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Uniform Rules for Internet Information Transactions: An Overview of Proposed UCITA

Carlyle C. Ring, Jr.*

INTRODUCTION

On July 29, 1999, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), after a decade of consideration, years of input from information industries, state bar groups, the American Bar Association, and others, adopted the Uniform Computer Information Transactions Act ("UCITA") by a 43 to 6 vote of the states. NCCUSL is a national organization of more than 350 practicing lawyers, judges, and academics – mostly gubernatorial appointees – from the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

Over the last two decades, NCCUSL has been actively engaged in developing appropriate uniform e-commerce rules for particular substantive electronic transactions, particularly through revisions to the Uniform Commercial Code ("UCC"). Consider the following five examples: (1) UCC Article 4A for e-commerce funds transfers (wholesale wire transfers) was promulgated in 1989, and now is enacted in all 50 states as well as being incorporated into CHIPS (Clearing House International Payments System), Fedwire (Federal Reserve Board) and NACHA (National Automated Clearing House Association); (2) Revised UCC Articles 3 and 4 were promulgated in 1990, in part to modernize check collections for electronic transactions (check truncation), and have since been enacted in 47 states; (3) Revised UCC Article 8 was promulgated in 1994, in part to modernize indirect electronic holding of securities, and is now enacted in 48 states; (4) Revised UCC Article 5 was promulgated in 1995, in part to cover electronic Letters of Credit, and has now been enacted in 45 states; and (5) Revised UCC Article 9 was

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promulgated in 1998, in part to accommodate electronic filings, and has already been enacted in 19 states with rapid consideration and enactment by many other states anticipated.

UCITA is another step taken by NCCUSL in its effort to develop e-commerce rules appropriate for particular transactions. UCITA began over ten years ago as a study by a Subcommittee of the American Bar Association. The Subcommittee concluded that there was a compelling need for clarity and certainty in licensing transactions of computer information and recommended to NCCUSL that a uniform act be drafted. NCCUSL, after study, agreed; a Drafting Committee was appointed in the early 90’s for a free-standing uniform act. Later, that Committee was merged into the Drafting Committee for a revised Article 2 with hub common provisions and separate provisions (spokes) for goods, leases, computer information and other subject matter in the future; later it was separated out as an independent UCC drafting effort in 1995 (UCC Article 2B); and in 1998 became again a drafting effort for a free-standing uniform act.¹

I. THE NEED FOR UNIFORMITY

Information technology accounts for more than one-third of the nation's economic growth and is the most rapidly expanding component of the U.S. economy. According to the U.S. Department of Commerce, by 2006 almost half of the U.S. workforce will be employed by industries that are either major producers or intensive users of information technology products and services.² Such employees now average $53,000 annual compensation, compared to

¹ The drafting process for NCCUSL is an open one. The drafting meeting notices and materials are provided to anyone who requests to be on the mailing list. The drafts are posted on the UCC website at the University of Pennsylvania; see <http://www.nccusl.org>. Observers attending the meetings are invited to participate in the discussions.

The UCITA drafting committee meetings were well attended, with 60-125 participating. The sessions were 2½ days long, from Friday morning until Sunday noon. After open discussion, motions and votes of the Drafting Committee members were taken. From 1995-1999, there were 17 drafting committee meetings. In addition, there were many seminars and other meetings in which UCITA was fully discussed, including ABA Annual and Mid-Year meetings. Individuals from a broad range of interest participated in these meetings, including representatives of licensees and licensors; banks, security and commodity exchanges; large and small software companies; entertainment, print and broadcasting industries; ABA and state bar associations; computer manufacturers; large and small companies that are users of information products; trade associations of both licensees and licensors; and government agencies.

a $30,000 average for all private sector employees. Until now, however, there has been no law providing clear, consistent, and uniform rules governing the intangibles of transactions involving computer information.

Few question the need for uniform rules. Everyone who has actively studied the issue concludes that uniform rules are required. Those uniform rules can either be achieved by uniform state laws, where contract law has traditionally resided, or by federal preemption. Congress has a number of bills now before it that would preempt parts of state contract law. Most states also are seeing more ad hoc bills on e-commerce.

In the early 90's, a federal task force on intellectual property in the National Information Infrastructure (NII) concluded: "[the] challenge for commercial law . . . is to adapt to the reality of the NII by providing clear guidance as to the rights and responsibilities of those using the NII. Without certainty in electronic contracting, the NII will not fulfill its commercial potential."

The White House issued a paper on July 1, 1997 that found: "Many businesses and consumers are still wary of conducting extensive business over the Internet because of a lack of a predictable legal environment governing transactions."

The White House Report notes the work of NCCUSL and states: "The administration supports the prompt consideration of these [uniform state law] proposals, and the adoption of uniform legislation by all states."

The statements made in the White House Paper have been reaffirmed by the Department of Commerce, stating: "It is important that governments set policies that facilitate, not hinder, Internet development."

The Conference Communiqué for the Global Business Dialogue on Electronic Commerce (GBDe) states:

We came together today for this inaugural conference of the
GBDe in order to express our collective sense of urgency with respect to addressing electronic commerce issues by businesses and public authorities worldwide. It is the consensus position of the GBDe that inconsistent local, national and international patchwork regulation and inflexible regulatory constraints will deprive consumers of the economic benefits of an innovative electronic marketplace and would lead to significant uncertainty to consumers. Governments, administrations, parliaments and international organizations around the world are beginning to question the applicability of traditional, national legislative approaches to this new medium, which is uniquely swift and borderless. They are challenging us to develop effective self-regulatory and market-driven mechanisms that are not limited to national border, to address critical policy issues. We have drawn up proposals and criteria that will create a practical and flexible – where needed – legal and effective market-driven framework for the Internet and electronic commerce, a framework that promotes an open and frictionless global marketplace. Existing barriers must be overcome. In that process, we give precedence to effective self-regulation and technological solutions, wherever possible. In special cases, where regulation may be considered essential, any intervention of public authorities should be narrowly tailored, internationally-oriented, transparent and aiming at a level playing field.

Hal Burman, Office of Legal Adviser, Department of State, at an American Law Institute meeting, emphasized the great importance of a consistent U.S. legal framework in order to succeed in international negotiations:

Our ability to extend and protect United States interests in a globalized economy – and electronic commerce is the epitome of that globalized economy – depends entirely on our ability to proceed from a basis of some commonality in state law. If there is any substantial delay [in completing UCITA] that will impair our effort, other countries are going to take the lead.

The need for uniformity is illustrated by the following common event: a business person is flying somewhere over the United States using his or her laptop computer, connecting with a database. The exact location of the airplane is unknown, as is the location of the servers, or the holder of the database. A license is proposed. The business person accesses the database which may be copyrighted. Among the many questions raised are: Is the holder of the database the owner or authorized by the owner to transfer the database? Has a valid license been agreed to? What are the terms of the license? What warranties arise? What are the applicable standards of performance? Who are the parties to the contract (license)? Have the identities of the parties been adequately established? What law applies? What states have jurisdiction in the event of a dispute? If the database holder is without authority to transfer the database, is the business person an infringer of the copyright?

Under current laws, these and many other questions are not answered clearly, consistently, or uniformly. Thus, there might be a valid and enforceable contract (license) or terms of a contract in one state but not another. The chaos in a national and international Internet setting is self-evident and wholly unacceptable.

The void can be filled either by integrating UCITA into existing state contract law, or by Congress imposing uniform rules likely to be without adequate provision to coordinate with, and integrate into, existing state contract law.

II. HOW MUCH TRUST SHOULD WE PLACE IN THE EFFICIENCY OF THE MARKETPLACE?

The continuing discussions about UCITA have centered on how much the marketplace should be counted upon to provide the best price, quality, and choices, and the extent to which statutory mandates should be placed upon the marketplace because of perceived, feared, or actual abuses.

Information technologies have been the engine that has sustained the economic growth and prosperity of the U.S. economy. Alan Greenspan, in remarks at a luncheon in Chicago on May 6, 1999, said:

The newest innovations, which we label information technologies, have begun to alter the manner in which we do business and create value . . . . The increasing ubiquitousness of Internet web sites is promising to significantly alter the way
large parts of our distribution system are managed . . . . The breadth of technological advance and its application has engendered a major upward reevaluation of business assets.\textsuperscript{10}

The Commerce Report found that information-technology industries account for one-third of our current economic growth, created 350,000 new jobs in 1997 alone, and pay 78% higher than other positions.\textsuperscript{11} The increase in productivity achieved through this new technology "in both 1996 and 1997 . . . [and] declining prices in IT-producing industries brought overall inflation down by 0.7 percentage points. The steep . . . 7 percent declines in IT prices for both 1996 and 1997 pulled down overall inflation below 2 percent."\textsuperscript{12} The technological improvements each year bring down the prices for computers, software, and databases. This benefits the economy and the users whose numbers increase exponentially each year.

FCC Chairman William E. Kennard on July 20, 1999, stated:

The fertile fields of innovation across the communications sector and around the country are blooming because from the get-go we have taken a deregulatory, competitive approach to communications structure – especially the Internet.

* * *

Jason Oxman in our Office of Policy and Plans . . . tested how effective this [policy] was in spurring the growth of the Internet by comparing our ISP marketplace to Britain's . . . . In Britain, you may be able to get a flat-rate to access the Internet, but you would be subject to per-minute charges for a local call. For the ISP . . . leased lines can cost upwards of $64,000 . . . .

Because of these obstacles, fewer people are on-line in the U.K. . . . . That is why last year, the ISP market in all of Europe only generated $4 billion in income, at most one-quarter of what it did in the U.S. . . . \textsuperscript{13}

Despite perceptions to the contrary, the bulk of the software industry is composed of small entrepreneurs with innovative ideas because the Internet and new technologies enable them to enter


\textsuperscript{11} See The Emerging Digital Economy II, supra note 2, at 38.

\textsuperscript{12} See The Emerging Digital Economy II, supra note 2, at 15.

