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# Digital Handshakes in Cyberspace Under E-Sign: "There's a New Sheriff in Town!"

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# DIGITAL HANDSHAKES IN CYBERSPACE UNDER E-SIGN: "THERE'S A NEW SHERIFF IN TOWN!"

*Michael H. Dessent**

*"A hacker today is sort of like the guy who goes around rattling all the windows and doors in a neighborhood, and there is a pretty good chance he will find one open."*[1]

## I. INTRODUCTION

Without doubt, electronic commerce has increased the efficiency of businesses and consumers seeking to purchase goods, services, or intangibles by placing these objects just a keystroke away.[2] If you already enjoy buying lingerie and foie gras over the Internet, you will love the new Electronic Signatures in Global and National Commerce Act ("E-SIGN").[3] Want to borrow $10,000

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1. Lizette Alvarez & Jeri Clausing, *Senate Approves Bill That Allows Online Contacts*, N.Y. TIMES, June 17, 2000, at A1 (quoting Senator Ronald Wyden of Oregon, sponsor of the Electronic Signatures in Global and National Commerce Act ("E-SIGN")). In today's booming e-commerce market, a hacker's diligence stands to be handsomely rewarded. Businesses that wish to compete via the Internet face many difficult problems. They must not only protect their customers from hackers, but must do so in such a way as to protect themselves contractually and otherwise from dishonest consumers.

2. *See generally* eMarketer: The World's Leading Provider of eBusiness statistics, *at* http://www.emarketer.com (last modified Oct. 22, 2001) (providing detailed reports, statistics, newsletters, and other data regarding commerce through the Internet). From December 1998 to December 1999, the number of online buyers doubled to 36.1 million. *Id.* In the United States alone, consumer online shopping revenues are expected to rise from $4.5 billion in 1998 to $35.3 billion by 2002, reflecting the incredible growth and speed with which personal computers and Internet technology have increased electronic commerce over the past few years. *Id.* However, with the explosion of electronic commerce comes the need to define, create, or eliminate laws that will affect the enforceability of these cyberspace contracts.

3. Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001–7006, 7021, 7031 (2000)).

at four in the morning over the Internet to buy a car? E-SIGN allows it. Or how about entering a "cybersigning chat room," extending a "digital handshake," and then buying that cherished wedding gown? E-SIGN allows this to happen. In this era of ever-prevalent e-commerce, juxtaposed with increasingly effective computer hacker schemes, lawyers will now be asked to represent those transacting business under the new E-SIGN.[4] Are you ready for it?

It was, of course, Samuel Williston and Arthur Corbin who told us that the concepts of offer,[5] acceptance,[6] and consideration[7] are the three basic essentials to the formation of a binding contract.[8] In the Uniform Commercial Code ("UCC"), Karl Llewellyn and Soia Mentschikoff liberally interpreted the contract formation process for the sale of goods.[9] Further, modern technology has and continues to redefine the way business transactions take place. With computers, the Internet, and credit cards in the mix, the steps necessary to form a binding contract in an evolving

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4. *See, e.g.*, Kate Marquess, *Sign on the Dot-com Line*, A.B.A. J., Oct. 2000, at 74 (discussing the facilitation of commerce over the Internet); Alvarez & Clausing, *supra* note 1 (discussing ways to protect consumers from hackers); Mark Ballard, *E-SIGN a Nudge, Not Revolution*, NAT'L L.J., Sept. 25, 2000, at B1, (discussing the effect of E-SIGN on the business community).

5. *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) [hereinafter RESTATEMENT] ("An offer is the 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."); *see also* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.3 (1990) (introducing offer and acceptance).

6. *See* RESTATEMENT, *supra* note 5, §§ 52–54, 56, 58, 59, 60–63, 69 (discussing the concept of acceptance within contracts); *see also* 1 FARNSWORTH, *supra* note 5, § 3.3 (introducing offer and acceptance).

7. *See* RESTATEMENT, *supra* note 5, § 71.

> (1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

*Id.*; *see also* 1 FARNSWORTH, *supra* note 5, § 2.2 (discussing consideration as a bargained-for exchange).

8. *See* 1 FARNSWORTH, *supra* note 5, § 1.8 (discussing the sources of modern contract law).

9. *See id.* § 1.9 (discussing the development and impact of the UCC on contract law); *see generally* E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, SELECTIONS FOR CONTRACTS (1998).

business landscape via non-traditional mediums may no longer be clear.

In recent years, society has seen a technological revolution with the development of the Internet, which not only expanded and changed the way people communicate globally, but has transformed the face of business transactions. Negotiations are no longer conducted solely through written or oral communication—they now take place electronically via the World Wide Web.[10]

## II. THE DEVELOPMENT OF THE LAW BEFORE OCTOBER 1, 2000

### A. *Statute of Frauds and Internet Transactions*

The Statute of Frauds[11] has long regulated contracts by requiring "writings" and "signing"[12] to indicate the parties' "intentions."[13] Seventeenth Century English courts required sufficient evidence to substantiate a contractual claim in order to prevent the possibility of fraud or perjury.[14] As such, contracts requiring more than one year to perform—or involving the sale of real property, the sale of securities, the answering for another's debts, the sale of personal property, or the sale of goods over five hundred dollars—are all required to be in writing to be enforceable.[15]

Internet transactions involving the sale of goods over five hundred dollars were in jeopardy of violating the Statute of Frauds because of the paperless nature of the transaction.[16] In addition, even if a paper printout of the electronic message was produced, the signature requirement under the Statute of Frauds would remain unsatisfied.[17]

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10. *See* sources cited *supra* note 4.

11. *See e.g.*, U.C.C. § 2-201 (1978).

12. "Sign" means "[t]o identify (a record) by means of a signature, mark, or other symbol with the intent to authenticate it as an act or agreement of the person identifying it." BLACK'S LAW DICTIONARY 1386 (7th ed. 1999).

13. *See* U.C.C. § 2-201 (1978).

14. *See* 2 FARNSWORTH, *supra* note 5, § 6.1 (discussing the history and function of the Statute of Frauds).

15. *See* U.C.C. § 2-201 (1978).

16. *See id.*

17. *See id.*

The Statute of Frauds issue is the initial focus of E-SIGN.[18] E-SIGN essentially says that a transaction will not be in violation of the Statute of Frauds simply because it is memorialized in a digital form and authenticated with a digital signature.[19] E-SIGN is enabling legislation—it does not provide structure so much as it provides permission.[20] Many commentators have heralded E-SIGN as the foundation that will allow e-contracts to flourish, however only time will tell.[21]

### B. *State Responses to Difficulties with E-Commerce*

Beginning in the 1990s, the American Law Institute ("ALI"), in conjunction with the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), sought to facilitate the use of electronic commerce through a series of attempted uniform legislation.[22] Efforts were made to amend the UCC directly, particularly Article 2. A whole new vocabulary was created, whereby documents were "authenticated,"[23] not just "signed,"[24] and a "record"[25] was created, not just a "writing."[26] Words such as "computer,"[27] "computer information"[28] and "copy"[29] were defined.

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18. *See* 15 U.S.C. § 7001(a) (2000) (stating a general rule of validity with regard to the use of electronic signatures in commerce).

19. *See id.*

20. *See supra* notes 2, 4, and accompanying text.

21. *See supra* notes 2, 4, and accompanying text.

22. *See* Carol A. Kunze, *Who Wrote UCITA?*, UCITA Online, *at* http://www.ucitaonline.com/slhpwri.html (last updated May 21, 2000).

23. UNIF. COMPUTER INFO. TRANSACTIONS ACT ("U.C.I.T.A.") § 102(a)(6) (2001) ("[T]o sign; or with the intent to sign a record, otherwise to execute or adopt an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with that record.").

UCITA will be referenced numerous times throughout this article. Its complete text can be found at the official Web site of NCCUSL's Uniform Law Commissioners which is run in association with the University of Pennsylvania Law School. The site is located at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last updated Jan. 11, 2002).

24. *See supra* note 12.

25. *See* U.C.I.T.A. § 102(a)(55) (2001) ("[I]nformation that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.").

26. *See* U.C.C. § 2-201 (1978) (using writing as a requirement for meeting the Statute of Frauds).

27. *See* U.C.I.T.A. § 102(a)(9) (2001) ("[A]n electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.").

28. *See id.* § 102(a)(10) ("[I]nformation in electronic form which is obtained from or

"Electronic agents"[30] and "electronic messages"[31] were also defined. The basic goal was that no agreement could be struck down simply because it was conducted through electronic means. One of the most unique definitions is as follows:

> [a] contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect . . . solely because its . . . creation . . . involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.[32]

At the same time E-SIGN was being developed, NCCUSL was working on a new Uniform Electronic Transactions Act ("UETA").[33] UETA was yet another attempt by NCCUSL to provide the electronic commerce world with some level of uniformity on a national level.[34] Eventually, this reform effort lost the support of the ALI. NCCUSL decided to retitle the amendment the Uniform Computer Information Transactions Act ("UCITA") and seek adoption through each state legislature.[35]

Inconsistencies and political disagreements damaged the effectiveness of both UETA and UCITA at the state level.[36] Finally, in

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through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.").

29. *See id.* § 102(a)(20) ("[T]he medium on which information is fixed on a temporary or permanent basis and from which it can be perceived, reproduced, used, or communicated, either directly or with the aid of a machine or device.").

30. *See id.* § 102(a)(27) ("[A] computer program, or electronic or other automated means, used independently to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance."); *see also* Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000).

31. *See* U.C.I.T.A. § 102(a)(27) (2001) ("[A] record or display that is stored, generated or transmitted by electronic means for the purpose of communication to another person or electronic agent.").

32. 15 U.S.C. § 7001(h) (2000).

33. UNIF. ELEC. TRANSACTIONS ACT ("U.E.T.A.") § 5b (Dec. 13, 1999 Draft). Like UCITA, UETA may be found at the official Web site of NCCUSL's Uniform Law Commissioners. The site is located at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last updated Jan. 11, 2002); *see* discussion *infra* Part IV.C.

34. *See* Carol A. Kunze, The ETA Forum, *at* http://www.webcom.com/legaled/ETAForum/bkgd.html (last updated July 11, 1999); *see also* discussion *infra* Part IV.C.

35. David G. Mayhan & Patricia A. Fennelly, *The Uniform Computer Information Act: Ready or Not, Here it Comes*, COLO. LAW., Dec. 28, 1999, at 63.

36. *See* discussion *infra* Parts IV.B, C; *see also* Maureen A. O'Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?*, 14 BERKELEY TECH. L.J. 635, 649–51 (1999).

June 2000, Congress and the President created E-SIGN. While the passage of the federal E-SIGN law does not supersede all state efforts to govern the area, it does preempt some of the earlier solutions proposed for the e-commerce puzzle.[37] E-SIGN specifically references UETA, ensuring UETA's existence in some form at least temporarily.[38] UCITA's continued survival, however, remains a mystery as there has never been a federal contract law for normal commercial transactions. Now with the enactment of E-SIGN, there is one.

### C. *Historic Evolution of the UCC and the E-Commerce Stumbling Blocks*

While E-SIGN may resolve some of the concerns regarding Internet transactions and the Statute of Frauds, it does not address other problem areas such as "shrink-wrap" licensing/contracting and intellectual property rights.[39]

When a buyer purchases a new product, there are certain warranties included. These warranties are generally laid out in the UCC.[40] With computer software and electronic purchases, there are three basic warranties involved.[41] Express warranties involve a specific promise given to the buyer by the distributor.[42] Also, there are two kinds of implied warranties—warranties of fitness and of merchantability.[43]

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37. *See* 15 U.S.C. § 7002 (2000) (specifying when E-SIGN does not preempt state law).

38. *See id.* § 7002(a)(1).

39. The question of federal preemption with regard to federal intellectual property rights is beyond the scope of this article. For material that elucidates the many controversies regarding intellectual property rights, see generally *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988); *Storm Impact v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998); *Novell v. Network Trade Ctr.*, 25 F. Supp. 2d 1218 (D. Utah 1997); *Microsoft Corp. v. Harmony Computers*, 846 F. Supp. 208 (E.D.N.Y. 1994); Holly K. Towle, *The New Uniform Computer Information Transactions Act, in* UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE, at 869, 873 (PLI Intellectual Prop. Course, Handbook Series G-576, 1999); Cem Kaner, *Software Engineering and UCITA*, 18 J. MARSHALL J. COMPUTER & INFO. L. 435 (1999).

40. *See* U.C.C. §§ 2-312 to -318 (1978).

41. Micalyn S. Harris, *UCITA: Helping David Face Goliath*, 18 J. MARSHALL J. COMPUTER & INFO. L. 365, 387 (1999).

42. *See* U.C.C. §§ 2-314 to 315 (1978).

43. *See id.*; *see also* Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547 (1999); Jonathan T. Cain, *Infotech and the Law: Major Changes Proposed for Software and Data Warranties, at* http://www.washington

With the evolution of technology, variations of contract formations and contractual terms began to appear. Consider shrink-wrap licenses. These licenses came to be known as "shrink-wrap" because they initially were pre-printed on the outside packaging of the software.[44] Once the wrapping was opened, the product was deemed to be accepted.[45] Further, shrink-wrap license contracts often involve the payment and shipment of software, which includes a complex license agreement. However, in order to fully comprehend the impact shrink-wrap agreements will have on technological contracts, the law surrounding shrink-wrap licenses must be examined.

Initially, courts found shrink-wrap licenses invalid on contract formation grounds.[46] However, courts allowed the formation of a contract by payment and shipment of the software. Thus, confusion remained as to what terms to adopt. Courts then looked to the battle of forms section of the UCC, section 2-207, and concluded that post-sale license terms were mere proposals which the user could adopt if he so chose.[47] Needless to say, most license terms went unaccepted and unadopted by the end user. However, in the wake of *ProCD v. Zeidenberg*,[48] the law began to change.[49]

The problems with shrink-wrap licenses were originally tackled by the states and were supposed to be resolved, in part, by UCITA.[50] However, this act has been submitted to legislatures throughout the United States by NCCUSL with only limited success. Reasons for the lukewarm response to UCITA will be discussed below.[51]

In addition to UCITA, in July 1999, NCCUSL proposed UETA.[52] UETA was designed to be passed by each state, in con-

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technology.com/news/11_6/news/9874-1.html (June 27, 1996).

44. Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 320 (1999).

45. *Id.*

46. *See* discussion *infra* Parts III.A, C, III.I.

47. *See* discussion *infra* Part III.A.

48. 86 F.3d 1447 (7th Cir. 1996).

49. *See* discussion *infra* Part III.D.

50. *See generally* Rustad, *supra* note 43, at 547; Towle, *supra* note 39, at 869; Raymond T. Nimmer, *UCITA: A Commercial Contract Code,* COMPUTER LAW., May 2000, at 3, 6.

51. *See* discussion *infra* Parts IV.B–C.

