

# UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT\*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-EIGHTH YEAR  
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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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August 4, 1999

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**UNIFORM COMPUTER INFORMATION  
TRANSACTIONS ACT**

**PART 1**

**GENERAL PROVISIONS**

[SUBPART A. SHORT TITLE AND DEFINITIONS]

**SECTION 101. SHORT TITLE.** This [Act] may be cited as Uniform Computer Information Transactions Act.

**SECTION 102. DEFINITIONS.**

(a) In this [Act]:

(1) “Access contract” means a contract to obtain electronically access to, or information from, an information processing system of another person, or the equivalent of such access.

(2) “Access material” means any information or material, such as a document, address, or access code, necessary to obtain authorized access to information or control or possession of a copy.

(3) “Aggrieved party” means a party entitled to a remedy for breach of contract.

(4) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of

performance, course of dealing, and usage of trade as provided in this [Act].

Whether an agreement has legal consequences is determined by this [Act].

(5) “Attribution procedure” means a procedure established by law, administrative rule, or agreement, or a procedure otherwise adopted by the parties, to verify that an electronic event is that of a specific person or to detect changes or errors in the information. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgment, or any other procedures that are reasonable under the circumstances.

(6) “Authenticate” means to sign, or otherwise to execute or adopt an electronic symbol, sound, or process attached to, included in, or logically associated or linked with, a record or term, with the intent to sign the record or a record to which it refers.

(7) “Automated transaction” means a contract formed or performed in whole or in part by electronic means or by electronic messages in which the electronic actions or messages of one or both parties which establish the contract are not reviewed in the ordinary course by an individual before the action or response.

(8) “Burden of establishing”, with respect to a fact, means the burden of persuading a trier of fact that the existence of the fact is more probable than its non-existence.

(9) “Cancellation” means an act by a party that puts an end to the

contract for breach by another.

(10) “Computer” means an electronic device that accepts information in digital or similar form and manipulates it for a specific result based on a sequence of instructions.

(11) “Computer information” means information in electronic form that is obtained from or through the use of a computer, or that is in digital or similar form capable of being processed by a computer. The term includes a copy of information in that form and any documentation or packaging associated with the copy.

(12) “Computer information transaction” means an agreement and the performance of that agreement to create, modify, transfer, or license computer information or informational rights in computer information. The term includes a support agreement to the extent covered in Section 612. A transaction is not included merely because the parties’ agreement includes that their communications about the transaction will be in the form of computer information.

(13) “Computer program” means a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result. The term does not include separately identifiable informational content.

(14) “Consequential damages” resulting from breach of contract include (i) any loss resulting from general or particular requirements and needs of which the other party at the time of contracting had reason to know and which could not reasonably be prevented, and (ii) injury to person or damage to other property

proximately resulting from any breach of warranty. The term does not include direct or incidental damages.

(15) “Conspicuous , with reference to a term, means so written, displayed, or otherwise presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react without review of the record by an individual. Conspicuous terms include the following:

(A) with respect to a person:

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

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

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

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

(16) “Consumer means an individual who is a licensee of information

or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for professional, or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments.

(17) "Consumer contract" means a contract between a merchant licensor and a consumer.

(18) "Contract" means the total legal obligation which results from the parties' agreement as affected by this [Act] and any other applicable rules of law.

(19) "Contract fee" means the price, fee, rent, or royalty payable in a contract under this [Act].

(20) "Contractual use restriction" means an enforceable restriction created by contract which concerns the use or disclosure of, or access to licensed information or informational rights, including a limitation on scope or manner of use.

(21) "Copy" means the medium on which information is fixed on a temporary or permanent basis and from which it can be perceived, reproduced, used, or communicated, either directly or with the aid of a machine or device.

(22) "Course of dealing" means a sequence of previous conduct between the parties to a particular transaction which establishes a common basis of understanding or interpreting their expressions and other conduct.

(23) "Course of performance" means a sequence of conduct in a



contract that involves repeated occasions for performance if a party, with knowledge of the nature of the performance and opportunity to object to it, accepts or acquiesces in the repeated performance without objection.

(24) “Court” includes an arbitration or other dispute-resolution forum if the parties have agreed to use of that forum or its use is required by law.

(25) “Delivery, with respect to a copy, means the voluntary physical or electronic transfer of possession or control.

(26) “Direct damages” means compensation for losses measured by Section 808(b)(1) or 809(a)(1). The term does not include consequential or incidental damages.

(27) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, or electromagnetic, or similar capabilities.

(28) “Electronic agent” means a computer program, or electronic or other automated means used independently to initiate an action or respond to electronic messages or performances without review or action by an individual at the time of the action, response or performance.

(29) “Electronic event” means an electronic authentication, display, message, record, or performance.

(30) “Electronic message” means a record or display stored, generated, or transmitted by electronic means for the purposes of communication to another person or electronic agent.

(31) “Financial accommodation contract” means an agreement under

which a person extends a financial accommodation to a licensee which agreement does not create a security interest in a transaction that is subject to [Article 9 of the Uniform Commercial Code]. The agreement may be in any form, including a license, lease, or software lease.

(32) “Financial services transaction” means a contract or a transaction that provides access to, use, transfer, clearance, settlement, or processing of:

(A) deposits, loans, funds, or monetary value represented in electronic form and stored or capable of storage electronically and retrievable and transferable electronically, or other right to payment to or from a person;

(B) an instrument or other item;

(C) a payment order, credit card transaction, debit card transaction, or a funds transfer, automated clearing house transfer, or similar wholesale or retail transfer of funds;

(D) a letter of credit, document of title, financial asset, investment property, or similar asset held in a fiduciary or agency capacity; or

(E) related identifying, verifying, access-enabling, authorizing, or monitoring information.

(33) “Financier” means a person that provides a financial accommodation to a licensee under a financial accommodation contract and either (i) becomes a licensee for the purpose of transferring or sublicensing the license to the party to which the financial accommodation is provided or (ii) obtains a contractual right under the financial accommodation contract to preclude the

licensee's use of the information or informational rights under a license in the event of breach of the financial accommodation contract. The term does not include a person that selects, creates, or supplies the information that is the subject of the license, owns the informational rights in the information, or provides support, modifications, or maintenance for the information.

(34) "Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(35) "Incidental damages resulting from breach of contract:

(A) means compensation for any commercially reasonable charges, expenses, or commissions reasonably incurred by an aggrieved party with respect to:

(i) inspection, receipt, transmission, transportation, care, or custody of identified copies or information that are the subject of the breach;

(ii) stopping delivery, shipment, or transmission;

(iii) effecting cover, return, or retransfer of copies or information after the breach of contract;

(iv) reasonable efforts after the breach otherwise to minimize or avoid loss resulting from the breach; and

(v) matters otherwise incident to the breach; and

(B) does not include consequential or direct damages.

(36) "Individual means a human being.

(37) "Information means data, text, images, sounds, mask works, or

computer program, including collections or compilations thereof.

(38) “Information processing system” means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(39) “Informational content” means information that is intended to be communicated to or perceived by an individual in the ordinary use of the information, or the equivalent of that information. The term does not include computer instructions that control the interaction of a computer program with other computer programs or with a machine or device.

(40) “Informational rights” include all rights in information created under laws governing patents, copyrights, mask works, trade secrets, trademarks, publicity rights, or any other law that gives a person, independently of contract, a right to control or preclude another person’s use of or access to the information on the basis of the rights holder’s interest in the information.

(41) “Knowledge”, with respect to a fact, means that a person has actual knowledge of the fact.

(42) “License” means a contract that authorizes access to, use of, distribution, display, performance, modification, or reproduction of information, or use of informational rights, and expressly limits the contractual rights, permissions, or uses granted, expressly prohibits some uses, or expressly grants less than all rights in the information. A contract may be a license whether or not the transferee has title to a licensed copy. The term includes an access contract and a

consignment of a copy. The term does not include a reservation or creation of a security interest.

(43) “Licensee” means a transferee in a license or other agreement under this [Act]. A licensor is not a licensee with respect to rights reserved to it under the agreement.

(44) “Licensor” means a transferor in a license or other agreement under this [Act]. Between a provider of access in an access contract and its customer, the provider is the licensor. Between the provider of access and a provider of the informational content to be accessed, the provider of content is the licensor. In an exchange of information or informational rights, each party is a licensor with respect to the information, informational rights, or access it provides.

(45) “Mass-market license” means a standard form that is prepared for and used in a mass-market transaction.

(46) “Mass-market transaction” means a transaction under this [Act] that is:

(A) a consumer contract; or

(B) any other transaction with an end-user licensee if:

(i) the transaction is for information or informational rights directed to the general public as a whole including consumers, under substantially the same terms for the same information;

(ii) the licensee acquires the information or rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in

a retail market; and

(iii) the transaction is not:

(I) a contract for redistribution or for public performance or public display of a copyrighted work;

(II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee other than minor customization using a capability of the information intended for that purpose;

(III) a site license; or

(IV) an access contract.

(47) “Merchant” means a person that deals in information or informational rights of the kind or that otherwise by the person’s occupation holds itself out as having knowledge or skill peculiar to the practices or information involved in the transaction, or a person to which such knowledge or skill may be attributed by the person’s employment of an agent or broker or other intermediary that by its occupation holds itself out as having such knowledge or skill.

(48) “Nonexclusive license” means a license that does not preclude the licensor from transferring to other licensees the same information, informational rights, or contractual rights within the same scope. The term includes a consignment of a copy.

(49) “Notice of a fact” means that the person has actual knowledge of it, has received notice or notification of it, from all the facts and circumstances known to it, has reason to know that the fact exists.

(50) “Notify , or “give notice , means to take such steps as may be reasonably required to inform the other person in the ordinary course whether or not the other person actually comes to know of it.

(51) “Party , as distinguished from “third party , means a person that has engaged in a transaction or made an agreement within this [Act].

(52) “Person includes an individual or an organization.

(53) “Present value means the amount, as of a date certain, of one or more sums payable in the future or the value of one or more performances due in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties in their agreement unless that rate was manifestly unreasonable when the transaction was entered into. Otherwise, the discount is determined by a commercially reasonable rate that takes into account the circumstances of each case when the agreement was entered into.

(54) “Published informational content means informational content prepared for or made available to recipients generally, or to a class of recipients, in substantially the same form. The term does not include informational content that is:

(A) customized for a particular recipient by an individual or group of individuals acting as or on behalf of the licensor, using judgment or expertise; or

(B) provided in a special relationship of reliance between the provider and the recipient.

(55) “Reasonable time means any time which is not manifestly

unreasonable. What is a reasonable time for taking an act depends on the nature, purpose and circumstances of such act.

(56) “Reason to know , with respect to a fact, means that:

(A) a person has knowledge of the fact; or

(B) from all the facts and circumstances known to the person

without investigation, the person should be aware that the fact exists.

(57) “Receive means:

(A) with respect to a copy, to take delivery; or

(B) with respect to a notice:

(i) to come to a person’s attention; or

(ii) to be delivered to and available at a location or system

designated by agreement for that purpose or, in the absence of an agreed location:

(I) to be delivered at the person’s residence, or the person’s place of business through which the contract was made, or at any other place held out by the person as a place for receipt of communications of the kind; or

(II) in the case of an electronic notification, to come into existence in an information processing system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise has designated or holds out that system or address as a place for receipt of notices of the kind and the sender does not know that the notice cannot be accessed from the particular system of the recipient.

(58) “Record means information that is inscribed on a tangible



medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(59) “Release means an agreement not to object to, or exercise any remedies to limit, the use of information or informational rights, if the agreement requires no affirmative act by the party giving the release to enable or support the other party’s use of the information or informational rights. The term includes a waiver of informational rights.

(60) “Return , with respect to information to which a rejected record applies, means:

(A) in the case of a licensee that rejects a record:

(i) with respect to a single information product transferred for a single contract fee, reimbursement of any contract fee paid from the person to which it was paid or from another person that may offer to reimburse that fee, and a right to stop payment of the contract fee, on proof of purchase and return of the information and all copies within a reasonable time after delivery to the licensee; and

(ii) with respect to an information product provided as part of multiple information products integrated into a bundled whole but retaining their separate identity and transferred for one contract fee:

(I) if the record is rejected before or during the initial use of the bundled product and that product is returned without further use and along with all other information products bundled along with it, reimbursement of the

aggregate contract fee for all bundled information products, on proof of purchase and return of all the bundled products and all copies within a reasonable time after delivery; or

(II) if a separate fee was identified by the licensor as charged to the licensee for a particular bundled information product, reimbursement of any separate contract fee paid for the separate information to which the rejected record applies, on proof of purchase and return of that information and all copies within a reasonable time after delivery; and

(B) in the case of a licensor that rejects a record proposed by the licensee, a right to receive redelivery of the information from the licensee, to stop delivery or access to the licensee, and reimbursement from the licensee of amounts paid by the licensor with respect to the rejected record along with reimbursement to the licensee of fees that it paid with respect to the rejected record.

(61) “Scope , with respect to a license, means terms defining:

(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; and

(D) the duration of the license.

(62) “Seasonable with respect to an act, means taken within the time agreed or, if no time is agreed, at or within a reasonable time.

