

D R A F T

FOR APPROVAL

**AMENDMENTS TO
UNIFORM COMPUTER INFORMATION
TRANSACTIONS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR
TUCSON, ARIZONA

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**AMENDMENTS TO
UNIFORM COMPUTER INFORMATION
TRANSACTIONS ACT**

WITH PREFATORY NOTE

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By

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT**

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AMENDMENTS TO UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

Prefatory Note

The UCITA Standby Committee held a 3 day meeting in Washington D.C. on November 16-18, 2001 to consider possible amendments to UCITA to resolve concerns. Suggested amendments for consideration were solicited widely in advance. Over 100 persons participated, representing the entire diversity of interests, to hear and extensively debate over 70 suggested amendments (many addressing the same issue in different ways). An ABA Working Group attended and participated in the meeting.

On December 17, 2001, the Standby Committee reported to the NCCUSL Executive Committee 19 recommended amendments to UCITA, which the Executive Committee reviewed favorably at its January, 2002 meeting.

Meanwhile, the ABA Working Group, with the Standby Committee Report and the 70 amendments suggested by Affect and others in hand, deliberated and issued its own Report to the ABA Board of Governors commenting favorably on the 19 recommendations made by the Standby Committee but expressing 11 additional concerns.

In a series of many, lengthy conference calls by the Committee and a Subcommittee of the Standby Committee, each of the 11 concerns were reviewed and considered in depth. On May 22, 2002, the Standby Committee approved 38 recommended amendments addressing in whole or in part 10 of the 11 concerns raised by the ABA Working Group. The full text of the Standby Committee Report is available on the NCCUSL website. The full text of the 38 amendments are set out herein. These amendments include and supersede the December, 2001 Report of the Standby Committee. (Also available on the NCCUSL website.)

The Index on the next page shows in Part A, 14 of the suggested amendments that have some substantive content (although styling may also be included because all amendments in any section are grouped). These substantive amendments will be read at the Annual Meeting line by line in the subsections amended. Another 24 amendments, under Part B of the Index, are for clarity and/or restructure the draft for clarity. The Committee Chair has, pursuant to Article 44A, Section 44A. 3, requested the President to waive the line-by-line reading of the Part B amendments since they are styling for clarity. (Section 44A.3(b) (1)).

On adoption, these amendments will require renumbering of other unamended sections and changes in cross-references. This will be done in coordination with the Committee on Style.

At the Annual Meeting, the Chair and Reporter will have prepared and made available to the Commissioners a Memorandum explaining in abbreviated form each amendment. A full explanation is contained in the Reports of the Standby Committee available at www.nccusl.org.

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AMENDMENTS TO

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

A. AMENDMENTS WITH SOME SUBSTANTIVE EFFECT

1. AMENDMENT # 1: SECTION 102 - modify two definitions

Make the following changes:

SECTION 102. DEFINITIONS.

(a) In this [Act]:

* * * * *

(11) “Computer information transaction” means an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information. The term includes a support contract under Section 612. The term does not include an agreement for performance of professional services by a member of a regulated profession, such as a doctor or lawyer, or an agreement merely providing that ~~transaction merely because the parties’ agreement provides that their~~ communications about the transaction will be in the form of computer information.

~~(58) “Scope”; means the terms with respect to terms of a license describing, means~~
the:

(A) the licensed copies, information, or informational rights involved;

(B) the use or access authorized, prohibited, or controlled;

(C) the geographic area, market, or location; or

(D) the duration of the license.

1 **2. AMENDMENT # 2: SECTION 104 - Delete the Section**

2 ~~**SECTION 104. MIXED TRANSACTIONS: AGREEMENT TO OPT-IN OR OPT-**~~
3 ~~**OUT.**~~ The parties may agree that this [Act], including contract formation rules, governs the
4 transaction, in whole or part, or that other law governs the transaction and this [Act] does not
5 apply, if a material part of the subject matter to which the agreement applies is computer
6 information or informational rights in it that are within the scope of this [Act], or is subject
7 matter within this [Act] under Section 103(b), or is subject matter excluded by Section 103(d)(1)
8 or (3). However, any agreement to do so is subject to the following rules:

9 (1) An agreement that this [Act] governs a transaction does not alter the applicability of
10 any statute, rule, or procedure that may not be varied by agreement of the parties or that may be
11 varied only in a manner specified by the statute, rule or procedure, including a consumer
12 protection statute [or administrative rule]. In addition, in a mass-market transaction, the
13 agreement does not alter the applicability of a law applicable to a copy of information in printed
14 form:

15 (2) An agreement that this [Act] does not govern a transaction:

16 (A) does not alter the applicability of Section 214 or 816; and

17 (B) in a mass-market transaction, does not alter the applicability under [this Act] of
18 the doctrine of unconscionability or fundamental public policy or the obligation of good faith.

19 (3) In a mass-market transaction, any term under this section which changes the extent to
20 which this [Act] governs the transaction must be conspicuous.

21 (4) A copy of a computer program contained in and sold or leased as part of goods and

1 ~~which is excluded from this [Act] by Section 103(b)(1) cannot provide the basis for an~~
2 ~~agreement under this section that this [Act] governs the transaction.~~

3
4 **3. AMENDMENT # 3: SECTION 105 - Divide into sections 104 and 105 and**
5 **modify as indicated**
6

7 **SECTION 104. CONSUMER PROTECTION LAW GOVERNS.** Except as otherwise
8 provided in this section, this [Act] does not limit, modify, or supersede a consumer protection
9 law applicable to the subject matter of this [Act] that is consistent with the Electronic Signatures
10 in Global and National Commerce Act, 15 U.S.C. § 7001 et. seq. To the extent that consumer
11 protection law provides greater protection to consumers than is provided in this [Act], the more
12 protective consumer protection law applies.

13 (1) **[Consumer Protection Law Defined]** In this section, “consumer
14 protection law” means a consumer protection statute, rule, or regulation, or other state action by
15 the executive, legislative or administrative branch of government which has the effect of law,
16 and applicable judicial or administrative decisions interpreting those statutes, rules, regulations,
17 or actions.

18 (2) **[Standard of Conspicuousness]** If a consumer protection law requires a
19 term to be conspicuous, the standard of conspicuousness under the consumer protection law
20 applies. However, a provision in the consumer protection law requiring a term to be
21 conspicuous does not preclude the term from being presented electronically.

1 (3) **[Required Writing or Signature]** Subject to the consumer laws
2 identified in Section 905, if a consumer protection law requires a writing or a signature, a record
3 or an authentication suffices.

4 (4) **[Required Assent]** If a consumer protection law addresses assent,
5 consent, or manifestation of assent, the standard of assent, consent, or manifestation of assent
6 under the consumer protection law applies and, subject to the consumer laws identified in
7 Section 905, may be accomplished electronically.

