

1 AN ACT concerning computer information transactions.

2 Be it enacted by the People of the State of Illinois,
3 represented in the General Assembly:

4 PART 1

5 GENERAL PROVISIONS

6 SUBPART A. SHORT TITLE AND DEFINITIONS

7 Section 101. Short title. This Act may be cited as the
8 Uniform Computer Information Transactions Act.

9 Section 102. Definitions.

10 (a) In this Act:

11 (1) "Access contract" means a contract to obtain by
12 electronic means access to, or information from, an
13 information processing system of another person, or the
14 equivalent of such access.

15 (2) "Access material" means any information or
16 material, such as a document, address, or access code,
17 that is necessary to obtain authorized access to
18 information or control or possession of a copy.

19 (3) "Aggrieved party" means a party entitled to a
20 remedy for breach of contract.

21 (4) "Agreement" means the bargain of the parties in
22 fact as found in their language or by implication from
23 other circumstances, including course of performance,
24 course of dealing, and usage of trade as provided in this
25 Act.

26 (5) "Attribution procedure" means a procedure to
27 verify that an electronic authentication, display,
28 message, record, or performance is that of a particular
29 person or to detect changes or errors in information.
30 The term includes a procedure that requires the use of

1 algorithms or other codes, identifying words or numbers,
2 encryption, or callback or other acknowledgment.

3 (6) "Authenticate" means:

4 (A) to sign; or

5 (B) with the intent to sign a record,
6 otherwise to execute or adopt an electronic symbol,
7 sound, message, or process referring to, attached
8 to, included in, or logically associated or linked
9 with, that record.

10 (7) "Automated transaction" means a transaction in
11 which a contract is formed in whole or part by electronic
12 actions of one or both parties which are not previously
13 reviewed by an individual in the ordinary course.

14 (8) "Cancellation" means the ending of a contract
15 by a party because of breach of contract by another
16 party.

17 (9) "Computer" means an electronic device that
18 accepts information in digital or similar form and
19 manipulates it for a result based on a sequence of
20 instructions.

21 (10) "Computer information" means information in
22 electronic form which is obtained from or through the use
23 of a computer or which is in a form capable of being
24 processed by a computer. The term includes a copy of the
25 information and any documentation or packaging associated
26 with the copy.

27 (11) "Computer information transaction" means an
28 agreement or the performance of it to create, modify,
29 transfer, or license computer information or
30 informational rights in computer information. The term
31 includes a support contract under Section 612. The term
32 does not include a transaction merely because the
33 parties' agreement provides that their communications
34 about the transaction will be in the form of computer

1 information.

2 (12) "Computer program" means a set of statements
3 or instructions to be used directly or indirectly in a
4 computer to bring about a certain result. The term does
5 not include separately identifiable informational
6 content.

7 (13) "Consequential damages" resulting from breach
8 of contract includes (i) any loss resulting from general
9 or particular requirements and needs of which the
10 breaching party at the time of contracting had reason to
11 know and which could not reasonably be prevented and (ii)
12 any injury to an individual or damage to property other
13 than the subject matter of the transaction proximately
14 resulting from breach of warranty. The term does not
15 include direct damages or incidental damages.

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

25 (A) with respect to a person:

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

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

34 (iii) a term prominently referenced in an

1 electronic record or display which is readily
2 accessible or reviewable from the record or
3 display; and

4 (B) with respect to a person or an electronic
5 agent, a term or reference to a term that is so
6 placed in a record or display that the person or
7 electronic agent cannot proceed without taking
8 action with respect to the particular term or
9 reference.

10 (15) "Consumer" means an individual who is a
11 licensee of information or informational rights that the
12 individual at the time of contracting intended to be used
13 primarily for personal, family, or household purposes.
14 The term does not include an individual who is a licensee
15 primarily for professional or commercial purposes,
16 including agriculture, business management, and
17 investment management other than management of the
18 individual's personal or family investments.

19 (16) "Consumer contract" means a contract between a
20 merchant licensor and a consumer.

21 (17) "Contract" means the total legal obligation
22 resulting from the parties' agreement as affected by this
23 Act and other applicable law.

24 (18) "Contract fee" means the price, fee, rent, or
25 royalty payable in a contract under this Act or any part
26 of the amount payable.

27 (19) "Contractual use term" means an enforceable
28 term that defines or limits the use, disclosure of, or
29 access to licensed information or informational rights,
30 including a term that defines the scope of a license.

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

1 (21) "Course of dealing" means a sequence of
2 previous conduct between the parties to a particular
3 transaction which establishes a common basis of
4 understanding for interpreting their expressions and
5 other conduct.

6 (22) "Course of performance" means repeated
7 performances, under a contract that involves repeated
8 occasions for performance, which are accepted or
9 acquiesced in without objection by a party having
10 knowledge of the nature of the performance and an
11 opportunity to object to it.

12 (23) "Court" includes an arbitration or other
13 dispute-resolution forum if the parties have agreed to
14 use of that forum or its use is required by law.

15 (24) "Delivery", with respect to a copy, means the
16 voluntary physical or electronic transfer of possession
17 or control.

18 (25) "Direct damages" means compensation for losses
19 measured by Section 808(b)(1) or 809(a)(1). The term does
20 not include consequential damages or incidental damages.

21 (26) "Electronic" means relating to technology
22 having electrical, digital, magnetic, wireless, optical,
23 electromagnetic, or similar capabilities.

24 (27) "Electronic agent" means a computer program,
25 or electronic or other automated means, used by a person
26 to initiate an action, or to respond to electronic
27 messages or performances, on the person's behalf without
28 review or action by an individual at the time of the
29 action or response to the message or performance.

30 (28) "Electronic message" means a record or display
31 that is stored, generated, or transmitted by electronic
32 means for the purpose of communication to another person
33 or electronic agent.

34 (29) "Financial accommodation contract" means an

1 agreement under which a person extends a financial
2 accommodation to a licensee and which does not create a
3 security interest governed by Article 9 of the Uniform
4 Commercial Code. The agreement may be in any form,
5 including a license or lease.

6 (30) "Financial services transaction" means an
7 agreement that provides for, or a transaction that is, or
8 entails access to, use, transfer, clearance, settlement,
9 or processing of:

10 (A) a deposit, loan, funds, or monetary value
11 represented in electronic form and stored or capable
12 of storage by electronic means and retrievable and
13 transferable by electronic means, or other right to
14 payment to or from a person;

15 (B) an instrument or other item;

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

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

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

26 (31) "Financier" means a person that provides a
27 financial accommodation to a licensee under a financial
28 accommodation contract and either (i) becomes a licensee
29 for the purpose of transferring or sublicensing the
30 license to the party to which the financial accommodation
31 is provided or (ii) obtains a contractual right under the
32 financial accommodation contract to preclude the
33 licensee's use of the information or informational rights
34 under a license in the event of breach of the financial

1 accommodation contract. The term does not include a
2 person that selects, creates, or supplies the information
3 that is the subject of the license, owns the
4 informational rights in the information, or provides
5 support for, modifications to, or maintenance of the
6 information.

7 (32) "Good faith" means honesty in fact and the
8 observance of reasonable commercial standards of fair
9 dealing.

10 (33) "Goods" means all things that are movable at
11 the time relevant to the computer information
12 transaction. The term includes the unborn young of
13 animals, growing crops, and other identified things to be
14 severed from realty which are covered by Section 2-107 of
15 the Uniform Commercial Code. The term does not include
16 computer information, money, the subject matter of
17 foreign exchange transactions, documents, letters of
18 credit, letter-of-credit rights, instruments, investment
19 property, accounts, chattel paper, deposit accounts, or
20 general intangibles.

21 (34) "Incidental damages" resulting from breach of
22 contract:

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

27 (i) inspection, receipt, transmission,
28 transportation, care, or custody of identified
29 copies or information that is the subject of
30 the breach;

31 (ii) stopping delivery, shipment, or
32 transmission;

33 (iii) effecting cover or retransfer of
34 copies or information after the breach;

1 (iv) other efforts after the breach to
2 minimize or avoid loss resulting from the
3 breach; and

4 (v) matters otherwise incident to the
5 breach; and

6 (B) does not include consequential damages or
7 direct damages.

8 (35) "Information" means data, text, images,
9 sounds, mask works, or computer programs, including
10 collections and compilations of them.

11 (36) "Information processing system" means an
12 electronic system for creating, generating, sending,
13 receiving, storing, displaying, or processing
14 information.

15 (37) "Informational content" means information that
16 is intended to be communicated to or perceived by an
17 individual in the ordinary use of the information, or the
18 equivalent of that information.

19 (38) "Informational rights" include all rights in
20 information created under laws governing patents,
21 copyrights, mask works, trade secrets, trademarks,
22 publicity rights, or any other law that gives a person,
23 independently of contract, a right to control or preclude
24 another person's use of or access to the information on
25 the basis of the rights holder's interest in the
26 information.

27 (39) "Insurance services transaction" means an
28 agreement between an insurer and an insured which
29 provides for, or a transaction that is, or entails access
30 to, use, transfer, clearance, settlement, or processing
31 of:

32 (A) an insurance policy, contract, or
33 certificate; or

34 (B) a right to payment under an insurance

1 policy, contract, or certificate.

2 (40) "Knowledge", with respect to a fact, means
3 actual knowledge of the fact.

4 (41) "License" means a contract that authorizes
5 access to, or use, distribution, performance,
6 modification, or reproduction of, information or
7 informational rights, but expressly limits the access or
8 uses authorized or expressly grants fewer than all rights
9 in the information, whether or not the transferee has
10 title to a licensed copy. The term includes an access
11 contract, a lease of a computer program, and a
12 consignment of a copy. The term does not include a
13 reservation or creation of a security interest to the
14 extent the interest is governed by Article 9 of the
15 Uniform Commercial Code.

16 (42) "Licensee" means a person entitled by
17 agreement to acquire or exercise rights in, or to have
18 access to or use of, computer information under an
19 agreement to which this Act applies. A licensor is not a
20 licensee with respect to rights reserved to it under the
21 agreement.

22 (43) "Licensor" means a person obligated by
23 agreement to transfer or create rights in, or to give
24 access to or use of, computer information or
25 informational rights in it under an agreement to which
26 this Act applies. Between the provider of access and a
27 provider of the informational content to be accessed, the
28 provider of content is the licensor. In an exchange of
29 information or informational rights, each party is a
30 licensor with respect to the information, informational
31 rights, or access it gives.

32 (44) "Mass-market license" means a standard form
33 used in a mass-market transaction.

34 (45) "Mass-market transaction" means a transaction

1 that is:

2 (A) a consumer contract; or

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

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

10 (ii) the licensee acquires the
11 information or informational rights in a retail
12 transaction under terms and in a quantity
13 consistent with an ordinary transaction in a
14 retail market; and

15 (iii) the transaction is not:

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

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

25 (III) a site license; or

26 (IV) an access contract.

27 (46) "Merchant" means a person:

28 (A) that deals in information or informational
29 rights of the kind involved in the transaction;

30 (B) that by the person's occupation holds
31 itself out as having knowledge or skill peculiar to
32 the relevant aspect of the business practices or
33 information involved in the transaction; or

34 (C) to which the knowledge or skill peculiar

1 to the practices or information involved in the
2 transaction may be attributed by the person's
3 employment of an agent or broker or other
4 intermediary that by its occupation holds itself out
5 as having the knowledge or skill.

6 (47) "Nonexclusive license" means a license that
7 does not preclude the licensor from transferring to other
8 licensees the same information, informational rights, or
9 contractual rights within the same scope. The term
10 includes a consignment of a copy.

11 (48) "Notice" of a fact means knowledge of the
12 fact, receipt of notification of the fact, or reason to
13 know the fact exists.

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

18 (50) "Party" means a person that engages in a
19 transaction or makes an agreement under this Act.