(63) “Send means, with any costs provided for and properly addressed

or directed as reasonable under the circumstances or as otherwise agreed, to (i) deposit in the mail or with a commercially reasonable carrier, (ii) deliver for transmission to or re-creation in another location or system, or (iii) take the steps necessary to initiate transmission to or re-creation in another location or system. In addition, with respect to an electronic message, the term means to initiate operations that in the ordinary course will cause the record to come into existence in an information processing system in a form capable of being processed by or perceived from a system of that type by the recipient, if the recipient uses or otherwise has designated or held out that system or address as a place for the receipt of communications of the kind. Receipt within the time in which it would have arrived if properly sent has the effect of a proper sending.

(64) “Software means a computer program, informational content included in the program, and any supporting information provided by the licensor.

(65) “Software lease means a lease of a copy of software, whether or not the lease is a lease under [Article 2A of the Uniform Commercial Code].

(66) “Standard form means a record or a group of related records containing terms prepared for repeated use in transactions and so used in a transaction in which there was no negotiation by individuals except to set the price, quantity, method of payment, selection among standard options, or time or method of delivery.

(67) “Term , with respect to an agreement or contract, means that portion of an agreement which relates to a particular matter.

(68) “Termination” means the ending of a contract by either party pursuant to a power created by agreement or law otherwise than for its breach.

(69) “Transfer” :

(A) with respect to a contractual interest, includes an assignment of the contract, but does not include an agreement to perform a contractual obligation or exercise contractual rights through a delegate or a sublicensee; and

(B) with respect to computer information, includes a sale or lease of a copy as well as an assignment of informational rights in computer information.

(70) “Usage of trade” means any practice or method of dealing that has such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

(b) The following definitions in [the Uniform Commercial Code] apply to this [Act]:

(1) “Document of title” [Section 1-201].

(2) “Financial asset” [Section 8-102(a)(9)].

(3) “Funds transfer” [Section 4A-104] (as applied to credit orders).

(4) “Identification” to the contract [Section 2-501].

(5) “Instrument” [Sections 9-105(i)] (1995 Official Draft);  
[9-102(a)(47)] (1998 Approved Draft).

(6) “Item” [Section 4-104].

(7) “Investment property” [Section 9-115(f)] (1995 Official Draft);  
[9-102(a)(49)] (1998 Approved Draft).

- (8) “Lease [Section 2A-102].
- (9) “Letter of credit [Section 5-102].
- (10) “Negotiable instrument [Section 3-104].
- (11) “Organization [Section 1-201].
- (12) “Payment order [Section 4A-103] (as applied to credit orders).
- (13) “Purchase [Section 1-201].
- (14) “Purchaser [Section 1-201].
- (15) “Sale [Section 2-106].
- (16) “Security interest [Section 1-201].

[SUBPART B. GENERAL SCOPE AND TERMS]

**SECTION 103. SCOPE; EXCLUSIONS; AGREEMENT THAT ACT GOVERNS.**

- (a) This [Act] applies to computer information transactions.
- (b) If a computer information transaction includes other subject matter, except as provided in subsections (c), (d), and (e), the following rules apply:
  - (1) If the computer information is the primary subject matter, this [Act] applies to the entire transaction.
  - (2) If the computer information is not the primary subject matter, this [Act] applies only to the part of the transaction pertaining to the computer information.

(c) The following rules apply between this [Act] and [articles of the Uniform Commercial Code]:

(1) If a transaction involves computer information and goods, this [Act] applies to the computer information.

(2) Notwithstanding subsection (1), if a copy of a computer program is contained in and sold or leased as part of other goods, this [Act] applies to the program and the copy only if:

(A) the other goods are a computer or computer peripheral; or

(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type.

(3) To the extent of a conflict between this [Act] and [Article 9], [Article 9] governs.

(4) This [Act] does not apply to subject matter within the scope of [Article 3, 4, 4A, 5, 6, 7, or 8 of the Uniform Commercial Code].

(d) This [Act] does not apply to:

(1) a financial services transaction;

(2) a contract to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering the

programming; or

(B) a motion picture, sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording. “Enhanced sound recording” means a separately identifiable product or service the dominant character of which consists of recorded sounds, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of those sounds, or (ii) other information, so long as recorded sounds constitute the dominant character of the product or service despite the inclusion of such other information.

(3) a compulsory license; or

(4) a contract of employment of an individual other than as an independent contractor; or

(5) a contract which does not require that the information be furnished as computer information or in which the form of the information as computer information is otherwise de minimis with respect to the primary subject matter of the transaction.

(e) Except as otherwise provided in subsections (c)(2-4), if a material part of the subject matter of a transaction includes computer information that is within this [Act] or subject matter excluded under subsection (d)(1) or (d)(2), the parties may agree that this [Act], including contract formation rules, governs the transaction in whole or in part or that other law governs the transaction and this [Act] does not apply; however, any agreement to do so is subject to the following

rules:

(1) An agreement that this [Act] governs a transaction does not alter an otherwise applicable rule or procedure that may not be varied by agreement or that may be varied only in a manner specified by the otherwise applicable rule or procedure and, in a mass-market transaction, does not alter:

(A) the applicability of a consumer protection statute [or administrative rule]; and

(B) law applicable to a tangible copy of information in print form.

(2) An agreement that this [Act] does not govern a transaction does not alter the applicability of Section 217 or 816 and, in a mass-market transaction, does not alter the applicability of unconscionability, fundamental public policy, or good faith under this [Act].

(3) In a mass-market transaction any term providing that this [Act] does or does not govern must be conspicuous.

**SECTION 104. SUPPLEMENTAL PRINCIPLES: COMMERCIAL PRACTICE; VARIATION BY AGREEMENT; GOOD FAITH; DECISION FOR COURT.**

(a) 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, other validating or invalidating cause, shall supplement the provisions of this [Act].



Among the laws supplementing and not displaced by this [Act] are trade secret laws and unfair competition laws.

(b) Any usage of trade in the business, trade, or industry in which the parties are engaged or of which they are or should be aware, along with any course of dealing or course of performance between parties are relevant to determining the existence or meaning of an agreement.

(c) 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:

(1) Obligations of good faith, diligence, reasonableness and care established by this [Act] may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable.

(2) Unconscionability under Section 111 and fundamental public policy as stated in Section 105(b) may not be varied by agreement.

(3) 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:

(A) limitations on agreed choice of law in Section 109(a);

(B) limitations on agreed choice of forum in Section 110;

(C) limitations in Section 201;

(D) limitations on a mass-market license in Section 211;

(E) requirements and return rights for manifest assent and opportunity to review in Section 112;

(F) the consumer defense arising from an electronic error in Section 217;

(G) requirements for an enforceable term in Sections 303(b), 307(g), 406(b)(c), and 804(a);

(H) restrictions on altering the period of limitations in Section 805(a) and (b).

(I) limitations on self-help repossession in Sections 815(b) and 816.

(d) Every contract or duty within this [Act] imposes an obligation of good faith in its performance or enforcement.

(e) Whether a term is conspicuous or is unenforceable under Section 105(a) or (b) or 211(a) is a question to be determined by the court.

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

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

(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, may enforce the remainder of the contract without the impermissible term, or so limit the application of the impermissible term as to avoid any 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] conflicts with a consumer protection statute [or administrative rule], the conflicting statute [or rule] governs.

(d) If the 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 or writing or a 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 in accordance with this [Act].

(4) A requirement of consent or agreement to a term is satisfied by an action that manifests assent to a term in accordance with this [Act].

**SECTION 106. RULES OF CONSTRUCTION.** In applying this [Act], the following rules of construction apply:

(1) This [Act] shall be liberally construed and applied to promote its underlying purposes and policies, which underlying purposes and policies are to:

(A) support and facilitate the realization of the full potential of computer information transactions;

(B) clarify the law governing computer information transactions;

(C) enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; and

(D) make the law uniform among the various jurisdictions.

(2) Except as otherwise provided in Section 104(c)(3), the use of mandatory language or the absence of a phrase such as “unless otherwise agreed” in a provision of this [Act] does not preclude the parties from varying the effect of the provision by agreement.

(3) The fact that a provision of this [Act] imposes a condition for a result does not by itself mean that the absence of that condition yields a different result.

(4) To be enforceable, a term need not be conspicuous, negotiated, or expressly assented or agreed to, unless this [Act] expressly so requires.

(5) Words in the singular include the plural, and in the plural include the singular.

#### **SECTION 107. LEGAL RECOGNITION OF ELECTRONIC RECORD AND AUTHENTICATION; USE OF ELECTRONIC AGENTS.**

(a) A record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.

(b) This [Act] does not require that a record or an authentication be generated, stored, sent, received, or otherwise processed by electronic means or in electronic form.

(c) In any transaction, a person may establish requirements regarding the type of authentication or record acceptable to it.

(d) A person that uses its own electronic agent for authentication, performance, or agreement, including manifestation of assent, is bound by the operations of the electronic agent, even if no individual was aware of or reviewed the agent's operations or the results of the operations.

#### **SECTION 108. PROOF AND EFFECT OF AUTHENTICATION.**

(a) Authentication may be proven in any manner, including showing that a party made use of information or access that could have been available only if it engaged in conduct or operations that authenticated the record or term.

(b) Subject to Section 215, compliance with a commercially reasonable attribution procedure for authenticating a record authenticates the record as a matter of law.

#### **SECTION 109. CHOICE OF LAW.**

(a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agreement.

(b) In the absence of an enforceable choice-of-law term, the following rules

apply:

(1) An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor is located when the agreement is made.

(2) A consumer contract that requires delivery of a copy on a physical medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.

(3) In all other cases, the contract is governed by the law of the jurisdiction having the most significant relationship to the transaction.

(c) In cases governed by subsection (b), if the jurisdiction whose law governs under that subsection is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under this [Act]. Otherwise, the law of the jurisdiction in the United States which has the most significant relationship to the transaction governs.

(d) For purposes of this section, a party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence.

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

(a) The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust.

(b) A choice-of-forum term is not exclusive unless the agreement expressly so provides.

#### **SECTION 111. UNCONSCIONABLE CONTRACT OR TERM.**

(a) If a court as a matter of law finds the contract or any term thereof to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

(b) If it is claimed or appears to the court that a contract or any term thereof may be unconscionable, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

#### **SECTION 112. MANIFESTING ASSENT; OPPORTUNITY TO REVIEW.**

(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:

(1) authenticates the record or term to adopt or accept it; or

(2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.

(b) An electronic agent manifests assent to a record or term if, after having an opportunity to review, the electronic agent:

(1) authenticates the record; or

(2) engages in operations that the circumstances indicate constitute acceptance.

(c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.

(d) Conduct or operations manifesting assent may be shown in any manner, including a showing that a person or an electronic agent obtained or used the information or informational rights and that a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to do so. Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that electronically reaffirms assent.

(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 the record or term 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 the record or term 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:

(A) it had a right to a return if it rejected the record;

(B) the record proposed a modification of contract;

(C) the record provided particulars of performance under Section 305; or

(D) in a case not involving a mass-market license, the parties at the time of contracting had reason to know that a record or terms would be presented after performance, use or access to the information began, unless the performance was mere delivery or a copy.

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

(f) The provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

**PART 2**  
**FORMATION AND TERMS**

[SUBPART A. GENERAL]

**SECTION 201. FORMAL REQUIREMENTS.**

(a) Except as otherwise provided in this section, a contract requiring payment of \$5,000 or more is not enforceable by way of action or defense unless:

(1) the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed and which reasonably identifies the copy or subject matter to which the contract refers; or

(2) the contract is a license for an agreed duration of one year or less or which can be terminated at will by the party against which the contract is asserted.

(b) A record is sufficient under subsection (a) even if it omits or incorrectly states a term, but the contract is not enforceable beyond the number of copies or subject matter shown in the record.

(c) A contract that does not satisfy the requirements of subsection (a) but which is valid and enforceable in all other respects, is enforceable if:

(1) a performance was tendered or the information was made available by one party and the tender was accepted or accessed by the other; or

(2) the party against which enforcement is sought admits in court, by pleading, testimony, or otherwise under oath, facts sufficient to indicate a contract has been made, but the agreement is not enforceable under this paragraph beyond

the number of copies or the subject matter admitted.

(d) Between merchants, if, within a reasonable time, a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, the record satisfies subsection (a) against the party receiving it unless notice of objection to its contents is given in a record within 10 days after the confirming record is received.

(e) An agreement that the requirements of this section need not be satisfied as to future transactions is effective if evidenced in a record authenticated by the person against which enforcement is sought.

(f) Except as otherwise provided in Section 105 and this section, no statute of frauds imposed by any law of this State applies to a transaction within the scope of this [Act].

## **SECTION 202. FORMATION IN GENERAL.**

(a) A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract.

(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

(c) Even if one or more terms are left open or to be agreed upon, a contract

does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(d) In the absence of conduct or performance by both parties to the contrary, a contract is not formed if there is a material disagreement about a material term, including scope.