8 (5) **[Applicability of Consumer Law]** Except as otherwise provided in this
9 paragraph, the applicability of a consumer protection law is determined by that law and not by
10 this [Act]. [However, the consumer protection laws of this State which apply to the subject
11 matter of this [Act] include: [Insert statutes that, on review by the legislature and amendment as
12 appropriate, are determined to be applicable to the subject matter of this [Act] such as a state's
13 unfair and deceptive practices act with amendments as appropriate.]

14 Legislative Note: This Section makes clear that a "consumer protection law" controls in the
15 case of a conflict between that law and this [Act]. Some consumer protection statutes apply to
16 goods and services and may not apply to computer information which is an intangible under
17 current law. Accordingly, states must review their consumer protection statutes to determine if
18 they should be applied to computer information and, if so, what amendments are required to
19 adapt them to that subject matter. In most cases, the state's unfair and deceptive practices act
20 should apply, but some modification may be required. For example, if a state's "unfair acts and
21 practices" statute requires the origin of the product to be specified on the "label or package,"
22 such a provision needs consideration before being applied to electronic information that has no
23 "label" or "package." It may also be appropriate to consider such issues as whether the
24 provision should apply to computer information for which no charge is made, or how the
25 provision can be applied to products having multiple "origins" such as software written by an
26 unaffiliated community of programmers. A consumer protection statute applicable to health
27 club contracts may not apply but a consumer protection statute requiring that a vendor's refund
28 policy be posted on the "premises" might apply if amended to allow compliance in an Internet
29 or other electronic environment. Amendments of consumer protection laws must be consistent
30 with the federal Electronic Signatures in Global and Electronic Commerce Act which requires
31 technological neutrality and that the amended statute reference the federal act.
32

1 **SECTION 105. RELATION TO FEDERAL LAW; FUNDAMENTAL PUBLIC**
2 **POLICY; LAWFUL PUBLIC COMMENT; TRANSACTIONS SUBJECT TO OTHER**
3 **STATE LAW.**

4 (a) **[Federal Law Preempts]** A provision of this [Act] which is preempted by federal
5 law is unenforceable to the extent of the preemption.

6 (b) **[Fundamental Public Policy Controls]** If a term of a contract violates a
7 fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of
8 the contract without the impermissible term, or limit the application of the impermissible term so
9 as to avoid a result contrary to public policy, in each case to the extent that the interest in
10 enforcement is clearly outweighed by a public policy against enforcement of the term.

11 ~~(c) Except as otherwise provided in subsection (d), if this [Act] or a term of a contract~~
12 ~~under this [Act] conflicts with a consumer protection statute [or administrative rule], the~~
13 ~~consumer protection statute [or rule] governs.~~

14 ~~(d) If a law of this State in effect on the effective date of this [Act] applies to a~~
15 ~~transaction governed by this [Act], the following rules apply:~~

16 ~~(1) A requirement that a term, waiver, notice, or disclaimer be in a writing is~~
17 ~~satisfied by a record.~~

18 ~~(2) A requirement that a record, writing, or term be signed is satisfied by an~~
19 ~~authentication.~~

20 ~~(3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is~~
21 ~~conspicuous under this [Act].~~

22 ~~(4) A requirement of consent or agreement to a term is satisfied by a manifestation of~~
23 ~~assent to the term in accordance with this [Act].~~

1 (c) **[Lawful Public Comment Not Prohibited]** In a transaction in which a copy of
2 computer information in its final form is made generally available in commerce, a term of a
3 contract is unenforceable to the extent that the term prohibits an end-user licensee from engaging
4 in otherwise lawful public discussion of the quality of performance of the computer information.
5 However, this subsection does not preclude enforcement of a term that establishes or enforces
6 rights under trade secret, trademark, defamation, commercial disparagement, or other laws.

7 (d) **[Noncontractual Copyright Notices]** This [Act] does not apply to a noncontractual
8 copyright permission notice. The effect of such a notice is determined by law other than this
9 [Act].

10 ~~[(ef)]~~ **[Conflicting Laws that Prevail]** The following laws govern in the case of a conflict
11 between this [Act] and the other law: [List laws establishing a digital signature and similar form
12 of attribution procedure.]]

13 ~~Legislative Note: The purpose of subsection (c) is to make clear that this Act does not alter the~~
14 ~~application to computer information transactions of the substantive provisions of a State=s~~
15 ~~consumer protection statutes or rules (including rules about the timing and content of required~~
16 ~~disclosures) and does not alter application of the State=s statutes giving regulatory authority to~~
17 ~~a state agency such as the Office of the Attorney General. It may be appropriate, for purposes of~~
18 ~~clarity, in subsection (c) to cross reference particular statutes such as the State=s Unfair and~~
19 ~~Deceptive Practices Act by inserting Aincluding [cite the statute].@ Subject to the federal~~
20 ~~Electronic Signatures Global and National Commerce Act, if certain consumer protection laws~~
21 ~~should be appropriately excepted from the electronic commerce rules in subsection (d), those~~
22 ~~laws should be excluded from the operation of subsection (d).~~

23
24
25 **4. AMENDMENT # 4: SECTION 110**
26 **Amend the section as follows:**

27 **SECTION 110. CONTRACTUAL CHOICE OF FORUM.**

28 (a) **[Limitations on Contractual Choice]** The parties in their agreement may choose an
29 exclusive judicial forum unless the choice is unreasonable ~~and~~ or unjust.

1 *****

2 (c) **[Decision for Court]** The enforceability of an agreed choice of exclusive forum is a
3 question for determination by a court of competent jurisdiction of the state in which the action is
4 brought.

5
6 **5. AMENDMENT # 5: SECTION 114 (NEW: SECTIONS 116 - 117)**
7 **Divide Section 114 as indicated; modify subsection (a) as indicated**
8

9 **SECTION ~~114~~ 116. SUPPLEMENTAL PRINCIPLES; GOOD FAITH;**
10 **COMMERCIAL PRACTICE ~~DECISION FOR COURT; REASONABLE TIME;~~**
11 **~~REASON TO KNOW.~~**

12 (a) **[Supplemental Principles]** Unless displaced by this [Act], principles of law and
13 equity, including the law merchant and the common law of this State relative to capacity to
14 contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, and
15 other validating or invalidating cause, supplement this [Act]. Among the laws supplementing
16 and not displaced by this [Act] are trade secret laws, ~~and~~ unfair competition laws, and the law of
17 fraud, misrepresentation, and unfair and deceptive practices, including as they may deal with
18 failure to disclose defects.