\textsuperscript{13} See http://www.fcc.gov/speeches/Kennard/spweek924.html.
the marketplace at low capital cost.\textsuperscript{14} The low cost of entry to the Internet also provides exciting opportunities for customers to access the marketplace in an organized and, in a most effective way, to enhance their marketplace and negotiating power.\textsuperscript{15} These factors played an important role in the following articulation by the White House of the principles that should govern e-commerce both international and domestically:

The following principles should, to the extent possible, guide the drafting of rules governing global electronic commerce:

- parties should be free to order the contractual relationship between themselves as they see fit;
- rules should be technology-neutral (i.e., the rules should neither require nor assume a particular technology) and forward looking (i.e., the rules should not hinder the use or development of technologies in the future);
- existing rules should be modified and new rules should be adopted only as necessary or substantially desirable to support the use of electronic technologies; and
- the process should involve the high-tech commercial sector as well as businesses that have not yet moved online.

... The U.S. should work closely with other nations to clarify applicable jurisdictional rules and to generally favor and enforce contract provisions that allow parties to select substantive rules governing liability. ... NCCUSL and the American Law Institute, working with the American Bar Association and other interest groups, are urged to continue their work to develop complementary domestic and international efforts.\textsuperscript{16}

III. STRIKING A BALANCE: UCITA'S GENERAL PRINCIPLES

UCITA embraces the innovative potential of a free marketplace. UCITA encourages the expansion of e-commerce, while providing broad protective limitations that can be relied upon to curb abuses. Such broad principles adjust to changing technology, practices, and

\textsuperscript{14} In California, according to the 1995 California State Employment Development Department, there were 6,633 software companies in California, with an average number of 16 employees.


circumstances, but prevent the restriction of innovation and prevent inventive counsel from evading mandatory contract terms. The following section describes UCITA's general principles regarding particular areas of law, such as freedom of contract, First Amendment issues, public policy issues, limitations on electronic contracting, and consumer protections within UCITA.

A. Freedom of Contract

UCITA, like the UCC, is premised on the parties to a contract having freedom of choice. The terms and effect of a contract are determined by agreement rather than by legislative fiat. The exercise of contract choice opens up full opportunities for innovation and growth. Under UCITA, with certain limited exceptions, the terms expressed by the parties in their agreement control. If their agreement is silent, then trade usage and the parties' course of dealing and performance are looked to, and only if the contract is silent and trade usage and course of performance are unhelpful do the "gap-filler" provisions of UCITA apply.

B. Information and First Amendment

Rights in intellectual property are established by other law such as patent and copyright law. UCITA specifically provides that federal preemption applies. State intellectual property law supplements UCITA and is not displaced by UCITA. UCITA adopts a neutral position with respect to what, ultimately, are issues of federal and international information rights policy. However, UCITA provides a basis for case by case resolution of the myriad issues in Section 105(b).

C. Fundamental Public Policy Issues

A principal concern of consumers and other users and developers of computer information has been that the contracts that allow the use of computer information should not violate fundamental public policies. Consumer advocates have argued that overreaching terms in mass market contracts should be prohibited, and law professors and other interested persons have raised serious concerns about attempts to limit innovation, competition, and fair comment through the use of contractual restrictions. The

18. See id. § 114(a).
UCITA Drafting Committee clearly understood the need to provide guidance in this area. It did not want to depart from the longstanding policy that a statute premised on freedom of contract should not be a regulatory statute and, thus, was reluctant to include in the statute a laundry list of impermissible terms. Instead, members of the Drafting Committee worked with members of the academic community for several months to craft a solution that would recognize the legal principle that certain terms of certain contracts may be unenforceable because they violate a fundamental public policy. That solution is now embodied in Section 105(b) and its accompanying comments, which are described in detail later in this article.

D. Certain Limitations

Some UCITA rules do restrict the effect of an agreement. Unconscionable terms are unenforceable,\textsuperscript{19} as are terms that are contrary to fundamental public policy mentioned above.\textsuperscript{20} Performance and enforcement of every contract or duty under UCITA is subject to the good faith standard, which includes the concept of fair dealing.\textsuperscript{21} UCITA defers to preemptive federal law,\textsuperscript{22} explicitly reminding practitioners of the role of federal law. It recognizes that the common and statutory law of fraud, duress, coercion, and the like continue to apply to computer information transactions.\textsuperscript{23} UCITA does not alter intellectual property law and specifically leaves trade secret and unfair competition laws fully in place.\textsuperscript{24} An unreasonable and unjust choice of forum is restricted.\textsuperscript{25} Finally, certain UCITA provisions are non-variable by agreement.\textsuperscript{26}

E. Consumer Protections

UCITA is a uniform commercial statute, not a consumer law statute. However, UCITA does provide consumer protection by (1) retaining existing consumer protections laws,\textsuperscript{27} (2) adopting

\begin{itemize}
  \item \textsuperscript{19} See U.C.I.T.A. § 111 (1999).
  \item \textsuperscript{20} See id. § 105(b).
  \item \textsuperscript{21} See id. § 114(b).
  \item \textsuperscript{22} See id. § 105(a).
  \item \textsuperscript{23} See id. § 114(a).
  \item \textsuperscript{24} U.C.I.T.A. § 114(a) (1999).
  \item \textsuperscript{25} See id. § 110.
  \item \textsuperscript{26} See id. § 113.
  \item \textsuperscript{27} See U.C.I.T.A. § 105(e).
\end{itemize}
consumer rules in UCC Article 2,28 and (3) adding limited additional protections appropriate for issues associated with computer information transactions.29

Many contract law rules in UCITA benefit consumers. The UCITA rules based on the doctrines of unconscionability, good faith, and fundamental public policy provide important consumer protections. But these rules also affect more than consumer transactions; they respond to commercial concerns as well. The UCITA rule (like that in UCC Article 2) on disclaimers of implied warranties in a record,30 or the UCITA rule that a contractual choice of forum is unenforceable if it is unreasonable and unjust,31 or the UCITA rule that assent is not effective unless there was an opportunity to review terms prior to giving assent,32 benefit consumers but are not typically denominated as "consumer protection" rules. These rules contribute to the fact that UCITA creates a world in which consumers are better off than under current law.

UCITA also includes rules focused solely on consumer contracts and rules focused on mass-market contracts, which include all consumer contracts.

Section 105(e) provides that, except for stated rules regarding electronic commerce, if there is a conflict between UCITA and a consumer protection statute, the consumer protection law governs. This leaves all consumer protection statutes in place. Consistent with this theme, UCITA enacts rules preserving existing consumer law even if that result would not necessarily occur under other state law, such as Section 104, which establishes that an agreement to opt into or out of UCITA cannot change a mandatory consumer protection law that would otherwise apply; and Section 109(a), which provides that an agreed choice of law cannot alter an otherwise applicable consumer protection rule that cannot be varied by agreement.

Moreover, UCITA retains consumer protection rules contained in UCC Article 2 including the following provisions: (a) Section 303: a contract term requiring that modifications of contract be in writing is not enforceable in a consumer contract unless the consumer manifests assent to the term; (b) Section 704: a licensee has the

28. See, e.g., U.C.C. § 2-302 (unconscionable); U.C.C. § 1-203 (good faith); U.C.I.T.A. §§ 303, 704 and 804.
29. See U.C.I.T.A. §§ 105(e), 104(3), 109(a), 209, 214, 304, 409(b), 503 and 805.
30. See id. § 406.
31. See id. § 110(a).
32. See id. § 112(a) and (e).
right to refuse tender of a copy that does not perfectly conform to the contract; and (c) Section 803: consequential damages for personal injury cannot be disclaimed for a computer program contained in consumer goods.

In addition, UCITA establishes various consumer protection rules focused on computer information transactions that do not exist under current law. These rules include: Section 209, providing that a license cannot alter terms expressly agreed between the parties and, if presented after delivery, the licensee has a cost-free right of return if it refuses said terms; Section 214, establishing that a consumer has the right to avoid an online contract if he acts promptly to avoid the effect of an electronic mistake; Section 302, the safe harbor rule for changing terms in a continuing contract requires that the licensee be given a right to terminate when change is made; Section 409(b), providing that a warranty to a consumer extends to all individual consumers in the family or household if use should have been expected by the licensor; Section 805, establishing that the statute of limitations for consumers cannot be reduced by agreement; Section 104, providing that a term changing the application of UCITA to a mass-market transaction must be conspicuous; and Section 503, establishing that a term prohibiting transfer of a contract right in a mass-market transaction must be conspicuous.

IV. SUMMARY OF UCITA'S PRINCIPAL PARTS

Like the UCC, enacted in all states, the principal theme of UCITA is that innovation and competition is best fostered in a free market where the parties may choose the technology and business models that best suit their transaction. The outline of UCITA parallels UCC Article 2 (regarding contracts for the sale of goods). Conceptually, UCITA's rules can be divided into three broad categories: gap-filler rules, formation rules, and non-variable rules.

Two thirds of UCC Article 2 and of UCITA's 106 sections are default rules that come into play only if the express terms of the agreement of the parties are silent on a matter and a term cannot be supplied by trade usage, course of dealing, or past performance of the parties. Only when the agreement is silent, and trade usage, etc. does not fill the gap, do the default rules of UCITA fill the gap. In the event that the default rules (based upon general business practice) are not appropriate for the particular transaction, the parties may include an express term that is appropriate. With the exception of only a few default rule sections, there is no
controversy over the approximately 70 UCITA gap-filler sections.

UCITA expands the contract formation rules to encompass electronic contracting for information. These rules comprise about twenty percent of UCITA's sections. They follow the wording and provisions of the new E-signature federal act and UETA, which, if enacted by a state, lifts the federal preemption. In addition, UCITA provides further substantive rules needed for on-line transactions that provide safeguards and safe harbors against inadvertent asset and attribution.

In addition to the gap-filler rules and the contract formation rules, UCITA contains a limited number of non-variable rules (listed in Section 113) to guard against abuses.

Structurally, UCITA is divided into eight parts. The following summary of each part lists the major issues governed by the relevant part.

Part 1 of UCITA provides rules to establish norms and to provide guidance when the parties do not deal with a matter in their contracts for computer information transactions. These transactions cover sale and licenses of computer software, computer games, contracts to create software and online information, multimedia interactive products and online computer data and databases. UCITA applies to the core of the modern digital information economy, but UCITA does not apply to print books, magazines, or newspapers or transactions in traditional records and motion pictures. UCITA, however, generally treats software embedded in goods (e.g. a computerized braking system) as goods. Moreover, UCITA will allow the parties to choose UCITA, or other law, in transactions where different bodies of law might otherwise apply to different aspects of the same transaction. In addition to defining the coverage of the law, Part 1 of UCITA provides important limitations on the ability of the parties to bind each other by agreement and on the use of standard forms and shrink wrap licenses, recognition of e-commerce, and much needed guidance for choice of law and forum.

