

**AMENDMENTS TO
UNIFORM COMPUTER INFORMATION
TRANSACTIONS ACT ***

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**AMENDMENTS TO
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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

AMENDMENT #1:

SECTION 102. DEFINITIONS.

(a) In this [Act]:

.....

(58) "Scope" means the terms of a license describing the:

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

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

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

(D) duration of the license.

AMENDMENT #2: Delete Section 104.

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

~~(1) An agreement that this [Act] governs a transaction does not alter the applicability of any statute, rule, or procedure that may not be varied by agreement of the parties or that may be varied only in a manner specified by the statute, rule or procedure, including a consumer~~

~~protection statute [or administrative rule]. In addition, in a mass-market transaction, the agreement does not alter the applicability of a law applicable to a copy of information in printed form:~~

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

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

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

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

~~(4) A copy of a computer program contained in and sold or leased as part of goods and which is excluded from this [Act] by Section 103(b)(1) cannot provide the basis for an agreement under this section that this [Act] governs the transaction.~~

AMENDMENT #3: Divide Section 105 into Section 104 and 105 as follows:

SECTION 104. CONSUMER PROTECTION LAW GOVERNS. Except as otherwise provided in this section, this [Act] does not limit, modify, or supersede a consumer protection law applicable to the subject matter of this [Act].

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

(2) [Standard of Conspicuousness] If a consumer protection law requires a term to be conspicuous, the standard of conspicuousness under the consumer protection law applies.

However, a provision in the consumer protection law requiring a term to be conspicuous does not preclude the term from being presented electronically.

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

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

(5) [Applicability of Consumer Law] The applicability of a consumer protection law is determined by that law as it would have applied in the absence of this [Act]. [Among the consumer protection laws of this State which apply to the subject matter of this [Act] are: *[Insert statutes that, on review by the legislature and amendment as appropriate, are determined to be applicable to the subject matter of this [Act] such as a state's unfair and deceptive practices act with amendments as appropriate.]*

Legislative Note: This Section makes clear that this [Act] does not change a "consumer protection law". Some consumer protection statutes apply to goods and services and may not apply to computer information which is an intangible under current law. Accordingly, states must review their consumer protection statutes to determine if they should be applied to computer information and, if so, what amendments are required to adapt them to that subject matter. In most cases, the state's unfair and deceptive practices act should apply, but some modification may be required. For example, if a state's "unfair acts and practices" statute requires the origin of the product to be specified on the "label or package," such a provision needs consideration before being applied to electronic information that has no "label" or "package." It may also be appropriate to consider such issues as whether the provision should

apply to computer information for which no charge is made, or how the provision can be applied to products having multiple “origins” such as software written by an unaffiliated community of programmers. A consumer protection statute applicable to health club contracts may not apply but a consumer protection statute requiring that a vendor’s refund policy be posted on the “premises” might apply if amended to allow compliance in an Internet or other electronic environment. Amendments of consumer protection laws must be consistent with the federal Electronic Signatures in Global and Electronic Commerce Act which requires technological neutrality and that the amended statute reference the federal act.

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

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

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

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

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

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

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

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

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

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

(d) **[Intellectual Property Notices]** This [Act] does not apply to an intellectual property notice which is based solely on intellectual property rights and is not part of a contract. The effect of such a notice is determined by law other than this [Act].

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

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

laws should be excluded from the operation of subsection (d).

AMENDMENT #4:

SECTION 110. CONTRACTUAL CHOICE OF FORUM.

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

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

AMENDMENT #5: Divide Section 114 into new Sections 116 and 117.

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

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

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

(c) **[Commercial Practice]** Any usage of trade in the vocation or trade in which the parties are engaged or 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.

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

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

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

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

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

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

(f) (d) **[Reason to Know]** A person has reason to know a fact if the person has

knowledge of the fact or, from all the facts and circumstances known to the person without investigation, the person should be aware that the fact exists.

AMENDMENT #6: New Section 118:

[SUBPART J. REVERSE ENGINEERING]

SECTION 118. TERMS ON REVERSE ENGINEERING.

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

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

(1) the elements have not previously been readily available to the licensee;

(2) the identification, analysis, or use is performed solely for the purpose of enabling such interoperability; and

(3) the identification, analysis, or use is not prohibited by law other than this [Act].

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

AMENDMENT #7: Delete Section 308:

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

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

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

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

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

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

~~(B) the license expressly grants 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.~~

SECTION 207. FORMATION: RELEASES OF INFORMATIONAL RIGHTS.

