

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
- Disadvantages
 - Speed / Ease of Modification
 - Hidden changes / Metadata
 - Is this the last draft or the signed copy

Delivery System

- Solutions
 - Comparison programs
 - Signed PDF files
 - E-mail / Contract Database systems
 - Digital Signatures
 - Metadata control

Delivery System

Summary: 5 revisions
Insertions: 2 Deletions: 3 Moves: 0 Formatting: 0
Comments: 0

Main document changes and comments

Deleted watt3320
This Agreement governs Your access, receipt and use of any Software or Services¶

Deleted watt3320
TO ¶

Inserted watt3320
THAT ¶

Inserted watt3320
GOVERN YOUR ACCESS, RECEIPT AND USE OF ANY SOFTWARE OR SERVICES¶

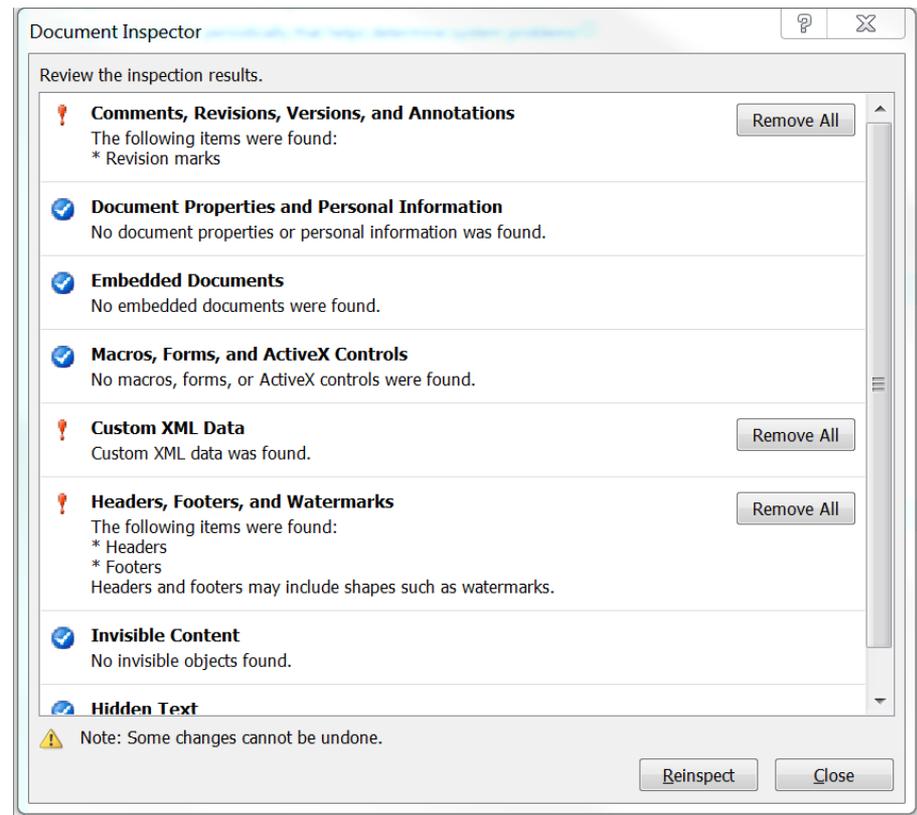
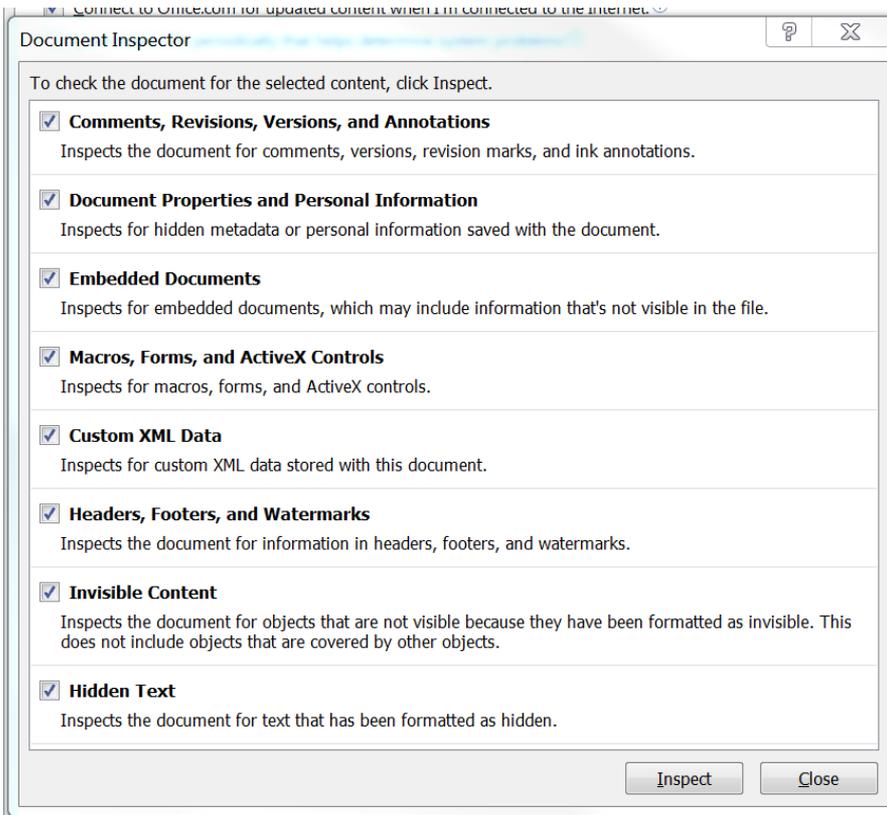
Deleted watt3320
This Agreement was last updated on _____ ¶