20 (51) "Person" means an individual, corporation,
21 business trust, estate, trust, partnership, limited
22 liability company, association, joint venture,
23 governmental subdivision, instrumentality, or agency,
24 public corporation, or any other legal or commercial
25 entity.

26 (52) "Published informational content" means
27 informational content prepared for or made available to
28 recipients generally, or to a class of recipients, in
29 substantially the same form. The term does not include
30 informational content that is:

31 (A) customized for a particular recipient by
32 one or more individuals acting as or on behalf of
33 the licensor, using judgment or expertise; or

34 (B) provided in a special relationship of

1 reliance between the provider and the recipient.

2 (53) "Receipt" means:

3 (A) with respect to a copy, taking delivery;

4 or

5 (B) with respect to a notice:

6 (i) coming to a person's attention; or

7 (ii) being delivered to and available at
8 a location or system designated by agreement
9 for that purpose or, in the absence of an
10 agreed location or system:

11 (I) being delivered at the person's
12 residence, or the person's place of
13 business through which the contract was
14 made, or at any other place held out by
15 the person as a place for receipt of
16 communications of the kind; or

17 (II) in the case of an electronic
18 notice, coming into existence in an
19 information processing system or at an
20 address in that system in a form capable
21 of being processed by or perceived from a
22 system of that type by a recipient, if the
23 recipient uses, or otherwise has
24 designated or holds out, that place or
25 system for receipt of notices of the kind
26 to be given and the sender does not know
27 that the notice cannot be accessed from
28 that place.

29 (54) "Receive" means to take receipt.

30 (55) "Record" means information that is inscribed
31 on a tangible medium or that is stored in an electronic
32 or other medium and is retrievable in perceivable form.

33 (56) "Release" means an agreement by a party not to
34 object to, or exercise any rights or pursue any remedies

1 to limit, the use of information or informational rights
2 which agreement does not require an affirmative act by
3 the party to enable or support the other party's use of
4 the information or informational rights. The term
5 includes a waiver of informational rights.

6 (57) "Return", with respect to a record containing
7 contractual terms that were rejected, refers only to the
8 computer information and means:

9 (A) in the case of a licensee that rejects a
10 record regarding a single information product
11 transferred for a single contract fee, a right to
12 reimbursement of the contract fee paid from the
13 person to which it was paid or from another person
14 that offers to reimburse that fee, on:

- 15 (i) submission of proof of purchase; and
- 16 (ii) proper redelivery of the computer
17 information and all copies within a reasonable
18 time after initial delivery of the information
19 to the licensee;

20 (B) in the case of a licensee that rejects a
21 record regarding an information product provided as
22 part of multiple information products integrated
23 into and transferred as a bundled whole but
24 retaining their separate identity:

- 25 (i) a right to reimbursement of any
26 portion of the aggregate contract fee
27 identified by the licensor in the initial
28 transaction as charged to the licensee for all
29 bundled information products which was actually
30 paid, on:

- 31 (I) rejection of the record before
32 or during the initial use of the bundled
33 product;

- 34 (II) proper redelivery of all

1 computer information products in the
 2 bundled whole and all copies of them
 3 within a reasonable time after initial
 4 delivery of the information to the
 5 licensee; and

6 (III) submission of proof of
 7 purchase; or

8 (ii) a right to reimbursement of any
 9 separate contract fee identified by the
 10 licensor in the initial transaction as charged
 11 to the licensee for the separate information
 12 product to which the rejected record applies,
 13 on:

14 (I) submission of proof of purchase;
 15 and

16 (II) proper redelivery of that
 17 computer information product and all
 18 copies within a reasonable time after
 19 initial delivery of the information to the
 20 licensee; or

21 (C) in the case of a licensor that rejects a
 22 record proposed by the licensee, a right to proper
 23 redelivery of the computer information and all
 24 copies from the licensee, to stop delivery or access
 25 to the information by the licensee, and to
 26 reimbursement from the licensee of amounts paid by
 27 the licensor with respect to the rejected record, on
 28 reimbursement to the licensee of contract fees that
 29 it paid with respect to the rejected record, subject
 30 to recoupment and setoff.

31 (58) "Scope", with respect to terms of a license,
 32 means:

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

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

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

5 (D) the duration of the license.

6 (59) "Seasonable", with respect to an act, means
7 taken within the time agreed or, if no time is agreed,
8 within a reasonable time.

9 (60) "Send" means, with any costs provided for and
10 properly addressed or directed as reasonable under the
11 circumstances or as otherwise agreed, to deposit a record
12 in the mail or with a commercially reasonable carrier, to
13 deliver a record for transmission to or re-creation in
14 another location or information processing system, or to
15 take the steps necessary to initiate transmission to or
16 re-creation of a record in another location or
17 information processing system. In addition, with respect
18 to an electronic message, the message must be in a form
19 capable of being processed by or perceived from a system
20 of the type the recipient uses or otherwise has
21 designated or held out as a place for the receipt of
22 communications of the kind sent. Receipt within the time
23 in which it would have arrived if properly sent, has the
24 effect of a proper sending.

25 (61) "Standard form" means a record or a group of
26 related records containing terms prepared for repeated
27 use in transactions and so used in a transaction in which
28 there was no negotiated change of terms by individuals
29 except to set the price, quantity, method of payment,
30 selection among standard options, or time or method of
31 delivery.

32 (62) "State" means a State of the United States,
33 the District of Columbia, Puerto Rico, the Unites States
34 Virgin Islands, or any territory or insular possession

1 subject to the jurisdiction of the United States.

2 (63) "Term", with respect to an agreement, means
3 that portion of the agreement which relates to a
4 particular matter.

5 (64) "Termination" means the ending of a contract
6 by a party pursuant to a power created by agreement or
7 law otherwise than because of breach of contract.

8 (65) "Transfer":

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

14 (B) with respect to computer information,
15 includes a sale, license, or lease of a copy of the
16 computer information and a license or assignment of
17 informational rights in computer information.

18 (66) "Usage of trade" means any practice or method
19 of dealing that has such regularity of observance in a
20 place, vocation, or trade as to justify an expectation
21 that it will be observed with respect to the transaction
22 in question.

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

- 25 (1) "Burden of establishing" Section 1-201.
- 26 (2) "Document of title" Section 1-201.
- 27 (3) "Financial asset" Section 8-102(a)(9).
- 28 (4) "Funds transfer" Section 4A-104.
- 29 (5) "Identification" to the contract Section 2-501.
- 30 (6) "Instrument" Section 9-102(a)(47).
- 31 (7) "Investment property" Section 9-102(a)(49).
- 32 (8) "Item" Section 4-104.
- 33 (9) "Letter of credit" Section 5-102.
- 34 (10) "Payment order" Section 4A-103.

1 (11) "Sale" Section 2-106.

2 SUBPART B. GENERAL SCOPE AND TERMS

3 Section 103. Scope; exclusions.

4 (a) This Act applies to computer information
5 transactions.

6 (b) Except as otherwise provided in subsection (d) and
7 Section 104, if a computer information transaction includes
8 subject matter other than computer information, the following
9 rules apply:

10 (1) If a transaction includes computer information
11 and goods, this Act applies to the part of the
12 transaction involving computer information, informational
13 rights in it, and creation or modification of it.
14 However, if a copy of a computer program is contained in
15 and sold or leased as part of goods, this Act applies to
16 the copy and the computer program only if:

17 (A) the goods are a computer or computer
18 peripheral; or

19 (B) giving the buyer or lessee of the goods
20 access to or use of the program is ordinarily a
21 material purpose of transactions in goods of the
22 type sold or leased.

23 (2) Subject to subsection (d)(3)(A), if a
24 transaction includes an agreement for creating, or for
25 obtaining rights to create, computer information and a
26 motion picture, this Act does not apply to the agreement
27 if the dominant character of the agreement is to create
28 or obtain rights to create a motion picture. In all
29 other such agreements, this Act does not apply to the
30 part of the agreement that involves a motion picture
31 excluded under subsection (d)(3), but does apply to the
32 computer information.

1 (3) In all other cases, this Act applies to the
2 entire transaction if the computer information and
3 informational rights, or access to them, is the primary
4 subject matter, but otherwise applies only to the part of
5 the transaction involving computer information,
6 informational rights in it, and creation or modification
7 of it.

8 (c) To the extent of a conflict between this Act and
9 Article 9 of the Uniform Commercial Code, Article 9 governs.

10 (d) This Act does not apply to:

11 (1) a financial services transaction;

12 (2) an insurance services transaction;

13 (3) an agreement to create, perform or perform in,
14 include information in, acquire, use, distribute, modify,
15 reproduce, have access to, adapt, make available,
16 transmit, license, or display:

17 (A) a motion picture or audio or visual
18 programming, other than in (i) a mass-market
19 transaction or (ii) a submission of an idea or
20 information or release of informational rights that
21 may result in making a motion picture or similar
22 information product; or

23 (B) a sound recording, musical work, or
24 phonorecord as defined or used in Title 17 of the
25 United States Code as of July 1, 1999, or an
26 enhanced sound recording, other than in the
27 submission of an idea or information or release of
28 informational rights that may result in the creation
29 of such material or a similar information product.

30 (4) a compulsory license;

31 (5) a contract of employment of an individual,
32 other than an individual hired as an independent
33 contractor to create or modify computer information,
34 unless the independent contractor is a freelancer in the

1 news reporting industry as that term is commonly
2 understood in that industry;

3 (6) a contract that does not require that
4 information be furnished as computer information or a
5 contract in which, under the agreement, the form of the
6 information as computer information is otherwise
7 insignificant with respect to the primary subject matter
8 of the part of the transaction pertaining to the
9 information;

10 (7) unless otherwise agreed between the parties in
11 a record:

12 (A) telecommunications products or services
13 provided pursuant to federal or state tariffs; or

14 (B) telecommunications products or services
15 provided pursuant to agreements required or
16 permitted to be filed by the service provider with a
17 federal or state authority regulating those services
18 or under pricing subject to approval by a federal or
19 state regulatory authority; or

20 (8) subject matter within the scope of Article 3,
21 4, 4A, 5, 7, or 8 of the Uniform Commercial Code.

22 (e) As used in subsection (d)(3)(B), "enhanced sound
23 recording" means a separately identifiable product or service
24 the dominant character of which consists of recorded sounds,
25 but which includes (i) statements or instructions whose
26 purpose is to allow or control the perception, reproduction,
27 or communication of those sounds or (ii) other information,
28 as long as recorded sounds constitute the dominant character
29 of the product or service.

30 (f) In this Section:

31 (1) "Audio or visual programming" means audio or
32 visual programming that is provided by broadcast,
33 satellite, or cable, as defined or used in the
34 Communications Act of 1934 and related regulations as

1 they existed on July 1, 1999, or by similar methods of
2 delivery.

3 (2) "Motion picture" means:

4 (A) "motion picture" as defined in Title 17 of
5 the United States Code as of July 1, 1999; or

6 (B) a separately identifiable product or
7 service the dominant character of which consists of
8 a linear motion picture, but which includes (i)
9 statements or instructions whose purpose is to allow
10 or control the perception, reproduction, or
11 communication of the motion picture or (ii) other
12 information, as long as the motion picture
13 constitutes the dominant character of the product or
14 service.

15 Section 104. Mixed transactions: agreement to opt-in or
16 opt-out. The parties may agree that this Act, including
17 contract-formation rules, governs the transaction, in whole
18 or part, or that other law governs the transaction and this
19 Act does not apply, if a material part of the subject matter
20 to which the agreement applies is computer information or
21 informational rights in it that are within the scope of this
22 Act, or is subject matter within this Act under Section
23 103(b), or is subject matter excluded by Section 103(d)(1) or
24 (2). However, any agreement to do so is subject to the
25 following rules:

26 (1) An agreement that this Act governs a
27 transaction does not alter the applicability of any
28 statute, rule or procedure that may not be varied by
29 agreement of the parties or that may be varied only in a
30 manner specified by the rule or procedure, including a
31 consumer protection statute or administrative rule. In
32 addition, in a mass-market transaction, the agreement
33 does not alter the applicability of a law applicable to a

1 copy of information in printed form.

