

Electronic Contracting Cases 2008–2009

By Juliet M. Moringiello* and William L. Reynolds**

In this Survey, we review electronic contracting cases decided between June 15, 2008, and June 15, 2009. During that period, we found that there was not much action on the formation by click-wrap or browse-wrap front. We have previously observed that the law of electronic contracts has matured,¹ and the fact that there have not been any decisions on whether click-wrap and browse-wrap are effective ways of forming contracts reflects that observation.² This year brought us three modification cases,³ two cases in which a party alleged that it was not bound to the offered terms because an unauthorized party agreed to the terms,⁴ one case in which formation by the exchange of e-mail messages was at issue,⁵ and one in which the plaintiffs argued, unsuccessfully, that they were third-party beneficiaries of the Craigslist Terms of Use.⁶ Finally, our last case addresses a question not unique to, but common in, electronic contracting cases: does Article 2 of the Uniform Commercial Code govern the transfer of software?⁷

* Professor, Widener University School of Law.

** Jacob A. France Professor of Judicial Process, University of Maryland School of Law. The authors thank Alisha Jacobsen of the University of Maryland Law School Class of 2010 for her able research assistance.

1. Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2007–2008*, 64 *BUS. LAW.* 199, 218 (2008) [hereinafter Moringiello & Reynolds, 2008 Survey]. See generally Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2006–2007*, 63 *BUS. LAW.* 219 (2007); Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2005–2006*, 62 *BUS. LAW.* 195 (2006); Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Internet Contracting Cases 2004–2005*, 61 *BUS. LAW.* 433 (2005).

2. Several of the cases discussed herein involve click-wrap agreements; the courts uniformly treat those agreements as they would any other form of contracting. If you click, you're bound. Two cases to that effect this year, not otherwise discussed herein, are *Universal Grading Service v. eBay, Inc.*, No. 1:08-cv-03557-CPS, 2009 U.S. Dist. LEXIS 49841 (E.D.N.Y. June 10, 2009); and *Blue Bird LLC v. Nolan*, No. 302920-V (Md. Cir. Ct. Oct. 23, 2008).

3. *Harris v. Blockbuster, Inc.*, No. 3:09-CV-00217-M, 2009 WL 1011732 (N.D. Tex. Apr. 15, 2009); *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 575 F. Supp. 2d 696 (D. Md. 2008); *Margae, Inc. v. Clear Link Techs., LLC*, No. 2:07-CV-00916-TC, 2008 WL 2465450 (D. Utah June 16, 2008).

4. *Via Viente Taiwan, L.P. v. United Parcel Serv., Inc.*, No. 4:08-CV-301, 2009 U.S. Dist. LEXIS 12408 (E.D. Tex. Feb. 17, 2009); *Kerr v. Dillard Store Servs., Inc.*, No. 07-2604-KHV, 2009 WL 385863 (D. Kan. Feb. 17, 2009).

5. *Alliance Laundry Sys., LLC v. Thyssenkrupp Materials, NA*, 570 F. Supp. 2d 1061 (E.D. Wis. 2008).

6. *Jackson v. Am. Plaza Corp.*, No. 08 Civ. 8980 (PKC), 2009 WL 1158829 (S.D.N.Y. Apr. 28, 2009).

7. *Conwell v. Gray Loon Outdoor Mktg. Group, Inc.*, 906 N.E.2d 805 (Ind. 2009).

I. MODIFICATION OF ONLINE AGREEMENTS

Contract modification cases have been popular recently. Last year, we discussed *Douglas v. U.S. District Court for the Central District of California*,⁸ the first reported case to address the ubiquitous terms of service modification provisions that state that the terms can be modified at any time. Modification of online contracts also made its way into the popular media when Facebook tried to slip a contract modification past its users.⁹