52. Ballard, *supra* note 4.

junction with UCITA, in order to standardize various contract laws on a national basis so that businesses could take advantage of the Internet.[53] Uniformity, however, was undermined by each state's numerous and lengthy additions to the original law.[54]

The UCC was drafted under the influence of a school of thought known as legal realism.[55] The legal realists drafted the UCC to reflect not only the common practices of contract law throughout the United States at the time, but to do away with many of the old common law conventions that plagued contract law and impeded efficient business transactions.[56] The drafters strived to make contract formation easy and not reliant on inflexible common law machinery.[57] For the most part, the drafters of the UCC were successful. Adoption of the UCC by the states has been almost universal, which explains why the drafters originally conceived UCITA as an amendment to the UCC.[58]

Yet, two common law doctrines invariably rear their ugly heads in the discussion of e-commerce and contracts. The drafters of the UCC targeted these rules because they pinpointed what the drafters wished to abolish. First, the "mirror image" rule required the documents exchanged by the parties to have exactly the same terms in order to form a contract.[59] Second, the "last shot" rule held that the terms sent last were the terms that were binding on both parties if the receiving party did not object and performed anyway.[60] UCC section 2-207 attempts to excise these common

53. Ballard, *supra* note 4; *see also* Adam White Scoville, *Clear Signatures, Obscure Signs*, 17 CARDOZO ARTS & ENT. L.J. 345 (1999).

54. Ballard, *supra* note 4. A total of twenty-two states have passed electronic transaction laws, and an additional twenty-four have addressed the problem in various other ways. *Id.*

55. *See generally* John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263 (2000); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997).

56. *See* sources cited *supra* note 55.

57. See U.C.C. §§ 1-106, 2-204, 2-206, 2-209 (1978).

58. *See* Matthew J. Smith, *An Overview of the Uniform Computer Information Transactions Act: Warranties, Self-Help, and Contract Formation—Why UCITA Should Be Renamed "The Licensors' Protection Act,"* 25 S. ILL. U. L.J. 389, 390 (2001).

59. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 225–48 (5th ed. 1995).

60. *Id.*

law demons from contract law, but in doing so has itself been the subject of much criticism.[61]

Section 2-207, often referred to as "the battle of the forms," states that

> [a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless the acceptance is expressly made conditional on assent to the additional or different terms.[62]

With regard to consumers, any additional terms will be considered proposals for additions to the contract.[63] Between merchants, the additional or different terms become part of the contract "unless the offer expressly limits acceptance to the terms of the offer, they materially alter [the contract], or notification of objection to [the additional terms]" is given.[64] The final part of section 2-207 provides that "[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract."[65] The terms of a contract formed by performance will be those on which both parties agree and those provided by the standard UCC "gap-fillers."[66]

This section of the UCC has prompted efforts at revision because of the promulgation of electronic contracts, shrink-wrap licenses, and click-wrap licenses.[67] The function of these licenses and contracts is to "disclaim warranties, limit liability for the breach of warranties, and to prohibit or limit the copying and use of material protected under the Copyright Act."[68] These licenses and contracts are placed on software packaging and are encoded as part of the set-up of computer programs.[69] When a consumer opens the packaging or clicks on the "accept" button referencing

61. *See id.*
62. U.C.C. § 2-207(1) (1978).
63. *Id.* § 2-207(2).
64. *Id.*
65. *Id.* § 2-207(3).
66. *Id.*
67. *See* Garry L. Founds, *Shrink-wrap and Clickwrap Agreements: 2B or Not 2B,* 52 FED. COMM. L.J. 99, 121 (1999).
68. *Id.*
69. *Id.*

the contract agreement, the user is agreeing to be bound by the terms included, even though a contract was never signed.[70]

Contracts such as these are an important part of today's business environment because of the amount of software purchased on the Internet or by phone. The licenses provide for the inventor of the program to legally bind those people downloading the program and those who receive it in the mail, without the use of a hard copy of the contract prior to or at the time of sale.[71] Hypothetically, if users do not select the "accept" button, thus binding them to the contract, or if they choose not to agree to the terms of a license included in the packaging of the product, they are not able to proceed and therefore do not have use of the program.

Unfortunately, enforceability of these licenses is not as simple as pressing a button. Inventors and companies distributing software over the Internet and by phone must take steps to ensure that a valid contract is conveyed to the purchasing party. More precisely, the distributor must make the purchaser "aware of . . . the terms of the license agreement together with price, quantity, and goods" in order to make the shrink-wrap license enforceable under current law in most jurisdictions.[72]

Distributors have a number of options for protecting both themselves and inventors. For instance, distributors could require the signing of a contract upon delivery, but this could increase costs.[73] A cheaper alternative is to have the purchaser press an "accept" button at the start of installation, but this might not be legally binding.[74] In addition, in a click-wrap agreement scenario, the licensor must also provide an escape route for those people who choose not to comply.[75] Hypothetically, when various conditions are met, a shrink-wrap license is legitimate and can be enforced as a valid contract.

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70. Assoc. of Research Libraries, *New Article of UCC Addresses Licenses, at* http://www.arl.org/newsltr/190/ucc.html (last modified Mar. 27, 1997).

71. Jon Roberts, *Internet and Licensing Issues—Do You Really Have a Deal?, available at* http://www.ttechnology.com/articles/1998/nov_98//internet_licensing.html (Nov. 1998).

72. *Id.*; *see also* Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 101–02 (3d Cir. 1991).

73. *See* Roberts, *supra* note 71.

74. *See id.*

75. *See id.*

The general terms of a shrink-wrap or click-wrap license are that it: "(1) prohibits making unauthorized copies of the software, (2) prohibits rental of the software, (3) prohibits reverse engineering and modifications to the software, (4) limits use of the software to one central processing unit, (5) disclaims warranties, and (6) and limits liability."[76] According to some authorities, all of these terms must appear on the outside of the package to be enforceable.[77] If the terms are not clearly visible to the purchaser, the contract as proposed by the distributor may not be enforced.[78] If this happens, the contract may be established by what the purchaser knew it to be at the time of purchase.[79] In this case, a court would interpret what those terms are by noting what was visible on the package (i.e., the price, what was purchased, and the number that were purchased) and what was known by the purchaser, with the rest of the terms being filled in by the UCC.[80]

The issue of enforceability of the shrink-wrap and click-wrap licenses is being debated because, among other things, there is no opportunity for the purchaser to negotiate the agreement and the terms are extremely broad and highly restrictive.[81] Also, when there is no signature by the party against whom the contract is being enforced, it can be argued that the contract is one of adhesion.[82] The contract could be something purchasers did not agree to and perhaps did not know about until after the sale, making it arguably unconscionable and unenforceable.[83] Interestingly, several federal courts have introduced a new element into the equation. Courts are now questioning whether section 2-207 requires two merchants to be involved. If it does, then a sale by a mer-

76. Lloyd L. Rich, *If You Use a Shrinkwrap License, It May Not Be Enforceable: Mass Market Software & The Shrinkwrap License, at* http://www.islandnet.com/~wwlia/us-soft1.htm (last visited Jan. 10, 2002).

77. *See* ProCD v. Zeidenberg, 908 F. Supp. 640, 651 (W.D. Wisc. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996), discussed *infra* at Part III.D.; *see also* Goodman, *supra* note 44.

78. *ProCD*, 908 F. Supp. at 651.

79. *Compare* Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 104–05 (3d Cir. 1991), *with* Arizona Retail Sys. v. Software Link, 831 F. Supp. 759, 765 (D. Ariz. 1993) (discussing the different treatment of terms made known to the parties before the contract was formed and those added after the contract was formed).

80. Michael J. Dunne & Elizabeth A. Barba, *Enforceability of Shrink-Wrap Licenses*, NEW JERSEY LAW., Sept. 1996, at 18.

81. Founds, *supra* note 67, at 103.

82. *See* Rich, *supra* note 76.

83. *See* Dunne & Barba, *supra* note 80.

chant to an individual consumer may be covered by yet another section—UCC section 2-204.[84]

## III. THE KEY CASES

A brief history of the key cases regarding shrink-wrap licensing and their application of the UCC will provide insight into why state legislatures began to propose legislative remedies, and how those remedies might affect contract law in the early Twenty-first Century. The dialogue regarding the appropriateness of "box-top licenses"—later redubbed "shrink-wrap licenses"[85] and analogized to "click-wrap agreements"[86]—and the applicability of UCC section 2-207 essentially began in 1991 in *Step-Saver Data Systems v. Wyse Technology*.[87] That dialogue continued throughout the 1990s, with each case helping to define the relationship between traditional contract theory and technology.[88] *Klocek v. Gateway, Inc.*[89] is the most recent opinion added to the dialogue and comes

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84. *See* discussion *infra* Part III.D.

85. A "shrink-wrap license" involves

> [a] printed license that is displayed on the outside of a software package and that advises the buyer that by opening the package, the buyer becomes legally obligated to abide by the terms of the license. Shrink-wrap licenses usually seek to (1) prohibit users from making unauthorized copies of the software, (2) prohibit modifications to the software, (3) limit use of the software to one computer, (4) limit the manufacturer's liability, and (5) disclaim warranties. — Also written *shrinkwrap license.* — Also termed *box-top license; tear-me-open license.*

BLACK'S LAW DICTIONARY 931 (7th ed. 1999).

86. *See, e.g.*, Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 593 (S.D.N.Y. 2001).

87. 939 F.2d 91 (3d Cir. 1991).

88. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149–50 (7th Cir. 1997) (holding that terms sent in a computer box, which stated that they governed the sale unless the computer was returned within thirty days, were binding on the buyer who did not return the computer); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding that a shrinkwrap license included with software was binding on the buyer under the UCC); Arizona Retail Sys. v. Software Link, 831 F. Supp. 759, 763 (D. Ariz. 1993) (holding that a contract was formed when the buyer opened the shrinkwrap on the software, where a license agreement appeared on the shrinkwrap); Rinaldi v. Iomega Corp., No. C.A. 98C-09-064RRC, 1999 WL 1442014, at *1 (Del. Super. Sept. 3, 1999) (finding that a seller's disclaimer of the implied warranty of merchantability for a computer "Zip drive" was sufficiently "conspicuous" as required by the UCC when contained in the packaging of the product); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); Brower v. Gateway 2000, Inc., 246 A.D.2d 246 (N.Y. App. Div. 1998); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000).

89. 104 F. Supp. 2d 1332 (D. Kan. 2000).

nipping at the heels of E-SIGN. Despite this, the question remains: did these cases present problems that the UCC and traditional contract devices could not adequately resolve, and do E-SIGN, UETA, and UCITA provide for better remedies?

### A. Step-Saver Data Systems, Inc. v. Wyse Technology

*Step-Saver* essentially began the federal discussion regarding the enforceability and applicability of shrink-wrap licenses.[90] Step-Saver evaluated the needs of particular computer users, compared those needs with available technology, and designed hardware and software packages to accommodate those needs.[91] In 1985, Step-Saver became aware of a company named The Software Link, Inc. ("TSL") that was producing a program Step-Saver felt would be beneficial to its clientele and would interface with the other hardware and software Step-Saver was marketing.[92] After Step-Saver conducted some preliminary testing, it decided to market a hardware and software package featuring TSL's own program called "Multilink."[93]

Between August 1986 and March 1987, Step-Saver "purchased and resold 142 copies of the Multilink Advanced Program."[94] Typically, Step-Saver would telephone TSL and place an order for twenty copies of Multilink at a time.[95] TSL would accept the order and promise to ship the goods promptly.[96] No reference was made during the phone calls regarding a disclaimer of any warranties.[97] "After the telephone order, Step-Saver would send a purchase order, detailing the items to be purchased, their price, shipping and payment terms."[98] TSL's shipment to Step-Saver included an invoice, and the terms contained in the enclosed invoice mirrored those in the Step-Saver purchase order.[99] Neither the purchase

90. *See Step-Saver*, 939 F.2d at 98–107.
91. *Id.* at 93.
92. *Id.* at 95.
93. *Id.*
94. *Id.*
95. *Id.* at 95–96.
96. *Id.* at 96.
97. *Id.*
98. *Id.*
99. *Id.*

orders nor the invoices referenced a disclaimer of warranty.[100] Printed on the packaging of each copy of Multilink, however, was a copy of a shrink-wrap license that contained various critical terms.[101]

Those terms disclaimed all express and implied warranties[102] and limited the purchaser's remedies to replacement of the program.[103] The license also included an integration clause.[104] The license instructed the purchaser that opening the packaging bound the purchaser to the terms included in the shrink-wrap license, and if this was not acceptable to return the unopened program to the seller within fifteen days.[105]

Significant performance problems arose and the enforceability of the shrink-wrap license came into question when Multilink's performance was allegedly inconsistent with TSL's representations to Step-Saver.[106] Entire systems that Step-Saver had sold to independent entities featuring Multilink were rendered useless and Step-Saver's customers, in turn, filed suit.[107] Step-Saver then filed suit against TSL alleging breach of warranty and intentional misrepresentation.[108] TSL defended the suit seeking shelter under the terms of its shrink-wrap license.[109]

Step-Saver argued that the contract was formed on the telephone when TSL agreed to ship the software at the agreed upon price.[110] This would make the shrink-wrap license a material alteration to the contract between the parties, and would therefore not become part of the contract under UCC section 2-207(2).[111]

TSL argued that formation did not occur until Step-Saver received the program, was given notice of the terms, and opened the

100. *Id.*
101. *Id.*
102. *Id.* However, this did not include a warranty stating that the disks contained in the box were free from defects. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 94.
108. *Id.*
109. *Id.*
110. *Id.* at 97.
111. *Id.*; *see supra* notes 62–66.

packaging.[112] In the alternative, TSL maintained that its acceptance of Step-Saver's telephone offer was conditional on Step-Saver's own acceptance of the shrink-wrap license.[113] Under this interpretation, TSL was making a counteroffer that Step-Saver accepted when it opened the packaging.[114] Finally, TSL argued that regardless of how the contract was formed, Step-Saver's repeated orders with knowledge of the disclaimer equated to Step-Saver's assent to the disclaimer.[115]

The Court of Appeals for the Third Circuit agreed with Step-Saver and used UCC subsections 2-207(1) and 2-207(2) in its analysis.[116] "The parties's [sic] performance demonstrates the existence of a contract. The dispute is, therefore, not over the existence of a contract, but the nature of its terms."[117] The court then applied section 2-207 to each of TSL's arguments in turn.[118]

First, the court held that the contract was sufficiently definite without reference to the shrink-wrap license, contrary to TSL's position.[119] The court held that all the necessary terms to form a contract were present including the identification of the goods, the quantity, and the price.[120] Furthermore the "gaping holes" that TSL claimed made the contract indefinite, namely the warranty provisions and party rights, would be taken care of by either copyright laws or the "gap fillers" of the UCC.[121] Therefore, reference to the shrink-wrap license was not necessary.[122]

Next, the court addressed whether the shrink-wrap license was a counteroffer.[123] The court stated that it was unsure whether a conditional acceptance analysis applied when a contract had been established by performance, but they made this assumption in order to address TSL's arguments.[124] The court noted the exis-

112. *Step-Saver*, 939 F.2d at 97.
113. *Id.* at 97–98.
114. *Id.* at 98.
115. *Id.*
116. *Id.*
117. *Id.* (citing McJunkin Corp. v. Mechanicals, Inc., 888 F.2d 481, 488 (6th Cir. 1989)).
118. *See id.* at 99–106.
119. *Id.* at 100.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 100–01.
124. *Id.* at 101. *But see* Arizona Retail Sys. v. Software Link, 831 F. Supp. 759, 764–65

tence of three tests to determine whether a writing constitutes a conditional acceptance.[125] The approach the court adopted "requires the offeree to demonstrate an unwillingness to proceed with the transaction unless the additional or different terms are included in the contract."[126] The court felt that this approach was the most consistent with the philosophy underlying UCC section 2-207(1).[127]

The court found that the language provided by TSL was not sufficient to make TSL's acknowledgement a conditional acceptance, thus triggering a contract under 2-207(1).[128] Specifically, the court held that the "consent by opening" language was not sufficient to transform the acknowledgement into a conditional acceptance.[129]

The refund provision in TSL's terms made a strong case that the acknowledgement was in fact a conditional acceptance.[130] However, this argument was trumped by the testimony of one of Step-Saver's employees who said that TSL had assured him that the shrink-wrap license did not apply to Step-Saver.[131] Additionally, there was evidence that TSL had attempted to have Step-Saver sign formal agreements that contained the warranty disclaimer and limited remedy terms.[132]

Finally, the court addressed whether the parties' "course of dealing" incorporated the disputed terms of the shrink-wrap li-

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(D. Ariz. 1993) ("[T]he court does not believe that the license agreement in this case could constitute a conditional acceptance regardless of its terms or the importance of those terms to TSL.").

