



Morgan Lewis

ELECTRONIC CONTRACTING

E-Commerce – Legal and Practical Issues

Pittsburgh, Pennsylvania

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INTRODUCTION

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



Delivery System

- Advantages
 - Speed
 - Ease of Modification
 - Drafting Tools
 - Spell Check
 - Numbering
 - Search/Replace
 - Track Changes

Delivery System

- Disadvantages
 - Hidden changes -
 - *"Is this the signed copy?"*
 - Technical problems
 - Compatibility – Word 07

Delivery System

- Disadvantages
 - Metadata
 - Word
 - Clean-Up Tools
 - WorkShare Protect

Delivery System

High Risk Elements

- External Recipients - Accept All Changes And Turn Off Track Changes
- External Recipients - Delete All Comments
- External Recipients - Delete All Text Smaller Than 5pt
- External Recipients - Delete All White Text
- External Recipients - Delete All Hidden Text
- External Recipients - Delete All Versions
- External Recipients - Clear All Previous Authors
- External Recipients - Delete Excel Links
- External Recipients - Delete PowerPoint Hidden Slides
- External Recipients - Turn Off Autoversioning

Medium Risk Elements

- External Recipients - Delete All Custom Properties
- External Recipients - Delete All Document Variables
- External Recipients - Convert Field Codes To Text
- External Recipients - Delete All Macros
- External Recipients - Delete Routing Slip
- External Recipients - Delete All Power Point Speaker Notes
- External Recipients - Clear All Document Reviewers

Low Risk Elements

- External Recipients - Delete Footnotes
- External Recipients - Reset Document Statistics
- External Recipients - Clear All Built-In Properties
- External Recipients - Delete All Excel and PowerPoint Headers
- External Recipients - Delete All Excel and PowerPoint Footers
- External Recipients - Delete Smart Tags
- External Recipients - Convert Attached Template To Normal

Delivery System

- Disadvantages
 - Confidentiality
 - cc/bcc
 - Forwarding

Delivery System

- Solutions
 - Signed hard copies
 - PDF files
 - Comparison programs
 - E-mail Record Management Programs

Electronic Contracting

- Examples
 - E-mail
 - Electronic Data Interchange (EDI)
 - Click-Wrap
 - (I Accept)
 - Browse-Wrap
 - (Site Use Terms)

Electronic Contracting

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

Electronic Contracting

- 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 Contracting

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

UCC - Alternatives

- UCITA

- (Uniform Computer Information Transactions Act)
- Replaced UCC 2B

- Enactment

- Maryland and Virginia (No repeal yet)
- Committees reviewing amendments

UCITA

- Rejections:
 - West Virginia (bomb shelter law),
New York (A.G. opinion)
- Opposition
 - Letter from 26 A.G.'s (including California and Pennsylvania)
 - NCCUSL has abandoned efforts towards passage

UCC Amendments

- Amendment to Article 2
 - Approved by NCCUSL in 2002, and by the ALI in 2003
 - No laws - submitted in Three States (Kansas, Nevada, Oklahoma)
 - Nothing pending in Pennsylvania

UCC Amendments

- Does Not Cover License Agreements
- Statute Of Frauds Limited
- Electronic Agents Can Form Contract

UCC Amendments

- Battle of Forms
 - Traditional - Mirror Image Rule
 - No contract until last version –
“Last Shot Rule”

UCC Amendments

- Battle of Forms
 - Current UCC - Formation
 - Contract Formed at time of non-mirror response
 - Current UCC – Terms - Complex

UCC Amendments

- Additional Terms
 - Apply unless other side objects or materially alters contract
- Conflicting Terms – No law
 - Varies between States
 - Many become “First Shot” states

UCC Amendments

- Conduct

- Only Agreed Terms – Missing terms filled in by UCC

- Proposed Amendments

- No difference how formed
- Agreed terms with missing filled in by UCC

Electronic Contracting

- Enforceability
 - Forms
 - Shrink Wrap/Click Wrap

Electronic Contracting

- Enforceability - Unsigned Forms
 - *ProCD v. Zeidenberg*
(7th Cir. 1996)
 - *Accord: Meridian v. Hardin* (ED Cal 2006)
 - Lessons
 - Legends - Click-wrap
 - Agreement Terms