19 (b) **[Good Faith]** Every contract or duty within the scope of this [Act] imposes an
20 obligation of good faith in its performance or enforcement.

21 (c) **[Commercial Practice]** Any usage of trade of which the parties are or should be
22 aware and any course of dealing or course of performance between the parties are relevant to
23 determining the existence or meaning of an agreement. [from former Section 113(b)]

1
2 **NEW SECTION 117 (FORMER SECTION 114(c) to (f))**

3 **SECTION 117. DECISION FOR COURT; LEGAL CONSEQUENCES;**
4 **REASONABLE TIME; REASON TO KNOW.**

5 ~~(e)~~ (a) **[Decision for Court]** Whether a term is conspicuous or is unenforceable under
6 Section 105(a), ~~(b)~~ or ~~(bc)~~, 110, 111, or 209(a) and whether an attribution procedure is
7 commercially reasonable or effective under Section 108, 212, or 213 are questions to be
8 determined by the court.

9 ~~(d)~~ (b) **[Legal Consequences]** Whether an agreement has legal consequences is
10 determined by this [Act].

11 ~~(e)~~ (c) **[Reasonable Time]** Whenever this [Act] requires any action to be taken within a
12 reasonable time, the following rules apply:

13 (1) **[Nature of Circumstances Controls]** What is a reasonable time for taking the
14 action depends on the nature, purpose, and circumstances of the action.

15 (2) **[Manifestly Unreasonable Term Precluded]** Any time that is not manifestly
16 unreasonable may be fixed by agreement.

17 ~~(f)~~ (d) **[Reason to Know]** A person has reason to know a fact if the person has
18 knowledge of the fact or, from all the facts and circumstances known to the person without
19 investigation, the person should be aware that the fact exists.
20

1 **6. AMENDMENT # 6: NEW SECTION 118**
2 **Add new section and Subpart as follows:**

3
4 **[SUBPART J. REVERSE ENGINEERING]**

5 **SECTION 118. TERMS ON REVERSE ENGINEERING.**

6 (a) **[Interoperability Defined]** In this section, “interoperability” means the ability of
7 computer programs to exchange information and of such programs mutually to use the
8 information that has been exchanged.

9 (b) **[Contract Term Unenforceable]** Notwithstanding the terms of a contract subject to
10 this [Act], a licensee that lawfully obtained the right to use a copy of a computer program may
11 identify, analyze, and use those elements of the program necessary to achieve interoperability of
12 an independently created computer program with other programs including adapting or
13 modifying the licensee’s computer program, if:

- 14 (1) the elements have not previously been readily available to the licensee;
15 (2) the identification, analysis, or use is performed solely for the purpose of enabling
16 such interoperability; and
17 (3) the identification, analysis, or use is not prohibited by law other than this [Act].

18 (c) **[Applicability of Section 105]** As applicable, identification, analysis, or use of
19 elements of a computer program for a purpose other than described in this section is governed by
20 Section 105(b).

1 **7. AMENDMENT # 7: SECTIONS 308 AND 207**

2 **Delete Section 308 and Modify Section 207 as follows:**

3
4 **A. Delete Section 308**

5 ~~**SECTION 308. DURATION OF CONTRACT.** If an agreement does not specify its~~
6 ~~duration, to the extent allowed by other law, the following rules apply:~~

7 ~~(1) Except as otherwise provided in paragraph (2), the agreement is enforceable for a~~
8 ~~time reasonable in light of the licensed subject matter and commercial circumstances but may be~~
9 ~~terminated as to future performances at will by either party during that time on giving seasonable~~
10 ~~notice to the other party.~~

11 ~~(2) The duration of contractual rights to use licensed subject matter is a time reasonable~~
12 ~~in light of the licensed informational rights and the commercial circumstances. However,~~
13 ~~subject to cancellation for breach of contract, the duration of the license is perpetual as to the~~
14 ~~contractual rights and contractual use terms if:~~

15 ~~(A) the license is of a computer program that does not include source code and the~~
16 ~~license:~~

17 ~~(i) transfers ownership of a copy; or~~

18 ~~(ii) delivers a copy for a contract fee the total amount of which is fixed at or~~
19 ~~before the time of delivery of the copy; or~~

20 ~~(B) the license expressly grants the right to incorporate or use the licensed information or~~
21 ~~informational rights with information or informational rights from other sources in a combined~~
22 ~~work for public distribution or public performance.~~

1 **B. Amend Section 207:**

2 **SECTION 207. FORMATION: RELEASES OF INFORMATIONAL RIGHTS.**

3 *****

4 ~~(c) In cases not governed by subsection (b), the duration of a release is governed by~~
5 ~~Section 308.~~

6
7 **8. AMENDMENT # 8: SECTION 209**

8 **Modify the section (availability of terms and notice) as follows:**

9
10 **SECTION 209. MASS-MARKET LICENSE.**

11 (a) ~~[Limitation on Terms]~~ A party adopts the terms of a mass-market license for
12 ~~purposes of Section 208~~ Adoption of the terms of a mass-market license under Section 208 is
13 effective only if the party agrees to the license, such as by manifesting assent, before or during
14 the party's initial performance or use of or access to the information. A term is not part of the
15 license if:

16 (1) the term is unconscionable or is unenforceable under Section 105(a) or (b); ~~or~~

17 (2) subject to Section 301, the term conflicts with a term to which the parties to the
18 license have expressly agreed;

19 (3) under Section 113, the licensee does not have an opportunity to review the term
20 before agreeing to it; or

21 (4) the term is not available to the licensee after assent to the license in one or more
22 of the following forms:

23 (A) an immediately available nonelectronic record that the licensee may keep;

1 (B) an immediately available electronic record that can be printed or stored by
2 the licensee for archival and review purposes; or

3 (C) in a copy available at no additional cost on a seasonable request in a record
4 by a licensee that was unable to print or store the license for archival and review purposes.

5 *****

6 **(b) [Right of Return and Reimbursement]** If a mass-market license or a copy of the
7 license is not available in a manner permitting an opportunity to review by the licensee before
8 the licensee becomes obligated to pay and the licensee does not agree, such as by manifesting
9 assent, to the license after having an opportunity to review, the licensee is entitled to a return
10 under Section 112 and, in addition, to:

11 (1) reimbursement of any reasonable expenses incurred in complying with the
12 licensor's instructions for returning or destroying the computer information or, in the absence of
13 instructions, expenses incurred for return postage or similar reasonable expense in returning the
14 computer information; and

15 (2) compensation for any reasonable and foreseeable costs of restoring the licensee's
16 information processing system to reverse changes in the system caused by the installation, if:

17 (A) the installation occurs because information must be installed to enable review
18 of the license; and

19 (B) the installation alters the system or information in it but does not restore the
20 system or information after removal of the installed information because the licensee rejected the
21 license.