125. *Step-*Saver, 939 F.2d at 101. The first two approaches were rejected. Under the first test, an offeree's response is a conditional acceptance to the extent it states a term "materially altering the contratual obligations solely to the disadvantage of the offeror." *Id.* (quoting Diatom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1576 (9th Cir. 1984)). A second approach considered an acceptance conditional when certain key words or phrases are used, such as written confirmation stating that the terms of the confirmation are "the only one's upon which we will accept orders." *Id.* (quoting Ralph Shrader, Inc. v. Diamond Int'l Corp., 833 F.2d 1210, 1214 (6th Cir. 1987)).

126. *Id.* at 102.

127. *Id.*; *see also supra* notes 62–66 and accompanying text.

128. *Step-Saver*, 939 F.2d at 102.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* Of course, the question follows that if TSL believed Step-Saver was bound by the terms contained in the shrink-wrap license, then why did it attempt to memorialize a formal agreement with Step-Saver binding it to terms to which, under TSL's theory, Step-Saver was already bound?

cense into the contractual relationship between the parties.[133] TSL argued that Step-Saver's continued orders and use of the software, with notice of the shrink-wrap license, incorporated the terms into the contract between the parties.[134]

The court declined to adopt this argument on two grounds.[135] First, the repeated exchange of forms only communicated to Step-Saver that TSL desired the disputed terms.[136] TSL's failure to obtain Step-Saver's express assent to the terms before the product was shipped allowed Step-Saver to reasonably conclude that while TSL might desire specific terms, it had agreed to do business on other terms, expressly agreed upon by the parties.[137] Second, the court held that the seller often has the opportunity to negotiate precise terms in multiple transaction agreements, just as TSL attempted to do in this case.[138] While a seller in TSL's position would like the court to incorporate all of the seller's terms, if the terms are not agreed upon by both parties, it would be against contract law to do so.[139]

Additionally, the court found the "course of dealing" between TSL and Step-Saver to be contrary to the idea that TSL's terms were incorporated into the contract.[140] First, TSL tried to obtain Step-Saver's express consent to the disclaimer and limitation of damages, however, Step-Saver refused.[141] Second, when TSL was notified of the problems with the software by Step-Saver, TSL exerted considerable time and energy in trying to rectify the problem.[142]

Overall, the Third Circuit held, as a policy matter, that it was better that conspicuous disclaimers be made available before the contract is formed.[143] The court stated that "[w]hen a disclaimer is not expressed until after the contract is formed, UCC section 2-

133. *Id.* at 102–04.
134. *Id.* at 103.
135. *Id.* at 104.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id. But see* Hill v. Gateway, 105 F.3d 1147 (7th Cir. 1997); ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

207 governs the interpretation of the contract, and, between merchants, such disclaimers, to the extent they materially alter the parties's [sic] agreement, are not incorporated into the parties's [sic] agreement."[144] The court used subsections 2-207(1) and 2-207(2) to analyze this problem, and stated that if this rule was to be changed, a legislature was the proper venue rather than the judiciary.[145]

The court's recognition of a contract upon the parties' performance of order, acceptance, and payment is a key distinction between *Step-Saver* and its progeny.[146] The *Step-Saver* court, by demarcating formation as the time the actual goods traded hands, is then allowed to use UCC section 2-207 to analyze the problem.[147]

### B. C. Itoh & Co. v. Jordan International Co.

The Third Circuit's reliance on subsections (1) and (2) of section 2-207 in *Step-Saver* can be compared to *C. Itoh & Co. v. Jordan International Co.*[148] where the Seventh Circuit relied on subsections 2-207(1) and 2-207(3).[149] *Itoh* is a reprieve from the technology-driven case law that has dominated the discussion thus far. *Itoh* provides insight into the Seventh Circuit's application of section 2-207 as opposed to the Third Circuit's understanding.[150]

C. Itoh & Co. was a "middle-man" who had submitted a purchase order for a stipulated quantity of steel coils to Jordan International Company.[151] Itoh's purchase order with Jordan was complemented by a contract to sell the steel coils it was purchasing from Jordan to Riverview Steel Corporation.[152] After the coils had been delivered by Jordan and paid for by Itoh, Riverview refused to pay Itoh claiming that the coils were defective and did not conform to the standards set forth in the contract between

144. *Step-Saver*, 939 F.2d at 105.
145. *Id.*
146. *Id. But see Hill*, 105 F.3d 1147.
147. *Step-Saver*, 939 F.2d at 105.
148. 552 F.2d 1228 (7th Cir. 1977).
149. *Id.* at 1238.
150. *See id.*
151. *Id.* at 1230.
152. *Id.*

Riverview and Itoh.[153] Itoh brought suit against Riverview claiming Riverview had wrongfully withheld payment.[154] Itoh also sued Jordan claiming that Jordan had sold defective steel and made a late delivery.[155] The Seventh Circuit was called upon to sort through all of the different form contracts that the parties had exchanged to determine the contractual relationships between the parties.[156]

The court began its discussion by analyzing the relationship between Itoh and Jordan.[157] Itoh sent a purchase order for the steel coils to Jordan which contained no arbitration provision.[158] In response to Itoh's purchase order, Jordan sent an acknowledgment containing a broad arbitration provision on the back page that was generally referenced by language on the front page.[159] After the documents were exchanged, Jordan delivered the coils and Itoh paid for them, but at no time did Itoh expressly assent or object to the additional arbitration term included in Jordan's acknowledgment.[160]

First, the court, in deciding the nature of Itoh and Jordan's relationship, clarified a misperception by some of the lower New York courts regarding the application of UCC section 2-201, stated that section 2-207 was the applicable code section.[161] The court then tracked the historical development of section 2-207 and its rejection of the common law "mirror image" rule.[162] The court quoted UCC section 2-207(1): "'[A] contract . . . [may be] recognized notwithstanding the fact that an acceptance . . . contains terms additional to . . . those of the offer. . . .'"[163]

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1232.
157. *Id.* at 1230.
158. *Id.*
159. *Id.* The notice stated, "[s]eller's acceptance is, however, expressly conditional on Buyer's assent to the additional or different terms and conditions set forth below and printed on the reverse side. If these terms and conditions are not acceptable, Buyer should notify Seller at once." *Id.*
160. *Id.*
161. *Id.* at 1232–33.
162. *Id.* at 1234–35.
163. *Id.* at 1235 (quoting Dorton v. Collins & Aikman Corp., 453 F.2d. 1161, 1166 (6th Cir. 1972)).

However, the court held that while section 2-207(1) was a departure from the "mirror image" rule, there were exceptions to section 2-207(1) that would prevent contract formation.[164] According to the *Itoh* court, section 2-207(1) "contains a proviso which operates to prevent an exchange of forms from creating a contract where 'acceptance is expressly conditional on assent to the additional . . . terms.'"[165] Following the precedent set forth by the Sixth Circuit in *Dorton v. Collins & Aikman Corp.*,[166] the Seventh Circuit construed the proviso narrowly, and after examining the language of Jordan's acknowledgement, held that it fell under the proviso.[167] Therefore, the exchange of forms between Jordan and Itoh did not result in a contract under UCC section 2-207(1) and Jordan's acknowledgment became a counteroffer.[168]

Since no contract existed, either party was free to walk away from the transaction at that time, but neither party did. Subsequently, performance between the parties took place.[169] The court noted that under the common law, Itoh's performance would probably have constituted acceptance of Jordan's counteroffer and the "last shot" rule would have applied; however, the UCC required a different analysis.[170] According to the court, in a situation where the parties' writings do not form a contract, but performance takes place, section 2-207(3) operates to create a contract based on the parties' performance.[171] So, while a contract did not exist under section 2-207(1), one was formed between Itoh and Jordan under section 2-207(3) that only left ambiguity regarding which terms governed the contractual relationship.[172]

At common law, the terms of the Jordan acknowledgment would have become the terms of the contract between Itoh and Jordan.[173] UCC section 2-207(3), however, states that "the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary

164. *Id.*
165. *Id.* (quoting U.C.C. § 2-207(1) (1978)).
166. 453 F.2d 1161 (6th Cir. 1972).
167. *Itoh*, 552 F.2d at 1235.
168. *Id.*
169. *Id.* at 1236.
170. *Id.*
171. *Id.*; *see* U.C.C. § 2-207(3) (1978).
172. *Itoh*, 552 F.2d at 1236.
173. *Id.*

terms incorporated under any other provisions of this Act."[174] The facts of the case showed that Itoh and Jordan did not agree on the arbitration provision, so the court then had to analyze whether the arbitration could be considered a supplementary term incorporated under some other provision of the UCC.[175]

The court found that the "supplementary terms" contemplated by section 2-207(3) were limited to the standardized "gap fillers" within UCC Article 2.[176] According to the Seventh Circuit, none of the standard "gap fillers" provided for arbitration when the parties were in disagreement.[177] Additionally, the Court felt that it was not good policy to allow disputed terms into a contract created by section 2-207(3) under the guise of "supplementary terms."[178]

The Seventh Circuit's application of UCC section 2-207 is to be distinguished from the Third Circuit's application. In *Itoh*, the Seventh Circuit relied on subsections 2-207(1) and 2-207(3), while the Third Circuit in *Step-Saver*, a factually analogous case, used subsections 2-207(1) and 2-207(2).[179] The differences in each court's application led to decisions diametrically opposed to one another in later cases regarding shrink-wrap licenses.

### C. Arizona Retail Systems, Inc. v. Software Link

*Arizona Retail Systems, Inc. v. Software Link*[180] presented a problem very similar to the one posed in *Step-Saver*. In fact, TSL was the defendant in this suit as well. *Step-Saver* was the primary support used by the District Court in Arizona when deciding *Arizona Retail Systems*. The court in *Arizona Retail Systems*, however, distinguished *Step-Saver* in some important ways and spent more time grappling with exactly when the numerous contracts were formed in order to determine the applicability of UCC section 2-207.[181]

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174. U.C.C. § 2-207(3) (1978).
175. *Itoh*, 552 F.2d at 1236–37.
176. *Id.* at 1237; *see also* U.C.C. §§ 2-308 to 2-310 (1978).
177. *Itoh*, 552 F.2d at 1237.
178. *Id.*
179. *See* discussion *supra* Parts III.A.
180. 831 F. Supp. 759 (D. Ariz. 1993).
181. *See id.* at 764–66.

Factually, *Arizona Retail Systems* is almost identical to *Step-Saver*.[182] Arizona Retail Systems (ARS) packaged computer systems consisting of assorted hardware and software catering to specific computer users' needs.[183] After becoming aware of TSL's software and doing some preliminary testing, ARS began to conduct business with TSL.[184] TSL and ARS conducted business in much the same manner as TSL and Step-Saver—a phone call for an order was answered with a shipment.[185] TSL's software did not perform as promised.[186] ARS's customers sued, and ARS sought indemnification from TSL.[187]

The *Arizona Retail Systems* court was much more meticulous in its analysis than was the *Step-Saver* court. The court, while recognizing the applicability of UCC section 2-207, also suggested the applicability of UCC section 2-209 to help determine the terms of the contract between the parties.[188] UCC section 2-209 allows for modification to existing contracts without consideration, another major change from the common law.[189] The court found that the parties entered into several contracts and that the first contract the parties formed was materially different, and therefore, required a different analysis than the subsequent contracts.[190]

The court was unclear factually with regard to what the first interaction between ARS and TSL entailed.[191] It was unable to determine whether ARS ordered an evaluation disk from TSL, or whether it ordered the regular software package that included the evaluation disk.[192] Because of this ambiguity, and because the court ultimately determined that ARS ordered an evaluation disk, intending to test the program before putting it into produc-

182. *See id.* at 761; *see* discussion *supra* Part III.A.
183. *Arizona Retail Sys.*, 831 F. Supp. at 760.
184. *Id.*
185. *Id.* at 761.
186. *Id.*
187. *Id.*
188. *Id.* at 762–63.
189. *See* U.C.C. § 2-209 (1978).
190. *Arizona Retail Sys.*, 831 F. Supp. at 763.
191. *Id.*
192. *Id.*

tion, the court analyzed the first transaction differently than the subsequent transactions.[193]

The court held that if ARS requested an evaluation disk and a copy of the live program, and then decided to keep the live copy, then ARS was bound by the shrink-wrap contract on the packaging of the live version.[194] In this scenario, the court held that the contract was formed when ARS opened the shrink-wrap on the live version whereby ARS had notice that this would result in contract formation—not when TSL shipped the test disk and live copy.[195] The *Arizona Retail Systems* court harmonize its opinion with *Step-Saver* by using the following language:

> The court's decision in this respect is not inconsistent with Step-Saver. The Step-Saver court addressed the situation in which a contract had been formed by the conduct of the parties—i.e., through the ordering and shipping of the agreed-upon goods—but the goods arrived with the license agreement affixed. In such cases, the contract is formed before the purchaser becomes aware of the seller's insistence on certain terms.[196]