*Margae, Inc. v. Clear Link Technologies, LLC*¹⁰ involved a business-to-business online agreement. The plaintiff and defendant were internet marketing companies.¹¹ The plaintiff agreed to the defendant's "Partner Agreement" by clicking an "I accept" link on the defendant's web site.¹² The Partner Agreement contained a modification clause that stated that the defendant could "modify the agreement at any time by notifying [the plaintiff] or by posting a new agreement" on the defendant's web site.¹³ About a month after the plaintiff accepted the original agreement, the defendant modified it and posted the modified agreement on its web site.¹⁴ The amended agreement contained an arbitration clause.¹⁵

The plaintiff sued the defendant after their relationship soured; the defendant sought to compel arbitration as provided in the amended agreement.¹⁶ The plaintiff raised three arguments opposing arbitration: that it did not agree to the amended agreement, that there was no consideration for the amended agreement, and that both the original agreement's modification clause and the entire amended agreement were unconscionable.¹⁷

One way in which *Margae* is distinguishable from last year's *Douglas* case is that the party trying to escape the modification was another business rather than a consumer. This difference, when combined with the fact that the plaintiff had reason to visit the defendant's web site regularly, led the court to hold that the plaintiff was bound by the amended agreement.¹⁸ The plaintiff's sophistication was also relevant to the court's rejection of the plaintiff's argument that it had no notice of the amended agreement.¹⁹ The court noted that the plaintiff "did not agree that actual notice of changes to the contract was required, so it should have monitored to determine whether any amendments had been posted."²⁰ Here,

8. 495 F.3d 1062, 1069 (9th Cir. 2007), *cert. denied sub nom.* Talk Am., Inc. v. Douglas, 128 S. Ct. 1472 (2008); Moringiello & Reynolds, 2008 Survey, *supra* note 1, at 206.

9. Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES, Feb. 19, 2009, at B1; Brian Stelter, *Facebook's Users Ask Who Owns Information*, N.Y. TIMES, Feb. 17, 2009, at B3.

10. No. 2:07-CV-00916-TC, 2008 WL 2465450, at *2 (D. Utah June 16, 2008).

11. *Id.* at *1.

12. *Id.* at *2.

13. *Id.*

14. *Id.* at *3.

15. *Id.*

16. *Id.*

17. *Id.* at *6.

18. *Id.* at *5-6.

19. *See id.* at *7.

20. *Id.* at *5.

there were two sophisticated parties, so the court properly respected their freedom of contract.

Another case involving the effect of a modification clause, *Harris v. Blockbuster Inc.*,²¹ involved a business-to-consumer contract, the Blockbuster Online Terms and Conditions. All Blockbuster Online members were required to click their assent to these terms as part of their registration process.²² Blockbuster's modification provision was fairly typical in that it stated that Blockbuster reserved the right to modify the Terms and Conditions "at any time, and in its sole discretion . . . with or without notice," and further provided that "[s]uch modifications will be effective immediately upon posting."²³ According to the Terms and Conditions, members agreed to review the terms periodically, and they also agreed that their continued use of the site after modification would constitute acceptance of the modified terms.²⁴

The Terms and Conditions also contained an arbitration clause, and the plaintiff challenged that clause using an interesting argument. The plaintiff's argument, with which the court agreed, was that the arbitration provision was illusory because of the unilateral modification provision.²⁵ In finding for the plaintiff, the court relied on the Fifth Circuit's opinion in *Morrison v. Amway Corp.*,²⁶ in which the court found an arbitration provision to be illusory where the defendant's terms provided that they could be amended at any time and that such amendments would become effective when published.²⁷ In *Morrison*, the court held that the contract was illusory because the modification clause was not *expressly limited* to prospective modifications.²⁸ Blockbuster's terms likewise lacked such a limitation.²⁹ Because Blockbuster had therefore promised the plaintiff nothing—it could always modify the terms retroactively—there was no consideration. Because there was no consideration, there was no contract.

