

“SOUNDS GREAT! WHERE DO I SIGN?”

SELECTED ISSUES IN THE FORMATION OF ELECTRONIC AGREEMENTS

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I. Introduction.

As the global economy has become increasingly dominated by transactions that involve - either in the mechanics of their fulfillment or in their subject matter - the transfer of electronic information, the law has grappled - sometimes fitfully - with the appropriate level of recognition to give contracts that are accomplished in whole or in part by electronic means. This paper examines two distinct but related issues arising in the formation of such contracts. In Section II of this paper, the author discusses recent laws designed to place agreements to which assent is manifested electronically on an equal footing with their traditional “pen and paper” counterparts. In Section III, the author examines emerging case law regarding the substantive requirements for valid assent to certain types of electronic agreements.

II. The Validity of Electronic Signatures in Contract Formation – the Relationship Between the Uniform Electronic Transactions Act (UETA) and E-Sign, with Reference to the Georgia Electronic Records and Signatures Act.

A. What is the primary issue sought to be addressed by UETA and E-Sign?

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The primary issue sought to be addressed by UETA and E-Sign - an issue of critical importance to the vitality of electronic communications in the conduct of business and other legal transactions - is the proper legal effect to be given to “writings” created, transmitted or recorded using emergent technologies. Specifically, where underlying law requires the use of a “writing”, will the use of electronic records or signatures, or the transmission or receipt of written communications in purely electronic form, satisfy that requirement?

1. Illustrative Case - The Georgia “Beeps and Chirps” Case.

The uncertainty of the effect electronic records and signatures would be afforded under legal requirements calling for a “writing” prior to the enactment of E-Sign, UETA and other analogous state laws is highlighted by the so-called “Beeps and Chirps” case decided by the Georgia Court of Appeals in 1996.² In that case, the plaintiff attempted to satisfy certain statutory requirements of “written” ante-litem notice by delivering such notice to the governmental defendant via facsimile, with a follow-up delivery of such notice in “hard copy” form. The facsimile copy of the notice was received by the defendant within the applicable period of limitation for such notice, while the “hard copy” form was not received by the defendant until after the expiration of such period. The Georgia Court of Appeals ruled that, though timely received, the facsimile copy of the notice did not satisfy the statutory requirement that such notice be received “in writing” prior to the expiration of the limitations period, stating that the facsimile copy did not itself constitute a writing, but rather merely “a series of beeps and chirps” “from which a writing may be accurately duplicated.” While the Georgia Supreme Court did overturn the dismissal of the plaintiff’s case on other grounds, it did not specifically resolve the question of whether plaintiff’s facsimile - or any other similar electronic communication - constituted a legally effective writing, and so did little to give Georgia practitioners comfort that Georgia law was adapting to the new realities posed by

² *Dept. of Transportation v. Norris*, 474 S.E.2d 216 (Ga. Ct. App. 1996).

increasing use of electronic communications to effect legal relationships. As the importance of such issues became increasingly apparent, both the federal government and the governments of many states (including Georgia) adopted legislation to specify the legal effect to be given to such “beeps and chirps.”

B. UETA.

1. What is UETA?

UETA is the Uniform Electronic Transactions Act, which was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and finalized in 1999.³ Like all other draft uniform statutes, UETA is not binding law in any given state unless and until expressly adopted by such state through its standard legislative processes. As a result, by the time UETA is actually adopted in a given state, that state’s “version” of UETA may contain significant state-specific variations arising from the “give and take” of the legislative process. As such, unless specifically noted herein, all references to UETA will refer to the model legislation as promulgated by NCCUSL, rather than to any state-specific variant.

2. What is the purpose of UETA?

According to the NCCUSL, the purpose of UETA is “to remove barriers to electronic commerce by validating and effectuating electronic records and signatures.”⁴ Simply put, UETA recognizes that e-commerce will necessarily be conducted by communications, and will be effectuated by and result in records, which exist entirely in electronic format, with no corresponding, contemporaneous “hard copy” counterpart. To the extent that certain state laws impose barriers on, or other disincentives to, conducting

³ Uniform Electronic Transactions Act (1999). When used in citations herein, “UETA” will refer to the final draft of the Uniform Electronic Transactions Act, which can be found on the Internet at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>.

business or other legal transactions in electronic format,⁵ UETA elevates electronic signatures and electronic records to functional equivalency with their traditional “pen and paper” counterparts for purposes of satisfying such legal requirements. Specifically, Section 7 of UETA provides as follows:

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.⁶

However, UETA’s applicability is limited in several important respects. First, UETA does not apply to every instance in which a writing may be used or required, or even to all situations where an electronic signature or record may be used or generated. UETA applies only to electronic signatures or records relating to “transactions”, which are defined by UETA as interactions “*between two or more persons relating to the conduct of business, commercial, or governmental affairs.*”⁷ Second, and more importantly, UETA applies only to “transactions between parties each of which has *agreed to conduct transactions by electronic means.*”⁸ Furthermore, even with respect to electronic signatures or records relating to “transactions”, UETA specifically provides

⁴ UETA, Prefatory Note.

⁵ Specific examples of such barriers cited by the NCCUSL include recognized contract principles (the Statute of Frauds, which generally requires that certain types of contracts must be evidenced by a writing signed by one or more parties to be enforceable), banking laws (statutes which require retention of canceled checks), and even deed recordation requirements. *See* UETA, Prefatory Note.

