

**AMENDMENTS TO SECTIONS 605 AND 816 OF THE
UNIFORM COMPUTER INFORMATION
TRANSACTIONS ACT**

(as Last Revised in 2000)

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

AS APPROVED BY THE EXECUTIVE COMMITTEE OF THE NATIONAL
CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
PURSUANT TO SECTION 4.3(3) OF ITS CONSTITUTION

at its

MIDYEAR MEETING IN SAVANNAH, GEORGIA,
JANUARY 13th and 14th, 2001

and

REVIEWED AND MODIFIED BY THE COMMITTEE ON STYLE OF THE
NATIONAL CONFERENCE

at its

MEETING IN SARASOTA FLORIDA, JANUARY 17th-21st, 2001

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ON UNIFORM STATE LAWS

AMENDMENTS TO SECTION 605 OF U.C.I.T.A.

SECTION 605. ELECTRONIC REGULATION OF PERFORMANCE.

(a) In this section, “automatic restraint” means a program, code, device, or similar electronic or physical limitation the intended purpose of which is to ~~restrict~~ prevent use of information contrary to the contract or applicable law.

(b) A party entitled to enforce a limitation on use of information may include an automatic 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;
- (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 an automatic 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 possession of the licensee or a third party and accessed without use of the licensor’s information or informational rights.

(d) A party that includes or uses an automatic restraint consistent with subsection (b) or (c) is not liable for any loss caused by the use of the restraint.

(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 to replace or disable the earlier copy by electronic means with an upgrade or other new information.

(f) This section does not authorize use of an automatic restraint to enforce remedies ~~in the event~~ because of breach of contract or ~~of~~ for cancellation for breach. If a right to cancel for breach of contract and a right to exercise a restraint under subsection (b)(4) exist simultaneously, any affirmative acts constituting electronic self-help may only be taken under Section 816, including the prohibition on mass-market transactions, instead of this section. Affirmative acts under this subsection do not include:

- (1) use of a program, code, device or similar electronic or physical limitation that operates automatically without regard to breach; or
- (2) a refusal to prevent the operation of a restraint authorized by this section or to reverse its effect.

AMENDMENTS TO SECTION 816 OF U.C.I.T.A.

SECTION 816. LIMITATIONS ON ELECTRONIC SELF-HELP.

(a) In this section:

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

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

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

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

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

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

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

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

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

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

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

(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 those damages are excluded by the terms of the license, if:

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

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

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

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

(g) A court of competent jurisdiction of this State shall give prompt consideration to a petition for injunctive relief and may enjoin, temporarily or permanently, the licensor from

exercising electronic self-help even if authorized by a license term or enjoin the licensee from misappropriation or misuse of computer information, as may be appropriate, upon consideration of the following:

(1) ~~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;

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

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

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

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

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

January 29, 2001

To: Commissioners
From: Carlyle Ring (Standby Committee Chair) and Ray Nimmer (Reporter)

Notes on amendments to U.C.I.T.A., adopted by Executive Committee January 13th-14th, 2001.

Sections 605 and 816 are intended to act in harmony. Section 605(f) was intended to make clear that the procedural limitations and safeguards of Section 816 in the event of a breach cannot be avoided by reliance on Section 605. In the JCOTS (Joint Commission on Technology and Science, Virginia) Study, there was concern that the language might be exploited so as to not accomplish this purpose. Accordingly, changes were made to the definition of “automatic restraint” to clearly state that it “prevents a breach; and Section 605(f) now states more clearly that in the event of a possible simultaneous breach and prevention of a breach, under (b)(4), Section 816 applies unless the affirmative acts are within (i) and (ii). This change of wording was carefully and extensively examined by all interested groups and the JCOTS staff to accomplish the stated purpose. The acceptance of the amendments will result in substantial added support from retail and financial services industries.

The amendments to Section 816 clarify what is a “wrongful use” of electronic self-help (Section 816(c)); remove an ambiguity as to the two kinds of harm that are prohibited by striking the word “grave” (Section 816(g)(1)); and clarify that the repossession of a tangible copy is permissible without breach of peace or the use of electronic self-help (Section 816(j)). These changes will increase support for U.C.I.T.A.