(e) If a term is to be fixed by later agreement and the parties intend not to be bound unless the term is so fixed, a contract is not formed if the parties do not agree to the term. In that case, each party shall deliver to the other party, or with the consent of the other party destroy, all copies of information and other materials already received and refund any contract fee paid for which performance has not been received. The parties remain bound by any contractual use restriction with respect to information or copies received or made and not delivered or deliverable to the other party.

**SECTION 203. OFFER AND ACCEPTANCE IN GENERAL.** Unless otherwise unambiguously indicated by the language or the circumstances:

(1) An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances.

(2) An order or other offer to acquire a copy for prompt or current delivery invites acceptance by either a prompt promise to ship or a prompt or current shipment of a conforming or nonconforming copy. However, a shipment of nonconforming copies is not an acceptance if the licensor seasonably notifies the

licensee that the shipment is offered only as an accommodation to the licensee.

(3) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

(4) If an offer in an electronic message evokes an electronic message in response, a contract is formed:

(A) when an electronic acceptance is received; or

(B) if the response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.

#### **SECTION 204. ACCEPTANCE WITH VARYING TERMS.**

(a) In this section, an acceptance materially alters an offer if it contains terms that materially conflict with or vary the terms of the offer or that add material terms not contained in the offer.

(b) Except as otherwise provided in Section 205, a definite and seasonable expression of acceptance operates as an acceptance, unless the acceptance materially alters the offer.

(c) If an acceptance materially alters the offer, a contract is not formed unless all other circumstances, including the conduct of the parties, establish a contract. If a contract is formed, the terms of the contract are determined:

(1) by the terms offered by one party if the other party agreed, such as by

manifesting assent, to those terms other than in the acceptance that contained the conflicting, varying, or additional terms; or

(2) under Section 212, if paragraph (1) does not apply and the contract is formed by conduct.

(d) If the acceptance does not materially alter the offer, a contract is formed on the terms of the offer. Terms in the acceptance that conflict with terms in the offer are not part of the contract. In addition, the following rules apply:

(1) Additional terms contained in the acceptance are treated as proposals for additional terms.

(2) Between merchants, the proposed additional terms become part of the contract unless the offeror gives notice of objection before or within a reasonable time after it receives the proposed terms.

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

(a) Except as otherwise provided in subsection (b), an offer or acceptance that, because of the circumstances or the language, is conditioned on agreement by the other party to the terms of the offer or acceptance, precludes formation of a contract unless the other party agrees to its terms, such as by manifesting assent.

(b) If an offer and acceptance are in standard forms and one or both are conditioned on acceptance of their terms, the following rules apply:

(1) Conditional language in a standard term precludes the formation of a contract only if the party proposing the form acts in a manner consistent with the

language, as by refusing to perform, refusing to permit performance, or refusing to accept the benefits of the contract, until the proposed terms are accepted.

(2) 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 210 or 211, except terms of the conditional offer which conflict with any expressly agreed terms on price and quantity.

#### **SECTION 206. OFFER AND ACCEPTANCE; ELECTRONIC AGENTS.**

(a) A contract may be formed by the interaction of electronic agents. If the interaction results in the electronic agents engaging in operations that the circumstances indicate constitute acceptance, a contract is formed but a court may grant appropriate relief if the operations resulted from fraud, electronic mistake, or the like.

(b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will:

(1) cause performance, provision of benefits, or allowance of the use or access that is the subject of the contract, or result in instructions to a person or an electronic agent to do so; or

(2) indicate acceptance or an offer, regardless of other expressions or actions by the individual to which the individual has reason to know the electronic

agent cannot react.

(c) The terms of a contract formed under subsection (b) are determined under Section 210 or 211, but do not include terms provided by the individual if the individual had reason to know that the electronic agent could not react to the terms as provided.

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

(a) A release is effective without consideration if it is:

- (1) in a record to which the releasing party agrees, such as by manifesting assent, and which identifies the informational rights released; or
- (2) enforceable under estoppel, implied license, or other rules of law.

(b) A release continues for the duration of the informational rights released if the agreement does not specify its duration and does not require affirmative performance after the grant of the release by:

- (1) the party granting the release; or
- (2) the party receiving the release, except for relatively insignificant acts.

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

## **SECTION 208. FORMATION: SUBMISSION OF INFORMATION.**



(a) The following rules apply to a submission of information for the creation, development, or enhancement of computer information which is not made pursuant to an existing agreement requiring the submission:

(1) A contract is not formed and is not implied from the mere receipt of an unsolicited submission.

(2) Engaging in a business, trade, or industry that by custom or practice regularly acquires ideas is not in itself an express or implied solicitation of the information.

(3) If the recipient seasonably notifies the person making the submission that the recipient maintains a procedure to receive and review submissions, a contract is formed only if:

(A) the submission is made and accepted pursuant to that procedure;

or

(B) the recipient expressly agrees to terms concerning the submission.

(b) An agreement to disclose an idea creates a contract enforceable against the receiving party only if the idea as disclosed is confidential, concrete, and novel to the business, trade, or industry or the party receiving the disclosure otherwise expressly agreed.

#### [SUBPART B. TERMS OF RECORDS]

## **SECTION 209. ADOPTING TERMS OF RECORDS.**

(a) Except as otherwise provided in Section 211, a party adopts the terms of a record, including a standard form, if the party agrees to the record, such as by manifesting assent.

(b) The terms of a record may be adopted as the terms of the contract after beginning performance or use under the agreement, if the parties had reason to know that their agreement would be represented in whole or in part by a later record to be agreed on and there would be no opportunity to review the record or a copy of it before performance or use began. If the parties fail to agree to terms and did not intend to form a contract unless they agreed, Section 202(e) applies.

(c) 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].

## **SECTION 210. MASS-MARKET LICENSE.**

(a) A party adopts the terms of a mass-market license for purposes of Section 210 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 under Section 111 or is unenforceable under Section 105(a) or (b); or

(2) subject to Section 301, the term conflicts with terms to which the parties to the license expressly agreed.

(b) If a licensee does not have an opportunity to review a mass-market license or a copy of it before becoming obligated to pay and does not agree, such as by manifesting assent, to the license after having that opportunity, 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 return or destruction of the computer information or, in the absence of instructions, incurred for return postage or similar reasonable expense in returning it; 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 upon removal of the installed information because of rejection of the license.

(c) In a mass-market transaction, if the licensor does not have an opportunity to review a record with proposed terms before the licensor delivers or becomes obligated to deliver the information, and if the licensor does not agree, such as by manifesting assent, to those terms after having that opportunity, the

licensor is entitled to a return.

**SECTION 211. TERMS OF CONTRACT FORMED BY CONDUCT.**

(a) Except as otherwise provided in subsection (b) and subject to Section 301, if a contract is formed by conduct of the parties, the terms of the contract shall be determined by consideration of the terms and conditions to which the parties expressly agreed, course of performance, course of dealing, usage of trade, the nature of the parties' conduct, the records exchanged, the information or informational rights involved, the supplementary terms of this [Act] which apply to the transaction, and all other relevant circumstances.

(b) This section does not apply if the parties authenticate a record of the agreement or a party agrees, such as by manifesting assent, to the record of the other party.

**SECTION 212. PRETRANSACTION DISCLOSURES IN INTERNET-TYPE TRANSACTIONS.** A licensor that makes its computer information available to a licensee electronically from its Internet or similar electronic site affords an opportunity to review the terms of a standard form license that satisfies Section 112(e) with respect to a licensee that acquires 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 comes 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 sale or license of the computer information; and

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

#### [SUBPART B. ELECTRONIC CONTRACTS: GENERALLY]

**SECTION 213. EFFICACY AND COMMERCIAL REASONABLENESS OF ATTRIBUTION PROCEDURE.** The efficacy and commercial reasonableness of an attribution procedure is determined by the court. In making this determination, the following rules apply:

(1) An attribution procedure established by statute or regulation is commercially reasonable for transactions within the coverage of the statute or regulation.

(2) Except as otherwise provided in paragraph (1), commercial reasonableness is determined in light of the purposes of the procedure and the

commercial circumstances at the time the parties agree to or adopt the procedure.

(3) A commercially reasonable attribution procedure may use any security device or method that is reasonable under the circumstances.

**SECTION 214. DETERMINING ATTRIBUTION OF ELECTRONIC EVENT TO PERSON.**

(a) An electronic event is attributed to a person if it was the act of that person or its electronic agent, or the person is otherwise bound by it under the law of agency or other law. The party relying on attribution of an electronic event to another person has the burden of establishing attribution.

(b) The act of a person may be shown in any manner, including a showing of the efficacy of an attribution procedure.

(c) The effect of an electronic act attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

**SECTION 215. ATTRIBUTION PROCEDURE FOR DETECTION OF CHANGES AND ERRORS: EFFECT OF USE.** If there is an attribution procedure between the parties to detect errors or changes in an electronic event and one party conformed to the procedure but the other party did not, and the nonconforming party would have detected the change or error had that party also

conformed, the conforming party may avoid the effect of the change or error.

#### **SECTION 216. ELECTRONIC ERROR: CONSUMER DEFENSES.**

(a) In this section, “electronic error” means an error in an electronic message created by a consumer using an information processing system when a reasonable method to detect and correct or avoid the error was not provided.

(b) In an automated transaction, a consumer is not bound by an electronic message that the consumer did not intend and which was caused by an electronic error, if the consumer:

(1) promptly on learning of the error:

(A) notifies the other party of the error; and

(B) causes delivery to the other party of all copies of the information or, pursuant to reasonable instructions received from the other party, delivers to another person or destroys all copies; and

(2) has not used or received any benefit from the information or caused the information or benefit to be made available to a third party.

(c) If subsection (b) does not apply, the effect of an error is determined by other law.

#### **SECTION 217. ELECTRONIC MESSAGE: WHEN EFFECTIVE; EFFECT OF ACKNOWLEDGING.**

(a) An electronic message is effective when received, even if no individual

is aware of its receipt.

(b) Receipt of an electronic acknowledgment of an electronic message establishes that the message was received, but by itself does not establish that the content sent corresponds to the content received.



## **PART 3**

### **CONSTRUCTION**

#### **[SUBPART A. GENERAL]**

**SECTION 301. PAROL OR EXTRINSIC EVIDENCE.** Terms with respect to which confirmatory records of the parties agree or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by:

(1) course of performance, course of dealing, or usage of trade; and

(2) evidence of consistent additional terms, unless the court finds the record to have been intended as a complete and exclusive statement of the terms of the agreement.

#### **SECTION 302. PRACTICAL CONSTRUCTION.**

(a) The express terms of an agreement and any course of performance, course of dealing, and usage of trade must be construed whenever reasonable as consistent with each other. However, if such construction is unreasonable:

(1) express terms prevail over course of performance, course of dealing, and usage of trade;

(2) course of performance prevails over course of dealing and usage of

trade; and

(3) course of dealing prevails over usage of trade.

(b) An applicable usage of trade in the place where any part of performance is to occur must be used in interpreting the agreement as to that part of the performance.

(c) Evidence of a relevant usage of trade, course of performance or course of dealing offered by one party in a proceeding is not admissible unless and until the party offering the evidence has given the other party notice that the court finds sufficient to prevent unfair surprise.

(d) The existence and scope of a usage trade are to be proved as facts.

### **SECTION 303. MODIFICATION AND RESCISSION.**

(a) An agreement modifying a contract subject to this [Act] needs no consideration to be binding.

(b) An authenticated record that precludes modification or rescission except by an authenticated record may not otherwise be modified or rescinded. In a standard form supplied by a merchant to a consumer, a term requiring an authenticated record for modification of the contract is not enforceable unless the consumer manifests assent to the term.

(c) The modification and the contract as modified must satisfy the requirements of Sections 201(a) and 307(g) if the contract as modified is within these provisions.

(d) An attempt at modification or rescission which does not satisfy subsection (b) or (c) may operate as a waiver if Section 702 is satisfied.

#### **SECTION 304. CONTINUING CONTRACTUAL TERMS.**

(a) Terms of a contract involving successive performances apply to all performances unless the terms are modified in accordance with this [Act] or the contract, even if the terms are not displayed or otherwise brought to the attention of a party with respect to each successive performance.

(b) If a contract provides that terms may be changed as to future performances by compliance with a described procedure, a change proposed in good faith pursuant to that procedure becomes part of the contract if the procedure:

(1) reasonably notifies the other party of the change; and

(2) in a mass-market transaction, permits the other party to terminate the contract as to future performance if the change alters a material term and the party in good faith determines that the modification is unacceptable.

(c) The parties by agreement may determine the standards for reasonable notice unless the agreed standards are manifestly unreasonable in light of the commercial circumstances.

**SECTION 305. TERMS TO BE SPECIFIED.** An agreement that is otherwise sufficiently definite to be a contract is not invalid because it leaves particulars of performance to be specified by one of the parties. If particulars of

performance are to be specified by a party, the following rules apply:

(1) Specification must be made in good faith and within limits set by commercial reasonableness.

(2) If a specification materially affects the other party's performance but is not seasonably made, the other party:

(A) is excused for any resulting delay in its performance; and

(B) may perform, suspend performance, or treat the failure to specify as a breach of contract.