⁶ UETA § 7. *See also* UETA § 2(7), which defines an “electronic record” broadly to mean any “record created, generated, sent, communicated, received, or stored by electronic means.”

⁷ UETA § 2(16) (emphasis added.)

⁸ UETA § 5(b) (emphasis added.)

that it does not apply to: laws “governing the creation and execution of wills, codicils, or testamentary trusts”; the Uniform Commercial Code (other than Sections 1-107 and 1-206, Article 2, and Article 2A); the Uniform Computer Information Transactions Act (UCITA); or to any other law specifically exempted by a given state when enacting UETA.⁹ Finally, UETA expressly provides that all “transactions” covered by that Act still remain “subject to other applicable substantive law” – meaning that, except to the limited extent that it places electronic signatures and records on equal legal footing with “hard-copy” counterparts, UETA does not displace the substantive principles of contract law (*e.g.*, prerequisites of contract formation other than a “writing” requirement, performance) or other bodies of law applicable to such signatures or records.

UETA recognizes that many interactions in the burgeoning e-commerce marketplace may be accomplished – by one or both parties to a transaction – through use of “electronic agents”, which UETA defines to mean “a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.”¹⁰ UETA provides that a valid contract may be formed “by the interaction of electronic agents of the parties” – or a party may be bound by the actions of such party’s electronic agent - “even if no individual was aware of or reviewed the electronic agents’ actions or the resulting terms and agreements.”¹¹ UETA terms such transactions “automated transactions”, even where only one party to the transaction utilized an electronic agent to propose or accept an offer or to render performance.¹²

In an electronic contracting model, where assent to a contract is given merely by clicking “I agree” (and, in some cases, may be given by an electronic agent without knowledge of the particulars of the transaction by any living person), UETA describes the

⁹ UETA § 3.

¹⁰ UETA § 2(6).

¹¹ UETA § 14.

¹² “Automated transaction” means a transaction “conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.” UETA § 2(2). UETA specifically cites the example of an online store - where an order transmitted by a human is reviewed and accepted by the seller’s electronic agent, without human intervention on the seller’s side - as an “automated transaction.” UETA, Comment to § 2.

circumstances under which legal effect of the “beeps and chirps” transmitted or received by an electronic device will be attributed or legally imputed to a live person:

so long as the electronic record or electronic signature resulted from a person’s action it will be attributed to that person . . . A person’s actions include actions taken by human agents of the person, as well as actions taken by an electronic agent, *i.e.*, the tool, of the person. Although the rule may appear to state the obvious, it assures that the record or signature is not ascribed to a machine, as opposed to the person operating or programming the machine.¹³

UETA specifically states that parties may vary the requirements of UETA by contract, except where explicitly provided to the contrary in that statute.¹⁴

3. Where has UETA been enacted?

As of October 2003, UETA (including state-specific variations thereof) has become law in forty-two states and in the District of Columbia.¹⁵

4. The Georgia Electronic Records and Signatures Act.

Notably, Georgia has not enacted UETA. However, in 1997, Georgia enacted an

¹³ UETA, Comment to § 9.

¹⁴ UETA § 5(d). As an example of a situation where UETA prescribes that the parties may not vary its requirements by agreement, *see* UETA § 5(c) - “A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.”

¹⁵ UETA has been enacted in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wyoming. *See* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp.

analogous statute, the Georgia Electronic Records and Signatures Act,¹⁶ which provides, in pertinent part, as follows:

- (a) Records and signatures shall not be denied legal effect or validity solely on the grounds that they are electronic.
- (b) In any legal proceeding, an electronic record or electronic signature shall not be inadmissible as evidence solely on the basis that it is electronic.
- (c) When a rule of law requires a writing, an electronic record satisfies that rule of law.
- (d) When a rule of law requires a signature, an electronic signature satisfies that rule of law.
- (e) When a rule of law requires an original record or signature, an electronic record or electronic signature shall satisfy such rule of law.¹⁷

Unlike UETA, the Georgia Electronic Records and Signatures Act is not expressly limited in its applicability to transactions between two or more people which are related to business, commercial, or governmental matters. Indeed, with respect to substantive law, the Georgia Electronic Records and Signatures Act only expressly limits its reach with respect to (i) laws governing wills and certain trusts, living wills, and/or powers of attorney, (ii) any “record that serves as a unique and transferable physical token of rights and obligations, including, without limitation, negotiable instruments and instruments of title wherein possession of the instrument is deemed to confer title,” and (iii) any law subsequently passed or amended by the General Assembly which “expressly refers to and limits the application of” the Georgia Electronic Records and Signatures Act to such law.¹⁸ In addition, like UETA,¹⁹ the Georgia Electronic Records and Signatures Act provides that, while an electronic record or signature may not be deemed

¹⁶ O.C.G.A. § 10-12-1 *et seq.*

¹⁷ O.C.G.A. § 10-12-4.

¹⁸ *Id.*

inadmissible in any legal proceeding solely because of its electronic nature, all other prerequisites to admissibility under applicable rules of evidence must still be satisfied with respect to such electronic record or signature.²⁰

C. E-Sign

1. What is E-Sign?

E-Sign refers to the Electronic Signatures in Global and National Commerce Act,²¹ which was signed into law in June 2000 and became effective in October of that year.