2 (2) An agreement that this Act does not govern a
3 transaction:

4 (A) does not alter the applicability of Section
5 214 or 816; and

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

10 (3) In a mass-market transaction, any term under
11 this Section which changes the extent to which this Act
12 governs the transaction must be conspicuous.

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

18 Section 105. Relation to federal law; fundamental public
19 policy; transactions subject to other State law.

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

22 (b) If a term of a contract violates a fundamental
23 public policy, the court may refuse to enforce the contract,
24 enforce the remainder of the contract without the
25 impermissible term, or limit the application of the
26 impermissible term so as to avoid a result contrary to public
27 policy, in each case to the extent that the interest in
28 enforcement is clearly outweighed by a public policy against
29 enforcement of the term.

30 (c) Except as otherwise provided in subsection (d), if
31 this Act or a term of a contract under this Act conflicts
32 with a consumer protection statute or administrative rule,
33 the consumer protection statute or rule governs.

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

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

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

8 (3) A requirement that a term be conspicuous, or
9 the like, is satisfied by a term that is conspicuous
10 under this Act.

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

14 (e) The following laws govern in the case of a conflict
15 between this Act and the other law:

16 The Electronic Commerce Security Act.

17 Section 106. Rules of construction.

18 (a) This Act must be liberally construed and applied to
19 promote its underlying purposes and policies to:

20 (1) support and facilitate the realization of the
21 full potential of computer information transactions;

22 (2) clarify the law governing computer information
23 transactions;

24 (3) enable expanding commercial practice in computer
25 information transactions by commercial usage and
26 agreement of the parties; and

27 (4) promote uniformity of the law with respect to
28 the subject matter of this Act among States that enact
29 it.

30 (b) Except as otherwise provided in Section 113(a), the
31 use of mandatory language or the absence of a phrase such as
32 "unless otherwise agreed" in a provision of this Act does not
33 preclude the parties from varying the effect of the provision

1 by agreement.

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

5 (d) To be enforceable, a term need not be conspicuous,
6 negotiated, or expressly assented or agreed to, unless this
7 Act expressly so requires.

8 Section 107. Legal recognition of electronic record and
9 authentication; use of electronic agents.

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

13 (b) This Act does not require that a record or
14 authentication be generated, stored, sent, received, or
15 otherwise processed by electronic means or in electronic
16 form.

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

20 (d) A person that uses an electronic agent that it has
21 selected for making an authentication, performance, or
22 agreement, including manifestation of assent, is bound by the
23 operations of the electronic agent, even if no individual was
24 aware of or reviewed the agent's operations or the results of
25 the operations.

26 Section 108. Proof and effect of authentication.

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

31 (b) Compliance with a commercially reasonable
32 attribution procedure agreed to or adopted by the parties or

1 established by law for authenticating a record authenticates
2 the record as a matter of law.

3 Section 109. Choice of law.

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

10 (b) In the absence of an enforceable agreement on choice
11 of law, the following rules determine which jurisdiction's
12 law governs in all respects for purposes of contract law:

13 (1) An access contract or a contract providing for
14 electronic delivery of a copy is governed by the law of
15 the jurisdiction in which the licensor was located when
16 the agreement was entered into.

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

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

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

31 (d) For purposes of this Section, a party is located at
32 its place of business if it has one place of business, at its
33 chief executive office if it has more than one place of

1 business, or at its place of incorporation or primary
2 registration if it does not have a physical place of
3 business. Otherwise, a party is located at its primary
4 residence.

5 Section 110. Contractual choice of forum.

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

9 (b) A judicial forum specified in an agreement is not
10 exclusive unless the agreement expressly so provides.

11 Section 111. Unconscionable contract or term.

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

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

23 Section 112. Manifesting assent; opportunity to review.

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

27 (1) authenticates the record or term with intent to
28 adopt or accept it; or

29 (2) intentionally engages in conduct or makes
30 statements with reason to know that the other party or
31 its electronic agent may infer from the conduct or

1 statement that the person assents to the record or term.

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

5 (1) authenticates the record or term; or

6 (2) engages in operations that in the circumstances
7 indicate acceptance of the record or term.

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

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

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

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

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

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

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

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

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

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

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

23 Section 113. Variation by agreement; commercial
24 practice.

25 (a) The effect of any provision of this Act, including
26 an allocation of risk or imposition of a burden, may be
27 varied by agreement of the parties. However, the following
28 rules apply:

29 (1) Obligations of good faith, diligence,
30 reasonableness, and care imposed by this Act may not be
31 disclaimed by agreement, but the parties by agreement may
32 determine the standards by which the performance of the
33 obligation is to be measured if the standards are not

1 manifestly unreasonable.

2 (2) The limitations on enforceability imposed by
3 unconscionability under Section 111 and fundamental
4 public policy under Section 105(b) may not be varied by
5 agreement.

6 (3) Limitations on enforceability of, or agreement
7 to, a contract, term, or right expressly stated in the
8 Sections listed in the following subparagraphs may not be
9 varied by agreement except to the extent provided in each
10 Section:

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

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

15 (C) the requirements for manifesting assent
16 and opportunity for review in Section 112;

17 (D) the limitations on enforceability in
18 Section 201;

19 (E) the limitations on a mass-market license
20 in Section 209;

21 (F) the consumer defense arising from an
22 electronic error in Section 214;

23 (G) the requirements for an enforceable term
24 in Sections 303(b), 307(g), 406(b) and (c), and
25 804(a);

26 (H) the limitations on a financier in Sections
27 507 through 511;

28 (I) the restrictions on altering the period of
29 limitations in Section 805(a) and (b); and

30 (J) the limitations on self-help repossession
31 in Sections 815(b) and 816.

32 (b) Any usage of trade of which the parties are or
33 should be aware and any course of dealing or course of
34 performance between the parties are relevant to determining

1 the existence or meaning of an agreement.

2 Section 114. Supplemental principles; good faith;
3 decision for court; reasonable time; reason to know.

4 (a) Unless displaced by this Act, principles of law and
5 equity, including the law merchant and the common law of this
6 State relative to capacity to contract, principal and agent,
7 estoppel, fraud, misrepresentation, duress, coercion,
8 mistake, and other validating or invalidating cause,
9 supplement this Act. Among the laws supplementing and not
10 displaced by this Act are trade secret laws and unfair
11 competition laws.

12 (b) Every contract or duty within the scope of this Act
13 imposes an obligation of good faith in its performance or
14 enforcement.

15 (c) Whether a term is conspicuous or is unenforceable
16 under Section 105(a) or (b), 111, or 209(a) and whether an
17 attribution procedure is commercially reasonable or effective
18 under Section 108, 212, or 213 are questions to be determined
19 by the court.

20 (d) Whether an agreement has legal consequences is
21 determined by this Act.

22 (e) Whenever this Act requires any action to be taken
23 within a reasonable time, the following rules apply:

24 (1) What is a reasonable time for taking the action
25 depends on the nature, purpose, and circumstances of the
26 action.

27 (2) Any time that is not manifestly unreasonable
28 may be fixed by agreement.

29 (f) A person has reason to know a fact if the person has
30 knowledge of the fact or, from all the facts and
31 circumstances known to the person without investigation, the
32 person should be aware that the fact exists.

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PART 2
FORMATION AND TERMS
SUBPART A. FORMATION OF CONTRACT

Section 201. Formal requirements.

(a) Except as otherwise provided in this Section, a contract requiring payment of a contract fee 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 agreement is a license for an agreed duration of one year or less or which may 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 under that subsection beyond the number of copies or subject matter shown in the record.

(c) A contract that does not satisfy the requirements of subsection (a) is nevertheless enforceable under that subsection if:

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

(2) the party against which enforcement is sought admits in court, by pleading or by 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

1 record in confirmation of the contract and sufficient against
2 the sender is received and the party receiving it has reason
3 to know its contents, the record satisfies subsection (a)
4 against the party receiving it unless notice of objection to
5 its contents is given in a record within a reasonable time
6 after the confirming record is received.

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

11 (f) A transaction within the scope of this Act is not
12 subject to a statute of frauds contained in another law of
13 this State.

14 Section 202. Formation in general.

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

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

25 (c) Even if one or more terms are left open or to be
26 agreed upon, a contract does not fail for indefiniteness if
27 the parties intended to make a contract and there is a
28 reasonably certain basis for giving an appropriate remedy.

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

33 (e) If a term is to be adopted by later agreement and

1 the parties intend not to be bound unless the term is so
2 adopted, a contract is not formed if the parties do not agree
3 to the term. In that case, each party shall deliver to the
4 other party, or with the consent of the other party destroy,
5 all copies of information, access materials, and other
6 materials received or made, and each party is entitled to a
7 return with respect to any contract fee paid for which
8 performance has not been received, has not been accepted, or
9 has been redelivered without any benefit being retained. The
10 parties remain bound by any contractual use term with respect
11 to information or copies received or made from copies
12 received pursuant to the agreement and not delivered or
13 deliverable to the other party.

14 Section 203. Offer and acceptance in general. Unless
15 otherwise unambiguously indicated by the language or the
16 circumstances:

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

20 (2) An order or other offer to acquire a copy for
21 prompt or current delivery invites acceptance by either a
22 prompt promise to ship or a prompt or current shipment of
23 a conforming or nonconforming copy. However, a shipment
24 of a nonconforming copy is not an acceptance if the
25 licensor seasonably notifies the licensee that the
26 shipment is offered only as an accommodation to the
27 licensee.

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

33 (4) If an offer in an electronic message evokes an

1 electronic message accepting the offer, a contract is
2 formed:

3 (A) when an electronic acceptance is received;

4 or

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

10 Section 204. Acceptance with varying terms.

11 (a) In this Section, an acceptance materially alters an
12 offer if it contains a term that materially conflicts with or
13 varies a term of the offer or that adds a material term not
14 contained in the offer.

15 (b) Except as otherwise provided in Section 205, a
16 definite and seasonable expression of acceptance operates as
17 an acceptance, even if the acceptance contains terms that
18 vary from the terms of the offer, unless the acceptance
19 materially alters the offer.

20 (c) If an acceptance materially alters the offer, the
21 following rules apply:

22 (1) A contract is not formed unless:

23 (A) a party agrees, such as by manifesting
24 assent, to the other party's offer or acceptance; or

25 (B) all the other circumstances, including the
26 conduct of the parties, establish a contract.

27 (2) If a contract is formed by the conduct of both
28 parties, the terms of the contract are determined under
29 Section 210.

30 (d) If an acceptance varies from but does not materially
31 alter the offer, a contract is formed based on the terms of
32 the offer. In addition, the following rules apply:

33 (1) Terms in the acceptance which conflict with

1 terms in the offer are not part of the contract.

2 (2) An additional nonmaterial term in the
3 acceptance is a proposal for an additional term. Between
4 merchants, the proposed additional term becomes part of
5 the contract unless the offeror gives notice of objection
6 before, or within a reasonable time after, it receives
7 the proposed terms.

8 Section 205. Conditional offer or acceptance.

9 (a) In this Section, an offer or acceptance is
10 conditional if it is conditioned on agreement by the other
11 party to all the terms of the offer or acceptance.

12 (b) Except as otherwise provided in subsection (c), a
13 conditional offer or acceptance precludes formation of a
14 contract unless the other party agrees to its terms, such as
15 by manifesting assent.