#### **SECTION 306. PERFORMANCE UNDER OPEN TERMS. A**

performance obligation of a party that can not be determined from the agreement or from other provisions of this [Act] requires the party to perform in a manner and in a time that is reasonable in light of the commercial circumstances existing at the time of agreement.

#### **[SUBPART B. INTERPRETATION]**

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

(a) A license grants:

(1) the rights that are expressly described; and

(2) the right to use any informational rights within the licensor's control

at the time of contracting which are necessary in the ordinary course to exercise the expressly described rights.

(b) If a license expressly limits use of the information or informational rights, use in any other manner is a breach of contract. In all other cases, a license contains an implied limitation that the licensee will not use the information or informational rights other than as described in subsection (a). However, use inconsistent with this implied limitation is not a breach if it is permitted under applicable law in the absence of the implied limitation.

(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 agreement.

(d) Neither party is entitled to any rights in new versions of, or improvements or modifications to, information made by the other party. A licensor's agreement to provide new versions, improvements, or modifications requires that the licensor provide them as developed and made generally commercially available from time to time by the licensor.

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

(f) Terms dealing with the scope of an agreement must be construed under ordinary principles of contract interpretation in light of the informational rights and the commercial context. In addition, the following rules apply:

(1) A grant of “all possible rights and for all media” or “all rights and for all media now known or later developed”, or a grant in similar terms, includes all rights then existing or later created by law and all uses, media, and methods of distribution or exhibition, whether then existing or developed in the future and whether or not anticipated at the time of the grant.

(2) A grant of an “exclusive license”, or a grant in similar terms, means that:

(A) for the duration of the license, the licensor will not exercise, and will not grant to any other person, rights in the same information or informational rights within the scope of the exclusive grant; and

(B) the licensor affirms that it has not previously granted those rights in a contract in effect when the licensee’s rights may be exercised.

(g) The rules of this section may be varied only by a record that is sufficient to indicate that a contract has been made and which is:

(1) authenticated by the party against which enforcement is sought; or

(2) prepared and delivered by one party and adopted by the other under Section 210 or 211.

**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) and Section 208, 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 seasonable 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 restrictions if:

(A) the license is of a computer program that does not license source code but that transfers ownership of a copy or delivery of 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 granted the right to incorporate or use the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance.

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

(a) Except as otherwise provided in subsection (b), an agreement that provides that the performance of one party is to be to the satisfaction or approval of the other requires performance sufficient to satisfy a reasonable person in the position of the party that must be satisfied.

(b) 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, subjective quality, suitability to taste, or similar characteristics.



**PART 4**  
**WARRANTIES**

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

(a) A licensor that is a merchant regularly dealing in information of the kind warrants that the information shall be delivered free of the rightful claim of any third person by way of infringement or misappropriation, but a licensee that furnishes detailed specifications to the licensor and the method required for meeting the specifications holds the licensor harmless against any such claim caused by compliance with the specification or method except for a claim that results from the failure of the licensor to adopt, or notify the licensee of, a noninfringing alternative of which the licensor had reason to know.

(b) A licensor warrants:

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

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

(A) as to a patent license, to the knowledge of the licensor, the licensed patent rights are valid and exclusive to the extent that exclusivity and

validity are recognized; and

(B) in all other cases, the licensed informational rights are valid and exclusive for the information as a whole to the extent that exclusivity and validity are recognized.

(c) The warranties in this section are subject to the following rules:

(1) If informational rights are subject to a right of privileged use, collective administration, or compulsory licensing, the warranty is subject to those rights.

(2) The obligations under subsections (a) and (b)(2) apply solely to informational rights arising under the laws of the United States or a State, or other jurisdiction of the United States, unless the contract expressly provides that the scope of the warranty obligations extends to rights under the laws of other countries. Language is sufficient for this purpose if it states “The licensor warrants [exclusivity] [noninfringement] in [specified countries] [worldwide], or words of similar import. In that case, the warranty extends to the specified country or, in the case of a general reference to “worldwide or the like, to all countries within the description, but only to the extent that the rights are recognized under a treaty or international convention to which the country and the United States are signatories.

(3) The warranties under subsections (a) and (b)(2) are not made in an agreement that merely permits use of rights under a patent.

(d) 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. In an automated transaction, language is sufficient if it is conspicuous. Otherwise, language in a record is sufficient if it states “There is no warranty against interference with your enjoyment of the information or against infringement , or words of similar import.

(e) Between merchants, a grant of a “quitclaim , or a grant in similar terms, grants the information or informational rights without an implied warranty as to infringement or misappropriation or as to the rights actually possessed or transferred by the licensor.

## **SECTION 402. EXPRESS WARRANTY.**

(a) Subject to subsection (c), an express warranty by a licensor is created as follows:

(1) An affirmation of fact or promise made by the licensor to its licensee in any manner, including in a medium for communication to the public such as advertising, which relates to the information and becomes part of the basis of the bargain creates an express warranty that the information to be furnished under the agreement must conform to the affirmation or promise.

(2) Any description of the information which is made part of the basis of the bargain creates an express warranty that the information must conform to the description.

(3) 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 must reasonably conform to the performance of the sample, model, or demonstration, taking into account such differences as 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.

(b) It is not necessary to the creation of an express warranty that the licensor use formal words such as “warrant” or “guaranty”, or state a specific intention to make a warranty. However, an express warranty is not created by:

(1) an affirmation or prediction merely of the value of the information or informational rights;

(2) a display or description of a portion of the information to illustrate the aesthetics, market appeal, or the like, of informational content; or

(3) a statement purporting to be merely the licensor’s opinion or commendation of the information or informational rights.

(c) An express warranty or express contractual obligation, if any, exists with respect to published informational content covered by this [Act] to the same extent that it would exist if the published informational content had been published in a form that placed it outside this [Act]. However, if the warranty or express contractual obligation is breached, the remedies of the aggrieved party are those under this [Act] and the agreement.

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

(a) Unless the warranty is disclaimed or modified, a merchant licensor of a computer program warrants:

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

(2) to the distributor that:

(A) the program is adequately packaged and labeled as the agreement or the circumstances may require; and

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

(3) that the program conforms to the promises or affirmations of fact made on the container or label, if any.

(b) Unless disclaimed or modified, other implied warranties with respect to computer programs may arise from course of dealing or usage of trade.

(c) No warranty is created under this section with respect to informational content, but an implied warranty may arise under Section 404.

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

(a) Unless the warranty is disclaimed or modified, a merchant that, in a

special relationship of reliance with a licensee, collects, compiles, processes, provides, or transmits informational content, warrants to its licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care.

(b) A warranty does not arise under subsection (a) with respect to:

(1) published informational content; or

(2) a person that acts as a conduit or provides only editorial services in collecting, compiling, or distributing informational content identified as that of a third person.

(c) This warranty is not governed by the preclusion in Section 104(c)(1) on disclaiming reasonableness and care.

**SECTION 405. IMPLIED WARRANTY: LICENSEE'S PURPOSE;  
SYSTEM INTEGRATION.**

(a) Unless the warranty is disclaimed or modified, if a licensor at the time of contracting has reason to know any particular purpose for which the information is required and that the licensee is relying on the licensor's skill or judgment to select, develop, or furnish suitable information, the following rules apply:

(1) Except as otherwise provided in paragraph (2), there is an implied warranty that the information is fit for that purpose.

(2) If from all the circumstances it appears that the licensor was to be paid for the amount of its time or effort regardless of the fitness of the resulting

information, the implied warranty is that the information will not fail to achieve the licensee's particular purpose as a result of the licensor's lack of reasonable effort.

(b) There is no warranty under subsection (a) with regard to:

(1) the aesthetics, market appeal, or subjective quality of informational content; or

(2) published informational content, but there may be a warranty with regard to the licensor's selection among published informational content from different providers.

(c) If an agreement requires a licensor to provide or select a system consisting of computer programs and goods, and the licensor has reason to know that the licensee is relying on the skill or judgment of the licensor to select the components of the system, there is an implied warranty that the components provided or selected will function together as a system.

(d) This warranty is not governed by the preclusion in Section 104(c)(1) on disclaiming reasonableness and care.

#### **SECTION 406. DISCLAIMER OR MODIFICATION OF WARRANTY.**

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other. Subject to Section 301 with regard to parol or extrinsic evidence, the disclaimer or modification is inoperative to the extent that construction is unreasonable.

(b) Except as otherwise provided in subsections (c), (d), and (e), to disclaim or modify an implied warranty or any part of it, but not the warranty in Section 401, the following rules apply:

(1) Except as otherwise provided in this subsection:

(A) To disclaim or modify an implied warranty arising under Section 403 language in a record must mention “merchantability” or “quality” or use words of similar import.

(B) To disclaim or modify an implied warranty arising under Section 404, language in a record must mention “accuracy” or use words of similar import.

(2) Language to disclaim or modify an implied warranty arising under Section 405 must be in a record. It is sufficient to state “There is no warranty that this information or efforts will fulfill any of your particular purposes or needs,” or words of similar import.

(3) Language in a record is sufficient to disclaim all implied warranties if it individually disclaims each implied warranty or, except for the warranty in Section 401, if it states “Except for express warranties stated in this contract, if any, this [information] [computer program] is provided with all faults, and the entire risk as to satisfactory quality, performance, accuracy, and effort is with the user,” or words of similar import.

(4) Language sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of merchantability is



sufficient to disclaim or modify the warranties under Sections 403 and 404.

Language sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of fitness for a particular purpose is sufficient to disclaim or modify the warranties under Section 405.

(5) Language in a record that disclaims or modifies an implied warranty under Sections 403 and 405 must be conspicuous.

(c) Unless the circumstances indicate otherwise, all implied warranties, but not the warranty in Section 401, are disclaimed by expressions like “as is” or “with all faults” or other language that in common understanding call the licensee’s attention to the disclaimer of warranties and makes plain that there are no implied warranties.

(d) If a licensee before entering into a contract has examined the information or the sample or model as fully as it desired or it has refused to examine the information, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to the licensee.

(e) An implied warranty may also be disclaimed or modified by course of performance, course of dealing, or usage of trade.

(f) If a contract requires ongoing performance or a series of performances by the licensor, language of disclaimer or modification which complies with this section is effective with respect to all performances under the contract.

(g) Remedies for breach of warranty may be limited in accordance with this [Act] with respect to liquidation or limitation of damages and contractual

modification of remedy.

**SECTION 407. MODIFICATION OF COMPUTER PROGRAM. A**

licensee that modifies a copy of a computer program, other than by using a capability of the program intended for that purpose in the ordinary course, does not invalidate any warranty regarding performance of an unmodified copy but does invalidate any warranties, express or implied, regarding performance of the modified copy. A modification occurs if a licensee alters code in, deletes code from, or adds code to the computer program.

**SECTION 408. CUMULATION AND CONFLICT OF WARRANTIES.**

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention, the following rules apply:

- (1) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (2) A sample displaces inconsistent general language of description.
- (3) Express warranties displace inconsistent implied warranties other than an implied warranty under Section 405(a).

**SECTION 409. THIRD-PARTY BENEFICIARIES OF WARRANTY.**

(a) Except for published informational content, a warranty to a licensee extends to persons for whose benefit the licensor intends to supply the information or informational rights and which rightfully use the information in a transaction or application of a kind in which the licensor intends the information to be used.

(b) A warranty to a consumer extends to each individual consumer in the licensee's immediate family or household if the individual's use was reasonably expected by the licensor.

(c) A contractual term that excludes or limits third-party beneficiaries is effective to exclude or limit a contractual obligation or contract liability to third persons except individuals described in subsection (b).

(d) A disclaimer or modification of a warranty or remedy which is effective against the licensee is also effective against third persons to which a warranty extends under this section.

## **PART 5**

### **TRANSFER OF INTERESTS AND RIGHTS**

#### **[SUBPART A. OWNERSHIP AND TRANSFERS]**

##### **SECTION 501. OWNERSHIP OF INFORMATIONAL RIGHTS.**

(a) If an agreement provides for conveyance of ownership of informational rights in a computer program, ownership passes at the time and place specified by the agreement but can not pass until the program is in existence and identified to the contract. If the agreement does not specify a different time or place, ownership passes when the program and the informational rights are in existence and identified to the contract.

(b) Transfer of a copy does not transfer ownership of informational rights.

##### **SECTION 502. TITLE TO COPY.**

(a) In a license:

(1) title to a copy is determined by the license;

(2) a licensee's right under the license to possession or control of a copy is governed by the license and does not depend solely on title to the copy; and

(3) if a licensor reserves title to a copy, the licensor retains title to that copy and any copies made of it, unless the license grants the licensee a right to make and sell copies to others, in which case the reservation of title applies only to copies delivered to the licensee by the licensor.

(b) If an agreement provides for transfer of title to a copy, title passes:

(1) at the time and place specified in the agreement; or

(2) in the absence of such specification:

(A) at the time and place the licensor completed its obligations with respect to delivery of a copy on a tangible medium; and

(B) at the time and place at which the licensor completed its obligations with respect to electronic delivery of a copy if a first sale occurs under federal copyright law.

(c) If the party to which title passes under the contract refuses delivery of the copy or rejects the terms of the agreement, title reverts in the licensor.