Part 2 of UCITA supplies modified contract formation rules adapted to permit and to facilitate electronic contracting, and rules to determine the terms of contracts formed, including protections against "imposed" terms, unauthorized communications, and

34. See id. §§ 107, 108.
35. See id. §§ 109, 110.
electronic error, and incentives for pretransaction disclosure of all terms to be part of the contract.

Part 3 of UCITA provides rules governing parol evidence, modification, changes in terms, and for interpretation in the absence of explicit treatment by the parties.

Part 4 of UCITA adjusts commonly recognized warranties as appropriate for computer information transactions; for example, to recognize the international context in connection with protections against infringement and misappropriation, and First Amendment considerations involved with informational content.

Part 5 of UCITA provides much needed clarification as to ownership rights and the ability to transfer rights (and duties) under a license, including by way of security so that financing for these transactions can be secured.

Part 6 of UCITA adapts traditional rules regarding what constitutes acceptable performance in the context of computer information transactions, including providing rules for the protection of the parties concerning the electronic regulation of performance, to clarify that the appropriate general rule is one of material breach with respect to cancellation (rather than so-called "perfect tender"), and to carry over the familiar UCC Article 2 rules when appropriate in the context of the tangible medium on which the information is fixed, and for impracticability. Part 6 also supplies guidance in the case of certain specialized types of contracts and for termination.

Part 7 of UCITA for the most part carries over the familiar Article 2 rules concerning breach when appropriate in the context of the tangible medium on which the information is fixed, but also adapts common law rules and Article 2 rules regarding waiver, cure, assurance, and anticipatory breach to the context of computer information transactions.

Part 8 of UCITA provides a remedy structure somewhat modeled on that of Article 2 but adapted in significant respects to the different context of a computer information transaction. For example, Section 808 of UCITA recognizes that the focus in a license context for a licensor's remedy should properly be on recovery for benefit conferred or for lost profit, rather than on

36. See id. § 605.
37. See id. § 601. See also id. § § 701, 704, and 802.
38. See U.C.I.T.A. Subparts B and D.
39. See id. at Subpart C.
40. See id. at Subpart E.
damage measurement by a substitute transaction, where the license is non-exclusive, such that additional transactions are permitted and there is very little cost in reproduction of the information and its redistribution. Section 816 of UCITA also contains very strict limitations on the generally recognized common law right of self-help as applicable in the electronic context.

V. OVERVIEW OF KEY PROVISIONS OF UCITA

The following discussion summarizes the key provisions of UCITA by working through the sections of the uniform act in chronological order.

A. Scope

1. Limited to "Computer Information Transactions" (Section 103(a))

UCITA covers "computer information transactions," defined as "agreement[s] . . . to create, modify, transfer, or license computer information or informational rights in computer information."41 "Computer information means information in electronic form that is obtained from or through a computer, or which is in a form capable of being processed by a computer."42 UCITA applies to contracts to license or buy software, contracts to create computer programs, contracts for on-line access to databases, and contracts to distribute information over the Internet. UCITA does not apply to goods such as television sets, stereo equipment, airplanes, or traditional books and publications. Goods generally remain subject to UCC Article 2 or Article 2A.

Many transactions may include more than "computer information." If a transaction also involves non-goods subject matter, UCITA applies only to the part of the transaction which is "computer information" and other law applies to the other subject matter. However, if the "primary subject matter" of the transaction is "computer information," then UCITA governs the entire transaction.43

In the event the other subject matter to a transactions "goods," UCC Article 2 or 2A applies to the "goods" subject matter and

42. See id. § 102(10).
43. See id. § 103(b).
UCITA applies to the "computer information" part of the transaction. However, if the "computer information" is simply embedded in "goods," UCC Article 2 or 2A applies to the entire transaction unless the "goods" are "a computer or computer peripheral" or "access to or use of the [computer] program is ordinarily a material purpose of the transaction."44

UCITA is coordinated with existing Articles 2 and 2A, so that coverage of each to the relevant part of the transaction will be facilitated. With respect to other subject matter (primarily services), UCC Articles 2 and 2A have worked in mixed transactions with the common law applicable to the services. The same result is expected in the application of UCITA to mixed transactions involving other non-goods subject matter.

If, nonetheless, the parties wish to contract for UCITA to apply, or other law to apply to the transaction in whole or in part, they may do so under the provisions below.

2. Opting in and Opting Out (Section 104)

Under common law, the right of parties to choose their own contract provisions generally permits them to adopt the law they may wish to apply to their transaction.45 However, UCITA places certain specific restrictions on opting into or out of UCITA in order to safeguard the parties.46

a. Restrictions on Opting Out

Parties may opt out of UCITA for the whole or part of the transaction that relates to computer information, but in a mass-market (i.e. anonymous, retail) transaction the term to "opt-out" must be conspicuous and the term must not alter the consumer defense of electronic error,47 the substantial limitations on electronic self-help,48 the applicability of unconscionability,49

44. Id. § 103(b).
45. See, e.g., Official Comment 2 to Section 3-104 of the Uniform Commercial Code, which reads: "Moreover, consistent with the principle stated in Section 1-102(2)(b), the immediate parties to an order or promise that is not an instrument may provide by agreement that one or more of the provisions of Article 3 determine their rights and obligations under the writing."
46. See U.C.I.T.A. § 104.
48. See id. § 816.
49. See id. § 111.
fundamental public policy,\textsuperscript{50} or good faith.\textsuperscript{51}

b. \textit{Restrictions on Opting In}

Parties may opt into UCITA to apply it to the part of the transaction that is non-UCITA subject matter if the opt-in term is \textit{conspicuous} in a mass-market transaction and the term does not alter an otherwise applicable rule or procedure that may not be varied or that may be varied only in a manner specified in the other law.

3. \textit{Exclusions from UCITA}

UCITA does not affect transactions in the core businesses of other information industries (e.g. print, motion picture, broadcast, sound recordings) whose commercial practices in their traditional businesses differ from those in the computer software industry. UCITA expressly excludes financial services transactions,\textsuperscript{52} upstream and merchant to merchant contracts for broadcast and cable TV\textsuperscript{53} and motion pictures,\textsuperscript{54} sound recordings,\textsuperscript{55} compulsory

\textsuperscript{50} See id. § 105(b).
\textsuperscript{51} See id. §§ 114(b) and 102(32).
\textsuperscript{52} "Financial services transaction" means:
  a contract or a transaction that provides access to, use, transfer, clearance, settlement, or processing of:
  a. deposits, loans, funds, or monetary value represented in electronic form and stored or capable of storage electronically and retrievable and transferable electronically, or other right to payment to or from a person;
  ii. an instrument or other item;
  iii. a payment order, credit card transaction, debit card transaction, or a funds transfer, automated clearing house transfer, or similar wholesale or retail transfer of funds;
  iv. a letter of credit, document of title, financial asset, investment property, or similar asset held in a fiduciary or agency capacity; or
  v. related identifying, verifying, access-enabling, authorizing, or monitoring information.
\textsuperscript{53} "Audio or visual programming" means audio and visual programming that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act of 1934 and related regulations as they existed on July 1, 1999, or by similar methods of delivery. See U.C.I.T.A. § 103(g) (1999).
\textsuperscript{54} "Motion picture" means:
(1) "motion picture" as defined in Title 17 of the United States Code as of July 1, 1999; or
(2) a separately identifiable product or service the dominant character of which consists of a linear motion picture, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of the motion picture or (ii) other information as long as the motion picture constitutes the dominant character of the product or service despite the inclusion of
licenses, contracts of employment of an individual other than as an independent contractor, a contract which does not require that the information be furnished as computer information or in which the form of the information as computer information is otherwise de minimis with respect to the primary subject matter of the transaction, newspapers, magazines, books, and other print forms not covered by the definition of "computer information" except when that part is transferred in electronic form (e.g. over Internet by license), and e-mail communications merely about the agreement.

B. Relation to Federal and Other State Law (Section 105)

1. Federal Preemption

Like all state laws, provisions of UCITA which are preempted by federal law are unenforceable to the extent of the preemption. Lest there be any question about this, particularly with respect to federal intellectual property laws, UCITA has expressly stated this principle in black-letter form. Federal copyright and patent law that preempts, controls.

2. Fundamental Public Policy

The UCITA Drafting Committee wrestled with numerous conflicting views regarding the propriety of shrinkwrap and clickwrap contracts and terms contrary to other public policy. Some participants in the drafting process urged that such contracts and terms be banned outright, while others suggested that UCITA should contain a list of impermissible terms (such as terms prohibiting reverse engineering, terms prohibiting certain kinds of

the other information.

See U.C.I.T.A. § 103(f) (February 2000 Revision).
55. "Sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording." See U.C.I.T.A. § 103(d)(2)(B) (February 2000 Revision).
57. See id. § 103(d)(4).
58. See id. § 103(d)(5).
59. See id. § 102(11).
60. "A transaction is not included merely because the parties' agreement includes that their communications about the transaction will be in the form of computer information." U.C.I.T.A. § 102(11) (1999).
61. See U.C.I.T.A. § 105(a).
comment about the software, etc.). Still others favored complete freedom of contract and asked that the enforceability of shrinkwrap contracts be subject to no greater restrictions than currently exist for other negotiated contracts. The Drafting Committee considered all of these positions carefully. It recognized that these contracts typically are not negotiated in the traditional sense, and that the licensee's sole negotiating power really lies in its decision to purchase or not to purchase. Where the licensee has the right to see the terms of a license prior to making its decision to purchase, and prior to paying for the product, ostensibly the licensee can make an educated decision about the purchase. Where the licensee does not have that opportunity, the issue becomes more problematic.

The Drafting Committee also realized that it was not practical to include a "laundry list" of impermissible terms. Such a list would be difficult to compile, and could not be flexible enough to keep pace with the changing technology practices to bypass the list. In the end, the Drafting Committee decided upon a balance that does not permit shrinkwrap contracts to be enforced unless certain basic protections are ensured. Rather than reflecting these basic protections in a "laundry list" of impermissible terms, the Drafting Committee developed a new approach that has been characterized as a type of heightened unconscionability standard. This approach is contained in Section 105(b), which provides that if a term of a contract violates a fundamental public policy, a court may refuse to enforce the contract, or it may enforce the remainder of the contract without the impermissible term, or it may so limit the application of any impermissible term as to avoid any result contrary to public policy. In each case, enforcement of the term is limited to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of that term.