2. Purposes of E-Sign.

Congress' stated purpose in enacting E-Sign was simple – to minimize barriers to interstate and global e-commerce posed by inconsistent state laws regarding the effectiveness of electronic signatures and records and to move toward a uniform model for recognition of electronic contracts.²² While a majority of states had already enacted laws validating electronic signatures prior to the promulgation of E-Sign, members of Congress noted that disparities between those state laws created insecurity as to the legal effect any given state might give to an interstate electronic transaction.²³ Furthermore, even though a number of states had adopted, or undertaken steps to adopt, UETA as the basis for their electronic signature statutes, Congress recognized a continuing need to expedite a national standard for recognition of electronic records and signatures amid concerns that certain

¹⁹ See UETA, Comment to § 13.

²⁰ O.C.G.A. § 10-12-04(g).

²¹ 15 U.S.C.A. §§ 7001-31 (2000).

²² See, e.g., 145 Cong. Rec. S14,882 (daily ed. Nov. 19, 1999) (statement of Sen. Abraham) (“The purpose of our legislation is to try to make all such agreements valid if they fit or meet some parameters . . . [i]f we don’t do this, impediments will exist between parties who wish to contract via the Internet and through the Internet.”)

²³ *Id.* (“It is possible for people to argue that a contract is valid in one State and not valid in the State of the other contracting party and, thus, is an invalid document.”)

states' modifications to UETA minimized the effectiveness of UETA as a uniform legal standard.²⁴

E-Sign's essential operative provisions state that, notwithstanding any other law:

. . . with respect to any transaction in or affecting interstate or foreign commerce --

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.²⁵

As such, like UETA, E-Sign does not purport to alter substantive principles of contract law or the requirements of other laws except to the extent that such principles would act to deny the legal effect, validity or enforceability of an electronic record or signature solely because it is set forth in electronic form.

Also, like UETA, E-Sign recognizes the use of electronic agents in the formation of contracts and other e-commerce transactions. E-Sign expressly states that:

no contract or other record relating to a transaction in or affecting interstate or foreign commerce may be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.²⁶

²⁴ See Robert A. Wittie and Jane K. Winn, *Electronic Record and Signatures Under the Federal E-Sign Legislation and the UETA*, 56 *Bus. Law.* 293, 296 (2000).

²⁵ 15 U.S.C.A. § 7001(a).

²⁶ 15 U.S.C.A. § 7001(h).

E-Sign specifically exempts certain contracts and legal records from its application, providing that the operative provisions of E-Sign do not apply to a contract or other record to the extent such contract or record is governed by: (i) law pertaining to the creation and execution of wills, codicils, or testamentary trusts; (ii) law applicable to adoption, divorce, or other matters of family law; or (iii) the Uniform Commercial Code “as in effect in any State” other than sections 1-107 and 1-206 and Articles 2 and 2A.²⁷

In addition, E-Sign does not currently mandate the legal validity of electronic records with respect to (a) certain official court documents; (b) any document required to accompany any transportation or handling of hazardous materials, or (c) any notice of (1) cancellation or termination of utility services, (2) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement relating to, an individual’s primary residence, (3) cancellation or termination of health insurance benefits or life insurance benefits (excluding annuities), or (4) recall of a product, or material failure of a product, that risks endangering health or safety.²⁸ Thus, the drafters of E-Sign specifically permitted the state and federal governments the option to deny legal effect to electronic records with respect to the foregoing notices and transactions, expressly justifying these exceptions on consumer-protection grounds. However, E-Sign also permits any federal regulatory agency to effectively strike a given exception from the scope of E-Sign “with respect to matters within [such agency’s] jurisdiction,” upon a finding that deletion of such exception “will not increase the material risk of harm to consumers.”²⁹ The preemptive effect of such a deletion by a given regulatory agency upon then-extant analogous state laws is unclear.

3. Preemptive Effect of E-Sign

Consistent with the stated intent of some members of Congress that E-Sign be an

²⁷ 15 U.S.C.A. § 7003(a).

²⁸ 15 U.S.C.A. § 7003(b).

²⁹ 15 U.S.C.A. § 7003(c).

interim measure to facilitate the adoption of uniform laws governing electronic records and signatures,³⁰ E-Sign’s preemption provisions provide that a state may “modify, limit or supersede” E-Sign only under certain specified conditions. First, a state may supersede E-Sign by adopting an exact version of UETA as finalized by the NCCUSL in 1999.³¹ Second, a state may, as an alternative to adopting UETA, enact other legislation governing electronic transactions so long as such legislation (i) is consistent with the provisions of E-Sign, (ii) is technology-neutral and (iii) if enacted or adopted after June 30, 2000, specifically references E-Sign.³² In effect, this means that, even if a state adopts UETA as the basis for its electronic transaction law, almost any modification to the text of UETA – other than those specifically authorized by Section 3(b)(4) of UETA – means that the resulting enactment is not an exact version of UETA as finalized by the NCCUSL in 1999, and instead will likely be subject to the above-described “consistency” test for preemption under the analysis set forth in E-Sign.