Header and footer changes
(none)

TERMS AND CONDITIONS¶

- 1. → **Agreement¶**
| ~~This Agreement governs Your access, receipt and use of any Software or Services¶~~
| ¶
| BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING YOUR ACCEPTANCE OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU AGREE ~~TO THAT~~ THE TERMS OF THIS AGREEMENT GOVERN YOUR ACCESS, RECEIPT AND USE OF ANY SOFTWARE OR SERVICES. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS, IN WHICH CASE THE TERMS "YOU" OR "YOUR" SHALL REFER TO SUCH ENTITY AND ITS AFFILIATES. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT ACCESS OR USE ANY SOFTWARE OR SERVICES.¶
- | ~~This Agreement was last updated on _____~~ From time to time, in our sole discretion, we may amend the terms and conditions of this Agreement. Such changes will become effective once made by us but will not apply retroactively. If a change is material, in our reasonable discretion, we will notify you. By continuing to use or access any Services or Software, you agree to be bound by the amended terms of this Agreement. No other change of any of the provisions of this Agreement shall be effective unless and until set forth in a writing duly signed by authorized representatives of both parties.¶
- 2. → **Term¶**
| This Agreement commences on the date You first accept it and continues until all Order Forms have expired or have been terminated (the "Term"). The term of each Order Form shall be as specified in such Order Form (each,

Delivery System



Delivery System

Summary: 5 revisions
Insertions: 2 Deletions: 3 Moves: 0 Formatting: 0
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Main document changes and comments

| | |
|--|--------|
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Header and footer changes
(none)

Text Box changes

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- 2. → Term¶

Electronic Contracting

- Examples
 - E-mail
 - EDI (Electronic Data Interchange)
 - 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)
 - *Brower v. Gateway 2000* (NY 1998) (enforce arbitration provision)
 - *Klocek v. Gateway* (Kansas 2000) (no enforcement of arbitration provision)

UCC Issues

- Battle of Forms
 - Traditional - Mirror Image Rule
 - *No contract until last version – “Last Shot Rule”*
 - Current UCC - Formation
 - *Contract Formed at time of non-mirror response*

UCC Issues

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

UCC Issues

- 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

- Unsigned Forms
 - *ProCD v. Zeidenberg*
(7th Cir. 1996)
 - Accord: *Stenzel v. Dell*, (Me 2005); *Meridian v. Hardin*
(ED Cal 2006)
 - Lessons
 - *Legends - Click-wrap*
 - *Agreement Terms*

Electronic Contracting

- Click-Wrap Agreement
 - “I Accept” clicked – terms enforceable
 - *i.Lan v. Netscout* (D. Mass. 2002) (enforcement for distributor that installed / clicked)
 - *Feldman v. Google* (E.D. Pa 2007) and *Novak v. Overture* (E.D. NY 2004) (Google terms enforceable including arbitration)
 - *A.V. v. iParadigms* (E.D. Va. 2009) (liability limit enforceable)

Electronic Contracting

- Browse wrap Agreements
 - No “I Accept” – Enforceability Issues
 - Need to demonstrate party knew purchase subject to agreement terms and terms were readily available to review
 - *Specht v. Netscape (S.D.N.Y. 2001) (aff’d. 2d.Cir. 2002)* (“Download” click; terms hidden; arbitration provision unenforceable)