That holding squares with standard contract doctrine. Each party to a contract must give consideration—that is, it must limit its freedom of action in some way. If it is free to modify its "promises" retroactively, it has not given up anything.³⁰ The court suggested, however, that consideration might be present if modifications were prospective only.³¹

The third modification case is interesting because in it, the *drafter* of the modification—a change that removed an arbitration clause—sought to escape the effect of the modification. The plaintiffs in *Harold Huggins Realty, Inc. v. FNC, Inc.*³²

21. No. 3:09-cv-217-M, 2009 WL 1011732, at *1 (N.D. Tex. Apr. 15, 2009).

22. *Id.*

23. *Id.* at *2.

24. *Id.*

25. *Id.*

26. 517 F.3d 248, 254 (5th Cir. 2008).

27. *Harris*, 2009 WL 1011732, at *1–3.

28. *Morrison*, 517 F.3d at 254–55.

29. *Harris*, 2009 WL 1011732, at *2.

30. RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981).

31. *Harris*, 2009 WL 1011732, at *2.

32. 575 F. Supp. 2d 696, 699 (D. Md. 2008).

brought a class action suit against the defendant. The defendant then moved to stay the suit pending arbitration, claiming that the plaintiffs were bound by an arbitration clause in the user agreements that they had agreed to electronically upon joining the defendant's "AppraisalPort" service.³³ The plaintiffs argued that they were bound instead by the modified agreement, which did not contain an arbitration clause.³⁴

The original terms to which the plaintiffs had agreed contained a clause stating that the agreement could be modified at any time.³⁵ The clause further provided that the modified terms would become effective thirty days after they were posted to the defendant's web site, and that the user would be asked to accept the changes the first time he logged onto the web site after modification.³⁶ The defendant modified its agreement twice, in 2002 and 2005.³⁷ Existing subscribers who logged on after the 2002 amendments were presented with a pop-up box that gave them the chance to view and agree to the modified terms.³⁸ The 2002 amendments contained the same arbitration clause as the original agreement.³⁹ The defendant amended the agreement again in 2005; that amendment removed the arbitration clause.⁴⁰ The defendant did not require users to affirmatively click their acceptance of the 2005 amendment; rather, for several weeks after the amendment was posted, a banner appeared at the top of the home page alerting viewers to the amended agreement.⁴¹

The defendant acknowledged that it had attempted to modify its agreement in 2005, but cleverly argued that its attempt was unsuccessful for two reasons: it did not require the existing subscribers to affirmatively accept the changes (that is, to acknowledge them), and it did not provide sufficient notice of the changes to its subscribers.⁴²

The court rejected the defendant's argument for several reasons. Of interest here is that the court found that the original agreement did not require a click-wrap-type assent as a condition to the effectiveness of a modification.⁴³ As the court read the modification provision, the condition to effectiveness was posting the modified terms on the web site, because the clause stated that "[n]ew terms will be effective 30 days after the changes are posted."⁴⁴ The court noted, however, that the modification clause was ambiguous and susceptible to at least two interpretations, and therefore construed the language against the drafter, the defendant.⁴⁵

33. *Id.* at 700.

34. *Id.*

35. *Id.* at 701.

36. *Id.*

37. *Id.*

38. *Id.* at 702.

39. *Id.*

40. *Id.* at 702-03.

41. *Id.* at 703.

42. *See id.* at 705.

43. *Id.* at 706-07.

44. *Id.* at 701.

45. *Id.* at 708. The court also held that the defendant was estopped from claiming that the modification was invalid due to its conduct before and during litigation. *Id.* at 708-14.

II. I NEVER AGREED TO THAT. REALLY, I DIDN'T.

This year, we review two cases in which plaintiffs claimed that they were not bound to online terms because someone else had taken the physical action required to assent to the terms. The two cases bring us nicely distinguishable fact patterns, with one involving an employee's assent to an employment agreement,⁴⁶ and the other involving a company's assent to a vendor agreement.⁴⁷