This factual nuance is key because the *Arizona Retail Systems* court's treatment of the contract on the trial copy is not unlike the judicial treatment of the Gateway cases.[197]

With regard to the subsequent contracts, TSL modified the arguments it previously used against Step-Saver, but to no avail. First, TSL argued that the shrink-wrap license was a proposed modification to the original contract that ARS accepted by opening the package, which is permissible under section 2-209.[198] Alternatively, TSL argued that the shrink-wrap license constituted a conditional acceptance of ARS's offer to purchase, and ARS accepted TSL's conditional acceptance by opening the package.[199] Finally, TSL argued that if the court insisted on applying UCC section 2-207, then the warranty terms of the shrink-wrap

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (App. Div. 1998); *see also* discussion *supra* Parts III.E–F.
198. *Arizona Retail Sys.*, 831 F. Supp. at 763; *see* U.C.C. § 2-209 (1978).
199. *Arizona Retail Sys.*, 831 F. Supp. at 764.

license became part of the contract because the terms were not material.[200]

The court responded to TSL's first argument with the following language:

> To the extent that the parties had entered into an agreement before ARS opened the shrinkwrap package, the license agreement would constitute a proposal for modification of the agreement pursuant to section 2-209. Section 2-209 requires assent to proposed modifications and this court, like the court in Step-Saver, concludes that the assent must be express and cannot be inferred merely from a party's conduct in continuing with the agreement.[201]

With regard to TSL's second argument, the court held that the shrink-wrap license could not constitute a conditional acceptance regardless of its terms or how important those terms were to TSL.[202] The court decided, "[b]y agreeing to ship the goods to Arizona Retail Systems, or, at the latest, by shipping the goods, TSL entered into a contract with ARS."[203] Once TSL entered into the contract, it had accepted ARS's offer and was not free to proffer the shrink-wrap license as a conditional acceptance.[204] This is because "conditional acceptances" are usually regarded as counteroffers.[205] A party to a contract cannot counteroffer after they have already accepted. The shrink-wrap license was either a proposal to modify or a material alteration, both of which required ARS's assent to become binding under section 2-209.[206] The court, relying on *Step-Saver*, rejected TSL's proposition that the warranty terms were not material.[207]

*Step-Saver* and *Arizona Retail Systems* seem to stand for the proposition that a contract is formed when one merchant communicates with another merchant, the parties agree on a price, and the seller ships the goods. In the event the terms are incomplete or the parties disagree on the terms, UCC sections 2-207(1) and (2), in addition to section 2-209, apply to fill in the proper

200. *Id.*
201. *Id.*
202. *Id.* at 764–65; *see also* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 101 (3d Cir. 1991).
203. *Arizona Retail Sys.*, 831 F. Supp. at 765.
204. *Id.*
205. *Id.*
206. *Id.* at 765–66.
207. *Id.* at 766.

terms—unless the one seeking the "last shot" uses words requiring the original offeror's express assent to the new terms.[208] When *ProCD v. Zeidenberg*[209] was decided, however, UCC section 2-207 may have become irrelevant in certain contexts.

## D. ProCD v. Zeidenberg

In *ProCD v. Zeidenberg*, ProCD took information from telephone directories and put them on a CD-ROM disc.[210] They added more information including nine-digit zip codes and sold the product as "SelectPhone."[211] ProCD invested more than ten million dollars to compile the information and to periodically update it.[212] To protect their investment, ProCD enclosed a restriction license in every box containing the software.[213] Additionally, ProCD placed a warning on the CD-ROM disks so that the restriction would appear whenever the program was used.[214]

Matthew Zeidenberg purchased the "SelectPhone" in 1994.[215] While he was aware of the license, he chose to ignore it and formed a company to resell the information that was in the "SelectPhone" database.[216] Zeidenberg also purchased additional copies of the "SelectPhone" to update the information he was reselling.[217] Each of these packages contained an identical license to the one included in the first copy of the "SelectPhone."[218]

ProCD sued Zeidenberg seeking an injunction to keep Zeidenberg from continuing to distribute the copied database.[219] The district court found the licenses to be invalid since they did not appear on the outside of the package and held that a person could not be bound by secret terms.[220] The district court looked at the

208. *See* discussion *supra* Parts III.A–B.
209. 86 F.3d 1447 (7th Cir. 1996).
210. *Id.* at 1447.
211. *Id.* at 1449.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 1450.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*

licenses as contracts and concluded that for there to be a valid contract there must be agreement between the parties on the terms.[221] It was Zeidenberg's position that "the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms."[222]

The Seventh Circuit questioned the lower court's analysis of the validity of the license being based on the "outside the box" terms.[223] The court pointed out that entire licenses cannot be put onto a box—it would be so small the consumer would not be able to read it.[224] The court found that "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike."[225] Thus, the key provision was UCC section 2-204.[226] There was only one merchant, the court said, and thus there could be no "battle of the forms" triggering 2-207.[227]

Comparing the situation here to that of sports, airline, or concert tickets, the full license is on the ticket and can be rejected or accepted by the use or return of the ticket.[228] In today's technologically advanced world, there are a limited number of software purchases that take place in a store with a box to scrutinize.[229] Increasingly, purchases are being made on the Internet or over the phone.[230] This led the court to question the effect of the current laws on the problem.[231] The court found that while the text was not completely fitted to the issue, the effects of the law were the same.[232]

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221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* (citing RESTATEMENT, *supra* note 5, § 211 cmt. a); 1 FARNSWORTH, *supra* note 5, § 4.26).
226. *ProCD*, 86 F.3d at 1452.
227. *Id.* at 1452. *But see supra* Parts III.A and III.C (discussing the interpretation of UCC § 2-207 (1978) within *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991), and *Arizona Retail Sys., Inc. v. Software Link*, 831 F. Supp. 759 (D. Ariz. 1993)).
228. *ProCD*, 86 F.3d at 1450.
229. *Id.* at 1451–52.
230. *Id.*
231. *Id.* at 1452–54.
232. *Id.*

The court found that ProCD's contract did allow for an opportunity to inspect the license that went into effect after the buyer used the program.[233] The court stated that ProCD, under the imprimatur of section 2-204, created a "rolling acceptance" period, which would not allow the purchaser to proceed until reading and agreeing to the terms of the license.[234]

Under UCC sections 2-602(1) and 2-606(1)(b) Zeidenberg could have returned the product if, after inspecting the license, he was unwilling to agree to all the terms.[235] Zeidenberg chose instead to inspect the license, try the product, and then keep the product to resell it on a commercial basis, thus violating the license.[236] Zeidenberg was held to the shrink-wrap agreement because he accepted the goods and accepted the terms of the license by clicking through the start of the program.[237]

While the material contained in ProCD's database was available elsewhere, ProCD compiled it and released it only under the terms of the license agreement.[238] The court held that since Zeidenberg was aware of the license and had the opportunity to return the product if he did not wish to comply with the license, then the shrink-wrap agreement was enforceable against him.[239] The court went so far as to say that this kind of license would make the information accessible on a larger scale, which would induce competition, and therefore, decrease the price of the individual products.[240] Finally, the court said that the shrink-wrap license would be "enforceable unless their terms are objectionable on grounds applicable to contracts in general. . . ."[241]

Unfortunately, this precedent-setting case does not answer all the necessary questions. For one, the decision addressed UCC section 2-207, but decided the issue was irrelevant because the case at bar only had one form.[242] This conclusion directly contradicts both *Step-Saver* and *Arizona Retail Systems* where the re-

233. *Id.* at 1452–53.
234. *Id.* at 1452.
235. *Id.*; *see also* U.C.C. §§ 2-602, 2-606 (1978).
236. *ProCD*, 86 F.3d at 1452–53.
237. *Id.* at 1452.
238. *Id.* at 1449.
239. *Id.* at 1451.
240. *Id.* at 1453.
241. *Id.* at 1449.
242. *Id.* at 1452.

spective courts held that a "battle of the forms" existed after only a telephone order.[243] *ProCD* also held that UCC section 2-207 only applied to merchants.[244] If this is true, then why does the second sentence of UCC section 2-207(2) refer directly to merchants, while merchants are not mentioned in subsection one or the first sentence of subsection two?[245] It is important to note that the holding in *ProCD* was made without any prior legal precedent.[246]

Under a section 2-207(1) and (2) analysis, the terms that are on the inside of the box or in the agreement that you click through would be considered proposals for addition to the contract.[247] It is this language that makes the opportunity to return the product at the distributor's expense so important. If, after seeing all terms of the license, the purchaser has the opportunity to return the product and chooses not to, their conduct seems to indicate that they know of and understand the terms of the contract.[248] This is essentially the analysis from *Step-Saver* and *Arizona Retail Systems*.[249]

Section 2-207(3) allows for the parties' actions to determine if a contract exists.[250] If a section 2-207 analysis was done, under the guidance of *Step-Saver* and *Arizona Retail Systems,* with the acknowledgment of the application to a non-merchant in *ProCD*, then the court could have removed some of the ambiguity that was left in this decision.

Additionally, if the court had addressed the issue of section 2-207, there would be the inclusion of "rolling contract" concerns. These "rolling contracts" mean that the contract is not formed when the product is bought, but when the purchaser opens the package and ultimately becomes aware of the additional terms; in other words, "money now terms later."[251] These con-

243. *See* discussion *supra* Parts III.A, C.
244. *ProCD,* 86 F.3d at 1452.
245. *See* U.C.C. § 2-707 (1978).
246. *See* Thomas J. McCarthy et al., *Survey: Sales,* 53 BUS. LAW. 1461, 1464 (1998).
247. *See* U.C.C. § 2-207 (1978).
248. *ProCD,* 86 F.3d at 1452.
249. *See* discussion *supra* Parts III.A, C.
250. *See* U.C.C. § 2-207(3) (1978).
251. Goodman, *supra* note 44, at 353–54.

tracts cause some concern that there is adhesion, and therefore, unconscionability.[252]

### E. Hill v. Gateway 2000, Inc.

Not long after the *ProCD* ruling came down, the Seventh Circuit Court of Appeals handed down another precedent-setting case, *Hill v. Gateway 2000, Inc.*[253] *Hill* dealt with some of the ambiguities that remained after the *ProCD* decision, including the enforceability of "rolling contracts." The Hills ordered a computer by phone and when the computer arrived so did a list of terms inside the box.[254] The terms, one of which was an arbitration clause, were said to govern unless the consumer returned the computer within thirty days.[255] The Hills were not told of any terms at the time of ordering the product, and when they received the computer and looked at the terms, the arbitration clause did not "stand out."[256] The Hills filed a lawsuit against Gateway alleging, "among other things, that the products shortcomings made Gateway a racketeer."[257] Gateway wanted the arbitration clause enforced against the Hills, but the trial judge refused, and Gateway took an immediate appeal.[258]

The Hills admitted to "noticing" the terms that came inside the box, but they denied reading them thoroughly.[259] The court noted that no law or statute required an arbitration clause to "stand out" and held that the agreement to arbitrate should be enforced.[260]

UCC section 2-204 again applied as a "rolling acceptance" period arose.[261] The court also stated that for a contract to be effec-

252. *Id.*
253. 105 F.3d 1147 (7th Cir. 1997).
254. *Id.* at 1148.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 1148, 1151.
261. *See id.* at 1148–49; *see also supra* Part III.D.

tive, it did not need to be read.[262] "People who accept take the risk that the unread terms may in retrospect prove unwelcome."[263]

The court relied heavily on *ProCD*, commenting on the binding nature of terms that were included within the product's box.[264] The Seventh Circuit held that so long as there was an opportunity to return the product if the consumer was unwilling to comply with the license terms, "[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance."[265] Gateway relied on this legal proposition to bind their customers to the license terms.[266]

According to the court, consumers generally do not have enough time to read all the restrictions included with products that are purchased.[267] Nor would it be reasonable to expect a salesperson to spend an exorbitant amount of time reading the terms to every customer.[268] It is not a productive way of doing business.[269] Instead, the use of shrink-wrap agreements with a return-or-approve policy should be applied to encourage a more prolific business arrangement.[270]

The Hills sued Gateway in part because they had problems with the quality of the product.[271] Their claim sought to invoke the warranty that came with the product since they were not satisfied with the company's response.[272] The warranty bound Gateway to future performance after the customer purchased the product.[273] Because they invoked the warranty, the Hills contradicted themselves in saying that once they received the product and Gateway received the money, all obligations were satisfied.[274]

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262. *Hill*, 105 F.3d at 1148.
263. *Id.*
264. *Id.*
265. *Id.* at 1148–49 (quoting ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996)).
266. *Id.* at 1149.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 1148.
272. *Id.* at 1149.
273. *Id.* at 1149–50.
274. *See id.* at 1149.

That is, the Hills couldn't invoke one part of the warranty to their benefit while ignoring the rest.[275] For Gateway to have been bound under the terms of the agreement, the Hills must also have been bound.[276]

The Hills argued that *ProCD* was irrelevant because they were not "merchants," and therefore, could not be bound under UCC section 2-207(2).[277] As the Hill court pointed out, however, the reason the *ProCD* court did not analyze section 2-207 was because the question in that case was one of how and when a contract may be formed, not whether terms can be added after the formation.[278] The Hills' faulty reasoning on this argument left them in an awkward position since they essentially had come up with a reason for ProCD's victory that was not part of that case's holding. The way the Hills interpreted *ProCD*, ProCD was victorious because Zeidenberg was a merchant and fell under the "unless" clause of section 2-207(2).[279]

This deft dodge by the *Hill* court did not take into account the language of section 2-207 or the holdings of *Step-Saver* and *Arizona Retail Systems*, which required no forms to make it a "battle of the forms" case.[280] Further, it did not resolve how a consumer or a merchant is to determine the difference between a box-top/shrink-wrap situation like *Step-Saver* and *Arizona Retail Systems* and a box-top situation like *ProCD* and *Hill*.