Section 105(b) and the Official Comments thereto provide several guideposts for courts as follows: (a) courts may consider a variety of factors in determining whether to override a term; (b) higher preference should be given to terms where parties have negotiated their contracts; (c) public policies most likely to be applicable are those relating to innovation, competition and fair comment; (d) courts should follow the guidance of the legislature in determining which public policies are fundamental; and (e) Section 105 is not limited to shrinkwrap and clickwrap contracts, though these contracts clearly were the impetus for its initial consideration.
3. Other Intellectual Property Law

UCITA is expressly supplemented by trade secret and unfair competition laws. UCITA is likewise supplemented by intellectual property law. UCITA does not change the rights conferred by these laws.

4. Consumer Protection Law

UCITA adds several new consumer protections; otherwise it does not change existing consumer law. Consumer laws which conflict with UCITA expressly control over UCITA.

5. E-Commerce Facilitation

In the case of a conflict between UCITA and another state law which existed on the date that UCITA was passed, UCITA employs the following provisions so as to facilitate e-commerce, with all its potential for lower costs and efficiencies, while providing a specific note to the legislatures advising them to review the statutes that may be affected by this section to determine whether under their fundamental policy the effect should not apply to some of those statutes, and, if so, to exclude such statutes from this section.

a. Writing

A requirement that a term, waiver, notice, or disclaimer be in writing is satisfied by a record.

b. Authenticate

A requirement that a writing or term be signed is satisfied by an authentication.

c. Conspicuous

A requirement that a term be conspicuous is satisfied by a term that is conspicuous in accordance with UCITA. Any state statute

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63. See id. §§ 105(a) and 114(a).
64. See id. § 105(c).
65. UCITA defines "record" as "Information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form." § 102(a)(54).
66. UCITA defines "authenticate" as "to sign, or with the intent to sign a record, otherwise to execute or adopt electronic symbol, sound, message or process referring to, attached to, included in, or logically associated, or linked, with that record." § 102(6).
concerning the time, manner, or content of a notice or disclosure is not within the definition of "conspicuous" and, thus, remains in full force and effect.\footnote{67}

d. Assent

A requirement of consent or agreement to a term is satisfied by an action that manifests assent to a term in accordance with UCITA.\footnote{68}

6. Digital Signature Act

A digital signature law existing on the effective date of UCITA is not affected by UCITA.\footnote{69}

\footnote{67. UCITA defines "conspicuous" as so written, displayed or presented that a reasonable person against whom it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react without review of the record by an individual. Conspicuous terms include, but are not limited to, the following:

(A) with respect to a person,

(i) a heading in capitals in a size equal or greater than, or in contrasting type, font or color to, the surrounding text;

(ii) language in the body of a record or display that is in larger or other contrasting type, font or color or is set off from the surrounding text by symbols or other marks that call attention to the language;

(iii) a term prominently referenced in an electronic record or display which is readily accessible and reviewable from the record or display;

(B) with respect to a person or an electronic agent, a term or reference to a term that is so placed in a record or display that the person or electronic agent cannot proceed without in some additional action taken with respect to the term or reference.

U.C.I.T.A. § 102(14).

68. See below for discussion of "manifest assent."

69. See U.C.I.T.A. § 105(e) (1999).}

The parties may vary any provision of UCITA, except those non-variable provisions listed in Section 113(a)(3).

C. Choice of Law and Forum (Sections 109 and 110)

In general, a designation of governing law contained in a contract is enforceable. This is consistent with the practice of most lawyers and businesses who routinely include choice of law and forum clauses in their contracts. It also is consistent with case law wherein courts routinely enforce such choices in the absence of egregious circumstances.

UCITA's only express exception to this principle arises with respect to consumer transactions. In a consumer transaction, a choice of law clause will not be enforceable to the extent that it varies a consumer protection rule which cannot be varied by agreement under the law of the jurisdiction whose law would apply in the absence of the agreement.

If there is no enforceable choice-of-law provision in a contract, the following default provisions will apply: (1) in an access contract, or contract providing for electronic delivery of a copy, the contract is governed by the law of the jurisdiction in which the licensor is located when the agreement is made; (2) a consumer contract which requires delivery of a copy on a physical medium to the consumer is governed by the law of the jurisdiction in which the copy is delivered, or should have been delivered; (3) in all other cases, the contract is governed by the law of the jurisdiction with the most significant relationship to the transaction; and (4) if the default jurisdiction is outside the United States, the laws of that jurisdiction govern only if they provide substantially similar protections and rights to the party not located in that jurisdiction.

70. The exceptions are: obligations of good faith (Section 114(b)); diligence, reasonableness and care (Section 113(a)(1)); limitations on choice of law or forum (Sections 109 and 110), the right to relief from an unconscionable contract or clause; the procedures for manifest asset and opportunity to review (Section 112); the protection for consumers for electronic error (Section 214); limitations as set forth in Section 201, protections for mass market licensees as set forth in Section 209; requirements for an enforceable term set forth in Sections 303(b), 307(g), 406(b)(c) and 804(a); limitations on a financier (Part 5); restrictions on the statute of limitations (Section 805(a) and (b)); and the protections limiting the use of electronic self-help (Sections 815(b) and 816).

71. See U.C.I.T.A. § 109(a).
72. See id. at § 109(b)(1).
73. See id. at § 109(b)(2).
74. See id. at § 109(b)(3).
as are provided under UCITA.\textsuperscript{75} Otherwise, the law of the jurisdiction in the United States with the most significant relationship to the transaction governs.\textsuperscript{76}

In general, UCITA also permits parties to designate a chosen forum for litigation unless the choice is unreasonable and unjust. The choice of forum is not exclusive unless the agreement expressly so provides.

**D. Statute of Frauds (Section 201)**

The UCITA Drafting Committee wrestled with whether to include a statute of frauds provision, given that such provisions are thought to be somewhat antithetical to "modern" contracting. However, in the end, the Committee determined that the risks presented by computer information transactions are so great (e.g. the threat of infringement, the split of interests involved in licensing, etc.) that a statute of frauds was necessary. As specifically noted in the OfficialComments, this section must be construed in relationship to federal intellectual property statutes that may establish an independent, preemptive, statute of frauds.

A contract requiring payment of $5,000 or more is \textit{not} enforceable unless there is a record authenticated by the party against which enforcement is sought sufficient to indicate that a contract has been made and to reasonably identify the copies of subject matter to which the contract refers, or the contract is a license for an agreed duration of less than one year.\textsuperscript{77}

A record is sufficient even if it omits or incorrectly states a term, but the contract is not enforceable beyond the subject matter or copies shown in the record.\textsuperscript{78}

An agreement that does not satisfy UCITA's statute of frauds requirements for sufficiency but which is valid in other respects is enforceable to the extent that performance has been tendered by one party and accepted by the other; or the party against which enforcement is sought admits in its pleading or testimony that a contract was made.\textsuperscript{79}

Between merchants, if within a reasonable time a record in confirmation of the agreement and sufficient against the sender is

\textsuperscript{75} See \textit{id.} at § 109(c).
\textsuperscript{76} See \textit{U.C.I.T.A.} at § 109 (c).
\textsuperscript{77} See \textit{id.} at § 201(a).
\textsuperscript{78} See \textit{id.} at § 201(b).
\textsuperscript{79} See \textit{id.} at § 201(c)(2).
received and the party receiving it has reason to know its contents, the record satisfies the requirements of sufficiency against the party receiving it unless notice of objection to its contents is given in a record within ten days after the confirming record is received.  

E. Manifesting Assent; Opportunity to Review (Section 112)

There are a number of concepts in UCITA that need to be read together to fully appreciate the safeguards incorporated to protect the parties from inadvertent contracts, particularly in e-commerce. Some of these protections do not exist in common law. These concepts include:

1. Authentication

Under UCITA, the term “authenticate” includes both a signature and “the intent to sign a record, otherwise to execute or adopt an electronic symbol, sound or process referring to, attached to, included in, or logically associated or linked with, a record or term.” There is no authentication without intent for the authentication to be a signing.

2. Agreement by conduct

Under UCITA, the term “agreement by conduct” means “intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.”

- If a party denies assent, “intent” or “reason to know” must be proven with the burden of persuasion on the party asserting the enforceability of the contract.
- The circumstances may include “reconfirmation” as a safe harbor, i.e., an initial click on “I agree,” followed by a second display asking whether the person really intends to agree to the agreement displayed and a second click in response thereto (usually referred to as a “double click” safe harbor).

This reconfirmation is not ordinarily employed or required

80. See id. at § 201(d).
81. See UCITA § 102(6) (emphasis added).
today. UCITA adds this safeguard, which will change existing business practices.

3. Opportunity to Review

Before conduct can be assent as discussed above, there must be an opportunity to review the terms. UCITA requires such opportunity to be made "available in a manner that ought to call it to the attention of a reasonable person and permit review." Absent assent, the transaction may be subject to the unwind provisions of Section 202(e).

4. Later terms

Under UCITA, after beginning performance or use, later terms are adopted only "if the parties had reason to know that their agreement would be represented . . . by a later record to be agreed on." Absent assent, the transaction may be subject to the unwind provisions of Section 202(e).

5. Refund

The licensee is entitled to reject the contract with later terms for any reason and obtain a refund, but, additionally, in a mass-market license the licensee may recover incidental costs of return or destruction and reasonable and foreseeable costs of restoring the licensee's system.

6. Pretransaction Disclosure

Section 211 provides a strong incentive for disclosure of all terms before the licensee must pay or gets delivery.

7. Attribution

Under UCITA, attribution to the party to be bound is required; the claimant has the "burden of establishing" attribution. The efficacy of an attribution procedure is determined by the circumstances including any agreement of the parties. Commercial reasonableness of an attribution procedure is a factor in making

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84. See id. § 112(e).
85. See id.
86. See id. § 210.
87. See id. § 112(e)(4).
88. See id. § 210(b).
90. See id. § 213(c).
that determination.\textsuperscript{91}

In short, a party to be bound must have an opportunity to review the terms, then assent with an intent to authenticate or intent by conduct and with reason to know that the other party will infer assent; or, if the opportunity to assent is after performance or use, the party to be bound must have reason to know there are later terms and, in a mass-market transaction, the party can return the item with a cost-free refund; and, lastly, the claimant has the burden of establishing attribution.\textsuperscript{92}

\textbf{F. Contract Formation (Sections 202-207)}

UCITA deals separately with forming a contract,\textsuperscript{93} and with the terms of that contract once formed.\textsuperscript{94}

UCITA's formation rules are contained in Sections 202 through 207. Section 202 sets forth the general formation rules; Section 203 provides the general rules governing offers and acceptances; Section 204 deals with offers and acceptances that contain varying terms; Section 205 covers conditional offers and acceptances; Section 206 provides for the formation of contracts by electronic agents; and Section 207 covers releases. This is the basically same framework contained in current UCC Article 2, but there are important differences between UCITA and Article 2 that should be noted.

