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Survey of the Law of Cyberspace: Electronic Contracting Cases 2006-2007

Juliet M. Moringiello
William L. Reynolds



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SURVEY OF THE LAW OF CYBERSPACE: ELECTRONIC CONTRACTING

CASES 2006-2007

Juliet M. Moringiello*

William L. Reynolds**

INTRODUCTION¹

“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”² The 2006-2007 crop of electronic contracting cases confirms that observation. Whatever doctrinal doubt judges and scholars may once have had about applying standard contract law to electronic transactions, those doubts have now been largely resolved. Factual problems remain, as they always will, but courts apply “traditional principles of contract law”³ in deciding electronic contracting cases. This is not to say that all commentators agree with the doctrinal results. But it is no longer possible to complain about the absence of law or its unsettled nature.

* Professor, Widener University School of Law. Crystal Burkhardt provided valuable research assistance.

** Jacob A. France Professor of Judicial Process, University of Maryland School of Law.

¹ This is the third article we have written on electronic contracting. See Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Internet Contracting Cases 2004-2005*, 61 BUS. LAW. 433 (2005) (“Moringiello & Reynolds, 2005 Survey”); Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2005-2006*, 62 BUS. LAW. 195 (2006) (“Moringiello & Reynolds, 2006 Survey”).

² *Trieber & Straub, Inc. v. United Parcel Service, Inc.*, 474 F.3d 379, 385 (7th Cir. 2007), quoting *Register.com v. Verio*, 356 F.3d 393, 403 (2d Cir. 2004).

³ *Feldman v. Google, Inc.*, Civil Action No. 06-2540, 2007 U.S. Dist. LEXIS 22996, *18 (E.D. Pa. March 29, 2007) (discussing clickwrap agreements).

I. CONTRACT FORMATION

The cases discussed in this part focus on contract formation. There are no browsewrap cases in this year's group, and the clickwrap cases are consistent with the case law that has developed over the past few years. We also discuss one shrinkwrap case. This year's cases are quite similar in their approach to the formation question. The cases reveal little in the way of doctrinal differences. On the other hand, they present some interesting factual variations.

*Feldman v. Google, Inc.*⁴ presents a simple formation issue that the court analyzed in an unsurprising way. The plaintiff in that case, a lawyer, purchased advertising from Google's AdWords program. To open his AdWords account, the plaintiff was required to complete an online registration process. During that process, the AdWords contract was displayed in a scroll box. The notice "**Carefully read the following terms and conditions**" appeared at the top of the page displaying the contract.⁵ In order to activate his account, the plaintiff was required to click a box indicating his assent to the AdWords contract. The contract contained a forum selection clause.

The court rejected the plaintiff's argument that he had had no notice of the forum selection clause and thus was not bound by it. The plaintiff tried to analogize his facts to those in the well-known case of *Specht v. Netscape Communications Corp.*,⁶ in which the Second Circuit held that a person downloading software was not bound by online terms. The court correctly

⁴ *Id.*

⁵ *Id.* at *7-8 (bold in original).

⁶ 306 F. 3d 17 (2nd Cir. 2002).

pointed out that *Specht* was easily distinguishable. A user of the web site involved in *Specht* would not have noticed that the contract terms even existed unless she scrolled down to a submerged screen. On the other hand, the plaintiff in *Feldman* was required to visit a web page that displayed the agreement in a scroll-box. Although the entire agreement was not visible in the box, the admonition to read the terms carefully *was* visible. Unlike the plaintiff in *Specht*, the *Feldman* plaintiff was also required to click to signify his agreement to the terms.⁷ Applying the rule that a clickwrap agreement is enforceable if the plaintiff has reasonable notice of and manifests assent to the terms, the court held that Feldman was bound by the AdWords contract, including the choice of forum clause.⁸

The next two cases, *Treiber & Straub, Inc. v. United Parcel Service, Inc.*,⁹ and *Bar-Ayal v. Time Warner Cable, Inc.*¹⁰ apply the common-law duty to read¹¹ to online terms. *Treiber & Straub* nicely illustrates the point that every person who signs a contract should first read it carefully. Plaintiff, a jeweler, wanted to return a ring worth \$105,000 to its manufacturer. The

⁷ *Id.* at *21-22.

⁸ *Id.* at *24.

⁹ 474 F. 3d 379 (7th Cir. 2007).

¹⁰ Case No. 03 CV 9905 (KMW), 2006 U.S. Dist. LEXIS 75972 (S.D.N.Y. Oct. 16, 2006).

¹¹ *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS, § 9.41 (5th ed. 2003) (explaining that “a party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding”).

vehicle chosen was UPS. Plaintiff made its shipping arrangements on the UPS web site. The ring never reached its destination, and plaintiff sued for the insurance coverage it thought it had purchased online. The online contract was a standard clickwrap agreement: A first-time user like plaintiff had to click twice to show that he agreed with the “Terms and Conditions of Service.” Those Terms made quite clear that insurance did *not* cover items worth more than \$50,000: “Excess Value insurance does not provide any protection for packages having an actual value in excess of \$50,000”¹²

The opinion by Judge Diane Wood treated the problem as one of “basic contract law: one cannot accept a contract and then defend based on one’s own failure to read it.”¹³ The court did not discuss the presentation of the terms in detail, but concluded that UPS provided adequate notice of insurance limitation, because the limitation was contained both in the Terms and Conditions of Service and in the UPS Tariff, which was referenced in the Terms and Conditions and available on the UPS web site.¹⁴ The shipper, after all, was a sophisticated company sending an expensive product.

The result is correct. Although the UPS disclaimer seems counterintuitive—you can insure a \$50,000 item for \$50,000, but you cannot insure a \$51,000 item for \$50,000—the

¹² 474 F. 3d at 382.

¹³ *Id.* at 385.