16 (c) If an offer and acceptance are in standard forms and
17 at least one form is conditional, the following rules apply:

18 (1) Conditional language in a standard term
19 precludes formation of a contract only if the actions of
20 the party proposing the form are consistent with the
21 conditional language, such as by refusing to perform,
22 refusing to permit performance, or refusing to accept the
23 benefits of the agreement, until its proposed terms are
24 accepted.

25 (2) A party that agrees, such as by manifesting
26 assent, to a conditional offer that is effective under
27 paragraph (1) adopts the terms of the offer under Section
28 208 or 209, except a term that conflicts with an
29 expressly agreed term regarding price or quantity.

30 Section 206. Offer and acceptance: electronic agents.

31 (a) A contract may be formed by the interaction of
32 electronic agents. If the interaction results in the

1 electronic agents' engaging in operations that under the
2 circumstances indicate acceptance of an offer, a contract is
3 formed, but a court may grant appropriate relief if the
4 operations resulted from fraud, electronic mistake, or the
5 like.

6 (b) A contract may be formed by the interaction of an
7 electronic agent and an individual acting on the individual's
8 own behalf or for another person. A contract is formed if
9 the individual takes an action or makes a statement that the
10 individual can refuse to take or say and that the individual
11 has reason to know will:

12 (1) cause the electronic agent to perform, provide
13 benefits, or allow the use or access that is the subject
14 of the contract, or send instructions to do so; or

15 (2) indicate acceptance, regardless of other
16 expressions or actions by the individual to which the
17 individual has reason to know the electronic agent cannot
18 react.

19 (c) The terms of a contract formed under subsection (b)
20 are determined under Section 208 or 209 but do not include a
21 term provided by the individual if the individual had reason
22 to know that the electronic agent could not react to the
23 term.

24 Section 207. Formation: releases of informational
25 rights.

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

28 (1) in a record to which the releasing party agrees,
29 such as by manifesting assent, and which identifies the
30 informational rights released; or

31 (2) enforceable under estoppel, implied license, or
32 other law.

33 (b) A release continues for the duration of the

1 informational rights released if the release does not specify
2 its duration and does not require affirmative performance
3 after the grant of the release by:

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

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

9 SUBPART B. TERMS OF RECORDS

10 Section 208. Adopting terms of records. Except as
11 otherwise provided in Section 209, the following rules apply:

12 (1) A party adopts the terms of a record, including
13 a standard form, as the terms of the contract if the
14 party agrees to the record, such as by manifesting
15 assent.

16 (2) The terms of a record may be adopted pursuant
17 to paragraph (1) after beginning performance or use if
18 the parties had reason to know that their agreement would
19 be represented in whole or part by a later record to be
20 agreed on and there would not be an opportunity to review
21 the record or a copy of it before performance or use
22 begins. If the parties fail to agree to the later terms
23 and did not intend to form a contract unless they so
24 agreed, Section 202(e) applies.

25 (3) If a party adopts the terms of a record, the
26 terms become part of the contract without regard to the
27 party's knowledge or understanding of individual terms in
28 the record, except for a term that is unenforceable
29 because it fails to satisfy another requirement of this
30 Act.

31 Section 209. Mass-market license.

1 (a) A party adopts the terms of a mass-market license
2 for purposes of Section 208 only if the party agrees to the
3 license, such as by manifesting assent, before or during the
4 party's initial performance or use of or access to the
5 information. A term is not part of the license if:

6 (1) the term is unconscionable or is unenforceable
7 under Section 105(a) or (b); or

8 (2) subject to Section 301, the term conflicts with
9 a term to which the parties to the license have expressly
10 agreed.

11 (b) If a mass-market license or a copy of the license is
12 not available in a manner permitting an opportunity to review
13 by the licensee before the licensee becomes obligated to pay
14 and the licensee does not agree, such as by manifesting
15 assent, to the license after having an opportunity to review,
16 the licensee is entitled to a return under Section 112 and,
17 in addition, to:

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

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

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

31 (B) the installation alters the system or
32 information in it but does not restore the system or
33 information after removal of the installed
34 information because the licensee rejected the

1 license.

2 (c) In a mass-market transaction, if the licensor does
3 not have an opportunity to review a record containing
4 proposed terms from the licensee before the licensor delivers
5 or becomes obligated to deliver the information, and if the
6 licensor does not agree, such as by manifesting assent, to
7 those terms after having that opportunity, the licensor is
8 entitled to a return.

9 Section 210. Terms of contract formed by conduct.

10 (a) Except as otherwise provided in subsection (b) and
11 subject to Section 301, if a contract is formed by conduct of
12 the parties, the terms of the contract are determined by
13 consideration of the terms and conditions to which the
14 parties expressly agreed, course of performance, course of
15 dealing, usage of trade, the nature of the parties' conduct,
16 the records exchanged, the information or informational
17 rights involved, the supplementary provisions of this Act,
18 and all other relevant circumstances.

19 (b) This Section does not apply if the parties
20 authenticate a record of the contract or a party agrees, such
21 as by manifesting assent, to the record containing the terms
22 of the other party.

23 Section 211. Pretransaction disclosures in Internet-type
24 transactions. This Section applies to a licensor that makes
25 its computer information available to a licensee by
26 electronic means from its Internet or similar electronic
27 site. In such a case, the licensor affords an opportunity to
28 review the terms of a standard form license which opportunity
29 satisfies Section 112(e) with respect to a licensee that
30 acquires the information from that site, if the licensor:

31 (1) makes the standard terms of the license readily
32 available for review by the licensee before the

1 information is delivered or the licensee becomes
2 obligated to pay, whichever occurs first, by:

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

9 (B) disclosing the availability of the
10 standard terms in a prominent place on the site from
11 which the computer information is offered and
12 promptly furnishing a copy of the standard terms on
13 request before the transfer of the computer
14 information; and

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

18 SUBPART C. ELECTRONIC CONTRACTS: GENERALLY

19 Section 212. Efficacy and commercial reasonableness of
20 attribution procedure. The efficacy, including the
21 commercial reasonableness, of an attribution procedure is
22 determined by the court. In making this determination, the
23 following rules apply:

24 (1) An attribution procedure established by law is
25 effective for transactions within the coverage of the
26 statute or rule.

27 (2) Except as otherwise provided in paragraph (1),
28 commercial reasonableness and effectiveness is determined
29 in light of the purposes of the procedure and the
30 commercial circumstances at the time the parties agreed
31 to or adopted the procedure.

32 (3) An attribution procedure may use any security

1 device or method that is commercially reasonable under
2 the circumstances.

3 Section 213. Determining attribution.

4 (a) An electronic authentication, display, message,
5 record, or performance is attributed to a person if it was
6 the act of the person or its electronic agent, or if the
7 person is bound by it under agency or other law. The party
8 relying on attribution of an electronic authentication,
9 display, message, record, or performance to another person
10 has the burden of establishing attribution.

11 (b) The act of a person may be shown in any manner,
12 including a showing of the efficacy of an attribution
13 procedure that was agreed to or adopted by the parties or
14 established by law.

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

20 (d) If an attribution procedure exists to detect errors
21 or changes in an electronic authentication, display, message,
22 record, or performance, and was agreed to or adopted by the
23 parties or established by law, and one party conformed to the
24 procedure but the other party did not, and the nonconforming
25 party would have detected the change or error had that party
26 also conformed, the effect of noncompliance is determined by
27 the agreement but, in the absence of agreement, the
28 conforming party may avoid the effect of the error or change.

29 Section 214. Electronic error: consumer defenses.

30 (a) In this Section, "electronic error" means an error
31 in an electronic message created by a consumer using an
32 information processing system if a reasonable method to

1 detect and correct or avoid the error was not provided.

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

5 (1) promptly on learning of the error:

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

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

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

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

16 Section 215. Electronic message: when effective; effect
17 of acknowledgment.

18 (a) Receipt of an electronic message is effective when
19 received even if no individual is aware of its receipt.

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

24 SUBPART D. IDEA OR INFORMATION SUBMISSIONS

25 Section 216. Idea or Information Submission.

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

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

1 agreement.

2 Section 302. Practical construction.

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

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

9 (2) course of performance prevails over course of
10 dealing and usage of trade; and

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

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

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

20 (d) The existence and scope of a usage of trade must be
21 proved as facts.

22 Section 303. Modification and rescission.

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

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

31 (c) A modification of a contract and the contract as
32 modified must satisfy the requirements of Sections 201(a) and

1 307(g) if the contract as modified is within those
2 provisions.

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

6 Section 304. Continuing contractual terms.

7 (a) Terms of an agreement involving successive
8 performances apply to all performances, even if the terms are
9 not displayed or otherwise brought to the attention of a
10 party with respect to each successive performance, unless the
11 terms are modified in accordance with this Act or the
12 contract.

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

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

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

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

28 (d) The enforceability of changes made pursuant to a
29 procedure that does not comply with subsection (b) is
30 determined by the other provisions of this Act or other law.

31 Section 305. Terms to be specified. An agreement that
32 is otherwise sufficiently definite to be a contract is not

1 invalid because it leaves particulars of performance to be
2 specified by one of the parties. If particulars of
3 performance are to be specified by a party, the following
4 rules apply:

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

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

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

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

14 Section 306. Performance under open terms. A
15 performance obligation of a party that cannot be determined
16 from the agreement or from other provisions of this Act
17 requires the party to perform in a manner and in a time that
18 is reasonable in light of the commercial circumstances
19 existing at the time of agreement.

20 SUBPART B. INTERPRETATION

21 Section 307. Interpretation and requirements for grant.

22 (a) A license grants:

23 (1) the contractual rights that are expressly
24 described; and

25 (2) a contractual right to use any informational
26 rights within the licensor's control at the time of
27 contracting which are necessary in the ordinary course to
28 exercise the expressly described rights.

29 (b) If a license expressly limits use of the information
30 or informational rights, use in any other manner is a breach
31 of contract. In all other cases, a license contains an

1 implied limitation that the licensee will not use the
2 information or informational rights otherwise than as
3 described in subsection (a). However, use inconsistent with
4 this implied limitation is not a breach if it is permitted
5 under applicable law in the absence of the implied
6 limitation.

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

12 (d) A party is not entitled to any rights in new
13 versions of, or improvements or modifications to, information
14 made by the other party. A licensor's agreement to provide
15 new versions, improvements, or modifications requires that
16 the licensor provide them as developed and made generally
17 commercially available from time to time by the licensor.

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

22 (f) Terms concerning scope must be construed under
23 ordinary principles of contract interpretation in light of
24 the informational rights and the commercial context. In
25 addition, the following rules apply:

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

33 (2) A grant of an "exclusive license", or a grant
34 in similar terms, means that:

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

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

9 (g) The rules in this Section may be varied only by a
10 record that is sufficient to indicate that a contract has
11 been made and which is:

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

14 (2) prepared and delivered by one party and adopted
15 by the other under Section 208 or 209.

16 Section 308. Duration of contract. If an agreement does
17 not specify its duration, to the extent allowed by other law,
18 the following rules apply:

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

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

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

1 (i) transfers ownership of a copy; or
 2 (ii) delivers a copy for a contract fee
 3 the total amount of which is fixed at or before
 4 the time of delivery of the copy; or
 5 (B) the license expressly grants the right to
 6 incorporate or use the licensed information or
 7 informational rights with information or
 8 informational rights from other sources in a
 9 combined work for public distribution or public
 10 performance.

11 Section 309. Agreement for performance to party's
 12 satisfaction.

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

18 (b) Performance must be to the subjective satisfaction
 19 of the other party if:

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

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

27 PART 4

28 WARRANTIES

29 Section 401. Warranty and obligations concerning
 30 noninterference and noninfringement.

31 (a) A licensor of information that is a merchant

1 regularly dealing in information of the kind warrants that
2 the information will be delivered free of the rightful claim
3 of any third person by way of infringement or
4 misappropriation, but a licensee that furnishes detailed
5 specifications to the licensor and the method required for
6 meeting the specifications holds the licensor harmless
7 against any such claim that arises out of compliance with the
8 specification or required method except for a claim that
9 results from the failure of the licensor to adopt, or notify
10 the licensee of, a noninfringing alternative of which the
11 licensor had reason to know.