Once it is determined, by applying Sections 202 through 207, that a contract has been formed, Sections 208 through 211 determine the terms of the contract. Section 208 is the basic provision, stating that the terms of a record are adopted when a party agrees to that record, subject to certain exceptions; Section 209 contains those exceptions as they relate to mass-market contracts; and Section 210 describes what terms are adopted when parties form a contract by conduct.

\textbf{1. Deciding Whether a Contract Has Been Formed}

\textit{a. General Formation Rules (Section 202)}

A contract may be formed in any manner sufficient to show

\textsuperscript{91} See id. § 212.
\textsuperscript{92} See id. § 213(a).
\textsuperscript{93} See id. § 201-207.
\textsuperscript{94} See U.C.I.T.A. § 208-211.
agreement, including by offer and acceptance, by conduct of the parties, or by operation of electronic agents which recognize the existence of a contract. Even if one or more terms are left open, the contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. In the absence of conduct or performance by both parties to the contrary, a contract is not formed if there is a material disagreement about a material term, including scope.

If a term is to be fixed by later agreement, and the parties intend not to be bound unless the term is so fixed, a contract is not formed if the parties subsequently do not agree to the term. This is known as the concept of "layered" (or "rolling") transactions.

b. Offer and Acceptance, Generally (Section 203)

Offer invites acceptance in any reasonable manner. Shipment or promise to ship a copy is a proper means of acceptance unless the offer provides otherwise. For electronic messages and performances, the timing of formation is based on the time that the electronic acceptance is received or electronic performance is received, if acceptance is by performance.

c. Acceptance with Varying Terms (Section 204)

The general rule is that a definite and seasonable acceptance operates as an acceptance even if it contains terms that are different from the offer, unless it materially alters the offer. An acceptance is deemed to materially alter an offer if it contains terms that materially conflict with or vary the terms of the offer, or that add material terms not contained in the offer. If an acceptance materially alters an offer, then a contract is not formed unless all other circumstances, including the conduct of the parties, establish a contract.

d. Conditional Offers and Acceptances (Section 205)

Offers or acceptances that, because of the circumstances or the language, are conditioned upon agreement by the other party to the terms of the offer or acceptance, generally preclude formation of a contract unless the other party agrees to the exact terms, but if both the offer and acceptance are contained in standard forms, and one or both are conditioned on acceptance of their terms, then the party requiring the agreement to its exact terms must act in a
manner consistent with those required terms, such as by refusing to perform, refusing to permit performance, or refusing to accept the benefits of the contract until the proposed exact terms are accepted.

If a party agrees to a conditional offer, it adopts the terms of that offer under Section 209 or 210, except terms of the conditional offer that conflict with any expressly agreed terms on price and quantity.

2. Determining What Terms Apply to a Contract, Once Formed (Sections 208-211)

a. Adopting Terms of Records (Section 208)

The general rule is that except as provided in Section 210, which contains certain protections for mass-market contracts, a party adopts the terms of a record, including a standard form, if that party agrees to the record. Adoption of certain terms may occur after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or in part by a later record to be agreed, but at the time performance or use commenced, there would be no opportunity to review the record.

With respect to later terms, the following roadmap applies:

- If the parties did not have reason to know that terms would be proposed later for assent, the later terms are proposed modifications governed by Section 303.
- If the parties had reason to know that terms would be proposed for later assent and did not intend to have an agreement unless the terms were agreed to, agreement to the terms establishes a contract, but Section 202(e) applies if the terms are rejected.
- If the parties had reason to know that terms would be later proposed for assent and intended to have an agreement even if the terms were not agreed to, agreement to the later terms makes them part of the contract, but the terms are left open if there is no agreement to the later terms.
- If the parties agreed that one party could specify later terms, but no further assent is required, Sections 304 and 305 apply.

Terms become part of the contract without regard to a party's knowledge or understanding of individual terms in the records, except for a term that is unenforceable because it fails to satisfy
some other requirement of UCITA.

b. Special Rules for Mass-Market Licenses (Section 209)

A party adopts the terms of a mass-market license only by manifesting assent before or during the party's initial performance or use of or access to the information. A term is not part of the license if it is unconscionable under Section 111 or unenforceable under Section 105(a) or (b), or, subject to Section 301, if it conflicts with terms to which the parties expressly agreed.

If a licensee does not have an opportunity to review a mass-market license prior to becoming obligated to pay, and does not agree to the license after having that opportunity, the licensee is entitled to a return under Section 112, and to reimbursement of reasonable expenses of return, compensation for reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation, if the installation occurs because information must be installed to enable review of the license and the installation alters the system or information in it but does not restore the system or information upon removal of the installed information because of rejection of the license.

c. Terms When Contract Formed by Conduct (Section 210)

When a contract is formed by conduct, UCITA provides that a court shall consider the following list of factors to determine what terms are included: (i) the terms and conditions to which the parties expressly agreed; (ii) course of performance, course of dealing, or usage of trade; (iii) the nature of the parties' conduct; (iv) the records exchanged; (v) the information or informational rights involved; and (vi) the supplementary terms of UCITA that apply and all other relevant circumstances.

Section 210 does not apply if the parties authenticate a record of the agreement, or a party agrees, by manifesting assent or otherwise, to the record of the other party.

G. Electronic Contracts (Sections 212-215)

The general rule here is that a record or authentication may not be denied legal effect, validity, or enforceability solely on the ground that it is electronic.95 The next sections of UCITA set forth

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particular rules to be used when an electronic record or authentication is at issue. Some key definitions to remember:

- **"Automated Transaction"** means a contract formed or performed in whole or in part by electronic means or by electronic messages in which the electronic actions or messages of one or both parties which establish the contract are not reviewed in the ordinary course by an individual before the action or response.\(^96\)

- **"Electronic"** means relating to technology having electrical, digital, magnetic, wireless, optical, or electromagnetic, or similar capabilities.\(^97\)

- **"Electronic Agent"** means a computer program or electronic or other automated means used independently to initiate an action or respond to electronic messages or performances without review or action by an individual at the time of the action, response, or performance.\(^98\)

- **"Electronic Message"** means a record or display stored, generated, or transmitted by electronic means for purposes of communication to another person or electronic agent.\(^99\)

- **"Record"** means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.\(^100\)

1. *Formation by Electronic Agents (Section 206)*

A contract may be formed by the interaction of electronic agents if the interaction results in the electronic agents engaging in operations that recognize the existence of a contract. Note that a remedy exists if formation occurs by mistake, fraud, or the like.

A contract also may be formed by the interaction of an electronic agent and an individual. A contract is formed if the individual takes actions or makes a statement that the individual has reason to know will (i) cause the agent to perform, provide benefits or permit the use or access that is the subject of the contract, or instruct a person or an electronic agent to do so; or (ii) indicate acceptance or an offer, regardless of other expressions...
or actions by the individual to which the electronic agent cannot react. The terms of the contract are determined under Section 208 or 209, but do not include terms provided by the individual in a manner to which the electronic agent could not react.

2. Procedure for Detection of Changes and Errors (Section 213 and 214)

UCITA provides that if parties use an attribution procedure for detecting changes or errors in electronic events (i.e., what you sent is not what the other person received), and one party conformed and the other party did not, and the procedure would have detected the change or error, the conforming party may avoid the effect of the change or error.¹⁰¹

3. Consumer Defense for Electronic Error (Section 214)

In an automated transaction, a consumer is not bound by an electronic message that the consumer did not intend and that was caused by an electronic error if the consumer promptly on the earlier of learning either of the error or of the other party's reliance on the message, in good faith notifies the other party of the error and that the consumer did not intend the original message; and delivers all copies of any information it received to the other party or delivers or destroys all copies pursuant to reasonable instructions received from the other party; and has not used or received a benefit from the information or caused the information or benefit to be made available to a third party.

4. Timing and Effectiveness of Electronic Messages (Section 215)

Receipt of an electronic message is effective when it is received at the place designated or held out by the recipient for such receipt. Receipt must not constitute assent, create an agreement, or change the requirements of the form and content of a notice, even if no individual is aware of its receipt; the mailbox rule is rejected. Receipt of an electronic acknowledgment establishes only that the message was received, not that the content sent corresponds to the content received. If errors are present, the general common law of mistake and Section 216 control the outcome.

¹⁰¹ See id. § 213.
H. Interpretation and Monitoring

1. Interpretation of Grant (Section 307)

A license grants the rights expressly described and all informational rights within the licensor's control that are necessary in the ordinary course to use the expressly described rights. If a license expressly limits use of the information or informational rights, use in any other manner is a breach. In all other cases, there is an implied limitation that the licensee shall not use the information or informational rights other than as described in the paragraph above. However, use inconsistent with this implied limitation is not a breach if it would be permitted under applicable law in the absence of the implied limitation.

A license that does not specify the number of permitted users permits the number of users that is reasonable in light of the informational rights involved and the commercial circumstances existing at the time of agreement. This provision (like the other provisions in this section) is a default rule that applies only in the absence of an agreement on the subject. Most parties will cover this subject in their contracts.

Neither party is entitled to any rights in or to improvements or modifications made by the other party after the license becomes enforceable. If the licensor agrees to provide new versions, improvements, or modifications, it must provide them as developed and generally made commercially available.

Neither party is entitled to receive copies of source code, object code, schematics, master copy, design material, or other information used by the other party in creating, developing, or implementing the information.