¹⁴ *Id.*

language of the agreement is clear enough. The lesson for shippers: take some extra care when dealing with expensive items.¹⁵

Many electronic contracting cases involve putative class actions where the defendant asserts that an arbitration clause prohibits class actions. These cases typically involve two questions: was there a contract¹⁶ including the arbitration clause; and, if so, was the clause unconscionable? Although different in theory, both lines of analysis inquire into the basic concept of fairness; typically, the clause is enforced unless the court smells a rat. We discuss the first question below, and save the second for the next section.

An example is *Bar-Ayal v. Time Warner Cable, Inc.*¹⁷ The plaintiff in that case had bought various products and services from defendant but later objected to certain of the charges imposed by the defendant. A putative class action ensued. (Without putative class actions and arbitration/forum selection clauses there would be little law in this area.) The case involved another clickwrap agreement, this one on a CD-ROM that the plaintiff had received from the defendant in order to install the software that he had bought. The installation process required a lot of clicks. Judge Kimba Wood's opinion noted that a buyer would "have been required to click 'accept' eight times to install the software, including a final 'accept' indicating that the

¹⁵ Of course, this is a recurrent theme in contract law. *See, e.g., Hadley v Baxendale*, 9 Exch. 341 (1854), where the failure to inform the shipping company that the defective shaft being shipped was critical to the mill's operation.

¹⁶ Here, we are using the Restatement definition of "contract," which is "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

¹⁷ Case No. 03 CV 9905 (KMW), 2006 U.S. Dist. LEXIS 75972 (S.D.N.Y. Oct. 16, 2006).

[buyer] ‘had the opportunity to read and understand each and every term in the [Agreement]....’¹⁸ The clickwrap terms included an arbitration clause.

Not only did Judge Wood have no trouble finding the clickwrap agreement enforceable, she gave short shrift to Plaintiff’s argument that the arbitration clause was hard to find because the buyer had to scroll down through 30 screens to find it. Her response: “It is not significantly more arduous to scroll down to read an agreement on a computer screen than to turn the pages of a printed agreement.”¹⁹ The plaintiff argued that because he was able to click “accept” without scrolling through the entire agreement, he should not be bound by it. The court noted that clicking “accept” without reading the entire agreement is the same as signing a paper document without reading all of its terms.²⁰ In short, if your clicks indicate that you’ve read the document, then you’re bound.²¹ That result has to be right.

What is the effect of shrinkwrap terms that follow a signed, negotiated agreement? That was the issue in *Wachter Mgt. Co. v. Dexter and Chaney, Inc.*²² The plaintiff had bought an accounting and project-management system from the defendant, a software provider, pursuant to a written proposal. The letter transmitting the proposal to the plaintiff stated that “the proposal

¹⁸ *Id.* at *42.

¹⁹ *Id.* at *43. The court also noted that, printed out, the Agreement was “only about nine pages—not an extraordinary length.” *Id.* at *44.

²⁰ *Id.*

²¹ The plaintiff raised the same facts in arguing that the arbitration clause was procedurally unconscionable. *See* notes ___ - ___ and accompanying text.

²² 144 P.3d 747 (Kans. 2006).

includes modules and licenses.”²³ The software package, when shipped, contained a shrinkwrap license which provided that any disputes between the parties had to be resolved in a state court in Seattle. Unhappy with the software, the buyer sued, arguing that the shrinkwrap agreement was an unenforceable addition to the written agreement. After determining that the software contract was a sale of goods covered by Article 2 of the UCC,²⁴ the court applied two Article 2 sections, § 2-204, which provides that a contract is formed “in any manner sufficient to show agreement,”²⁵ and § 2-209, which governs modifications. Applying these sections, the court concluded that the contract was formed when the plaintiff signed the defendant’s proposal to sell it the software and as a result, the shrinkwrap license was a proposal for modification.²⁶ In order for the amendments to become part of the contract, both parties had to agree to them.²⁷

After explaining the relevant UCC sections, the court turned to defendant’s argument that plaintiff had “expressly consented to the terms of the shrinkwrap agreement when it installed and used the software rather than returning it.”²⁸ After an extensive discussion of precedent, the court concluded that it would follow the analysis set forth in *Step-Saver Data Systems, Inc. v. Wyse Technology*.²⁹ There, the Third Circuit had held that a buyer who used the software after

²³ *Id.* at 756.

²⁴ See *infra* at nn._____.

²⁵ U.C.C. § 2-204.

²⁶ 144 P. 3d at 751.

²⁷ *Id.*

²⁸ *Id.* at 752.

²⁹ 939 F. 2d 91 (3d Cir. 1991).

receiving the shrinkwrap had not agreed with the new terms found in the shrinkwrap. Express assent, in other words, was needed for the new terms to be part of the agreement. The court in *Step-Saver*, however, applied UCC § 2-207, because in that case, the plaintiff had ordered software from the defendant by phone, following the phone conversation with a written purchase order. The shrinkwrap license that arrived with the software was therefore, in the court's opinion, a written confirmation that contained additional terms.³⁰ Therefore, the terms of the license could not become part of the agreement absent express assent to those terms.

The defendant in *Wachter* urged reliance on two cases in which shrinkwrap agreements were upheld, *ProCD v. Zeidenberg*³¹ and *Hill v. Gateway 2000, Inc.*³² Curiously, the court distinguished these two cases on the basis of the fact that they both involved consumer plaintiffs who had not “enter[ed] into negotiations with the vendors prior to their purchases.”³³ Following this reasoning, a consumer is expected to read and understand shrinkwrap terms; a business person who has negotiated a contract that states that it includes licenses is not expected to understand that term. That makes no sense.

Wachter was decided on a 4-3 split. The dissent also emphasized traditional contract analysis. The dissent, however, did not see the issue as one of modification, but rather as one of contract formation. The dissent rejected the *Step-Saver* analysis because the buyer had been notified that there would be “licenses” included in the proposal, it should have known that it

³⁰ *Wachter Mgt.*, 144 P. 3d at 752.

³¹ 86 F. 3d 1447 (7th Cir. 1996).