Electronic Contracting

- Recent Cases
 - *In re Zappos* (D. Nev. 2012) (no acceptance, no legends, order without seeing arbitration terms)
 - *Nynguyen v. Barnes & Noble* (9th Cir. 2014) (link one of many on each page; no legends; arbitration unenforceable)
 - *Sgouros v. TransUnion* (7th Cir. 2016) (Accept for credit authorization not agreement terms; no legends; arbitration unenforceable)

Electronic Contracting

- Additional Issues
 - Unconscionable terms unenforceable
 - *Comb v. PayPal* (Cal. 2002) (ability to withhold disputed payments; unilaterally change terms)
 - *Douglas v. U.S.* (9th Cir. 2007) (AOL browse wrap terms for unilateral changes including new service charges; arbitration; waive class action)

Electronic Contracting

- Additional Issues
 - User and User actions impact enforceability
 - *Nyguyen v. Barnes & Noble* (9th Cir. 2014) (terms unenforceable against consumers enforceable against businesses)
 - *Register v. Vario* (2d Cir. 2004); *Southwest v. Broad first* (N.D. Tex. 2007) (repeated access to site)

Electronic Contracting

- Drafting issues
 - View Terms before Assent
 - Assent Before Access To Product
 - Clear disclosure of terms - Notice of consequences of assent or reject
 - Clear method of assent ("I Accept")

Electronic Contracting

- Drafting issues
 - Record of assent
 - Customary agreement terms
 - Notice and acceptance of Updates

Electronic Agreements - Netscape

SmartDownload - Microsoft Internet Explorer

File Edit View Favorites Tools Help

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

Address <http://www.netscape.com/download/smartdownload.html?cp=dowdep6> Go Links

Home > Computing & Internet > Download > Netscape Products >

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Download By downloading, I agree to the terms of the following agreement:

```
Communicator, Netscape
Navigator, and Netscape
SmartDownload
```

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Done Internet

Electronic Agreements - Netscape

The screenshot shows a Microsoft Internet Explorer browser window with the title "Netscape Products: Netscape Client Software End User License Agreement - Microsoft Internet Explorer". The address bar shows the URL "http://home.netscape.com/download/client.html". The page content includes a Netscape logo, navigation links (Mail, Calendar, IM, Search, My Netscape, Download), and a "More from Netscape" dropdown. Below this is a promotional banner for "Free (3-5 day) Ground Shipping" and a "TBS SUPER AWARDS WEEKEND" advertisement. The main content area is titled "Client Software End User License Agreement" and contains the following text:

Redistribution or Rental Not Permitted

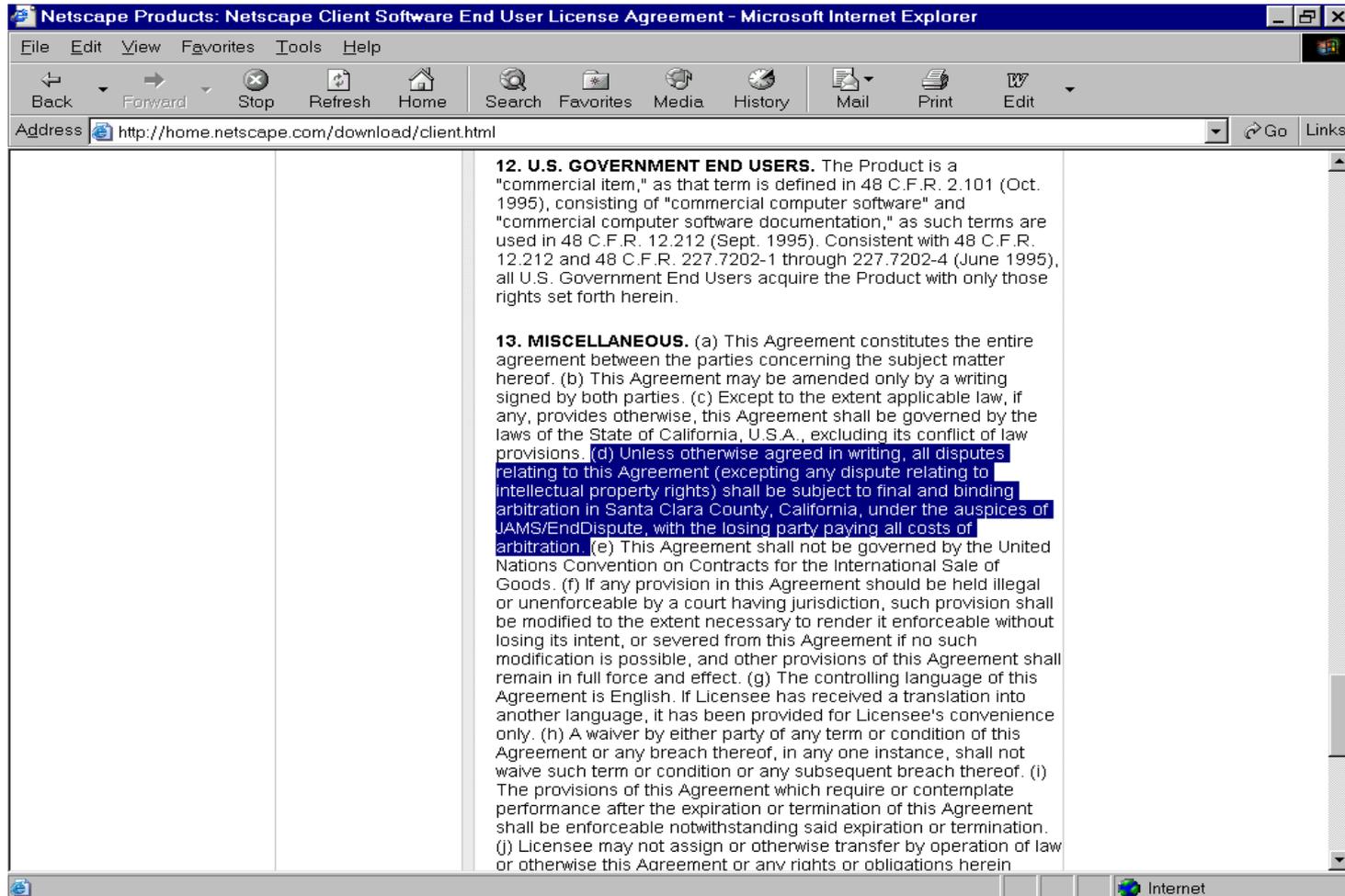
These Terms apply to Netscape Communicator, Netscape Navigator, and Netscape SmartDownload

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

The left sidebar contains a "Departments" section with links for SmartUpdate, Communicator, Plug-Ins, My Sidebar, Netscape 6 Themes, Shareware, SmartDownload, and Servers. Below that is a "Download Information" section 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.