22 *****

23 (d) [Notice of Refund] In a case governed by subsection (b), notice must be given in the
24 license or otherwise that a refund may be obtained if the terms are refused.

1 **9. AMENDMENT # 9: SECTION 307**

2 **Delete subsection (c) and renumber remaining subsections:**

3 **SECTION 307. INTERPRETATION AND REQUIREMENTS FOR GRANT.**

4 *****

5 ~~(c) An agreement that does not specify the number of permitted users permits a number~~
6 ~~of users which is reasonable in light of the informational rights involved and the commercial~~
7 ~~circumstances existing at the time of the agreement.~~

9 **10. AMENDMENT # 10: SECTION 401**

10 **Amend the section as follows:**

11 **SECTION 401. WARRANTY AND OBLIGATIONS CONCERNING**
12 **NONINTERFERENCE AND NONINFRINGEMENT.**

13 *****

14 (d) [Disclaimer or Modification Permitted] Except as otherwise provided in
15 subsection (e), a warranty under this section may be disclaimed or modified only by specific
16 language or by circumstances that give the licensee reason to know that the licensor does not
17 warrant that competing claims do not exist or that the licensor purports to grant only the rights it
18 may have. An obligation to hold harmless under this section may be disclaimed or modified only
19 by specific language or by circumstances giving the licensor reason to know that the licensee
20 does not provide a hold-harmless obligation to the licensor. In an automated transaction,
21 language is sufficient if it is conspicuous. Otherwise, language in a record is sufficient if it
22 states:

1 (1) as to a licensor’s obligation, “There is no warranty against interference with your
2 enjoyment of the information or against infringement”, or words of similar import; or

3 (2) as to a licensee’s obligation, “There is no obligation to hold you harmless from
4 any actions taken in compliance with the specifications or methods furnished by me under this
5 contract”, or words of similar import.

6
7 **11.AMENDMENT # 11: SECTION 410 (NEW)**

8 **Add the following new section:**

9
10 **SECTION 410. NO IMPLIED WARRANTIES FOR FREE COMPUTER**

11 **PROGRAM.** The warranties under Sections 401 and 403 apply to a computer program only if
12 the licensor intends to make a profit from the distribution of the copy of the program or acts
13 generally for commercial gain derived from controlling use of the program or making,
14 modifying, or redistributing copies of the program.

15
16 **12.AMENDMENT # 12: SECTION 503:**

17 **Amend the section for gifts as follows:**

18 **SECTION 503. TRANSFER OF CONTRACTUAL INTEREST.** The following rules
19 apply to a transfer of a contractual interest:

20 (1) **[When Transfer of Contract Permitted]** ~~✱~~ Except as otherwise provided in
21 paragraph (3), a party’s contractual interest may be transferred unless the transfer:

22 (A) is prohibited by other law; or
23 (B) ~~except as otherwise provided in paragraph (3),~~ would materially change the duty
24 of the other party, materially increase the burden or risk imposed on the other party, or

1 materially impair the other party's property or its likelihood or expectation of obtaining return
2 performance.

3 (2) **[Enforceability of Term Prohibiting Transfer]** Except as otherwise provided in
4 paragraph (3) and Section 508(a)(1)(B) , a term prohibiting transfer of a party's contractual
5 interest is enforceable, and a transfer made in violation of that term is a breach of contract and is
6 ineffective to create contractual rights in the transferee against the nontransferring party, except
7 to the extent that:

8 (A) the contract is a license for incorporation or use of the licensed information or
9 informational rights with information or informational rights from other sources in a combined
10 work for public distribution or public performance and the transfer is of the completed,
11 combined work; ~~or~~

12 (B) the transfer is of a right to payment arising out of the transferor's due
13 performance of less than its entire obligation and the transfer would be enforceable under
14 paragraph (1) in the absence of the term prohibiting transfer; ~~;~~ or

15 (C) the term is in a mass-market license and the transfer complies with 17 U.S.C.
16 Section 117, is made with the computer containing the authorized copy, and is a gift or donation:

17 (i) to a public elementary or secondary school; ;

18 (ii) to a public library; ; or

19 (iii) from a consumer to another consumer.
20

1 **13.AMENDMENT # 13: SECTIONS 815 AND 816**

2 **Amend Sections 815 and 816 to ban electronic self help as follows:**

4 **SECTION 815. RIGHT TO POSSESSION AND TO PREVENT USE.**

5 *****

6 (b) [Limitation on Exercise Without Judicial Process] Except as otherwise provided
7 in Sections 814 and 816, a licensor may exercise its rights under subsection (a) without judicial
8 process only if this can be done by taking possession of a tangible copy. ~~(1) without a breach of~~
9 ~~the peace, in which event the licensor may take further steps with respect to the copy, including~~
10 ~~erasing the copy by electronic means, subject to Section 618(a) relating to return of the~~
11 ~~licensee's information, and~~

12 ~~(2) without a foreseeable risk of personal injury or significant physical damage to~~
13 ~~information or property other than the licensed information; and~~

14 ~~(3) in accordance with Section 816.~~

16 **SECTION 816. LIMITATIONS ON ELECTRONIC SELF-HELP.**

17 (a) ~~In this section:~~

18 ~~(1) A~~Electronic self-help@ ~~means the use of electronic means to exercise a~~
19 ~~licensor's rights under Section 815(b).~~

20 ~~(2) A~~Wrongful use of electronic self-help@ ~~means use of electronic self-help other~~
21 ~~than in compliance with this section.~~

22 (b) ~~On cancellation of a license, electronic self-help is not permitted, except as provided~~
23 ~~in this section. Electronic self-help is prohibited in mass-market transactions.~~

1 ~~(c) If the parties agree to permit electronic self-help, the licensee shall separately~~
2 ~~manifest assent to a term authorizing use of electronic self-help. In accordance with Section~~
3 ~~112(c), a general assent to a license containing a term authorizing use of electronic self-~~
4 ~~help is not sufficient to manifest assent to the use of electronic self-help. The term must:~~

- 5 ~~(1) provide for notice of exercise as provided in subsection (d);~~
6 ~~(2) state the name of the person designated by the licensee to which notice of exercise~~
7 ~~must be given and the manner in which notice must be given and place to which notice must be~~
8 ~~sent to that person; and~~
9 ~~(3) provide a simple procedure for the licensee to change the designated person or~~
10 ~~place.~~

11 ~~(d) Before resorting to electronic self-help authorized by a term of the license, the~~
12 ~~licensor shall give notice in a record to the person designated by the licensee stating:~~