12 (b) A licensor warrants:

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

19 (2) as to rights granted exclusively to the
20 licensee, that within the scope of the license:

21 (A) to the knowledge of the licensor, any
22 licensed patent rights are valid and exclusive to
23 the extent exclusivity and validity are recognized
24 by the law under which the patent rights were
25 created; and

26 (B) in all other cases, the licensed
27 informational rights are valid and exclusive for the
28 information as a whole to the extent exclusivity and
29 validity are recognized by the law applicable to the
30 licensed rights in a jurisdiction to which the
31 license applies.

32 (c) The warranties in this Section are subject to the
33 following rules:

34 (1) If the licensed informational rights are

1 subject to a right of privileged use, collective
2 administration, or compulsory licensing, the warranty is
3 not made with respect to those rights.

4 (2) The obligations under subsections (a) and
5 (b)(2) apply solely to informational rights arising under
6 the laws of the United States or a State, unless the
7 contract expressly provides that the warranty obligations
8 extend to rights under the laws of other countries.
9 Language is sufficient for this purpose if it states "The
10 licensor warrants 'exclusivity' 'noninfringement' 'in
11 specified countries' 'worldwide'", or words of similar
12 import. In that case, the warranty extends to the
13 specified country or, in the case of a reference to
14 "worldwide" or the like, to all countries within the
15 description, but only to the extent the rights are
16 recognized under a treaty or international convention to
17 which the country and the United States are signatories.

18 (3) The warranties under subsections (a) and (b)(2)
19 are not made by a license that merely permits use, or
20 covenants not to claim infringement because of the use,
21 of rights under a licensed patent.

22 (d) Except as otherwise provided in subsection (e), a
23 warranty under this Section may be disclaimed or modified
24 only by specific language or by circumstances that give the
25 licensee reason to know that the licensor does not warrant
26 that competing claims do not exist or that the licensor
27 purports to grant only the rights it may have. In an
28 automated transaction, language is sufficient if it is
29 conspicuous. Otherwise, language in a record is sufficient if
30 it states "There is no warranty against interference with
31 your enjoyment of the information or against infringement",
32 or words of similar import.

33 (e) Between merchants, a grant of a "quitclaim", or a
34 grant in similar terms, grants the information or

1 informational rights without an implied warranty as to
2 infringement or misappropriation or as to the rights actually
3 possessed or transferred by the licensor.

4 Section 402. Express warranty.

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

7 (1) An affirmation of fact or promise made by the
8 licensor to its licensee, including by advertising, which
9 relates to the information and becomes part of the basis
10 of the bargain creates an express warranty that the
11 information to be furnished under the agreement will
12 conform to the affirmation or promise.

13 (2) Any description of the information which is
14 made part of the basis of the bargain creates an express
15 warranty that the information will conform to the
16 description.

17 (3) Any sample, model, or demonstration of a final
18 product which is made part of the basis of the bargain
19 creates an express warranty that the performance of the
20 information will reasonably conform to the performance of
21 the sample, model, or demonstration, taking into account
22 differences that would appear to a reasonable person in
23 the position of the licensee between the sample, model,
24 or demonstration and the information as it will be used.

25 (b) It is not necessary to the creation of an express
26 warranty that the licensor use formal words, such as
27 "warranty" or "guaranty", or state a specific intention to
28 make a warranty. However, an express warranty is not created
29 by:

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

32 (2) a display or description of a portion of the
33 information to illustrate the aesthetics, appeal,

1 suitability to taste, subjective quality, or the like of
2 informational content; or

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

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

14 Section 403. Implied warranty: merchantability of
15 computer program.

16 (a) Unless the warranty is disclaimed or modified, a
17 licensor that is a merchant with respect to computer programs
18 of the kind warrants:

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

22 (2) to the distributor that:

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

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

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

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

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

4 Section 404. Implied warranty: informational content.

5 (a) Unless the warranty is disclaimed or modified, a
6 merchant that, in a special relationship of reliance with a
7 licensee, collects, compiles, processes, provides, or
8 transmits informational content warrants to that licensee
9 that there is no inaccuracy in the informational content
10 caused by the merchant's failure to perform with reasonable
11 care.

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

- 14 (1) published informational content; or
- 15 (2) a person that acts as a conduit or provides no
16 more than editorial services in collecting, compiling,
17 distributing, processing, providing, or transmitting
18 informational content that under the circumstances can be
19 identified as that of a third person.

20 (c) The warranty under this Section is not subject to
21 the preclusion in Section 113(a)(1) on disclaiming
22 obligations of diligence, reasonableness, or care.

23 Section 405. Implied warranty: licensee's purpose;
24 system integration.

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

- 31 (1) Except as otherwise provided in paragraph (2),
32 there is an implied warranty that the information is fit

1 for that purpose.

2 (2) If from all the circumstances it appears that
3 the licensor was to be paid for the amount of its time or
4 effort regardless of the fitness of the resulting
5 information, the warranty under paragraph (1) is that the
6 information will not fail to achieve the licensee's
7 particular purpose as a result of the licensor's lack of
8 reasonable effort.

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

11 (1) the aesthetics, appeal, suitability to taste, or
12 subjective quality of informational content; or

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

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

24 (d) The warranty under this Section is not subject to
25 the preclusion in Section 113(a)(1) on disclaiming diligence,
26 reasonableness, or care.

27 Section 406. Disclaimer or modification of warranty.

28 (a) Words or conduct relevant to the creation of an
29 express warranty and words or conduct tending to disclaim or
30 modify an express warranty must be construed wherever
31 reasonable as consistent with each other. Subject to Section
32 301 with regard to parol or extrinsic evidence, the
33 disclaimer or modification is inoperative to the extent that

1 such construction is unreasonable.

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

6 (1) Except as otherwise provided in this
7 subsection:

8 (A) To disclaim or modify the implied warranty
9 arising under Section 403, language must mention
10 "merchantability" or "quality" or use words of
11 similar import and, if in a record, must be
12 conspicuous.

13 (B) To disclaim or modify the implied warranty
14 arising under Section 404, language in a record must
15 mention "accuracy" or use words of similar import.

16 (2) Language to disclaim or modify the implied
17 warranty arising under Section 405 must be in a record
18 and be conspicuous. It is sufficient to state "There is
19 no warranty that this information, our efforts, or the
20 system will fulfill any of your particular purposes or
21 needs", or words of similar import.

22 (3) Language in a record is sufficient to disclaim
23 all implied warranties if it individually disclaims each
24 implied warranty or, except for the warranty in Section
25 401, if it is conspicuous and states "Except for express
26 warranties stated in this contract, if any, this
27 'information' 'computer program' is provided with all
28 faults, and the entire risk as to satisfactory quality,
29 performance, accuracy, and effort is with the user", or
30 words of similar import.

31 (4) A disclaimer or modification sufficient under
32 Article 2 or 2A of the Uniform Commercial Code to
33 disclaim or modify an implied warranty of merchantability
34 is sufficient to disclaim or modify the warranties under

1 Sections 403 and 404. A disclaimer or modification
2 sufficient under Article 2 or 2A of the Uniform
3 Commercial Code to disclaim or modify an implied warranty
4 of fitness for a particular purpose is sufficient to
5 disclaim or modify the warranties under Section 405.

6 (c) Unless the circumstances indicate otherwise, all
7 implied warranties, but not the warranty under Section 401,
8 are disclaimed by expressions like "as is" or "with all
9 faults" or other language that in common understanding calls
10 the licensee's attention to the disclaimer of warranties and
11 makes plain that there are no implied warranties.

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

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

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

26 (g) Remedies for breach of warranty may be limited in
27 accordance with this Act with respect to liquidation or
28 limitation of damages and contractual modification of remedy.

29 Section 407. Modification of computer program. A
30 licensee that modifies a computer program, other than by
31 using a capability of the program intended for that purpose
32 in the ordinary course, does not invalidate any warranty
33 regarding performance of an unmodified copy but does

1 invalidate any warranties, express or implied, regarding
2 performance of the modified copy. A modification occurs if a
3 licensee alters code in, deletes code from, or adds code to
4 the computer program.

5 Section 408. Cumulation and conflict of warranties.
6 Warranties, whether express or implied, must be construed as
7 consistent with each other and as cumulative, but if that
8 construction is unreasonable, the intention of the parties
9 determines which warranty is dominant. In ascertaining that
10 intention, the following rules apply:

11 (1) Exact or technical specifications displace an
12 inconsistent sample or model or general language of
13 description.

14 (2) A sample displaces inconsistent general
15 language of description.

16 (3) Express warranties displace inconsistent
17 implied warranties other than an implied warranty under
18 Section 405(a).

19 Section 409. Third-party beneficiaries of warranty.

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

26 (b) A warranty to a consumer extends to each individual
27 consumer in the licensee's immediate family or household if
28 the individual's use would have been reasonably expected by
29 the licensor.

30 (c) A contractual term that excludes or limits the
31 persons to which a warranty extends is effective except as to
32 individuals described in subsection (b).

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

5 PART 5

6 TRANSFER OF INTERESTS AND RIGHTS

7 SUBPART A. OWNERSHIP AND TRANSFERS

8 Section 501. Ownership of informational rights.

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

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

19 Section 502. Title to copy.

20 (a) In a license:

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

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

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

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

5 (2) if the agreement does not specify a time and
6 place:

7 (A) with respect to delivery of a copy on a
8 tangible medium, at the time and place the licensor
9 completed its obligations with respect to tender of
10 the copy; or

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

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

19 Section 503. Transfer of contractual interest. The
20 following rules apply to a transfer of a contractual
21 interest:

22 (1) A party's contractual interest may be
23 transferred unless the transfer:

24 (A) is prohibited by other law; or

25 (B) except as otherwise provided in paragraph
26 (3), would materially change the duty of the other
27 party, materially increase the burden or risk
28 imposed on the other party, or materially impair the
29 other party's property or its likelihood or
30 expectation of obtaining return performance.

31 (2) Except as otherwise provided in paragraph (3)
32 and Section 508(a)(1)(B), a term prohibiting transfer of
33 a party's contractual interest is enforceable, and a

1 transfer made in violation of that term is a breach of
2 contract and is ineffective to create contractual rights
3 in the transferee against the nontransferring party,
4 except to the extent that:

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

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

16 (3) A right to damages for breach of the whole
17 contract or a right to payment arising out of the
18 transferor's due performance of its entire obligation may
19 be transferred notwithstanding an agreement otherwise.

20 (4) A term that prohibits transfer of a contractual
21 interest under a mass-market license by the licensee must
22 be conspicuous.

23 Section 504. Effect of transfer of contractual interest.

24 (a) A transfer of "the contract" or of "all my rights
25 under the contract", or a transfer in similar general terms,
26 is a transfer of all contractual interests under the
27 contract. Whether the transfer is effective is determined by
28 Sections 503 and 508(a)(1)(B).

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

31 (1) The transferee is subject to all contractual
32 use terms.

33 (2) Unless the language or circumstances otherwise

1 indicate, as in a transfer as security, the transfer
2 delegates the duties of the transferor and transfers its
3 rights.

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

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

12 (c) A party to the original contract, other than the
13 transferor, may treat a transfer that conveys a right or duty
14 of performance without its consent as creating reasonable
15 grounds for insecurity and, without prejudice to the party's
16 rights against the transferor, may demand assurances from the
17 transferee under Section 708.

18 Section 505. Performance by delegate; subcontract.

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

22 (1) the contract prohibits delegation or
23 subcontracting; or

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

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

30 (c) An attempted delegation that violates a term
31 prohibiting delegation is not effective.