As noted above, Georgia elected – well prior to the enactment of E-Sign – to enact the Georgia Electronic Records and Signatures Act rather than the then-developing UETA. The apparent consistency of the Georgia statute with the terms of E-Sign, along with its technology-neutral stance, bolsters an argument that the Georgia Electronic Records and Signatures Act is not preempted by E-Sign. However, in an abundance of caution, the General Assembly added a specific reference to E-Sign when amending the statute in 2001,³³ presumably to better track all prongs of the “consistency” exemption from preemption found in E-Sign.

³⁰ See, e.g., 145. Cong. Rec. S14,882, *supra* note 22 (“In short, we believe this bill will be an interim approach until the States have passed a model uniform act.”)

³¹ 15 U.S.C.A. § 7002(a)(1). While Section 3(B)(4) of UETA specifically provides that states may except laws from being affected by such state’s adoption of UETA, E-Sign specifically provides that any such exception “shall be preempted to the extent such exception is inconsistent with” certain provisions of E-Sign. *Id.*

³² 15 U.S.C.A. § 7002(a)(2). With respect to the requirement that such non-UETA legislation remain technology-neutral, that subsection provides that such legislation must “not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.” *Id.*

³³ OCGA 10-12-2(b).

D. Required Evidence of Consent to Use Electronic Records and Signatures under UETA and E-Sign.

It important to bear in mind that, just as neither E-Sign and UETA mandates or endorses a particular technological standard for electronic records or signatures – each is thus termed “technology-neutral” – neither statute *requires* the use of electronic signatures or records in given transactions. Instead, each statute generally leaves the choice of using electronic records or signatures in a given transaction to the parties thereto.³⁴ However, while the goal of each of UETA and E-Sign is to place electronic records and signatures on the same footing as their “hard-copy” counterparts, each of those statutory schemes requires some level of consent by a party to the use of electronic records or signatures in transactions between the parties.

1. Proof that a Party Has Consented to Use of Electronic Records.

Under UETA, there is no prescribed quantum of proof required to demonstrate that a given party has agreed to conduct a transaction using electronic records and/or signatures. Such agreement may be determined by reference to “the context and surrounding circumstances, including the parties’ conduct” with respect to such transaction.³⁵ Express consent may be given by paper or by electronic methods.³⁶

Unlike UETA, E-Sign does not affirmatively require that the parties to a given transaction agree to use or accept electronic records in order for those electronic records to have legal effect (except as set forth below in connection with certain consumer notices). In contrast, E-Sign merely provides that parties are not required to use such

³⁴ UETA § 5(a); 15 U.S.C.A. § 7001(b)(2).

³⁵ UETA § 5(b).

³⁶ *See* UETA, Comments to § 5. Provisions of UETA which appear to allow parties to obtain such consent via paper contracts has given rise to concerns on the part of consumer protection advocates that such consent will be subject to abuse - *e.g.*, in cases where parties without meaningful access to electronic records may be forced to agree, in paper contracts, to receive and be bound by such electronic records.

electronic records (a negative rule, rather than an affirmative one).³⁷ The practical effect of this provision is likely that, like UETA, a party's use of electronic records will be subject to E-Sign in any instance in which the surrounding facts and circumstances indicate that party's consent to give legal effect to such electronic records.

Consistent with consumer-protection policies evidenced elsewhere in that statute, E-Sign, in contrast to UETA, does impose very specific requirements for consent to use electronic records in one situation: valid consumer consent is required before the electronic provision of consumer information required by statute, regulation or rule of law will be deemed to satisfy legal requirements that such information be provided in writing. The consumer must have given affirmative consent to the use of electronic records to provide or make available such information, and the consent must not have been withdrawn.³⁸ The consumer must provide, or at least confirm, the consent electronically, to demonstrate that the consumer has the capability to receive the relevant information in electronic form.³⁹

2. Scope of Consent to Use of Electronic Records.

Under UETA, “[a] party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. [This right] may not be waived by agreement.”⁴⁰ Under E-Sign, the consumer need only be notified of the scope of the consent required by the other party (*e.g.*, whether the consent sought applies only to the particular transaction or to identified categories of information that may be delivered in the course of the parties' relationship), though the consumer is entitled to withdraw consent at any time.⁴¹

³⁷ 15 U.S.C.A. § 7001(b)(2).

³⁸ 15 U.S.C.A. § 7001(c)(1).

³⁹ *Id.*

⁴⁰ UETA § 5(c).

⁴¹ 15 U.S.C.A. § 7001(c)(1).

III. Assent To, And Enforceability Of, Electronic Agreements: Click-Wrap and Browse-Wrap Agreements.

A. Context: Shrink-wrap Agreements.

First, it is useful to examine the case law which arose involving the (relatively) more traditional “shrink-wrap” agreements (the precursor to click-wrap and browse-wrap agreements), as that case law continues to be applied – and modified – in the context of click-wrap and browse-wrap agreements. Shrink-wrap agreements are most commonly associated with software provided on magnetic or optical media. These agreements are provided to the offeree on paper and derive their name from the business practice of sealing the terms within the software’s shrink-wrapped packaging. Shrink-wrap agreements are not usually signed by the respective parties, instead generally providing that use of the associated software, or retention of the software beyond a specified time, constitutes assent to the terms of the shrink-wrap agreement.