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

(1) A party's interest in a contract may be transferred unless the transfer:

(A) is prohibited under other law; or

(B) 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) Except as provided in Section 508(a)(1)(B), a term prohibiting transfer of a party's interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective 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 of a right to payment arising out of the transferor's due performance of less than its entire obligation would be enforceable under paragraph (1) in the absence of the contractual term prohibiting transfer.

(3) A right to damages for breach of the whole contract or a right arising out of the transferor's due performance if the entire obligation can be transferred notwithstanding paragraph (1)(B) or an agreement otherwise.

(4) A term which prohibits transfer of a mass-market license must be conspicuous.

#### **SECTION 504. EFFECT OF TRANSFER OF CONTRACTUAL RIGHTS.**

(a) A transfer of "the contract" or of "all my rights under the contract", or a transfer in similar general terms, is a transfer of all contractual rights. Whether the transfer is effective is determined under Section 503 and Section 508(a)(1)(B).

(b) The following rules apply to a transfer of a party's contractual rights:

(1) The transferee is subject to all contractual use restrictions.

(2) Unless the language or circumstances otherwise indicate, as in a transfer as security, the transfer delegates the duties of the transferor and transfers

its rights.

(3) Acceptance of the transfer is a promise by the transferee to perform the delegated duties. The promise is enforceable by the transferor and any other party to the original contract.

(4) The transfer does not relieve the transferor of any duty to perform, or of liability for breach of contract, unless the other party to the original contract agrees that the transfer has that effect.

(c) A party to the original contract other than the transferor may treat a transfer that conveys a right or duty of performance without its consent as creating reasonable grounds for insecurity and, without prejudice to the party's rights against the transferor, may demand assurances from the transferee pursuant to Section 709.

#### **SECTION 505. PERFORMANCE BY A DELEGATE; SUBCONTRACT.**

(a) A party may perform its contractual duties or exercise its rights through a delegate or a subcontract unless:

(1) the contract prohibits delegation or subcontracting; or

(2) the other party has a substantial interest in having the original promisor perform or control the performance.

(b) Delegating or subcontracting performance does not relieve the party delegating or subcontracting the performance of a duty to perform or of liability for breach.

(c) An attempted delegation that violates a term that prohibits delegation is

not effective.

#### **SECTION 506. TRANSFER BY LICENSEE.**

(a) If all or any part of a licensee's interest in a license is transferred, voluntarily or involuntarily, the transferee acquires no interest in information, copies, or the contractual or informational rights of the licensee unless the transfer is effective under Section 503. If the transfer is effective, the transferee takes subject to the terms of the license.

(b) Except as otherwise provided under trade secret law, a transferee acquires no more than the contractual or other rights its transferor was authorized to transfer.

#### **[SUBPART B. FINANCING ARRANGEMENTS]**

**SECTION 507. FINANCING WHERE FINANCIER DOES NOT BECOME LICENSEE.** If a financier does not become a licensee, the following rules apply:

- (1) The financier does not receive the benefits or burdens of the license.
- (2) The licensee's rights and obligations with respect to the information and informational rights are governed by:
  - (A) the license;
  - (B) any rights of the licensor under other applicable law; and



(C) to the extent not inconsistent with subparagraphs (A) and (B), any agreement between the financier and the licensee, which may add additional conditions to the licensee's right to use the licensed information or informational rights.

#### **SECTION 508. FINANCE LICENSES.**

(a) If a financier becomes a licensee and then transfers the license, or sublicenses the information or informational rights, to a licensee receiving the financial accommodation, the following rules apply:

(1) The transfer or sublicense to the accommodated licensee is not effective unless:

(A) the transfer or sublicense is effective under Section 503; or

(B) the following conditions are fulfilled:

(i) before the licensor delivered the information or granted the license to the financier, the licensor received notice in a record from the financier giving the name and location of the accommodated licensee and clearly indicating that the license was being obtained in order to transfer or sublicense it to the accommodated licensee;

(ii) the financier became a licensee solely to make the financial accommodation; and

(iii) the accommodated licensee adopts the terms of the license, as supplemented by the financial accommodation contract, to the extent the

modifications are not inconsistent with the license contract and any rights of the licensor under other law.

(2) A financier that makes a transfer that is effective under paragraph (1)(B) may make only the single transfer of rights under the license contemplated by the notice unless the licensor consents to a later transfer.

(b) If a financier makes an effective transfer of a license, or an effective sublicense of the information or informational rights subject to the license, to an accommodated licensee, the following rules apply:

(1) The accommodated licensee's rights and obligations are governed by:

(A) the license;

(B) any rights of the licensor under other applicable law; and

(C) to the extent not inconsistent with subparagraphs (A) and (B),

the financial accommodation contract, which may impose additional conditions to the licensee's right to use the licensed information or informational rights.

(2) The financier makes no warranties to the accommodated licensee other than the warranty under Section 401(b)(1) and any express warranties in the financial accommodation contract.

#### **SECTION 509. FINANCING ARRANGEMENTS: OBLIGATIONS**

**IRREVOCABLE.** Unless the accommodated licensee is a consumer, a term in the financial accommodation contract that the accommodated licensee's obligations are

irrevocable and independent is enforceable. The obligations become irrevocable and independent upon the licensee's acceptance of the license or the giving of value by the financier.

**SECTION 510. FINANCING ARRANGEMENTS: REMEDIES OR ENFORCEMENT.**

(a) Except as otherwise provided in subsection (b), on material breach of a financial accommodation contract by the accommodated licensee, the following rules apply:

(1) The financier may cancel the financial accommodation contract;

(2) Subject to paragraphs (3) and (4), the financier may pursue its remedies against the accommodated licensee under the financial accommodation contract.

(3) If the financier became a licensee and made a transfer or sublicense that was effective under Section 508, it may exercise the remedies of a licensor under this [Act], including the rights of an aggrieved party under Section 815, subject to the limitations of Section 816.

(4) If the financier did not become a licensee, it may enforce a contractual right to preclude the licensee's further use of the information. The financier has no right to take possession, use the information or informational rights, or transfer the license. If the accommodated licensee agreed to transfer possession to the financier in the event of breach, the financier may enforce that

contractual right only if the licensor consents or if a transfer would be effective under Section 503.

(b) The following additional limitations apply to a financier's remedies under subsection (a):

(1) A financier entitled under the financial accommodation contract to take possession or prevent use of the information, copies, or related materials may do so only if the licensor consents or if doing so would not result in a material adverse change of the duty of the licensor, materially increase the burden or risk imposed on the licensor, disclose or threaten to disclose trade secrets or confidential material of the licensor, or materially impair the licensor's likelihood or expectation of obtaining return performance.

(2) The financier may not otherwise exercise control over, have access to, or sell, transfer, or otherwise use the information or copies without the consent of the licensor unless the financier or transferee is subject to the terms of the license and:

(A) the licensee owns the title to the licensed copy, the license does not preclude transfer of the licensee's rights, and the transfer complies with federal copyright law for the owner of a copy to make the transfer; or

(B) the license is transferable by its express terms and the financier fulfills any conditions to, or complies with any restrictions on, transfer.

(3) The financier's remedies under the financial accommodation contract are subject to the licensor's rights and the terms of the license.

**SECTION 511. FINANCING ARRANGEMENTS: MISCELLANEOUS  
RULES.**

(a) The creation of a financier's interest does not place any obligations on or alter the rights of a licensor.

(b) A financier's interest does not attach to any intellectual property rights of the licensor unless the licensor expressly consents to the interest in a license or another record.

## **PART 6**

### **PERFORMANCE**

#### **[SUBPART A. GENERAL]**

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

(a) A party shall perform in a manner that conforms to the contract.

(b) If there is an uncured material breach of contract by a party which precedes the aggrieved party's performance, the aggrieved party does not have a duty to perform other than with respect to contractual use restrictions. In addition, the following rules apply:

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

(2) The aggrieved party may cancel the contract only if the breach is a material breach of the whole contract or the agreement so provides.

(c) Except as otherwise provided in subsection (b), tender of performance by a party entitles the party to acceptance of that performance. In addition, the following rules apply:

(1) A tender of performance occurs when the party, with manifest present ability and willingness to perform, offers to complete the performance.

(2) If a performance by the other party is due at the time of the tendered performance, tender of the other party's performance is a condition to the tendering party's obligation to complete its tendered performance.

(3) A party shall pay or render the consideration required by the agreement for a performance it accepts. A party that accepts a performance has the burden of proving a breach with respect to the accepted performance.

(d) Except as otherwise provided in Sections 603 and 604, in the case of a performance with respect to a copy, Sections 606 through 610 and Sections 704 through 707 prevail over this section.

## **SECTION 602. LICENSOR’S OBLIGATIONS TO ENABLE USE.**

(a) In this section, “enable use” means to grant a contractual right or permission with respect to information or informational rights and to complete the acts, if any, required under the agreement to make the information available to a party.

(b) A licensor shall enable use by the licensee pursuant to the contract. The following rules apply to enabling use:

(1) If nothing other than the grant of a contractual right or permission is required to enable use, the licensor enables use when the contract becomes enforceable.

(2) If the agreement requires delivery of a copy, enabling use occurs when the copy is delivered. If the agreement requires delivery of a copy and steps authorizing the licensee’s use, enabling use occurs when the last of those steps occurs.

(3) In an access contract, to enable use requires furnishing all access

material necessary to obtain the agreed access.

(4) If the agreement requires a transfer of ownership of informational rights and a filing or recording is allowed by law to establish priority of the transferred ownership, on request by the licensee, the licensor shall execute and deliver a record for that purpose.

**SECTION 603. SUBMISSIONS OF INFORMATION TO SATISFACTION OF PARTY.** If an agreement requires that the submission of information be to the satisfaction of the recipient, the following rules apply:

(1) Sections 606 through 610 and Sections 704 through 707 do not apply to the submission.

(2) If the information is not satisfactory to the recipient and the parties engage in efforts to correct the deficiencies in a manner and over a time consistent with the ordinary standards of the business, trade, or industry, the efforts or the passage of time required for the effort are neither an acceptance nor refusal of the submission.

(3) Except as otherwise provided in paragraph (4), neither refusal nor acceptance occurs unless the recipient expressly refuses or accepts the submission, but the recipient may not use the submission before acceptance.

(4) Silence and a failure to act in reference to a submission beyond a commercially reasonable time to respond entitles the submitting party to demand in a record delivered to the recipient a decision on the submission. If the recipient



fails to respond within a reasonable time after receipt of the demand, the submission is deemed to have been refused.

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

- (1) Sections 607 through 610 and Sections 704 through 707 do not apply.
- (2) The rights of the parties are determined under Section 601 and the ordinary standards of the business, trade, or industry.
- (3) Before tender of the performance, a party may inspect the media, labels, or packaging but may not view the information or otherwise receive the performance before completing any performance of its own that is then due.

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

- (a) In this section, “restraint” means a program, code, device, or similar electronic or physical limitation the intended purpose of which is to restrict use of information.
- (b) A party entitled to enforce a limitation on use of information which does not depend on a breach of contract by the other party may include a restraint in

the information or a copy of it and use that restraint if:

(1) a term of the agreement authorizes use of the restraint;

(2) the restraint prevents a use that is inconsistent with the agreement or with informational rights that were not granted to the licensee;

(3) the restraint prevents use after expiration of the stated duration of the contract or a stated number of uses; or

(4) the restraint prevents use after the contract terminates, other than on expiration of a stated duration or number of uses, and the licensor gives reasonable notice to the licensee before further use is prevented.

(c) This section does not authorize a restraint that affirmatively prevents or makes impracticable a licensee's access to its own information or information of a third party, other than the licensor, if that information is in the licensee's possession and accessed without use of the licensor's information or informational rights.

(d) A party that includes or uses a restraint pursuant to subsection (b) or (c) is not liable for any loss caused by the use.

(e) This section does not preclude electronic replacement or disabling of an earlier copy of information by the licensor in connection with delivery of a new copy or version under an agreement electronically to replace or disable the earlier copy with an upgrade or other new information.

(f) This section does not authorize use of a restraint to enforce remedies in the event of breach of contract.

[SUBPART B. PERFORMANCE IN DELIVERY OF COPIES]

**SECTION 606. COPY: DELIVERY; TENDER OF DELIVERY.**

(a) Delivery of a copy must be at the location designated by agreement, but, in the absence of a designation, the following rules apply:

(1) The place for delivery of a copy on a physical medium is the tendering party's place of business or, if it has none, its residence. However, if the parties know at the time of contracting that the copy is located in some other place, that place is the place for delivery.

(2) The place for electronic delivery of a copy is an information processing system designated by the licensor.

(3) Documents of title may be delivered through customary banking channels.

(b) Tender of delivery of a copy requires the tendering party to put and hold a conforming copy at the other party's disposition and give the other party any notice reasonably necessary to enable it to obtain access, control, or possession of the copy. Tender must be at a reasonable hour and, if applicable, requires the tender of access material and other documents required by the agreement. The party receiving tender shall furnish facilities reasonably suited to receive tender. In addition, the following rules apply:

(1) If the contract requires delivery of a copy held by a third person without being moved, the tendering party shall tender access material or documents

required by the agreement.

