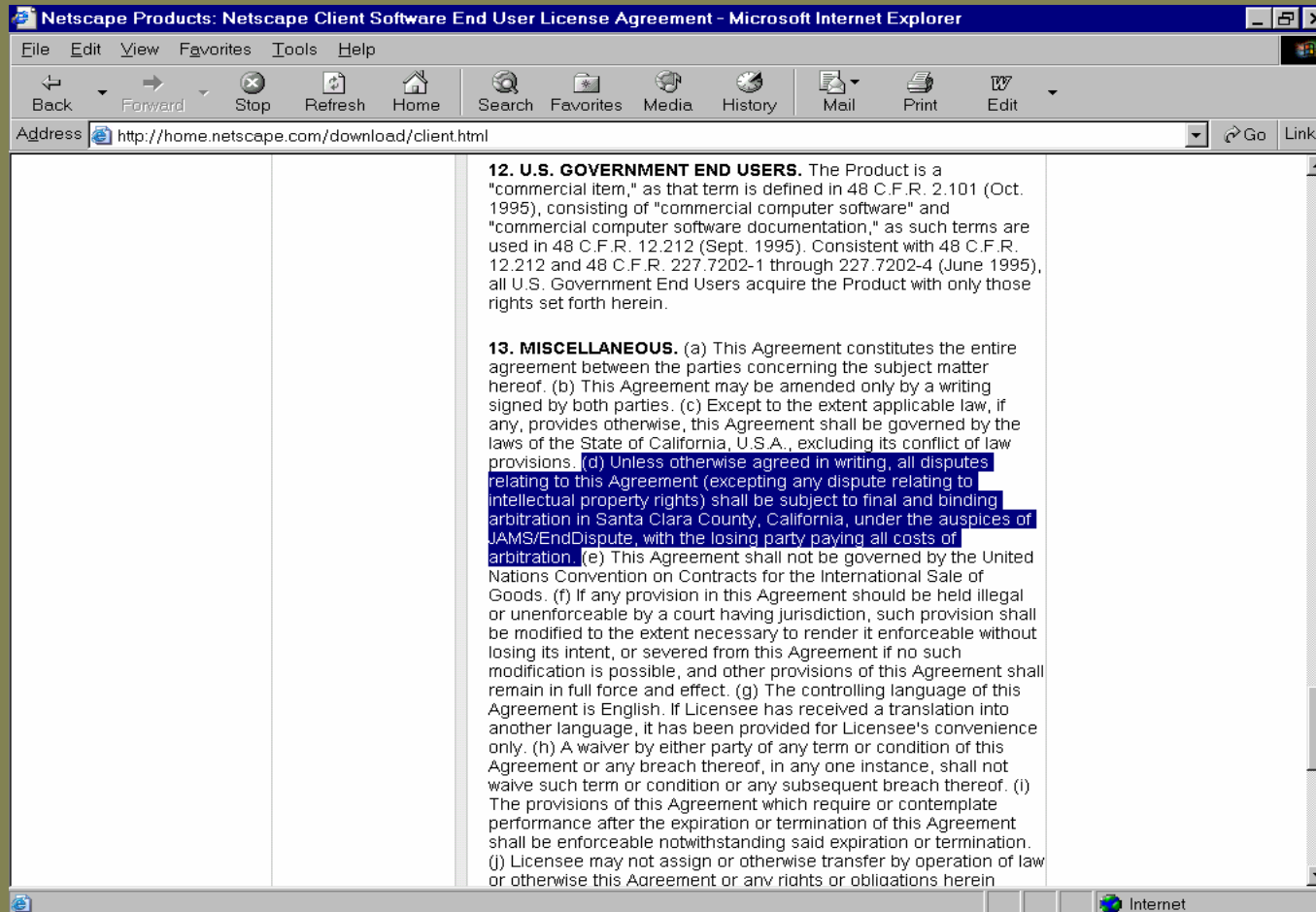
Redistribution or Rental Not Permitted

These Terms apply to Netscape Communicator, Netscape Navigator, and Netscape SmartDownload