Because shrink-wrap terms are usually not available for review until after the offeree had completed the transaction in which he purchased the copy of the relevant software, some courts - such as the court in *Step-Saver Data Systems, Inc. v. Wyse Technology*⁴² - initially refused to enforce shrink-wrap agreements on the grounds that these agreements constituted “additional terms” not part of the original contract; under UCC § 2-207, such additional terms must often be expressly assented to before they become binding upon the offeree. In the court’s opinion, merely using the software which had already been the subject of a completed purchase transaction did not constitute such express assent to additional terms.

However, this trend was reversed in 1996, when the Seventh Circuit held, in *ProCD, Inc. v. Zeidenberg*,⁴³ that shrink-wrap agreements were enforceable so long as those agreements (i) complied with standard contracting principles (*e.g.*, notice of terms prior to performance, valid assent to those terms) and (ii) were not unconscionable or

⁴² 939 F. 2d 91 (3d Cir. 1991).

violative of other principles of law. In support of its decision, the court in *ProCD* cited UCC § 2-204, which provides that a contract for the sale of goods may be made in any fashion sufficient to show that an agreement between the parties had been reached, including by the conduct of one or both of the parties. The *ProCD* court concluded that, inasmuch as the user in that case had sufficient pre-purchase notice that use of the software was subject to additional terms and a right to return the software if he did not agree to those terms, his subsequent conduct in using and retaining the software constituted express assent to the terms of the shrink-wrap agreement within the meaning of UCC § 2-204. The reasoning of *ProCD* has been generally followed by other courts in finding shrink-wrap agreements enforceable.⁴⁴

B. “Click-wrap” and “Browse-wrap” Agreements Distinguished.

It is important to understand the essential difference between click-wrap and browse-wrap agreements. Unlike “shrink-wrap” agreements, the terms “click-wrap” and “browse-wrap” are generally descriptive of the form and manner of assent required of the offeree in order to create a legally binding contract, rather than the manner in which those terms are provided to the offeree.

Specifically, a “click-wrap” agreement usually denotes an electronic agreement in which the offeree must affirmatively record his assent to the terms of the agreement in order to proceed with the transaction to be governed by the agreement (usually by “clicking” an on-screen button marked “yes” or “I agree” or by typing “I agree” into a pre-designated onscreen field). Depending on the offeror’s preference, the “assent” and “decline” buttons may be found at either the outset or conclusion of the relevant terms of the associated agreement, or may instead merely accompany a “link” to the substantive terms of the agreement, which terms the offeree may review (or not review) at his leisure prior to affirmatively assenting, or declining assent, to those terms.

⁴³ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

⁴⁴ See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000).

Conversely, a “browse-wrap” agreement, as that term is commonly used, describes an online agreement to which the offeror signifies his assent by taking some further action which he has been made aware will signify his acceptance of that agreement – as the name implies, the offeror will often specify that the offeree’s actions in continuing to “browse” or access the resources or services to be governed by the agreement will be deemed to signify assent to that agreement. Unlike most click-wrap agreements, browse-wrap agreements are usually available for review only via a hyperlink, often situated “below the fold” of the applicable web page (*i.e.*, in that portion of the web page which is not visible on screen when the web page is first loaded and only accessible by “scrolling down”), and sometimes in a typeface somewhat smaller than the other type on the subject web page. Increasingly, the critical language which alerts the offeree that “browsing” the web site or accessing the services constitutes assent to an agreement is located in the body of the agreement terms and thus is accessible only if - and *after* - the offeror has elected to review the terms of that agreement.⁴⁵

C. Click-wrap Agreements.

Generally, click-wrap agreements – marked by their conspicuous requirement that an offeree affirmatively signify an intent to be bound by the terms of an agreement prior to performance by the offeror – have been looked upon much more favorably by the courts than have browse-wrap agreements. Today, the guiding principle with respect to click-wrap agreements appears to be that such agreements are enforceable where the

⁴⁵ For example, see the Amazon.com website (www.amazon.com) (small link at bottom of web page stating simply “Conditions of Use”; terms available by hyperlink specify “If you visit or shop at Amazon.com, you accept these conditions.”); MSNBC.com website (www.msnbc.com) (small link at bottom of web page stating simply “Terms and Conditions”; no express statement that access or use of the msnbc.com web site signifies acceptance to the terms of the linked agreement). Compare the foregoing to the eBay web site (www.ebay.com) (text at bottom of web page in same font size as remainder of page, providing that “[u]se of this Web site constitutes acceptance of the eBay User Agreement and Privacy Policy.”); Atlanta Journal Constitution web site (www.ajc.com) (text at bottom of page reads “[b]y using ajc.com you accept the terms of our Visitor Agreement. Please read it.”). All of the foregoing web sites are described as of October 12, 2003.

traditional principles of contract formation are adhered to (*i.e.*, the offeree has notice of - and an opportunity to review - the relevant terms prior to performance and signifies his assent to them) and those terms do not violate other provisions of law which would render them unenforceable (*e.g.*, unconscionability).⁴⁶ To understand the context of the decisions regarding adequate notice of terms required to render click-wrap agreements enforceable, it is useful to review cases which have found analogous shrink-wrap agreements enforceable.