(2) If the tendering party is required or authorized to send a copy to the other party and the contract does not require the tendering party to deliver the copy at a particular destination, the following rules apply:

(A) In tendering delivery of a copy on a physical medium, the tendering party shall put the copy in the possession of a carrier and make a contract for its transportation that is reasonable in light of the nature of the information and other circumstances, with expenses of transportation to be borne by the receiving party.

(B) In tendering electronic delivery of a copy, the tendering party shall initiate a transmission that is reasonable in light of the nature of the information and other circumstances, with expenses of transmission to be borne by the receiving party.

(3) If the tendering party is required to deliver a copy at a particular destination, the party shall make a copy available at that destination and bear the expenses of transportation or transmission.

**SECTION 607. COPY: PERFORMANCE RELATED TO DELIVERY; PAYMENT.** If performance requires delivery of a copy:

(1) The party required to deliver need not complete a tendered delivery until the receiving party tenders any performance then due.

(2) Tender of delivery is a condition of the other party's duty to accept the

copy.

(3) Tender entitles the tendering party to acceptance of the copy.

(4) If payment is due on delivery of a copy, the following rules apply:

(A) Tender of delivery is a condition of the receiving party's duty to pay.

(B) Tender entitles the tendering party to payment according to the contract.

(C) All copies required by the contract must be tendered in a single delivery, and payment is due only on tender.

(5) If the circumstances give either party the right to make or demand delivery in lots, the contract fee, if it can be apportioned, may be demanded for each lot.

(6) If payment is due and demanded on delivery of a copy or on delivery of a document of title, the right of the party receiving tender to retain or dispose of the copy or document, as against the tendering party, is conditional on making the payment due.

**SECTION 608. COPY: RIGHT TO INSPECT; PAYMENT BEFORE INSPECTION.**

(a) Except as otherwise provided in Sections 603 and 604, if performance requires delivery of a copy, the following rules apply:

(1) Except as otherwise provided in this section, the party receiving the

copy has a right before payment or acceptance to inspect at a reasonable place and time and in a reasonable manner to determine conformance to the contract.

(2) The party making the inspection shall bear the expenses of inspection.

(3) A place or method of inspection or an acceptance standard fixed by the parties is presumed to be exclusive. However, the fixing of a place, method, or standard does not postpone identification to the contract or shift the place for delivery, passage of title, or risk of loss. If compliance with the place or method becomes impossible, inspection must be made as provided in this section unless the place or method fixed by the parties was an indispensable condition the failure of which avoids the contract.

(4) A party's right to inspect is subject to existing obligations of confidentiality.

(b) If a right to inspect exists under subsection (a) but the agreement is inconsistent with an opportunity to inspect before payment, the party does not have a right to inspect before payment.

(c) If the contract requires payment before inspection of a copy, nonconformity in the tender does not excuse the party receiving the tender from making payment unless:

(1) the nonconformity appears without inspection and would justify refusal under Section 609; or

(2) despite tender of the required documents, the circumstances would

justify an injunction against honor of a letter of credit under [Article 5 of the Uniform Commercial Code].

(d) Payment made under the circumstances described in subsection (b) or (c) is not an acceptance of the copy and does not impair a party's right to inspect or preclude any of the party's remedies.

#### **SECTION 609. COPY: WHEN ACCEPTANCE OCCURS.**

(a) Acceptance of a copy occurs when the party to which the copy is tendered:

(1) signifies, or acts with respect to the copy in a manner that signifies, that the tender was conforming or that the party will take or retain the copy in spite of a nonconformity;

(2) fails to make an effective refusal;

(3) commingles the copy or the information in a manner that makes compliance with the party's duties after refusal impossible;

(4) substantially obtains the benefit from the copy and can not return that benefit; or

(5) acts in a manner inconsistent with the licensor's ownership, but any such act is an acceptance only if the licensor elects to treat it as an acceptance and ratifies the act to the extent it was within contractual use restrictions.

(b) Except in cases governed by subsection (a)(3) or (4), if there is a right to inspect under Section 608 or the agreement, acceptance of a copy occurs only after

the party has had a reasonable opportunity to inspect.

(c) If an agreement requires delivery in stages involving separate portions which taken together comprise the whole of the information, acceptance of any stage is conditional until acceptance of the whole.

#### **SECTION 610. COPY: EFFECT OF ACCEPTANCE.**

(a) A party accepting a copy shall pay or render the consideration required by the agreement for the copy it accepts. Acceptance of a copy precludes refusal and, if made with knowledge of a nonconformity in the tender, may not be revoked because of it unless acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not by itself impair any other remedy for nonconformity.

(b) The party accepting a copy has the burden of proving a breach of contract with respect to the copy.

(c) 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 any breach, notify the other party of a breach or be barred from any remedy for that breach; and

(2) if the claim is for breach of an obligation regarding noninfringement and the accepting party is sued by a third party because of the breach, notify the other party within a reasonable time after receiving notice of the litigation or be



precluded from any remedy over for the liability established by the litigation.

[SUBPART C. SPECIAL TYPES OF CONTRACTS]

**SECTION 611. ACCESS CONTRACTS.**

(a) If an access contract provides for access over time, the licensee's rights of access are to the information as modified and made commercially available by the licensor from time to time during that period. In addition, the following rules apply:

(1) A change in the content of the information is a breach of contract only if the change conflicts with an express term of the agreement.

(2) Unless it is subject to a contractual use restriction, information obtained by the licensee is free of any use restriction other than a restriction resulting from the informational rights of another person or other applicable law.

(3) Access must be available at times and in a manner:

(A) conforming to the express terms of the agreement; and

(B) to the extent not expressly stated in the agreement, at times and in a manner that is reasonable for the particular type of contract in light of the ordinary standards of the business, trade, or industry.

(b) In an access contract that gives the licensee a right of access at times substantially of its own choosing during agreed periods, an occasional failure to have access available during those times is not a breach of contract if it is:

(1) consistent with ordinary standards of the business, trade, or industry for the particular type of contract; or

(2) caused by:

(A) scheduled downtime;

(B) reasonable needs for maintenance;

(C) reasonable periods of equipment, software, or communications failure; or

(D) events reasonably beyond the licensor's control, and the licensor exercises such commercially reasonable efforts as the circumstances require.

#### **SECTION 612. CORRECTION AND SUPPORT AGREEMENTS.**

(a) If a person agrees to correct performance problems or provide similar services with respect to information other than as an effort to cure its own breach of contract, the following rules apply:

(1) Except as otherwise provided in paragraph (2), the person:

(A) shall perform at a time and place and in a manner consistent with the express terms of the agreement and, to the extent not stated in the express terms, at a time and place and in a manner that is reasonable in light of ordinary standards of the business, trade, or industry; and

(B) does not undertake that its services will correct all performance problems unless the agreement expressly so provides.

(2) If the services are provided by a licensor of the information as part

of a limited remedy, the licensor undertakes that its performance will provide the licensee with information that conforms to the agreement to which the limited remedy applies.

(b) A licensor is not required to provide instruction or other support for the licensee's use of information or access. A person that agrees to provide support shall make the support available in a manner and with a quality consistent with express terms of the support agreement and, to the extent not stated in the express terms, at a time and place and in a manner that is reasonable in light of ordinary standards of the business, trade, or industry.

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

(a) In this section:

(1) "Dealer" means a merchant licensee that receives information directly or indirectly from a licensor for sale or license to end users.

(2) "End user" means a licensee that acquires a copy of the information from a dealer by delivery on a physical medium for the licensee's own use and not for sale, license, transmission to third parties, or public display or performance for a fee.

(3) "Publisher" means a licensor, other than a dealer, that offers a license to an end user with respect to information distributed by a dealer to the end user.

(b) 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 from 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) The contract between the end user and the dealer is conditioned on the end user's agreement to the publisher's license.

(2) If the end user does not agree, 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 211 and 112(e).

(3) The dealer is not bound by the terms, and does not receive the benefits, of an agreement between the publisher and the end user unless the dealer and end user adopt those terms as part of their agreement.

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

(1) in the form as received; and

(2) subject to any contractual terms of the publisher that the publisher provides for end users.

(d) A dealer that enters into agreement with an end user is a licensor of the end user under this [Act].

#### [SUBPART D. LOSS AND IMPOSSIBILITY]

#### **SECTION 614. RISK OF LOSS OF COPY.**

(a) Except as otherwise provided in this section, the risk of loss as to a copy, including a copy delivered electronically, passes to the licensee upon its receipt of the copy.

(b) If an agreement requires or authorizes a licensor to send a copy on a physical medium by carrier, the following rules apply:

(1) If the agreement does not require the licensor to deliver the copy at a particular destination, the risk of loss passes to the licensee when the copy is duly delivered to the carrier, even if the shipment is under reservation.

(2) If the agreement requires the licensor to deliver the copy at a particular destination and the copy is duly tendered there in the possession of the carrier, the risk of loss passes to the licensee when the copy is tendered at that destination.

(3) If a tender of delivery of a copy or a shipping document fails to conform to the contract, the risk of loss remains with the licensor until cure or acceptance.

(c) If a copy is held by a third party to be delivered or reproduced without being moved or a copy is to be delivered by making access available to a physical resource containing a tangible copy, the risk of loss passes to the licensee upon:

(1) the licensee's receipt of a negotiable document of title covering the copy;

(2) acknowledgment by the third party to the licensee of the licensee's

right to possession of or access to the copy; or

(3) the licensee's receipt of a record directing the third party, pursuant to an agreement between the licensor and the third party, to make delivery or authorizing the third party to allow access.

**SECTION 615. EXCUSE BY FAILURE OF PRESUPPOSED  
CONDITIONS.**

(a) Unless a party has assumed a different obligation, delay in performance or nonperformance in whole or in part by a party other than of an obligation to make payments or to conform to contractual use restrictions, is not a breach of contract if the delay or nonperformance is of a performance that has been made impracticable by:

(1) the occurrence of a contingency whose nonoccurrence was a basic assumption on which the contract was made; or

(2) compliance in good faith with any foreign or domestic statute, governmental rule, regulation, or order, whether or not it later proves to be invalid.

(b) A party claiming excuse under subsection (a) shall seasonably notify the other party that there will be delay or nonperformance.

(c) If an excuse affects only a part of a party's capacity to perform an obligation for delivery of copies, the party claiming excuse shall allocate performance among its customers in any manner that is fair and reasonable and notify the other party of the estimated quota to be made available. In making the

allocation, the party claiming excuse may include the requirements of regular customers not then under contract and its own requirements in making the allocation.

(d) A party that receives notice in a record pursuant to subsection (b) of a material or indefinite delay in delivery of copies or of an allocation under subsection (c), by notice in a record, may:

(1) terminate and thereby discharge any executory portion of the contract; or

(2) modify the contract by agreeing to take the available allocation in substitution.

(e) If, after receipt of notice under subsection (b), a party fails to modify the contract within a reasonable time not exceeding 30 days, the contract lapses with respect to any performance affected.

#### [SUBPART E. TERMINATION]

### **SECTION 616. TERMINATION; SURVIVAL OF OBLIGATIONS.**

(a) Except as otherwise provided in subsection (b), on termination all obligations that are still executory on both sides are discharged.

(b) In addition to any term that is agreed to survive, the following survive termination:

(1) a right based on previous breach or performance of the contract;

(2) an obligation of confidentiality, nondisclosure, or noncompetition to the extent enforceable under other law;

(3) a contractual use restriction applicable to any licensed copy or information received from the other party, or copies made of it, that are not returned or returnable to the other party;

(4) an obligation to return, deliver, or dispose of information, materials, documentation, copies, records, or the like to the other party or an obligation to destroy copies, or the right to obtain information from an escrow agent;

(5) a choice of law or forum;

(6) an obligation to arbitrate or otherwise resolve disputes by alternative dispute resolution procedures;

(7) a term limiting the time for commencing an action or for giving notice;

(8) an indemnity term or a right related to a claim of a type described in Section 805(d)(1);

(9) a limitation of remedy or modification or disclaimer of warranty; and

(10) an obligation to provide an accounting and make any payment due under the accounting.

#### **SECTION 617. NOTICE OF TERMINATION.**

(a) Except as otherwise provided in subsection (b), a party may not terminate a contract except on the happening of an agreed event, such as the



expiration of the stated duration, unless the party gives reasonable notice of termination to the other party.

(b) An access contract may be terminated without giving notice. However, except on the happening of an agreed event, termination requires giving reasonable notice to the licensee if the access contract pertains to information owned and provided by the licensee to the licensor.

(c) A term dispensing with a notice required under this section is invalid if its operation would be unconscionable. However, a term specifying standards for giving notice is enforceable if the standards are not manifestly unreasonable.

#### **SECTION 618. TERMINATION: ENFORCEMENT.**

(a) On termination of a license, a party in possession or control of information, copies, or other materials that are the property of the other party or are subject to a contractual obligation to be delivered to that party on termination, shall use commercially reasonable efforts to deliver or hold them for disposal on instructions of that party. If any materials are jointly owned, the party in possession or control shall make them available to the joint owners.

