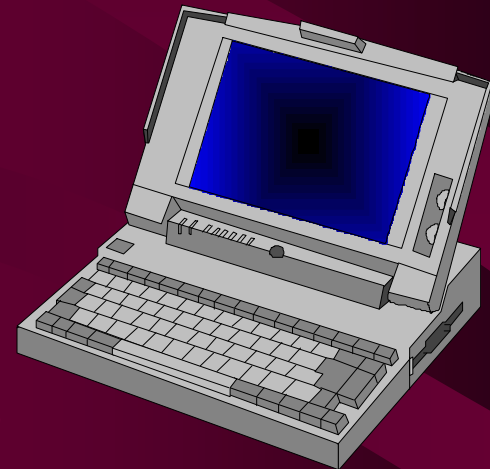


ELECTRONIC CONTRACTING: UPDATE ON AGREEMENTS, ENCRYPTION AND DIGITAL SIGNATURES

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Morgan Lewis

**Internet Law Update
Pittsburgh, Pennsylvania
April 6, 2004**



Morgan Lewis
C O U N S E L O R S A T L A W

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

SmartDownload - Microsoft Internet Explorer

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Done Internet

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 browser's menu bar includes File, Edit, View, Favorites, Tools, and Help. The toolbar contains buttons for Back, Forward, Stop, Refresh, Home, Search, Favorites, Media, History, Mail, Print, and Edit. The Netscape logo and navigation tools are visible at the top of the page. The main content area features a navigation breadcrumb: Home > Computing & Internet > Download > Netscape Products > License Agreements > Client. The title of the page is "Client Software End User License Agreement". On the left side, there are two sections: "Departments" with links for SmartUpdate, for Communicator, Plug-Ins, My Sidebar, Netscape 6 Themes, Shareware, SmartDownload, and Servers; and "Download Information" with links for Install Instructions, Installation Options, Can't Install, Netscape 6?, Netscape 6 FAQ, Netscape 6 Help, Communicator Help, How to Download Via FTP, Technical Support, License Agreements, and Release Notes. The main text area contains the following content:

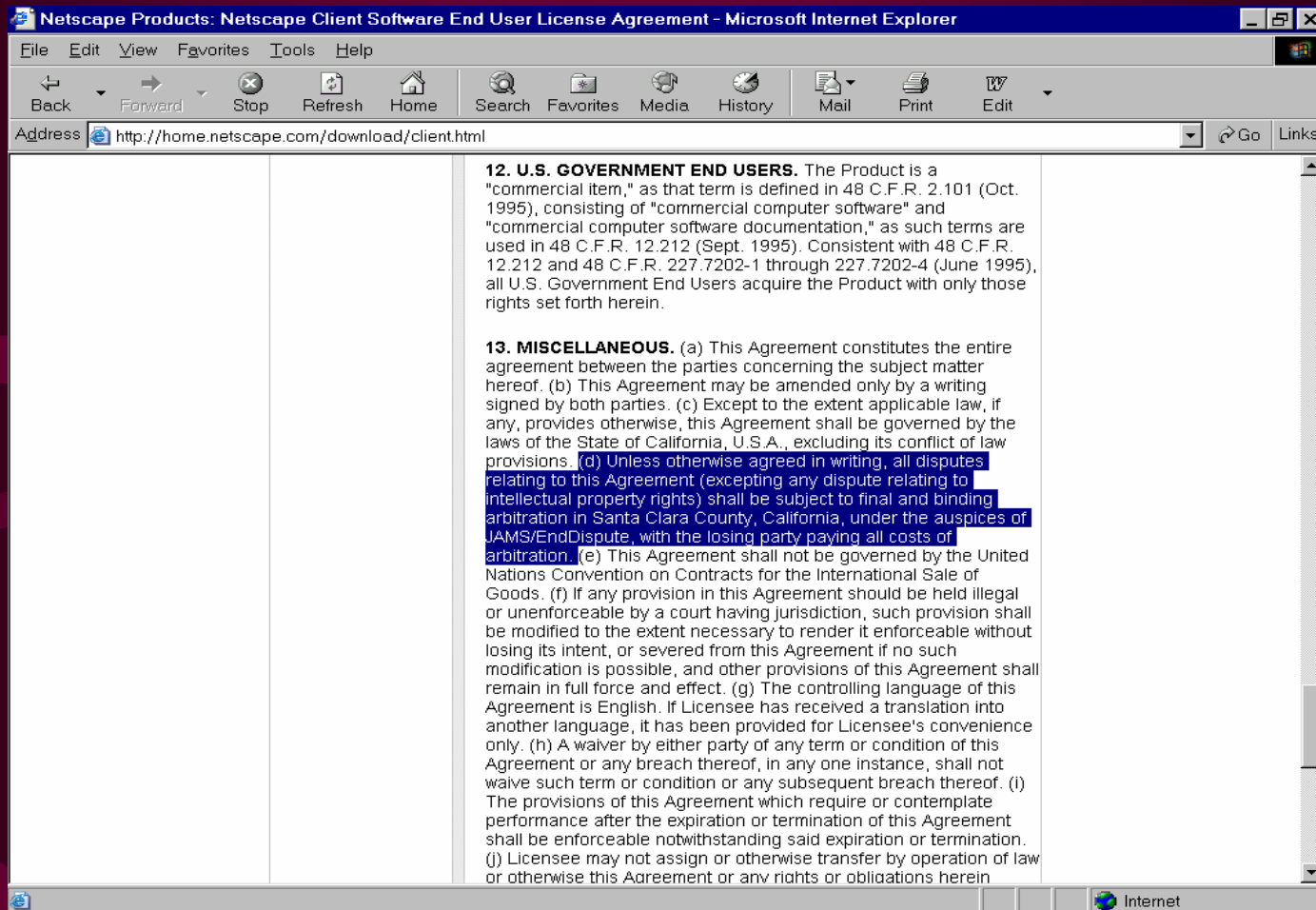
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Electronic Agreements - Netscape