1. Notice of Terms and Indicia of Assent in the Shrink-wrap Context.

Several courts have enforced the terms set forth in shrink-wrap agreements where the circumstances indicated that the offeree was made aware that additional terms applied to the relevant hardware, software or services at issue, even though the offeree was not able to review those terms prior to purchasing the relevant hardware, software or services. In these cases, notice of additional terms was communicated to the offeree at the time of purchase via various methods, including notice of the existence of the shrink-wrap agreement: (i) on a sales receipt;⁴⁷ (ii) on a sales order;⁴⁸ or (iii) on the outside of the box containing the relevant hardware or software.⁴⁹ In addition, several courts have pragmatically endorsed a “money now, terms later” approach to contract formation as an expedient manner of doing business when conducting transactions involving hardware or software.⁵⁰ However, where the agreement formed at the time of purchase of the goods or services contained an integration clause which appeared to preclude additional terms, at least one court has refused to enforce the terms of a shrink-wrap agreement included with the goods or services being purchased.⁵¹

⁴⁶ See, *e.g.*, *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

⁴⁷ *McCrimmon v. Tandy Corp.*, 202 Ga. App. 233, 414 S.E.2d 15 (1991).

⁴⁸ *I-A Equipment Co., Inc. v. ICode, Inc.*, 43 U.C.C. Rep. Serv. 2d 807 (Mass. Dist. Ct. 2000).

⁴⁹ See, *e.g.*, *ProCD*, *supra* note 43.

⁵⁰ *Id.*; *Brower v. Gateway 2000, Inc.* 246 A.D.2d 246 (1st Dep’t 1998).

⁵¹ *Morgan Laboratories, Inc. v. Micro Data Base Systems, Inc.*, 41. U.S.P.Q.D.2d (N.D. Ca. 1997).

Unlike a click-wrap agreement, where the offeree communicates his assent or rejection of the applicable terms of the agreement by expressly communicating “I agree” or “I do not agree”, the offeree of the terms of a shrink-wrap agreement is often deemed to assent to those terms by continuing to accept the benefit of the goods or services subject to the agreement, *e.g.*, by failing to return the subject goods or services within a reasonable time after being given notice that failure to do so constitutes assent to those terms.⁵² Indeed, many cases involving shrink-wrap agreements have held that such retention of the goods or services after actual notice of the terms of the applicable shrink-wrap agreements rendered those agreements binding on the offeree, notwithstanding defects in notice of such terms to the offeree prior to purchase of the applicable goods and services. Often, these decisions have rested on the rationale that, even if these shrink-wrap agreements constituted “additional terms” under UCC § 2-207 (which the offeree - especially if the offeree was a nonmerchant - was free to accept or decline), the offeree had affirmatively signified his assent to those additional terms in the manner specified by those terms.⁵³ At the same time, other courts have refused to deem such agreements binding merely by virtue of retention of the benefit of the goods or services, where it was not clear that the offeree contemplated at the time of the purchase of those goods or services that the additional terms would become part of the parties’ agreement.⁵⁴

2. Notice of Terms and Indicia of Assent in the Click-wrap Context.

Because click-wrap agreements, by their nature, require the offeree to expressly and unequivocally signify assent or rejection of their terms prior to accessing or using the applicable goods or services, courts have almost uniformly held the terms of click-

⁵² See, *e.g.*, *Adobe Systems, Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051 (N.D. Cal. 2002); *Hill*, *supra* note 44.

⁵³ See *Hill*, *supra* note 44.

⁵⁴ See, *e.g.*, *Kocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kans. 2000).

wrap agreements enforceable against the offeree, even where the notice to the offeree of the applicable terms was less than ideal.

Generally, a party who signifies his acceptance to a contract is deemed to have read and understood the terms of that contract,⁵⁵ and so, in practice, courts have generally held that, where an offeree clicks (or otherwise expressly signifies) “I agree” when faced with a click-wrap agreement, he will be deemed to have agreed to be bound by any terms which he had an *opportunity* to review prior to his assent thereto. While the best practice in ensuring assent to all terms of a click-wrap agreement would be to present the offeree with all terms of that agreement and require him to “scroll” to the end of the contract before signifying his assent, recent cases have held that, where the offeree expressly signifies his assent to given click-wrap terms, he will be bound by those terms so long as the he had a reasonable opportunity to review them, notwithstanding the fact that he did not in fact review them.

In *Forrest v. Verizon Comm., Inc.*,⁵⁶ the relevant click-wrap agreement was set forth in a “scroll box” on the offeree’s screen, but the offeree was not required to “scroll down” through all of the terms of that agreement before signifying his agreement to be bound. As a result, it was possible to signify agreement to the terms of the agreement without ever actually reviewing all of the terms set forth therein. In that case, the court held that, by virtue of his express assent to the terms of the click-wrap agreement which he had an opportunity to review, the offeree was bound by a forum selection provision in the agreement, even though the specific provision at issue was only visible to the offeree if he elected “scroll down” to review the remainder of the agreement. The *Forrest* court specifically noted that “one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not.”⁵⁷ Bolstering the court’s view that the offeree had appropriate notice of the significance of the relevant terms despite not reviewing them was a conspicuous statement at the outset of the agreement

⁵⁵ See 2 Williston on Contracts § 6:43 (4th ed.)

⁵⁶ 805 A.2d 1007 (D.C. 2002).

⁵⁷ *Id.* at 1010.

directing the offeree to “PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY.”

The principle espoused in *Forrest* was recently extended in *DeJohn v. The .TV Corp., Register.com et al.*,⁵⁸ where the offeree - who expressly clicked an “I agree” button - was deemed bound by all terms set forth in a click-wrap agreement, even though those terms did not accompany the “I agree” button at all, but rather were available for review only if the offeree chose to follow an associated hypertext link to those terms. As in *Forrest*, the *DeJohn* court held that, where the offeree had a reasonable opportunity to review the terms of the relevant agreement and expressly signified his assent to those terms, his failure to actually review those terms would not prevent the enforcement of those terms against him.

An example of the effectiveness of express assent via an “I agree” button in a differing context can be found in *I.Lan Systems, Inc. v. Netscout Service Level Corp.*⁵⁹ In that case, an offeree claimed that it was not bound by the terms of a click-wrap agreement - to which it affirmatively expressed consent - on the grounds that the click-wrap agreement did not appear on the relevant website until after the contract for purchase of software had been concluded - in effect, the offeree claimed that it had no notice that additional terms were applicable to the purchase at the time the purchase contract was performed. In that case, the court held that, notwithstanding the fact that the click-wrap agreement may have constituted additional terms not set forth in the original purchase contract, the offeree could not deny his subsequent agreement to be bound by those terms where he had an opportunity to review those terms and had expressly assented to them.

3. Special Note - Georgia Law on Shrink-wrap Agreements.

Though Georgia case law regarding the enforceability of shrink-wrap agreements is sparse to non-existent, the practitioner should be aware that courts of other

⁵⁸ 245 F. Supp. 2d 913 (C.D. Ill. 2003).

jurisdictions which have applied Georgia law in cases involving shrink-wrap agreements have found such agreements unenforceable under Georgia law, at least on the specific facts of those cases. It is unclear whether the Georgia courts would consider such opinions persuasive authority in their own examinations of shrink-wrap and click-wrap agreements, especially as those cases pre-date the *ProCD* and *Patterson* cases and their progeny.⁶⁰

D. Browse-wrap Agreements.

Like shrink-wrap and click-wrap agreements, the enforceability of browse-wrap agreements is usually reviewed by courts by reference to traditional principles applicable to contract formation. However, unlike the relatively uniform decisions applicable to shrink-wrap and click-wrap agreements, recent decisions regarding the enforceability of browse-wrap agreements have been mixed at best, with the courts split over whether browse-wrap agreements afford sufficient notice of their terms and proof of the offeree's assent thereto to form a legally binding agreement.

1. Terms in Browse-wrap Agreements Enforceable.

Cases in which courts enforced terms in browse-wrap agreements - or at least suggested that such terms were enforceable - include the following:

a. *Register.com, Inc. v. Verio, Inc.*⁶¹ The court found that the offeree had assented to the additional terms set forth on the offeror's web site where

⁵⁹ 183 F.Supp. 2d 238 (D. Mass. 2002).

⁶⁰ See *Step-Saver Data Systems, Inc. v. Wyse Technology*, *supra* note 42 (3rd Circuit applying Georgia and Arizona law and finding that shrink-wrap agreement constituted additional terms under UCC § 2-207 which were not agreed to by the offeree and so did not become part of the agreement between the parties; the parties' prior terms were sufficiently definite to constitute an integrated agreement.) See also *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (Arizona district court applying Georgia law and reaching similar conclusion).

⁶¹ 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

such terms (i) were clearly posted on the offeror's website and (ii) expressly provided that use of the website signified assent to those terms. The court expressly rejected the offeree's argument that it had not effectively assented to such terms because it did not click an "I agree" button.)

b. *Pollstar v. Gigmania, Ltd.*⁶² The court declined the offeree's motion to dismiss based on assertion that browse-wrap agreements were *prima facie* unenforceable. The court noted that express assent may not be required for formation of a browse-wrap agreement, citing UCC § 2-204, which provides that parties may form a contract in any manner which is sufficient to show that the parties had reached agreement as to terms; however, the court did express concern with the inconspicuous nature of the notice that additional terms applied to the offeree's use of the website.

2. Terms in Browse-wrap Agreements Unenforceable.

Cases in which courts declined to enforce terms in browse-wrap agreements include the following:

a. *Ticketmaster v. Tickets.com*⁶³ The court refused to enforce a browse-wrap agreement (which consisted of a general statement that use of the website signified agreement to additional terms) on the grounds that there was insufficient proof that the offeree knew of and assented to such terms. The court went on to distinguish browse-wrap agreements from shrink-wrap and click-wrap agreements on the grounds that the latter types of agreements were "open and obvious and in fact hard to miss." However, the court stopped short of declaring browse-wrap agreements *prima facie* unenforceable, noting that an offeror may be able to prevail on enforcing

⁶² 170 F. Supp. 2d 974 (E.D. Cal. 2000).

⁶³ 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. 2000).

such agreements by presenting evidence of the offeree's actual knowledge of such terms and implied agreement to same.

b. *Specht v. Netscape Communications Corp.*⁶⁴ The court refused to enforce a browse-wrap agreement where (i) the notice of additional terms was set forth "below the fold" of the website (meaning that notice of the terms were not visible until and unless the user scrolled down to reveal a portion of the website not visible when the website was initially loaded), and (ii) the website proprietor did not require affirmative assent to those - in the court's view, hidden - terms before downloading the software at issue. To the *Specht* court, failure to meet the foregoing elements demonstrated that the offeree was not put on notice that he would become subject to a legally binding agreement containing such terms.