The first of these cases, *Kerr v. Dillard Store Services, Inc.*⁴⁸ was straightforward enough: the plaintiff had been fired by Dillard's, her employer, and then brought an action against them alleging discrimination and retaliation. The employer sought to stay the litigation, contending that the plaintiff had agreed—in an online agreement—to submit any disputes she had with the employer to arbitration.⁴⁹ The issue the court addressed was whether there was sufficient evidence that the plaintiff had agreed to arbitrate.⁵⁰

The employer had maintained an intranet for its employees.⁵¹ It claimed that the plaintiff had initialed a form on that intranet signaling her assent to arbitration.⁵² The plaintiff's version was that a supervisor, one Champlin, had instead "signed" the employee's assent on the intranet.⁵³ Although the employer had attempted to limit access to an employee's intranet account by, inter alia, assigning each employee her own password, the court found that protection, strong as it was, simply was not enough.⁵⁴ The employer "did not have adequate procedures to maintain the security of intranet passwords, to restrict unauthorized access . . . to determine whether electronic signatures were genuine or to determine who opened individual e-mails."⁵⁵ The lesson is clear: anyone who relies on an electronic signature must take care to ensure that the signature is valid. That lesson is especially appropriate for those who control access to the electronic system used to signal the assent.

In contrast, the parties in *Via Viente Taiwan, L.P. v. United Parcel Service, Inc.*⁵⁶ were both businesses. The plaintiff, a seller of nutritional beverages, used the defendant's services to ship its products overseas.⁵⁷ The defendant required the plaintiff to install its UPS OnLine software in order to use its services.⁵⁸ During that process, the individual installing the software was required to click his as-

46. *Kerr v. Dillard Store Servs., Inc.*, No. 07-2604-KHV, 2009 WL 385863 (D. Kan. Feb. 17, 2009).

47. *Via Viente Taiwan, Inc. v. United Parcel Serv., Inc.*, No. 4:08-cv-301, 2009 U.S. Dist. LEXIS 12408 (E.D. Tex. Feb. 17, 2009).

48. *Kerr*, 2009 WL 385863, at *1.

49. *Id.*

50. *Id.* at *4.

51. *Id.* at *1.

52. *Id.* at *2.

53. *Id.*

54. *Id.* at *5.

55. *Id.*

56. No. 4:08-CV-301, 2009 U.S. Dist. LEXIS 12408, at *2 (E.D. Tex. Feb. 17, 2009).

57. *Id.*

58. *Id.*

sent to a License Agreement.⁵⁹ After installation, the License Agreement remained available for review at any time when someone was using the software program.⁶⁰ According to the License Agreement, the parties agreed that the exclusive jurisdiction over any lawsuit arising out of the agreement would be heard in a federal or state court in Atlanta, Georgia.⁶¹ When a dispute arose, the plaintiff sued in Texas.⁶² It argued that it should not be bound by the forum selection clause in the License Agreement because a UPS employee installed the software; thus no one in the plaintiff's organization agreed to the License Agreement.⁶³

In rejecting the plaintiff's argument, the court emphasized both the contracting practices that have become routine in the past decade, as well as the plaintiff's business sophistication.⁶⁴ First, the court noted that the installation of the UPS software "required the completion of a click-through set up process that . . . would hardly be a surprise to anyone who has ever installed software on a computer, much less the employees of a sophisticated company which boasts international operations."⁶⁵ Second, the court questioned the credibility of the plaintiff's contention that it was not aware that the installation of the UPS software required assent to a License Agreement.⁶⁶ In order for the plaintiff to be completely unaware of the agreement, it would have had to allow a UPS technician unsupervised access to its computers. The court refused to believe that a sophisticated company would do such a thing.⁶⁷ Last, the court stressed that the plaintiff kept the benefit of its bargain by using the program to conduct its business; therefore, allowing the plaintiff to disavow portions of the contract would be inequitable.⁶⁸

III. THE RELATIONSHIP BETWEEN THE UETA AND THE U.C.C.

The Uniform Electronic Transactions Act ("UETA") tells us that a contract "may not be denied legal effect or enforceability solely because it is in electronic form."⁶⁹ It is not a general contracting statute, and questions of substantive contract law are governed by the applicable body of contract law, such as the common law of contracts or Article 2 of the Uniform Commercial Code ("U.C.C."). The opinion in *Alliance Laundry Systems, LLC v. Thyssenkrupp Materials, NA*⁷⁰ explores the relationship between the U.C.C. and the UETA in detail.