Electronic Agreements - Netscape



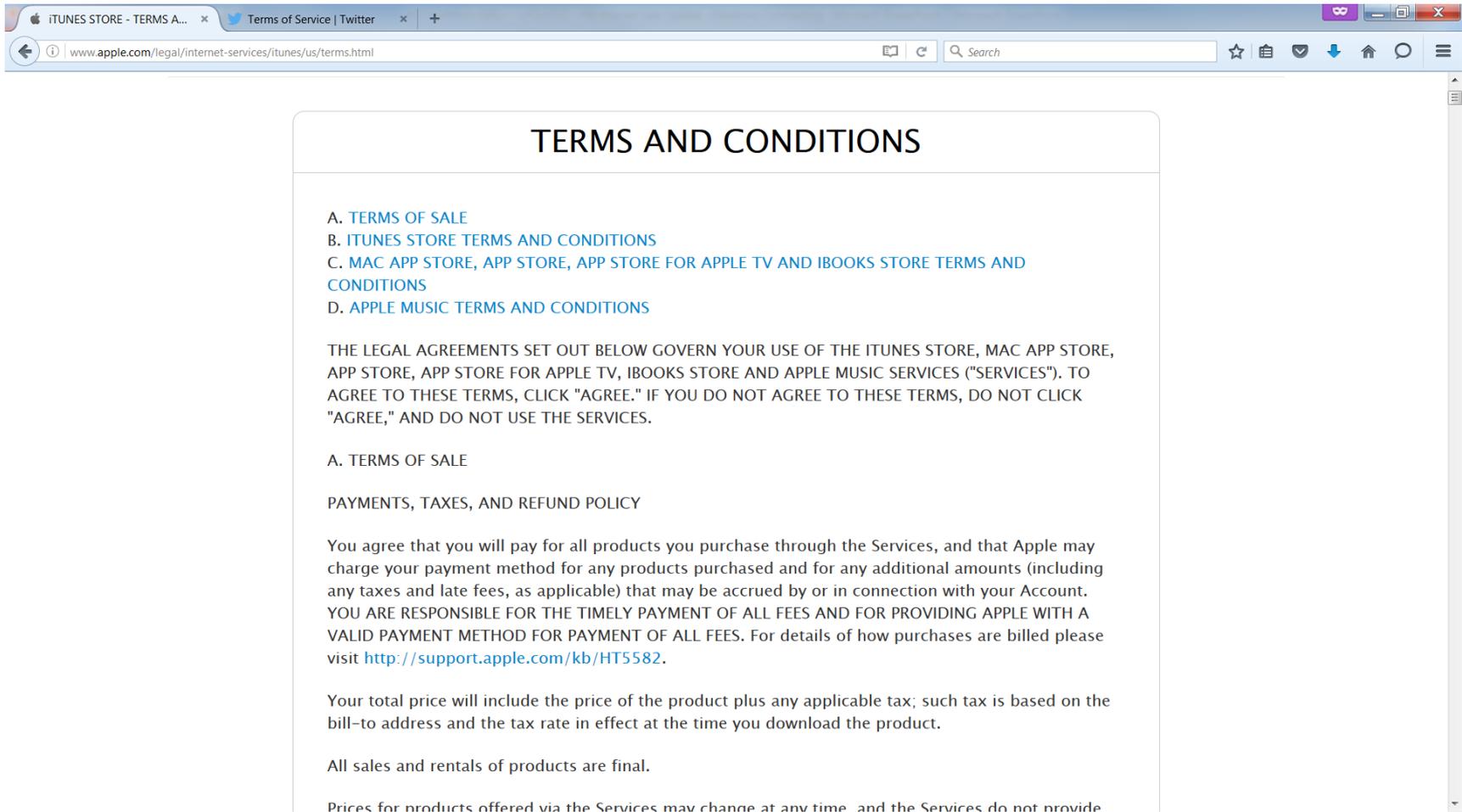
Electronic Agreements – E-Bay

Legal Disputes

PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS YOUR RIGHTS AND WILL HAVE A SUBSTANTIAL IMPACT ON HOW CLAIMS YOU AND EBAY HAVE AGAINST EACH OTHER ARE RESOLVED.

You and eBay agree that any claim or dispute at law or equity that has arisen, or may arise, between us relating in any way to or arising out of this or previous versions of the eBay User Agreement, your use of or access to the Services, or any products or services sold or purchased through the Services, will be resolved in accordance with the provisions set forth in this Legal Disputes Section.

Electronic Agreements – Apple



The image shows a browser window with the URL www.apple.com/legal/internet-services/itunes/us/terms.html. The page content is as follows:

TERMS AND CONDITIONS

- A. [TERMS OF SALE](#)
- B. [ITUNES STORE TERMS AND CONDITIONS](#)
- C. [MAC APP STORE, APP STORE, APP STORE FOR APPLE TV AND IBOOKS STORE TERMS AND CONDITIONS](#)
- D. [APPLE MUSIC TERMS AND CONDITIONS](#)

THE LEGAL AGREEMENTS SET OUT BELOW GOVERN YOUR USE OF THE ITUNES STORE, MAC APP STORE, APP STORE, APP STORE FOR APPLE TV, IBOOKS STORE AND APPLE MUSIC SERVICES ("SERVICES"). TO AGREE TO THESE TERMS, CLICK "AGREE." IF YOU DO NOT AGREE TO THESE TERMS, DO NOT CLICK "AGREE," AND DO NOT USE THE SERVICES.