Terms dealing with scope are construed under ordinary principles of contract interpretation in light of the commercial context. In addition, the following two rules apply: First, a grant of "all possible rights" or "all possible media" includes all rights then existing or created by law in the future and all uses, media and methods of distribution or exhibition then existing or developed in the future, whether or not anticipated at the time of the grant.\textsuperscript{102} Second, a grant of an "exclusive license" or a grant using similar terms conveys to the licensee exclusive rights in the information as against the licensor and all other persons to exercise the rights

\textsuperscript{102} See U.C.I.T.A. § 307(f)(1).
granted within the scope of the license. It affirms that the licensor will not grant rights in the same information, nor has it made such a grant in the past that remains in force at the time of contract.\footnote{See id. at §§ 307(f)(2) and 401(b)(2).}

2. \textit{Duration of Contract (Section 308)}

If an agreement does not specify its duration, the following two rules apply (extending the applicable common law rules): First, except as provided below, the agreement is enforceable for a time reasonable in light of the commercial circumstances, but may be terminated at will by either party on seasonable notice. Second, if the license is a software contract, other than for source code, that transfers ownership of a copy, or provides for delivery of a copy for a contract fee, the total amount of which is fixed at or before delivery, or the license expressly granted the right to incorporate or use the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance, then the contractual rights of the licensee to use the licensed information or informational rights are perpetual (subject to cancellation for breach).

Again, these provisions are default rules that apply in the absence of an agreement on the subject. Most parties will cover these matters in their contracts.

I. \textbf{WARRANTIES: PART 4}

UCITA provides the following basic warranties which will be familiar to practitioners in the field of licensing law: Quiet Enjoyment and Non-infringement, Merchantability of a Computer Program, Information Content, and Fitness for Licensee's Purpose and System Integration. UCITA also clarifies the elements of an express warranty. It sets forth the manner in which implied warranties may be disclaimed. Implied warranties are not generally recognized and/or clear under common law (the Restatement (Second) of Contracts makes no mention of implied warranties); UCITA thus significantly extends the scope of warranties over those under current law.
Overview of Proposed UCITA

1. Warranty of Enjoyment and Non-infringement (Section 401)

A licensor who is a merchant regularly dealing in information of the kind warrants that the information shall be delivered free of the rightful claim of any third person by way of infringement or misappropriation, but a licensee that furnishes detailed specifications to the licensor and the method required for meeting the specifications holds the licensor harmless against any such claim caused by compliance with the specification or method, except for a claim that results from the failure of the licensor to adopt a non-infringing alternative of which the licensor had reason to know. This warranty applies to the circumstances at the time of delivery. It does not pertain to future events, such as a subsequently issued patent.

This warranty does not cover infringement claims that result from the licensee combining the licensed information with other information, the composite of which infringes a third party right. These qualifications are consistent with UCC Article 2, which provides an “as delivered” warranty. Note that this warranty applies to licensors of information. It does not apply to persons who merely provide communications or transmission services. Service providers of this type do not, for the purpose of contract law, engage in activities that reasonably create the inference that they assure the absence of infringing information.

Any licensor (regardless of whether it is merchant or non-merchant) warrants, under Section 401, the following:

(1) For the duration of the contract that no person holds a claim to or interest in the information which arose from an act or omission of the licensor, other than a claim by way of infringement or misappropriation, which will interfere with licensee’s enjoyment of its interest; and

(2) As to rights granted exclusively to the licensee, that within the scope of the license [and as to other law that applies to the licensed rights]:

(A) [As to a patent license,] to the knowledge of the licensor, any licensed patent rights are valid and exclusive to the extent that exclusivity and validity are recognized by the law under which the patent rights were created; and

(B) In all other cases, the licensed informational rights are

104. See U.C.C. § 2-312(1)(b).
valid and exclusive for the information as a whole to the extent that exclusivity and validity are recognized... 105

However, the licensor warranties are subject to the following: (1) "If the licensed informational rights are subject to a right of privileged use, collective administration, or compulsory licensing, the warranty is [subject] to those rights;" and (2) With respect to the above paragraphs, unless the contract expressly applies to use or rights outside the United States, warranties apply solely to rights arising under federal or state law.106

Safe harbor language is included; and the warranties under the above paragraphs are not made in an agreement that merely permits use of rights under a patent. This provision recognizes the historical concept that a patent license is no more than the waiver by the licensor of its right to sue for use of its rights. A patent license does not create an affirmative right to use the patented technology, nor does it assure that there are no blocking patents that may prevent use of the licensed technology.

If a licensor wishes to disclaim this warranty, it must use specific language, or circumstances must exist, which give the licensee reason to know that the licensor does not warrant that competing claims do not exist or that the licensor purports to grant only the rights that it has. Language is sufficient if it states "There is no warranty against interference with your enjoyment of the information or against infringement," or words of similar import.107

There is one exception to the specific language rule described above. Between merchants, a grant of a "quitclaim," or similar words, grants the information or information rights without an implied warranty as to infringement or the like.108

2. Express Warranty (Section 402)

A licensor expressly warrants that information to be furnished under an agreement will conform to any affirmation of fact or promise, or description made by licensor to licensee in any manner, including in a medium for communication to the public, such as advertising that relates to the information and becomes part of the basis of the bargain.

It is not necessary to use words like "warranty" or "guarantee;"

105. See U.C.I.T.A. § 401(b).
106. See id. at § 401(c).
107. See id. at § 401(d).
108. See id. at § 401(e).
however, a mere affirmation of the value of the information or statement purporting to be the licensor’s opinion or commendation of the information does not create a warranty. This section does not alter the standards by which an express warranty for published informational content is either created or not created under other law.

3. **Implied Warranty, Merchantability of Computer Program (Section 403)**

This warranty differs depending upon *to whom* it is directed.

Under UCITA, a merchant licensor warrants: (1) to the *end user* that the computer program is reasonably fit for the ordinary purpose for which it is used; and (2) to a *distributor* that (a) the program is adequately packaged and labeled as the agreement or the circumstances may require; and (b) in the case of multiple copies, the copies are within the variations permitted by the agreement, of even kind, quality, and quantity, within each unit and among all units involved; and (3) to *both* the end user and the distributor that the program conforms to the promises or affirmations of fact made on the container or label, if any.

4. **Implied Warranty, Informational Content (Section 404)**

UCITA establishes a new implied warranty that focuses on the accuracy of data provided under a contract. The basic warranty states that “a merchant that, in a special relationship of reliance with a licensee, collects, compiles, processes, provides or transmits informational content warrants to its licensee that there is no inaccuracy in the informational content caused by the merchant’s failure to perform with reasonable care.” Note that this warranty does not guarantee that there will be no inaccuracies; rather it gives some protection by assuring that there will be no inaccuracies caused by a failure to use reasonable care.

This warranty does not arise with respect to a person that acts as a conduit (see also Section 112(g)) or provides only editorial services in collecting, compiling, or distributing informational content identified as that of a third person, because a person collecting, summarizing, or transmitting third party data acting as a conduit does not create the same expectations about performance as does a direct information provider. Additionally, the warranty

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109. See id. at § 404(a).
under this section is not subject to the preclusion under Section 113(a)(1).\textsuperscript{110}

5. \textit{Implied Warranty, Licensee's Purpose; System Integration (Section 405)}

If the licensor has reason to know of any particular purpose for which the information is required and that the licensee is relying on the licensor for expertise, there is an implied warranty that the information will be fit for that purpose unless, from all the circumstances, it appears that the licensor was to be paid for the amount of its time or effort regardless of the suitability of the information. In such a case, the implied warranty is that there is no failure to achieve the licensee's particular purpose caused by the licensor's lack of reasonable care and workmanlike effort to achieve that purpose.

There is no such warranty for aesthetics, appeal, or subjective quality of informational content, or for published informational content (but there may be a warranty with regard to the licensor's selection among published informational content from different providers).

If the agreement requires the licensor to select components to function as a system, there is an implied warranty that that all components will work together. This is a new warranty. Note that the warranty under this section is not subject to the preclusion in Section 113(a)(1).\textsuperscript{111}

6. \textit{Third Party Beneficiaries (Section 409)}

UCITA adopts a third party beneficiary concept like that found in UCC Article 2. Except for published informational content, warranty made to a licensee extends to persons for whose benefit the licensor intends to supply the information. For purposes of this concept, the licensor is deemed to have intended to supply information to any other individual consumer who is in the consumer licensee's immediate family or household, if it was reasonable to expect that such individual would rightfully use the information. Note that this section does not expand or limit tort liability.

\textsuperscript{110} U.C.I.T.A. § 113(a)(1) provides, as does UCC Article 1, that "obligations of ... diligence, reasonableness and care ... may not be disclaimed."

\textsuperscript{111} See U.C.I.T.A. § 406(b)(1)(A) and (2).
7. **Disclaimers (Section 406)**

The "safe harbor" language of disclaimer is made more clear and explicit than that permissible under UCC Article 2. Under Section 406, an implied warranty may be disclaimed by course of performance or usage of trade. In addition, disclaimers of warranties made under Sections 403 and 405 must be conspicuous.

J. **Transfer of Interests and Rights: Part 5**

1. **Ownership of Informational Rights and Title to Copies (Section 501 and 502)**

   If a contract provides for transfer of ownership of informational rights in computer software, ownership passes as specified by the contract, or, if not specified, when the information and the informational rights are in existence and identified to the contract. However, transfer of a *copy* does *not* transfer ownership of informational rights.

   Title to a copy is determined by the license; a licensee's right to possession or control of a copy is governed by the license and does not depend on title to the copy. If a licensor reserves title to a copy, the licensor also has title to any copies made of it, unless the license grants the licensee a right to make and transfer copies to others, in which case reservation of title reserves title only to copies delivered to the licensee by the licensor.

   If the agreement provides for transfer of title to a copy, title passes as specified by the agreement; or, if not specified, then in a transaction involving delivery on a physical medium, at the time and place at which the licensor completed its delivery obligations; or in a transaction involving electronic delivery, if a first sale occurs under federal copyright law, at the time and place at which the licensor completed its delivery obligations.

2. **Transfer (Section 503)**

   UCITA generally permits transfer of a contractual interest under a license. However, transfer may be prohibited under other law, or may not be allowed if such a transfer would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, or materially impair the other party's property or its likelihood or expectation of obtaining return performance.
However, if the parties agree to a term prohibiting transfer, that term is enforceable. In a mass-market license such term must also be conspicuous. A transfer made in violation of such a term is a breach and is ineffective except if the contract is a license that was granted for incorporation or use of the information or informational rights in a combined work for public distribution or public performance and the transfer is of the completed combined work or the transfer is of the right to payment and would be enforceable under UCITA in the absence of the contract term prohibiting transfer.

3. Effect of Transfer (Section 504)

Subject to Section 503, transfer of the contract transfers all contractual rights, and the transferee is subject to all contractual use terms. Unless the language or circumstances indicate otherwise, the transfer is a delegation of performance of the duties of the transferor, which is subject to Section 503. Acceptance of the transfer constitutes the promise of the transferee to perform the delegated duties. The transfer does not relieve the transferor of any duty to perform or of any liability for breach of contract unless the contract so provides. A party to the original contract other than the transferor may treat any transfer that delegates performance without its consent as creating reasonable grounds for insecurity and, without prejudice to its rights against the transferor, may demand assurances from the transferee.

4. Transfer by License (Section 506)

If any part of a licensee's interest in a license is transferred, voluntarily or involuntarily, the following three rules apply: (1) The transferee acquires no interest in information, copies, or the contractual or informational rights of the licensee unless the transfer is permitted under Section 503. (2) If the transfer is effective under the above rule, the transferee takes subject to the terms of the license. (3) Except as otherwise provided under trade secret law, a transferee that acquires information that is subject to the informational rights of a third party acquires no more rights than the contractual rights that its transferor was authorized to transfer.

K. Financing Arrangements (Sections 507-511)

UCITA establishes bridge rules for license financing transactions
that are not governed by UCC Article 9. UCITA describes two such transactions:

- Financing relationships where the financier (e.g. a person who makes a financial accommodation but is neither the licensor nor a secured party under Article 9) does not become a party to the license; and
- Financing relationships where the financier becomes a "conduit" party to the license and passes through the rights to the ultimate licensee (this is akin to a finance lease under UCC Article 2A).

In transactions where the financier does not become a party to the license, the financier receives neither the benefits nor the burdens of the license, but is permitted to separately contract for additional conditions on the licensee's right to use the licensed information. For example, under Section 509, unless the licensee is a consumer, a term between the financier and the licensee that the licensee's obligations are irrevocable and independent is enforceable. Note that in all such cases, the licensee is contracting away its own right to act, but not conveying any part of the license itself.

For a "finance license," there are different rules as follows: (1) it must be permitted under Section 503, since it technically is a transfer; (2) clear notice must be given to the licensor; and (3) the licensee basically must look to the licensor for its rights and obligations, and not to the finance licensor, but remains subject to any additional conditions placed on it by the terms of the financial accommodation contract.

If a licensee materially breaches a financial accommodation contract, the financier may cancel the contract and pursue its remedies subject to the following restrictions: (1) if the financier became a licensee and made a transfer that was effective under Section 508, then it is entitled to exercise the remedies of a licensor, but subject to the restrictions on exercise contained in Section 816; (2) if the financier did not become a licensee, it may enforce a contractual right to preclude the licensee's further use of the information but otherwise has no rights to the information or the license; and (3) even if the financier has a contractual right as against the licensee to take possession of the information, or have the license transferred to it, this must comply with the transfer rules of UCITA or it will not be effective. A financier's remedies always are subject to the rights of the licensor.
L. Performance: Part 6

1. General Rule (Section 601)

A party must perform in a manner that conforms to the contract. Failure to do so gives the other party the right to a remedy, subject to waiver and the agreement itself. The remedies that are available depend on (a) the agreement; and (b) in the absence of an agreement, on the remedies that would be available under UCITA, which adopts the common law doctrine of material breach for all but mass-market transactions. Note also that this Part provides different treatment of performance for delivery of copies than other types of performance. Sections 606 through 610 deal with performance by delivery of copies.

2. Tender of Performance (Section 601)

A tender of performance issue arises when a party, with manifest present ability and willingness to perform, offers to complete performance. Under UCITA, if performance by the other party is due at the time of the tendered performance, tender of the other party's performance is a condition to the tendering party's obligation to complete the performance. A party must pay the consideration required under an agreement for performance which it accepts. A party that accepts performance has the burden of proving a breach for accepted performance. If there is an uncured material breach by one party that precedes the aggrieved party's performance, the aggrieved party does not have to perform, other than by not violating contractual use restrictions.

3. Immediately Completed Performances (Section 604)

Some performances, by their nature, immediately upon delivery provide a licensee with substantially all of the value of performance, or with other significant benefits that cannot be returned after received. In these cases, Sections 607 through 610 and 704 through 707 do not apply; the rights of the parties are determined under Section 601 and the ordinary standards of the industry; before tender, the receiving party may inspect the media, labels, or packaging, but may not view the information or otherwise receive the performance before completing any performance of its own that is then due.
4. Special Rules for Performance in Delivery of Copies (Sections 606-610)

These rules are similar to those of UCC Article 2.\textsuperscript{112}

5. Access Contracts (Section 611)

Access must be available according to the express terms of the agreement, and if there are no express terms, then it must be available in a manner that is reasonable for the particular contract in light of the ordinary standards of the business, trade or industry.

Intermittent or occasional failures of access are not a breach or default if they are consistent with the express terms of the agreement, consistent with the ordinary industry standards or caused by scheduled downtime, reasonable maintenance needs, reasonable periods of equipment, software, or communications failure, or events reasonable beyond the licensor's control, and the licensor exercises such commercially reasonable efforts as the circumstances require.

6. Correction and Support Agreements (Section 612)

If a party agrees to correct performance problems or provide similar services other than as an effort to cure its own breach, the following rules apply: (1) Performance must be consistent with the agreement. To the extent not dealt with by the agreement, performance must be consistent with industry standards. (2) A party does not promise that its correction services will correct all problems unless the agreement expressly so provides. (3) If part of a limited remedy, licensor undertakes that performance will provide the licensee with information that conforms to the agreement to which the limited remedy applies. (4) In the absence of an agreement there is no obligation to provide support.

7. Publishers, Dealers, and End Users (Section 613)

This section deals with the three party relationship common in modern information transactions (i.e. publisher, dealer, and end user). A dealer is a merchant licensee that receives information from a licensor for sale or license to an end user. A publisher is a licensor that is not a dealer who offers a license to an end user with respect to information distributed to the end user by a dealer.

\textsuperscript{112} See U.C.C. Article 2, particularly §§ 2-307 through 2-311, and 2-507 through 2-514.
An end user is a licensee that acquires the information from a dealer by delivery on a physical medium for the licensee's own use and not for sale, license, transmission to third parties, or for public display or performance for a fee.

A dealer is not bound or benefited by the contract between the publisher and an end user, unless that contract expressly so provides. A dealer is obligated to refund an end user's money if the end user refuses terms of the publisher's license where there was no opportunity to review before payment. If the agreement provides for distribution of copies on a physical medium or in packaging provided by the publisher or authorized third party, a dealer may distribute those copies and documentation only in the form as received and subject to any contractual terms of the publisher that the publisher provides to end users.

M. Breach: Part 7

1. Material Breach (Section 701)

Whether a party is in breach is determined by the agreement, or, in the absence of the agreement, by the default rules of UCITA. Breach entitles the aggrieved party to its remedies.

UCITA provides two levels of breach, material and not material. A breach is *material* if: (1) the contract so provides; (2) the breach is a substantial failure to perform an agreed term that is an essential element of the agreement; or (3) the circumstances, including the language of the agreement, the reasonable expectations of the parties, the standards and practices of the business, trade or industry, or the character of the breach indicate that (a) the breach caused or is likely to cause substantial harm to the aggrieved party; or (b) the breach substantially deprived or is likely to substantially deprive the aggrieved party of a significant benefit it reasonably expected under the contract.\(^{113}\)

2. Waiver (Section 702)

UCITA adopts waiver concepts from original UCC Article 2, 2A, and common law.

Waivers contained in a record to which the party agrees after breach do not require consideration. A party that accepts performance that it knows is defective and does not within a

\(^{113}\) *See* U.C.I.T.A. § 701(b).
reasonable time after acceptance notify the other party of the defect, waives all remedies for breach of that defect, unless acceptance was made on the reasonable assumption that the breach would be cured, and it was not seasonably cured. Except for a performance that is to be a party's satisfaction, a party that refuses performance and fails to specify particular defects that are ascertainable by reasonable inspection waives the right to rely on those defects to justify refusal if the other party could have cured the defects if they had been identified seasonably or between merchants, the other party after refusal requested in a record a full and final statement of all defects on which the refusing party proposes to rely. Moreover, waiver for one breach does not waive the same or similar breaches that later occur.

3. Cure (Section 703)

UCITA allows a breaching party to cure, at its expense, if it gives notice to the other party and if the cure is effected promptly, within the contractual period provided.

Except for mass-market licenses, in the case of an agreement that required a single delivery of a copy where the recipient was required to accept a nonconforming copy because the nonconformity was not material, the breaching party must make a prompt, good faith effort to cure if it receives timely notice of nonconformity and demand for cure from the recipient, and the cost of cure would not disproportionately exceed the direct damages caused by the nonconformity to the aggrieved party.

Additionally, UCITA contains special rules for copies, which are set forth in Sections 704-707. These sections are similar to UCC Sections in Part 6.

N. Remedies: Part 8

UCITA Section 801 strives to put the aggrieved party in the same position as it would have been in had the other party performed as agreed. Rights and remedies are cumulative, but a party may not recover more than once for the same loss. A court may deny or limit a remedy other than liquidated damages if the remedy would put the aggrieved party in a substantially better position than if other party had fully performed.

Despite a party's breach, the aggrieved party is required to continue to comply with contractual use restrictions with respect to information or copies that have not been returned or are not
returnable to the breaching party. Neither rescission nor a claim for rescission of the contract, nor refusal or return of the information, bars or is inconsistent with a claim for damages or other remedy.

On cancellation, the breaching party must return all information that it would be required to return under Section 618, or comply with reasonable instructions of the owner of the information. Upon cancellation, obligations that are executory on both sides are discharged, except for any right based on prior breach of performance or as specifically otherwise set forth in Section 616(b).

UCITA provides different remedies for material and non-material breaches. Certain remedies are available only in the case of material breach, unless the agreement between the parties specifically provides for them to be available in cases other than material breach. These remedies are: cancellation, certain recoupment, the right to discontinue access under an access contract, the right to possession and to prevent use, and electronic self-help. (The last two flow only from cancellation, thus requiring the material breach.)