³² 105 F. 3d 1147 (7th Cir. 1997).

³³ *Wachter Mgt.*, 144 P. 3d at 754.

should pay attention to the shrinkwrap.³⁴ The buyer, in other words, should have expected that the contract would not be complete until the later terms were received.³⁵

Although much can be said for both positions, we think the dissent has the better of the views. The buyer should have been aware that important material would follow in the shrinkwrap. Its failure to read and understand that material should not absolve the buyer from performance according to its terms.

II. PROCEDURAL UNCONSCIONABILITY

Closely related to the formation issue is that of procedural unconscionability. Often, a party trying to escape the effect of a forum selection or arbitration clause will argue both that a contract was not formed and that the clause in question cannot be enforced because it is unconscionable. Because the arguments related to substantive unconscionability tend not to focus on the electronic nature of the contract in question, we concentrate on procedural unconscionability.³⁶

Sometimes, when a court finds that a clickwrap or browsewrap agreement has been formed, it will make quick work of the procedural unconscionability argument, because the

³⁴ *Id.* at 756.

³⁵ The dissent thus was following the lead opinion of *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), although the dissent did not discuss *Hill*.

³⁶ Courts will find procedural unconscionability when there are defects in the manner in which the contract was negotiated (or not). In determining whether there is procedural unconscionability, courts will inquire into whether the terms unreasonably favor one of the parties. JOHN EDWARD MURRAY, JR. MURRAY ON CONTRACTS § 96 (4th ed. 2001).

arguments challenging formation and the arguments for procedural unconscionability often overlap. This was the case in *Bar-Ayal*, in which the plaintiff argued that he did not have adequate notice of the clickwrap terms. Because the court thoroughly analyzed this argument in finding that a contract had been formed, it did not address it in its discussion of procedural unconscionability.³⁷ This year, however, two cases, *Riensch v. Cingular Wireless, LLC*³⁸ and *Bragg v. Linden Research*,³⁹ contain extended discussions of procedural unconscionability. The two courts came to very different conclusions.

A decision of the U.S. District Court for the Western District of Washington, *Riensch* discusses in detail procedural unconscionability in the context of a clickwrap agreement. In that case, the plaintiff, Riensch, activated his wireless phone service through the defendant's web site. Cingular's terms of service were presented to the plaintiff on the web site, and he was required to click to indicate his agreement with the terms in order to activate the service. He also received a paper copy of the terms of service in a welcome kit that Cingular mailed to him. Cingular's terms of service included an arbitration provision.⁴⁰ Riensch challenged the arbitration provision on two grounds: First, he claimed that he never agreed to the provision because he did not read the agreement online; and second, he claimed that the arbitration agreement was unconscionable and thus unenforceable.⁴¹

³⁷ *Bar-Ayal*, 2006 U.S. Dist. LEXIS 75972 at *59.

³⁸ No. C06-1325Z, 2006 U.S. Dist. LEXIS 93747 (W.D. Wash. Dec. 27, 2006).

³⁹ 487 F. Supp. 2d 593 (E.D. Pa. 2007).

⁴⁰ *Riensch*, 2006 U.S. Dist LEXIS 93747 at *2.

⁴¹ *Id.* at *4-5.

The court disposed of Riensche's first challenge quickly, holding that Riensche was bound to the terms whether he read them or not.⁴² This holding is consistent with contract law generally, under which persons are bound to contracts that they sign, whether or not they have read them.⁴³ Under the electronic contracting statutes, a click qualifies as a signature.⁴⁴ Because Cingular proved that Riensche was required to click to agree to the terms before receiving his service, Cingular proved that Riensche signed the terms and thus was bound by them.

The court then turned to the plaintiff's argument that the arbitration clause in Cingular's terms of service was unconscionable. Riensche argued that the provision was both substantively and procedurally unconscionable. The court ultimately ruled that the clause was substantively unconscionable because of its class action waiver and its limitation on injunctive relief. This ruling is unrelated to the electronic nature of Cingular's terms of use. More interesting from an electronic contracting perspective is the court's holding that Cingular's arbitration clause was *not* procedurally unconscionable.

The court, looking to Washington law, explained that an agreement is procedurally unconscionable if one party lacked meaningful choice in entering the contract. To determine whether a party has such a meaningful choice, courts consider a number of factors, including: “ ‘the manner in which the contract was entered,’ ‘whether each party [had] a reasonable

⁴² *Id.* at *5.

⁴³ See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS, § 9.41 (5th ed. 2003) (explaining that “a party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding”).

⁴⁴ 15 U.S.C. § 7006 (5); UNIF. ELEC. TRANS. ACT, 7A U.L.A. 211, § 2 (8).

opportunity to understand the terms of the contract,” and ‘whether the important terms [were] hidden in a maze of fine print.’”⁴⁵

The holding that there was no procedural unconscionability gives some guidance to lawyers advising Internet companies about the presentation of their online contract terms. Because some of Riensche’s contentions in support of his procedural unconscionability argument were not unique to electronic contracting, here we will focus on the ones most relevant to online terms. First, he argued that he lacked meaningful choice because he was required to enter personal information on Cingular’s website before the terms of service were presented to him. Because Riensche had the option to cancel the transaction after entering this information, the court found that the fact that he was required to submit personal information did not support his procedural unconscionability argument.⁴⁶

Riensche based his second argument on the “time-out” feature on Cingular’s web site. He suggested that the agreement was unconscionable because a customer was required to retype his personal information if there was no computer activity for 15 minutes, thus depriving the customer of a reasonable opportunity to understand the terms. The court rejected this argument, noting that a customer had unlimited time to review the terms, despite the time-out feature, because a customer could take as long as he wanted to review the agreement and then submit his information at a later time.⁴⁷ In addition, Cingular had a return policy that allowed customers to

⁴⁵ *Riensche*, 2006 U.S. Dist. KEXIS 93747 at *19, *quoting* *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445, 449 (D.C. Cir. 1965).