In *ProCD*, Zeidenberg's product box had the printed statement that there were additional terms inside.[281] Therefore, the Hills' second argument was that they could not be bound because they were unaware that there were additional terms inside the box.[282] This argument was not well founded. Once they opened the product box and were presented with the list of terms, the Hills were aware of the license.[283] But even this arguably goes beyond the factual scope of the case because the Hills knew before they

275. *See id.*
276. *Id.* at 1150.
277. *Id.*
278. *Id.*
279. *Id.*
280. *See* discussion *supra* Parts III.A, C.
281. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996).
282. *See Hill*, 105 F.3d at 1150.
283. *See id.*

placed their order that the computer carton would include important terms.[284] Gateway's advertisements specifically articulated this fact.[285] If the Hills had purchased the product in a store, then whether the additional terms were acknowledged on the outside of the box might have been a more legally relevant question, but that was not the case.[286]

*Hill* involved a phone order, and therefore, the need for the statement of additional terms was not necessary.[287] In fact, the court felt that customers were better off when vendors cut unnecessary costs like phone recitation.[288] If the Hills had not opened the box for more than thirty days, they would have had a good argument that a notice of additional terms was necessary in order to bind them.[289] However, based on Gateway's advertisements, the Hills knew that when the box came, it would include some terms.[290] In either case, the Hills opened the box within thirty days and were made aware of these terms.[291] In their situation, the notice of additional terms would not have prevented them from purchasing, since they did not see the box before the purchase was made.[292]

The mere fact that the additional terms were not mentioned on the outside of the box was also not a strong argument. If the Hills had been concerned about what the advertisements mentioned, they could have requested a copy of the terms or warranty before purchasing the computer.[293] The court also pointed out that the Hills could have consulted public sources, such as the Internet or Better Business Bureau.[294] Even if the Hills chose not to pursue those avenues, they had the final option of sending the product back within thirty days if the terms were not to their liking.[295]

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284. *Id.*
285. *Id.*
286. *See id.*
287. *Id.* at 1149.
288. *Id.*
289. *See id.*
290. *Id.* at 1150.
291. *Id.*
292. *See id.*
293. *Id.*
294. *Id.*
295. *Id.*

*ProCD* supports the decision in this case and upholds the license agreement and additional terms if contract formation occurred when the Hills kept the computer for thirty days.[296] The court found that because the Hills were competent adults and aware of the terms, they would be bound by the contract.[297] The Hills chose to keep the product after reading the terms and were thereby restricted by the arbitration clause, just as Gateway was bound by the warranty clause.[298]

But what result under *Step-Saver*? *Step-Saver* held that the contract between TSL and Step-Saver was formed under section 2-207, not section 2-204, when Step-Saver ordered, TSL shipped, and Step-Saver paid.[299] With the contract completed, any gaps would be filled with standard UCC provisions.[300] Any additional terms submitted by the parties were only proposals requiring some sort of assent beyond just using the software the way they had intended from the point of formation.[301] The only difference between the circumstances in *Step-Saver* and those in *Hill* is that the parties exchanged invoices and purchase orders that agreed on the goods and price.[302] Essentially, this is what Hill and Gateway did in their phone transaction, except rather than sending a purchase order, the Hills gave their credit card number.[303]

Gateway and the *Hill* court find more agreeable precedent with *Arizona Retail Systems*. Gateway could point to the section of *Arizona Retail Systems* that dealt with the initial contract separately from all the subsequent transactions.[304] But then the question arises, were the Hills ordering a trial computer, a "demo," or an appliance that they planned to put immediately into service?[305] Additionally, the problem remains, how is a consumer, based on the following precedent, to know when the contract is formed, so

296. *Id.* at 1148–50.
297. *Id.* at 1149.
298. *Id.* at 1149–50.
299. *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 99 (3d Cir. 1991).
300. *Id.* at 100–01; *see also* U.C.C. § 2-204 (1978).
301. *See Step-Saver*, 939 F.2d at 100–01; *see also* U.C.C. § 2-207 (1978).
302. *See Step-Saver*, 939 F.2d at 96.
303. *Hill*, 105 F.3d at 1148.
304. *See* discussion *supra* Part III.C.
305. *See id.* (applying logic of *Arizona Retail Systems* that the enforceability of the license with regard to demo software hinged on the fact that the software was to be tried out). Conversely in *Hill*, the argument could be made that the Hills were buying an appliance that they planned to put immediately in service.

that he can determine the applicability and enforceability of the terms of a shrink-wrap license?

## F. Brower v. Gateway 2000, Inc.

Following its victory in *Hill,* Gateway found itself embroiled in yet another dispute regarding the terms in its shrink-wrap agreement. This time the mandatory arbitration clause was the focus of inquiry in *Brower v. Gateway 2000, Inc.*[306] *Brower*, decided by the First Appellate Division of the Supreme Court of New York, followed the precedent of *Hill*, but remanded the case to determine whether Gateway's concession regarding arbitration was as unconscionable as its original terms.[307]

*Brower* was a class action lawsuit in which the plaintiffs complained of deceptive sales practices in seven causes of action.[308] These included breach of warranty, breach of contract, fraud, and unfair trade practices.[309] The plaintiffs in *Brower*, like the Hills, were angry about Gateway's failure to provide customer service and technical support.[310] Gateway moved to dismiss the complaint based on the arbitration clause in the shrink-wrap license packaged with the computer.[311]

The plaintiffs, in order to survive dismissal, argued that the arbitration clause was not part of the terms of the contract under section 2-207.[312] In the alternative, plaintiffs argued that the arbitration clause was unconscionable under section 2-302 and that the contract was one of adhesion and ultimately unenforceable.[313] To support this proposition, the plaintiffs explained how difficult and costly it was to use the arbitration forum that Gateway had designated.[314] Expense and accessibility being prohibitive, the

306. 676 N.Y.S.2d 569 (App. Div. 1998).
307. *Id.* at 574–75.
308. *Id.* at 570.
309. *Id.*
310. *Id.* at 570–71; *see also supra* Part III.E. (discussing Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997)).
311. *Id.* at 571.
312. *Id.*
313. *Id.*; *see also* U.C.C. § 2-302 (1978).
314. *Brower*, 676 N.Y.S.2d at 571.

plaintiffs argued that no reasonable consumer could be expected to appreciate the significance of the arbitration term.[315]

In support of their adhesion argument, the plaintiffs pointed out that the International Chamber of Commerce ("ICC"), the arbitration body Gateway had chosen, was not commonly used for consumer matters.[316] Additionally, the ICC headquarters was located in France, and it was difficult to locate not only the organization, but its rules as well.[317] To illustrate this point, the plaintiffs showed that the ICC was not registered with the Secretary of State of New York.[318] In fact, almost all of the plaintiffs' efforts to contact the ICC had been unsuccessful.[319] The plaintiffs eventually succeeded in obtaining the ICC's rules through the United States Council for International Business, which maintained sporadic communications with the ICC.[320]

To buttress their argument, the plaintiffs showed that the cost of ICC arbitration was prohibitive; a claim of less than $50,000 required advance fees of $4,000—$2,000 of which was nonrefundable even if the consumer won.[321] This amount was far in excess of the value of most Gateway products and any recovery an aggrieved consumer could hope to obtain.[322] The ICC also followed the European model, or the "loser pays" model, where the loser of the litigation has to pay not only all of their own expenses, including travel to Chicago, Illinois, but the expenses of their opponent as well.[323]

The court, in resolving this dispute, relied heavily on *Hill*.[324] Similar to *Hill*, the *Brower* court determined formation to be after the non-merchant plaintiffs had kept their computers for thirty days, making section 2-207 inapplicable since there was only one form.[325]

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315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.* at 571–72.
325. *Id.*

The court also rejected the plaintiffs' second argument that the arbitration clause was unenforceable as a contract of adhesion.[326] The court held that while the parties did not possess equal bargaining power, that alone was not enough.[327] According to the court, a consumer has the ultimate choice of whether to buy a computer from Gateway over the phone or to buy a computer from some other entity at a retail facility.[328] This choice, in the eyes of the court, more than made up for the disparity in bargaining power.[329] Additionally, the court was persuaded by the argument that a consumer had thirty days to inspect and use the product, and if he was unsatisfied could return it for a refund.[330] The court acknowledged that returning the goods to avoid the formation of the contract was an affirmative action that may impose an expense upon the consumer.[331] However, in the court's view, these burdens were balanced by the convenience and ease of ordering the computer over the phone.[332]

Next, the court addressed the alleged unconscionability of the arbitration clause.[333] Under New York law, unconscionability requires that a contract be both procedurally and substantively unconscionable.[334]

> [T]here must be "some showing of an 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" . . . [T]he purpose of this doctrine [of unconscionability] is not to redress the inequality between the parties but simply to ensure that the more powerful party cannot "surprise" the other party with some overly oppressive term.[335]

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326. *Id.* at 572–73.

327. *Id.*

328. *Id.*

329. *See id.*

330. *See id.*

331. *Id. But see supra* Parts III.A (discussing Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991)), III.C (discussing Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993)).

332. *Brower*, 676 N.Y.S.2d at 572–73. *But see supra* Parts III.A (discussing Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991)), III.C. (discussing Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993)).

333. *Brower*, 676 N.Y.S.2d at 573.

334. *Id.*

335. *Id.* (citations omitted).

To determine whether or not a transaction suffers from procedural unconscionability, a court will look to the contract formation process to determine if, in fact, one party "lacked any meaningful choice in entering into the contract."[336] The court considers such factors as "the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used 'high pressure' tactics, and any disparity in the parties' bargaining power."[337]

The court held that in this transaction the terms were not procedurally unconscionable.[338] To begin with, any consumer could return the product in thirty days, ample time to inspect, interpret, and reject the seller's terms.[339] The agreement was titled in large print and contained sixteen paragraphs appearing in the same size print.[340] The arbitration clause was not "hidden" within the text of the document,[341] nor was the consumer placed in a precarious position by returning the merchandise to avoid formation of the contract.[342] In other words, procedurally, there was nothing wrong with the contract, but this punch was telegraphed by the court's allegiance to the *Hill* decision.[343]

Substantive unconscionability requires an "examination of the substance of the agreement in order to determine whether the terms unreasonably favor one party."[344] The court found that the forum selection terms did not rise to the level of unconscionability, but the high cost in arbitrating before the ICC served as a deterrent to a consumer who wished to invoke the process.[345] The consumer, once barred from the courts by the arbitration clause, was effectively barred from seeking any redress at all due to the high cost of the ICC forum.[346] The court found this combination of

336. *Id.*
337. *Id.* (citing Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 828 (N.Y. 1988)).
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at 573–74.
343. *See id.* at 571–72, 574 (analyzing *Hill* with approval).
344. *Id.* at 574 (citing Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 829 (N.Y. 1988)).
345. *Id.*
346. *Id.*

elements to be unconscionable.[347] While the court noted that unconscionability in New York generally relied on both procedural and substantive unconscionability, substantive unconscionability on its own could be sufficient to render the terms of a contract unenforceable.[348]

*Brower* stands for the proposition that shrink-wrap agreements and "rolling contracts" are acceptable so long as they do not violate the rules of unconscionability. However, consumers are still left to wonder whether the phone call to the mail order computer store is an "offer" and the shipment on the part of the vendor acts as an "acceptance," thereby forming a contract.[349] On the other hand, do *ProCD*, *Hill*, and *Brower* control, mandating that the consumer's phone call becomes an invitation to offer?[350] That invitation would set into motion the steps necessary to form a "rolling contract."[351] The courts' deference to efficient business compounds this problem because, according to *Hill* and *Brower*, time is too precious to waste dictating over the phone to the consumer exactly what type of relationship he or she is entering.[352]

### G. Rinaldi v. Iomega Corp.

Following the *ProCD* and the *Gateway* decisions, various courts addressed additional issues concerning shrink-wrap-type licenses. One of these cases was *Rinaldi v. Iomega Corp.*[353] This class action suit was brought before the Superior Court of Delaware by the plaintiffs because they believed a Zip drive manufactured by Iomega caused damage to their computer storage disks.[354] The plaintiffs alleged a breach of the implied warranty of merchantability claiming that the defendant had not properly satisfied the conspicuous requirement of the Delaware Code.[355] The plaintiffs' allegations were based on the fact that the disclaimer was located

347. *Id.* at 575.
348. *Id.* at 574.
349. *See supra* Parts III.A, C.
350. *See supra* Parts III.D–E.
351. *See supra* Part III.D (discussing *ProCD*); *supra* Part III.E (discussing *Hill*).
352. *See supra* Part III.E (discussing *Hill*).
353. C.A. No. 98C-09-064 RRC, 1999 Del. Super. LEXIS 563 (Del. Super. Ct. Sept. 3, 1999).
354. *Id.* at *2.
355. *Id.* at *3.

inside the packaging.[356] They claimed, in part, that "the disclaimer, located in the packaging of the product, could not realistically be called to the attention of the consumer until after the sale had been consummated, thus rendering the disclaimer not 'conspicuous' as a matter or [sic] law and therefore ineffective."[357]

The court looked to *ProCD* and *Hill* for guidance, though the issue was somewhat varied.[358] For something to be "conspicuous," it must be "written in a way that a reasonable person against whom it is to operate ought to notice it."[359] The purpose is "to protect a buyer from unexpected and unbargained for language of disclaimer."[360] This related to the shrink-wrap license issue set forth in *ProCD*.[361] The court in *ProCD* found that additional terms inside the packaging could still bind the party, so long as the party was able to return the product if the terms were not agreeable.[362] The *ProCD* court determined that for all of the terms to be included on the outside packaging, the distributor would have to use microscopic type which would bring up UCC section 2-316 issues concerning typeface and character size.[363]

The *Rinaldi* court pointed out that while *ProCD* was dealing with a shrink-wrap license, the rule that came out of the case was that the UCC permits the use of an "approve-or-return" policy.[364] This allows terms inside the box to become part of the contract, and the terms are binding on the parties.[365]

The *Rinaldi* court also made reference to the commercial practicalities of doing business in today's market.[366] The *Rinaldi* court, much like the *ProCD* court, found that disclaimers (not unlike ProCD's license terms) were reasonably placed in the product's packaging.[367] The court stated that after purchase, con-

356. *Id.* at *7.
357. *Id.* at *10.
358. *Id.*
359. BLACK'S LAW DICTIONARY 305 (7th ed. 1999).
360. *Rinaldi*, 1999 Del. Super. LEXIS 563, at *7 (citing U.C.C. § 2-316 cmt. 1 (1962)).
361. *See supra* Part III.D (discussing *ProCD*).
362. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452–53 (7th Cir. 1996).
363. *Rinaldi*, 1999 Del. Super. LEXIS 563, at *12–13; *see also ProCD*, 86 F.3d at 1450–51; U.C.C. § 2-316(2) (1978).
364. *Rinaldi*, 1999 Del. Super. LEXIS 563, at *15.
365. *Id.* at *14–15.
366. *Id.* at *19.
367. *Id.*

sumers had the opportunity to read the disclaimers and either keep the product and accept the terms, or reject the terms by returning the product.[368] The court accepted the disclaimer, though inside the packaging, as conspicuous and thus, ruled in Iomega's favor.[369]

## H. M.A. Mortenson Co. v. Timberline Software Corp.

The recent case of *M.A. Mortenson Co. v. Timberline Software Corp.*,[370] also involved shrink-wrap license issues and whether added terms in the limitations and remedies clause are unconscionable.[371] Mortenson purchased licensed software from Timberline, which Mortenson used to prepare a construction bid.[372] After presenting the bid, Mortenson realized the bid was $1.95 million less than it was supposed to be.[373] Mortenson sued Timberline for breach of warranties, alleging that the software was defective, that the licensing agreement in the software packaging was not part of the parties' contract, and that "the provision limiting [the] damages to recovery of the purchase price was . . . unconscionable."[374]

The software was in a case with the full text of the license agreement on the outside of each diskette pouch as well as in the instruction manual.[375] Timberline also had a click-wrap agreement that appeared every time the program was used.[376] In addition, Timberline had wrapped agreements around all of the devices and products shipped to Mortenson.[377]

The software program malfunctioned nineteen times the day Mortenson attempted to use the program to make what became

368. *Id.*
369. *Id. But see* Goodman, *supra* note 44, at 358 (arguing that courts should apply adhesion contract law when enforcing "shrink-wrap" agreements found in pre-packaged software).
370. 998 P.2d 305 (Wash. 2000).
371. *See id.* at 307.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.* at 308.
376. *Id.*
377. *Id.*

"the unreasonable bid."[378] It later surfaced that the software had a number of bugs and that numerous complaints had been made to Timberline.[379] Timberline reacted by sending out an updated version of the software.[380] This action showed that the software was defective.