The case involved two parties who had dealt with each other a number of times.⁷¹ The parties had exchanged e-mails with content suggesting that they

59. *Id.* at *3.

60. *Id.*

61. *Id.* at *2-3.

62. *Id.* at *2.

63. *Id.*

64. *Id.* at *6-7.

65. *Id.*

66. *See id.* at *7.

67. *Id.*

68. *Id.*

69. UNIF. ELEC. TRANSACTIONS ACT § 7(a), 7A U.L.A. 225 (1999).

70. 570 F Supp. 2d 1061, 1066-67 (E.D. Wis. 2008).

71. *Id.* at 1062-63.

had reached agreement on a contract.⁷² The question we are concerned with was whether that agreement was a “contract”; that is, did it bind the parties?

The defendant first argued that, under the UETA, an electronic agreement could not be binding (that is, be a contract) unless the parties had intended to create a contract in electronic form.⁷³ The court correctly observed that the UETA has nothing directly to say about electronic contract formation: “The UCC, not the UETA, provides the substantive law that determines whether parties form [a] contract, and nothing in the UCC prohibits the formation of agreements by electronic means.”⁷⁴ The UETA might be relevant, the court noted, if the statute of frauds were an issue, but “absent a statute of frauds defense, a contract formed by electronic means will be enforceable under the UCC even if . . . the UETA does not apply to the transaction.”⁷⁵ In other words, the UETA only goes to the effectiveness of the “signature”; other questions involving formation are controlled by the U.C.C. or other substantive law.

The court then turned to the question of whether a contract had been formed under the U.C.C. It noted that, “in the parties’ previous dealings, when defendant received a purchase order from plaintiff, defendant typically signed and returned it, and, in the present case, defendant did not do so.”⁷⁶ The court held that this course of performance between the parties could permit a jury to find that they understood that a contract was not formed until the defendant returned—physically—the purchase order.⁷⁷ That ruling makes sense; contract law has long discussed the question of formation in the context of negotiations in one medium but it was understood that a contract would not be created unless a different medium, typically paper, was used.⁷⁸

Once again, the old verities of contract law enter the electronic age. A contract formed by e-mail is perfectly acceptable—unless the parties did not intend to be bound until there was something “down on paper.” And it is the substantive law of contracts, not the UETA, which controls the question of intent.

IV. WHO CAN SUE?

Most electronic contracting cases in the past have involved challenges to choice-of-forum and arbitration clauses.⁷⁹ Many terms of use, especially those for social networking sites, contain anti-spam clauses. *Jackson v. American Plaza*

72. *Id.* at 1064–65.

73. *Id.* at 1067 n.3.

74. *Id.*

75. *Id.* at 1067.

76. *Id.*

77. *Id.* at 1069–70.

78. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 66 (1981). The court relied, for common sense, on *Francis H. Leggett Co. v. W. Salem Canning Co.*, 144 N.W. 969, 972 (Wis. 1914), (“letters or telegraphic communications between the parties will not be construed as a contract when it is plain that they were intended only as preliminary negotiations to be followed by a formal contract”). *Alliance*, 570 F. Supp. 2d at 1067.

79. We have read dozens of cases in preparing these surveys. The great majority of them raise problems involving choice-of-forum clauses, arbitration clauses, class actions, or unconscionability.