A. TERMS OF SALE

PAYMENTS, TAXES, AND REFUND POLICY

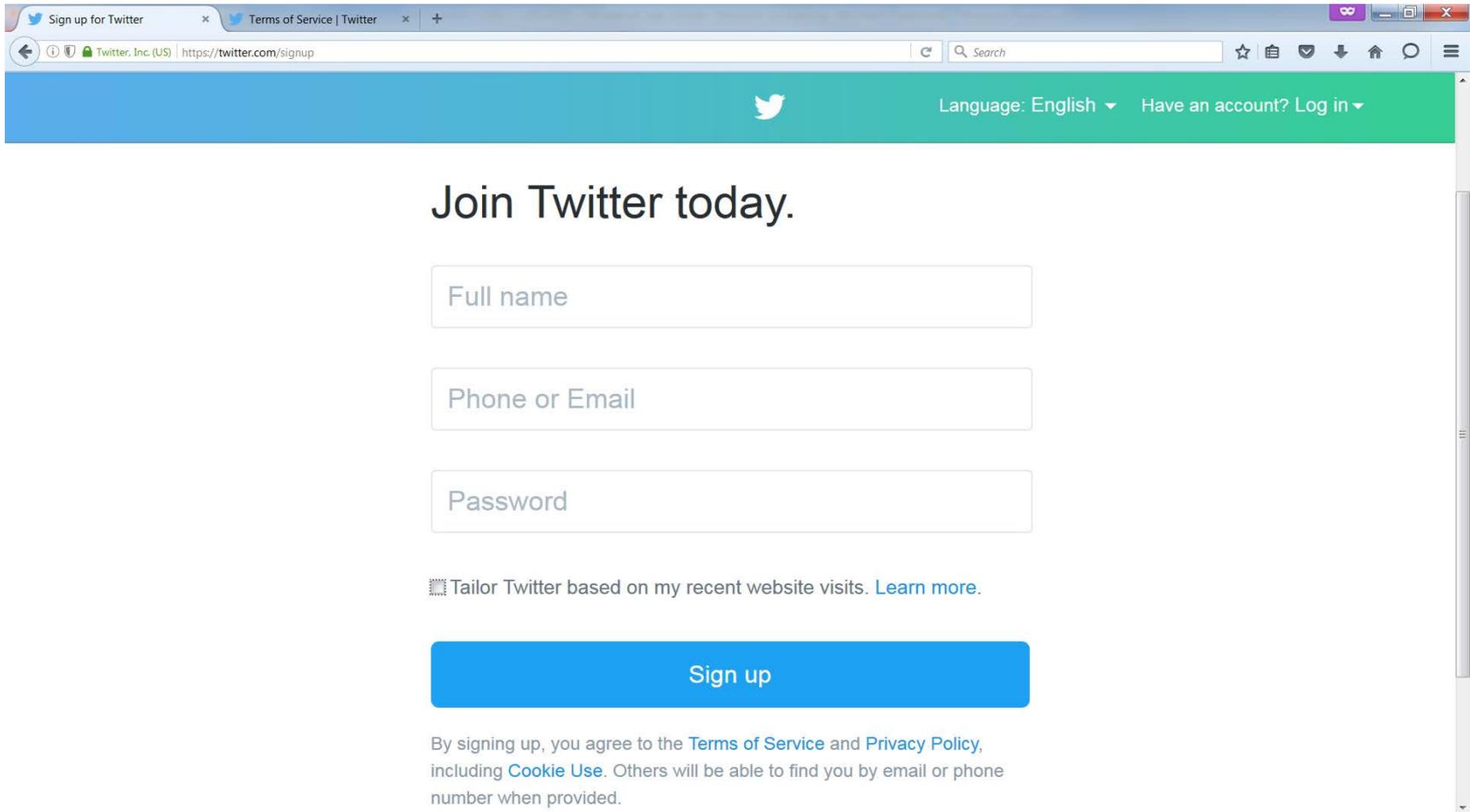
You agree that you will pay for all products you purchase through the Services, and that Apple may charge your payment method for any products purchased and for any additional amounts (including any taxes and late fees, as applicable) that may be accrued by or in connection with your Account. YOU ARE RESPONSIBLE FOR THE TIMELY PAYMENT OF ALL FEES AND FOR PROVIDING APPLE WITH A VALID PAYMENT METHOD FOR PAYMENT OF ALL FEES. For details of how purchases are billed please visit <http://support.apple.com/kb/HT5582>.

Your total price will include the price of the product plus any applicable tax; such tax is based on the bill-to address and the tax rate in effect at the time you download the product.

All sales and rentals of products are final.

Prices for products offered via the Services may change at any time and the Services do not provide

Electronic Agreements – Twitter



The screenshot shows a web browser window with two tabs: "Sign up for Twitter" and "Terms of Service | Twitter". The address bar shows "https://twitter.com/signup". The page header includes the Twitter logo, "Language: English", and "Have an account? Log in". The main heading is "Join Twitter today." Below it are three input fields: "Full name", "Phone or Email", and "Password". A checkbox for "Tailor Twitter based on my recent website visits. Learn more." is present. A blue "Sign up" button is at the bottom. Below the button, a paragraph states: "By signing up, you agree to the Terms of Service and Privacy Policy, including Cookie Use. Others will be able to find you by email or phone number when provided."

Sign up for Twitter

Terms of Service | Twitter

Twitter, Inc. (US) | https://twitter.com/signup

Language: English Have an account? Log in

Join Twitter today.

Full name

Phone or Email

Password

Tailor Twitter based on my recent website visits. [Learn more.](#)

[Sign up](#)

By signing up, you agree to the [Terms of Service](#) and [Privacy Policy](#), including [Cookie Use](#). Others will be able to find you by email or phone number when provided.