- 13 ~~(1) that the licensor intends to resort to electronic self-help as a remedy on or after 15~~
14 ~~days following receipt by the licensee of the notice;~~
15 ~~(2) the nature of the claimed breach that entitles the licensor to resort to self-help; and~~
16 ~~(3) the name, title, and address, including direct telephone number, facsimile number,~~
17 ~~or e-mail address, to which the licensee may communicate concerning the claimed breach.~~

18 ~~(e) A licensee may recover direct and incidental damages caused by wrongful use of~~
19 ~~electronic self-help. The licensee may also recover consequential damages for wrongful use of~~
20 ~~electronic self-help, whether or not those damages are excluded by the terms of the license, if:~~

- 21 ~~(1) within the period specified in subsection (d)(1), the licensee gives notice to the~~
22 ~~licensor=s designated person describing in good faith the general nature and magnitude of~~
23 ~~damages;~~

1 ~~(2) the licensor has reason to know the damages of the type described in subsection~~
2 ~~(f) may result from the wrongful use of electronic self-help; or~~

3 ~~(3) the licensor does not provide the notice required in subsection (d).~~

4 ~~(f) Even if the licensor complies with subsections (c) and (d), electronic self-help may~~
5 ~~not be used if the licensor has reason to know that its use will result in substantial injury or harm~~
6 ~~to the public health or safety or grave harm to the public interest substantially affecting third~~
7 ~~persons not involved in the dispute.~~

8 ~~(g) A court of competent jurisdiction of this State shall give prompt consideration to a~~
9 ~~petition for injunctive relief and may enjoin, temporarily or permanently, the licensor from~~
10 ~~exercising electronic self-help even if authorized by a license term or enjoin the licensee from~~
11 ~~misappropriation or misuse of computer information, as may be appropriate, upon consideration~~
12 ~~of the following:~~

13 ~~(1) harm of the kinds stated in subsection (f), or the threat thereof, whether or not the~~
14 ~~licensor has reason to know of those circumstances;~~

15 ~~(2) irreparable harm or threat of irreparable harm to the licensee or licensor;~~

16 ~~(3) that the party seeking the relief is more likely than not to succeed under its claim~~
17 ~~when it is finally adjudicated;~~

18 ~~(4) that all of the conditions to entitle a person to the relief under the laws of this~~
19 ~~State have been fulfilled; and~~

20 ~~(5) that the party that may be adversely affected is adequately protected against loss,~~
21 ~~including a loss because of misappropriation or misuse of computer information, that it may~~
22 ~~suffer because the relief is granted under this [Act].~~

1 ~~(h) Before breach of contract, rights or obligations under this section may not be waived~~
2 ~~or varied by an agreement, but the parties may prohibit use of electronic self-help, and the~~
3 ~~parties, in the term referred to in subsection (c), may specify additional provisions more~~
4 ~~favorable to the licensee.~~

5 ~~(i) This section does not apply if the licensor obtains physical possession of a copy~~
6 ~~without a breach of the peace and without use of electronic self-help, in which case the lawfully~~
7 ~~obtained copy may be erased or disabled by electronic means.~~

8 (a) [Definitions] In this section:

9 (1) [Electronic Self-help] “Electronic self-help” means the use of electronic means
10 to exercise a licensor’s rights under Section 815(b).

11 (2) [Wrongful Use] “Wrongful use of electronic self-help” means use of electronic
12 self-help other than in compliance with this section.

13 (b) [Electronic Self-Help Prohibited] On cancellation of a license, electronic self-help
14 is prohibited.

15 (c) [Attorney’s Fees] In an action by a licensor for prejudgment relief pursuant to
16 contractual rights to prevent continued use of the information by a licensee, a court may award
17 the prevailing party in that proceeding attorneys fees with respect to the proceeding
18 notwithstanding any term of a license.

19 (d) [Limitations Not Waivable] The limitations under this section may not be waived or
20 varied by an agreement before breach of contract.

21 (e) [Other Laws Not Affected] This section does not apply to rights or obligations under
22 other laws, including title 17 of the United States Code.

1
2 **14.AMENDMENT # 14: SECTION 905**

3 **Amend the section as follows:**

4
5 **SECTION 905. ~~ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL~~**
6 **~~COMMERCE ACT~~ RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
7 **NATIONAL COMMERCE ACT.** This [Act] modifies, limits, and supersedes the federal
8 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq.,
9 ~~except that nothing in this [Act] modifies, limits, or supersedes~~ but does not modify, limit, or
10 supersede Section ~~7001(c)~~ 101(c) of that Act (15 U.S.C. Section 7001(c)) or authorize, ~~nor~~
11 ~~authorizes~~ electronic delivery of any of the notices described in Section ~~7003(b)~~ 103(b) of that
12 Act (15 U.S.C. Section 7003(b)).

13
14 **B. AMENDMENTS TO CLARIFY OR RESTRUCTURE FOR CLARITY**

15
16
17 **15.AMENDMENT # 15: SECTION 106**

18 **Add the Following**

19
20 **SECTION 106. RULES OF CONSTRUCTION.**

21 *****

22 (e) [Section Headings Part of Act] Section headings are part of this [Act] but subsection
23 headings are not.

24
25 **16.AMENDMENT # 16: SECTION 112 (NEW 112 AND 113)**

26 **Divide Section 112 into Sections 112 and 113 as follows**

27
28 **SECTION 112. MANIFESTING ASSENT; ~~OPPORTUNITY TO REVIEW.~~**

29 [retain subsections (a), (b), (c) and (d) and delete subsection (e) as follows]

1 ~~(c) With respect to an opportunity to review, the following rules apply:~~

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

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

8 ~~(3) If a record or term is available for review only after a person becomes obligated to~~
9 ~~pay or begins its performance, the person has an opportunity to review only if it has a right to a~~
10 ~~return if it rejects the record. However, a right to a return is not required if:~~

11 ~~(A) the record proposes a modification of contract or provides particulars of~~
12 ~~performance under Section 305; or~~

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

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

18 [retain subsection (f) renumber as (e) and renumber (g) as (f) and amend as follows]

19 **(g) (f) [Online Services, Network Access, and Telecommunications Services]**

20 Providers of online services, network access, and telecommunications services, or the operators
21 of facilities thereof, do not manifest assent to a contractual relationship simply by their provision
22 of those services to other parties, including, without limitation, transmission, routing, or

1 providing connections; linking; caching; hosting; information location tools; ~~or~~ and storage of
2 materials, at the request or initiation of a person other than the service provider.

3
4 **SECTION 113. OPPORTUNITY TO REVIEW.**

5 (a) **[Manner of Availability; Generally]** A person has an opportunity to review a
6 record or term only if it is made available in a manner that ought to call it to the attention of a
7 reasonable person and permit review.