32 Section 506. Transfer by licensee.

1 (a) If all or any part of a licensee's interest in a
2 license is transferred, voluntarily or involuntarily, the
3 transferee does not acquire an interest in information,
4 copies, or the contractual or informational rights of the
5 licensee unless the transfer is effective under Section 503
6 or 508(a)(1)(B). If the transfer is effective, the transferee
7 takes subject to the terms of the license.

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

12 SUBPART B. FINANCING ARRANGEMENTS

13 Section 507. Financing if financier does not become
14 licensee. If a financier does not become a licensee in
15 connection with its financial accommodation contract, the
16 following rules apply:

17 (1) The financier does not receive the benefits or
18 burdens of the license.

19 (2) The licensee's rights and obligations with
20 respect to the information and informational rights are
21 governed by:

22 (A) the license;

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

25 (C) to the extent not inconsistent with
26 subparagraphs (A) and (B), any financial
27 accommodation contract between the financier and the
28 licensee, which may add additional conditions to the
29 licensee's right to use the licensed information or
30 informational rights.

31 Section 508. Finance licenses.

1 (a) If a financier becomes a licensee in connection with
2 its financial accommodation contract and then transfers its
3 contractual interest under the license, or sublicenses the
4 licensed computer information or informational rights, to a
5 licensee receiving the financial accommodation, the following
6 rules apply:

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

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

11 (B) the following conditions are fulfilled:

12 (i) before the licensor delivered the
13 information or granted the license to the
14 financier, the licensor received notice in a
15 record from the financier giving the name and
16 location of the accommodated licensee and
17 clearly indicating that the license was being
18 obtained in order to transfer the contractual
19 interest or sublicense the licensed information
20 or informational rights to the accommodated
21 licensee;

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

24 (iii) the accommodated licensee adopts
25 the terms of the license, which terms may be
26 supplemented by the financial accommodation
27 contract, to the extent the terms of the
28 financial accommodation contract are not
29 inconsistent with the license and any rights of
30 the licensor under other law.

31 (2) A financier that makes a transfer that is
32 effective under paragraph (1)(B) may make only the single
33 transfer or sublicense contemplated by the notice unless
34 the licensor consents to a later transfer.

1 (b) If a financier makes an effective transfer of its
2 contractual interest in a license, or an effective sublicense
3 of the licensed information or informational rights, to an
4 accommodated licensee, the following rules apply:

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

7 (A) the license;

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

10 (C) to the extent not inconsistent with
11 subparagraphs (A) and (B), the financial
12 accommodation contract, which may impose additional
13 conditions to the licensee's right to use the
14 licensed information or informational rights.

15 (2) The financier does not make warranties to the
16 accommodated licensee other than the warranty under
17 Section 401(b)(1) and any express warranties in the
18 financial accommodation contract.

19 Section 509. Financing arrangements: obligations
20 irrevocable. Unless the accommodated licensee is a consumer,
21 a term in a financial accommodation contract providing that
22 the accommodated licensee's obligations to the financier are
23 irrevocable and independent is enforceable. The obligations
24 become irrevocable and independent upon the licensee's
25 acceptance of the license or the financier's giving of value,
26 whichever occurs first.

27 Section 510. Financing arrangements: remedies or
28 enforcement.

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

32 (1) The financier may cancel the financial

1 accommodation contract.

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

6 (3) If the financier became a licensee and made a
7 transfer or sublicense that was effective under Section
8 508, it may exercise the remedies of a licensor for
9 breach, including the rights of an aggrieved party under
10 Section 815, subject to the limitations of Section 816.

11 (4) If the financier did not become a licensee or
12 did not make a transfer that was effective under Section
13 508, it may enforce a contractual right contained in the
14 financial accommodation contract to preclude the
15 licensee's further use of the information. However, the
16 following rules apply:

17 (A) The financier has no right to take
18 possession of copies, use the information or
19 informational rights, or transfer any contractual
20 interest in the license.

21 (B) If the accommodated licensee agreed to
22 transfer possession of copies to the financier in
23 the event of material breach of the financial
24 accommodation contract, the financier may enforce
25 that contractual right only if permitted to do so
26 under subsection (b)(1) and Section 503.

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

29 (1) A financier described in subsection (a)(3)
30 which is entitled under the financial accommodation
31 contract to take possession or prevent use of
32 information, copies, or related materials may do so only
33 if the licensor consents or if doing so would not result
34 in a material adverse change of the duty of the licensor,

1 materially increase the burden or risk imposed on the
2 licensor, disclose or threaten to disclose trade secrets
3 or confidential material of the licensor, or materially
4 impair the licensor's likelihood or expectation of
5 obtaining return performance.

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

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

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

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

22 Section 511. Financing arrangements: effect on
23 licensor's rights.

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

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

30 PART 6
31 PERFORMANCE
32 SUBPART A. GENERAL

1 Section 601. Performance of contract in general.

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

4 (b) If an uncured material breach of contract by one
5 party precedes the aggrieved party's performance, the
6 aggrieved party need not perform except with respect to
7 contractual use terms. In addition, the following rules
8 apply:

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

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

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

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

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

26 (3) A party shall pay or render the consideration
27 required by the agreement for a performance it accepts.
28 A party that accepts a performance has the burden of
29 establishing a breach of contract with respect to the
30 accepted performance.

31 (d) Except as otherwise provided in Sections 603 and
32 604, in the case of a performance with respect to a copy,
33 this Section is subject to Sections 606 through 610 and
34 Sections 704 through 707.

1 Section 602. Licensor's obligations to enable use.

2 (a) In this Section, "enable use" means to grant a
3 contractual right or permission with respect to information
4 or informational rights and to complete the acts, if any,
5 required under the agreement to make the information
6 available to the licensee.

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

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

13 (2) If the agreement requires delivery of a copy,
14 enabling use occurs when the copy is tendered to the
15 licensee.

16 (3) If the agreement requires delivery of a copy
17 and steps authorizing the licensee's use, enabling use
18 occurs when the last of those acts occurs.

19 (4) In an access contract, enabling use requires
20 tendering all access material necessary to enable the
21 agreed access.

22 (5) If the agreement requires a transfer of
23 ownership of informational rights and a filing or
24 recording is allowed by law to establish priority of the
25 transferred ownership, on request by the licensee, the
26 licensor shall execute and tender a record appropriate
27 for that purpose.

28 Section 603. Submissions of information to satisfaction
29 of party. If an agreement requires that submitted
30 information be to the satisfaction of the recipient, the
31 following rules apply:

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

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

8 (3) Except as otherwise provided in paragraph (4),
9 neither refusal nor acceptance occurs unless the
10 recipient expressly refuses or accepts the submitted
11 information, but the recipient may not use the submitted
12 information before acceptance.

13 (4) Silence and a failure to act in reference to a
14 submission beyond a commercially reasonable time to
15 respond entitle the submitting party to demand, in a
16 record delivered to the recipient, a decision on the
17 submission. If the recipient fails to respond within a
18 reasonable time after receipt of the demand, the
19 submission is deemed to have been refused.

20 Section 604. Immediately completed performance. If a
21 performance involves delivery of information or services
22 which, because of their nature, may provide a licensee,
23 immediately on performance or delivery, with substantially
24 all the benefit of the performance or with other significant
25 benefit that cannot be returned, the following rules apply:

26 (1) Sections 607 through 610 and Sections 704
27 through 707 do not apply.

28 (2) The rights of the parties are determined under
29 Section 601 and the ordinary standards of the business,
30 trade, or industry.

31 (3) Before tender of the performance, a party
32 entitled to receive the tender may inspect the media,
33 labels, or packaging but may not view the information or

1 otherwise receive the performance before completing any
2 performance of its own that is then due.

3 Section 605. Electronic regulation of performance.

4 (a) In this Section, "automatic restraint" means a
5 program, code, device, or similar electronic or physical
6 limitation the intended purpose of which is to restrict use
7 of information.

8 (b) A party entitled to enforce a limitation on use of
9 information may include an automatic restraint in the
10 information or a copy of it and use that restraint if:

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

13 (2) the restraint prevents a use that is
14 inconsistent with the agreement;

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

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

22 (c) This Section does not authorize an automatic
23 restraint that affirmatively prevents or makes impracticable
24 a licensee's access to its own information or information of
25 a third party, other than the licensor, if that information
26 is in the possession of the licensee or a third party and
27 accessed without use of the licensor's information or
28 informational rights.

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

32 (e) This Section does not preclude electronic
33 replacement or disabling of an earlier copy of information by

1 the licensor in connection with delivery of a new copy or
2 version under an agreement to replace or disable the earlier
3 copy by electronic means with an upgrade or other new
4 information.

5 (f) This Section does not authorize use of an automatic
6 restraint to enforce remedies in the event of breach of
7 contract or of cancellation for breach.

8 SUBPART B. PERFORMANCE IN DELIVERY OF COPIES

9 Section 606. Copy: delivery; tender of delivery.

10 (a) Delivery of a copy must be at the location
11 designated by agreement. In the absence of a designation, the
12 following rules apply:

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

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

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

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

32 (1) If the contract requires delivery of a copy

1 held by a third person without being moved, the tendering
2 party shall tender access material or documents required
3 by the agreement.

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

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

16 (B) In tendering electronic delivery of a
17 copy, the tendering party shall initiate or cause to
18 have initiated a transmission that is reasonable in
19 light of the nature of the information and other
20 circumstances, with expenses of transmission to be
21 borne by the receiving party.

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

26 Section 607. Copy: performance related to delivery;
27 payment.

28 (a) If performance requires delivery of a copy, the
29 following rules apply:

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

33 (2) Tender of delivery is a condition of the other

1 party's duty to accept the copy and entitles the
2 tendering party to acceptance of the copy.

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

5 (1) Tender of delivery is a condition of the
6 receiving party's duty to pay and entitles the tendering
7 party to payment according to the contract.

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

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

14 (d) If payment is due and demanded on delivery of a copy
15 or on delivery of a document of title, the right of the party
16 receiving tender to retain or dispose of the copy or
17 document, as against the tendering party, is conditioned on
18 making the payment due.

19 Section 608. Copy: right to inspect; payment before
20 inspection.

21 (a) Except as otherwise provided in Sections 603 and
22 604, if performance requires delivery of a copy, the
23 following rules apply:

24 (1) Except as otherwise provided in this Section,
25 the party receiving the copy has a right before payment
26 or acceptance to inspect the copy at a reasonable place
27 and time and in a reasonable manner to determine
28 conformance to the contract.

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

31 (3) A place or method of inspection or an
32 acceptance standard fixed by the parties is presumed to
33 be exclusive. However, the fixing of a place, method, or

1 standard does not postpone identification to the contract
2 or shift the place for delivery, passage of title, or
3 risk of loss. If compliance with the place or method
4 becomes impossible, inspection must be made as provided
5 in this Section unless the place or method fixed by the
6 parties was an indispensable condition the failure of
7 which avoids the contract.

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

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

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

17 (1) the nonconformity appears without inspection and
18 would justify refusal under Section 704; or

19 (2) despite tender of the required documents, the
20 circumstances would justify an injunction against honor
21 of a letter of credit under Article 5 of the Uniform
22 Commercial Code.

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

27 Section 609. Copy: when acceptance occurs.

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

30 (1) signifies, or acts with respect to the copy in a
31 manner that signifies, that the tender was conforming or
32 that the party will take or retain the copy despite the
33 nonconformity;

1 (2) does not make an effective refusal;

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

5 (4) obtains a substantial benefit from the copy and
6 cannot return that benefit; or

7 (5) acts in a manner inconsistent with the
8 licensor's ownership, but the act is an acceptance only
9 if the licensor elects to treat it as an acceptance and
10 ratifies the act to the extent it was within contractual
11 use terms.