Electronic Agreements - E-Bay

The screenshot shows a Microsoft Internet Explorer browser window displaying the eBay User Agreement page. The address bar shows the URL: <http://cgi4.ebay.com/aw-cgi/eBayISAPI.dll?>

The page features the eBay logo and navigation links: [home](#), [my eBay](#), [site map](#), and [sign in](#). Below these are buttons for [Browse](#), [Sell](#), [Services](#), [Search](#), [Help](#), and [Community](#). A secondary row of buttons includes [overview](#), [registration](#), [buying & selling](#), [my eBay](#), [about me](#), [feedback forum](#), and [safe harbor](#).

A progress indicator shows three steps: 1. Registration (highlighted), 2. Check email, and 3. User ID & Password.

Accept the User Agreement

- Review the eBay User Agreement
- Check off the four boxes below
- Click the 'I accept' button at the bottom of the page

This agreement helps keep eBay a safe place to buy and sell, and promotes trust among our community members.

eBay User Agreement

THE FOLLOWING DESCRIBES THE TERMS ON WHICH EBAY OFFERS YOU ACCESS TO OUR SERVICES.

Welcome to eBay Inc.'s User Agreement. This Agreement describes the terms and conditions applicable to your use of our services at <http://www.ebay.com> and our general principles of our International affiliates. If you have any questions, please refer to our User Agreement Frequently Asked Questions at (<http://pages.ebay.com/help/basics/f-agreement.html>) or our User Agreement Revision Frequently Asked Questions at

I have read the eBay User Agreement, accept all of its terms and conditions and specifically acknowledge and accept the following: Check off the boxes:

Electronic Agreements - E-Bay

eBay User Agreement - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites Media History Mail Print Edit

Address <http://cgi4.ebay.com/aw-cgi/eBayISAPI.dll?> Go Links

the terms and conditions applicable to your use of our services at <http://www.ebay.com> and our general principles of our International affiliates. If you have any questions, please refer to our User Agreement Frequently Asked Questions at (<http://pages.ebay.com/help/basics/e-agreement.html>) or our User Agreement Revision Frequently Asked Questions at

I have read the eBay User Agreement, accept all of its terms and conditions and specifically acknowledge and accept the following:

I must be an adult (18 years old (21 years old in some states)) to trade on eBay and I certify that I am an adult and can enter into this Agreement.

eBay cannot and does not control the quality, safety, legality or accuracy of any item listed or any item description. Trading over the Internet has certain inherent risks; I understand these risks exist even if I take advantage of various tools offered by eBay in order to minimize the risk of fraud.

I will not provide fraudulent information and I am solely responsible for any information I provide to eBay. I will comply with all laws applicable to my activities on the web site and with this Agreement. I will not sell any prohibited, illegal or infringing items on eBay and I will not do anything that will interfere with the proper working of the eBay web site.

I understand that this Agreement limits my rights to collect damages from eBay for operating the web site and providing its service and that if I violate this Agreement I may be liable to pay eBay for the damages caused by my violation.

To indicate how you would like to be contacted by eBay, please go to My eBay after completing registration.

Check off the boxes:

I agree *required*

I agree *required*

I agree *required*

I agree *required*

Internet

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