Mortenson's main argument was that the purchase order alone was the fully integrated contract to which the parties were bound and that the additional terms of the license were not part of the contract.[381] The *Mortenson* court distinguished *Step-Saver* before analyzing and basing its decision on *ProCD*.[382] According to the *Mortenson* court, *Step-Saver* did not apply because "this is a case about contract formation, not contract alteration."[383] Factually, the *Mortenson* court distinguished *Step-Saver* on the grounds that *Step-Saver* was not about the "enforceability of a standard license agreement against an *end-user*."[384] *Step-Saver*, according to the *Mortenson* court, regarded the applicability of a shrink-wrap license agreement to a middleman "who [was] simply includ[ing] the software in an integrated system" and "had been assured that the license did not apply."[385]

The court, in analyzing this case, found that the parties did not intend for the purchase order to be the full contract.[386] It also found "that the purchase order did not prevent the terms of the license from becoming part of the contract or render the limitation of [the] remedies clause unenforceable."[387] Mortenson attempted to argue that the license terms were merely requests to add new terms to the contract.[388] The court followed *ProCD* and held that the terms of the license were part of the contract.[389]

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378. *Id.* at 309.
379. *Id.*
380. *Id.*
381. *Id.* at 309–10.
382. *See id.* at 312–13; *see supra* Part III.D (discussing *ProCD*).
383. *Mortenson*, 998 P.2d at 312; *supra* Part III.A (discussing *Step-Saver*).
384. *Mortenson*, 998 P.2d at 312.
385. *Id.*
386. *Id.* at 313.
387. *Id.* at 310–11.
388. *Id.*
389. *Id.* at 313.

Thus, when Mortenson used the software, he agreed to the terms.[390]

Mortenson's final argument was that even if he was bound by the license terms, the limited remedies clause was unconscionable.[391] The court did not find that the limited remedies clause was one-sided or overly harsh.[392] For instance, Mortenson had the option to return the program and not be bound by the clause.[393] He chose to take advantage of the program and was therefore bound by the contract terms.[394] The court ultimately declared that Timberline's license terms were valid, enforceable, and binding on Mortenson.[395]

The *Mortenson* case was one of the most recent cases to be based on the Seventh Circuit's rationale provided in *ProCD* and *Hill*. Unfortunately, the Washington Supreme Court completely disregarded the Third Circuit's analysis and distinguished *Step-Saver* and *Arizona Retail Systems* as cases that deal with alteration of contracts rather than formation.[396] Disturbingly, the foundation of the Seventh Circuit's "rolling contract" logic that the Washington Supreme Court accepted is itself without foundation.[397] The rule announced in *ProCD* is not consistent with traditional contract logic and flies in the face of not only the Third Circuit (*ProCd*, *Hill*), but the First Circuit as well[398] and seems to adopt a position it denounced a long time ago.[399] While the Seventh Circuit very astutely recognizes the need for efficiency in e-commerce, it seems to be willing to sacrifice consumer protection to achieve that goal.[400]

## I. Klocek v. Gateway, Inc.

The most recent case to interpret the enforceability of shrink-

390. *Id.*
391. *Id.* at 314.
392. *See id.* at 314–15.
393. *See id.* at 313, 315.
394. *See id.* at 315–16.
395. *Id.* at 316.
396. *See id.* at 312; *see also id.* at 317 (Sanders, J., dissenting).
397. *See* Goodman, *supra* note 44, at 350; *see also* McCarthy, *supra* note 246, at 1464.
398. *See* Ionics, Inc. v. Elmwood Sensors, Inc., 110 F.3d 184, 188–89 (1st Cir. 1997).
399. *See* Roto-Lith Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).
400. *See* McCarthy, *supra* note 246, at 1466.

wrap licenses is *Klocek v. Gateway, Inc.*[401] *Klocek* articulates the split in authority between the Seventh Circuit (*ProCd* and *Hill*) and the Third Circuit (*Step-Saver*).[402] The *Klocek* court notes that the shrink-wrap cases have all turned on the formation of the contract between the parties.[403] The United States District Court for the District of Kansas refused to follow *ProCD* and its progeny in favor of the UCC section 2-207 analysis adopted by the *Step-Saver* court.[404]

The *Klocek* dispute arose out of the "purchase[ ] of a Gateway computer and a Hewlett–Packard scanner."[405] The typical Gateway scenario ensued with the plaintiff alleging false advertising and breach of contract, and Gateway seeking shelter under the arbitration agreement in its shrink-wrap license.[406] Gateway also pointed out that it mailed a copy of its quarterly magazine to all existing customers which contained a notice of a change in the arbitration terms of the shrink-wrap license.[407] The nature of the change was to expand a consumer's choice in arbitration bodies.[408] These facts are not all that revealing as they tend to exemplify the pattern of litigation surrounding Gateway's shrink-wrap license. However, what is extremely intriguing is footnote one in the *Klocek* court's analysis, which states, "[n]either party explains why—if the arbitration agreement was an enforceable contract—Gateway was entitled to unilaterally amend it by sending a magazine to computer customers."[409]

Gateway, as if anticipating the *Klocek* court's disapproval of its shrink-wrap license agreement, made a policy argument based on the Federal Arbitration Act ("FAA").[410] As the court pointed out, "The FAA ensures that written arbitration agreements in maritime transactions and transactions involving interstate commerce are 'valid, irrevocable, and enforceable.' Federal policy favors ar-

401. 104 F. Supp. 2d 1332 (D. Kan. 2000).
402. *Id.* at 1337.
403. *Id.* at 1338.
404. *Id.* at 1338–40.
405. *Id.* at 1334.
406. *Id.*; *see also supra* Part III.E (discussing *Hill*); *supra* Part III.F (discussing *Brower*).
407. *Klocek*, 104 F. Supp. 2d at 1335 n.1.
408. *Id.* For an explanation for this change, see *supra* Part III.F (discussing *Brower*).
409. *Klocek*, 104 F. Supp. 2d at 1335 n.1.
410. *Id.* at 1335.

bitration agreements and requires that we 'rigorously enforce' them. 'Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'"[411] The court was persuaded that arbitration could be compelled but placed an "initial summary-judgment-like burden of establishing that it [was] entitled to arbitration" on Gateway.[412] Gateway ultimately failed to meet this burden.[413]

The *Klocek* court held that the holes in the evidentiary record were too big to allow it to agree with Gateway and compel arbitration.[414] While there was some question as to whether Missouri or Kansas law would apply, the court ultimately determined that it did not matter because both states had adopted the UCC, which governed the transaction.[415]

The court then acknowledged the split in authority between the Seventh Circuit (*ProCD, Hill*), the Third Circuit (*Step-Saver*), and the District of Arizona (*Arizona Retail Systems*).[416] The court determined that the split in authority was attributable to the point in time that each individual court determined the formation of the contract to be complete.[417] Here, "[t]he Court [was] not persuaded that Kansas or Missouri courts would follow the Seventh Circuit . . . . [T]he Seventh Circuit concluded without support that UCC § 2-207 was irrelevant because the cases involved only one written form."[418]

According to the *Klocek* court, UCC section 2-207 disputes often arise under a "battle of the forms" scenario, but nothing in the language of section 2-207 precludes its application to scenarios where there is only one form.[419] In fact, the court pointed to the

411. *Id.* (citations omitted).
412. *Id.* at 1336.
413. *Id.*
414. *Id.*
415. *Id.* at 1336–37.
416. *Id.* at 1337–38.
417. *Id.* at 1338.
418. *Id.* at 1339; *see also* sources cited *supra* note 397.
419. *Id.*; UCC section 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the

official comment of section 2-207 noting that, "2-207(1) and (2) apply 'where an agreement has been reached orally . . . and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed.'"[420] The court noted that both Kansas and Missouri have adopted this analytical approach, and therefore, UCC section 2-207 applied to the dispute.[421]

After announcing that UCC section 2-207 was applicable, the court scrutinized the contractual labels of the parties.[422] The *Klocek* court took exception to the *ProCD* court's finding that "the vendor is the master of the offer."[423] "In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree."[424] The general exception is when a price quote can amount to an offer if it reasonably appears that assent is the only thing required to turn the quote into a contract.[425] However, the court ruled that Gateway had not shown any evidence which would place the controversy under this narrow exception.[426]

Therefore, in the *Klocek* court's eyes, Klocek made the offer that Gateway accepted when it shipped the computer.[427] With formation determined, the court proceeded with the section 2-207 analysis.[428] According to the court, under section 2-207, Gateway's shrink-wrap license was "either an expression of acceptance or [a] written confirmation. As an expression of acceptance, the Standard Terms [shrink-wrap license] would constitute a counteroffer only if Gateway expressly made its acceptance conditional on plaintiff's assent to the additional or different terms."[429] The court stated, "'the conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the addi-

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contract [if the contract is not between merchants].

U.C.C. § 2-207 (1978).

420. *Klocek*, 104 F. Supp. 2d at 1339 (citing U.C.C. § 2-207 cmt. 1 (1978)).

421. *Id.* at 1339–40.

422. *Id.* at 1340–41.

423. *Id.* at 1340 (citing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996)).

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

tional or different terms are included in the contract.'"[430] The court found the record barren of any such notice.[431]

*Klocek* created confusion with regard to which test to use when determining whether or not conditional acceptance has been adequately communicated to and acted upon by the offeror. One view holds that, "the offeree's response stating a materially different term solely to the disadvantage of the offeror constitutes a conditional acceptance."[432] The other end of the spectrum holds "that the conditional nature of the acceptance should be so clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed without the additional or different terms."[433] The middle ground "approach requires that the response predicate acceptance on clarification, addition or modification."[434] The court noted that the first standard had been overruled and that Gateway did not satisfy either of the other two standards, so deciding which one was applicable was irrelevant.[435]

The *Klocek* court vindicated the Hills by deciding that the plaintiff in the case at bar, in almost exactly the same situation as the Hills, was not a merchant.[436] Because Klocek was not a merchant, the additional terms contained in the shrink-wrap license were not part of the contract.[437] Gateway argued that Klocek accepted the terms by keeping the computer more than five days.[438] The court agreed that under the terms of the contract the plaintiffs' retention of the computer for more than five days would

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430. *Id.* (quoting Brown Mach., Inc. v. Hercules, Inc., 770 S.W.2d 416, 420 (Mo. Ct. App. 1989)).

431. *Id.* at 1341.

432. *Id.* at 1340 n.12.

433. *Id.* at 1340–41 n.12.

434. *Id.* at 1341 n.12.

435. *Id.* at 1341.

436. *Id.*; *see supra* Part III.E (discussing *Hill*). The Seventh Circuit held that it did not matter that the Hills were not merchants because UCC section 2-207 did not apply. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997).

437. *Klocek*, 104 F. Supp. 2d at 1341; *see also* U.C.C. § 2-207(2) (1978).

> The additional terms are to become construed as proposals for additions to the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

*Id.*

438. *Klocek*, 104 F. Supp. 2d at 1341.

bind them to the terms of the contract.[439] However, Gateway failed to prove that the contract was binding at all; therefore, the five-day retention period term was neither effective nor enforceable.[440] Further, the court was unpersuaded by the argument that keeping the computer for more than five days, by itself, demonstrated assent.[441]

Thus concludes the most recent chapter in the shrink-wrap saga. However, more questions are left than answered. Which courts' rationale controls, that of the Seventh Circuit, the Third Circuit, or one of the numerous state or federal district courts that have analyzed the shrink-wrap problem? If nothing else, the body of case law points to a discrepancy in the law which seems to invite the intervention of the United States Supreme Court. The ultimate outcome of this controversy, however, may depend on whether Supreme Court appointments are made by President George W. Bush.

### J. Caspi v. Microsoft Network, L.L.C.

One last case pertains to the discussion of UETA, UCITA, and other proposed e-commerce legislation. *Caspi v. Microsoft Network, L.L.C.*[442] analogized shrink-wrap licenses and agreements to click-wrap licenses and agreements.[443] In *Caspi*, the Appellate Division of the Superior Court of New Jersey agreed with the future UCITA by holding an "on-screen click" acceptable conduct sufficient to bind a party to a contract, so long as the user had a reasonable opportunity to read the contract.[444] In *Caspi*, prospective MSN members were prompted by the software to view the membership agreement.[445] The agreement appeared in a scrollable computer screen with two choices stating "I Agree" or "I Don't Agree."[446] Potential members had the option to click either response at any time while viewing the agreement.[447] The agree-

439. *Id.*
440. *Id.*
441. *Id.*
442. 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).
443. *Id.* at 532.
444. *Id.*
445. *Id.* at 530.
446. *Id.*
447. *Id.*

ment also contained a forum selection clause, which stated that all actions deriving from the agreement would be venued in King County, Washington.[448] Potential members incurred no charges until they viewed the agreement, or were afforded an opportunity to view, and clicked the "I Agree" button.[449]

In *Caspi*, the court held that the forum selection clause, as well as the rest of the contract, was enforceable because members could scroll through the contract and read it before clicking the mouse in agreement.[450] Thus, according to the court, the ability to scroll through numerous computer screens is sufficient to make an online agreement enforceable.[451] The court felt that medium alone is insufficient to hold a contract unenforceable, because just as individuals can read through the fine print of a written agreement, they can also read through fine print on a computer screen.[452]

One problem with contracts like the one at issue in *Caspi* is whether the person who clicks the "I Agree" button has the authority to do so. Traditional agency law is hard to apply because, when dealing with the electronic medium, it is hard to decipher "apparent authority" when individuals are not seeking or talking with each other. Thus, UCITA requires attribution to the sender as evidence of authorization.[453] Under UCITA, attribution to the sender occurs when: (1) it was sent by the sender; (2) there was a commercially reasonable attribution procedure used; or (3) the sender was negligent and the receiver detrimentally relied on it.[454] UCITA does not, however, define what "commercially reasonable" is; that is left for the courts to define.[455]

448. *Id.* at 529.
449. *Id.* at 530.
450. *Id.* at 532.
451. *Id.* at 530.
452. *Id.* at 531.
453. *See* U.C.I.T.A. §§ 108, 212–13 (2001).
454. *See id.*
455. *See id.* § 212.

