

Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Ave., N.W.  
Washington  
D.C. 20580

The logo for Selwood Research features the company name in a green, sans-serif font. To the right of the text is a stylized graphic consisting of two overlapping, light green, teardrop-like shapes that form a partial circle. The larger shape is on the left, and the smaller one is on the right, partially overlapping the first.

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## **Re: E-Sign Study — Comment P004102**

### **Introduction**

Jeremy Newman and Christopher Smithies respectfully submit these comments to the U.S. Federal Trade Commission in respect of E-SIGN Study-Comment P004102. Our interest in this proceeding stems from our development of a new mechanism for capturing informed consent electronically. We believe this technology is well suited for gathering consumer consent as required by Section 101(c)(1)(C)(ii) of the E-SIGN Act. Below we describe our experience in electronic signatures, our technology, and how we believe it can be used by companies to satisfy E-SIGN's consumer consent requirements.

### **Background**

Newman and Smithies have spent the past ten years working in the global electronic signature marketplace. In 1990, they formed PenOp Limited, a company that developed and marketed software that allowed electronic documents to be signed in much the same way as paper documents – with a handwritten signature.

The ethos behind PenOp<sup>®</sup> was that electronic signatures must a) be inherently understood by the average consumer; b) focus on the intentions of the user, not the actions within the computer; and c) carry evidentiary weight before a judge and jury. As a result, the core function of PenOp (and its later incarnation as the authentication-neutral Ceremony<sup>™</sup> architecture) was the recording of evidence of informed consent.

PenOp grew to serve over 300 customers in 30 countries around the world, but primarily in the USA where PenOp was granted five patents authored by Smithies and Newman. In October 2000, the business was purchased by Communication Intelligence Corporation (CIC) of California. Newman and Smithies left to form an independent inventor's partnership called Selwood Research to continue their research in this field.

### **E-SIGN and The Consumer Consent Provision**

We believe Congress took the appropriate approach in E-SIGN by avoiding technology-specific prescription, and balancing the interests of consumers with those of commercial parties.

### ***Consumer Consent is Good for E-commerce***

We strongly believe that the quality of consumer protection is directly related to the quality of informed consent afforded to the consumer. Furthermore, the quality of informed consent enhances consumer confidence.

CONSUMER CONSENT → CONSUMER PROTECTION → CONSUMER CONFIDENCE

Any alternative to a signature on paper is a departure from the consumer's comfort zone, so making the process easy to use and understand is as important as making it "secure".

### ***The Cost of Consent is Marginal***

The savings in costs and time made possible by electronic commerce provide ample incentive to companies to use these methods. The requirement for consumer consent of this section of E-SIGN may reduce these efficiency gains, but would do so in favor of consumer protection benefits. The consumer consent in question is required only once per supplier relationship, and is only one consent (i.e. signature) among several that the consumer may need to provide in the course of the electronic relationship. Moreover, not all e-commerce relationships will include notices that have to be made "in writing". Thus, e-commerce is unlikely to suffer as result of this consumer consent provision.

### ***Verification of Channel is Implicit***

Verification that the consumer can access the records in the electronic form is vital, but fortunately simple: if the business seeks consent using the consumer's chosen channel of communication (e.g. email address or web page) and the subsequent consent demonstrates knowledge of that request, the ability to access is proven.

### ***Verification of the Consumer can be Presumed***

The Act does not require the verification of the consumer giving consent to be any more stringent than the method the business would use to verify the consumer as a customer. In other words, the consenting party is verified in the same way as the business chooses to verify him or her as their customer. A comparison can be made with paper commerce: if the business mails a solicitation to the address of their customer and receives a response, there is no onus on them to obtain any further evidence that the customer lives at that address.

### ***Consumer Consent can be Simple – Today***

We firmly believe that obtaining consent can be accomplished with minimal – if any – burden using current technologies. In studying the need for electronic consent and electronic evidence, Selwood Research has devised a new mechanism for capturing informed consent electronically that we outline below. This method would be ideal for gathering consumer consent as required by Section 101(c)(1)(C)(ii) of the E-SIGN Act. This mechanism could equally apply to the parental consent requirements set out in the rules implementing the Children's Online Privacy Protection Act of 1998.