~~(c) In cases not governed by subsection (b), the duration of a release is governed by~~

Section 308.

AMENDMENT #8:

SECTION 209. MASS-MARKET LICENSE.

(a) ~~[Limitation on Terms]~~ ~~A party adopts the terms of a mass-market license for purposes of Section 208~~ Adoption of the terms of a mass-market license under Section 208 is effective only if the party agrees to the license, such as 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:

- (1) the term is unconscionable or is unenforceable under Section 105(a) or (b); ~~or~~
- (2) subject to Section 301, the term conflicts with a term to which the parties to the license have expressly agreed;
- (3) under Section 113, the licensee does not have an opportunity to review the term before agreeing to it; or
- (4) the term is not available to the licensee after assent to the license in one or more of the following forms:
 - (A) an immediately available nonelectronic record that the licensee may keep;
 - (B) an immediately available electronic record that can be printed or stored by the licensee for archival and review purposes; or
 - (C) in a copy available at no additional cost on a seasonable request in a record by a licensee that was unable to print or store the license for archival and review purposes.

(b) **[Right of Return and Reimbursement]** If a mass-market license or a copy of the

license is not available in a manner permitting an opportunity to review by the licensee before the licensee becomes obligated to pay and the licensee does not agree, such as by manifesting assent, to the license after having an opportunity to review, the licensee is entitled to a return under Section 112 and, in addition, to:

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

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

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

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

(d) [Notice of Refund] In a case governed by subsection (b), notice must be given in the license or otherwise that a refund may be obtained from the person to whom the payment was made or other person designated in the notice if the licensee refuses the terms.

AMENDMENT #9:

SECTION 307. INTERPRETATION AND REQUIREMENTS FOR GRANT.

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

AMENDMENT #10:

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

(d) **[Disclaimer or Modification Permitted]** Except as otherwise provided in subsection (e), a warranty under this section may be disclaimed or modified only by specific language or by circumstances that 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 it may have. An obligation to hold harmless under this section may be disclaimed or modified only by specific language or by circumstances giving the licensor reason to know that the licensee does not provide a hold-harmless obligation to the licensor. In an automated transaction, language is sufficient if it is conspicuous. Otherwise, language in a record is sufficient if it states:

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

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

AMENDMENT #11: New Section 410:

SECTION 410. NO IMPLIED WARRANTIES FOR FREE COMPUTER PROGRAM. The warranties under Sections 401 and 403 apply to a computer program only if

the licensor intends to make a profit from the distribution of the copy of the program or acts generally for commercial gain derived from controlling use of the program or making, modifying, or redistributing copies of the program.

AMENDMENT #12:

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

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

- (A) is prohibited by other law; or
- (B) ~~except as otherwise provided in paragraph (3),~~ 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.

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

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

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

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

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

(ii) to a public library; ; or

(iii) from a consumer to another consumer.

AMENDMENT #13:

SECTION 815. RIGHT TO POSSESSION AND TO PREVENT USE.

(b) **[Limitation on Exercise Without Judicial Process]** Except as otherwise provided in Sections 814 and 816, a licensor may exercise its rights under subsection (a) without judicial process only if this can be done by taking possession of a tangible copy; ~~(1) without a breach of the peace, in which event the licensor may take further steps with respect to the copy, including erasing the copy by electronic means, subject to the same obligations that arise Section 618(a) relating to return of the licensee's information and a licensor shall exercise reasonable care in the custody and preservation of the licensee's property in the licensor's possession.~~

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

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

SECTION 816. LIMITATIONS ON ELECTRONIC SELF-HELP.

(a) In this section:

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

(2) ~~“Wrongful use of electronic self-help” means use of electronic self-help other than in compliance with this section.~~

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

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

~~(1) provide for notice of exercise as provided in subsection (d);~~

~~(2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and~~

~~(3) provide a simple procedure for the licensee to change the designated person or place.~~

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

~~(1) that the licensor intends to resort to electronic self-help as a remedy on or after 15 days following receipt by the licensee of the notice;~~

~~(2) the nature of the claimed breach that entitles the licensor to resort to self-help; and~~

~~(3) the name, title, and address, including direct telephone number, facsimile number, or e-mail address, to which the licensee may communicate concerning the claimed breach.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) [Definitions] In this section, “electronic self-help” means electronically to exercise without court order a licensors’s rights in the event of cancellation of a license due to the licensee’s breach of contract, but does not include actions expressly permitted under Section 814 and 815 (b).