8 (b) **[Manner of Availability; Electronic Agent]** An electronic agent has an opportunity
9 to review a record or term only if it is made available in manner that would enable a reasonably
10 configured electronic agent to react to the record or term.

11 (c) **[When Right of Return Required]** If a record or term is available for review only
12 after a person becomes obligated to pay or begins its performance, the person has an opportunity
13 to review only if it has a right to a return if it rejects the record. However, a right to a return is
14 not required if:

15 (1) the record proposes a modification of contract or provides particulars of
16 performance under Section 305; or

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

21 (d) **[How Right of Return Created]** The right to a return under this section may arise
22 by law or agreement.

1 (e) **[Agreement For Future Transactions]** The effect of provisions of this section may
2 be modified by an agreement setting out standards applicable to future transactions between the
3 parties.

4
5 **17.AMENDMENT # 17: SECTION 211 (NEW 114)**
6 **Move and renumber Section 211 as follows**
7

8 **SECTION ~~211~~ 114. PRETRANSACTION DISCLOSURES IN INTERNET-TYPE**
9 **TRANSACTIONS.**

10 (a) **[Scope of Section]** This section applies to a licensor that makes its computer
11 information available to a licensee by electronic means from its Internet or similar electronic
12 site.

13 (b) **[Sufficient Opportunity to Review]** In such a case, the licensor affords an
14 opportunity to review the terms of a standard form license which opportunity satisfies Section
15 113 with respect to a licensee that acquires the information from that site, if the licensor:

16 (1) makes the standard terms of the license readily available for review by the
17 licensee before the information is delivered or the licensee becomes obligated to pay, whichever
18 occurs first, by:

19 (A) displaying prominently and in close proximity to a description of the
20 computer information, or to instructions or steps for acquiring it, the standard terms or a
21 reference to an electronic location from which they can be readily obtained; or

22 (B) disclosing the availability of the standard terms in a prominent place on the
23 site from which the computer information is offered and promptly furnishing a copy of the
24 standard terms on request before the transfer of the computer information; and

(2) does not take affirmative acts to prevent printing or storage of the standard terms for archival or review purposes by the licensee.

(c) [Other Methods of Giving Opportunity to Review] Failure to provide an opportunity to review under this section does not preclude providing an opportunity to review by other means pursuant to Section 113 or other law.

18.AMENDMENT # 18: SECTION 113 (NEW 115):

Restructure and modify as follows; move former subsection (b) to newly reorganized section 116

~~SECTION 113~~ 115. VARIATION BY AGREEMENT; COMMERCIAL PRACTICE.

(a) [Variation By Agreement] Except as otherwise provided in subsection (b), the The effect of any provision of this [Act], including an allocation of risk or imposition of a burden, may be varied by agreement of the parties. ~~However, the following rules apply:~~

(b) [Rules Not Variable By Agreement] The following rules are not variable by agreement:

(3) [Other Nonvariable Rules] Limitations on enforceability of, or agreement to, a contract, term, or right expressly stated in the sections listed in the following subparagraphs may not be varied by agreement except to the extent provided in each section:

(H) the requirements of Section 304(b)(2);

~~(J)~~ (J) the limitations on a financier in Sections 507 through 511;

~~(K)~~ (K) the restrictions on altering the period of limitations in Section 805(a) and

(b); and

(K) (L) the limitations on self-help repossession in Sections 815(b) and 816.

(b) Any usage of trade of which the parties are or should be aware and any course of dealing or course of performance between the parties are relevant to determining the existence or meaning of an agreement.

19.AMENDMENT # 19: SECTION 202

Amend the section as follows:

SECTION 202. FORMATION IN GENERAL.

(d) [Material Disagreement Bars Formation] 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 a term concerning scope. For purposes of this subsection, the material disagreement must exist at the time of attempted contracting and does not refer to a later dispute about the meaning of agreed terms.

20.AMENDMENT # 20: SECTION 204:

Amend the section as follows:

SECTION 204. ACCEPTANCE WITH VARYING TERMS.

(a) [When Acceptance Materially Alters Offer] ~~In this section, a~~ An acceptance materially alters an offer if it contains a term that materially conflicts with or varies a term of the offer or that adds a material term not contained in the offer.

1 **21.AMENDMENT # 21: SECTION 205:**

2 **Amend the section as follows:**

4 **SECTION 205. CONDITIONAL OFFER OR ACCEPTANCE.**

5 (a) **[When Offer or Acceptance Conditional]** ~~In this section, a~~ An offer or acceptance
6 is conditional if it is conditioned on agreement by the other party to all the terms of the offer or
7 acceptance.

8 *****

9 (c) **[Conditional Offer or Acceptance in Standard Form]** If the offer and acceptance
10 are in standard forms and at least one form is conditional, the following rules apply:

11 (1) **[Acts Consistent with Conditions]** Conditional language in a standard term
12 precludes formation of a contract based on the offer or acceptance ~~only~~ if the actions of the party
13 proposing the form are consistent with the conditional language, such as by refusing to perform,
14 refusing to permit performance, or refusing to accept the benefits of the agreement, until its
15 proposed terms are accepted.

16 (2) **[Agreement to Conditions]** A party that agrees, such as by manifesting assent,
17 to a conditional offer that is effective under paragraph (1) adopts the terms of the offer under
18 Section 208 or 209, except for a term that conflicts with an expressly agreed term regarding price
19 or quantity.

1 **22.AMENDMENT # 22: SECTION 208:**

2 **Amend the section as follows:**

3
4 **SECTION 208. ADOPTING TERMS OF RECORDS.** ~~Except as otherwise provided in~~
5 ~~Section 209, the following rules apply:~~

6 ~~(1)~~ **(a) [Adoption of Terms]** A party adopts the terms of a record, including a standard
7 form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.

8 ~~(1)~~ **(b) [Later Terms]** The terms of a record may be adopted ~~pursuant to paragraph (1)~~
9 after beginning performance or use if the parties had reason to know that their agreement would
10 be represented in whole or part by a later record to be agreed on and there would not be an
11 opportunity to review the record or a copy of it before performance or use begins. If the parties
12 fail to agree to the later terms and did not intend to form a contract unless they so agreed,
13 Section 202(e) applies.

14 ~~(1)~~ **(c) [Effect of Terms]** If a party adopts the terms of a record, the terms become part
15 of the contract without regard to the party's knowledge or understanding of individual terms in
16 the record, except for a term that is unenforceable because it fails to satisfy another requirement
17 of this [Act].

18 **(d) [Limits on Mass-Market Terms]** The rules of Section 209 also apply in the case of
19 a mass-market license.