⁴⁶ *Id.* at *21.

⁴⁷ *Id.* at *21-22. Cingular is now AT&T Wireless. The AT&T Wireless web site presents the terms of service in a manner similar to that described in the opinion. Even after the site “times out”, the terms of service remain available for review, but the customer is required to resubmit

terminate their service without an early termination fee after receiving their welcome kits. As a result, the court found that Cingular's customers had an adequate opportunity to familiarize themselves with the terms.⁴⁸

Riensché next argued that the agreement was "incomprehensible" and therefore unconscionable. In rejecting this argument, the court looked to the terms of service, focusing both on the method of presentation and the wording of the terms. The terms stated near the top that the agreement required "the use of arbitration to resolve disputes," and limited "the remedies available . . . in the event of a dispute."⁴⁹ The statement was both prominent and clearly worded. The court then pointed to the actual arbitration clause found later in the agreement and likewise concluded that it was clearly worded. The word arbitration was in capital letters and the terms stated that the arbitration clause "affects your rights." The terms also provided a link to the web site for the American Arbitration Association so that the customer could obtain additional information about arbitration rules.⁵⁰ Because of the prominence and clarity of the arbitration agreement, the court concluded the Riensché had a reasonable opportunity to understand the terms.

Finally, the plaintiff contended that the arbitration clause was unconscionable because it was hidden in a maze of fine print. To support this contention, he alleged that the terms were

his credit card information. See <http://www.wireless.att.com/cell-phone-service/welcome/index.jsp>.

⁴⁸ *Riensché*, 2006 U.S. Dist. LEXIS 93747 at *22-23.

⁴⁹ *Id.* at *25.

⁵⁰ *Id.* at *22-23.

presented in “a four-page solid block of text in fine print with no paragraph or other section breaks,” and that the terms were written in a difficult to read font. He argued that the font used signaled to the reader that the terms were not important.⁵¹

The court rejected this last argument for several reasons. First, the court noted that Cingular gave Riensche the opportunity to read the terms in three different formats. Riensche could read the terms either online, in a form printed from Cingular’s web site, or in the paper form included in the welcome kit. In the online version and the printable version, all terms appeared in identical font, which, according to the court, was legible. In the paper terms included in the welcome kit, the word “arbitration” appeared in capital letters. In all three versions of the terms of service, there was a statement near the beginning of the terms that the agreement required the use of arbitration and limited the remedies available to the customer in the event of a dispute.⁵²

After surveying a number of Washington cases, the court concluded that the use of small print does not render a standard form agreement procedurally unconscionable. The court also rejected the argument that the lack of breaks between sections renders the terms unconscionable. In addition, the court found that the use of capital letters to highlight the word “arbitration” weighed against an unconscionability finding. Last, the court noted that because the plaintiff had sued AT&T in the past, the plaintiff was aware of the use of arbitration clauses in cellular telephone contracts.⁵³

⁵¹ *Id.* at *23.

⁵² *Id.* at *25.

⁵³ *Id.* at *27-28.

At the other end of the procedural unconscionability spectrum is the decision in the Eastern District of Pennsylvania in *Bragg*,⁵⁴ a case involving the wildly popular virtual world Second Life.⁵⁵ In all of the cases discussed so far, a reader might disagree with the result but not with the analysis used by the court. The last case in this section, however, is the exception that proves the rule. Although the line of analysis in the Second Life litigation is straightforward enough, the result is so wrong on so many grounds, that a reader must conclude that the virtual nature of the litigation led the court astray.

The *Bragg* dispute arose out of the plaintiff's participation in Second Life. The plaintiff, Marc Bragg, sued Linden, contending that Linden, by canceling his Second Life account, deprived him of property that he had accumulated in the virtual world.⁵⁶ To participate in Second Life, Bragg was required to indicate his agreement with the Second Life terms of use. The terms of that agreement do not appear in a scroll box; rather, there is a box next to the underlined statement "I agree to the terms of use." The underlined statement is a hyperlink to the terms themselves and the registrant must click the "I agree" box in order to register.⁵⁷ The terms of use contained an arbitration clause. As a result, Linden moved to compel arbitration.⁵⁸

⁵⁴ 487 F. Supp. 2d 593 (E.D. Pa. 2007)..

⁵⁵ <http://www.secondlife.com>. The Second Life homepage reports membership statistics; as of July 5, 2007, more than 7.8 million people had registered for a Second Life membership.

⁵⁶ *Bragg*, 487 F. Supp. 2d at 595.

⁵⁷ The Second Life registration process can be found at <https://secure.web8.secondlife.com/join>.

⁵⁸ *Bragg*, 487 F. Supp. 2d at 597..

The court held that Linden's arbitration clause was both procedurally and substantively unconscionable. Again, because the procedural unconscionability arguments are most relevant to Internet commerce, we will focus on the court's discussion of those arguments.

Because the parties in *Bragg* agreed that California law governed their dispute, the court applied California's unconscionability standards. Under California law, both substantive and procedural unconscionability are necessary to render a term unenforceable.⁵⁹ In determining that the arbitration clause in the Second Life terms of service was unconscionable, the court focused on both the relative bargaining positions of the parties and the physical presentation of the terms. The court also stressed that unconscionability cannot be determined solely from the face of the contract, but that the circumstances under which the contract was executed, the contract's purpose and its effect must be considered as well.⁶⁰

First, the court explained that if terms are presented by a party of superior bargaining strength to a party of far weaker bargaining strength on a "take it or leave it" basis, the terms constitute a contract of adhesion and are therefore procedurally unconscionable. The court found both that Bragg was the weaker party and that the terms were presented on a "take it or leave it" basis.⁶¹ These findings are somewhat surprising when the circumstances under which the contract was executed and its purpose are considered. Mr. Bragg is a lawyer, and on his web site he claims expertise in both contract law and "cyber law."⁶² As a result, he should have known

⁵⁹ *Id.* at 605.