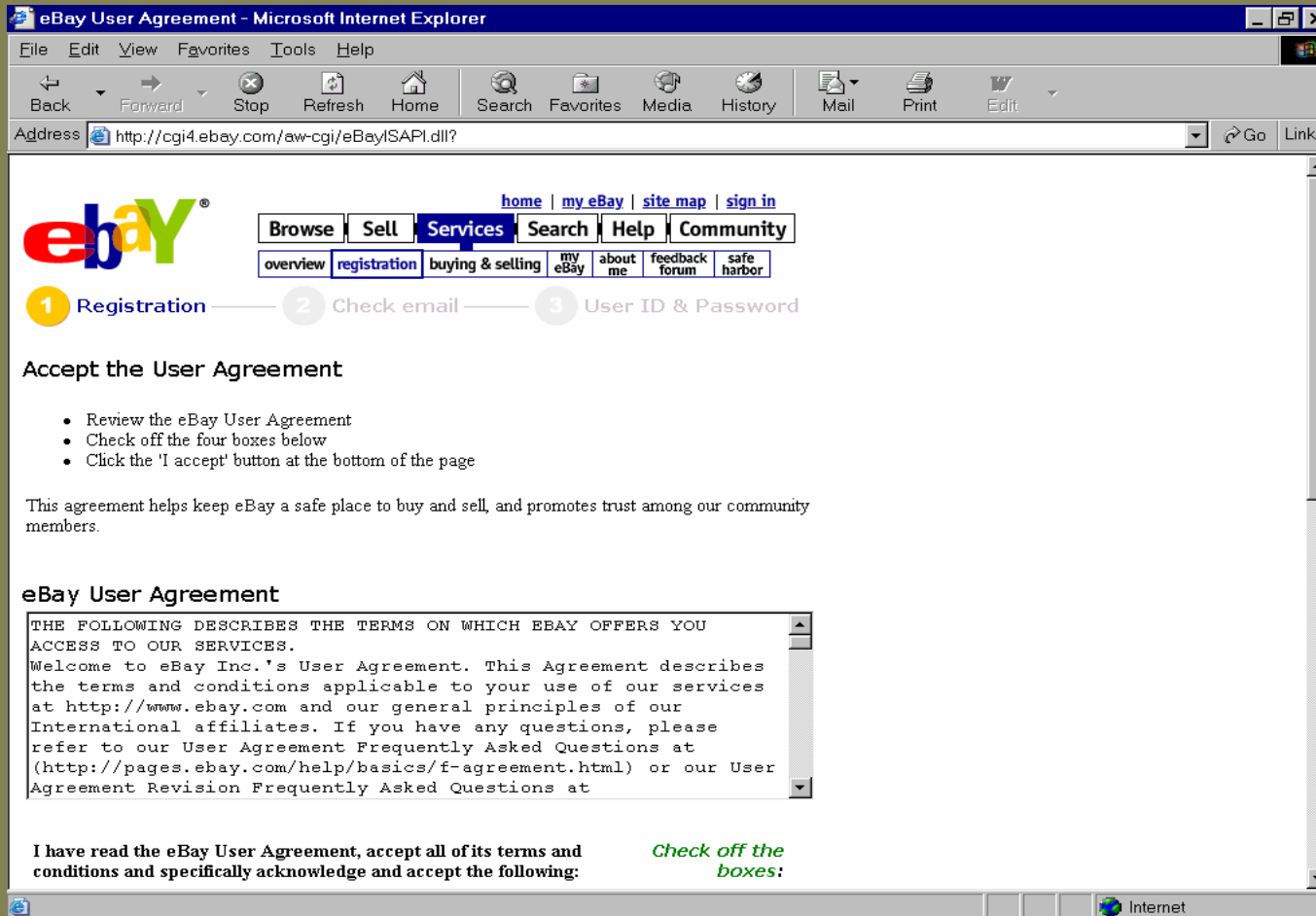
BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE (THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT ("LICENSEE") IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

1. LICENSE AGREEMENT. As used in this Agreement, for residents of Europe, the Middle East or Africa, "Netscape" shall mean Netscape Communications Ireland Limited; for residents of Japan, "Netscape" shall mean Netscape Communications (Japan), Ltd.; for residents of all other countries, "Netscape" shall mean Netscape Communications Corporation. In this Agreement "Licensor" shall mean Netscape except under the following circumstances: (i) if Licensee acquired the Product as a bundled component of a third party product or service, then such third party shall be Licensor; and (ii) if any third party software is included as

