

InfoPAK<sup>SM</sup>

## Contracts 2.0: Making and Enforcing Contracts Online

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# Contracts 2.0: Making and Enforcing Contracts Online

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This InfoPAK<sup>SM</sup> is designed to provide corporate counsel with a general overview of making and enforcing online contracts. It is meant to be a primer for understanding how to prepare electronic contracts that will be enforceable agreements and the common pitfalls to avoid with respect to contracting in an electronic environment. This InfoPAK<sup>SM</sup> will first summarize basic contract law principles that apply to the evaluation of an online or electronic contract in many U.S. jurisdictions. This InfoPAK<sup>SM</sup> will then evaluate U.S. state and federal laws and several international laws specifically governing the validity of electronic signatures or the formation and enforceability of online contracts. Next, this InfoPAK<sup>SM</sup> will summarize case law addressing the two most common forms of online contracts, namely, click-wrap and browse-wrap agreements. Finally, this InfoPAK<sup>SM</sup> includes a short summary guideline for creating and enforcing online contracts and several samples of online contract materials, namely, sample contract introductions, a sample Terms of Use/End User License Agreement, and a sample Terms of Service.

This information should not be construed as legal advice or a legal opinion on specific facts, or representative of the views of Venable, LLP, DIRECTV, LLC or ACC or any of its lawyers, unless so stated. Further, this InfoPAK is not intended as a definitive statement on the subject. Rather, it is intended to serve as a tool for readers, providing practical information to the in-house practitioner.

This material was prepared by the attorneys of **Venable, LLP**, 2012 Sponsor of ACC's IT, Privacy & E-Commerce Committee (ITPEC) and **DIRECTV, LLC**, at the direction of the Association of Corporate Counsel. For more information regarding the authors please see the "About the Author" section of this InfoPAK.

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# I. Introduction: Contract Law Refresher/Important Contract Law Doctrines

## A. Online Contract/Agreements Overview

1. A contract is no less a contract simply because it is entered into via a computer.<sup>1</sup>
2. The bright line rules regarding online agreements are still being developed.<sup>2</sup>
3. Courts generally apply traditional contract law principles to online contracts.<sup>3</sup>
4. The vast majority of online agreements take the form of a “click-wrap agreement.”<sup>4</sup> Typical forms of online agreements include online terms of use for popular web services.
5. In a “click-wrap” agreement the user typically manifests assent by clicking an “I accept” icon on a web-page or pop-up screen.
6. Courts addressing “click-wrap” agreements have uniformly held them to be valid and enforceable.<sup>5</sup>
7. As with any contract, a user’s failure to read a “click-wrap” agreement prior to accepting its terms, will not excuse compliance with its terms.<sup>6</sup>
8. Browse-wrap agreements: those agreements which are formed not by clicking “I accept,” but through a user’s access or use of a website for which terms of use are in effect; browse-wrap agreements are more likely to be rejected by courts.<sup>7</sup>
  - Courts, however, have enforced browse-wrap agreements based on the following reasoning:<sup>8</sup>
    - People often enter into service contracts without first seeing the terms.<sup>9</sup>
    - More enforceable against frequent visitors to sites.<sup>10</sup>
    - More enforceable against sophisticated commercial entities.<sup>11</sup>

## B. Contract Formation

### I. Valid contracts require: offer, acceptance, and consideration.<sup>12</sup>

- Offer.
  - Definition: Manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.<sup>13</sup>
  - Whether communication constitutes an offer rather than preliminary negotiation depends upon surrounding circumstances.<sup>14</sup>
- An Offer combined with an Acceptance results in “Mutual Assent.”
  - Timing of acceptance in traditional contracting environments: acceptance occurs when the acceptance is mailed or sent, not when received or acknowledged (the “Mailbox Rule”).<sup>15</sup>
  - Similarly, electronic acceptance is effective when acceptance is sent.<sup>16</sup>
- Mutual Assent.<sup>17</sup>
  - Mutual assent is the manifestation by both parties of an intent to be bound.
  - Acceptance of an offer can be manifested by acts as well as words, <sup>18</sup> **including through e-mail communication.**<sup>19</sup>
    - Browse-wrap could potentially be a manifestation of assent through action of accessing site.<sup>20</sup>
    - Contract offers and acceptances through separate e-mail may also suffice, if mutual assent is reached.
  - A “meeting of the minds” must exist with respect to each material issue in the agreement.<sup>21</sup>
    - Failure to agree on essential terms of a contract indicates a lack of mutual assent.<sup>22</sup>
    - Online agreements must demonstrate both parties intend to be bound.<sup>23</sup>
    - A clear indication of affirmative assent is the distinction between click-wrap and browse-wrap agreements.<sup>24</sup>
  - Mutual assent is determined under an objective standard: what would a reasonable person think of the meaning of the outward expressions of the parties?<sup>25</sup>
- Definitiveness of Terms.
  - Terms of the agreement should be clear and unambiguous, and it is the duty of a court, not a jury, to determine if a valid contract exists.<sup>26</sup>

- When plain and unambiguous, a court must presume parties meant what they expressed, and will not consider what parties may have subjectively intended.<sup>27</sup>
- Ambiguity arises if a reasonable person would believe language is susceptible to more than one meaning.
- A contract must be construed in its entirety.<sup>28</sup>

2. The Uniform Commercial Code (“UCC”) rejects common law “mirror image” rule, as valid contracts between merchants can be formed without all terms matching.<sup>29</sup>

If the terms of the offer and acceptance differ, the terms of the offer become part of a contract between merchants if the offer expressly limits acceptance to its own terms, or if the varying terms of the acceptance materially alter the terms of the offer.<sup>30</sup>

### C. Consideration

1. Definition: An act, forbearance, change in legal relations, or promise.<sup>31</sup>
2. Mutuality required: Both parties must exchange promises representing legal obligations.<sup>32</sup>
3. Adequacy of consideration is determined at the time the agreement is entered into.<sup>33</sup>

### D. Common Contract Validity Problems

1. Illusory: No valid contract when one of the parties assumes no obligation.<sup>34</sup>
  - When no obligation is created, the consideration element fails.<sup>35</sup>
  - Both parties must be bound or neither is bound.<sup>36</sup>
2. Unconscionable Contracts/Contracts of Adhesion.
  - “Inequality so gross as to shock the conscience.”<sup>37</sup>
  - Two elements for determining whether a contract is unconscionable:<sup>38</sup>
    - Procedural: Inequality in the manner in which contract was negotiated.<sup>39</sup>

- Procedural unconscionability usually occurs in context of a contract of adhesion.<sup>40</sup>
  - Definition of “Adhesion”: Imposed and drafted by party of superior bargaining strength giving offeree only the opportunity to accept or reject.<sup>41</sup>
  - Some argue that click-wrap agreements are unconscionable because they are “take it or leave it,” but courts generally find them valid (except when the terms are so egregious that they violate public policy).<sup>42</sup>
- Two bases for procedural inequality:<sup>43</sup>
  - Oppression: Inequality of bargaining power creating no real negotiation and an absence of meaningful choice.
  - Surprise: Supposedly agreed-upon terms of the bargain are hidden through fine print or convoluted language.<sup>44</sup>
- Substantive: Inequality due to overly harsh or one-sided results.<sup>45</sup>
  - Procedural and substantive elements do not have to be present in the same degree in order for a contract to be unconscionable.<sup>46</sup>

### 3. Agreement to Agree<sup>47</sup>

- A promise to agree in the future is not binding on the parties, and therefore creates a failure of consideration.
- Rule: If essential element of a promise is reserved for future agreement, the promise gives no rise to legal obligations until the future promise is made.<sup>48</sup>
  - Depends on relative importance and severability of future matter.<sup>49</sup>
  - If unessential, parties must accept reasonable determination of unsettled point.<sup>50</sup>

## E. Additional Contract Requirements: Statute of Frauds

### 1. Purpose:

- Provide reliable evidence of the existence and terms of certain types of contracts; and
- Reduce the chance that contracts are created as a result of perjury or fraud.<sup>51</sup>

### 2. A contract is not valid, unless it is:<sup>52</sup>

- In writing; and
- Signed by each party to the contract.
  - Some court decisions have relaxed the signature requirement to allow for electronic communication.<sup>53</sup>



- Verification issues can arise for anyone relying on electronic signatures and companies must take actions to ensure that each signature is valid.<sup>54</sup>

### 3. The Statute of Frauds applies to (varies slightly across jurisdictions):

- Agreement that will not be performed within one year of making of the agreement;<sup>55</sup>
- Agreement made in consideration of marriage;<sup>56</sup>
- Special promise to answer for debt or default of another person;<sup>57</sup>
- Leasing agreement longer than a year or for sale of real property made by an agent;<sup>58</sup>
- Agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate for a period of longer than a year;<sup>59</sup>
- Agreement that will not be performed during the lifetime of the promisor;<sup>60</sup>
- Contract promising to loan or grant or extend credit for amount greater than \$100,000;<sup>61</sup>
- Charge of character, conduct, credit, concerning character or content, to the intent or purpose that other may obtain credit, money, or goods;<sup>62</sup>
- Charge any person upon a promise made after attaining age of majority, to pay debt contracted during infancy;<sup>63</sup>
- UCC purchase of goods over \$500;<sup>64</sup> and
- UCC lease over \$1,000.<sup>65</sup>

### 4. Exceptions:

- When an agreement or contract is a qualified financial contract, meaning:<sup>66</sup>
  - Agreement to which each party is a natural person; and
  - Agreement is for purchase or sale of foreign exchange and other currency swaps, commodity swaps, rate swaps or security-index swaps.

### 5. Sufficient evidence to overcome any claim that an agreement does not meet the standards with respect to the Statute of Frauds is present when:<sup>67</sup>

- Evidence exists of an electronic communication, including recording of a phone call or written text produced by computer retrieval;
- Confirmation in writing sufficient to indicate that a contract has been made between the two parties;
- Party admits contract made in pleading, testimony or otherwise in court; or
- Terms of the consideration need not be set forth in the writing and may be proven by other evidence.<sup>68</sup>
-

## II. U.S. Laws Applicable to Electronic Signatures and Contracts.

### A. UETA: Uniform Electronic Transactions Act

#### 1. Purpose of UETA:

- Remove barriers to doing business electronically by validating electronic signatures and records, while keeping intact record retention and other substantive law requirements.<sup>69</sup>

#### 2. Scope of UETA:

- The definition of “transaction” limits UETA to “interactions between people relating to business, commerce, and governmental affairs.”<sup>70</sup>
- Intended to pertain only to Sales and Lease transactions under Articles 2 and 2A of the UCC.<sup>71</sup>
- Only applies between parties that have agreed to conduct transactions electronically.<sup>72</sup>

#### 3. Four Primary Rules of UETA:

- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.<sup>73</sup>
- A contract may not be denied legal effect solely because an electronic record was used in its formation.<sup>74</sup>
- If a law requires a record to be in writing, an electronic record satisfies such law.<sup>75</sup>
- If a law requires a signature, an electronic signature satisfies such law.<sup>76</sup>

#### 4. Application of UETA to contracting transactions:

- The parties must have an agreement to conduct transactions electronically:<sup>77</sup>
  - Need not be a formal, written agreement.<sup>78</sup>
  - Can be inferred from actions, language, and other circumstances or rules. UETA cites to common Restatements and UCC standards.<sup>79</sup>
- Signature must be linked or logically associated with the record in order to be valid.<sup>80</sup>
  - Attribution:
    - Generally, an electronic act is attributed to the person you want to enforce it against by showing efficacy of security procedures and procedures to identify/verify that a person is who they say they are.<sup>81</sup>

- Click-through transactions are binding if done with the intent to sign.<sup>82</sup>
  - Note that in anonymous situations (such as online transactions) there must be mechanisms or “security procedures” in place in order to affirmatively attribute the act to the person against whom the contract is to be enforced.<sup>83</sup>
- Automated Transactions:
  - Contracts can be formed between two electronic agents, even if no individual is aware of or reviews the transaction.<sup>84</sup>
  - Intent to contract is inferred by the programming and use of the machines.<sup>85</sup>
- Click Through: Contract between individual and electronic agent.
  - Contract is formed when an individual performs an action which:<sup>86</sup>
    - They are free to refuse; and
    - They have reason to know will cause the electronic agent to complete the transaction or performance.
- Laws requiring the provision of information:
  - If a law requires you to provide information in writing, providing electronic information satisfies such requirement.<sup>87</sup>
  - KEY CAVEAT: If the sender inhibits the ability of the recipient to store or print an electronic record, then the record is not enforceable against the recipient.<sup>88</sup>
    - This requirement cannot be waived by agreement unless the law that requires the providing of information allows for waiver by agreement.<sup>89</sup>

## 5. Exceptions to UETA

- Laws governing the creation and execution of wills, codicils, or testamentary trusts.<sup>90</sup>
- The UCC generally,<sup>91</sup> except that UETA does apply to:
  - Sec. 1-107 (waiver of rights after breach);
  - Sec. 1-206 (Statute of Frauds for sale of personal property over \$5,000);
  - Article 2 (sales); and
  - Article 2A (leases).
    - Uniform Computer Information Transactions Act (“UCITA”) (only adopted by Maryland (“MD”) and Virginia (“VA”)).<sup>92</sup>
    - Other laws identified by an individual state.<sup>93</sup>

## 6. Application of UETA in MD and VA:

### ■ Maryland Exceptions:

- Same exceptions as in model law.<sup>94</sup>
- Some additional exceptions also found in E-Sign.<sup>95</sup>
  - Cancellation of utility services;
  - Primary residence foreclosure, eviction or similar proceeding;
  - Cancellation or change in health and life insurance benefits;
  - Laws governing divorce, adoption and other family matters;
  - Court orders; and
  - Documents required for handling/transport of hazardous materials.

### ■ Virginia Exceptions:

- Wills and codicils.<sup>96</sup>
- UCC generally,<sup>97</sup> but it does apply to:
  - Sec. 8.1A-306 (waiver of rights after breach); and
  - Sec. 8.2 – Sales and Sec. 8.2A – Leases.

## 7. Application of UETA to mobile devices:

- There is still a basic requirement that assent to something be manifested in a manner that makes clear to the consumer, or communicates in a manner that the consumer should reasonably know, that they are agreeing to a specific act.
- The definitions of “electronic” and “computer” in UETA, E-Sign and UCITA are broad enough to include wireless mobile devices. Mobile devices will most likely be seen as computers, and the transactions involving such devices fit within the definition of “electronic”.
  - “Electronic means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.”<sup>98</sup>
  - “Electronic agent means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic record or performances in whole or in part, without review or action by an individual.”<sup>99</sup>
- Mobile devices may present compliance issues regarding “conspicuousness” and “logically-associated” requirements relating to differences in screen displays or how agreement terms appear to a consumer on a mobile device. Sometimes what is conspicuous or clear on a computer screen may not be on a handheld/mobile device.

- Companies should ensure that information that they are required to provide in a conspicuous manner is still conspicuous when being accessed from a mobile device. This may include running a parallel site for mobile devices.
- Companies should ensure that the terms that consumers are assenting to or signing electronically are still logically associated with the process of a signature provided on a mobile device.

## B. E-Sign: Electronic Signatures in Global and National Commerce Act

### I. Application of E-Sign:

- Only applies to transactions in or affecting Interstate Commerce.<sup>100</sup>
- Establishes a general rule for these types of transactions.
  - What E-Sign does:
    - Grants legal validity to electronic signatures or contracts, or contracts relating to electronic signatures.<sup>101</sup>
    - Electronic records satisfy requirements of any laws requiring that contracts or other records be in writing.<sup>102</sup>
  - What E-Sign does not do: <sup>103</sup>
    - Affect substantive rights.
    - Require any person to agree to use or accept electronic records or signatures.
    - If a law requires contracts or transactions to be in writing, the enforceability of the electronic copy may be affected if it is not in a form that can be accurately retained and reproduced for all parties.<sup>104</sup>
    - Use of electronic agents does not affect legal validity so long as the action of the agent is legally attributable to the person to be bound.<sup>105</sup>

### 2. Consumer Protections in E-Sign:

- If laws require the provision of information, such information may be provided electronically if:
  - The consumer affirmatively consents to receive information electronically and does not withdraw such consent.<sup>106</sup>
  - Prior to consent, the consumer is provided with a conspicuous statement of his right to receive information in hard copy if he wishes and his ability to, and procedures for, withdrawing consent.<sup>107</sup>

- Prior to the consumer's consent, the entity required to provide the consumer information must provide a statement of hardware and software needed to access the consumer information electronically and notice of any subsequent changes to these requirements.<sup>108</sup>
- Effect on Validity of Contract:
  - The failure to obtain proper consent to meet consumer protection requirements does not negate the legal effectiveness, validity or enforceability of the contract.<sup>109</sup>
  - Withdrawal of consent does not affect the legal effectiveness or validity of electronic records provided or made available before receipt of the withdrawal.<sup>110</sup>
- Exception to Preemption: State laws passed under UETA are usually not preempted. <sup>111</sup>
  - Primary exceptions:<sup>112</sup>
    - Laws governing the creation and execution of wills, codicils, or testamentary trusts.
    - State statute, regulation or law governing adoption, divorce, or other family issues.
    - The UCC, except for Sections 1-107 and 1-206 and Articles 2 and 2A.
  - Other exceptions:<sup>113</sup>
    - Court orders and notices.
    - Notices of termination of utilities, repossession, foreclosure or eviction.
    - Cancellation or termination of health or life insurance benefits.
    - Recall of products that risks endangering health or safety.
    - Requirements of documentation to accompany transport or handling of hazardous materials.

## C. UCITA: Uniform Computer Information Transactions Act

### I. Overview.

- Intended to cover software and other information technology that is licensed, but not usually sold, and thus not covered under Article 2 of the UCC.
- It is a controversial law, particularly with consumer groups, and has only been enacted in Maryland and Virginia.
- Generally, if a transaction consists of both computer information and goods, then this statute applies only to the part of the transaction dealing with computer information.<sup>114</sup>

## 2. Preemptions.

- Federal law.<sup>115</sup>
- If there is a conflict between UCITA and Article 9 of the UCC, the UCC governs.<sup>116</sup>

## 3. Legal Recognition of Electronic Record.

- Record or authentication (i.e., signature) may not be denied legal effect or enforceability solely because it is in electronic form.<sup>117</sup>
- No requirement that there be any other interaction between the parties other than those which are carried out electronically.<sup>118</sup>
- In any transaction, the parties may establish requirements regarding the type of acceptable authentication or record.<sup>119</sup>

## 4. Contract Requirements under UCITA.

- Formal Requirements.
  - A contract with a value of \$5,000 or more is not enforceable unless either:<sup>120</sup>
    - The party against which enforcement is sought signs or intends to sign an electronic record, or otherwise executes or adopts an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with, that record;<sup>121</sup> or
    - The transaction involves a license of one year or less, or a license that can be terminated at will by the party against which enforcement is sought.<sup>122</sup>
  - Absent either of the above, a contract is still enforceable if:
    - Performance was tendered, or information made available, and the other party accepted it or accessed the information.<sup>123</sup>
      - (Note that UCITA does not provide additional information about how this applies to different types of contracts, such as service or solution agreements. However, based on the intent of this section of UCITA, this appears to refer to the accessing of the information that was the topic of the contract. Therefore, if the parties contracted for a service and that service is used by consumer after it was made available by the licensor, the use of the service likely constitutes assent to the contractual terms.)
    - The party against whom enforcement is sought admits facts sufficient to show a contract was made, but only with respect to a certain number of copies or specific subject matter.<sup>124</sup>
    - Between merchants, the party received a record confirming the contract and did not object within 10 days.<sup>125</sup>

- **Contract Formation:**
  - Contract can be formed in any manner sufficient to show agreement between the parties on material terms.
  - Parties' intent to contract trumps any other insufficiencies that might lead to a finding that no contract was formed. For example, unspecified terms or one party reserving the right to modify.<sup>126</sup>
- **Authentication: Determining the validity of the signature.**<sup>127</sup>
  - Can be proven in any manner, including showing that a party made use of the information or rights that were only available to parties who agreed to the terms.
  - Compliance with a commercially reasonable attribution procedure agreed to or adopted by parties or established by law, authenticates the record as a matter of law.
  - Authentication relates to manifesting of assent after opportunity to review.
- **Manifesting assent requires an opportunity to review.**
  - Similar to UETA and E-Sign, UCITA requires that either a signature or an action that the person has reason to know will be interpreted as assent by the electronic agent.<sup>128</sup>
  - Demonstrate that a person obtained or used the rights and that there was a procedure in place where they could not have used or obtained such rights without exhibiting conduct that manifested assent is sufficient.<sup>129</sup>
- **Opportunity to review is sufficient if:**<sup>130</sup>
  - Person: Only if the record or term is made available in a conspicuous manner.
  - Electronic agent:
    - Only if the record or term is made available in a manner that would enable a reasonably configured electronic agent to react to the record or term; or
    - If a record or term is available only after a person becomes obligated to pay or begins its performance, only if there is a right to return upon the rejection of the record.
  - Right to return not required in all situations.<sup>131</sup>
- **Modifying by Agreement:**<sup>132</sup>
  - Most terms in UCITA can be modified by agreement, unless modification is specifically prohibited by the terms of UCITA.
  - Electronic agents in contracting.<sup>133</sup>
  - Attribution procedures.<sup>134</sup>



## 5. Exceptions to UCITA:<sup>135</sup>

- Financial services transactions.
- Any agreement involving:
  - Audio or visual programming that is provided by broadcast, satellite or cable;
  - A motion picture, sound recording, musical work or phonorecord;
  - A compulsory license;
  - A contract for employment of an individual; or
  - A contract that does not require information to be furnished as computer information, or in which computer information is an insignificant part.

## 6. As adopted in Maryland and Virginia.

- Differences in the Maryland version of UCITA:
  - Exceptions are generally the same as model law, except:<sup>136</sup>
    - There is an additional exception for insurance services transactions.
    - A term is not part of a mass market license if it is not available for viewing before and after assent in either a printed license or in an electronic form.<sup>137</sup>
    - The 10-day time period that merchants have to object to terms in a contract is changed to “reasonable time”.<sup>138</sup>
    - A term in a mass market license that limits the duration to less than a year must be conspicuous.<sup>139</sup>
- Differences in the Virginia version of UCITA:
  - Mass market licenses must “expressly and conspicuously” set forth any designation of an exclusive forum.<sup>140</sup>
  - In a mass market license, the term must be available before and after assent in a readable form.<sup>141</sup>
  - Though motion pictures are not covered by this law, mass market transactions for movies are covered.<sup>142</sup>

## 7. Backlash against UCITA

- Generally opposed by consumer and library groups. As a result, the UCITA statute adopted by Virginia creates different rules for non-profit libraries.
- In 2003 the National Conference of Commissioners on Uniform State Laws (NCCUSL) stopped promoting passage of UCITA at the state level.

- “Bomb-Shelter” Legislation to protect citizens from the effects of UCITA was passed in Iowa, North Carolina, West Virginia, Vermont and Idaho.

### III. Canadian and European Union (“EU”) Laws Applicable to Electronic Signatures and Contracts.

- A. This section provides an overview of Canadian and EU law concerning electronic signatures and electronic contracting, and the potential applicability of such laws to U.S. companies.
- B. Canadian Laws
  - I. Electronic Signatures
    - The primary Canadian law concerning electronic signatures is the Personal Information Protection and Electronic Documents Act (PIPEDA).<sup>143</sup>
      - Part 1 of PIPEDA primarily addresses data protection and privacy.
      - Part 2 addresses electronic documents.
    - Applicability to U.S. Companies:
      - Article 4 of Part 1 of PIPEDA states that Part 1 applies to “every organization” that collects personal information in Canada.<sup>144</sup> Part 2 of PIPEDA does not expressly address its applicability to foreign entities. In addition, Part 2 does not contain language specifically restricting its applicability to Canadian businesses or persons, and instead speaks in very general terms about electronic signatures in Canada. Therefore, the presumption is that it applies to anyone executing electronic signatures in Canada.
    - Key Provisions:
      - Part 2 of PIPEDA:
        - Defines “electronic signatures” as “a signature that consists of one or more letters, characters, numbers or other symbols in digital form incorporated in, attached to, or associated with an electronic document.”<sup>145</sup>
        - Defines a “secure electronic signature” as an electronic signature that results from technology prescribed under the accompanying Secure Electronic Signature Regulations.<sup>146</sup>

- The Secure Electronic Signature Regulations<sup>147</sup> contain detailed and highly technical specifications concerning the requirements for a valid secure electronic signature.<sup>148</sup>
  - The Regulations further state that a secure electronic signature is a digital signature that results from the completion of five steps, including encryption, association with the electronic document, and transmission.<sup>149</sup>
- PIPEDA provides that the Governor in Council may prescribe a technology or process *only* if it can prove that:
  - The electronic signature is unique to the signatory;
  - The technology or process used to attach or associate the signature to the document is under the sole control of the signatory;
  - The technology or process can be used to identify the signatory and
  - The signature and document are so linked that any subsequent changes are detectable.<sup>150</sup>
- Sections 43 and 46 of PIPEDA state that if a Canadian federal law, or regulation listed in Schedules 2 or 3 accompanying PIPEDA, requires a signature, the requirement is satisfied if the signature is provided in accordance with the regulations passed in conjunction with PIPEDA.<sup>151</sup>

## 2. Electronic Contracting

- There is no Canadian federal law concerning electronic commerce and contracting. The Uniform Law Conference of Canada, however, adopted the Uniform Electronic Commerce Act (UECA)<sup>152</sup> in 1999, and subsequently, most provinces and territorial jurisdictions have passed electronic commerce laws, albeit with varying degrees of accordance with UECA.<sup>153</sup>
- Applicability of UECA to U.S. Companies.
  - Like PIPEDA, UECA does not contain separate provisions regarding applicability to extraterritorial entities. However, similar to PIPEDA, UECA's language is general and appears to apply to any electronic contracting that occurs in Canada.
- Key Provisions.
  - UECA provides that "[i]nformation shall not be denied legal effect or enforceability solely by reason that it is in electronic form."<sup>154</sup>
  - UECA also makes it clear that no person is required to use or accept electronic information, but provides that "a person's consent to do so may be inferred from the person's conduct."<sup>155</sup> Sections 7 and 8 provide that requirements under the law of the enacting jurisdiction for information to be in writing or for a person to provide information in writing to another person may be satisfied by electronic information.<sup>156</sup>

- UECA defines “**electronic signature**” as “information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document.”<sup>157</sup> UECA states that a requirement in a jurisdiction that passes UECA for a signature is satisfied by an electronic signature and that jurisdiction may require that the signature reliably identify the person (including the time the signature was made), and that the association between the signature and the document is reliable (including the time the signature was made).<sup>158</sup>
- UECA contains provisions regarding original copies of documents, retention of documents, and copies.<sup>159</sup>
  - Part 2 of UECA governs the Communication of Electronic Documents, (i.e. electronic contract formation). Section 20 addresses the formation and operation of contracts and provides that unless the parties agree otherwise, offer or acceptance of a contract may be expressed through an electronic document or by clicking an icon on a computer screen or “otherwise communicating electronically in a manner that is intended to express the offer or acceptance”.<sup>160</sup> Section 20 also makes it clear that contracts will not be denied legal effect or enforceability solely due to their electronic nature.<sup>161</sup>
  - Additionally, UECA provides that contracts may be formed by the interaction of “natural persons” and electronic agents (such as a person clicking on a contract on a website). Note that UECA provides protections against errors when a natural person is dealing with an electronic agent.<sup>162</sup> UECA defines an “electronic agent” as “a computer program or any other electronic means used to initiate an action or respond to electronic documents or actions in whole or in part without review by a natural person at the time of the response or action.”<sup>163</sup> One protection for persons contracting with electronic agents is that if there is a material error in the document and the electronic agent did not provide the natural person an opportunity to prevent or correct it, the natural person notifies the other party of the error as soon as practicable, the natural person takes reasonable steps to return any consideration received, and the natural person has not used or received any material benefit or value from the consideration, then the contract has no legal effect.<sup>164</sup>
- Section 23 of UECA contains provisions regarding the time and place of sending and receipt of electronic documents. This is important because the nature of electronic documents can present unique issues in determining when a document is considered sent or received for the purpose of contracting.<sup>165</sup> Under UECA, unless otherwise agreed, an electronic document is sent when it “enters an information system out of the control of the originator”, or if sent within the same information system, when “it becomes capable of being retrieved and processed by the addressee.”<sup>166</sup> Conversely, a document is presumed received when it “enters an information system used or designated by the addressee” and is “capable of being retrieved and processed by the addressee.”<sup>167</sup> Regarding

location, the sending and receiving locations of electronic documents are presumed to be the places of business of the originator and the addressee.<sup>168</sup>

## C. European Union (“EU”).

### I. Electronic Signatures.

- The EU Directive concerning electronic signatures is Directive 1999/93/EC of the European Parliament and of the Council (the “E-Signature Directive”).<sup>169</sup> Article 1 clearly states that its purpose is to facilitate the use of electronic signatures and that it does not cover aspects relating to contracts.<sup>170</sup>

### 2. Applicability to U.S. Companies.

- Article 7 governs “[i]nternational aspects” of the E-Signature Directive and clearly states that it has applicability to non-EU member countries. Specifically, it states that “Member States shall ensure” that verifications of signatures issued by entities outside the EU that meet certain conditions “are recognized as legally equivalent to certificates issued by a certification-service-provider established within the [European] Community.”<sup>171</sup> Additionally, Article 7 calls upon the European Commission to propose bilateral and multilateral agreements with third countries and international organizations “[i]n order to facilitate cross-border certification services with third countries and legal recognition of advanced electronic signatures originating in third countries.”<sup>172</sup>

### 3. Key Provisions:

- The E-Signature Directive contains many terms that use language specific to the EU. What follows is a list of the most important definitions. Article 2 of the E-Signature Directive contains a full list of definitions.<sup>173</sup>
  - “**Electronic signature**” is defined as “data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication.”<sup>174</sup>
  - “**Advanced electronic signature**” is defined as an electronic signature that is “uniquely linked to the signatory”, is “capable of identifying the signatory”, is “created using means that the signatory can maintain under his sole control”, and is “linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.”<sup>175</sup>
  - A “**signature-creation device**” is “configured software or hardware used to implement the signature-creation data.”<sup>176</sup>
  - A “**certificate**” is “an electronic attestation which links signature-verification data to a person and confirms the identity of that person.”<sup>177</sup>

- A “**certification-service-provider**” is “an entity or a legal or natural person who issues certificates or provides other services related to electronic signatures.”<sup>178</sup>
- Article 3, titled “**Market access**”, provides that EU member states may establish systems to regulate electronic signatures, but may not place barriers such as requiring prior authorization before providing certification services.<sup>179</sup>
- Article 4 governs the internal market among EU member states.
- Article 5, titled “Legal effects of electronic signatures”, states that EU member states shall ensure that advanced electronic signatures based on a qualified certificate and created by a secure-signature-creation device “satisfy the legal requirements of a signature . . . in the same manner as a handwritten signature” and “are admissible as evidence in legal proceedings.”<sup>180</sup> More generally, Article 5 also states that EU member states are to ensure that electronic signatures (in this instance it does not specify “advanced” electronic signatures) are not denied legal effectiveness because they are electronic *or* not based on a qualified certificate *or* not based on a qualified certificate issued by an accredited certification-service-provider *or* not created by a secure-signature-created device.<sup>181</sup>
- Article 7, which addresses signatures generated by entities based in non-EU countries, lists three situations in which the signature must be recognized as valid within the EU. Either the non-EU certification-service-provider, the entity that provides the electronic attestation that links the signature data to the person and confirms that person’s identity, must meet the requirements of the E-Signature Directive and be accredited under a “voluntary accreditation scheme established in an EU member state,” or the non-EU-issued certificate must be guaranteed by an EU certification-service provider, or the certificate or certification-service provider must be recognized under a multilateral or bilateral agreement.<sup>182</sup>
- Article 6 governs liability, and Article 8 discusses data protection. The remaining articles cover such topics as implementation and entry into force.<sup>183</sup>
- Annexes
  - Annex I lists the requirements for qualified certificates.
  - Annex II lists the requirements for certification-service-providers issuing qualified certificates.
  - Annex III lists the requirements for secure signature-creation-devices.
  - Annex IV lists a series of recommendations for secure signature verification, including that the data used to verify the signature correspond to the data displayed to the verifier, that the use of a pseudonym is clearly indicated, and that the security-relevant changes can be detected.

#### 4. Electronic Commerce/Contracting.

- The European Directive concerning electronic commerce in the EU is Directive 2000/31/EC of the European Parliament and Council on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (the “Directive on Electronic Commerce”).<sup>184</sup>

■ Applicability to U.S. Companies.

- Recital 58 of the Directive on Electronic Commerce clearly states that the Directive “should not apply to service providers established in a third country” and that it therefore only applies to EU member countries.<sup>185</sup> In addition, while Recital 62 states that “[c]ooperation with third countries should be strengthened in the area of electronic commerce,” the Directive does not provide any further information about the effects of EU e-commerce law on third-country companies.<sup>186</sup> A 2001 Communication from the European Commission to the Council and the European Parliament explained that the Directive on Electronic Commerce “does not cover service providers from third countries nor does it allow them to benefit from the free movement of information society services.”<sup>187</sup> However, the Communication does go on to state that “[e]ach Member State may define its policy with respect to those third country service providers, provided that policy conforms with international trade agreements,” and allows that the EU “may well need to develop a coordinated approach to third country providers.”<sup>188</sup>
  - To date, it does not appear that the EU has adopted such a coordinated approach. Indeed, in January 2012, the European Commission published a Communication on E-Commerce and Other Online Services that noted the current low rate of cross-border electronic commerce within the EU,<sup>189</sup> and aimed to increase e-commerce by supplementing the Directive on Electronic Commerce.<sup>190</sup> However, once again, it does not address commerce conducted by companies established outside the EU.
  - It should be noted that it is possible that some EU member states, applying their national laws, may require companies not established in the EU to comply with the Directive on Electronic Commerce in some situations.<sup>191</sup>
- Recital 19 of the Directive on Electronic Commerce provides guidance for determining where a service provider is established and states that the place of establishment shall be determined according to the case law of the EU Court of Justice, which establishes that “the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment . . . .” Regarding electronic commerce, Recital 19 states that “the place of establishment of a company providing services via an internet website is not the place at which the technology supporting its website is located or at the place at which its website is accessible but the place where it pursues its economic activity.”<sup>192</sup> Further, “in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided.”<sup>193</sup> Therefore, while the Directive may not apply to information service providers from third countries doing business online within the EU, it may provide a useful framework for the applicable legal principles to online contracting in the EU, as well as possible best practices to follow to maximize the chances of an electronic contract being given legal effect in the EU.

■ Key Provisions:

- The objective of the Directive on Electronic Commerce is to facilitate the “free movement” of “information society services between Member States.”<sup>194</sup> The definition of “information society services” is very broad and covers almost every economic activity that can take place electronically, including the “selling of goods on-line.”<sup>195</sup>
- Article 5 requires certain general information to be provided by service providers, including: the name of the service provider, the geographic address at which the service provider is established, and details of the service provider (including e-mail address) that allow the service provider to be contacted rapidly.<sup>196</sup> In addition, if the service provider is part of a regulated profession or is subject to an authorization scheme, additional information is required, such as any relevant codes of conduct.<sup>197</sup>
- Section 2 requires that commercial communications be identified as such, and addresses “unsolicited commercial communication[s].”<sup>198</sup>
- Section 3 covers “[c]ontracts concluded by electronic means.” Article 9 requires EU member states to “ensure that their legal system allows contracts to be concluded by electronic means,” that legal requirements for contracts do not create obstacles to the use of electronic contracts, and that electronic contracts are not denied legal effectiveness solely due to their electronic creation.<sup>199</sup>
- Article 10 governs the “[i]nformation to be provided” by service providers prior to the placement of the order.<sup>200</sup> Article 11 lists the principles that apply to the actual placing of the order in an electronic contract.<sup>201</sup> However, neither article applies to “contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.”<sup>202</sup> Article 10 requires the service provider to clearly provide: “the different technical steps to follow to conclude the contract,” whether the contract will be filed with the service provider and if it will be accessible, “the technical means for identifying and correcting input errors prior to the placing of the order,” and the languages available for the conclusion of the contract.<sup>203</sup> Also, the recipient must be able to store and reproduce the contract terms and general conditions.<sup>204</sup> Article 11 provides that the following principles apply to the placing of an order online: “the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means,” and that the “order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.”<sup>205</sup> In addition, Article 11 requires EU member states to require service providers to provide “effective and accessible technical means” for consumers to identify and correct errors before placing the order. <sup>206</sup>
- Section 4, which comprises Articles 12 through 15, addresses the “liability of intermediary service providers”.<sup>207</sup>
- Directive 97/7/EC (the “Distance Selling Directive”), which governs distance selling contracts, may impose additional requirements.<sup>208</sup> The Distance Selling Directive “applies to any consumer distance contract made under the law of an EU member state as well as the European Economic Area (EEA).” <sup>209</sup> The Distance Selling Directive provides several protections for customers including:
  - “Provision of comprehensive information before the purchase;



- Confirmation of that information in a durable medium (such as written confirmation);
- Consumer's right to cancel the contract within a minimum of seven working days without giving any reason and without penalty, except the cost of returning the goods (right of withdrawal);
- If the consumer has cancelled the contract, the right to a refund within 30 days of cancellation;
- Delivery of the goods or performance of the service within 30 days of the day after the consumer placed his order;
- Protection from unsolicited selling;
- Protection from fraudulent use of payment cards; and
- Non-validity of any waiver of the rights and obligations provided for under the directive, whether instigated by the consumer or the supplier."<sup>210</sup>

## IV. Summary of Case Law Addressing Click-wrap/Browse-wrap Agreements

### A. Definition of Click-wrap Agreements

1. Under a typical arrangement, terms and conditions are provided when purchased software is installed or downloaded, or when a site is accessed or service is requested on the Internet.
2. Terms are usually presented in a separate frame on the same screen with an "accept" button or in a new window with an "accept" button contained therein. Terms may also be presented as a hyperlink next to an "accept" button.
3. Terms and conditions are presented on a "take it or leave it" basis; no bargaining between the parties with respect to the terms of the agreement.

4. Acceptance of the terms is typically manifested by clicking on an on-screen icon or button.

## B. Case Law Permitting Click-wrap Agreements

### 1. *Forrest v. Verizon Communications Inc.*, 805 A.2d 1007 (D.C. App. 2002)

- **Facts:** Verizon sought to enforce a forum selection clause contained in its terms of service. Verizon's online service agreement appeared to subscribers in a scroll box, allowing customers to view only a small portion of the agreement at any given time. In order to assent to the terms of the agreement, subscriber must click an "Accept" button below the scroll box.
- **Issue:** Does presentation of the terms of service in a scroll box provide sufficient notice of the terms?
- **Holding:** The use of an electronic service agreement contained in a scroll box does not amount to inadequate notice. "[A] contract is no less a contract simply because it is entered into via a computer."

### 2. *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660 (D.MD 2009)

- **Facts:** CoStar licensed its database of real estate properties to Alliance Group. Alliance then shared its access with a third party, which was not authorized under the terms of use agreed to by Alliance. CoStar moved to enforce the terms of use.
- **Issue:** Can the terms of use be enforced if the user did not review the terms, and in fact is a third party to the agreement?
- **Holding:** The affirmative step of clicking a box and accepting the terms bound Alliance to the agreement, including anyone that Alliance shared its password with. Failure to read the contract does not make it void.

### 3. *Segal v. Amazon.com, Inc.* 763 F. Supp. 2d 1367 (S.D. Fla. 2011)

- **Facts:** Segal attempted to invalidate a forum selection clause in the seller agreement contained on Amazon.com, claiming in part that because the clause was contained in a click-wrap agreement it was not binding because Segal did not read the agreement.
- **Issue:** Does a click-wrap agreement create a binding agreement, even if the party did not read the terms?
- **Holding:** Click-wrap agreements are binding and enforceable throughout the federal circuits. The failure to read a contract does not excuse a party from being bound by it.

4. *Fteja v. Facebook, Inc.* 2012 U.S. Dist. LEXIS 12991 (S.D.N.Y. 2012)

- **Facts:** Facebook placed its terms of service in a hyperlink below the sign up button that new users encounter during the registration process. Fteja sued after his account was banned and Facebook moved to enforce a forum selection clause contained in the terms of service. Fteja claimed he never saw the terms and that the hyperlink was not adequate notice to manifest acceptance.
- **Issue:** Is the placing of a terms of service agreement behind a hyperlink, and requiring affirmative steps to accept those terms, enough to enforce an agreement?
- **Holding:** The hyperlink under the sign up button was enough notice to create an agreement, there does not have to be a frame or page with the text of the agreement near the “accept” button. A blue underlined link is well known on the Internet to contain more information, which is similar to a real world contract referencing different pages of the agreement.

5. *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379 (7th Cir. 2007)

- **Facts:** Treiber shipped a \$100,000 ring via UPS and bought \$50,000 in insurance from UPS for the package. UPS lost the package and denied any liability for the loss because their terms of use, for which Treiber twice clicked “I agree”, did not allow shipments of a value over \$50,000.
- **Issue:** Did UPS’s terms and conditions, shipping tariff, and insurance policy create a binding agreement that cleared UPS of all liability?
- **Holding:** The terms and conditions were twice agreed to by Treiber and the tariff and insurance policy both offered the same clause limiting the value of shipped items to \$50,000 or less. There was ample notice and clear agreement by Treiber, regardless of whether he understood the terms of the agreement.

6. *Doe I v. AOL LLC*, 552 F.3d 1077 (9th Cir. 2009)

- **Facts:** A class action case was brought against AOL after it released anonymized user data for research purposes. The case was brought in California and AOL moved to enforce a forum selection clause contained in the Member Agreement, that each member must click “I agree” on before service was granted.
- **Issue:** Is the forum selection clause contained in the Member Agreement valid?
- **Holding:** The court took the validity of the agreement as a given, not even discussing whether the Doe plaintiffs formed a binding contract. The clause was found unenforceable due to California public policy having nothing to do with the overall validity of the contract. This court appears to see click-wrap agreements as a standard form of contracting not warranting special attention or analysis.

## C. Best Practices for Enforceable Click-wrap Agreements.

- Conspicuous presentation of the terms prior to any payment, download, access or installation of software or other goods and services.
- Require the checking of a box, clicking of a radio button, or scrolling the entire agreement to affirm acceptance before clicking “accept,” and, if possible, offer a “decline” button as well.
- Place the terms, or a hyperlink to the terms, on the same screen and near the “accept” button.
- Allow the user to easily read and navigate all of the terms.
- Consider highlighting especially important terms in a different color or font size to increase the likelihood of a user viewing them.
- Provide an opportunity to print and/or save a copy of the terms.
- Offer the user the option to decline as prominently and by the same method as the option to agree.
- Ensure that the terms are easy to locate online after the user agrees.
- Consider offering an easy to read and understand summary of the terms, especially key terms like forum selection and arbitration clauses.

## D. Definition of Browse-wrap Agreements.

1. Placement of a link to the terms of use on a webpage, but requiring no affirmative action to manifest acceptance by a user.
2. Assent to the terms is shown by using the website or service after notice of the existence of the terms of use, no other action is required.
3. Terms and conditions are presented on a “take it or leave it” basis; no bargaining between the parties with respect to the terms of the agreement.
4. Accepted by courts, but with more restrictions than click-wrap agreements.

5. Courts seem more willing to enforce browse-wrap agreements against businesses than against individual consumers. This may be a result of the facts which courts have faced in the cases that have been brought rather than a signal of judicial preference.<sup>211</sup>

## E. Case Law Permitting Browse-wrap Agreements.

### 1. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002)

- **Facts:** Netscape allows users to download free software by clicking on a designated box. Software is subject to a license agreement that contains an arbitration clause. The user is not required to agree to the terms and conditions of the license agreement prior to downloading the software and there is no notice of the license agreement until the user scrolls down to the next page. Next page allows the user to click on a hyperlink that will take the user to another web page to read the full terms and conditions.
- **Issue:** Are users subject to the arbitration clause simply because they downloaded the software?
- **Holding:** The clause in this case was invalid because the agreement was not visible prior to the user encountering the download button. The court left open the opportunity to create a binding agreement when the user is put on clear notice that they are agreeing to the terms behind a link. As long as an objective observer would find the terms were available, the contract would likely be found binding.

### 2. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004)

- **Facts:** Register.com sells domain names and Verio designs and develops websites. Users could submit search queries through Register.com for information about customers. Search results included a notice that by submitting the query, the user agreed not to use the data for commercial advertising or e-mail solicitation. Verio created a robot to obtain the customer information and used it for marketing purposes in violation of the use restriction.
- **Issue:** Does a contract exist between Register.com and Verio?
- **Holding:** Under standard contract principles, Verio had sufficient knowledge of the terms of use to create a binding and enforceable contract due to its repeated visits to Register.com via its robot.

### 3. *Hubbert v. Dell Corp.* 835 N.E.2d 113 (Ill. App. Ct. 2005)

- **Facts:** Hubbert bought computers from Dell's website and attempted to sue for false advertising. Dell claimed that Hubbert was bound by an arbitration clause contained in the terms of sale available on Dell's website. The terms were on each of the five screens

used to purchase the computer, and the final three screens warned of the terms in larger font.

- **Issue:** Was there adequate notice of the terms of sale to create a binding agreement?
- **Holding:** The multiple statements that sales were controlled by the terms and conditions, as well as the availability of the terms on multiple pages via hyperlink, created a binding agreement. The purchase process is like a multipage contract, and the blue links serve to bring the purchaser to the terms of sale pages of that contract.

4. *Southwest Airlines v. Boardfirst, LLC*, 2007 U.S. Dist. LEXIS 96230 (N.D. Tex. 2007)

- **Facts:** Southwest's website allows passengers to check in for flights starting 24 hours prior to departure. Passengers receive a boarding pass that indicates what order they will board the plane based on a first-come, first-served basis (i.e., A, B and C boarding passes). Boardfirst is a website that helps Southwest passengers obtain "A" boarding passes for a fee. A passenger provides Boardfirst with information that allows Boardfirst to log on to the Southwest website as an agent. Fine print at the bottom of Southwest's homepage indicates that use of the website constitutes acceptance of the Terms and Conditions, which at the time was limited to personal, non-commercial purposes.
- **Issues:** Is there a valid contract? Did Boardfirst breach the terms and conditions of use?
- **Holding:** Boardfirst had sufficient notice of the Terms and Conditions to form a valid contract and breached the contract by using the Southwest website for a commercial purpose after being put on notice of the terms.

5. *Cvent, Inc. v. Eventbrite, Inc.* 739 F. Supp. 2d 927 (E.D. Va. 2010)

- **Facts:** Cvent claimed Eventbrite breached the terms of service for its website by copying content for Eventbrite's use. A link to the terms was only available on the first page of the website, and mixed among several dozen other links of the same size and color at the bottom of the page.
- **Issue:** Is a single link on the front page of a site enough to place a customer on notice of the terms?
- **Holding:** Had Cvent made their terms conspicuous on their site and not buried them, the court would likely have found them binding. The placement of the link and the fact that it was only on the front page did not constitute sufficient notice of the terms to create a binding contract.

## F. Best Practices for Enforceable Browse-wrap Agreements.

1. Place links to the terms of use or sale in prominent positions on every page of a website in a position visible upon initial loading of the page.
2. Clearly name the link to the terms of service agreement as leading to the terms and conditions of sale or use.
3. The link to terms of service should lead directly to the terms, not a separate landing page that requires further investigation.
4. The terms of service should be written in easy to read font and language. This is especially true for those terms most likely to be challenged, such as arbitration and forum selection clauses.
5. Highlight especially important terms in a different color or font size to increase the likelihood of a user viewing such terms.
6. During checkout or at the time of a sale, make links to the terms of use or sale conspicuous by changing font size or position of the links.
7. Do not require a user to scroll a page to find the terms, especially on a page where any transaction will take place.
8. Provide the user with an opportunity to print and/or save a copy of the terms.
9. Ensure that the terms are easy to locate online for future reference after the user agrees.
10. Place a disclaimer on all pages near the link stating that continued use of the page or service binds the user to the terms contained behind the link.

11. Offer an easy-to-read and understandable summary of the terms, especially key terms like forum selection and arbitration clauses.



## V. About the Authors

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Working at the intersection of commerce and technology, A.J. Zottola, a partner with the national law firm of Venable LLP in its Washington, DC office, focuses his practice on the exploitation of intellectual property, intangible, and technology assets in business and strategic relationships. Mr. Zottola has been recognized in *CHAMBERS USA* and *LEGAL 500* for his technology and outsourcing work. Prior to joining Venable LLP, Mr. Zottola worked as an associate with Brobeck, Phleger & Harrison LLP in its Business and Technology practice group and with Morgan Lewis & Bockius in its Trademark and Copyright practice group.

Mr. Zottola regularly represents U.S. and foreign enterprises, from *Fortune* 500 companies and small start-ups to trade and professional associations, in a variety of industries including software, e-commerce, information technology, electronics, media and entertainment, toys and other consumer products, financial services, telecommunications, and other newer technologies.

Mr. Zottola is admitted to the Bars of Maryland and the District of Columbia. Mr. Zottola received his B.A. from Bucknell University in Economics and Chemistry and is a *cum laude* graduate and prior member of the Catholic University Law Review of Catholic University of America, Columbus School of Law.

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Joseph Walker is a member of the Corporate Group of Venable LLP in its Washington, DC office. Mr. Walker's practice focuses on corporate transactional matters, including mergers and acquisitions, loan, financing and other strategic transactions for a variety of clients. He represents business entities of all sizes, in various industries, in connection with corporate law and securities matters.

He has experience in drafting, structuring and negotiating a wide variety of transaction documents including merger agreements, licensing agreements, operating agreements, stock purchase agreements, real estate purchase agreements, commercial leases and joint venture agreements.

## Representative Matters

### Mergers, Acquisitions and Joint Ventures:

- Represented national educational services provider in shareholder buyout and subsequent private equity minority investment.
- Advised large government contractor on sale of business to international government contracting firm.
- Successfully completed acquisition of local hospital for large regional healthcare network.
- Represented food supplement developer in establishing an international production and manufacturing joint venture with Chinese manufacturer.

### Technology and Licensing Transactions:

- Assisted large software developer in the resolution of certain disputes arising out of master licensing agreements for comprehensive enterprise software licensing applications.
- Represented copyright holder in negotiation and creation of various licensing and corporate agreements to create joint venture for the global performance of copyrighted materials.

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## Technology and Licensing Transactions:

Assists a global software developer in various disputes and compliance matters relating to master licensing agreements for business process management software applications.

- Represented a litigation support and eDiscovery company in the sale of its business to a global business services company.
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Before joining DIRECTV, Mr. Crincoli was Of Counsel in the Technology Transactions Group of Morrison & Foerster LLP. He previously held in-house counsel positions in the interactive division of The Walt Disney Company, the digital studios division of Sony Pictures Entertainment, and several internet start-ups. In addition, he was an associate in the Los Angeles and New York offices of Debevoise & Plimpton and in the New York office of Reavis & McGrath (now Fulbright & Jaworski).

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## VI. Sample Forms & Policies

### A. Appendix A - Sample Contract Introduction(s) for Click-wrap & Browse-wrap

#### **BASIC FORM OF ONLINE CONTRACT INTRODUCTIONS**

##### **[FOR USE IN CONNECTION WITH CLICK-WRAP ARRANGEMENTS.]**

BY CLICKING "I ACCEPT" AT THE END OF THIS AGREEMENT OR BY INSTALLING, ACCESSING, OR USING ANY PART OF THE \_\_\_\_\_, YOU ACKNOWLEDGE THAT YOU HAVE READ THIS AGREEMENT, THAT YOU UNDERSTAND IT AND ITS TERMS AND CONDITIONS, AND THAT YOU AGREE TO BE BOUND LEGALLY BY IT AND ITS TERMS AND CONDITIONS.

IF YOU DO NOT AGREE WITH THIS AGREEMENT, YOU ARE NOT GRANTED PERMISSION BY COMPANY TO INSTALL, ACCESS, OR OTHERWISE USE THE SYSTEM. IN SUCH CASE, PLEASE CLICK "I REJECT" AND PROMPTLY RETURN AND/OR DELETE ANY MATERIALS RELATED TO THE SYSTEM THAT YOU HAVE RECEIVED FROM COMPANY OR THAT YOU HAVE IN YOUR POSSESSION.

##### **[FOR USE IN CONNECTION WITH CLICK-WRAP ARRANGEMENTS.]**

I HAVE READ AND UNDERSTOOD THE FOREGOING AGREEMENT AND AGREE TO BE BOUND BY ALL OF ITS TERMS AND CONDITIONS. PLEASE MANIFEST YOUR ASSENT TO THIS AGREEMENT BY CLICKING ON THE APPROPRIATE LINK BELOW.

I HAVE READ AND UNDERSTOOD AND I REJECT THIS AGREEMENT.  
ACCEPT THIS AGREEMENT.

##### **[FOR USE IN CONNECTION WITH BROWSE-WRAP ARRANGEMENTS.]**

**IMPORTANT** – THIS IS A LEGAL DOCUMENT BETWEEN YOU (WHICH SHALL BE IDENTIFIED HEREIN AS "You" OR THE "User" (WITH "User" FURTHER DESCRIBED BELOW)) AND COMPANY ("COMPANY"), WITH IT BEING GENERALLY UNDERSTOOD (AS APPLICABLE) THAT YOU ARE OTHERWISE AGREEING TO THIS AGREEMENT ON BEHALF OF THE ENTITY THAT WILL BE NAMED ON THE CUSTOMER ACCOUNT WITH COMPANY. BEFORE ACCESSING OR USING \_\_\_\_\_, YOU SHOULD READ CAREFULLY THE FOLLOWING TERMS AND CONDITIONS CONTAINED IN THIS AGREEMENT (THE "Agreement") AS THEY GOVERN ACCESS TO AND USE OF THE \_\_\_\_\_ AND ITS ASSOCIATED \_\_\_\_\_ (THE "\_\_\_\_\_"). COMPANY IS WILLING TO ALLOW ACCESS TO AND USE OF THE \_\_\_\_\_ ONLY ON THE CONDITION THAT YOU ACCEPT ALL OF THE TERMS AND CONDITIONS CONTAINED IN THIS AGREEMENT.

## B. Appendix B - Guidelines for Creating Enforceable Online Contracts

Creating enforceable online contracts requires adherence to established practices that conform to basic contracting doctrines. The following checklist briefly summarizes the issues and practices that should be given consideration when preparing an online contract:

### I. Providing Notice:

- a) Use clear and understandable language
- b) Ensure visible, prominent, and conspicuous placement of the terms on the primary page of the website, and all other pages, if possible (terms should be accessible without scrolling)
- c) Be aware of special characteristics of the consumer base that could affect the effectiveness of the notice (e.g., international consumer base may require notice in multiple languages)
- d) Carefully consider use of potentially unenforceable terms (e.g., class action waivers, arbitration requirements, inconvenient forum selection, or unilateral amendment rights without notice)

### II. Use One of the Generally Accepted Options for Obtaining the Electronic Signature/Manifestation of Assent:

- a) Use a process requiring a click-through, e.g., an "I Agree" button
- b) Request a typed signature appearing at the end of an electronic document or email exchange
- c) Use an automated signature process that allows for verification by both parties
- d) Require affirmation that an exchange of mutually agreed upon offers and acceptances will constitute acceptance
- e) Require acknowledgement that continued use of a website or online service after sufficient notice of the terms of use and a period for rejection, e.g., 30 days, will constitute acceptance

### III. Maintain a Record Keeping Process for the Electronic Documents:

- a) Retain a copy of all electronic agreements, including evidence of signature/authorization
- b) Copies of electronic agreements must be stored in a form that accurately reflects the information set forth in the agreement agreed upon by both parties
- c) Neither party may inhibit the ability of the other party to download, store or print the applicable record of the agreement
- d) The stored copy of the agreement must remain accessible for later reference
- e) Records can be kept in electronic-only form, provided that they meet the previous requirements
- f) Encourage both parties to maintain records

**IV. Verify the Identity of the Contracting Parties:**

- a) Consider use of Commercial Identity Verification Services
- b) Consider use of Digital Certificates
- c) Consider requesting certain information to verify identity, *e.g.*, address

**V. Amending an Existing Electronic Agreement:**

- a) Provide adequate notice of the revised terms and permit the other party to terminate the agreement or accept the revised terms
- b) Seek the consent of the counterparty to the agreement to the revised terms prior to the effective time of the amendment
- c) If possible, consider tying the amended agreement to the effective date of a renewal term

## C. Appendix C - Sample Terms of Use/E.U.L.A.

### BASIC FORM OF TERMS OF USE/END USER LICENSE AGREEMENT

Effective as of [DATE]

**IMPORTANT – THIS IS A LEGAL AGREEMENT BETWEEN YOU ("You" or the "Authorized User") AND THE \_\_\_\_\_ ("We" or "Company"). BEFORE DOWNLOADING, ACCESSING, OR USING ANY PART OF THE \_\_\_\_\_, YOU SHOULD READ CAREFULLY THE FOLLOWING TERMS AND CONDITIONS CONTAINED IN THIS {TITLE} (the or this "TOU") AS THEY GOVERN YOUR ACCESS TO AND USE OF \_\_\_\_\_ (collectively, the or this "\_\_\_\_\_"). Company IS WILLING TO LICENSE AND ALLOW THE USE OF THIS \_\_\_\_\_ ONLY ON THE CONDITION THAT YOU ACCEPT AND AGREE TO ALL OF THE TERMS AND CONDITIONS CONTAINED IN THIS TOU. IF YOU DO NOT AGREE WITH THIS TOU, YOU ARE NOT GRANTED PERMISSION TO ACCESS OR OTHERWISE USE THE \_\_\_\_\_.**

#### TERMS AND CONDITIONS

1. **LICENSE GRANT.** The \_\_\_\_\_ is provided by Company, and this TOU provides to you a personal, revocable, limited, non-exclusive, royalty-free, non-transferable license to use the \_\_\_\_\_ conditioned on your continued compliance with the terms and conditions of this TOU. This TOU permits you to use and access for personal or business purposes only the \_\_\_\_\_ (i) on a single laptop, workstation, or computer and (ii) from the Internet or through an on-line network. You may also load information from the \_\_\_\_\_ into your laptop's, workstation's, or computer's temporary memory (RAM) and print and download materials and information from the \_\_\_\_\_ solely for your personal or business use, provided that all hard copies contain all copyright and other applicable notices contained in such materials and information. If you are using the \_\_\_\_\_ on behalf of a company or other form of entity, please note that such a company or entity may have a separate agreement with Company regarding access and usage privileges for the \_\_\_\_\_. Nevertheless, your personal use of the \_\_\_\_\_ will be subject to the obligations and restrictions regarding use of the \_\_\_\_\_ as set forth in this TOU.
2. **RESTRICTIONS.** The foregoing license is limited. You may not use, copy, store, reproduce, transmit, distribute, display, rent, lease, sell, modify, alter, license, sublicense, or commercially exploit any data provided by Company through the \_\_\_\_\_ in any manner not expressly permitted by this TOU. In addition, you may not modify, translate, decompile, create derivative work(s) of, copy, distribute, disassemble, broadcast, transmit, publish, remove or alter any proprietary notices or labels, license, sublicense, transfer, sell, mirror, frame, exploit, rent, lease, private label, grant a security interest in, or otherwise use in any manner not expressly permitted herein the \_\_\_\_\_.

3. **USER OBLIGATIONS.** By downloading, accessing, or using the \_\_\_\_\_ in order to view our information and materials or submit information of any kind, you represent that you are at least the legal age of majority and will, at all times, provide true, accurate, current, and complete information when submitting information or materials on the \_\_\_\_\_, including, without limitation, when you provide information via a \_\_\_\_\_ registration or submission form. In addition, you agree to abide by all applicable local, state, national, and international laws and regulations with respect to your use of the \_\_\_\_\_. This TOU is also expressly made subject to any applicable export laws, orders, restrictions, or regulations.
  
4. **PROPRIETARY RIGHTS.** This TOU provides only a limited license to access and use the \_\_\_\_\_. Accordingly, you expressly acknowledge and agree that Company transfers no ownership or intellectual property interest or title in and to the \_\_\_\_\_ to you or anyone else. All text, graphics, user interfaces, visual interfaces, photographs, sounds, artwork, computer code (including html code), programs, software, products, information, and documentation as well as the design, structure, selection, coordination, expression, "look and feel," and arrangement of any content contained on or available through the \_\_\_\_\_, unless otherwise indicated, are owned, controlled, and licensed by Company and its successors and assigns and are protected by law including, but not limited to, United States copyright, trade secret, patent, and trademark law, as well as other state, national, and international laws and regulations. Except as expressly provided herein, Company does not grant any express or implied right to you or any other person under any intellectual or proprietary rights. Accordingly, your unauthorized use of the \_\_\_\_\_ may violate intellectual property or other proprietary rights laws as well as other laws, regulations, and statutes. This \_\_\_\_\_ is Copyright © 20\_\_\_\_\_ and/or its licensors. All rights reserved. \_\_\_\_\_, Company, the Company logo, and all other names, logos, and icons identifying Company and its programs, products, and services are proprietary trademarks of Company, and any use of such marks, including, without limitation, as domain names, without the express written permission of Company is strictly prohibited. Other service and entity names mentioned herein may be the trademarks and/or service marks of their respective owners.
  
5. **FEEDBACK AND SUBMISSIONS.** Company welcomes your feedback and suggestions about Company's products or services or the \_\_\_\_\_. By transmitting any suggestions, information, material, or other content (collectively, "feedback") to Company, you represent and warrant that such feedback does not infringe or violate the intellectual property or proprietary rights of any third party (including, without limitation, patents, copyrights, or trademark rights) and that you have all rights necessary to convey to Company and enable Company to use such feedback. In addition, any feedback received through the \_\_\_\_\_ will be deemed to include a royalty-free, perpetual, irrevocable, transferable, non-exclusive right and license for Company to adopt, publish, reproduce, disseminate, transmit, distribute, copy, use, create derivative works, and display (in whole or in part) worldwide, or act on such feedback without additional approval or consideration, in any form, media, or technology now known or later developed for the full term of any rights that may exist in such content, and you hereby waive any claim to the contrary.
  
6. **DISCLAIMER.** WHILE Company ENDEAVORS TO PROVIDE RELIABLE INFORMATION, SERVICES, PROGRAMS, SOFTWARE, AND MATERIALS, THE \_\_\_\_\_ IS PROVIDED ON AN "AS-IS" AND "AS AVAILABLE" BASIS AND MAY INCLUDE ERRORS, OMISSIONS, OR OTHER INACCURACIES. YOU ASSUME THE SOLE RISK OF MAKING USE OF THE \_\_\_\_\_. Company MAKES NO REPRESENTATIONS OR WARRANTIES ABOUT THE RESULTS THAT CAN BE ACHIEVED FROM OR THE SUITABILITY, COMPLETENESS, TIMELINESS, RELIABILITY,



LEGALITY, OR ACCURACY OF THE \_\_\_\_\_ FOR ANY PURPOSE, AND EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OR ANY OTHER IMPLIED WARRANTY UNDER THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT AS ENACTED BY ANY STATE. Company ALSO MAKES NO REPRESENTATION OR WARRANTY THAT THE \_\_\_\_\_ WILL OPERATE ERROR FREE OR IN AN UNINTERRUPTED FASHION OR THAT ANY DOWNLOADABLE FILES OR INFORMATION WILL BE FREE OF VIRUSES OR CONTAMINATION OR DESTRUCTIVE FEATURES.

7. **LIMITATION OF LIABILITY.** You expressly absolve and release Company from any claim of harm resulting from a cause beyond Company's control, including, but not limited to, failure of electronic or mechanical equipment or communication lines, telephone or other connection problems, computer viruses, unauthorized access, theft, operator errors, severe weather, earthquakes, or natural disasters, strikes, or other labor problems, wars, or governmental restrictions. MOREOVER, IN NO EVENT SHALL Company BE LIABLE FOR ANY INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE USE OF THE \_\_\_\_\_, WITH THE DELAY OR INABILITY TO USE THE \_\_\_\_\_, OR FOR ANY INFORMATION, SERVICES, PROGRAMS, PRODUCTS, AND MATERIALS AVAILABLE THROUGH THE \_\_\_\_\_, WHETHER BASED IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, EVEN IF Company HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. BECAUSE SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE ABOVE LIMITATION MAY NOT APPLY. NOTWITHSTANDING THE FOREGOING, TOTAL LIABILITY OF Company FOR ANY REASON WHATSOEVER RELATED TO USE OF THE \_\_\_\_\_ SHALL NOT EXCEED THE TOTAL AMOUNT PAID BY YOU TO Company IN CONNECTION WITH THE SUBJECT MATTER OF THE PARTICULAR DISPUTE DURING THE PRIOR THREE MONTHS.
8. **INDEMNITY.** You agree to defend, indemnify, and hold harmless Company and affiliates and all of their respective employees, agents, directors, officers, shareholders, attorneys, successors, and assigns from and against any and all claims, proceedings, damages, injuries, liabilities, losses, costs, and expenses (including reasonable attorneys' fees and litigation expenses) relating to or arising from any breach by you of this TOU.
9. **GOVERNING LAW.** This TOU has been made in and will be construed and enforced solely in accordance with the laws of the United States of America and the State of \_\_\_\_\_, U.S.A. as applied to agreements entered into and completely performed in the State of \_\_\_\_\_. You and Company each agree to submit to exclusive subject matter jurisdiction, personal jurisdiction, and venue of the courts in the State of \_\_\_\_\_ for any disputes between us under or arising out of this TOU. You also agree to waive any right to a jury trial in connection with any action or litigation in any way arising out of or related to this TOU and acknowledge that either party may seek attorney's fees in any proceeding. Any claim you might have against Company must be brought within two (2) years after the cause of action arises, or such claim or cause of action is barred. You also acknowledge and agree that any applicable state law implementation of the Uniform Computer Information Transactions Act (including any available remedies or laws) shall not apply to this TOU and is hereby disclaimed. Company makes no representation that the \_\_\_\_\_ is appropriate or available for use in other locations outside the State of \_\_\_\_\_, and access to the \_\_\_\_\_ from states, territories, or nations where any aspect of the \_\_\_\_\_ is illegal is prohibited. You access the \_\_\_\_\_ on your own volition and are responsible for compliance with all applicable

local laws with respect to your access and use of the \_\_\_\_\_. A printed version of this TOU and of any related notice given in electronic form shall be admissible in judicial or administrative proceedings based upon or relating to this TOU to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form. Please contact Company if you wish to receive a printed copy of this TOU.

10. **TERM AND TERMINATION.** This TOU and your right to use the \_\_\_\_\_ will take effect at the moment you click "I ACCEPT" or you install, access, or use the \_\_\_\_\_ and is effective until terminated as set forth below. This TOU will terminate automatically if you click "I REJECT". In addition, Company reserves the right at any time and on reasonable grounds, which shall include, without limitation, any reasonable belief of fraudulent or unlawful activity or actions or omissions that violate any term or condition of this TOU, to deny your access to the \_\_\_\_\_ or to any portion thereof in order to protect its name and goodwill, its business, and/or other Authorized Users, and this TOU will also terminate automatically if you fail to comply with this TOU, subject to the survival rights of certain provisions identified below. Termination will be effective without notice. You may also terminate this TOU at any time by ceasing to use the \_\_\_\_\_, but all applicable provisions of this TOU will survive termination, as identified below. Upon termination, you must destroy all copies of any aspect of the \_\_\_\_\_ in your possession. In addition to the miscellaneous section below, the provisions concerning Company's proprietary rights, feedback, indemnity, disclaimers of warranty, limitation of liability, and governing law will survive the termination of this TOU for any reason.
11. **MISCELLANEOUS.** You acknowledge that any breach, threatened or actual, of this TOU will cause irreparable injury to Company, such injury would not be quantifiable in monetary damages, and Company would not have an adequate remedy at law. You therefore agree that Company shall be entitled, in addition to other available remedies, to seek and be awarded an injunction or other appropriate equitable relief from a court of competent jurisdiction restraining any breach, threatened or actual, of your obligations under any provision of this TOU. Accordingly, you hereby waive any requirement that Company post any bond or other security in the event any injunctive or equitable relief is sought by or awarded to Company to enforce any provision of this TOU. The parties agree that this TOU is for the benefit of the parties hereto as well as Company's licensors. Accordingly, this TOU is personal to you, and you may not assign your rights or obligations to any other person or entity without Company's prior written consent. Failure by Company to insist on strict performance of any of the terms and conditions of this TOU will not operate as a waiver by Company of that or any subsequent default or failure of performance. If any provision (or part thereof) contained in this TOU is determined to be void, invalid, or otherwise unenforceable by a court of competent jurisdiction or on account of a conflict with an applicable government regulation, such determination shall not affect the remaining provisions (or parts thereof) contained herein and the illegal, invalid, or unenforceable clause shall be modified in compliance with applicable law in a manner that most closely matches the intent of the original language. No joint venture, partnership, employment, or agency relationship exists between you and Company as a result of this TOU or your utilization of the \_\_\_\_\_. Headings herein are for convenience only. This TOU represents the entire agreement between you and Company with respect to use of the \_\_\_\_\_, and it supersedes all prior or contemporaneous communications and proposals, whether electronic, oral, or written between you and Company with respect to the \_\_\_\_\_.

## D. Appendix D - Sample Terms of Service

### BASIC FORM OF TERMS OF SERVICE

Effective as of [Date]

**IMPORTANT – THIS IS A LEGAL AGREEMENT BETWEEN YOU ("You" or the "Authorized User") AND THE \_\_\_\_\_ ("We" or "Company"). BEFORE ACCESSING OR USING ANY PART OF THE www.ADDRESS.\_\_\_\_ WEBSITE, YOU SHOULD READ CAREFULLY THE FOLLOWING TERMS AND CONDITIONS CONTAINED IN THIS TERMS OF SERVICE AGREEMENT (the or this "TOS") AS THEY GOVERN YOUR ACCESS TO AND USE OF THIS Company WEB SITE AND ANY PROGRAMS, SERVICES, TOOLS, MATERIALS, OR INFORMATION AVAILABLE THROUGH THE Company WEBSITE OR USED IN CONNECTION THEREWITH (collectively, the or this "Company WebSite"). Company IS WILLING TO LICENSE AND ALLOW THE USE OF THIS Company WEBSITE ONLY ON THE CONDITION THAT YOU ACCEPT AND AGREE TO ALL OF THE TERMS AND CONDITIONS CONTAINED IN THIS TOS. IF YOU DO NOT AGREE WITH THIS TOS, YOU ARE NOT GRANTED PERMISSION TO ACCESS OR OTHERWISE USE THE Company WEBSITE AND ARE INSTRUCTED TO EXIT THE Company WEBSITE IMMEDIATELY.**

#### TERMS AND CONDITIONS

1. **LICENSE GRANT.** The Company WebSite is provided by Company, and this TOS provides to you a personal, revocable, limited, non-exclusive, royalty-free, non-transferable license to use the Company WebSite and any programs, services, tools, materials, or information made available through or from the Company WebSite conditioned on your continued compliance with the terms and conditions of this TOS. This TOS permits you to use and access for personal or business purposes only the Company WebSite (i) on a single laptop, workstation, or computer and (ii) from the Internet or through an on-line network. You may also load information from the Company WebSite into your laptop's, workstation's, or computer's temporary memory (RAM) and print and download materials and information from the Company WebSite solely for your personal or business use, provided that all hard copies contain all copyright and other applicable notices contained in such materials and information. If you are using the Company WebSite on behalf of a company or other form of entity, please note that such a company or entity may have a separate agreement with Company regarding access and usage privileges for the Company WebSite, including, without limitation, a member services agreement with Company. Nevertheless, your personal use of the Company WebSite will be subject to the obligations and restrictions regarding use of the Company WebSite as set forth in this TOS.
2. **RESTRICTIONS.** The foregoing license is limited. You may not use, copy, store, reproduce, transmit, distribute, display, rent, lease, sell, modify, alter, license, sublicense, or commercially exploit any data provided by Company through the Company WebSite in any manner not expressly permitted by this TOS. In addition, you may not modify, translate, decompile, create derivative work(s) of, copy, distribute, disassemble, broadcast, transmit, publish, remove or alter any proprietary notices or labels, license,

sublicense, transfer, sell, mirror, frame, exploit, rent, lease, private label, grant a security interest in, or otherwise use in any manner not expressly permitted herein the Company WebSite. Moreover, you may not (i) use any "deep link," "page scrape," "robot," "spider," or other automatic device, program, script, algorithm, or methodology, or any similar or equivalent manual process, to access, acquire, copy, or monitor any portion of the Company WebSite or in any way reproduce or circumvent the navigational structure or presentation of the Company WebSite to obtain or attempt to obtain any materials, documents, or information through any means not purposely made available through the Company WebSite, (ii) attempt to gain unauthorized access to any portion or feature of the Company WebSite, including, without limitation, the account of another Authorized User(s), or any other systems or networks connected to the Company WebSite or to any Company server or to any of the services offered on or through the Company WebSite, by hacking, password "mining," or any other illegitimate or prohibited means, (iii) probe, scan, or test the vulnerability of the Company WebSite or any network connected to the Company WebSite, nor breach the security or authentication measures on the Company WebSite or any network connected to the Company WebSite, (iv) reverse look-up, trace, or seek to trace any information on any other Authorized User of or visitor to the Company WebSite, (v) take any action that imposes an unreasonable or disproportionately large load on the infrastructure of the Company WebSite or Company's systems or networks or any systems or networks connected to the Company WebSite, (vi) use any device, software, or routine to interfere with the proper working of the Company WebSite or any transaction conducted on the Company WebSite, or with any other person's use of the Company WebSite, (vii) forge headers, impersonate a person, or otherwise manipulate identifiers in order to disguise your identity or the origin of any message or transmittal you send to Company on or through the Company WebSite, (viii) use the Company WebSite to harvest or collect e-mail addresses or other contact information; (ix) market, co-brand, private label, separately distribute, resell, or otherwise permit third parties to access and use the Company WebSite (or any part thereof) without Company express, separate, and prior written permission, or (x) use the Company WebSite in an unlawful manner or in a manner that could damage, disparage, or otherwise negatively impact Company.

3. **USER OBLIGATIONS.** By downloading, accessing, or using the Company WebSite in order to view our information and materials or submit information of any kind, you represent that you are at least the legal age of majority and will, at all times, provide true, accurate, current, and complete information when submitting information or materials on the Company WebSite, including, without limitation, when you provide information via a Company WebSite registration or submission form. If you provide any false, inaccurate, untrue, or incomplete information, Company reserves the right to terminate immediately your access to and use of the Company WebSite. In addition, you agree to abide by all applicable local, state, national, and international laws and regulations with respect to your use of the Company WebSite. Without limiting the generality of the foregoing, you agree that you shall not use nor disclose to any other party in a manner not permitted by this TOS any personally identifiable information, which you receive or which is made available from Company in connection with this TOS. This TOS is also expressly made subject to any applicable export laws, orders, restrictions, or regulations. You shall not export the Company WebSite (or access thereto) without complying with such laws, orders, restrictions, or regulations. In addition, you also acknowledge and agree that use of the Internet and access to or transmissions or communications with the Company WebSite is solely at your own risk. While Company has endeavored to create a secure and reliable Company WebSite, you should understand that the confidentiality of any communication or material transmitted to/from the Company WebSite over the

Internet or other form of global communication network cannot be guaranteed. Accordingly, Company is not responsible for the security of any information transmitted to or from the Company WebSite. You agree to assume all responsibility concerning activities related to your use of the Company WebSite, including, providing any support or meeting any requirements of your contracts with third parties, obtaining and paying for all licenses and costs for third-party software and hardware necessary for implementation of the Company WebSite, and maintaining and backing up any data. Any support, training, updates, upgrades, or maintenance of or for the Company WebSite shall only be available through the sole discretion of Company or pursuant to the terms and conditions of a separate written agreement with Company.

4. **DELIVERY OF INFORMATION.** When using and/or to facilitate the operation of certain features of the Company WebSite, you may provide Company with additional content or information (a "Posting"). In connection with delivering and providing to Company any such Posting, you hereby and automatically grant to Company a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable right and license (through multiple tiers) to copy, distribute, create derivative works from, display, modify, reformat, transmit, and otherwise use any such content or information as necessary in connection with the Company WebSite and Company's service obligations in any form, media, or technology now known or later developed for the full term of any rights that may exist in such content or information. With respect to any such content or information, you must also obtain at your sole expense all necessary consents, rights, permissions, and clearances (and provide Company with reasonable proof thereof (if requested)) required for Company to use such content or information in connection with Company's services and the Company WebSite. Notwithstanding the foregoing, you acknowledge and agree that Company shall not be responsible for any failures, inoperability, delays, or problems caused by your failure to obtain the necessary rights, clearance or permission or to provide any necessary content or information for your use of the Company WebSite in a timely or accurate manner. Moreover, Company assumes no responsibility for the deletion of or failure to store any content or information.
5. **OTHER TERMS AND CONDITIONS.** Additional notices, terms, and conditions may apply to membership, receipt of services, participation in a particular program, conference, training, or seminar, Authorized User registration with the Company WebSite, and/or to other specific portions or features of the Company WebSite, all of which are made a part of this TOS by this reference. In particular, this TOS, in and of itself, shall not entitle you to any of the Company membership benefits until you execute and Company accepts Company's member services agreement with Company. You agree to abide by such other notices, terms, and conditions. If there is a conflict between this TOS and the terms posted for or applicable to a specific portion of the Company WebSite, the latter terms shall control with respect to your use of that portion of the Company WebSite. Company's obligations, if any, with respect to its programs, services, tools, materials, or information are governed solely by the terms, conditions, notices, and agreements pursuant to which they are provided, and nothing on this TOS should be construed to alter such terms, conditions, notices, and agreements.
6. **USER NAME HANDLING POLICY.** Registration as an Authorized User for access to certain areas of the Company WebSite, namely, the Company member area, may require both a user name and a password. Only one Authorized User can use one user name and password and, thus, one account. By limiting access, it helps avoid unauthorized usage by other persons or entities because anyone with knowledge of both your user name and password can gain entry to the Company WebSite and to your account.

Accordingly, by using the Company WebSite, you agree to consider your user name and password as confidential information and to keep your user name and password confidential. You also agree not to use another Authorized User's user name and password. You will immediately notify Company if you become aware of any loss or theft of your password or any unauthorized use of your user name and password. Company cannot and will not be liable for any loss or damage arising from your failure to comply with these obligations. Company reserves the right to delete or change (with notice) a user name or password at any time and for any reason.

7. **PRIVACY POLICY.** You understand, acknowledge, and agree that the operation of certain programs, services, tools, materials, or information of the Company WebSite requires the submission, use, and dissemination of various personal identifying information. Accordingly, if you wish to access and use those programs, services, tools, materials, or information of the Company WebSite, you acknowledge and agree that your use of the Company WebSite will constitute acceptance of Company's personal identifying information collection and use practices. Please see Company's [Privacy Policy](#) for a summary of Company's personal identifying information collection and use practices.
8. **POSTINGS.** This Company WebSite may contain blogs, message boards, comment areas, questionnaires, chat rooms, and other interactive features where Authorized Users can share and display certain Postings. To the extent that the Company WebSite contains such communication forums (collectively, "Forums"), you agree that by using the Company WebSite you will not post or transmit any of the following materials on the Company WebSite's Forums:
  - a. anything that interferes with or disrupts the Company WebSite or the operation thereof,
  - b. statements or material that defames, harasses, abuses, stalks, threatens, intimidates, or in any way infringes on the rights of others,
  - c. unauthorized copyrighted materials or any other material that infringes on the intellectual property rights, trade secrets, or privacy of others,
  - d. statements or material that violates other contractual or fiduciary rights, duties, or agreements,
  - e. statements or material that is bigoted, hateful, or racially offensive,
  - f. statements or material that encourages criminal conduct or that would give rise to civil liability or otherwise violates any law or regulation in any jurisdiction,
  - g. statements or material that constitutes anti-competitive collaboration and/or antitrust violations,
  - h. statements or material that contains vulgar, obscene, profane, or otherwise objectionable language or images that typically would not be considered socially or professionally responsible or appropriate in person,
  - i. statements or material that harms minors,
  - j. statements or material that impersonates any other person or entity, whether actual or fictitious, including, without limitation, employees and representatives of Company,
  - k. statements or material that misrepresents your affiliation with any entity and/or Company,
  - l. anything that violates the privacy or publicity rights of any other person, including, without limitation, displaying any personal identifying information of another individual,
  - m. chain letters or pyramid schemes,
  - n. statements or material that constitutes junk mail, spam, or unauthorized advertising or promotional materials,
  - o. statements or material that are "off-topic" for a designated Forum, and
  - p. files that contain malicious code, viruses, corrupted files, or any other similar software or programs that may damage the operation of another's computer, network, or the Company WebSite.

As Forums are public, the Authorized User experience is enhanced if you follow the foregoing and following guidelines. Please use netiquette. Please do not post any content or information of a personal nature, such as video or audio of friends and family. Please be succinct and stay on topic within a particular Forum. Please remember to respect others and their opinions. Company encourages open and sincere communication, but urges all Authorized Users to remember that Forums are intended to be a resource for all.

9. **PERMISSION TO USE POSTINGS.** You represent that you have all necessary rights to make the Posting available to Company and a Forum, and you also acknowledge that such Postings are non-confidential for all purposes and that Company has no control over the extent to which any idea or information may be used by any party or person once it's posted or displayed. Accordingly, notwithstanding this right and license, it is understood that by merely permitting your information, content, and materials to appear on the Company WebSite, Company has not become and is not a publisher of such information, content, and materials and is merely functioning as an intermediary to enable you to provide and display a Posting. Moreover, Company assumes no responsibility for the deletion of or failure to store any Posting and recommends that you do not post, display, or transmit any confidential or sensitive information.
10. **NO PRE-SCREENING OF POSTINGS.** Company is not responsible for screening, policing, editing, or monitoring your or another Authorized User's Postings and encourages all of its Authorized Users to use reasonable discretion and caution in evaluating or reviewing any Posting. Moreover, and except as provided below with respect to Company's right and ability to delete or remove a Posting (or any part thereof), Company does not endorse, oppose, or edit any opinion or information provided by you or another Authorized User and does not make any representation with respect to, nor does it endorse the accuracy, completeness, timeliness, or reliability of any advice, opinion, statement, or other material displayed, uploaded, or distributed by you or any other Authorized User. Nevertheless, Company reserves the right to delete or take other action with respect to Postings (or parts thereof) that Company believes in good faith violate this TOS and/or are, or are potentially, unlawful or harmful to Company or its products, services, and goodwill. If you violate this TOS, Company may, in its sole discretion, delete the unacceptable content from your Posting, remove or delete the Posting in its entirety, issue you a warning, and/or terminate your use of the Company WebSite. Moreover, it is a policy of Company to take appropriate actions under the Digital Millennium Copyright Act under U.S. Copyright Law and other applicable intellectual property laws. If you become aware of Postings that violate these rules regarding acceptable behavior or content, you may contact Company as provided below.
11. **PROPRIETARY RIGHTS.** This TOS provides only a limited license to access and use the Company WebSite. Accordingly, you expressly acknowledge and agree that Company transfers no ownership or intellectual property interest or title in and to the Company WebSite to you or anyone else. All text, graphics, user interfaces, visual interfaces, photographs, sounds, artwork, computer code (including html code), programs, software, products, information, and documentation as well as the design, structure, selection, coordination, expression, "look and feel," and arrangement of any content contained on or available through the Company WebSite, unless otherwise indicated, are owned, controlled, and licensed by Company and its successors and assigns and are protected by law including, but not limited to, United States copyright, trade secret, patent, and trademark law, as well as other state, national, and

international laws and regulations. Except as expressly provided herein, Company does not grant any express or implied right to you or any other person under any intellectual or proprietary rights. Accordingly, your unauthorized use of the Company WebSite may violate intellectual property or other proprietary rights laws as well as other laws, regulations, and statutes. Please be aware that Company does enforce its intellectual property rights to the fullest extent of the law and, in particular and without limitation, with respect to illegal use of terms confusingly similar to any of Company's trademarks. This Company WebSite is Copyright © 20\_\_ The \_\_\_\_\_ and/or its licensors. All rights reserved. Company also owns a copyright in the contents of the Company WebSite as collective work and/or compilation and in the selection, coordination, arrangement, and enhancement of the content of the Company WebSite. Any downloadable or printable programs, directories, databases, information, or materials available through the Company WebSite and all copyrights, trade secrets, and know-how related thereto, unless otherwise indicated, are owned by Company. \_\_\_\_\_, Company, the Company logo, and all other names, logos, and icons identifying Company and its programs, products, and services are proprietary trademarks of Company, and any use of such marks, including, without limitation, as domain names, without the express written permission of Company is strictly prohibited. Other service and entity names mentioned herein may be the trademarks and/or service marks of their respective owners.

12. **FEEDBACK AND SUBMISSIONS.** Company welcomes your feedback and suggestions about Company's products or services or the Company WebSite. By transmitting any suggestions, information, material, or other content (collectively, "feedback") to Company, you represent and warrant that such feedback does not infringe or violate the intellectual property or proprietary rights of any third party (including, without limitation, patents, copyrights, or trademark rights) and that you have all rights necessary to convey to Company and enable Company to use such feedback. In addition, any feedback received through the Company WebSite will be deemed to include a royalty-free, perpetual, irrevocable, transferable, non-exclusive right and license for Company to adopt, publish, reproduce, disseminate, transmit, distribute, copy, use, create derivative works, and display (in whole or in part) worldwide, or act on such feedback without additional approval or consideration, in any form, media, or technology now known or later developed for the full term of any rights that may exist in such content, and you hereby waive any claim to the contrary.
13. **LINKS TO OTHER SITES.** Company may provide links, in its sole discretion, to other sites on the World Wide Web for your convenience in locating or accessing related information, products, and services. These sites have not necessarily been reviewed by Company and are maintained by third parties over which Company exercises no control. Accordingly, Company expressly disclaims any responsibility for the content, the materials, the accuracy of the information, and/or the quality of the products or services provided by, available through, or advertised on these third-party Web sites. Moreover, these links do not imply an endorsement with respect to any third party or any Web site or the products or services provided by any third party.



14. **THIRD-PARTY PRODUCTS/SERVICES.** Company, in its sole discretion, may post the advertisements of third parties on the Company WebSite and/or feature materials, programs, products, and services provided by third parties, including, without limitation, Company's members. Company makes no representations with respect to, nor does it guarantee or endorse, the quality, non-infringement, accuracy, completeness, timeliness, reliability, or correct sequencing of such third-party materials, programs, products, and services or any other materials, programs, products, and services which such third-party materials, products, and services may access. Your correspondence or any other dealings with third parties found on the Company WebSite are solely between you and such third party. Accordingly, Company expressly disclaims responsibility and liability for all third-party provided materials, programs, products, and services contained on or accessed through the Company WebSite, and you agree that Company shall not be responsible for any loss or damage of any sort incurred as a result of any such dealings or as the result of the presence of such third parties on the Company WebSite.
15. **DISCLAIMER.** WHILE Company ENDEAVORS TO PROVIDE RELIABLE INFORMATION, SERVICES, PROGRAMS, SOFTWARE, AND MATERIALS, THE INFORMATION, SERVICES, PROGRAMS, SOFTWARE, AND MATERIALS AVAILABLE ON OR THROUGH THE Company WEBSITE ARE PROVIDED ON AN "AS-IS" AND "AS AVAILABLE" BASIS AND MAY INCLUDE ERRORS, OMISSIONS, OR OTHER INACCURACIES. Company IS ALSO NOT RESPONSIBLE FOR ANY POSTINGS PROVIDED BY YOU THAT ARE AVAILABLE THROUGH OR FROM THE Company WEBSITE. MOREOVER, Company MAY MAKE MODIFICATIONS AND/OR CHANGES IN THE Company WEBSITE OR IN THE INFORMATION, SERVICES, PROGRAMS, SOFTWARE, AND MATERIALS AVAILABLE ON THE Company WEBSITE AT ANY TIME AND FOR ANY REASON. YOU ASSUME THE SOLE RISK OF MAKING USE AND/OR RELYING ON THE INFORMATION, SERVICES, PROGRAMS, AND MATERIALS AVAILABLE ON THE Company WEBSITE. Company MAKES NO REPRESENTATIONS OR WARRANTIES ABOUT THE RESULTS THAT CAN BE ACHIEVED FROM OR THE SUITABILITY, COMPLETENESS, TIMELINESS, RELIABILITY, LEGALITY, OR ACCURACY OF THE INFORMATION, SERVICES, PROGRAMS, AND MATERIALS AVAILABLE ON THE Company WEBSITE FOR ANY PURPOSE, AND EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OR ANY OTHER IMPLIED WARRANTY UNDER THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT AS ENACTED BY ANY STATE. Company ALSO MAKES NO REPRESENTATION OR WARRANTY THAT THE Company WEBSITE WILL OPERATE ERROR FREE OR IN AN UNINTERRUPTED FASHION OR THAT ANY FILES OR INFORMATION THAT YOU DOWNLOAD FROM THE SITE WILL BE FREE OF VIRUSES OR CONTAMINATION OR DESTRUCTIVE FEATURES.
16. **LIMITATION OF LIABILITY.** You expressly absolve and release Company from any claim of harm resulting from a cause beyond Company's control, including, but not limited to, failure of electronic or mechanical equipment or communication lines, telephone or other connection problems, computer viruses, unauthorized access, theft, operator errors, severe weather, earthquakes, or natural disasters, strikes, or other labor problems, wars, or governmental restrictions. MOREOVER, IN NO EVENT SHALL Company BE LIABLE FOR ANY INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE USE OF THE Company WEBSITE, WITH THE DELAY OR INABILITY TO USE THE Company WEBSITE, OR FOR ANY INFORMATION, SERVICES, PROGRAMS, PRODUCTS, AND MATERIALS AVAILABLE THROUGH THE Company WEBSITE, WHETHER BASED IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, EVEN IF Company HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

BECAUSE SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE ABOVE LIMITATION MAY NOT APPLY.

NOTWITHSTANDING THE FOREGOING, TOTAL LIABILITY OF Company FOR ANY REASON WHATSOEVER RELATED TO USE OF THE Company WEBSITE SHALL NOT EXCEED THE TOTAL AMOUNT PAID BY YOU TO Company IN CONNECTION WITH THE SUBJECT MATTER OF THE PARTICULAR DISPUTE DURING THE PRIOR THREE MONTHS.

17. **INDEMNITY.** You agree to defend, indemnify, and hold harmless Company and affiliates and all of their respective employees, agents, directors, officers, shareholders, attorneys, successors, and assigns from and against any and all claims, proceedings, damages, injuries, liabilities, losses, costs, and expenses (including reasonable attorneys' fees and litigation expenses) relating to or arising from any breach by you of this TOS.
18. **NOTICE OF SECURITY BREACH.** In addition to the foregoing indemnification obligation, if you discover or are notified of a breach or potential breach of security with respect to any personally identifiable information provided or made available by Company, you shall immediately (i) notify Company of such breach or such potential breach and (ii) if the applicable data was in your possession or control, including, without limitation, in instances where such possession or control was permitted by this TOS at the time of such breach or potential breach, you shall immediately (a) investigate such breach or such potential breach, (b) inform Company of the results of such investigation, (c) assist Company using commercially reasonable efforts in maintaining the confidentiality of such information, and (d) assist Company as reasonably necessary to enforce Company's rights and to enable Company to comply with any state or federal law requiring the provision of notice of any security breach with respect to any personally identifiable information of the affected or impacted data subjects.
19. **GOVERNING LAW.** This TOS has been made in and will be construed and enforced solely in accordance with the laws of the United States of America and the State of \_\_\_\_\_, U.S.A. as applied to agreements entered into and completely performed in the State of \_\_\_\_\_. You and Company each agree to submit to exclusive subject matter jurisdiction, personal jurisdiction, and venue of the courts in the State of \_\_\_\_\_ for any disputes between us under or arising out of this TOS. You also agree to waive any right to a jury trial in connection with any action or litigation in any way arising out of or related to this TOS and acknowledge that either party may seek attorney's fees in any proceeding. Any claim you might have against Company must be brought within two (2) years after the cause of action arises, or such claim or cause of action is barred. You also acknowledge and agree that any applicable state law implementation of the Uniform Computer Information Transactions Act (including any available remedies or laws) shall not apply to this TOS and is hereby disclaimed. Company makes no representation that the Company WebSite is appropriate or available for use in other locations outside the State of \_\_\_\_\_, and access to the Company WebSite from sates, territories, or nations where any aspect of the Company WebSite is illegal is prohibited. You access the Company WebSite on your own volition and are responsible for compliance with all applicable local laws with respect to your access and use of the Company WebSite. A printed version of this TOS and of any related notice given in electronic form shall be admissible in judicial or administrative proceedings based upon or relating to this TOS to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form. Please contact Company if you wish to receive a printed copy of this TOS.

20. **ENFORCING SECURITY ON THE SITE.** Actual or attempted unauthorized use of the Company WebSite may result in criminal and/or civil prosecution, including, without limitation, punishment under the Computer Fraud and Abuse Act of 1986 under U.S. federal law. Company reserves the right to view, monitor, and record activity on the Company WebSite without notice or permission from you, including, without limitation, by archiving notices or communications sent by you through the Company WebSite. Any information obtained by monitoring, reviewing, or recording is subject to review by law enforcement organizations in connection with investigation or prosecution of possible criminal or unlawful activity on the Company WebSite as well as to disclosures required by or under applicable law or related government agency actions. Company will also comply with all court orders involving requests for such information. In addition to the foregoing, Company reserves the right, at any time and without notice, to modify, suspend, terminate, or interrupt operation of or access to the Company WebSite, or any portion of the Company WebSite, in order to protect the Company WebSite, Company, or Company's business.
21. **TERM AND TERMINATION.** This TOS and your right to use the Company WebSite will take effect at the moment you click "I ACCEPT" or you install, access, or use the Company WebSite and is effective until terminated as set forth below. This TOS will terminate automatically if you click "I REJECT". In addition, Company reserves the right at any time and on reasonable grounds, which shall include, without limitation, any reasonable belief of fraudulent or unlawful activity or actions or omissions that violate any term or condition of this TOS, to deny your access to the Company WebSite or to any portion thereof in order to protect its name and goodwill, its business, and/or other Authorized Users, and this TOS will also terminate automatically if you fail to comply with this TOS, subject to the survival rights of certain provisions identified below. Termination will be effective without notice. You may also terminate this TOS at any time by ceasing to use the Company WebSite, but all applicable provisions of this TOS will survive termination, as identified below. Upon termination, you must destroy all copies of any aspect of the Company WebSite in your possession. In addition to the miscellaneous section below, the provisions concerning Company's proprietary rights, feedback, indemnity, disclaimers of warranty, limitation of liability, and governing law will survive the termination of this TOS for any reason.
22. **MISCELLANEOUS.** You acknowledge that any breach, threatened or actual, of this TOS will cause irreparable injury to Company, such injury would not be quantifiable in monetary damages, and Company would not have an adequate remedy at law. You therefore agree that Company shall be entitled, in addition to other available remedies, to seek and be awarded an injunction or other appropriate equitable relief from a court of competent jurisdiction restraining any breach, threatened or actual, of your obligations under any provision of this TOS. Accordingly, you hereby waive any requirement that Company post any bond or other security in the event any injunctive or equitable relief is sought by or awarded to Company to enforce any provision of this TOS. The parties agree that this TOS is for the benefit of the parties hereto as well as Company's licensors. Accordingly, this TOS is personal to you, and you may not assign your rights or obligations to any other person or entity without Company's prior written consent. Failure by Company to insist on strict performance of any of the terms and conditions of this TOS will not operate as a waiver by Company of that or any subsequent default or failure of performance. If any provision (or part thereof) contained in this TOS is determined to be void, invalid, or otherwise unenforceable by a court of competent jurisdiction or on account of a conflict with an applicable government regulation, such determination shall not affect the remaining provisions (or parts thereof) contained herein and the illegal, invalid, or unenforceable clause shall be modified in compliance

with applicable law in a manner that most closely matches the intent of the original language. No joint venture, partnership, employment, or agency relationship exists between you and Company as result of this TOS or your utilization of the Company WebSite. Headings herein are for convenience only. This TOS, along with the Company's Privacy Policy, represents the entire agreement between you and Company with respect to use of the Company WebSite, and it supersedes all prior or contemporaneous communications and proposals, whether electronic, oral, or written between you and Company with respect to the Company WebSite.

## VII. Endnotes

<sup>1</sup> *Forrest v. Verizon Communications Inc.*, 805 A.2d 1007 (D.C. App. 2002) (emphasis added).

<sup>2</sup> Not every jurisdiction has addressed online contract formation in case law. Maryland did not address online agreements under the common law until 2009. See *Bluebird, LLC., v. Nolan*, No. 302920-V., 2009 WL 1498703 (Md. Cir. Ct. April 28, 2009). Virginia still has not addressed the issue in state courts, but it has been addressed in a federal court interpreting Virginia law. See *A.V. v. Iparadigms, LLC*, 544 F. Supp. 2d 473, 480 (E.D. Va. 2008) (federal court interpreting Virginia state law). California also has had online contract formation discussed in federal law interpreting state law. See *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

<sup>3</sup> See *Bluebird, LLC*, No. 302920-V., 2009 WL 1498703 (no page numbers are provided for this case); See *A.V. v. Iparadigms, LLC*, 544 F. Supp. 2d at 480; See also Juliet M. Moringiello & William L. Reynolds, *American Bar Association Electronic Contracting Cases 2008-2009*, 65 Bus. Law. 317 (2009) (“The courts uniformly treat those agreements as they would any other form of contracting. If you click, you’re bound.”).

<sup>4</sup> *Bluebird, LLC.*, No. 302920-V., 2009 WL 1498703.

<sup>5</sup> *Id.*

<sup>6</sup> *Costar Realty Information, Inc., v. Mark Field Alliance Valuation Group*, 612 F. Supp. 2d 660, 669 (D. Md. 2009); See also *Feldman*, 513 F. Supp. 2d at 236 (interpreting California law).

<sup>7</sup> See *Martin v. Snapple Bev. Corp.*, No. B174847, 2005 Cal. App. Unpub. LEXIS 5938, at \*14 (Cal. Ct. App. July 7, 2005). This case is unpublished and not approved for use as citation for courts, but serves as the only mention of browse-wrap agreements that can be found in VA, MD, or CA state law. See also *Feldman*, 513 F. Supp. 2d at 236 (applying California state law) (“Browse wrap does not require the user to take any affirmative action before the Web site performs its end of the contract.”).

<sup>8</sup> See *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981-82 (2000) (browse-wrap held enforceable despite agreement printed in gray and superimposed on slightly different gray background); see also *Register.com v. Verio, Inc.*, 356 F.3d 393, 431 (2d Cir. 2004) (agreement similar to browse-wrap where terms sent after going to website, thus no assent on the first visit to the website but a frequent visitor could be bound).

<sup>9</sup> *Id.*

<sup>10</sup> See James J. Tracy, *Legal Update: Browsewrap Agreements: Register.com, Inc. v. Verio Inc.*, 11 B.U. J. Sci. & Tech. L. 164, 170 (2005); *Register.com v. Verio, Inc.*, 356 F.3d at 431.

<sup>11</sup> Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459, 472-76 (2006) (summarizing the facts and circumstances wherein browse-wrap agreements have been found to be enforceable).

<sup>12</sup> These requirements are consistent across VA, MD, and CA. See *Montagna v. Holiday Inns, Inc.*, 269 S.E.2d 838, 844 (Va. 1980); See *Cochran v. Norkunas*, 919 A.2d 700, 710 (Md. 2007); see also *City of Los Angeles v. Superior Court of the County of Los Angeles*, 333 P.2d 745, 750 (Cal. 1959).

<sup>13</sup> *Donovan v. Rrl Corp.*, 27 P.3d 702, 709 (Cal. 2001).

<sup>14</sup> *Id.*

<sup>15</sup> See *United States Life Ins. Co. v. Wilson*, 18 A.3d 110, 126-27 (Md. Ct. Spec. App. 2011).

<sup>16</sup> *Id.*

<sup>17</sup> *Cochran*, 919 A.2d at 710; see *Montagna*, 269 S.E.2d at 844.

<sup>18</sup> *Cochran*, 919 A.2d at 710. Silence in certain instances may also serve as acceptance of offer, but as general rule does not serve as acceptance. *Id.*

<sup>19</sup> See *Lim v. The TV Corp. Int'l*, 121 Cal. Rptr. 2d 333, 339 (Cal. App. 4th 2002) (holding that email can validly serve as evidence of a contractual agreement).

<sup>20</sup> See Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459, 472-76 (2006); See James J. Tracy, *Legal Update: Browsewrap Agreements: Register.com, Inc. v. Verio Inc.*, 11 B.U. J. Sci. & Tech. L. 164 (2005).

<sup>21</sup> *Montagna*, 269 S.E.2d at 845; *Scott v. Pacific Gas & Elec. Co.*, 904 P.2d 834, 841 (Cal. 1995).

<sup>22</sup> *Id.*

<sup>23</sup> See *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007). See generally *Martin v. Snapple Bev. Corp.*, No. B174847, 2005 Cal. App. Unpub. LEXIS 5938, at \*15 (Cal. Ct. App. July 7, 2005) (Whereas browse-wrap license agreements are part of the website and the user assents to the contract when the user visits the website, a click-wrap license/agreement permits the consumer to manifest his or her consent to the terms of a contract by clicking on an acceptance button.”).

<sup>24</sup> See *Martin v. Snapple Bev. Corp.*, No. B174847, 2005 Cal. App. Unpub. LEXIS 5938, at \*15 (Cal. Ct. App. July 7, 2005); see also *Feldman*, 513 F. Supp. 2d at 236.

<sup>25</sup> *Costar Realty Information*, 612 F. Supp. 2d 660, 669 (D. Md. 2009); *Cochran v. Norkunas*, 919 A.2d 700, 710 (Md. 2007).

<sup>26</sup> *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 493 S.E.2d 512, 519 (Va. 1997).

<sup>27</sup> *Cochran*, 919 A.2d at 710.

<sup>28</sup> *Id.*; *City of Los Angeles v. Superior Court of the County of Los Angeles*, 333 P.2d 745, 750 (Cal. 1959).

<sup>29</sup> *Steiner v. Mobil Oil Corp.*, 20 Cal.3d 90 (Cal. 1977).

<sup>30</sup> *Id.*

<sup>31</sup> *Chicago Title Ins. Co. v. AMZ Ins. Servs., Inc.*, 115 Cal. Rptr. 3d 707, 725 (Cal. App. 4th 2010).

<sup>32</sup> *Id.*

<sup>33</sup> *Steiner v. Thexton*, 48 Cal. 4th 411 (Cal. 2010).

<sup>34</sup> *Cheek v. United Healthcare of the Mid-Atlantic Inc.*, 835 A.2d 656, 662 (Md. 2003) (“An ‘illusory promise’ appears to be a promise, but it does not actually bind or obligate the promisor to anything. An illusory promise is composed of ‘words in a promissory form that promise nothing.’”); *Chicago Title Ins. Co.*, 188 Cal. Rptr. 3d at 725.

<sup>35</sup> *Cheek*, 835 A.2d at 662 (Md. 2003).

<sup>36</sup> *American Agric. Co. v. Kennedy*, 48 S.E. 868, 870 (Va. 1904).

<sup>37</sup> *Smyth Bros.-McCleary-McClellan Co. v. Beresford*, 104 S.E. 371, 382 (Va. 2012). This “shocks the conscience” language is not found in CA and MD cases, but it summarizes the proposition of unconscionability. An unconscionable contract is also summarized as having “extreme unfairness.” *Walther v. Sovereign Bank*, 872 A.2d 735, 744 (Md. 2005).

<sup>38</sup> *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 350 (Cal. App. 4th 2007); *Walther*, 872 A.2d at 744. Virginia does not make the procedural versus substantive distinction.

<sup>39</sup> *Gatton*, 61 Cal. Rptr. 3d at 352.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 240-41 (E.D. Pa. 2007) (holding click-wrap agreement valid under CA law); *contra America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001) (holding click-wrap agreement invalid because it violated public policy by restricting California citizen’s right to sue under a class action remedy). Virginia and Maryland have not found click-wrap agreements in violation of public policy.

<sup>43</sup> *Gatton*, 61 Cal. Rptr. 3d at 352.

<sup>44</sup> *Id.* at 352; *Walther v. Sovereign Bank*, 872 A.2d 735, 744 (Md. 2005).

<sup>45</sup> *Gatton*, 61 Cal. Rptr. 3d at 356.

<sup>46</sup> *Id.* at 350.

<sup>47</sup> *City of Los Angeles v. Superior Court of the County of Los Angeles*, 333 P.2d 745, 750 (1959); see also *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 493 S.E.2d 512, 519 (Va. 1997) (arguing contract was agreement to agree and thus too vague and indefinite to enforce).

<sup>48</sup> *City of Los Angeles*, 333 P.2d at 750.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *C. Porter Vaughan, Inc., Realtors v. Dilorenzo*, 689 S.E.2d 656, 659 (2010); see also *Phillippe v. Shapell Indus. Inc.*, 743 P.2d 1279, 1289 (Cal. 1987).

<sup>52</sup> CAL. CIV. CODE § 1624(a) (Deering 2012); VA. CODE ANN. §11-2 (West 2012); MD. CODE ANN., Cts. & Jud. Proc. § 5-901 (2012).

<sup>53</sup> *Donovan v. Rrl Corp.*, 27 P.3d 702, 713 (Cal. 2001). This “relaxation” of signature requirement for contracts does not mean a signature is not necessary. The cases have considered typewritten or printed name in telegram or a tape recording identifying parties to be sufficient.

<sup>54</sup> See also Juliet M. Moringiello & William L. Reynolds, *American Bar Association Electronic Contracting Cases 2008-2009*, 65 Bus. Law. 317 (2009) (citing *Kerr v. Dillard Store Servs, Inc.* No. 07-2604-KHV, 2009 WL 38586 at \*5 (D. Kan. Feb. 17, 2009)). Although these sources do not directly address Maryland, Virginia or California law, it is illustrative of the general issues that can arise with electronic signatures.

<sup>55</sup> CAL. CIV. CODE § 1624(a); VA. CODE ANN. §11-2; MD. CODE ANN., Cts. & Jud. Proc. § 5-901.

<sup>56</sup> CAL. CIV. CODE § 1624(a); VA. CODE ANN. §11-2; MD. CODE ANN., Cts. & Jud. Proc. § 5-901.

<sup>57</sup> CAL. CIV. CODE § 1624(a); VA. CODE ANN. §11-2; MD. CODE ANN., Cts. & Jud. Proc. § 5-901.

<sup>58</sup> CAL. CIV. CODE § 1624(a); VA. CODE ANN. §11-2; MD. CODE ANN., Cts. & Jud. Proc. § 5-901.

<sup>59</sup> CAL. CIV. CODE § 1624(a); VA. CODE ANN. §11-2.

<sup>60</sup> CAL. CIV. CODE § 1624(a). Provision is only present in California.

<sup>61</sup> *Id.* This monetary number varies across states. In Virginia the amount is \$25,000. VA. CODE ANN. §11-2. In Maryland, no amount is provided in the statute.

<sup>62</sup> VA. CODE ANN. §11-2. Provision is in Virginia code only.

<sup>63</sup> VA. CODE ANN. §11-2. Provision is in Virginia code only.

<sup>64</sup> CAL. COM. CODE §2201 (2012); VA. CODE ANN. §8.2-201 (2012); MD. CODE ANN., Com. Law § 2-201 (2012).

<sup>65</sup> CAL. COM. CODE § 10201 (2012); VA. CODE ANN. §8.2A-201 (2012); MD. CODE ANN., Com. Law § 2A-201 (2012).

<sup>66</sup> CAL. CIV. CODE § 1624(b). Qualified Financial contract exception only in California.

<sup>67</sup> CAL. CIV. CODE § 1624(b). The California statute gives detailed information on when evidence is sufficient that a contract has been made, but Virginia and Maryland's statutes do not provide explicit statutory guidance.

<sup>68</sup> VA. CODE ANN. §11-2.

<sup>69</sup> UNIF. ELEC. TRANSACTIONS ACT (1999), *Prefatory Note* 1 U.L.A. 21 (Supp. 2001).

<sup>70</sup> *Id.* at § 2(16), §3(a).

<sup>71</sup> *Id.* at § 3 (b)(2).

<sup>72</sup> *Id.* at §5.

<sup>73</sup> *Id.* at § 7(a).

<sup>74</sup> *Id.* at § 7(b).

<sup>75</sup> *Id.* at § 7(c).

<sup>76</sup> *Id.* at § 7(d).

<sup>77</sup> *Id.* at §7, comment 2.

<sup>78</sup> *Id.* at § 2, comment 1.

<sup>79</sup> *Id.* at § 2(1), comment 1.

<sup>80</sup> *Id.* at § 2, comment 7.

<sup>81</sup> *Id.* at § 9(a).

<sup>82</sup> *Id.* at § 9, comment 5.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at § 14(1).

<sup>85</sup> *Id.* at § 14, comment 1.

<sup>86</sup> *Id.* at § 14(2).

<sup>87</sup> *Id.* at § 8.

<sup>88</sup> *Id.* at § 8(c).

<sup>89</sup> *Id.* at § 8(d).

<sup>90</sup> *Id.* at § 3(b)(1).

<sup>91</sup> *Id.* at § 3(b)(2).

<sup>92</sup> *Id.* at § 3(b)(3).

<sup>93</sup> *Id.* at § 3(b)(4).

<sup>94</sup> MD. COM. LAW §21-102(b).

<sup>95</sup> MD. COM. LAW § 21-102(b-c).

<sup>96</sup> VA. CODE ANN. § 59.1-481(b)(1).

<sup>97</sup> VA. CODE ANN. § 59.1-481(b)(2).

<sup>98</sup> UETA § 2(5).

<sup>99</sup> *Id.* at § 2(6).

<sup>100</sup> 15 U.S.C.A. § 7001(a).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at § 7001(b).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at § 7001(e).

<sup>105</sup> *Id.* at § 7001(h).

<sup>106</sup> *Id.* at § 7001(c)(1)(A).

<sup>107</sup> *Id.* at § 7001 (c)(1)(B).

<sup>108</sup> *Id.* at § 7001 (c)(1)(C-D).

<sup>109</sup> *Id.* at § 7001(c)(3).

<sup>110</sup> *Id.* at § 7001(c)(4).

<sup>111</sup> *Id.* at § 7002(a)(1).

<sup>112</sup> *Id.* at § 7003(a).

<sup>113</sup> *Id.* at § 7003(b).

<sup>114</sup> *Id.* at § 103(b).

<sup>115</sup> *Id.* at § 105(a).

<sup>116</sup> *Id.* at § 103(c).

<sup>117</sup> UCITA § 107(a).

<sup>118</sup> *Id.* at § 107(b).

<sup>119</sup> *Id.* at § 107(c).

<sup>120</sup> *Id.* at § 201(a) and (f).

<sup>121</sup> *Id.* at § 201(a)(1).

<sup>122</sup> *Id.* at § 201(a)(2).

<sup>123</sup> *Id.* at § 201(c)(1).

<sup>124</sup> *Id.* at § 201(c)(2).

<sup>125</sup> *Id.* at § 201(d).

<sup>126</sup> *Id.* at § 202(b).

<sup>127</sup> *Id.* at § 108.

<sup>128</sup> *Id.* at § 112(a).

<sup>129</sup> *Id.* at § 112(d).

<sup>130</sup> *Id.* at § 112(e).

<sup>131</sup> *Id.* at § 112(e)(3)(A-B).

<sup>132</sup> *Id.* at § 113.

<sup>133</sup> *Id.* at § 206.

<sup>134</sup> *Id.* at § 212-13.

<sup>135</sup> *Id.* at § 103(d).

<sup>136</sup> MD. COM. LAW § 21-103(d).

<sup>137</sup> MD. COM. LAW § 21-209(4).

<sup>138</sup> *Id.* at § 21-109(b)(2).

<sup>139</sup> *Id.* at § 21-209(d).

<sup>140</sup> VA. CODE ANN. § 59.1-505.3(2)(C).

<sup>141</sup> *Id.* at § 59.1-508.9.

<sup>142</sup> *Id.* at § 59.1-501.3(d)(2)(A).

<sup>143</sup> Personal Information Protection and Electronic Documents Act (PIPEDA), S.C. 2000, c. 5 (Can.).

<sup>144</sup> PIPEDA § 4; *see also* TERESA SCASSA & MICHAEL EUGENE DETURBIDE, ELECTRONIC COMMERCE AND INTERNET LAW IN CANADA, 105 (2004), *available on* Google Books (explaining that PIPEDA “applies to all organizations engaged in commercial activity in Canada”).

<sup>145</sup> PIPEDA § 31.

<sup>146</sup> *Id.*

<sup>147</sup> Secure Electronic Signature Regulations, SOR/2005-30 (Can.).

<sup>148</sup> *See, e.g.*, Secure Electronic Signature Regulations § 1, SOR/2005-30 (Can.) (defining “hash function” as “an electronic one-way mathematical process that converts data contained in an electronic document into a message digest that is unique to that data in a way that, were that data changed, it would, on conversion, result in a changed message digest”).

<sup>149</sup> Secure Electronic Signature Regulations § 2, SOR/2005-30 (Can.).

<sup>150</sup> PIPEDA § 48.

<sup>151</sup> PIPEDA §§ 43, 46. The Schedules are annexes to PIPEDA listing the laws and regulations whose requirements for signatures are addressed by PIPEDA.

<sup>152</sup> *Uniform Electronic Commerce Act (UECA)* (Can. 1999), *available at* <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u1>.

<sup>153</sup> SCASSA & DETURBIDE, *supra* note 145, at 2-3; *see, e.g.*, Province of Alberta Internet Sales Contract Regulation, A. Reg. 81/2001 (Can.), *available at* [http://www.qp.alberta.ca/574.cfm?page=2001\\_081.cfm&lg\\_type=Regs&isbncIn=9780779752836](http://www.qp.alberta.ca/574.cfm?page=2001_081.cfm&lg_type=Regs&isbncIn=9780779752836).

<sup>154</sup> UECA § 5.

<sup>155</sup> UECA § 7.

<sup>156</sup> UECA §§ 7, 8.

<sup>157</sup> UECA § 1.

<sup>158</sup> UECA § 10. However, when the signature or signed document is to be provided to the government, the

relevant government office must have consented to receive electronic signatures and the signature meets the technological standards for method and reliability established by the government. UECA § 10(3).

<sup>159</sup> UECA §§ 11-14.

<sup>160</sup> UECA § 20.

<sup>161</sup> *Id.* (“A contract shall not be denied legal effect or enforceability solely by reason that an electronic document was used in its formation.”).

<sup>162</sup> UECA §§ 21, 22.

<sup>163</sup> UECA § 19.

<sup>164</sup> *See* UECA § 22 (discussion of the four elements that must be present in order for a contract created between a natural person and an electronic agent to have no legal effect).

<sup>165</sup> UECA § 23.

<sup>166</sup> UECA § 23(1).

<sup>167</sup> UECA § 23(2).

<sup>168</sup> UECA § 23(3). In situations where either the originator or the addressee has multiple places of business, the location that “has the closest relationship to the underlying transaction to which the electronic document relates” or, if there is no underlying transaction, the principle place of business is the location. UECA § 23(4)(a).

<sup>169</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic Signatures, 1999 O.J. (L 13) 12 [hereinafter *E-Signature Directive*].

<sup>170</sup> E-Signature Directive, art. 1.

<sup>171</sup> E-Signature Directive, art. 7.

<sup>172</sup> E-Signature Directive, art. 7.

<sup>173</sup> Additional terms defined include: signatory, signature-creation data, secure-signature-creation device, signature-verification device, qualified certificate, electronic-signature product, and voluntary accreditation.

<sup>174</sup> E-Signature Directive, art. 2(1).

<sup>175</sup> E-Signature Directive, art. 2(2).

<sup>176</sup> E-Signature Directive, art. 2(6).

<sup>177</sup> E-Signature Directive, art. 2(9).

<sup>178</sup> E-Signature Directive, art. 2(11).

<sup>179</sup> E-Signature Directive, art. 3.

<sup>180</sup> E-Signature Directive, art. 5.

<sup>181</sup> *Id.*



<sup>182</sup> E-Signature Directive, art. 7 (“Member States shall ensure that certificates which are issued as qualified certificates to the public by a certification-service-provider established in a third country are recognized as legally equivalent to certificates issued by a certification-service-provider established within the Community if: (a) the certification-service-provider fulfills the requirements laid down in this Directive and has been accredited under a voluntary accreditation scheme established in a Member State; or (b) a certification-service-provider established within the Community which fulfills the requirements laid down in this Directive guarantees the certificate; or (c) the certificate or the certification-service-provider is recognized under a bilateral or multilateral agreement between the Community and third countries or international organizations.”).

<sup>183</sup> See, e.g., E-Signature Directive, arts. 13, 14.

<sup>184</sup> Directive 2000/31/EC of the European Parliament and Council on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter *Directive on Electronic Commerce*].

<sup>185</sup> Directive on Electronic Commerce, Recital 58.

<sup>186</sup> Directive on Electronic Commerce, Recital 62 (“Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.”).

<sup>187</sup> *Communication from the Commission to the Council and the European Parliament E-Commerce and Financial Services*, at 6, COM (2001) 66 final (Feb. 7, 2001).

<sup>188</sup> *Id.*

<sup>189</sup> A European Commission report published in March 2011 noted that in 2010, 51% of EU internet users purchased goods or services online within their home country, but only 12% purchased goods or services online across borders within the EU. The figure is even lower for Internet users who purchased goods or services online in 2010 from non-EU sellers (7%), *European Commission Directorate General for Health & Consumers, Consumer Conditions Scorecard- Consumers at Home in the Single Market, 4th Edition*, at 11 (Mar. 2011), available at [http://ec.europa.eu/consumers/consumer\\_research/edition/s/cms5\\_en.htm](http://ec.europa.eu/consumers/consumer_research/edition/s/cms5_en.htm).

<sup>190</sup> *Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A coherent framework for building trust in the Digital Single Market for e-commerce and online services*, at 17, COM (2011) 942 final (Jan. 11, 2011).

<sup>191</sup> See *EU Approves Electronic Communications Directive and Members States Begin to Implement E-Commerce Directive*, Alston & Bird LLP (Oct. 10, 2002), available at <http://www.alston.com/Files/Publication/bb8e048e-9366-44e2-8ac2-877507d9a9e2/Presentation/PublicationAttachment/c9e3f016-3346-48e9-8772-1c8d1d1ecf5a/EU%20Approves%20Electronic%20Communications.pdf>

<sup>192</sup> Directive on Electronic Commerce, Recital 19.

<sup>193</sup> *Id.*

<sup>194</sup> Directive on Electronic Commerce, Recital 8.

<sup>195</sup> Directive on Electronic Commerce, Recital 18. The precise meaning of information society services is defined in Directives 98/34/EC and 98/48/EC. See Directive on Electronic Commerce, art. 2(a).

<sup>196</sup> Directive on Electronic Commerce, art. 5.

<sup>197</sup> *Id.*

<sup>198</sup> See Directive on Electronic Commerce, arts. 6-8.

<sup>199</sup> Directive on Electronic Commerce, art. 9 (“Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.”).

<sup>200</sup> Directive on Electronic Commerce, art. 10.

<sup>201</sup> Directive on Electronic Commerce, art. 11.

<sup>202</sup> Directive on Electronic Commerce, arts. 10(4), 11(3).

<sup>203</sup> Directive on Electronic Commerce, art. 10.

<sup>204</sup> Directive on Electronic Commerce, art. 10(3).

<sup>205</sup> Directive on Electronic Commerce, art. 11.

<sup>206</sup> Directive on Electronic Commerce, art. 11(3).

<sup>207</sup> Section 4 includes Article 12 (“Mere Conduit”), Article 13 (“Caching”), Article 14 (“Hosting”), and Article 15 (“No General Obligation to Monitor”).

<sup>208</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19 [hereinafter *Distance Selling Directive*].

<sup>209</sup> *Distance Selling*, European Commission, available at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/dist\\_sel1/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sel1/index_en.htm)

<sup>210</sup> *Id.*

<sup>211</sup> Compare *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402-04 (2d Cir. 2004), and *Southwest Airlines v. Boardfirst, LLC.*, 2007 U.S. Dist. LEXIS 96230, 17-22 (N.D. Texas, 2007) (holding browse-wrap agreements binding against companies due to their repeated visits and use of the sites) with *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, (2d Cir. 2002) (finding a browse-wrap agreement not valid against a consumer). But see *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 121-23 (Ill. App. Ct. 5th Dist., 2005) (holding a browse-wrap agreement valid against a group of consumers due to repeated warnings of the terms of sale during the purchasing process). See generally Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459 (2006-07).