⁶⁰ *Id.*

⁶¹ *Id.* at 606.

⁶² <http://www.chescolawyers.com/biography.html>

that his click might bind him to the contract terms and therefore that he should have read the terms. The court recognized Bragg's legal expertise, but held that because Bragg "was never presented with an opportunity to use his expertise and lawyering skills to negotiate terms different from [those] that Linden offered," he was the far weaker party.⁶³

Many contracts are nonnegotiable, and that fact alone does not render them unconscionable. A court will not find that a standard form nonnegotiable contract is unconscionable if the complaining party can find the offered product service or product elsewhere. The availability of alternative choices is relevant to the procedural unconscionability analysis because the absence of a meaningful choice is key to a finding of unconscionability.⁶⁴ In finding an absence of a meaningful choice, the court in *Bragg* relied on *Dean Witter Reynolds, Inc. v. Superior Court*.⁶⁵ The court's analogy to *Dean Witter* is tenuous for two reasons. First, the services at issue in that case were brokerage services, and the other cases that the *Dean Witter* case discussed involved banking services, health insurance, and distributorship arrangements.⁶⁶ The *Dean Witter* court describes such services as "needed."⁶⁷ Second Life is a virtual world.

⁶³ *Bragg*, 487 F. Supp. 2d at 606

⁶⁴ One of us has taught Contract law for many years. First-year students often believe all adhesion contracts are unconscionable. Once they reflect on the issue, however, they change their minds. That reflection seems to have escaped the judge and his clerks.

⁶⁵ 211 Cal. App. 3d. 758 (1989).

⁶⁶ *Id.* at 797.

⁶⁷ *Id.*

Some users view it as a game, although many entities use it for business purposes.⁶⁸ Bragg did not allege that he was using Second Life in his business. In addition, Second Life is not the only virtual world in existence,⁶⁹ but Bragg alleged that it is the only virtual world that grants its participants property rights in virtual land. That allegation, however, is the crux of his dispute with Linden.⁷⁰ The second reason that the analogy to *Dean Witter* is tenuous is that the court in *Dean Witter* gave much weight to the plaintiff's sophistication as a lawyer. The court in *Bragg* did not.

Another element of procedural unconscionability is surprise. The court found surprise in *Bragg* because the arbitration clause was "buried . . . in a lengthy paragraph under the benign heading 'GENERAL PROVISIONS.'"⁷¹ When Bragg joined Second Life, the Terms of Service⁷²

⁶⁸ See, e.g. Anjali Athavaley, *A Job Interview You Don't Have to Show Up For*, Wall Street Journal, June 20, 2007, p. D1 (discussing companies that conduct job interviews in Second Life); Richard Siklos, *A Virtual World but Real Money*, New York Times, October 19, 2006 (describing the Second Life marketing activities of companies such as Starwood and Sony BMG); Stephanie Strom, *Foundation With Real Money Ventures Into Virtual World*, New York Times, June 22, 2007 (describing Second Life events hosted by the John D. and Catherine T. Mac Arthur Foundation).

⁶⁹ For a discussion of the different types of virtual worlds, see generally F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1 (2004).

⁷⁰ Plaintiff's Complaint at 3, available at http://lawyers.com/BraggvLinden_Complaint.pdf.

⁷¹ *Bragg*, 487 F. Supp. 2d at 606.

consisted of 13 paragraphs, separated by line breaks and by paragraph headings that were in bold, capital letters. Printed from the web site, the form was nine pages long, and the paragraph including the arbitration clause appeared on the ninth page, in the last paragraph. The paragraph that the court described as lengthy was slightly more than one-half of a page in print, with a 2 ¾ inch left-hand margin.⁷³ The court also noted that Linden failed to either set forth the arbitration costs and rules in the Terms of Service or provide a hyperlink to a site where such information was available. Presumably such a link would have made the arbitration clause more comprehensible.⁷⁴

*Bragg and Feldman v. Google*⁷⁵ were both decided by the Eastern District of Pennsylvania applying California law. On the unconscionability question, they came to

⁷² According to the complaint filed in the Chester (PA) County Court of Common Pleas on October 4, 2006, Bragg became a member of Second Life in November or December of 2005. Complaint at 16.

⁷³ The Terms of Service as they existed in November and December of 2005 can be found using the Wayback Machine at Internet Archive, <http://web.archive.org/web/20051031014820/http://secondlife.com/corporate/tos.php>.

⁷⁴ *Bragg*, 487 F. Supp. 2d at 607.

⁷⁵ Civil Action No. 06-2540, 2007 U.S. Dist. LEXIS 22996 (E.D. Pa. March 29, 2007)

completely opposite conclusions, with the court in *Feldman* spending very little time on it.⁷⁶ The *Bragg* court spent a lot of time on the unconscionability question. Yet its decision was profoundly wrong. First, it utterly eludes us how an attorney who claims to specialize in “cyber law” could claim unconscionability when faced with a clear statement of contract terms not involving the sale of a necessity. Worse, the opinion calls into question the validity of all adhesion contracts. Under the holding, those who deal with Sears, Visa, or Amazon lack contracts that can be enforced in the Eastern District of Pennsylvania. Finally, the *Bragg* court did not even discuss the recent (and on point) contrasting precedent in *Feldman*, a decision from the same District. We doubt the opinion will be followed; it certainly should not be.

III. SCOPE OF THE ELECTRONIC CONTRACTING STATUTES

A case from the U.S. District Court for the Western District of New York, *Trell v. American Association for the Advancement of Science*,⁷⁷ reminds us that traditional paper world contract formation rules apply to contracts alleged to be formed over the Internet. It is always important to keep in mind that the electronic contracting statutes, the Uniform Electronic Transactions Act (“UETA”)⁷⁸ and the federal Electronic Signatures in Global and National

⁷⁶ The plaintiff in *Feldman*, like the plaintiff in *Bragg*, was an attorney. The court in *Feldman*, however, took that fact into account in describing the plaintiff as “a sophisticated purchaser . . . capable of understanding the Agreement’s terms.” *Id.* at *34.