12 (b) Except in cases governed by subsection (a)(3) or
13 (4), if there is a right to inspect under Section 608 or the
14 agreement, acceptance of a copy occurs only after the party
15 has had a reasonable opportunity to inspect the copy.

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

20 Section 610. Copy: effect of acceptance; burden of
21 establishing; notice of claims.

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

30 (b) A party accepting a copy has the burden of
31 establishing a breach of contract with respect to the copy.

32 (c) If a copy has been accepted, the accepting party
33 shall:

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

6 (2) if the claim is for breach of a warranty
7 regarding noninfringement and the accepting party is sued
8 by a third party because of the breach, notify the
9 warrantor within a reasonable time after receiving notice
10 of the litigation or be precluded from any remedy over
11 for the liability established by the litigation.

12 SUBPART C. SPECIAL TYPES OF CONTRACTS

13 Section 611. Access contracts.

14 (a) If an access contract provides for access over a
15 period of time, the following rules apply:

16 (1) The licensee's rights of access are to the
17 information as modified and made commercially available
18 by the licensor from time to time during that period.

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

22 (3) Unless it is subject to a contractual use term,
23 information obtained by the licensee is free of any use
24 restriction other than a restriction resulting from the
25 informational rights of another person or other law.

26 (4) Access must be available:

27 (A) at times and in a manner conforming to the
28 express terms of the agreement; and

29 (B) to the extent not expressly stated in the
30 agreement, at times and in a manner reasonable for
31 the particular type of contract in light of the
32 ordinary standards of the business, trade, or

1 industry.

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

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

10 (2) caused by:

11 (A) scheduled downtime;

12 (B) reasonable needs for maintenance;

13 (C) reasonable periods of failure of
14 equipment, computer programs, or communications; or

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

19 Section 612. Correction and support contracts.

20 (a) If a person agrees to provide services regarding the
21 correction of performance problems in computer information,
22 other than an agreement to cure its own existing breach of
23 contract, the following rules apply:

24 (1) If the services are provided by a licensor of
25 the information as part of a limited remedy, the licensor
26 undertakes that its performance will provide the licensee
27 with information that conforms to the agreement to which
28 the limited remedy applies.

29 (2) In all other cases, the person:

30 (A) shall perform at a time and place and in a
31 manner consistent with the express terms of the
32 agreement and, to the extent not stated in the
33 express terms, at a time and place and in a manner

1 that is reasonable in light of ordinary standards of
2 the business, trade, or industry; and

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

6 (b) Unless required to do so by an express or implied
7 warranty, a licensor is not required to provide instruction
8 or other support for the licensee's use of information or
9 access. A person that agrees to provide support shall make
10 the support available in a manner and with a quality
11 consistent with express terms of the support agreement and,
12 to the extent not stated in the express terms, at a time and
13 place and in a manner that is reasonable in light of ordinary
14 standards of the business, trade, or industry.

15 Section 613. Contracts involving publishers, dealers,
16 and end users.

17 (a) In this Section:

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

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

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

29 (b) In a contract between a dealer and an end user, if
30 the end user's right to use the information or informational
31 rights is subject to a license by the publisher and there was
32 no opportunity to review the license before the end user
33 became obligated to pay the dealer, the following rules

1 apply:

2 (1) The contract between the end user and the
3 dealer is conditioned on the end user's agreement to the
4 publisher's license.

5 (2) If the end user does not agree, such as by
6 manifesting assent, to the terms of the publisher's
7 license, the end user has a right to a return from the
8 dealer. A right under this paragraph is a return for
9 purposes of Sections 112, 208, and 209.

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

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

18 (1) in the form as received; and

19 (2) subject to the terms of any license the
20 publisher that the publisher provides to the dealer to be
21 furnished to end users.

22 (d) A dealer that enters into an agreement with an end
23 user is a licensor with respect to the end user under this
24 Act.

25 SUBPART D. LOSS AND IMPOSSIBILITY

26 Section 614. Risk of loss of copy.

27 (a) Except as otherwise provided in this Section, the
28 risk of loss as to a copy that is to be delivered to a
29 licensee, including a copy delivered by electronic means,
30 passes to the licensee upon its receipt of the copy.

31 (b) If an agreement requires or authorizes a licensor to
32 send a copy on a tangible medium by carrier, the following

1 rules apply:

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

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

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

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

20 (1) the licensee's receipt of a negotiable document
21 of title or other access materials covering the copy;

22 (2) acknowledgment by the third party to the
23 licensee of the licensee's right to possession of or
24 access to the copy; or

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

29 Section 615. Excuse by failure of presupposed
30 conditions.

31 (a) Unless a party has assumed a different obligation,
32 delay in performance by a party, or nonperformance in whole
33 or part by a party, other than of an obligation to make

1 payments or to conform to contractual use terms, is not a
2 breach of contract if the delay or nonperformance is of a
3 performance that has been made impracticable by:

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

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

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

13 (c) If an excuse affects only a part of a party's
14 capacity to perform an obligation for delivery of copies, the
15 party claiming excuse shall allocate performance among its
16 customers in any manner that is fair and reasonable and
17 notify the other party of the estimated quota to be made
18 available. In making the allocation, the party claiming
19 excuse may include the requirements of regular customers not
20 then under contract and its own requirements.

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

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

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

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

1 Section 616. Termination: survival of obligations.

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

5 (b) The following survive termination:

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

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

11 (3) a contractual use term applicable to any
12 licensed copy or information received from the other
13 party, or copies made of it, which are not returned or
14 returnable to the other party;

15 (4) an obligation to deliver, or dispose of
16 information, materials, documentation, copies, records,
17 or the like to the other party, an obligation to destroy
18 copies, or a right to obtain information from an escrow
19 agent;

20 (5) a choice of law or forum;

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

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

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

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

29 (10) an obligation to provide an accounting and make
30 any payment due under the accounting; and

31 (11) any term that the agreement provides will
32 survive.

33 Section 617. Notice of termination.

1 (a) Except as otherwise provided in subsection (b), a
2 party may not terminate a contract except on the happening of
3 an agreed event, such as the expiration of the stated
4 duration, unless the party gives reasonable notice of
5 termination to the other party.

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

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

15 Section 618. Termination: enforcement.

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

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

31 (c) Each party may enforce its rights under subsections
32 (a) and (b) by acting pursuant to Section 605 or by judicial
33 process, including obtaining an order that the party or an

1 officer of the court take the following actions with respect
2 to any licensed information, documentation, copies, or other
3 materials to be delivered:

- 4 (1) deliver or take possession of them;
- 5 (2) without removal, render unusable or eliminate
6 the capability to exercise contractual rights in or use
7 of them;
- 8 (3) destroy or prevent access to them; and
- 9 (4) require that the party or any other person in
10 possession or control of them make them available to the
11 other party at a place designated by that party which is
12 reasonably convenient to both parties.

13 (d) In an appropriate case, a court of competent
14 jurisdiction may grant injunctive relief to enforce the
15 parties' rights under this Section.

16 PART 7
17 BREACH OF CONTRACT
18 SUBPART A. GENERAL

19 Section 701. Breach of contract; material breach.

20 (a) Whether a party is in breach of contract is
21 determined by the agreement or, in the absence of agreement,
22 this Act. A breach occurs if a party without legal excuse
23 fails to perform an obligation in a timely manner, repudiates
24 a contract, or exceeds a contractual use term, or otherwise
25 is not in compliance with an obligation placed on it by this
26 Act or the agreement. A breach, whether or not material,
27 entitles the aggrieved party to its remedies.

- 28 (b) A breach of contract is material if:
- 29 (1) the contract so provides;
 - 30 (2) the breach is a substantial failure to perform a
31 term that is an essential element of the agreement; or
 - 32 (3) the circumstances, including the language of the

1 agreement, the reasonable expectations of the parties,
2 the standards and practices of the business, trade, or
3 industry, and the character of the breach, indicate that:

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

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

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

12 Section 702. Waiver of remedy for breach of contract.

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

19 (b) A party that accepts a performance with knowledge
20 that the performance constitutes a breach of contract and,
21 within a reasonable time after acceptance, does not notify
22 the other party of the breach waives all remedies for the
23 breach, unless acceptance was made on the reasonable
24 assumption that the breach would be cured and it has not been
25 seasonably cured. However, a party that seasonably notifies
26 the other party of a reservation of rights does not waive the
27 rights reserved.

28 (c) A party that refuses a performance and fails to
29 identify a particular defect that is ascertainable by
30 reasonable inspection waives the right to rely on that defect
31 to justify refusal only if:

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

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

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

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

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

17 Section 703. Cure of breach of contract.

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

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

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

30 (3) in a case not governed by paragraph (1) or (2),
31 the party in breach seasonably notifies the aggrieved
32 party of its intent to cure and promptly provides a
33 conforming performance before cancellation by the

1 aggrieved party.

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

8 (1) the party in breach receives seasonable notice
9 of the specific nonconformity and a demand for cure of
10 it; and

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

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

19 SUBPART B. DEFECTIVE COPIES

20 Section 704. Copy: refusal of defective tender.

21 (a) Subject to subsection (b) and Section 705, tender of
22 a copy that is a material breach of contract permits the
23 party to which tender is made to:

24 (1) refuse the tender;

25 (2) accept the tender; or

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

28 (b) In a mass-market transaction that calls for only a
29 single tender of a copy, a licensee may refuse the tender if
30 the tender does not conform to the contract.

31 (c) Refusal of a tender is ineffective unless:

32 (1) it is made before acceptance;

1 (2) it is made within a reasonable time after
2 tender or completion of any permitted effort to cure; and

3 (3) the refusing party seasonably notifies the
4 tendering party of the refusal.

5 (d) Except in a case governed by subsection (b), a party
6 that rightfully refuses tender of a copy may cancel the
7 contract only if the tender was a material breach of the
8 whole contract or the agreement so provides.

9 Section 705. Copy: contract with previous vested grant
10 of rights. If an agreement grants a right in or permission
11 to use informational rights which precedes or is otherwise
12 independent of the delivery of a copy, the following rules
13 apply:

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

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

21 (3) A breach that is material with respect to a
22 copy allows cancellation of the contract only if the
23 breach cannot be seasonably cured and is a material
24 breach of the whole contract.

25 Section 706. Copy: duties upon rightful refusal.

26 (a) Except as otherwise provided in this Section, after
27 rightful refusal or revocation of acceptance of a copy, the
28 following rules apply:

29 (1) If the refusing party rightfully cancels the
30 contract, Section 802 applies and all contractual use
31 terms continue.

32 (2) If the contract is not canceled, the parties

1 remain bound by all contractual obligations.

2 (b) On rightful refusal or revocation of acceptance of a
3 copy, the following rules apply to the extent consistent with
4 Section 802:

5 (1) Any use, sale, display, performance, or
6 transfer of the copy or information it contains, or any
7 failure to comply with a contractual use term, is a
8 breach of contract. The licensee shall pay the licensor
9 the reasonable value of any use. However, use for a
10 limited time within contractual use terms is not a
11 breach, and is not an acceptance under Section 609(a)(5),
12 if it:

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

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

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

21 (2) A party that refuses a copy shall:

22 (A) deliver the copy and all copies made of
23 it, all access materials, and documentation
24 pertaining to the refused information to the
25 tendering party or hold them with reasonable care
26 for a reasonable time for disposal at that party's
27 instructions; and

28 (B) follow reasonable instructions of the
29 tendering party for returning or delivering copies,
30 access material, and documentation, but instructions
31 are not reasonable if the tendering party does not
32 arrange for payment of or reimbursement for
33 reasonable expenses of complying with the
34 instructions.

1 (3) If the tendering party does not give
2 instructions within a reasonable time after being
3 notified of refusal, the refusing party, in a reasonable
4 manner to reduce or avoid loss, may store the copies,
5 access material, and documentation for the tendering
6 party's account or ship them to the tendering party and
7 is entitled to reimbursement for reasonable costs of
8 storage and shipment.