## IV. STATE LEGISLATION AND THE DEVELOPMENT OF UETA & UCITA

### A. *State Legislation*

Prior to E-SIGN, about forty-four states had enacted, or were considering, legislation to account for signed writings in the electronic context.[456] Utah was the first state that recognized the need for revolutionizing the Statute of Frauds when it enacted the Digital Signatures Act in 1995.[457] Under the Utah approach, a digitally signed message satisfies both the "writing" and "signing" requirement of the Statute of Frauds.[458] In order to understand the significance of this Act and others modeled on it, it is necessary to examine the technology underlying Utah's Digital Signature Act.

Essentially, digital signatures allow for authentication of documents transferred online.[459] Authentication is important to online contracts because it provides the security and accuracy consumers and buyers are searching for over the Internet.[460] For example, companies that receive credit card numbers can defend against fraud by using the digital signature to verify the identity of the purchaser, or an e-mailed offer of employment could be legally binding if sent and signed by the employer.

One way of producing a digital signature is through the use of encryption.[461] Encryption is based on the use of two mathematical keys to encode and decode the signature of the sender.[462] The signature is encrypted on the text of the electronic message to verify the original content, sender, and whether alteration or tampering has occurred.[463] The signature is composed of two encrypted keys,

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456. Ballard, *supra* note 4, at B6.

457. UTAH CODE ANN. §§ 46-3-101 to -504 (1999); Thomas J. Smedinghoff, *Moving with Change: Electronic Signature Legislation as a Vehicle for Advancing E-Commerce,* 17 J. MARSHALL J. COMPUTER & INFO. L. 723, 726 (1999).

458. *See* Smedinghoff, *supra* note 457, at 726.

459. John A Chanin, *The Uniform Computer Information Transactions Act: A Practitioner's View,* 18 J. MARSHALL J. COMPUTER & INFO. L. 279, 305 (1999).

460. *Id.* at 305–06.

461. Scoville, *supra* note 53, at 349 (explaining that encryption was the focus of the Utah Digital Signature Act, however there are other methods, each with their own peculiar drawbacks); *see* Alvarez & Clausing, *supra* note 1.

462. Scoville, *supra* note 53, at 349–50.

463. *Id.* at 352–54.

one private, one public.[464] The private key is kept solely in the possession of, and known only to, the sender of the message whereas the public key is made publicly available.[465] The two keys are mathematically related such that a message decrypted by the public key could only have been encrypted by the private key.[466] Thus, one can decode with the public key and verify the owner of the private key, but not be able to deduce the code of the private key.[467] Further, the two keys provide a built-in security system because if the message has been tampered with or altered in any way, the public key will be unable to decrypt the message, indicating there has been an alteration since signing.[468]

Digital signature keys are purchased by the sender and issued through a Certification Authority ("CA").[469] A CA is usually a trusted third party such as a bank or company specializing in the digital signature process.[470] The role of a CA is to verify the respective identities of parties possessing key pairs and then to certify the digital signatures of the parties involved in the transaction.[471] Once the CA has verified the "private key," or signature of the sender, the CA will inform the recipient of the digitally signed message which "public key" is necessary to decode the message.[472]

While encrypted digital signature technology provides the ability to authenticate and legally bind parties to online contracts, it is not without its disadvantages. First, the mere cost factor of purchasing keys and setting up CAs may provide a barrier to immediate implementation. Not only will companies/consumers have to purchase the software, they must also train employees on the encryption/decryption process.

Second, the lack of uniformity in the nationwide implementation of digital signatures poses problems for the widespread acceptance and use of such technology.[473] While many states have recognized some form of digital signature, each state has tailored

464. *Id.* at 351–52.
465. *Id.* at 351.
466. *Id.* at 352–53.
467. *Id.* at 351.
468. *Id.*
469. *Id.* at 352.
470. *Id.* at 352–53.
471. *Id.*
472. *Id.*
473. Scoville, *supra* note 53, at 400–01.

this use to meet their own needs and not the needs of nationwide implementation.[474]

California, the second state to respond to the influx of electronic commerce and the Statute of Frauds controversy, enacted Chapter 78.[475] Under Chapter 78, a written contract is no longer needed in sophisticated business contracts involving derivative, foreign exchange, and certain other financial market transactions, known collectively as "qualified financial contracts."[476]

This abolishment of a written contract requirement under Chapter 78 is only applicable to qualified financial contracts that: (1) cannot be performed within one year; (2) are for the sale of goods over $500; and (3) are for the sale of personal property over $5,000.[477] Further, Chapter 78 requires independent evidence that an agreement exists.[478] Such evidence may come in the form of a printed copy of any electronic communication so long as a hard copy is provided.[479] Additionally, an enforceable contract can be created by sending a confirmation within five business days of an agreement.[480] The responding party has three business days upon receiving the confirmation to send a rejection, and without it, the contract will prevail.[481] By passing Chapter 78, California has recognized the continuous and rapidly changing face of modern technology in the business world by accommodating new forms of communication under the Statute of Frauds in order to facilitate the transactional process.

California's minimalist and technology-neutral approach to digital signatures was much different than the Utah Digital Signatures Act, which tended to focus on issues raised by cryptography based digital signatures.[482] This technology-neutral attitude

474. *Id.* Some states embrace the digital signature in its full capacity, while others maintain that mere electronic signatures will suffice. *Id.*

475. CAL. CIV. CODE § 1624(b) (2001). *See generally* John M. Feser Jr., *Has Communication Technology Rendered the Statute of Frauds a Fraud of a Statute?*, 30 MCGEORGE L. REV. 431 (1999) (describing the background of Chapter 78).

476. CAL. CIV. CODE § 1624(b) (2001).

477. *Id.* § 1624(b)(2).

478. *Id.* § 1624(b)(3).

479. *Id.* § 1624(b)(3)(A).

480. *Id.* § 1624(b)(3)(B).

481. *Id.*

482. *See* Smedinghoff, *supra* note 457, at 726.

was reflected in UETA and UCITA and ultimately in E-SIGN.[483] Further, it would seem that states still retain the power under E-SIGN to determine what types of technology are acceptable to conduct electronic commerce, with one exception.[484] E-SIGN specifically provides that sound technology cannot be used to authenticate a digital signature, so at least for the time being, this type of technology seems to be on hold.[485]

Leaving the states to determine what type of technology is acceptable to conduct electronic commerce could open up another can of worms. For example, Utah's legislation is biased, technologically speaking, to cryptography.[486] Contrast this with Georgia which takes the broader approach that the writing and signature requirements of the Statute of Frauds will be satisfied by an "electronic signature."[487] A "secure electronic signature" under Georgia law is a verification method "unique to the person using it, . . . capable of verification, . . . under the sole control of the person using it, and . . . linked to data in such a manner that if the data are changed the electronic signature is invalidated."[488] The various state interpretations have resulted in incompatible technologies that stand in the way of widespread implementation of online authentication. Therefore, until there is federal legislation with regards to digital or electronic signatures, it is unclear which state law will govern the use of digital/electronic signatures and whether the agreement will be enforceable amongst buyers and sellers of varying states.

## B. *UCITA*

UCITA was the first attempt at creating a uniform body of law with regard to electronic commerce.[489] Originally, UCITA was a proposed revision to the UCC known as Article 2B to be submitted along with revisions of Articles 1, 2 and 2A.[490] After losing the

483. *See id.* at 726–27.
484. *See* 15 U.S.C. § 7002 (2000).
485. *See id.* § 7001.
486. *See* UTAH CODE ANN. §§ 46-3-101 to -504 (2000).
487. *See* GA. CODE ANN. § 10-12-4 (2000).
488. *Id.* § 10-12-3(6).
489. Mayhan & Fennelly, *supra* note 35, at 63.
490. O'Rourke, *supra* note 36, at 647.

support of the ALI, Article 2B was renamed UCITA.[491] The drafters of UCITA sought to emulate the state legislation previously discussed, seeking to replace common law "writing" and "signing"[492] requirements with the concept of a "record"[493] that is "authenticated."[494] The term "record" is used as a substitute for the "writing" requirement, and was designed to add electronically stored information to writings currently defined under the UCC.[495]

UCITA also provided for three methods to form an agreement or consent to a particular term. The first method is the traditional "agreement"[496] between parties by manifesting assent to a record or term, or by authenticating a record of term.[497] The law uses "authentication"[498] in place of a signature requirement.[499] Thus definition allows for the use of digital or other electronic signatures.[500] Manifestation of assent also was defined.[501]

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491. *See* Mayhan & Fennelly, *supra* note 35, at 63.

492. "Sign" means "[t]o identify (a record) by means of a signature, mark, or other symbol with the intent to authenticate it as an act or agreement of the person identifying it." BLACK'S LAW DICTIONARY 1386 (7th ed. 1999).

493. *See* U.C.I.T.A. § 102(55) (2001) ("[I]nformation that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.").

494. *See id.* § 102(6) ("[T]o sign; or with the intent to sign a record, otherwise to execute or adopt an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with that record.").

495. *See* Raymond T. Nimmer, *International Information Transactions: An Essay on Law in an Information Society*, 26 BROOK. J. INT'L L. 5, 8 (2000).

496. *See* U.C.I.T.A. § 102(4) (2001) ("[T]he bargain of the parties in fact as found in their language or by implication from other circumstances, including course of performance course of dealing and usage of trade as provided in this [act].").

497. *Id.* § 210.

498. *See id.* § 102(6).

499. *See id.* § 101.

500. *See id.*

501. UCITA defines "manifestation of assent" as follows:

> (a) A person manifests assent to a record or term if the person, acting with knowledge of, or having an opportunity to review the record, term or copy of it:
>
> (1) authenticates the record or term with intent to adopt or accept it; or
>
> (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.
>
> (b) An electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent:
>
> (1) authenticates the record or term; or
>
> (2) engages in operations that in the circumstances indicate acceptance of

In itself, manifestation of assent usually does not replace other forms of agreements, but when the law is unclear regarding an agreement following the manifestation of assent, rules will provide evidence of such agreement.[502]

UCITA was intended as a key step toward uniformity in the courts where electronic commerce is concerned. UCITA, prepared by NCCUSL, applies specifically to commercial agreements[503] and

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the record or term.

(c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.

(d) Conduct or operations manifesting assent may be proved in any manner, including a showing that a person or an electronic agent obtained or used the information or informational rights and that a procedure existed by which a person or an electronic agent must have engaged in the conduce or operations in order to do so. Proof of compliance with subsection (a) (2) is sufficient if there is conduct that assents and subsequent conduct reaffirms assent by electronic means.

(e) With respect to an opportunity to review, the following rules apply:

(1) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.

(2) An electronic agent has an opportunity to review a record or term only if it is made available in manner that would enable a reasonably configured electronic agent to react to the record or term.

(3) If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record. However, a right to a return is not required if (a) the record proposes a modification of contact or provides particulars of performance under Section 305; or

(A) the record proposes a modification of contact or provides particulars of performance under Section 305; or

(B) the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began.

(4) The right to a return under paragraph (3) may arise by law or by agreement.

(f) The effect of provisions of this section may be modified by an agreement setting out standards, applicable to future transactions between the parties.

(g) Providers of online services network access, and telecommunications services, or the operators of facilities thereof, do not manifest assent to a contractual relationship simply by their provision of those services to other parties, including, without limitation, transmission, routing, or providing connections, linking, caching, hosting, information location tools, or storage of materials, at the request or initiation of a person other than the service provider.

*Id.* § 112.

502. *See id.* § 210.

503. Patrick A. Shah, *The Uniform Computer Information Transactions Act*, 15

was designed to: "(1) support and facilitate the realization of the potential of computer information transactions; (2) clarify the law governing computer information transactions; (3) enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; (4) promote uniformity of the law. . . ."[504]

UCITA was designed to cover software licenses, programs, and electronic commerce where computer information is the majority of the document.[505] The contracts covered by UCITA, are considered valid contracts and are enforceable.[506] However, to bind a party, UCITA requires that "licensee[s] have an 'opportunity to review' the terms prior to assenting and also that [they] reaffirm assent for electronic transactions."[507]

UCITA, for example, contains provisions specifically applicable to shrink-wrap and click-wrap agreements.[508] The buyer must know of the possibility of more terms to the agreement, have the right to return the product at the distributor's cost, and if the software caused changes in the computer, then compensation must be given by the distributor.[509] These qualifications are established to attempt to avoid problem areas such as unconscionability and adhesion, yet still allow the contracts to be found valid.[510]

Unconscionability issues, however, will not be ignored, and compliance with UCITA's qualifications does not guarantee validity.[511] Shrink-wrap licenses can and will be found unenforceable and void in certain instances. When this happens, the distributor is left with very little recourse other than relying on copyright and intellectual property laws.[512]

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BERKELEY TECH. L.J. 85, 85 (2000).

504. U.C.I.T.A. § 106(a) (2001).

505. Shah, *supra* note 503, at 85.

506. *Id.* at 90–91.

507. *Id.* at 90.

508. U.C.I.T.A. § 209 (2001). Comment 2(a) to section 209 provides additional insight on this point.

509. *See* Shah, *supra* note 503, at 91.

510. U.C.I.T.A. § 211 (2001).

511. *See* Shah, *supra* note 503, at 90–91.

512. Founds, *supra* note 67, at 101.

The proposed changes in the UCC and UCITA include changing the warranties to be more applicable to today's products.[513] One of the planned changes is to distinguish between two types of express warranties, information and informational content.[514] These new express warranties would provide better coverage for today's technology by applying to programs, databases, and other technological algorithm processes.

The original implied warranties would remain essentially unchanged. A third implied warranty, however, would apply to software development and design contracts.[515] The implementation of these warranties on computer-based products is a way for the distributor and the consumer to check and balance each other. The warranty is not effective if the license is not agreed to, but if it is agreed to, the warranty protects the consumer.[516]

The continued applicability of UCITA is somewhat in question. The few states that have adopted UCITA have added extensive amendments, changing the core of the document.[517] Additionally, E-SIGN, which specifically references UETA, seems at least to preliminarily indicate a preference for legislation at the federal level.[518] Further, some commentators argue that UCITA conflicts with federal intellectual property law.[519] All of these factors, combined with UCITA's allegiance with the highly controversial precedent of *ProCD*, could spell the end of the statute.

### C. *UETA*

UETA[520] was developed concurrently with UCITA, and in July of 1999, UETA was approved by NCCUSL and various states began implementing the legislation.[521]

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513. *See* Shah, *supra* note 503, at 94–95; *see also* Harris, *supra* note 41, at 387–89; Kaner, *supra* note 39, at 484.

514. Shah, *supra* note 503, at 95.

515. *Id.* at 96.