(b) Termination of a license ends all right under the license for the licensee to use or access the licensed information, informational rights, or copies. Continued use of the licensed copies or exercise of terminated rights is a breach of contract unless authorized by a term that survives termination.

(c) Each party may enforce its rights under subsections (a) and (b) by acting

pursuant to Section 605 or by judicial process, including obtaining an order that the party or an officer of the court take the following actions with respect to any licensed information, documentation, copies, or other materials to be delivered:

- (1) deliver or take possession of them;
  - (2) without removal, render unusable or eliminate the capability to exercise contractual rights in or use of them;
  - (3) destroy or prevent access to them; and
  - (4) require that the party or any other person in possession or control of them and make them available to the other party at a place designated by that party which is reasonably convenient to both parties.
- (d) In an appropriate case, injunctive relief may be granted to enforce the parties' rights under this section.

## **PART 7**

### **BREACH OF CONTRACT**

#### **[SUBPART A. GENERAL]**

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

(a) Whether a party is in breach of contract is determined by the agreement or, in the absence of agreement, this [Act]. A breach occurs in the following circumstances, among others, if a party fails to perform an obligation in a timely manner, repudiates a contract, or exceeds a contractual use restriction. A breach, whether or not material, entitles the aggrieved party to its remedies.

(b) A breach of contract is material if:

(1) the contract so provides;

(2) the breach is a substantial failure to perform an agreed term that is an essential element of the agreement; or

(3) the circumstances, including the language of the agreement, the reasonable expectations of the parties, the standards and practices of the business, trade, or industry, or the character of the breach, indicate that:

(A) the breach caused or is likely to cause substantial harm to the aggrieved party; or

(B) the breach substantially deprived or is likely substantially to deprive the aggrieved party of a significant benefit it reasonably expected under the contract.

(c) The cumulative effect of nonmaterial breaches may be material.

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

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

(b) A party that accepts a performance with knowledge that the performance constitutes a breach and fails within a reasonable time after acceptance to notify the other party of the breach waives all remedies for the breach, unless acceptance was made on the reasonable assumption that the breach would be cured and it has not been seasonably cured. However, a party that, having notified the other party of an explicit reservation of rights, performs, promises performance, or assents to performance in the manner demanded or offered by the other party does not waive the rights reserved.

(c) Except for performance that is to be to the party's satisfaction, a party that refuses a performance and fails to identify in connection with its refusal 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 had been identified seasonably; or

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

(d) Waiver of a remedy for breach of contract in one performance does not waive any remedy for the same or a similar breach in future performances unless the party making the waiver expressly so states.

(e) A waiver may not be retracted as to the performance to which the waiver applies. However, 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.

### **SECTION 703. CURE OF BREACH OF CONTRACT.**

(a) A party in breach of contract may cure the breach at its own expense if:

(1) the time for performance has not expired, the party in breach seasonably notifies the aggrieved party of its intent to cure, and, within the time for performance, makes a conforming performance;

(2) the party in breach had reasonable grounds to believe the performance would be acceptable with or without money allowance, seasonably notifies the aggrieved party of its intent to cure, and provides a conforming performance within a further reasonable time after performance was due; or

(3) in cases not governed by paragraph (1) or (2), the party in breach seasonably notifies the aggrieved party of its intention to provide a conforming performance and promptly does so before cancellation by the aggrieved party.

(b) In a license other than a mass-market license, if the agreement required a single delivery of a copy and the party receiving tender of delivery was required to accept a nonconforming copy because the nonconformity was not a material breach of contract, the party in breach shall promptly and in good faith make an effort to cure if:

(1) the party in breach receives seasonable notice of a specified nonconformity and a demand for cure of the nonconforming copy; and

(2) the cost of the effort to cure does not disproportionately exceed the direct damages caused by the nonconformity to the aggrieved party.

(c) A party may not cancel a contract or refuse a performance because of a breach that has been seasonably cured under subsection (a). However, notice of intent to cure does not preclude refusal of the performance or cancellation.

#### [SUBPART B. DEFECTIVE COPIES]

### **SECTION 704. COPY: REFUSAL OF DEFECTIVE TENDER.**

(a) Subject to subsection (b) and Sections 705 and 706, if a tender of a copy is a material breach of contract, the party to which tender is made may:

(1) refuse the tender;

(2) accept the tender; or

(3) accept any commercially reasonable units and refuse the rest.

(b) In a mass-market transaction that calls for only a single tender of a copy, a licensee may refuse the tender if the copy or tender fails in any respect to conform to the contract.

(c) Refusal of a tender is ineffective unless it is made before acceptance and within a reasonable time after tender or completion of any permitted effort to cure and the refusing party seasonably notifies the tendering party.

(d) Except as otherwise provided in subsection (b), a party that refuses tender of a copy may cancel the contract only if there has been a material breach of the whole contract or the agreement so provides.

#### **SECTION 705. COPY: CONTRACT WITH PREVIOUS VESTED**

**GRANT OF RIGHTS.** If an agreement grants a right in or permission to use informational rights which precedes or is otherwise independent of the delivery of a copy, the following rules apply:

(1) A party may refuse a tender of a copy which is a material breach as to that copy, but refusal of that tender does not cancel the contract.

(2) In a case governed by paragraph (1), the tendering party may cure the breach by seasonably providing a conforming copy before the breach becomes material as to the whole contract.

(3) A breach that is material with respect to a copy allows cancellation of

the contract only if the breach cannot be seasonably cured and is a material breach of the whole contract.

**SECTION 706. COPY: DUTIES UPON RIGHTFUL REFUSAL.**

(a) After rightful refusal of a copy, if the refusing party rightfully cancels the contract, Section 802 applies, but if the contract is not canceled, the parties remain bound by all contractual obligations.

(b) The following rules apply to a copy that was rightfully refused or as to which acceptance was rightfully revoked, and to any copies of it that are in the possession or control of the refusing party to the extent that the rules are consistent with Section 802 if that section also applies:

(1) Any use, sale, or other transfer of the refused copy or the information it contains, or any failure to comply with a contractual use restriction, is a breach of contract unless authorized by this section or by the tendering party. The licensee shall pay the licensor the reasonable value of the use to the licensee. However, use for a limited time within contractual use restrictions is not a breach and does not constitute acceptance under Section 609(a)(5) if the use:

(A) occurs after the tendering party is seasonably notified of refusal;

(B) is not for distribution and is solely part of measures reasonable under the circumstances to avoid or reduce loss; and

(C) is not contrary to instructions concerning disposition of the copy received from the party in breach.



(2) The refusing party shall:

(A) deliver all copies, access materials, and documentation pertaining to the refused copy to the tendering party or hold them with reasonable care for a reasonable time for disposal at that party's instructions; and

(B) follow reasonable instructions of the tendering party for returning or delivering the copies, access material, and documentation. Instructions are not reasonable if the tendering party does not arrange for payment of or reimbursement for reasonable expenses of complying with the instructions.

(3) If the tendering party gives no instructions within a reasonable time after being notified of refusal, the refusing party, in a reasonable manner to reduce or avoid loss, may store the copies, access material, and documentation for the tendering party's account or ship them to the tendering party and is entitled to reimbursement for reasonable costs of storage and shipment.

(4) The refusing party has no contractual obligations other than those stated in this section or the agreement with respect to the copy, access material, and documentation that were refused. Both parties remain bound by any contractual use restrictions with respect to copies that would have been enforceable had the performance not been refused.

(5) In complying with this section, the refusing party shall act in good faith. Conduct in good faith under this section is not acceptance or conversion and may not be the basis for an action for damages under the contract.

## **SECTION 707. COPY: REVOCATION OF ACCEPTANCE.**

(a) A party that has accepted a nonconforming copy may revoke acceptance only if the nonconformity is a material breach of contract and the party accepted the copy:

(1) on the reasonable assumption that the nonconformity would be cured, and it has not been seasonably cured;

(2) during a period of continuing efforts by the party in breach at adjustment and cure, and the breach has not been seasonably cured; or

(3) without discovery of the nonconformity, if the acceptance was reasonably induced either by the other party's assurances or by the difficulty of discovery before acceptance.

(b) Revocation is not effective until the revoking party notifies the other party of the revocation.

(c) Revocation is precluded if:

(1) it does not occur within a reasonable time after the party attempting to revoke discovers or should have discovered the ground for it;

(2) it occurs after a substantial change in condition or identifiability not caused by defects in the information, such as after the party commingles the information in a manner that makes its return impossible; or

(3) the party attempting to revoke received a substantial benefit from the information, which benefit cannot be returned.

(d) A party that rightfully revokes has the same duties and is under the

same restrictions as if the party had refused the copy.

[SUBPART C. REPUDIATION AND ASSURANCES]

**SECTION 708. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.**

(a) A contract imposes an obligation on each party not to impair the other's expectation of receiving due performance. If reasonable grounds for insecurity arise with respect to the performance of either party, the aggrieved party may:

- (1) demand in a record adequate assurance of due performance; and
- (2) until that assurance is received, if commercially reasonable, may suspend any performance, other than with respect to contractual use restrictions, for which the agreed return has not been received.

(b) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered is determined according to commercial standards.

(c) Acceptance of any improper delivery or payment does not impair an aggrieved party's right to demand adequate assurance of future performance.

(d) After receipt of a justified demand under subsection (a), failure, within a reasonable time not exceeding 30 days, to provide assurance of due performance which is adequate under the circumstances of the particular case is a repudiation of the contract under Section 709.

## **SECTION 709. ANTICIPATORY REPUDIATION.**

(a) If either party to a contract repudiates a performance not yet due and the loss of performance will substantially impair the value of the contract to the other party, the aggrieved party may:

(1) await performance by the repudiating party for a commercially reasonable time or resort to any remedy for breach of contract, even if it has urged the repudiating party to retract the repudiation or has notified the repudiating party that it would await its performance; and

(2) in either case, suspend its own performance or proceed in accordance with Section 812 or 813, as applicable.

(b) Repudiation includes language that one party will not or cannot make a performance still due under the contract or voluntary, affirmative conduct that reasonably appears to the other party to make a future performance impossible.

## **SECTION 710. RETRACTION OF ANTICIPATORY REPUDIATION.**

(a) A repudiating party may retract its repudiation until its next performance is due unless the aggrieved party, after the repudiation, has canceled the contract, materially changed its position, or otherwise indicated that it considers the repudiation final.

(b) A retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform the contract. However, a retraction must contain any assurance justifiably demanded under

Section 709.

(c) Retraction restores a repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay caused by the repudiation.

## **PART 8**

### **REMEDIES**

#### **[SUBPART A. GENERAL]**

##### **SECTION 801. REMEDIES IN GENERAL.**

(a) The rights and remedies provided in this [Act] are cumulative, but a party may not recover more than once for the same loss.

(b) Except as otherwise provided in Sections 803 and 804, if a party is in breach of contract, whether or not the breach is material, the aggrieved party has the rights provided in the agreement or this [Act], but the aggrieved party shall continue to comply with any contractual use restrictions with respect to information or copies received from the other party which have not been returned or are not returnable to the other party.

(c) Neither rescission nor a claim for rescission of the contract nor refusal or return of the information precludes or is inconsistent with a claim for damages or other remedy.

##### **SECTION 802. CANCELLATION.**

(a) An aggrieved party may cancel a contract if there is a material breach that has not been cured or waived or the agreement allows cancellation for the breach.

(b) Cancellation is not effective until the canceling party notifies the party

in breach of the cancellation, unless a delay required to notify the party would cause or threaten material harm or loss to the aggrieved party. The notification may be in any form reasonable under the circumstances. However, in an access contract, a party may cancel rights of access without notice.

(c) On cancellation, the following rules apply:

(1) A party in possession or control of licensed information, documentation, materials, or copies of licensed information must take the following actions:

(A) A party that has rightfully refused a copy must comply with Section 707(b) as to the refused copy in possession or control of that party.

(B) A party in breach of contract which is in possession or control of licensed information, documentation, or materials or copies of them that would be subject to an obligation to return under Section 618, must deliver all information, documentation, materials, and copies to the other party or hold them with reasonable care for a reasonable time for disposal at that party's instructions. The party in breach of contract shall follow any reasonable instructions received from the other party.

(C) Except as otherwise provided in subparagraphs (A) and (B), the party must comply with Section 618 as to all information, documentation, materials, and copies.

(2) All obligations that are executory on both sides at the time of cancellation are discharged, but the following survive:

(A) any right based on prior breach or performance; and

(B) the rights, duties, and remedies described in Section 616(b).

(3) Cancellation of a license by the licensor ends any contractual right of the licensee to use the information, informational rights, copies, or other materials.

(4) Cancellation of a license by the licensee ends any contractual right to use the information, informational rights, copies, or other materials, but the licensee may use the information for a limited time after the license has been canceled if the use:

(A) is within contractual use restrictions;

(B) is not for distribution and is solely part of measures reasonable under the circumstances to avoid or reduce loss; and

(C) is not contrary to instructions received from the party in breach concerning disposition of them.

(5) The licensee shall pay the licensor the reasonable value of any use after cancellation permitted under paragraph (4).

(6) The obligations under this subsection apply to all information, documentation, materials, and copies received by the party and any copies made therefrom.