*Corp.*⁸⁰ involved the popular “community” site Craigslist. In that case, the plaintiffs, who were competitors of the defendant, claimed that they were harmed by the defendant’s multiple postings in contravention of the Craigslist Terms of Use.⁸¹ The plaintiffs had not entered into any contract with the defendant; instead, the plaintiffs argued that they were third-party beneficiaries of the defendant’s contract with Craigslist.⁸² That contract, a click-wrap agreement, contained a clause that limited the frequency of postings on Craigslist.⁸³ It was this clause that the defendant allegedly violated and which the plaintiffs claimed as the basis for its third-party beneficiary action.⁸⁴

The court ruled that there “is nothing unique about such a contract—a so-called ‘click-wrap’ agreement—that would foreclose the possibility of it creating rights enforceable by third-party beneficiaries.”⁸⁵ That reasoning is surely correct. Once again, contracts formed by electronic means are to be treated the same as contracts formed by other means. There is nothing unique about a click-wrap agreement that would lead a court to treat it differently.

It only remained for the court to apply standard third-party beneficiary doctrine. The key question under that doctrine is whether the plaintiffs were an intended beneficiary of the agreement between Craigslist and the defendant.⁸⁶ The court gave seven reasons why the plaintiffs did not enjoy that status, the most interesting of those reasons was probably that the Terms of Use stated that if a user (such as the plaintiffs) were dissatisfied with Craigslist, its “only recourse was to immediately discontinue use.”⁸⁷ That language does not seem to endow users such as the plaintiffs with the right to sue other users. Moreover, the Craigslist agreement provided an internal grievance mechanism for those who had some problem with the site.⁸⁸ These and other reasons amply justified the holding that the plaintiffs were not third-party beneficiaries.

V. SOFTWARE: WHAT LAW APPLIES?

The contract at issue in *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*⁸⁹ was not electronic, but the opinion addresses a question often involved in electronic contracting cases⁹⁰: does Article 2 of the U.C.C. govern the transfer of software? In this part, we discuss *Gray Loon*, and we also discuss a development that should

80. 80 Civ. 8980, 2009 WL 1158829, at *1 (S.D.N.Y. Apr. 28, 2009).

81. *Id.* Craigslist was not a defendant. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at *4.

86. *Id.* at *3.

87. *Id.* at *2.

88. *Id.* at *6.

89. 906 N.E.2d 805, 811 (Ind. 2009).

90. See, e.g., *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 331–32 (D. Mass. 2002) (holding that software transfers are governed by Article 2 of the U.C.C.); *Wachter Mgmt. v. Dexter & Chaney, Inc.*, 144 P.3d 747, 751 (Kan. 2006) (holding that Article 2 of the U.C.C. applies to software).

affect the answer to that question, the American Law Institute's approval, in May 2009, of its *Principles of the Law of Software Contracts*.⁹¹

The facts in *Conwell* were very simple. A new company, Piece of America ("POA"),⁹² hired a web-site designer to develop a web site.⁹³ The designer did so and was duly paid.⁹⁴ POA then decided to change its web site, and the designer did so.⁹⁵ This time the designer was not paid.⁹⁶ Negotiations got the designer nowhere, and it eventually took down the site.⁹⁷ The designer then sued for non-payment, and POA countersued for conversion of the web site.⁹⁸

To determine the applicable body of contract law, the court analogized web sites to software and reviewed some of the cases discussing whether Article 2 should apply to software transfers. The court found that the "thrust" of the contract was the supply of services and, therefore, the common law of contracts should control.⁹⁹ The court rejected cases that distinguish between software delivered in a tangible medium and software delivered electronically, and correctly reasoned that it "would be a mistake . . . to treat software as a good simply because it was contained in a tangible medium that fits within that category."¹⁰⁰ The court then applied standard contract analysis and concluded that POA owed the designer money for the modified design and other work.¹⁰¹

That left the question of POA's conversion action. That claim was predicated on the fact that Gray Loon had taken down the web site that POA had already paid for.¹⁰² Because POA "owned" the site, it was argued, Gray Loon had converted it by taking it out of commission.¹⁰³

The problem with that reasoning, according to the majority, is that POA never owned the site.¹⁰⁴ The court rejected the argument that the site was a work for hire; Gray Loon's use of skill and creativity showed that it was an independent contractor rather than an employee.¹⁰⁵ As a result, POA only had a non-exclusive license rather than an ownership interest; because it was not an owner it could not maintain a claim for conversion.¹⁰⁶

91. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (Proposed Final Draft 2009) [hereinafter PRINCIPLES].