Electronic Contracting

- 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 Contracting

- 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 Contracting

- Recent Cases
 - Non-click license term unenforceable
Specht v. Netscape (S.D.N.Y. 2001) (aff'd. 2d.Cir. 2002)
 - Non-click arbitration term unenforceable
Affinity v. CCCS (D. Flor. 2006)

Electronic Contracting

- Recent Cases

- Unconscionable terms unenforceable (arbitration)

- *Comb v. PayPal (Cal. 2002)*

- Spiders violate click-wrap

Register.com, Inc. v. Verio, Inc., 356 F.2d 393 (2d Cir. 2004)

Electronic Contracting

- Recent Cases
 - Ability to make unilateral changes void contract
 - *Defontes v. Dell* (R.I. 2004)
 - Contra *Provencer v. Dell*, (D.Cal 2006)

Electronic Contracting

- Drafting issues
 - View Terms before Assent
 - Assent Before Access To Product
 - Clear disclosure of terms

Electronic Contracting

- Drafting issues (con't)
 - Clear method of assent
("I Accept" or "I Reject")
 - Notice of consequences of assent or reject
 - Record of assent

Electronic Contracting

- Drafting issues (con't)
 - Consistency of Terms

Electronic Agreements - Netscape

SmartDownload - Microsoft Internet Explorer

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Done Internet

Electronic Agreements - Netscape

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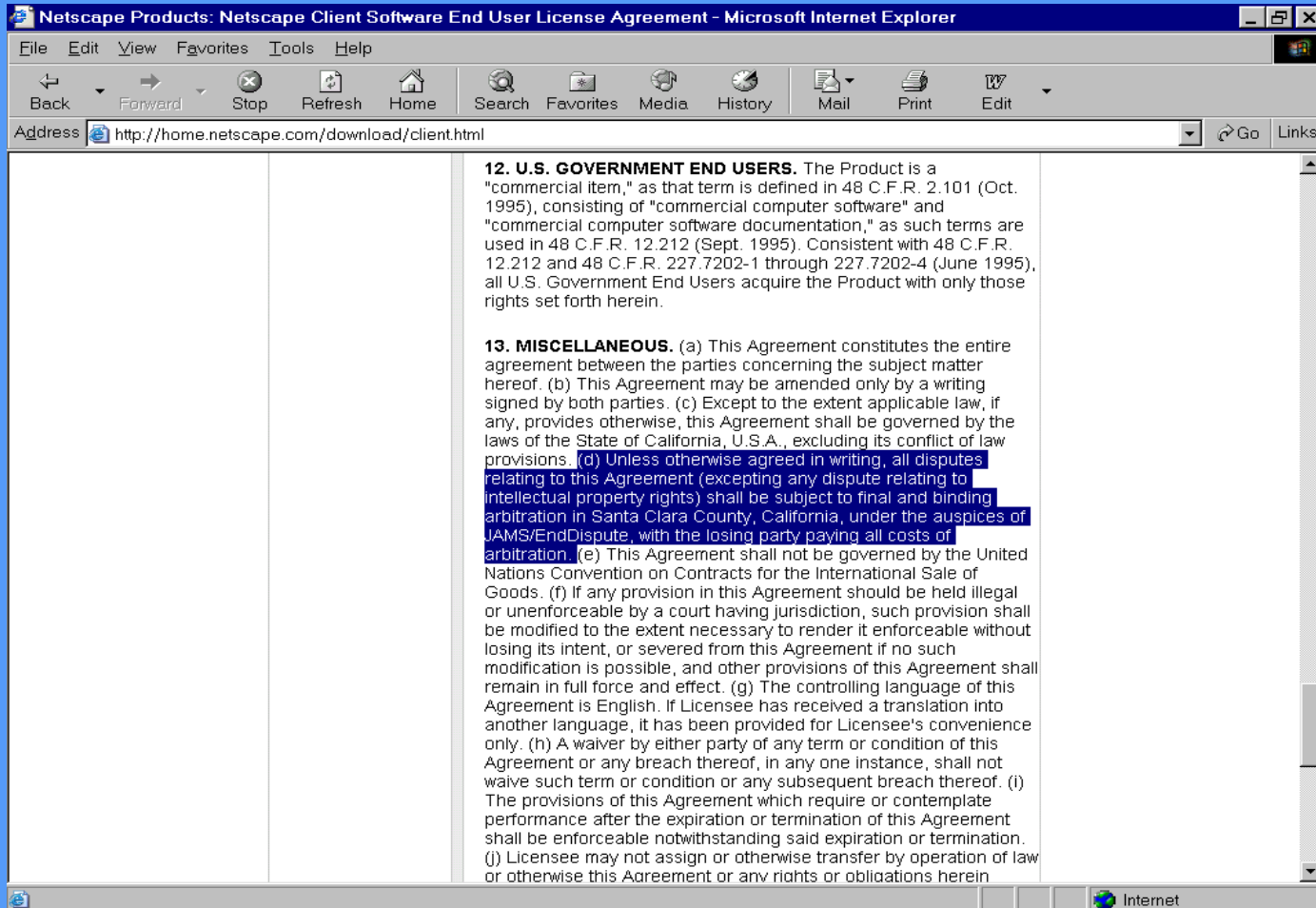
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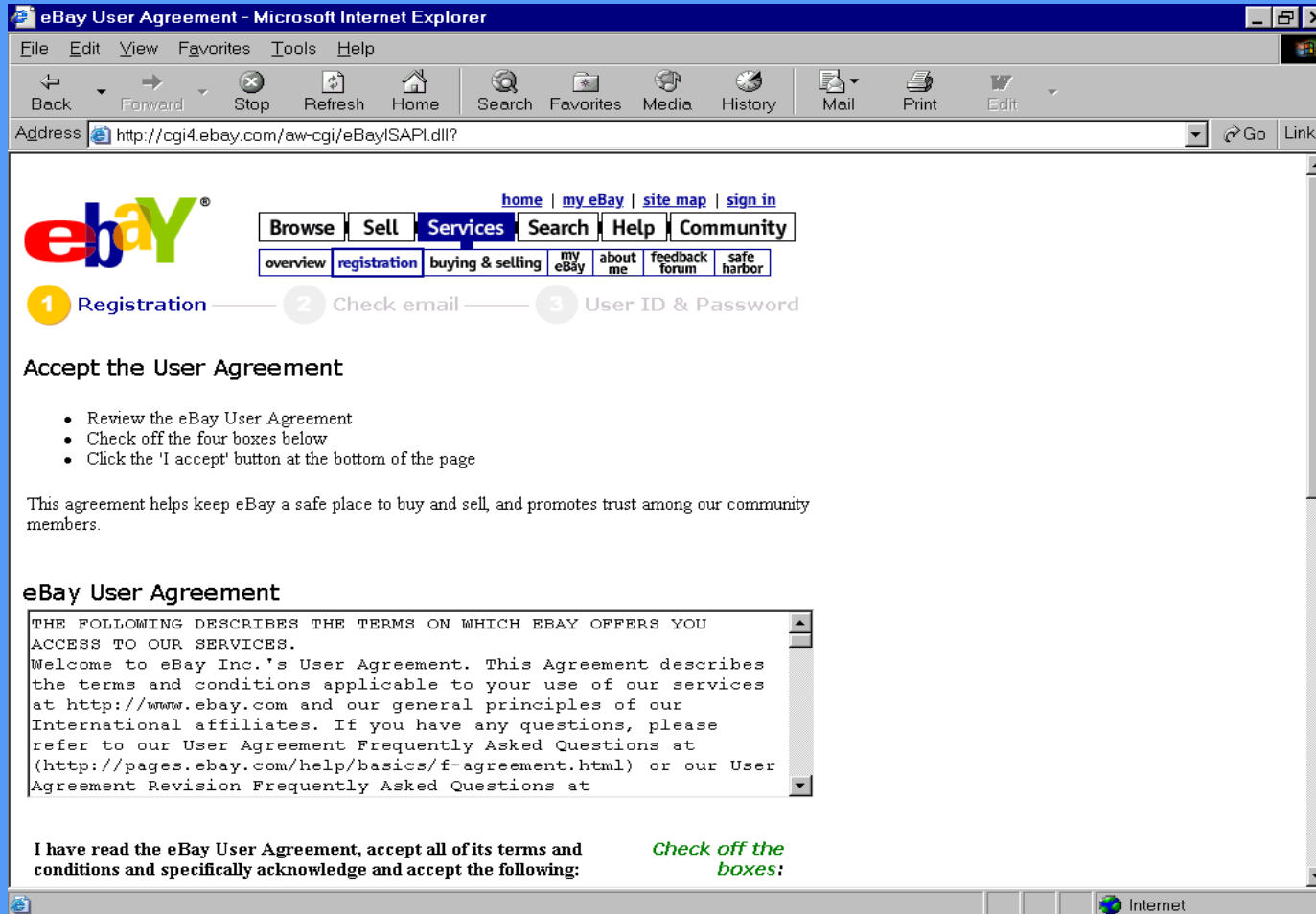
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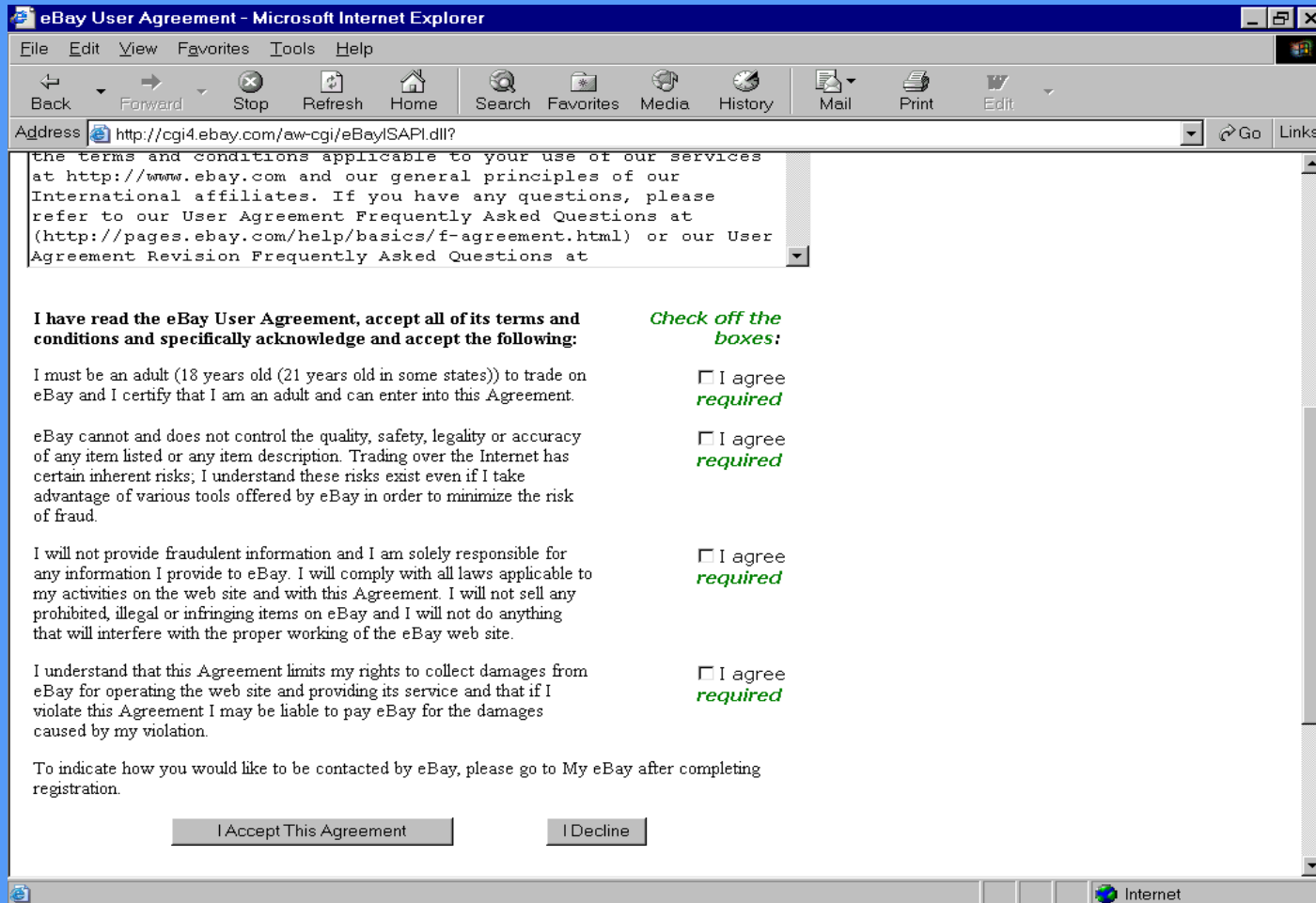
Electronic Agreements - Netscape



Electronic Agreements - Netscape



Electronic Agreements - Netscape



Encryption

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

Writings / Signatures

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

Writings / Signatures

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

Writings / Signatures

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

Writings / Signatures

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

Writings / Signatures

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

Biography



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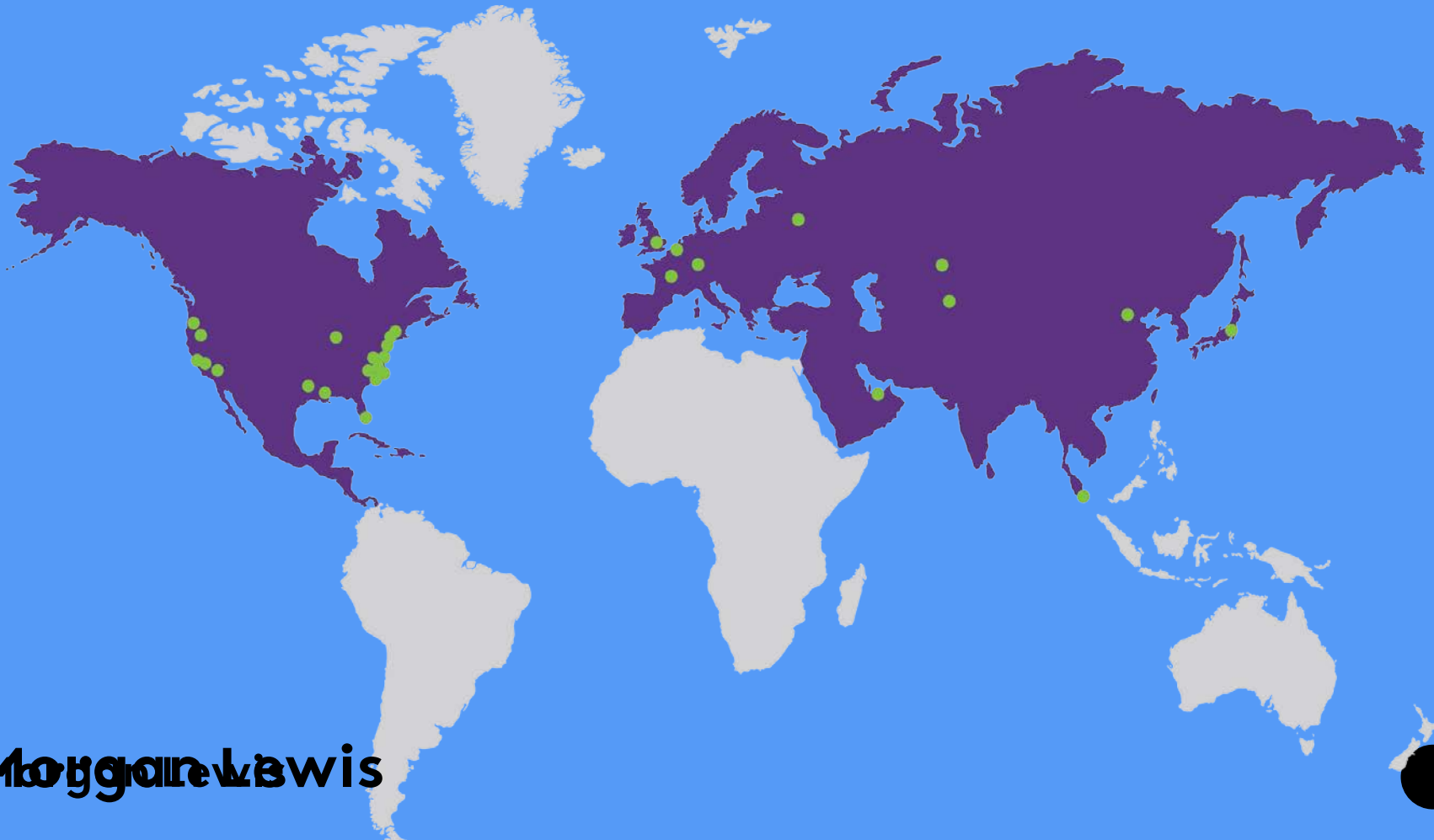
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