Writings / Signatures

- Statute of Frauds
 - Writing Requirement
- Signature Requirement
 - Electronic Signatures (vs. Digital Signatures)
 - UETA (Uniform Electronic Transaction Act)
 - *43 States*
 - E-Sign
(Electronic Signatures in Global and National Commerce Act)
 - *Federal Law (6-30-00)*

Writings / Signatures

- UETA
 - Electronic = Paper Signature
 - No change in substantive
- E-Sign
 - Electronic = Paper Signature for Interstate Commerce
 - Exceptions - UCC, Estates, Family Law, Foreclosure, Insurance cancellations
 - Pre-emption

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
 - *DocuSign*
 - *Digicert*
 - *MS Word*

Block-Chain

- Technology underlying Bitcoin – no need for intermediary
 - Distributed ledger system - creates digital record of ownership of an asset
 - Peer-to-peer network of computers
 - Each “block” contains a record with a unique cryptographic signature that is time stamped and contains a link to a “chain” of prior blocks
 - No block can be changed without breaking the chain and system provides a complete record of the sequence of events

Block-Chain

- Potential Applications
 - Financial Institutions - potential savings in settling transactions and other back-office functions without the need for third-party verification
 - Letters of credit that automatically initiate payment upon arrival of a shipment
 - Investment vehicles that provide automatic returns without the need for human intervention
 - Automatic and distributed payment systems for intellectual property such as copyrighted music

Block-Chain

- Potential Issues
 - Privacy
 - Private personal or financial information that is required for a transaction becomes public information – Private Block-chains
 - Scalability
 - Blockchain Bloat - Longer chains become, longer to download, more computing power required and longer takes to verify a transaction.
 - Legal Issues
 - Illicit transactions; Correcting error in Chain; Jurisdiction issues

Block-Chain

- Current Developments
 - Chamber of Digital Commerce
 - Lawyers Committee
 - Hyperledger Project
 - Formed by Linux Foundation -12/15 – 80 members
- Caution
 - R3 CEV LLC
 - Goldman Sachs

Tech&Sourcing@MorganLewis Blog

About Tech&Sourcing@MorganLewis

- Morgan Lewis's Tech&Sourcing@MorganLewis blog highlights the latest developments and trends affecting technology, outsourcing, and other commercial transactions. It discusses key issues and best practices for commercial contract lawyers and sourcing professionals. The blog is run primarily by members of our Technology, Outsourcing and Commercial Transactions Practice, with guest blogs from Morgan Lewis lawyers in our privacy, labor and employment, life sciences, retail, healthcare, energy, and financial services practice areas.
- <https://www.morganlewis.com/blogs/sourcingatmorganlewis>

Contract Corner



BLOG POST

TECH & SOURCING @ MORGAN LEWIS

TECHNOLOGY, OUTSOURCING, AND COMMERCIAL TRANSACTIONS
NEWS FOR LAWYERS AND SOURCING PROFESSIONALS

Contract Corner: An Anthology

December 09, 2015

A regular feature of *Sourcing@MorganLewis* is our "Contract Corner." In these posts, members of our global outsourcing and strategic commercial transactions practice highlight particular contract provisions and review issues and potential approaches to negotiating and drafting those provisions. As the year draws to a close and the holiday season is upon us, we have organized links to our Contract Corner blog posts in one place. These posts cover many different provisions and aspects of drafting commercial, outsourcing, and technology contracts:

- > **Non-Disclosure Agreements**
[Key Considerations in Understanding and Negotiating Non-Disclosure Agreements](#)
- > **IT Agreements**
[Key Considerations in Understanding and Negotiating IT Agreements](#)
- > **Global Agreements**
[Global versus Local Agreements](#)
- > **License Rights**
[Considering Usage Rights in Software License Agreements](#)
- > **Open Source**
[Open Sourcing](#)

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<https://www.morganlewis.com/blogs/sourcingatmorganlewis/2015/12/contract-corner-an-anthology>

Attorney Profile



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Peter M. Watt-Morse, one of the founding partners of the firm's Pittsburgh office, has worked on all forms of commercial and technology transactions for more than 30 years. Peter works on business and intellectual property (IP) matters for a broad range of clients, including software, hardware, networking, and other technology clients, pharmaceutical companies, healthcare providers and payors, and other clients in the life science industry. He also represents banks, investment advisers, and other financial services institutions.