92. POA's business model should be of interest to older readers who bought a square inch of the Yukon back in the older days of TV; POA planned to sell square inch parcels of land in each of the fifty states.

93. *Conwell*, 906 N.E.2d at 808.

94. *Id.*

95. *Id.*

96. *Id.* at 808–09.

97. *Id.* at 809.

98. *Id.* at 808–09.

99. *Id.* It was, after all, a contract that required the use of independence and skill by the web site designer. *Id.* at 808.

100. *See id.* at 812.

101. *Id.* at 813.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 814–15.

106. *Id.* at 817.

In any event, the court ruled that POA's failure to pay a monthly hosting fee to Gray Loon meant that the latter could take down the site as a form of self-help.¹⁰⁷ Thus, the site host can hold the site hostage for payment of the hosting fee. This holding is consistent with the ruling that POA lacked an ownership interest—otherwise, a conversion would have taken place.

To try and resolve the questions about whether the common law of contracts or Article 2 of the U.C.C. should apply to software transfers, the American Law Institute (“ALI”) launched its software contracting project several years ago, and in May 2009, the ALI membership approved the *Principles of the Law of Software Contracts*.¹⁰⁸ Because this is simply a survey of one year's developments on electronic contracting, we point out just a few provisions of the *Principles*.

First, the *Principles* apply to software transfers, whether they are characterized as sales, leases, licenses, or some other type of transfer.¹⁰⁹ This is important because Article 2 of the U.C.C. applies to sales of goods.¹¹⁰ As a result, courts opining on whether Article 2 or the common law of contracts applies to a transfer of software must often determine whether the software was sold or licensed.¹¹¹

The second notable aspect of the *Principles*, and the important one for the purpose of this Survey, is that it contains provisions that specifically address electronic contracts.¹¹² First, the *Principles* provide that “a transferee adopts a standard form as a contract when a reasonable transferor would believe the transferee intends to be bound by the form.”¹¹³ This rule recognizes the developing case law that has allowed several different types of electronic presentations (such as click-wrap and browse-wrap) to result in binding contracts.¹¹⁴ The *Principles* provide a safe harbor for a particular type of click-wrap, however, stating that a transferee will be deemed to have adopted an electronic standard form as a contract when the transferee “signifies agreement at the end of or adjacent to the electronic standard form.”¹¹⁵ Therefore, if the offeree clicks her agreement to a standard form on the same web page as the form itself, she has received adequate notice of it and is deemed to have adopted it. Otherwise, the *Principles* reject the click-wrap browse-wrap distinction and focus on whether the offeree was given notice of the offered terms.

VI. CONCLUSION

The cases involving the law of electronic contracting look pretty much like cases involving oral or paper contracts. There are wrinkles, to be sure, but issues

107. *Id.* A concurring judge observed that the holder of a non-exclusive license should have a breach of contract claim in this situation, but Gray Loon had failed to sue for breach. *Id.* at 819.

108. See PRINCIPLES, *supra* note 91.

109. *Id.* § 1.06.

110. U.C.C. § 2-204 (2002) (governing formation of a contract for the sale of goods).

111. See, e.g., *Softman Prods. Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1084–87 (C.D. Cal. 2001).

112. See PRINCIPLES, *supra* note 91, § 2.02.

113. *Id.* § 2.02(b).

114. See *id.* § 2.02 cmt. b.

115. *Id.* § 2.02(c)(3).

involving what passes for a valid signature, the effectiveness of modifications, and the status of possible beneficiaries of a contract are all issues that can be found in standard contracts books. Resolution of those cases with digital aspects should not differ from resolution of their oral and paper counterparts—unless the electronic wrinkle is sufficiently different to lead to a policy difference. The cases reviewed herein tell us that rarely happens.