1 **23.AMENDMENT # 23: SECTION 212**

2 **Amend the section as follows:**

4 **SECTION 212. EFFICACY AND COMMERCIAL REASONABLENESS OF**
5 **ATTRIBUTION PROCEDURE.**

6 (a) [Decision for Court] The efficacy, including the commercial reasonableness, of an
7 attribution procedure is determined by the court. ~~In making this determination, the following~~
8 ~~rules apply:~~

9 (b) [Applicable Standards] In making the determination under subsection (a), the
10 following rules apply:

11 *****

12 **24.AMENDMENT # 24: SECTION 302**

13 **Modify the section as follows:**

15 **SECTION 302. PRACTICAL CONSTRUCTION.**

16 *****

17 (d) [Question of Fact] The existence and scope of a usage of trade must be proved as
18 ~~facts~~ a question of fact.

20 **25.AMENDMENT # 25: SECTION 303:**

21 **Modify the section as follows:**

23 **SECTION 303. MODIFICATION AND RESCISSION.**

24 *****

25 (c) [When Record Required] A modification of a contract and the contract as modified

1 must satisfy the requirements of Sections 201(a) and ~~307(g)~~ 307(f) if the contract as modified is
2 within those provisions.

3 (d) **[Waiver]** ~~An~~ Subject to Section 702, an attempt at modification or rescission which
4 does not satisfy subsection (b) or (c) may operate as a waiver ~~if Section 702 is satisfied.~~
5

6 **26.AMENDMENT # 26: SECTION 309:**

7 **Modify the section as follows:**

8 **SECTION 309. AGREEMENT FOR PERFORMANCE TO PARTY'S**
9 **SATISFACTION.**
10

11 (b) **[When Subjective Satisfaction Standard Applies]** Performance must be to the
12 subjective satisfaction of the other party if:

13 (1) the agreement expressly so provides, such as by stating that approval is in the
14 “sole discretion” of the party, or words of similar import; or

15 (2) the agreement is for informational content to be evaluated in reference to
16 subjective characteristics such as aesthetics, appeal, or suitability to taste, ~~or subjective quality.~~
17

18 **27.AMENDMENT # 27: SECTION 402:**

19 **Modify the section as follows:**

20 **SECTION 402. EXPRESS WARRANTY.**

21 (a) **[How Created]** ~~Subject to~~ Except as otherwise provided by subsection (c), an
22 express warranty by a licensor is created as follows:

23 *****

1 (3) **[Sample, Model, or Demonstration]** Any sample, model, or demonstration of a
2 final product which is made part of the basis of the bargain creates an express warranty that the
3 performance of the information will ~~reasonably~~ conform to the performance of the sample,
4 model, or demonstration, taking into account differences that would appear to a reasonable
5 person in the position of the licensee between the sample, model, or demonstration and the
6 information as it will be used.

7
8 **28.AMENDMENT # 28: SECTION 403:**
9 **Modify the section as follows:**

10 **SECTION 403. IMPLIED WARRANTY: MERCHANTABILITY OF COMPUTER**
11 **PROGRAM.**

12 (a) **[Terms of Implied Warranty]** Unless the warranty is disclaimed or modified, a
13 licensor that is a merchant with respect to computer programs of the kind warrants:

14 (1) to its end user licensee that the computer program is fit for the ordinary purposes
15 for which such computer programs are used;

16 (2) to its distributor that:

17 (A) the program is adequately packaged and labeled as the agreement requires;

18 and

19 (B) in the case of multiple copies, the copies are within the variations permitted
20 by the agreement, of even kind, quality, and quantity within each unit and among all units
21 involved; and

22 (3) to the parties described in paragraphs (1) and (2), that the program conforms to
23 any promises or affirmations of fact made on the container or label.

1
2 **29.AMENDMENT # 29: SECTION 404**

3 **Amend the section as follows:**

4 **SECTION 404. IMPLIED WARRANTY: INFORMATIONAL CONTENT.**

5 *****

6 (b) **[When No Warranty Exists]** ~~A~~ There is no warranty ~~does not arise~~ under
7 subsection (a) with respect to:

8 (1) subjective characteristics of the informational content, such as the aesthetics,
9 appeal, ~~or~~ and suitability to taste;

10 ~~(1)~~ (2) published informational content; or

11 ~~(2)~~ (3) a person that acts as a conduit or provides no more than editorial services in
12 collecting, compiling, distributing, processing, providing, or transmitting informational content
13 that under the circumstances can be identified as that of a third person.

14 (c) **[Disclaimer Permitted]** The warranty under this section is not subject to the
15 preclusion in Section ~~113(a)(1)~~ 115(a)(1) on disclaiming obligations of diligence,
16 reasonableness, or care.

17
18 **30.AMENDMENT # 31: SECTION 504**

19 **Amend the section as follows:**

20 **SECTION 504. EFFECT OF TRANSFER OF CONTRACTUAL INTEREST.**

21 *****

22 (b) **[Effect of Transfer; General Rules]** The following rules apply to a transfer of a
23 party's contractual interests:

1 (1) **[Contractual Use Terms Apply]** The transferee is subject to all contractual use
2 terms.

3 (2) **[Delegation of Duties]** Unless the language or circumstances otherwise indicate,
4 as in a transfer as security under [Uniform Commercial Code, Article 9], the transfer delegates
5 the duties of the transferor and transfers its rights.

6
7 **31.AMENDMENT # 32: SECTION 601**
8 **Amend the section as follows:**

9 **SECTION 601. PERFORMANCE OF CONTRACT IN GENERAL.**

10 *****

11 (b) **[Effect of Uncured Material Breach]** If an uncured material breach of contract by
12 one party precedes the aggrieved party's performance, the aggrieved party need not perform
13 except with respect to restrictions in contractual use terms, ~~but the contractual use terms do not~~
14 ~~apply to information or copies properly received or obtained from another source.~~ In addition,
15 the following rules apply:

16 (1) **[Right to Refuse]** The aggrieved party may refuse a performance that is a
17 material breach as to that performance or a performance that may be refused under Section
18 704(b).

19 (2) **[Right to Cancel]** The aggrieved party may cancel the contract only if the ~~breach~~
20 ~~is a material breach of the whole contract or the agreement so provides~~ conditions of Section 802
21 are met.

1 (3) [Information From Other Sources] The contractual use terms do not apply to
2 information or copies properly received or obtained from another source not covered by the
3 agreement.

4
5 **32.AMENDMENT # 33: SECTION 604**

6 **Amend the section as follows:**

7 **SECTION 604. IMMEDIATELY COMPLETED PERFORMANCE.** If a performance
8 involves delivery of information or services which, because of their nature, may provide a
9 licensee, immediately on performance or delivery, with substantially all the benefit of the
10 performance or with other significant benefit that cannot be returned, the following rules apply:

11 (1) [Rules About Copies Do Not Apply] Sections 607 through 610 and Sections 704
12 through 707 do not apply.