1. Cancellation of Contract (Section 802)

Cancellation is available only in cases of material breach, or where the contract expressly provides for it. Cancellation is not effective until the aggrieved party notifies the breaching party of cancellation, except in circumstances where delay would cause or threaten material harm or loss to the aggrieved party.

Cancellation by the licensor ends the right of the licensee to use the information; cancellation by the licensee also ends contractual right of licensee to use the information, but there are provisions for the licensee to continue to use the information for a reasonable time thereafter, as long as the licensee complies with the license, and pays reasonable value. (This is intended to give licensees time to obtain substitute information; otherwise this could be a remedy that licensees would never be able to afford to use, given the importance of information systems in business today.)

“No cancellation” clauses in contracts are effective, but do not preclude the exercise of other rights and remedies.

2. Contractual Modification of Remedy (Section 803)

Generally (subject to certain restrictions), parties may add remedies not contemplated by UCITA, and limit remedies which are
provided by UCITA.

A remedy expressly described as exclusive is the sole remedy; otherwise, resort to a contractual remedy is optional. If an exclusive remedy fails, the aggrieved party is entitled to other remedies under UCITA. In the original agreement, parties (except for a consumer contract) may reduce the period of limitations to not less than one year, but may not extend it.\footnote{Note that this does not prevent later tolling agreements.}

The primary rule for determining whether a cause of action has accrued is that the cause of action accrues when the conduct constituting the breach occurs, regardless of whether the aggrieved party is aware of the breach (see Section 804(c) and (d)). Consequential damages and incidental damages may be disclaimed or limited unless the disclaimer or limitation is unconscionable. Limitation or disclaimer of consequential damages for injury to the person in the case of a consumer transaction for a computer program contained in consumer goods is prima facia unconscionable, but a limitation or disclaimer of damages for a commercial loss is not.

In the following cases, a breach of warranty claim against a third party accrues on the later of the act or omission constituting the breach or when it could be discovered: infringement, misappropriation, libel, defamation or the like; breaches regarding misuse of a party's confidential information; and breaches regarding the failure to provide an indemnity against a third party claim.

3. Statute of Limitations (Section 805)

An action must be commenced within the later of four years after the right of action accrues; or one year after the breach was or should have been discovered, but not more than five years after the right of action accrues.

4. Measure of Damages (Sections 807-809)

In general, Section 807 provides:

a. Measures to Avoid Loss (Section 807)

The burden of establishing failure to mitigate is on the breaching party. Neither party may recover consequential damages for losses caused by the content of published informational content unless the agreement expressly so provides, or for damages that are
speculative. The remedy for breach relating to disclosure or misuse of information that is a trade secret or in which the aggrieved party has a right of confidentiality includes, as consequential damages, compensation for the benefit received by the party in breach as a result of the breach.

b. Measure of Licensor's Damages (Section 808)

The licensor may recover for its losses resulting in the ordinary course from the particular breach, or, if appropriate, as to the entire contract, the sum of (1) and (2) below, less expenses saved:

(1) damages measured in any combination of the following ways, but not to exceed the contract fee and market value of other consideration required under the contract for the performance that was the subject of the breach:

(A) the amount of accrued and unpaid contract fees and the value of other consideration earned but not received for: (i) any performance accepted by the licensee; and (ii) any performance to which Section 604 applies [relating to immediately completed performances];

(B) For performances not covered by subparagraph (A), if the licensee repudiated or wrongfully refused the performance, or the licensor rightfully cancelled the contract and the breach [of contract] makes possible a substitute transaction by the licensor, the amount of loss as determined by the contract fees and the market value of other consideration required under the contract for the performance less: (i) contract fees and the market value of other consideration received from an actual and commercially reasonable substitute transaction entered into by the licensor in good faith and without unreasonable delay; or (ii) the market value of a commercially reasonable hypothetical substitute transaction.

(C) For performances not governed by subparagraph (A), if the breach does not make possible a substitute transaction as set forth above, lost profits, including reasonable overhead, that the licensor would have realized on acceptance and full payment for performance that was not delivered to the licensee because of the licensee's breach; or
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(D) damages calculated in any reasonable manner;

(2) [plus] any consequential and incidental damages.\textsuperscript{115}

The Official Comments to this section contain a number of useful illustrative examples of measurement of damages in various situations.

(c) Measure of Licensee's Damages (Section 809)

The Licensee may recover for losses resulting in the ordinary course from the particular breach, or, if appropriate, as to the entire contract, the sum of (1) or (2) plus (3) below, less unpaid contract fees for performance that has been accepted:

(1) Damages measured in any combination of the following ways, but not to exceed the contract fee and market value for the performance that was the subject of the breach, plus restitution of any amounts paid for performance not received:

(a) for accepted performance, where the acceptance has not been rightfully revoked, the value of the performance required less the value of the performance accepted as of the time and place of acceptance.

(b) for performance that has not been rendered or was rightfully refused, or acceptance revoked, (i) the amount of any payments made and the value of other consideration given to the licensor with respect to the performance; (ii) the market value of the performance less the contract fee for that performance; or (iii) the difference between the cost of a commercially reasonable substitute transaction actually entered into by the licensee in good faith and without unreasonable delay for substantially similar information with the same contractual use restrictions, less the contract fee under the breached contract; or

(2) damages calculated in any reasonable manner;

(3) [plus] incidental and consequential damages.\textsuperscript{116}

\textsuperscript{115} See U.C.I.T.A. § 808.

\textsuperscript{116} See id. § 809.
5. **Licensor’s Right to Complete (Section 812)**

The decision to complete must be made “in exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization on effort or investment.” Most often this section will be applicable to custom development contracts; this section will have little applicability in other information contract contexts.

6. **Right to Discontinue Access (Section 814)**

On the material breach of an access contract, or if the agreement so provides, a party may discontinue all contractual rights of access of the party in breach and direct any person that is assisting the performance of the contract to discontinue its performance.

7. **Right to Possession and to Prevent Use (Section 815)**

Upon cancellation of a license, the licensor has the right to possession of all copies of the licensed information in possession of the licensee, and to prevent the continued use of the licensed information by the licensee.

Except as provided in Section 814 (dealing solely with access contracts and described in 5 above), a licensor may exercise these rights without judicial process (i.e. self-help) only if this can be done without a breach of the peace, and without a foreseeable risk of personal injury or significant damage to information or property other than the licensed information, and in accordance with the restrictions set forth in Section 816 (described below). This self-help remedy is not available to the extent that the information, before breach of the license and in the ordinary course of performance under the license, was so altered or commingled that the information is no longer separable or identifiable.

Additionally, UCITA provides the licensor with the right to an expedited judicial hearing.

8. **Limitations on Electronic Self-help (Section 816)**

The default rule is that electronic self-help is prohibited. Even if the parties agree to electronic self-help, if its exercise will result in substantial harm to the public health and safety or grave harm to the public interest, it is prohibited. Electronic self-help must be separately negotiated and assented to by the parties. Upon cancellation of a license, use of electronic means to exercise a
licensor's right to repossession is not permitted except as provided in Section 816. (Note: This is a change from current common law, under which electronic self-help is more broadly permitted.)

If agreed to, the licensee must separately manifest assent to the term authorizing use of electronic self-help, and the term must provide for notice of exercise as described below, state the name of the person designated by the licensee to whom notice of exercise must be given and the place to which and manner in which notice must be given and sent, and provide a simple procedure for the licensee to change the designated person or place.

Prior to the exercise of electronic self-help authorized by the term of the agreement, the licensor shall give notice to the designated person, stating that the licensor intends to exercise electronic self-help as a remedy on or after 15 days following the receipt by the licensee of the notice, the nature of the claimed breach which entitles the licensor to resort to electronic self-help, and the name, title, and address, including direct telephone, facsimile, and/or e-mail number, with whom the licensee may communicate concerning the claimed breach.

If there is wrongful exercise of self-help, the licensee may recover direct and incidental damages caused by wrongful exercise of electronic self-help, and consequential damages, even if such damages are excluded by the terms of the license, if (a) within the fifteen day time period the licensee gives notice to the licensor's designated person describing in good faith the general nature and magnitude of the damages; or (b) the licensor otherwise has reason to know that its use of electronic self-help will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties not involved in the dispute.

Notwithstanding the above, the remedy of electronic self-help may not be used if the licensor has reason to know that it will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties uninvolved in the dispute. There are provisions for licensees to seek prompt injunctive relief against licensor's exercise of electronic self-help. Licensor is entitled to prompt consideration of injunctive relief from misappropriation or misuse of computer information. Before breach, the rights or obligations under Section 816 may not be waived or varied, but the parties may specify additional provisions more favorable to the licensee and can
include a provision specifically prohibiting electronic self-help.

These provisions, when taken together with the provisions of Section 815, are so restrictive that it is unlikely that any licensor will be able to effectively use electronic self-help except in the most egregious cases; e.g. where a licensee is improperly disclosing the licensor's confidential and proprietary information. Most licensors would not agree to negotiate such provisions into their standard form contracts; thus, it is a major benefit for licensees that UCITA effectively excludes electronic self-help from standard form contracts.

CONCLUSION

UCITA's clearly-defined scope includes transactions that cover the sale and license of computer software, computer games, contracts to create software and online information, multimedia interactive products, and online computer data and databases. Moreover, UCITA will allow the parties to choose UCITA, or other law, in transactions, where different bodies of law might otherwise apply to different aspects of the same transaction.

UCITA modifies familiar rules regarding contract formation, contract modification, and warranties to facilitate electronic contracting. UCITA also clarifies rules regarding licensing, especially in the areas of ownership rights and the ability to transfer a license. UCITA's rules regarding performance and breach of contract are quite similar to the UCC, but the UCITA remedy structure recognizes the significant differences between the appropriate measure of damages for breach of a contract for the sale of goods versus breach of a contract for a computer information transaction, including substantial limitations on the generally recognized common law right of self-help in the electronic context.

UCITA provides an essential framework for parties to contract electronically for computer information. In this new, exciting Information Age, intangible information products are licensed and sold globally. The transactions are borderless and faceless. A new clear and consistent set of uniform rules is required. The exponential growth of this sector of our national economy requires uniform rules for the information highway, established promptly by either federal preemption of state contract law or the adoption of UCITA by the various states. UCITA integrates into existing state contract law and thus is an appropriate means for achieving uniformity. UCITA became available for consideration by the
various states as of December 1999. It has already been enacted in Virginia and Maryland.