⁷⁷ No. 04-CV-0030E(Sr), 2007 U.S. Dist LEXIS 36942 (W.D. N.Y. May 21, 2007).

⁷⁸ 7A U.L.A. 211.

Commerce Act (“E-SIGN”),⁷⁹ do not provide substantive rules of contract formation. As a result, the traditional rules of contract formation apply to electronic contracts absent a court’s contrary ruling.

The plaintiff in *Trell* had submitted a manuscript to the defendant, the publisher of a scholarly journal. The defendant declined to publish the article, and the plaintiff sued for breach of contract. The plaintiff claimed that he submitted the article in response to an advertisement on the defendant’s web site that sought articles and stated that submissions would be investigated for their suitability for publication. In support of his breach of contract claim, the plaintiff asserted that the web site advertisement “created a unilateral contract” and that by submitting his manuscript, he had performed under that contract. His complaint also alleged that the web site advertisement was an offer to contract and that by submitting the manuscript, he accepted the offer, thus forming a contract.⁸⁰

The court dismissed Trell’s claims, finding that no contract had been formed. In doing so, the court stressed that the fact that the advertisement was communicated over the Internet did not require a departure from traditional contract law principles.⁸¹ It is hornbook contract law that an advertisement is generally not an offer to enter into either a bilateral or a unilateral contract.⁸² As a result, the court in *Trell* found that the defendant’s web site advertisement invited Trell’s offer

⁷⁹ 15 U.S.C. § 7001 *et seq.*

⁸⁰ *Trell*, 2007 U.S. Dist. LEXIS at * 4-5.

⁸¹ *Id.* at *18-19.

⁸² *See* PERILLO, *supra* note - - at § 2.6 (e) (explaining that an advertisement that contains no language of commitment constitutes a preliminary proposal inviting offers).

in the form of Trell's manuscript. The defendant, by rejecting the manuscript, rejected the offer, and no contract was formed.⁸³ *Trell*, in other words, was a routine case, only of interest because it applied routine contract law to an electronic situation

*In re McDonald's French Fries Litigation*⁸⁴ reminds us that, under the electronic transactions statutes, when another statute requires a writing, an electronic record will satisfy that requirement.⁸⁵ The plaintiffs in *McDonald's* sued McDonald's for breach of an express warranty that McDonald's french fries contained no allergens and were gluten-free. The alleged express warranty was on the defendant's web site. The defendant's restaurants are franchised, and the alleged warranties were on the corporate web site. As a result, under the Uniform Commercial Code, the plaintiffs would have to prove privity with the McDonald's corporation in order to prevail.⁸⁶

⁸³ *Id.*

⁸⁴ No. 06 C 4467, 2007 U.S. Dist. LEXIS 38960 (N.D. Ill. May 30, 2007).

⁸⁵ 15 U.S.C. § 7001 (a); UETA § 7 ("if a law requires a record to be in writing, an electronic record satisfies the law"). Exceptions to this general rule are enumerated in the electronic transactions statutes. For instance, both UETA and E-SIGN exempt laws governing wills and trusts and most of the Uniform Commercial Code from their scope. 15 U.S.C. § 7003 (a); UETA § 3.

⁸⁶ U.C.C. § 2-318.

Because french fries are consumer products, however, the plaintiffs argued that the Magnuson-Moss Warranty Act⁸⁷ gave them a cause of action against McDonald's even without privity. Under Magnuson-Moss, a consumer damaged by the failure of a warrantor to comply with a written warranty may sue that warrantor.⁸⁸ The definition of "written warranty" is silent as to electronic communications. Nevertheless, the court in *McDonald's* held, without discussion, that because McDonald's had made "written representations through the web site about the composition of" the french fries, the plaintiffs' claims could proceed under Magnuson-Moss.⁸⁹ This holding is consistent with the electronic transactions statutes.

Another important point for lawyers to keep in mind is this: the electronic transactions statutes do not *require* parties to transact their business electronically. A New York trial court case, *DWP Pain Free Med. P.C. v. Progressive Northeastern Ins. Co.*,⁹⁰ illustrates this point. In that case, a health services provider sued an insurance company for benefits under New York's No-Fault Insurance Law. Under that law, an insurance carrier must pay or deny a claim for benefits within 30 days after receipt of the claim. An insurer may request additional verification of a claim within 10 days after receipt.⁹¹ In *DWP*, the plaintiff submitted its claim for services, and the defendant sent its request for verification. With that request, the insurance company sent

⁸⁷ 15 U.S.C. § 2301 *et seq.* Magnuson-Moss does not *require* that anyone give a written warranty; its provisions apply, however, when a product supplier gives a written warranty.

⁸⁸ 15 U.S.C. § 2310 (d).

⁸⁹ *In re McDonald's French Fries Litigation*, 2007 U.S. Dist. LEXIS 38960 at *12.

⁹⁰ 14 Misc. 3d 800 (Dist. Ct. Suffolk Cty. 2006).

⁹¹ *Id.* at 801.

a form for the plaintiff to complete and sign. In the verification request, the defendant stated that “electronic signatures are not acceptable.” The plaintiff never returned the signed form.⁹²

The plaintiff argued, erroneously, that both the New York version of UETA and the federal E-SIGN Act required the insurance company to accept the electronic signatures. The court pointed out that while the electronic signature statutes *allow* parties to accept electronic signatures and records, they do not require parties to do so. As a result, the court rejected the plaintiff’s argument that its electronically submitted forms sufficed as original documents.⁹³

It is important to note the difference between *DWP* and one of last year’s survey cases, *Seagate U.S. LLC v. CIGNA Corp.*⁹⁴ The question in that case was whether the requirement that “written notice” be sent allowed for electronic notices. The *Seagate* opinion was on a motion to dismiss; the court refused to dismiss so that the meaning of the word “written” could be determined.⁹⁵ The lesson for lawyers from these two cases is clear: if you do not want to accept electronic communications, make that explicit in your contracts.

IV. OTHER ISSUES

⁹² *Id.* at 802-803.

⁹³ *Id.* at 804.

⁹⁴ No. C 05-4272 PVT, 2006 WL 1071881 (N.D. Cal. Apr. 21, 2006).

⁹⁵ Moringiello & Reynolds, *2006 Survey* at 206.

Does the UCC apply to transfers of software? Much academic ink has been spilled over the question of whether Article 2 of the UCC applies to transfers of software.⁹⁶ The issue has rarely surfaced in the cases we have read for our three surveys, and only one case in this year's group reached the issue.

*Wachter Mgt. Co. v. Dexter and Chaney, Inc.*⁹⁷ involved a sale of software along with various services. The court, relying in part on a lower court precedent,⁹⁸ held that "software is considered to be goods subject to the UCC even though incidental services are provided along with the sale of the software."⁹⁹ The court reasoned that the "maintenance, training, and consulting services would not have been necessary if Wachter had not purchased DCI's

⁹⁶ See, e.g., Jean Braucher, *Contracting Out of Article 2 Using a "License" Label: A Strategy That Should Not Work for Software Products*, 40 Loy. L. A. L. Rev. 261 (2006) (concluding that end-use software contracts should be classified as Article 2 transactions); Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 38 DUQ. L. REV. 459 (arguing for a new commercial code specifically tailored to software transactions); Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994) (arguing for separate treatment of licenses under the UCC); Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 EMORY L. J. 853 (1986) (arguing that Article 2 should be read to encompass software transactions).

⁹⁷ 144 P. 3d 747 (Kans. 2006) (also discussed *supra* at _____)

⁹⁸ *Systems Design v. Kansas City P.O. Employees Credit Union*, 788 P.2d 578 (Kans. App. 1990).

⁹⁹ *Wachter*, 144 P. 3d at 369.

software.”¹⁰⁰ Because the court had earlier found software to be a good, the characterization of the services as “incidental” led ineluctably to the result.

Privacy Policies. Many web sites post privacy policies. Should a visitor to the site be able to rely on them? That was the issue in *Collegenet, Inc. v. XAP Corp.*¹⁰¹ This Lanham Act case involved a claim for unfair competition; both parties operate online college admission applications services, and Plaintiff claimed that it had been injured by Defendant’s false and misleading privacy policy. The privacy policy in question stated that personal data submitted through Defendant by a student applicant would not be revealed to third parties without the “express Consent” of the applicant. Plaintiff contended, however, that personal data was shared with others after student applicants answered “yes” to a query as to whether they wished information about financial aid. Applicants, in other words, were allegedly agreeing through an opt-in provision to the sharing of their data even though the student applicants were given insufficient information about that choice.

The Court ruled that it would hear proof as to whether the confidentiality promise was ‘fundamental to the products and services that Defendant offers for sale....’¹⁰², and thus subject to liability under the Lanham Act. The court noted, however, that, “Identity theft associated with use of the internet to buy products and services is a common occurrence. Promises of

¹⁰⁰ *Id.*

¹⁰¹ 442 F.Supp.2d 1070 (D. Or . 2006). One of the authors is associated with a law firm that represented a party in *CollegeNet*. That author did not participate in the litigation.

¹⁰² *Id.* at 1077.

confidentiality of information provided over the internet are certainly more than incidental....”¹⁰³ That certainly seems true enough; privacy promises should be enforced.

The express consent issue in *Collegenet* is relevant to electronic contracting generally. In the 2001 Cyberspace Survey, a group of Cyberspace Committee authors recommended strategies for avoiding disputes about assent in clickwrap agreements. One of their recommended strategies was that the “user’s words of assent or rejection should be clear and unambiguous.”¹⁰⁴ The defendant in *Collegenet* would have avoided a lot of trouble by following that advice.

Web Agents. The opinion in *Internet Archive v. Shell*¹⁰⁵ mentioned, but neither discussed nor resolved, an issue that has not received much serious academic scrutiny.¹⁰⁶ That issue is whether “web agents”¹⁰⁷ have the same authority to bind their principals as do human agents.

¹⁰³ *Id.*

¹⁰⁴ Christina L. Kunz, Maureen F. Del Duca, Heather Thayer & Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401, 411 (2001).

¹⁰⁵ Civil Action No. 06-cv-01726-LTB-CBS, 2007 U.S. Dist. LEXIS 10239 (D. Colo. Feb. 13, 2007). The parties in *Internet Archive* settled their dispute in April, 2007. See <http://www.archive.org/iathreads/post-view.php?id=119669>.

¹⁰⁶ Very few articles discuss the issues that arise from the use of electronic agents in contract formation. For a particularly good discussion of these issues, see Anthony J. Bellia, *Contracting With Electronic Agents*, 50 EMORY L.J. 1047 (2001).

The issue arose this way in *Internet Archive*. Internet Archive uses a technology called the Wayback Machine to copy information from websites and store that information as an archive to be used by future generations. The plaintiff, Suzanne Shell, maintains a web site called “profane-justice.org.” Shell’s site contains a notice that begins “IF YOU COPY OR DISTRIBUTE ANYTHING ON THIS SITE – YOU ARE ENTERING INTO A CONTRACT.” Among the purported contract terms are a term charging \$5,000 for each page copied, and one granting Shell a “perfected security interest of \$250,000 per each occurrence of unauthorized use of the web site in all of the user’s land, assets and personal property.”¹⁰⁸ There is no requirement that the user click to agree to these terms.¹⁰⁹ Shell sued Internet Archive for, among other things, breach of contract.

¹⁰⁷ Electronic agents are commonly referred to as “bots.” While the term for “bot” is short for “robot,” it encompasses many different software programs, including web crawlers, spiders, aggregators, and worms. For an excellent discussion of bots, see Steven T. Middlebrook & John Muller, *Thoughts on Bots: The Emerging Law of Electronic Agents*, 56 BUS. LAW. 341 (2000).