(d) A term providing that a contract may not be canceled precludes cancellation but does not limit other rights and remedies.

(e) Unless a contrary intention clearly appears, an expression such as



“cancellation, “rescission, or the like may not be construed as a renunciation or discharge of a claim in damages for an antecedent breach.

### **SECTION 803. CONTRACTUAL MODIFICATION OF REMEDY.**

(a) Except as otherwise provided in this section and in Section 804:

(1) an agreement may provide for remedies in addition to or in substitution for those provided in this [Act] and may limit or alter the measure of damages recoverable under this [Act] or a party’s other remedies under this [Act], such as by precluding a party’s right to cancel for breach of contract, limiting remedies to return or delivery of copies and repayment of the contract fee, or limiting remedies repair or replacement of the nonconforming copies; and

(2) resort to a contractual remedy is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(b) Subject to subsection (c), if performance of an exclusive or limited remedy causes the remedy to fail of its essential purpose, the aggrieved party may pursue other remedies under this [Act].

(c) Failure or unconscionability of an agreed exclusive or limited remedy makes a term disclaiming or limiting consequential or incidental damages unenforceable unless the agreement expressly makes the disclaimer or limitation independent of the agreed remedy.

(d) Consequential damages and incidental damages may be limited or disclaimed by agreement unless the disclaimer or limitation is unconscionable.

Limitation or disclaimer of consequential damages for injury to the person in a consumer contract for a computer program that is subject to this [Act] and is contained in consumer goods is prima facie unconscionable, but limitation or disclaimer of damages for a commercial loss is not.

#### **SECTION 804. LIQUIDATION OF DAMAGES.**

(a) Damages for breach of contract by either party may be liquidated by agreement in an amount that is reasonable in light of the loss anticipated at the time of contracting, the actual loss, or the actual or anticipated difficulties of proving loss in the event of breach. If a term liquidating damages is unenforceable under this subsection, the aggrieved party may pursue the remedies provided in this [Act], except as limited by other terms of the contract.

(b) If a party justifiably withholds delivery of copies because of the other party's breach of contract, the party in breach is entitled to restitution for any amount by which the sum of the payments it made for the copies exceeds the amount of the liquidated damages payable to the aggrieved party in accordance with subsection (a). The right to restitution is subject to offset to the extent that the aggrieved party establishes:

- (1) a right to recover damages other than under subsection (a); and
- (2) the amount or value of any benefits received by the party in breach, directly or indirectly, by reason of the contract.

(c) A term that does not liquidate damages, but that limits damages

available to the aggrieved party, must be evaluated under Section 803.

#### **SECTION 805. STATUTE OF LIMITATIONS.**

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

(b) By the original agreement, the parties may reduce the period of limitations to not less than one year after the right of action accrues but may not extend it. However, in a consumer contract, the period of limitations may not be reduced.

(c) Except as otherwise provided in subsection (d), a right of action accrues when the act or omission constituting a breach of contract occurs, even if the aggrieved party did not know of the breach. A right of action for breach of warranty accrues when tender of delivery of a copy pursuant to Section 606, or access to the information, occurs. However, if the warranty expressly extends to future performance of the information or a copy, the right of action accrues when the performance fails to conform to the warranty, but not later than the date the warranty expires.

(d) In the following cases, a right of action accrues on the later of the date the act or omission constituting the breach of contract occurred or the date on which it was or should have been discovered by the aggrieved party, but not earlier than the date for delivery of a copy if the claim relates to information in the copy:

- (1) a breach of warranty against third-party claims for:
    - (A) infringement or misappropriation; or
    - (B) libel, defamation, or the like;
  - (2) a breach of contract involving a party's disclosure or misuse of confidential information; or
  - (3) a failure to provide an indemnity or to perform another obligation to protect or defend against a third-party claim.
- (e) If an action commenced within the period of limitation is so terminated as to leave available a remedy by another action for the same breach of contract, the other action may be commenced after expiration of the period of limitation if the action is commenced within six months after termination of the first action, unless the termination resulted from voluntary discontinuance or dismissal for failure or neglect to prosecute.
- (f) This section does not alter the law on tolling of the statute of limitations and does not apply to a right of action that accrued before the effective date of this [Act].

**SECTION 806. REMEDIES FOR FRAUD.** Remedies for material misrepresentation or fraud include all remedies available under this [Act] for nonfraudulent breach of contract.

[SUBPART B. DAMAGES]

## **SECTION 807. MEASUREMENT OF DAMAGES IN GENERAL.**

(a) Except as otherwise provided in the agreement, an aggrieved party may not recover compensation for that part of a loss which could have been avoided by taking measures reasonable under the circumstances to avoid or reduce loss. The burden of establishing a failure of the aggrieved party to take measures reasonable under the circumstances is on the party in breach.

(b) Neither party may recover:

(1) consequential damages for losses resulting from the content of published informational content unless the agreement expressly so provides; or

(2) damages that are speculative.

(c) The remedy for breach of contract for disclosure or misuse of information that is a trade secret or in which the aggrieved party has a right of confidentiality includes as consequential damages compensation for the benefit obtained as a result of the breach.

(d) For purposes of this [Act], market value is determined as of the date of breach of contract and the place for performance.

(e) Damages or expenses that relate to events after the date of judgment must be reduced to their present value as of the date of judgment.

## **SECTION 808. LICENSOR'S DAMAGES.**

(a) In this section, "substitute transaction" means a transaction by the

licensor which would not have been possible in the absence of the licensee's breach and which is in the same information or informational rights with the same contractual use restrictions as the transaction to which the licensee's breach applies.

(b) Except as otherwise provided in Section 807, a breach of contract by a licensee entitles the licensor to recover the following compensation for the losses resulting in the ordinary course from the breach or, if appropriate, as to the whole contract, less expenses saved as a result of the breach to the extent not otherwise accounted for under this section:

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

(A) the amount of accrued and unpaid contract fees and the market value of other consideration earned but not received for:

(i) any performance accepted by the licensee; and

(ii) any performance to which Section 604 applies;

(B) for performances not governed by subparagraph (A), if the licensee repudiated or wrongfully refused the performance or the licensor rightfully canceled and the breach makes possible a substitute transaction, the amount of loss as determined by contract fees and the market value of other consideration required under the contract for the performance less:

(i) the contract fees and market value of other consideration received from an actual and commercially reasonable substitute transaction entered

into by the licensor in good faith and without unreasonable delay; or

(ii) the market value of a commercially reasonable hypothetical substitute transaction;

(C) for performances not governed by subparagraph (A), if the breach does not make possible a substitute transaction, lost profit, including reasonable overhead, that the licensor would have realized on acceptance and full payment for performance that was not delivered to the licensee because of the licensee's breach; or

(D) damages calculated in any reasonable manner; and

(2) any consequential and incidental damages.

#### **SECTION 809. LICENSEE'S DAMAGES.**

(a) Subject to subsection (b) and except as otherwise provided in Section 807, a breach of contract by a licensor entitles the licensee to recover the following compensation for losses resulting in the ordinary course from the breach or, if appropriate, as to the whole contract, less expenses saved as a result of the breach to the extent not otherwise accounted for under this section:

(1) damages measured in any combination of the following ways, but not to exceed the market value of the performance that was the subject of the breach plus restitution of any amounts paid for performance not received and not accounted for within the indicated recovery:

(A) with respect to performance that has been accepted and the

acceptance not rightfully revoked, the value of the performance required less the value of the performance accepted as of the time and place of acceptance;

(B) with respect to performance that has not been rendered or that was rightfully refused or acceptance of which was rightfully revoked:

(i) the amount of any payments made and the value of other consideration given to the licensor with respect to that performance and not previously returned to the licensee;

(ii) the market value of the performance less the contract fee for that performance; or

(iii) the cost of a commercially reasonable substitute transaction less the contract fee under the breached contract, if the substitute transaction was actually entered into by the licensee in good faith and without unreasonable delay for substantially similar information with the same contractual use restrictions; or

(C) damages calculated in any reasonable manner; and

(2) incidental and consequential damages.

(b) The amount of damages must be reduced by any unpaid contract fees for performance by the licensor which has been accepted by the licensee and as to which the acceptance has not been rightfully revoked.

#### **SECTION 810. RECOUPMENT.**

(a) Except as otherwise provided in subsection (b), an aggrieved party, upon notifying the party in breach of contract of its intention to do so, may deduct



all or any part of the damages resulting from the breach from any payments still due under the same contract.

(b) If a breach of contract is not material with reference to the particular performance, an aggrieved party may exercise its rights under subsection (a) only if the agreement does not require further affirmative performance by the other party and the amount of damages deducted can be readily liquidated under the agreement.

#### [SUBPART C. PERFORMANCE REMEDIES]

##### **SECTION 811. SPECIFIC PERFORMANCE.**

(a) Specific performance may be ordered:

(1) if the agreement provides for that remedy, other than an obligation for the payment of money;

(2) if the contract was not for personal services and the agreed performance is unique; or

(3) in other proper circumstances.

(b) An order for specific performance may contain any terms and conditions considered just and must provide adequate safeguards consistent with the contract to protect the confidential information, information, and informational rights of both parties.

##### **SECTION 812. LICENSOR'S RIGHT TO COMPLETE.**

(a) On breach of contract by a licensee, the licensor may:

(1) identify to the contract any conforming copy not already identified if, at the time it learned of the breach, the copy was in its possession;

(2) in the exercise of reasonable commercial judgment for purposes of avoiding loss and effective realization on effort or investment, complete the information and identify it to the contract, cease work on it, relicense or dispose of it, or proceed in any other commercially reasonable manner; and

(3) pursue any remedy for breach that has not been waived.

(b) On breach by a licensee, both parties remain bound by all contractual use restrictions.

**SECTION 813. LICENSEE’S RIGHT TO CONTINUE USE.** On breach of contract by a licensor, a licensee that has not canceled the contract may continue to use the information and informational rights under the contract. If the licensee continues to use the information or informational rights, the licensee is bound by all terms of the contract, including contractual use restrictions, obligations not to compete, and obligations to pay contract fees. In addition, the following rules apply:

(1) The licensee may pursue any remedy for breach that has not been waived.

(2) The licensor’s rights remain in effect but are subject to the licensee’s remedy for breach, including any right of recoupment or setoff.

**SECTION 814. RIGHT TO DISCONTINUE ACCESS.** On material breach of an access contract or if the agreement so provides, a party may discontinue all contractual rights of access of the party in breach and direct any person that is assisting the performance of the contract to discontinue its performance.

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

(a) Upon cancellation of a license, the licensor has the right to:

(1) possession of all copies of the licensed information in the possession or control of the licensee and any other materials pertaining to that information which by contract were to be returned or delivered by the licensee to the licensor; and

(2) prevent the continued exercise of contractual and informational rights in the licensed information under the license.

(b) Except as otherwise provided in Section 814, a licensor may exercise its rights under subsection (a) without judicial process only if this can be done:

(1) without a breach of the peace;

(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.

(c) In a judicial proceeding, the court may enjoin a licensee in breach of contract from continued use of the information and informational rights and may order that the licensor or a judicial officer take the steps described in Section 618.

(d) A party has a right to an expedited judicial hearing on a request for prejudgment relief to enforce or protect its rights under this section.

(e) The right to possession under this section is not available to the extent that the information, before breach of the license and in the ordinary course of performance under the license, was so altered or commingled that the information is no longer identifiable or separable.

(f) A licensee that provides information to a licensor subject to contractual use restrictions has the rights and is subject to the limitations of a licensor under this section with respect to the information it provides.

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

(a) In this section, “electronic self-help” means the use of electronic means to exercise a licensor’s rights pursuant to Section 815(b)

(b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section.

(c) A licensee must separately manifest assent to a term authorizing 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 which 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 with whom the licensee may communicate concerning the claimed breach.

(e) 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 such 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 fails to 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 parties not involved in the dispute.

(g) A court of competent jurisdiction of this State shall give prompt consideration to an application for injunctive relief and may, temporarily or permanently, enjoin 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) grave 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, as the case may be;

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

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

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

(h) Before breach, rights or obligations under this section may not be waived or varied by an agreement, but 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 possession of a copy without a breach of the peace and the electronic self-help is used solely with respect to that copy.

## **PART 9**

### **MISCELLANEOUS PROVISIONS**

#### **SECTION 901. UNIFORMITY OF APPLICATION AND**

**CONSTRUCTION.** In applying and construing this Uniform Act consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**SECTION 902. SEVERABILITY.** If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

**SECTION 903. EFFECTIVE DATE.** This [Act] takes effect on [                      ].

#### **SECTION 904. TRANSACTIONS COVERED.**

(a) This [Act] applies to all transactions within its scope that become enforceable on or after its effective date.

(b) Contracts that are enforceable and rights of action that accrue before the effective date of this [Act] are governed by the law then in effect unless the parties agree to be governed by this [Act]. However, an agreement to be bound by this



[Act] does not affect the rights of a third party that is not a party to the agreement.

(c) The following provisions of law establishing a digital signature or similar form of attribution procedure govern in the case of a conflict between this Act and the provisions of the law:

**SECTION 905. REPEALS.** The following acts and parts of acts are repealed: