

ELECTRONIC CONTRACTING

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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**
 - 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

The screenshot shows a Microsoft Internet Explorer browser window displaying the Netscape Client Software End User License Agreement. The browser's 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, License Agreements, and Client. The main content area is titled "Client Software End User License Agreement" and includes a sidebar with links for Departments (SmartUpdate, for Communicator, Plug-Ins, My Sidebar, Netscape 6 Themes, Shareware, SmartDownload, Servers) and Download Information (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, Release Notes). The main text contains the following sections:

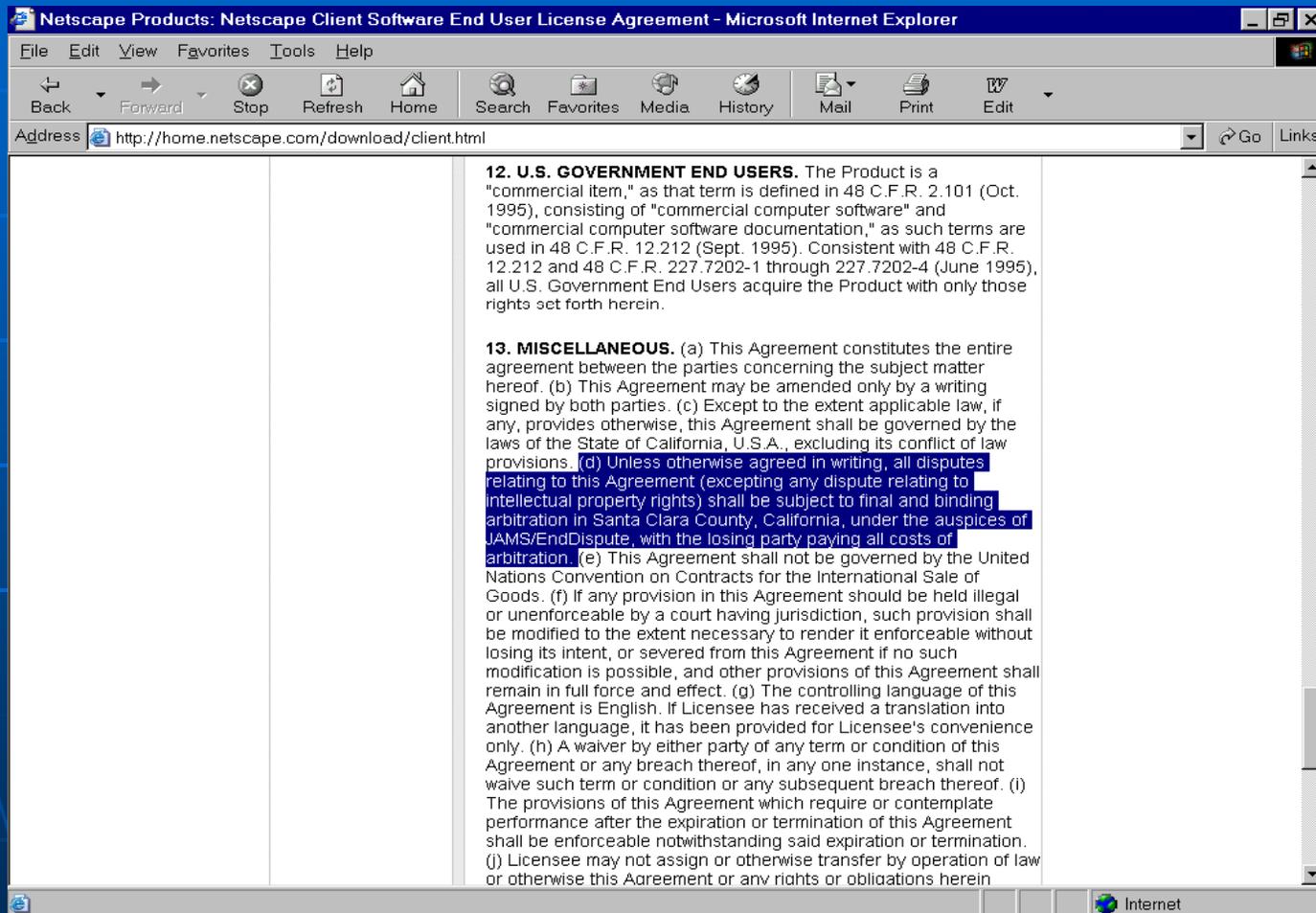
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Electronic Agreements - Netscape



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

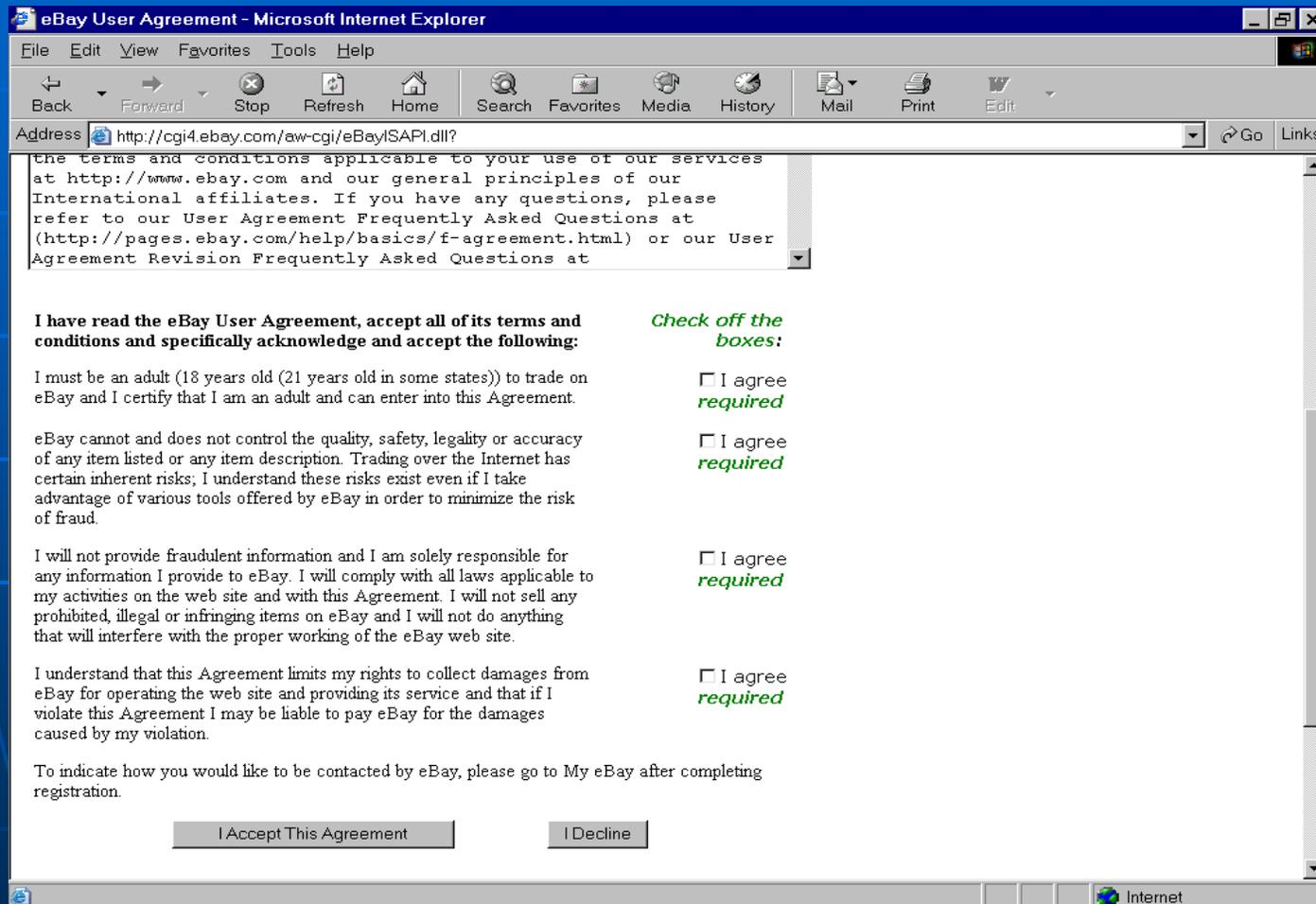
This agreement helps keep eBay a safe place to buy and sell, and promotes trust among our community members.

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



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