516. *Id.*

517. *See* Rustad, *supra* note 43, at 589.

518. *See* 15 U.S.C. § 7002 (2000).

519. Towle, *supra* note 39, at 875–76.

520. U.E.T.A. § 5b (Dec. 13, 1999 Draft). Like UCITA, UETA may be found at the official Web site of NCCUSL's Uniform Law Commissioners. The site is located at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last updated Jan. 11, 2002).

521. Amelia H. Boss, *Uniform Electronic Transactions Act*, *in* ECOMMERCE:

UETA is somewhat broader in scope than UCITA. As one commentator has noted:

> Where the UCITA is limited to commercial licensing, the UETA applies to many non-commercial signatures and records.
>
> Most prominent among the substantive differences between the UCITA and the UETA is that the UCITA still includes evidentiary presumptions for signatures that use reasonable attribution or security procedures. Where the UETA has deleted its provisions on the effect of a security procedure, the UCITA may instead delete the penalties for mandating unreasonable procedures.[522]

UETA applies to electronic transactions. Transactions that are covered are those that involve an "action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs."[523]

UETA construes an electronic signature to be an "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."[524] The need for signatures on contracts is threefold: (1) to assure the accuracy of information included; (2) to show that the parties had an opportunity to read the contract; and (3) to establish an agreement by the parties.[525] By allowing an electronic signature to "stand in" for a written signature, and subsequently enforcing electronic contracts, people and businesses can proceed with a certain amount of confidence.[526]

The validation of electronic signatures will not only be of use in electronic contracts, but it will also benefit click-wrap licenses. Presently, click-wrap licenses are acknowledged when the "accept" button is selected during installation of the software.[527] If a signature replaced the "accept" button, it would make the agreement more likely to be enforced.[528] As long as the UETA rules are

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STRATEGIES FOR SUCCESS IN THE DIGITAL ECONOMY 2000, at 391, 393 (PLI Intellectual Prop. Course, Handbook Series G-588, 2000).

522. Scoville, *supra* note 53, at 394–95.

523. U.E.T.A. §§ 2(16), 3 (Dec. 13, 1999 Draft).

524. *Id.* § 2(8).

525. R. David Whitaker, *Rules Under the Uniform Electronic Transactions Act for an Electronic Equivalent to a Negotiable Promissory Note*, 55 BUS. LAW. 437, 437 n.1 (1999).

526. *See* Boss, *supra* note 521, at 397.

527. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452–53 (7th Cir. 1996).

528. *See* Whitaker, *supra* note 525, at 447–48.

adhered to, it appears the use of signatures in licenses would benefit distributors employing click-wrap licenses.[529]

UETA is in place to protect parties involved in electronic contracts and to promote their use.[530] It is of interest that while deleted in the latest version, UETA originally included a so-called repugnancy clause.[531] While the clause was included because certain parties felt that electronic contracts and signatures were not sufficient for some transactions,[532] others felt that its inclusion would cause uncertainty.[533] Because of the repugnancy clause parties using an electronic contract had to first ensure that their contract fell within the scope of UETA.

### D. *E-SIGN*

E-SIGN goes far beyond any of the state measures, including UCITA, UETA, and even the UCC, and affects "services" as well as "real property," a broad sweep for one statute, which also allows opportunities for judicial activism.[534] E-SIGN simply provides that, "with respect to any transactions in or affecting interstate or foreign commerce,"[535] a contract cannot be denied legal effect because it was executed by an "electronic signature"[536] or an "electronic record,"[537] or an "electronic agent"[538] made the transaction.[539]

The statute provides that "a State statute, regulation, or other rule of law *may* modify, limit, or supersede" this law, only if it is

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529. *See id.*

530. *See* U.E.T.A. § 6 cmts. 1–2 (Dec. 13, 1999 Draft); Whitaker, *supra* note 525, at 439.

531. See Scoville, *supra* note 53, at 389.

532. *See id.* at 383.

533. *Id.* at 389 n.205.

534. *See* 15 U.S.C. §§ 7001(a), 7006(13) (2000).

535. *Id.* § 7001(a).

536. *Id.* § 7006(5) ("The term 'electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.").

537. *Id.* § 7006(4) ("The term 'electronic record' means a contract or other record created, generated, sent communicated, received, or stored by electronic means.").

538. *Id.* § 7006(5) ("The term 'electronic agent' means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time or the action or response.").

539. *Id.* § 7001(a).

"an enactment or adoption of the Uniform Electronics Transactions Act," as approved by NCCUSL and not inconsistent with E-SIGN.[540] Moreover, E-SIGN preempts Articles 2 and 2A in their entirety as well as UCC sections 1-107 and 1-206 in every state.[541]

The purpose of E-SIGN is broad. Congress stated that "by removing the uncertainty over the legal effect, validity, or enforceability of electronic signatures and records, electronic commerce will have the opportunity to reach its full potential."[542]

With one exception, the legislators were quite careful to avoid determining what type of "encryption"[543] or "signature device"[544] will be permitted. E-SIGN contains a prohibition against oral communications qualifying as an "electronic record."[545] Beyond this exception, however, commentators argue that the states should ultimately determine what kind of signature technology to approve and accept.[546] Thumbprints, simple passwords, pin numbers, or encrypted keys are distinct possibilities.[547] However, could a clever hacker simply access this "secret" method and affix a consumer's signature to an electronic contract not authorized?

"Consumers are left to prove a negative," says Margo Saunders of the National Consumer Law Center.[548] Without a requirement for a paper signature, hackers could easily forge electronic signatures on anything from online purchases to credit card applications.[549] Thus the states may have a major task in developing further protections of users.[550]

E-SIGN states that a consumer may "consent [ ] electronically or confirm [ ] his or her consent electronically, in a manner that

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540. *Id.* § 7002(a)(1).

541. *Id.* § 7003(a)(3).

542. H.R. REP. NO. 106-341, pt. 1, at 8 (1999).

543. Scoville, *supra* note 53, at 350 ("Encryption, specifically, is the process whereby an algorithm (a series of mathematical processes) is applied to . . . data, or plain text, producing the scrambled ciphertext. Through an inverse mathematical process, namely decryption, the ciphertext may be retransformed into the original plain text.").

544. *Id.* at 349–50. ("Hardware, software or technology of some kind which authenticates identity and attaches it to information.").

545. 15 U.S.C. § 7001(c)(6) (2000).

546. Scoville, *supra* note 53, at 409.

547. Alvarez & Clausing, *supra* note 1.

548. *Id.*

549. *Id. Cf.* Scoville, *supra* note 53, at 357 (noting that paper signature requirements are often imposed because of concern about authenticity).

550. *See* Alvarez & Clausing, *supra* note 1.

reasonably demonstrates that the consumer can access information in the electronic form. . . ."[551] Of course, a consumer could withdraw her consent if it is received "within a reasonable period of time."[552] What if the recipient of such a "withdrawal" by e-mail is on vacation and does not open it for two weeks? E-SIGN suggests that he will be bound.[553] Query: Does an E-SIGN withdrawal mean the same as "rejection"[554] or "revocation of acceptance"[555] under the common law, or does it constitute a "counteroffer?"[556] With no other federal contract law, will courts in diversity cases apply the contract law of the state involved or see this as an opportunity to engage in "judicial legislation" through interpretation of E-SIGN?

### E. *The European Union Directive*

The United States is not the only nation struggling to make online transactions safer and more efficient.[557] In fact, the European Union is rapidly moving to enact Internet solutions to contracting online.[558] The speed at which the European Union has engaged and come to tentative resolution regarding electronic commerce problems has caused some American commentators to

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551. 15 U.S.C. § 7001(c)(1)(C)(ii) (2000).

552. *Id.* § 7001(c)(4).

553. *See id.*

554. Section 38 of the Restatement (Second) of Contracts defines "Rejection" as follows: "(1) An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention. (2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement." RESTATEMENT, *supra* note 5, § 38.

555. Section 53 of the Restatement (Second) of Contracts states that "Acceptance by Performance" and "Manifestation of Intention Not to Accept" are

> (2) the rendering of a performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance. (3) Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute acceptance if before the offeror performs his promise the offeree manifests an intention not to accept.

*Id.* § 53.

556. Section 54 of the Restatement (Second) of Contracts defines counteroffer as follows: "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counteroffer." *Id.* § 54.

557. Towle, *supra* note 39, at 873–74.

558. *Id.*

fear that the European model could become the standard.[559] The goal of the European Union Directive, adopted in May of 1997, is to ensure that European consumers doing business via the Internet are provided with broad protection.[560]

Specifically, it is aimed at consumers entering into "distance contracts" by "'means of communication at a distance.'"[561] Consumer is defined as a natural person acting outside his/her trade, business, or profession.[562] Distance contracts pertain to contracts involving goods or services between a buyer and seller under an organized distance sale plan, where the seller exclusively uses a "means of communication at a distance" through contract formation.[563] Some of the acceptable "means" of communication used to form distance contracts are non-contract communications such as mail, fax, Internet/computer, radio, telephone, television, and videotex.[564]

Recognizing the need to provide legal structure to Internet consumers, the European Directive secured for consumers the right to the following information prior to entering into a transaction: the supplier's name and address, the main features of the product or service including prices and taxes, any added delivery costs, arrangements for payment and delivery, the right to withdraw from the contract, and the duration of the offer.[565] In addition, this information must be presented in an appropriate means of communication, in a comprehensible manner, and in "due regard . . . to the principles of good faith in commercial transactions."[566]

On or before delivery of the product, the supplier has to provide the buyer with information in writing or another tangible medium regarding rights to withdrawal, any post-sale services and guarantees, and the conditions for canceling long term con-

559. Nimmer, *supra* note 50, at 6.

560. Towle, *supra* note 39, at 874.

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, art. 4, § 1a–i, *at* http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397L0007.html (last visited Jan. 12, 2002) [hereinafter European Directive].

566. *Id.* art. 4, § 2.

tracts.[567] In addition, the consumer has the right to withdraw anytime for any reason within seven days of receiving the product or confirmation of the order.[568] Finally, the supplier has thirty days to return any previous payments.[569]

The European Directive also recognized the difference between ordinary goods and "special" products that can be copied or used before the withdrawal date.[570] Thus, books, software, audio and video recordings, records, CD's, and the like, as opposed to conventional goods, can not be returned if they are taken out of their original wrapping.[571]

Finally, not all types of contracts are included under the European Directive.[572] Contracts relating to financial services, immovable property, and those concluded by means of automatic vending machines, telecommunications operators via payphones, or at an auction are all excluded.[573]

With the European Directive leading the world in Internet legal structure, American scholars and lawmakers fear that the proposed American legislation will fade away if not passed by the states in the near future.[574] Therefore, the European Directive may become the law of the land by default.

## V. CONCLUSION

Can you foresee a video teleconference over business negotiations involving parties from several different states adjourning into a "cybersigning room" offering a "digital handshake system" that allows people to securely complete their negotiations? If you believe that is the future—think again: it is the present. The new E-SIGN gives electronic signatures the legal weight of paper signatures.[575]

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567. *See id.* art. 5.
568. *See id.* art. 6.
569. *See id.* art. 7.
570. Towle, *supra* note 39, at 874.
571. *Id.*
572. *See* European Directive, *supra* note 565, at art. 3.
573. *See id.*
574. Towle, *supra* note 39, at 874–75.
575. *See* 15 U.S.C. §§ 7001, 7006, 7021, 7023 (2000).

Historically, businesses and customers have had to wait several days or weeks for paper contracts to be properly executed by all parties. The new law offers consumers the chance to sign legally enforceable contracts for car loans, health insurance, and stock accounts over the Internet—around the clock with no time delay. You can even submit your tax forms without having to also send the separate paper form bearing your signature.[576] Customers, however, still have some choices—whether to do business online or on paper.[577] And because of political negotiating, insurance and utility companies must still send notices through the mail.[578] Trusts and wills cannot be executed over the Internet, and products may not be recalled online.[579] To make you feel quite safe, mortgages must also be foreclosed with a paper trail.[580]

While the statute does not specifically identify what a digital signature will look like, companies and consumers could fashion various remedies. Three examples are:

> (1) A simple password entered into a form on a Web page. In this case the Web site would have to issue the password, or confirm that it belongs to a certain person; (2) Hardware like thumbprint-scanning devices or electronic pads and styluses that plug into personal computes. The information would be sent over the Internet to a business, which would then keep it on file as proof of authenticity; (3) Third-party services that use software to generate encrypted keys—essentially personalized scrambled code tied to one party—that can be attached to any e-mail message or tamper-proof electronic documents. The third party holds the identity of the two parties and can then use the encryption software to ensure that only the two parties involved in a contract can obtain and sign the document, whether on a Web page or in e-mail.[581]

With the technological advances that have been made in the last ten years, there is the probability that newer and better processes and materials will be found. To protect those that invent, distribute, or purchase such products, the legal community will have to be prepared to recognize the changes taking place and how they will affect the laws. As computing environments

576. *Id.* § 7004(a)–(c).
577. *See id.* § 7004.
578. *Id.* § 7003(a)–(b).
579. *Id.*
580. *Id.*
581. Alvarez & Clausing, *supra* note 1, at B14.

change and more people become computer friendly, there is a desire for simpler ways of doing things. People do not want to have to go somewhere to sign a contract when they could just do it online.

On the other hand, with secured transactions, there is always a fear that someone could access the information and perhaps sign in place of someone else.[582] Contract law has made giant leaps in countering would-be fraudulent activity by encoding messages and transactions, and UETA has provided a good beginning base for these issues that will improve as technology does.

As people get to know today's technologies better, more time and money will be invested into products that will enhance or replace the technology already available. In order to protect consumers, many companies are providing longer and improved warranty coverage. This helps allocate the risk of loss for customers who purchase expensive equipment or programs and makes them more willing to spend the money necessary to acquire it.[583]

Laws, as they have in the past, will change in order to be applicable in the new environment. New contractual terms and licensing agreements will have to be established and the laws may be reinterpreted. The trend over the last century was an increase in the number of people applying for copyright, patent, and trademark protections, and we can expect the same in the future.[584] It is anticipated, however, that there will be even more people seeking protection from contract and license agreements. The laws will be interpreted in new ways and may be abandoned or rewritten to suit the changing economy. It is true in nature and true in the law: only the strong and adaptable will survive.

582. *See generally* Craig W. Harding, *Selected Issues in Electronic Commerce: New Technologies and Legal Paradigms, in* DOING BUSINESS ON THE INTERNET: THE LAW OF ELECTRONIC COMMERCE, at 7 (Patents, Copyrights, Trademarks & Literary Prop. Course, Handbook Series G-491, 1997).

583. *See* Fred M. Greguras, *1998 Trends in Software Licensing and Legal Protection for Software, at* http://www.oikoumene.com/softwr_licnsetrnds98.html (June 4, 1998).

584. *See id.*