¹⁰⁸ *Internet Archive*, 2007 U.S. Dist LEXIS 10239 at *3-4.

¹⁰⁹ *Id.* at *4. Whether a contract was formed or not, the security interest purportedly granted would be unenforceable both under Article 9 of the Uniform Commercial Code and under mortgage law, because both those bodies of law require that the contract granting the security interest be signed or otherwise authenticated by the party granting the security interest. *See* U.C.C. § 9-203 (requiring that the debtor authenticate a security agreement); WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* (3RD ED.) § 10.1 (explaining the applicability of statutes of frauds to real estate transactions).

One of Internet Archive's arguments was that because no human being at Internet Archive was aware that the contract existed, no contract had been formed. To support this argument, Internet Archive cited one of the cases we discussed in our first survey, *Register.com v. Verio*.¹¹⁰ In *Register.com*, automated agents were also involved in the contracts, but in that case, the defendant did not attempt to separate its knowledge of the terms from its automated agent's knowledge of the terms. Internet Archive distinguished its facts from those in *Register.com* by arguing that while its agents accessed Shell's web site numerous times, no human being at Internet Archive was aware of the terms.¹¹¹

As noted above, the automated agent issue has not yet received much academic scrutiny. The electronic transactions statutes provide that a contract may be formed by electronic agents. The Uniform Electronic Transactions Act states that this is so "even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements."¹¹² E-SIGN provides that a contract cannot be denied enforceability solely because an electronic agent was used in its formation.¹¹³ Both of these statutes are of course facilitative; they do not state that all contracts formed by bots are enforceable, rather, they leave the substantive formation questions

¹¹⁰ 356 F. 3d 393 (2nd Cir. 2004).

¹¹¹ *Internet Archive*, 2007 U.S. Dist LEXIS 10239 at *17-18.

¹¹² UETA § 14.

¹¹³ E-SIGN § 7001 (h).

to other law.¹¹⁴ Because the parties in the *Internet Archive* case settled their dispute, we will have to wait a little bit longer for a judicial pronouncement on contract formation by bots.

Incorporation by Reference. In last year's survey, we discussed two cases that addressed the question of when terms posted on a web site become part of a paper contract.¹¹⁵ There was one such case this year, *International Star Registry of Illinois v. Omnipoint Marketing L.L.C.*¹¹⁶ The parties in this business-to-business case had entered into several paper contracts, evidenced

¹¹⁴ UETA § 14 cmt. 1 (“these are salutary provisions consistent with the fundamental purpose of the Act to remove barriers to electronic transactions while leaving the substantive law . . . unaffected to the greatest extent possible;” E-SIGN § 7001 (h) (stating that a contract will not be denied enforceability solely because it was formed by electronic agents “so long as the action of any such electronic agent is legally attributable to the person to be bound”). *See also* Middlebrook and Muller, *supra* note - - at 349 (stressing that the UETA provision is intended only “to eliminate the potential argument that the use of an electronic tool or automated process *per se* indicates a lack of assent and therefore prevents contract formation”).

¹¹⁵ *See* Moringiello & Reynolds, *2006 Survey* at 199-201 (discussing *Hugger-Mugger L.L.C. v. NetSuite, Inc.*, No. 2:04-CV-592 TC, 2005 U.S. Dist. LEXIS 33003 (D. Utah Sept. 12, 2005) and *Affinity Internet, Inc. v. Consolidated Credit Counseling Servs., Inc.*, 920 So. 2d 1286 (Fla. Dist. Ct. App. 2006)).

¹¹⁶ No. 05 C 6923, 2006 U.S. Dist. LEXIS 68420 (N.D. Ill Sept. 6, 2006).

by signed invoices. Each invoice contained a reference to Omnipoint's web site, and the invoice explicitly stated that by signing the invoice, the party signing certified that he had "read and agree[d] to the provisions set forth in this invoice and to the terms and conditions posted at <http://www.omnipointmarketing.com/genterms.html>."¹¹⁷ The web site terms included a forum selection clause. The plaintiff argued that the web terms had not been incorporated into the parties' agreement. The court applied a two-part test for incorporation by reference under which a document (in this case, the web page) is incorporated into a contract by reference if: 1) the contract describes the document; and 2) the contract expresses the parties' intent to be bound by the terms of the document.¹¹⁸ The written contract in this case met both prongs of the test, so the court held that the plaintiff was bound by the forum selection clause.

The ALI Principles. Finally, the American Law Institute released in early 2007 a "Discussion Draft" of the Principles of the Law of Software Contracts ("the Principles").¹¹⁹

¹¹⁷ *Id.* at *3-4. Professor Jay Mootz has given this method of contract formation the name "sign-wrap." Francis J. Mootz, III, *After the Battle of the Forms: Commercial Contracting in the Electronic Age* at 15 (2007) available at <http://ssrn.com/abstract=981288>

¹¹⁸ *Id.* at *9

¹¹⁹ The Discussion Draft follows two "tentative" drafts, both of which were thoroughly discussed within the ALI. The Reporter is Robert Hillman of Cornell, and the Co-Reporter is Maureen O'Rourke of Boston University. A "Principles" project is not a Restatement; rather, it purports to "express the law as it should be, which may or may not express the law as it is." *See*

Most of those Principles are only tangentially relevant to this paper, for they deal with contract and intellectual property issues generally. The Principles, however, do have a substantial component involving contract formation – including electronic contracts, and all attorneys practicing in this area should be aware of them.

CONCLUSION

The courts are getting it right. The decision involving electronic contracts are following the general law of contracts pretty closely; *Bragg* is an exception, at least on its face, but even that opinion did not purport to do anything radical. By now it is clear that no special e-contract law will be created. Certainly there seems no need for such a law, or much of a demand.

<http://www.ali.org/index.cfm?fuseaction=projects.main>. The distinction between Restatement and Principles is an important one to bear in mind.