## **The Recitaline™ Method**

Recitaline™ is a service that gathers evidence of informed consent by recording spoken declarations of intent (“recitals”) on behalf of consumers, businesses and government organizations.

Spoken declarations not only eliminate the overhead of paper or electronic signatures, but also provide excellent *prima facie* and forensic evidence of legal intent.

Using our method, consumers can consent to receive information electronically by making a telephone call and reciting a declaration to that effect. The familiarity and simplicity of making a phone call offers a consumer friendly method of providing consent. Likewise, this method provides for flexibility as to the contents of the declaration of consent by the consumer.

In addition, our service allows declarations to be made in the consumer’s native language. For this reason, the service is particularly suited for an environment in which consents are obtained globally.

These recitals are recorded as evidence of informed consent having been given, and recordings are made available to both the business and the consumer.

### ***Compliance with ESIGN***

ESIGN disqualifies oral communications from being electronic records in § 101(c)(6). However, consumer consent can be oral and electronic as long as such consent “demonstrates that the consumer can access information in the electronic form”. Indeed, the Senate Congressional Record supports this.<sup>1</sup> However, the FTC may wish to consider suggesting changes to the statutory language of ESIGN in order to clarify this point.

### ***How it works***

The business (i.e. the party which needs to obtain, maintain and rely on evidence of the consumer’s consent) sends a request for consent to the consumer via the electronic channel of choice (e.g. via an e-mail to the user’s e-mail address, or a web page dedicated to that user).

The request includes a graphical (or textual) element termed a **SignSpot™**. This area specifies a telephone number to call, a document number, and the text of the declaration or recital to be read out. Taken together, when keyed and/or spoken into a phone after placing the call, these elements serve as strong evidence that the consumer:

- a) actively consents to be sent electronic rather than paper records; and
- b) is able to access information via the electronic channel in question.

The Recitaline service notifies the business that the recording has been made, and supplies both the business and the consumer with links to the recording.

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<sup>1</sup> See the Senate Congressional Record of Friday, June 16<sup>th</sup> 2000 in which it states: “It should be noted that Section 101(c)(6) does not preclude the consumer from using her voice to sign or approve that record.”.  
Available at: <http://www.angelfire.com/ca6/UWLAInternetLaw/Senate.html>

## **An Example**

Acme Underwriting has many customers, some of which have supplied it with their e-mail addresses. Others have registered on Acme's web site where each customer has a dedicated area into which he or she can log in.

Acme wishes to supply its customers with information about their policies in electronic rather than paper form. To do so, Acme needs to obtain the consent of each policyholder, and do so in such a way that demonstrates that he or she can access the information in electronic form.

Acme sends an e-mail to those of its policyholders that have e-mail, and/or displays to each user logging into the Acme site a web page, that contains an invitation to receive records electronically rather than on paper. The invitation includes a SignSpot™ that instructs the consumer how to accept the offer, as follows:

- Call this toll-free number: 1-800-123-4567.
- Key in this document number: 0224973.
- At the tone, recite the following:  
"I John Doe consent to receive electronic records from Acme Underwriting as described in document number 0224973".
- Before you hang up, make a note of the reference number that is given to you.

The recording made by the service demonstrates both informed consent and the accessibility of the electronic form in a single, low-burden step.

## **Conclusion**

**We appreciate the opportunity to comment on the important issue of implementation of the E-SIGN. We believe that the use of our technology or similar technologies provides an effective means of complying with the consumer consent requirements of the new law. Further time will allow businesses to adopt and utilize such technologies, strengthening consumer confidence and ultimately benefiting electronic commerce.**

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March 16, 2001

**Notices:** Recitaline and SignSpot are trademarks of Recitaline Limited. PenOp is a registered trademark and Ceremony a trademark of Communication Intelligence Corporation. The methods described here are the subject of pending patents.