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

(c) [Attorney’s Fees] In an application by a licensor where the licensor seeks

prejudgment relief pursuant to contractual rights to prevent continued use of the information by a licensee, a court may award the prevailing party in that proceeding reasonable attorneys fees with respect to the proceeding notwithstanding any term of a license.

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

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

AMENDMENT #14:

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

AMENDMENT #15:

SECTION 106. RULES OF CONSTRUCTION.

(e) [Section Headings Part of Act] Section headings are part of this [Act] but subsection

headings are not.

AMENDMENT #16: Divide Section 112 into Section 112 and 113

SECTION 112. MANIFESTING ASSENT; ~~OPPORTUNITY TO REVIEW.~~

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

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

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

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

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

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

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

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

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

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

Providers of online services, network access, and telecommunications services, or the operators of facilities thereof, do not manifest assent to a contractual relationship simply by their provision of those services to other parties, including, without limitation, transmission, routing, or providing connections; linking; caching; hosting; information location tools; ~~or~~ and storage of materials, at the request or initiation of a person other than the service provider.

SECTION 113. OPPORTUNITY TO REVIEW.

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

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

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

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

(2) the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and the parties at the time of contracting had reason

to know that a record or term would be presented after performance, use, or access to the information began.

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

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

AMENDMENT #17:

SECTION ~~2H~~ 114. PRETRANSACTION DISCLOSURES IN INTERNET-TYPE TRANSACTIONS.

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

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

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

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

(B) disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnishing a copy of the 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.

AMENDMENT #18:

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

~~(L)~~ (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.~~

AMENDMENT #19:

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.

AMENDMENT #20:

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.

AMENDMENT #21:

SECTION 205. CONDITIONAL OFFER OR ACCEPTANCE.

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

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

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

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

AMENDMENT #22:

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

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

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

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

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

AMENDMENT #23:

SECTION 212. EFFICACY AND COMMERCIAL REASONABLENESS OF ATTRIBUTION PROCEDURE.

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

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

AMENDMENT #24:

SECTION 302. PRACTICAL CONSTRUCTION.

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

AMENDMENT #25:

SECTION 303. MODIFICATION AND RESCISSION.

(c) **[When Record Required]** A modification of a contract and the contract as modified must satisfy the requirements of Sections 201(a) and ~~307(g)~~ 307(f) if the contract as modified is within those provisions.

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

AMENDMENT #26:

SECTION 309. AGREEMENT FOR PERFORMANCE TO PARTY'S SATISFACTION.

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

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

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

AMENDMENT #27:

SECTION 402. EXPRESS WARRANTY.

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

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

AMENDMENT #28:

SECTION 403. IMPLIED WARRANTY: MERCHANTABILITY OF COMPUTER PROGRAM.

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

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

(2) to its distributor that:

(A) the program is adequately packaged and labeled as the agreement requires;
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 the parties described in paragraphs (1) and (2), that the program conforms to any promises or affirmations of fact made on the container or label.

AMENDMENT #29:

SECTION 404. IMPLIED WARRANTY: INFORMATIONAL CONTENT.

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

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

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

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

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

AMENDMENT #30:

SECTION 504. EFFECT OF TRANSFER OF CONTRACTUAL INTEREST.

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

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

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

AMENDMENT #31:

SECTION 601. PERFORMANCE OF CONTRACT IN GENERAL.

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

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

(2) **[Right to Cancel]** The aggrieved party may cancel the contract only if the ~~breach~~

is a material breach of the whole contract or the agreement so provides conditions of Section 802 are met.

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

AMENDMENT #32:

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

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

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

AMENDMENT #33:

SECTION 605. ELECTRONIC REGULATION OF PERFORMANCE.

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

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

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

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

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

AMENDMENT #34:

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

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

(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.

AMENDMENT #35:

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

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

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

AMENDMENT #36:

SECTION 701. BREACH OF CONTRACT; MATERIAL BREACH.

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

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

[renumber as appropriate]

AMENDMENT #37:

SECTION 702. WAIVER OF REMEDY FOR BREACH OF CONTRACT.

(a) **Waiver as to Executory Performance** Except for a waiver in accordance with subsection (b) or a waiver supported by consideration, a waiver affecting an executory portion of

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

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

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

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

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

~~(f) Except for a waiver in accordance with subsection (a) or a waiver supported by consideration, a waiver affecting an executory portion of a contract may be retracted by seasonable notice received by the other party that strict performance will be required in the future, unless the retraction would be unjust in view of a material change of position in reliance on the waiver by that party.~~

AMENDMENT #38:

SECTION 802. CANCELLATION.

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