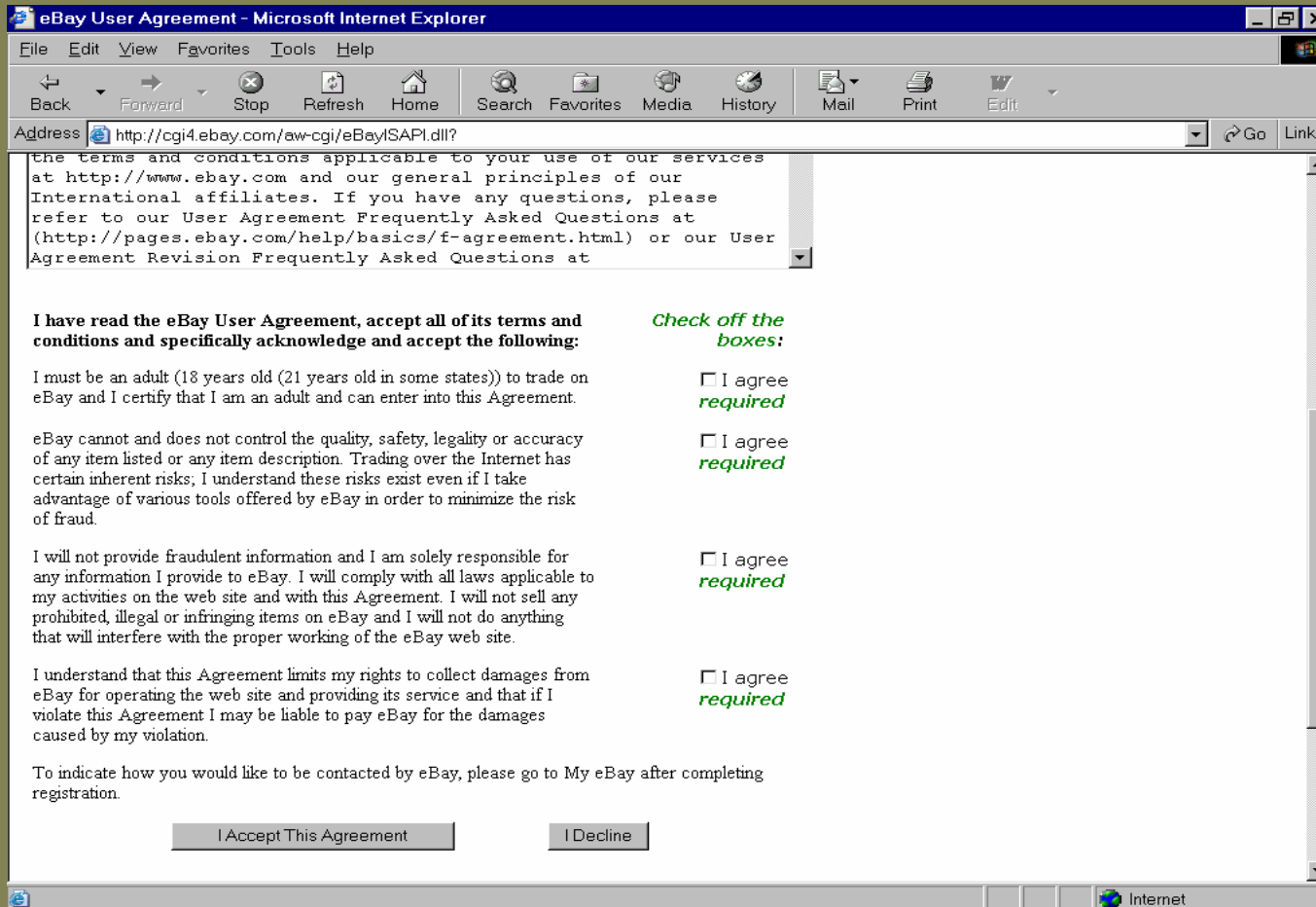
Electronic Agreements - Netscape



Electronic Agreements - E-Bay



Electronic Agreements - E-Bay



Electronic Agreements

- Statute of Frauds
 - Writing Requirement
 - UETA
- Signature Requirement
 - Authentication Requirement

Electronic Agreements

- UCITA
(Uniform Computer Information Transactions Act)
 - Replaces UCC 2B
 - Covers Software/Web Agreements

Electronic Agreements

- Enactment:
Maryland and Virginia
 - Committees reviewing amendments
- Rejections:
Iowa (bomb shelter law), New York (A.G. opinion)

Electronic Agreements

- Opposition
 - Letter from 26 A.G.'s (including California and Pennsylvania)
- Nothing pending in Pennsylvania

Encryption

- Security Issues
 - Structure of the Internet
 - Enhanced Security
 - Security Problems

Encryption

- Encryption Technology
 - Private Key
 - Public Key

Encryption

- Issues
 - Export
 - Trade Secret Protection
 - Attorney-Client Privileged Information
 - Software Escrow Agreements
 - Creation of Private Networks

Digital Signatures

- Issues
 - Identity of Party
 - Document Modification
- Methods for Digital Signatures
 - Password
 - Biometrics

Digital Signatures

- Public Key Encryption
 - Creation of Signature - Use of Encryption
 - Hash Function
 - Commercial Vendors

UETA / E-Sign

- UETA
(Uniform Electronic Transaction Act)
 - 43 States including Pennsylvania
- E-Sign
(Electronic Signatures in Global and National Commerce Act)
 - Federal Law (6-30-00)

UETA / E-Sign

- UETA
 - Digital = Paper Signature
 - Exceptions - UCC, Estates
 - Use of Signatures for Evidence, Notaries
 - No change in substantive law

UETA / E-Sign

- E-Sign
 - Digital = Paper Signature for Interstate Commerce
 - Exceptions - UCC, Estates, Family Law, Foreclosure, Insurance cancellations
 - Pre-emption
 - Specific technologies
 - Utah and California

UETA / E-Sign

- Additional Information
 - ABA Guidelines
 - http://www.abanet.org/scitech/ec/isc/digital_signature.html