E. Unconscionable Terms.

The practitioner should not lose sight of the fact that, just as the enforceability of shrink-wrap and click-wrap agreements is generally determined in accordance with traditional principles of contract formation, the enforceability of specific terms will likewise be reviewed for compliance with traditional principles of contract enforceability, including the substantive conscionability of those terms. In this regard, *see, e.g., Brower v. Gateway 2000, Inc.*,⁶⁵ in which the court found a shrink-wrap agreement contained in a box with computer hardware and software was part of the purchase agreement between the parties, but refused to enforce an arbitration provision contained therein as unconscionable under New York law.

⁶⁴ 306 F.3d 17 (2d Cir. 2002).

F. Practice Pointers to Increase Potential for Enforceability of Shrink-wrap, Click-wrap and Browse-wrap Agreements.

The practitioner should consider the following principles - gleaned from the cases cited herein - when drafting (or advising clients on the use of) shrink-wrap, click-wrap and browse-wrap agreements.

1. The offeree should be put on notice - via conspicuous indicia - that agreement to additional terms is a prerequisite to - or an effect of - accepting the benefits of the goods or services to which the additional terms will apply. This notice should occur during the initial formation of the contract for the acquisition or use of the relevant goods or services.

In the case of shrink-wrap or click-wrap agreements contained in packaging for the product or service or in the product or service itself, the offeree should be made aware of the existence - and significance of - additional terms at the time he makes the contract to acquire or use such product or service - *e.g.*, on the outside of the packaging, in a sales order form.

In the case of a click-wrap agreement, the “I accept” and “I do not accept” buttons should be placed with - and no more or less visible than - either the text of the additional terms to be accepted or, at the very least, a hypertext link or other mechanism which provides access to those terms.

Where a browse-wrap agreement is used, conspicuous notice of the additional terms should be given prior to the offeree being permitted to use or access the product or service, and should be placed “above the fold” on the web-site, with a conspicuous hypertext link to the additional terms (if the additional terms are not themselves displayed “above the fold”).

The offeree should always be made aware of the intended significance of the additional terms - namely, that such terms constitute an offer to enter into a legally

⁶⁵ *Supra* note 50.

binding relationship - by resort to prominent statements to the effect of “PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY”, “THE FOLLOWING CONSTITUTES A LEGALLY BINDING AGREEMENT”, or “YOUR USE OF THIS SITE CONSTITUTES ACCEPTANCE OF OUR TERMS AND CONDITIONS.”

In any instance in which a shrink-wrap, click-wrap or browse-wrap agreement is used in conjunction with a written agreement, the written agreement should specifically reference the terms of the shrink-wrap, click-wrap or browse-wrap agreement, and the integration/merger clause of the written agreement should be drafted to make clear that the terms of the shrink-wrap, click-wrap or browse-wrap agreement will become part of the written agreement.

2. Wherever possible, the additional terms should require affirmative consent to those terms prior to the offeree being permitted to use or access the product or service, or at least specify - again, conspicuously and prior to the offeree being permitted to use or access the product or service - that use or access of the product or service constitutes acceptance of those terms.

As demonstrated by the cases, courts are much more willing to enforce the terms of an agreement where the offeree has indicated provable express assent to its terms, even if the offeree did not in fact review those terms prior to signifying his assent. However, where an affirmative expression of assent is not practicable - *i.e.*, in a shrink-wrap or browse-wrap agreement - the agreement should provide a mechanism whereby the offeree’s assent may be reasonably implied by his actions. In these cases, the agreement should clearly apprise the offeree that certain actions - or inaction - will be deemed to signify his assent to the terms set forth in the agreement (*e.g.*, use of the product or service, failure to relinquish access to or possession of the product or service within a specified time.)

To foreclose an argument by an offeree that he rejected the additional terms simply by failing to agree to them, the agreement should always specify the manner in which the offeree must signify his rejection of those terms. In the case of a click-wrap

agreement, this means always including an “I do not accept” button, the clicking of which will prevent further access to the relevant product or service. Where a shrink-wrap or browse-wrap is used, the agreement should specify the mechanism by which rejection must be signified - *e.g.*, relinquishment of the product or service within a specified time or refraining from use of the product or service. To support the assertion that agreement to the additional terms are essential to the formation of an agreement between the parties with respect to the product or service, the additional terms should make clear that, in the event the offeree rejects the additional terms, the agreement will be automatically “undone” as if it had never been formed and the offeree entitled to a return of applicable consideration given by the offeree upon, *e.g.*, relinquishment of the product or service.

3. The agreement should always be reviewed for potentially unconscionable terms or terms which otherwise violate another legal requirement. Because of their nature as “take-it-or-leave-it” contracts, the terms of shrink-wrap, click-wrap and browse-wrap agreements should always be reviewed for terms which a court may deem to be substantively unconscionable or otherwise in violation of applicable legal principles, as cases have demonstrated that a court may refuse to enforce such a term, notwithstanding that fact that the agreement is otherwise enforceable as a whole.