13 (2) [Section 601 and Usage of Trade] The rights of the parties are determined under
14 the other provisions of this [Act], including Section 601 and the ordinary standards of the
15 business, trade, or industry.

16
17 **33.AMENDMENT # 13: SECTION 605**

18 **Amend the section as follows:**

19 **SECTION 605. ELECTRONIC REGULATION OF PERFORMANCE.**

20 *****

21 (d) [Effect of Use of Authorized Restraint] (d) A party that includes or uses an
22 automatic restraint in accordance with ~~consistent with~~ subsection (b) or (c) is not liable for any
23 loss caused by the use of the restraint to prevent use of information contrary to the contract or

1 applicable law. This subsection does not alter the effect or enforceability of contract terms such
2 as warranties or of other laws.

3 *****

4 (f) **[No Use As Remedy For Breach]** This section does not authorize use of an automatic
5 restraint to enforce remedies because of breach of contract or for cancellation for breach. If a
6 right to cancel for breach of contract and a right to exercise a restraint under subsection (b)(4)
7 exist simultaneously, any affirmative acts constituting ~~electronic~~ self-help may only be taken
8 pursuant to the limitations in Sections 815(b) and 816, including the prohibition on mass-market
9 transactions, instead of this section. Affirmative acts under this subsection do not include:

10 (1) use of a program, code, device or similar electronic or physical limitation that
11 operates automatically without regard to breach; or

12 (2) a refusal to prevent the operation of a restraint authorized by this section or to
13 reverse its effect.

14 **34.AMENDMENT # 34: SECTION 610**

15 **Amend the section as follows:**

16 **SECTION 610. COPY: EFFECT OF ACCEPTANCE; BURDEN OF**
17 **ESTABLISHING; NOTICE OF CLAIMS.**

18 *****

19 (c) **[Post-Acceptance Notification of Disputes]** If a copy has been accepted, the
20 accepting party shall:
21

(1) except with respect to claims of a type described in Section 805(d)(1), within a reasonable time after it discovers or should have discovered a breach of contract, notify the other party of the breach or be barred from any remedy for the breach; and

(2) if the claim is ~~for breach of a warranty regarding noninfringement of a type described in Section 805(d)(1)~~ and the accepting party is sued by a third party ~~because of the breach for such claim~~, notify the ~~warrantor~~ party making the warranty within a reasonable time after receiving notice of the litigation or be precluded from any remedy over for the liability established by the litigation.

35.AMENDMENT # 35: SECTION 613

Amend the section as follows:

SECTION 613. CONTRACTS INVOLVING PUBLISHERS, DEALERS, AND END USERS.

(b) **[Contract Between Dealer and End User]** In a contract between a dealer and an end user, if the end user's right to use the information or informational rights is subject to a license by the publisher and there was no opportunity to review the license before the end user became obligated to pay the dealer, the following rules apply:

(1) **[Conditioned on Agreement to License]** The contract between the end user and the dealer is conditioned on the end user's agreement to the publisher's license.

(2) **[Right of Return to Dealer]** If Unless the end user does ~~not agree~~ agrees, such as by manifesting assent, to the terms of the publisher's license, the end user has a right to a

1 return from the dealer. A right under this paragraph is a return for purposes of Sections 112,
2 208, and 209.

3 *****

4 (c) **[Dealer Distribution]** If an agreement provides for distribution of copies on a
5 tangible medium or in packaging provided by the publisher or an authorized third party, a dealer
6 may distribute those copies and documentation only:

- 7 (1) in the form as received; and
8 (2) subject to the terms of any license ~~the publisher~~ that the publisher provides to the
9 dealer to be furnished to end users.

10
11 **36.AMENDMENT # 36: SECTION 701**
12 **Amend the section as follows:**

13 **SECTION 701. BREACH OF CONTRACT; MATERIAL BREACH.**

14 (a) **[When Breach Occurs]** Whether a party is in breach of contract is determined by
15 the agreement ~~or, in the absence of agreement, and~~ this [Act]. A breach occurs if a party without
16 legal excuse fails to perform an obligation in a timely manner, repudiates a contract, or exceeds a
17 contractual use term, or otherwise is not in compliance with an obligation placed on it by this
18 [Act] or the agreement.

19 (b) **[Effect of Breach]** A breach of contract, whether or not material, entitles the
20 aggrieved party to its remedies. Whether a breach of a contractual use term is an infringement or
21 a misappropriation is determined by applicable informational property rights law.

22 [renumber as appropriate]
23

1 **37.AMENDMENT # 37: SECTION 702**

2 **Amend the section as indicated:**

3 **SECTION 702. WAIVER OF REMEDY FOR BREACH OF CONTRACT.**

4 (a) **[Waiver as to Executory Performance]** Except for a waiver in accordance with
5 subsection (b) or a waiver supported by consideration, a waiver affecting an executory portion of
6 a contract may be retracted by seasonable notice received by the other party that strict
7 performance will be required in the future, unless the retraction would be unjust in view of a
8 material change of position in reliance on the waiver by that party.

9 (b) **[Waiver in a Record]** A claim or right arising out of a breach of contract may be
10 discharged in whole or part without consideration by a waiver in a record to which the party
11 making the waiver agrees after breach, such as by manifesting assent, or which the party making
12 the waiver authenticates and delivers to the other party after breach.

13 *****

14 (c) ~~(d)~~ **[Waiver by Failure to Inform]** A party that refuses a performance and fails to
15 identify a particular defect that is ascertainable by reasonable inspection waives the right to rely
16 on that defect to justify refusal only if:

17 (1) the other party could have cured the defect if it were stated ~~identified~~ seasonably;
18 or

19 (2) between merchants, the other party after refusal made a request in a record for a
20 full and final statement of all defects on which the refusing party relied.

21 *****

22 ~~(f) Except for a waiver in accordance with subsection (a) or a waiver supported by~~
23 ~~consideration, a waiver affecting an executory portion of a contract may be retracted by~~

1 ~~seasonable notice received by the other party that strict performance will be required in the~~
2 ~~future, unless the retraction would be unjust in view of a material change of position in reliance~~
3 ~~on the waiver by that party.~~

4
5
6 **38.AMENDMENT # 38: SECTION 802**

7 **Modify the section as follows:**

8 **SECTION 802. CANCELLATION.**

9 (a) **[When Cancellation Allowed]** An aggrieved party may cancel a contract for breach
10 ~~if there~~ the breach is a material breach of the whole contract ~~that~~ which has not been cured or
11 waived or the agreement allows cancellation for the breach.