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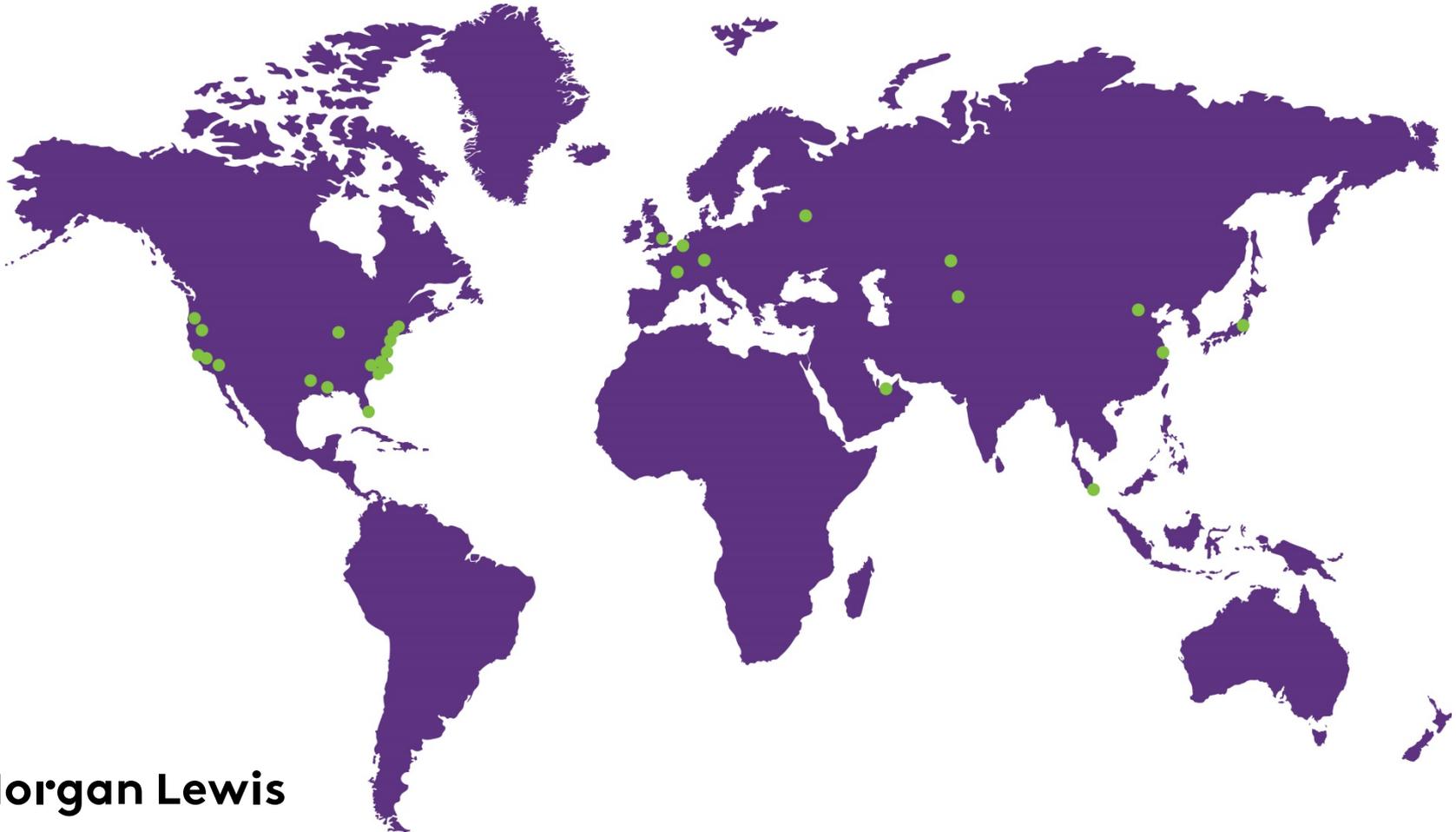
Andrew J. Gray IV concentrates his practice on intellectual property (IP) litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and start-ups on computer and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, and before the US International Trade Commission.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

| | | | | |
|----------|-----------|---------------|---------------|----------------|
| Almaty | Dallas | Los Angeles | Philadelphia | Silicon Valley |
| Astana | Dubai | Miami | Pittsburgh | Singapore |
| Beijing | Frankfurt | Moscow | Princeton | Tokyo |
| Boston | Hartford | New York | San Francisco | Washington, DC |
| Brussels | Houston | Orange County | Santa Monica | Wilmington |
| Chicago | London | Paris | Shanghai | |



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