9 (4) Both parties remain bound by all contractual
10 use terms that would have been enforceable had the
11 performance not been refused.

12 (5) In complying with this Section, the refusing
13 party shall act in good faith. Conduct in good faith
14 under this Section is not acceptance or conversion and
15 may not be a ground for an action for damages under the
16 contract.

17 Section 707. Copy: revocation of acceptance.

18 (a) A party that accepts a nonconforming tender of a
19 copy may revoke acceptance only if the nonconformity is a
20 material breach of contract and the party accepted it:

21 (1) on the reasonable assumption that the
22 nonconformity would be cured, and the nonconformity was
23 not seasonably cured;

24 (2) during a continuing effort by the party in
25 breach at adjustment and cure, and the breach was not
26 seasonably cured; or

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

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

33 (c) Revocation of acceptance of a copy is precluded if:

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

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

8 (3) the party attempting to revoke received a
9 substantial benefit or value from the information, and
10 the benefit or value cannot be returned.

11 (d) A party that rightfully revokes has the same duties
12 and is under the same restrictions as if the party had
13 refused tender of the copy.

14 SUBPART C. REPUDIATION AND ASSURANCES

15 Section 708. Adequate assurance of performance.

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

21 (1) demand in a record adequate assurance of due
22 performance; and

23 (2) until that assurance is received, if
24 commercially reasonable, suspend any performance, other
25 than with respect to contractual use terms, for which the
26 agreed return performance has not been received.

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

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

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

6 Section 709. Anticipatory repudiation.

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

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

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

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

24 Section 710. Retraction of anticipatory repudiation.

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

30 (b) A retraction may be by any method that clearly
31 indicates to the aggrieved party that the repudiating party
32 intends to perform the contract. However, a retraction must

1 contain any assurance justifiably demanded under Section 708.

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

5 PART 8

6 REMEDIES

7 SUBPART A. GENERAL

8 Section 801. Remedies in general.

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

11 (b) Except as otherwise provided in Sections 803 and
12 804, if a party is in breach of contract, whether or not the
13 breach is material, the aggrieved party has the remedies
14 provided in the agreement or this Act, but the aggrieved
15 party shall continue to comply with any contractual use terms
16 with respect to information or copies received from the other
17 party which have not been returned or are not returnable to
18 the other party.

19 (c) Rescission or a claim for rescission of the
20 contract, or refusal of the information, does not preclude
21 and is not inconsistent with a claim for damages or other
22 remedy.

23 Section 802. Cancellation.

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

27 (b) Cancellation is not effective until the canceling
28 party gives notice of cancellation to the party in breach,
29 unless a delay required to notify the party would cause or
30 threaten material harm or loss to the aggrieved party. The
31 notification may be in any form reasonable under the

1 circumstances. However, in an access contract, a party may
2 cancel rights of access without notice.

3 (c) On cancellation, the following rules apply:

4 (1) If a party is in possession or control of
5 licensed information, documentation, materials, or copies
6 of licensed information, the following rules apply:

7 (A) A party that has rightfully refused a copy
8 shall comply with Section 706(b) as to the refused
9 copy.

10 (B) A party in breach of contract which would
11 be subject to an obligation to deliver under Section
12 618, shall deliver all information, documentation,
13 materials, and copies to the other party or hold
14 them with reasonable care for a reasonable time for
15 disposal at that party's instructions. The party in
16 breach of contract shall follow any reasonable
17 instructions received from the other party.

18 (C) Except as otherwise provided in
19 subparagraphs (A) and (B), the party shall comply
20 with Section 618.

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

24 (A) any right based on previous breach or
25 performance; and

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

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

32 (4) Cancellation of a license by the licensee ends
33 any contractual right to use the information,
34 informational rights, copies, or other materials, but the

1 licensee may use the information for a limited time after
2 the license has been canceled if the use:

3 (A) is within contractual use terms;

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

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

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

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

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

19 (e) Unless a contrary intention clearly appears, an
20 expression such as "cancellation", "rescission", or the like
21 may not be construed as a renunciation or discharge of a
22 claim in damages for an antecedent breach.

23 Section 803. Contractual modification of remedy.

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

26 (1) an agreement may provide for remedies in
27 addition to or in substitution for those provided in this
28 Act and may limit or alter the measure of damages
29 recoverable under this Act or a party's other remedies
30 under this Act, such as by precluding a party's right to
31 cancel for breach of contract, limiting remedies to
32 returning or delivering copies and repayment of the
33 contract fee, or limiting remedies to repair or

1 replacement of the nonconforming copies; and

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

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

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

14 (d) Consequential damages and incidental damages may be
15 excluded or limited by agreement unless the exclusion or
16 limitation is unconscionable. Exclusion or limitation of
17 consequential damages for personal injury in a consumer
18 contract for a computer program that is subject to this Act
19 and is contained in consumer goods is prima facie
20 unconscionable, but exclusion or limitation of damages for a
21 commercial loss is not unconscionable.

22 Section 804. Liquidation of damages.

23 (a) Damages for breach of contract by either party may
24 be liquidated by agreement in an amount that is reasonable in
25 light of:

26 (1) the loss anticipated at the time of contracting;

27 (2) the actual loss; or

28 (3) the actual or anticipated difficulties of
29 proving loss in the event of breach.

30 (b) If a term liquidating damages is unenforceable under
31 this subsection, the aggrieved party may pursue the remedies
32 provided in this Act, except as limited by other terms of the
33 contract.

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

9 (1) a right to recover damages other than under
10 subsection (a); and

11 (2) the amount or value of any benefits received by
12 the party in breach, directly or indirectly, by reason of
13 the contract.

14 (d) A term that does not liquidate damages, but that
15 limits damages available to the aggrieved party, must be
16 evaluated under Section 803.

17 Section 805. Limitation of actions.

18 (a) Except as otherwise provided in subsection (b), an
19 action for breach of contract must be commenced within the
20 later of four years after the right of action accrues or one
21 year after the breach was or should have been discovered, but
22 not later than five years after the right of action accrues.

23 (b) If the original agreement of the parties alters the
24 period of limitations, the following rules apply:

25 (1) The parties may reduce the period of limitation
26 to not less than one year after the right of action
27 accrues but may not extend it.

28 (2) In a consumer contract, the period of
29 limitation may not be reduced.

30 (c) Except as otherwise provided in subsection (d), a
31 right of action accrues when the act or omission constituting
32 a breach of contract occurs, even if the aggrieved party did
33 not know of the breach. A right of action for breach of

1 warranty accrues when tender of delivery of a copy pursuant
2 to Section 606, or access to the information, occurs.
3 However, if the warranty expressly extends to future
4 performance of the information or a copy, the right of action
5 accrues when the performance fails to conform to the
6 warranty, but not later than the date the warranty expires.

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

13 (1) a breach of warranty against third-party claims
14 for:

15 (A) infringement or misappropriation; or

16 (B) libel, slander, or the like;

17 (2) a breach of contract involving a party's
18 disclosure or misuse of confidential information; or

19 (3) a failure to provide an indemnity or to perform
20 another obligation to protect or defend against a
21 third-party claim.

22 (e) If an action commenced within the period of
23 limitation is so concluded as to leave available a remedy by
24 another action for the same breach of contract, the other
25 action may be commenced after expiration of the period of
26 limitation if the action is commenced within six months after
27 conclusion of the first action, unless the action was
28 concluded as a result of voluntary discontinuance or
29 dismissal for failure or neglect to prosecute.

30 (f) This Section does not alter the law on tolling of
31 the statute of limitations and does not apply to a right of
32 action that accrued before the effective date of this Act.

33 Section 806. Remedies for fraud. Remedies for material

1 misrepresentation or fraud include all remedies available
2 under this Act for nonfraudulent breach of contract.

3 SUBPART B. DAMAGES

4 Section 807. Measurement of damages in general.

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

12 (b) A party may not recover:

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

16 (2) damages that are speculative.

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

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

25 (e) Damages or expenses that relate to events after the
26 date of entry of judgment must be reduced to their present
27 value as of that date. In this subsection, "present value"
28 means the amount, as of a date certain, of one or more sums
29 payable in the future or the value of one or more
30 performances due in the future, discounted to the date
31 certain. The discount is determined by the interest rate
32 specified by the parties in their agreement unless that rate

1 was manifestly unreasonable when the agreement was entered
2 into. Otherwise, the discount is determined by a
3 commercially reasonable rate that takes into account the
4 circumstances of each case when the agreement was entered
5 into.

6 Section 808. Licensor's damages.

7 (a) In this Section, "substitute transaction" means a
8 transaction by the licensor which would not have been
9 possible except for the licensee's breach and which
10 transaction is for the same information or informational
11 rights with the same contractual use terms as the transaction
12 to which the licensee's breach applies.

13 (b) Except as otherwise provided in Section 807, a
14 breach of contract by a licensee entitles the licensor to
15 recover the following compensation for losses resulting in
16 the ordinary course from the breach, less expenses avoided as
17 a result of the breach, to the extent not otherwise accounted
18 for under this subsection:

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

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

27 (i) any performance accepted by the
28 licensee; and

29 (ii) any performance to which Section 604
30 applies;

31 (B) for performances not governed by
32 subparagraph (A), if the licensee repudiated or
33 wrongfully refused the performance or the licensor

1 rightfully canceled and the breach makes possible a
2 substitute transaction, the amount of loss as
3 determined by contract fees and the market value of
4 other consideration required under the contract for
5 the performance less:

6 (i) the contract fees and market value of
7 other consideration received from an actual and
8 commercially reasonable substitute transaction
9 entered into by the licensor in good faith and
10 without unreasonable delay; or

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

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

20 (D) damages calculated in any reasonable
21 manner; and

22 (2) consequential and incidental damages.

23 Section 809. Licensee's damages.

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

31 (1) damages measured in any combination of the
32 following ways, but not to exceed the market value of the
33 performance that was the subject of the breach plus

1 restitution of any amounts paid for performance not
2 received and not accounted for within the indicated
3 recovery:

4 (A) with respect to performance that has been
5 accepted and the acceptance not rightfully revoked,
6 the value of the performance required less the value
7 of the performance accepted as of the time and place
8 of acceptance;

9 (B) with respect to performance that has not
10 been rendered or that was rightfully refused or
11 acceptance of which was rightfully revoked:

12 (i) the amount of any payments made and
13 the value of other consideration given to the
14 licensor with respect to that performance and
15 not previously returned to the licensee;

16 (ii) the market value of the performance
17 less the contract fee for that performance; or

18 (iii) the cost of a commercially
19 reasonable substitute transaction less the
20 contract fee under the breached contract, if
21 the substitute transaction was entered into by
22 the licensee in good faith and without
23 unreasonable delay for substantially similar
24 information with the same contractual use
25 terms; or

26 (C) damages calculated in any reasonable
27 manner; and

28 (2) incidental and consequential damages.

29 (b) The amount of damages must be reduced by any unpaid
30 contract fees for performance by the licensor which has been
31 accepted by the licensee and as to which the acceptance has
32 not been rightfully revoked.

33 Section 810. Recoupment.

1 (a) Except as otherwise provided in subsection (b), an
2 aggrieved party, upon notifying the party in breach of
3 contract of its intention to do so, may deduct all or any
4 part of the damages resulting from the breach from any
5 payments still due under the same contract.

6 (b) If a breach of contract is not material with
7 reference to the particular performance, an aggrieved party
8 may exercise its rights under subsection (a) only if the
9 agreement does not require further affirmative performance by
10 the other party and the amount of damages deducted can be
11 readily liquidated under the agreement.

12 SUBPART C. REMEDIES RELATED TO PERFORMANCE

13 Section 811. Specific performance.

14 (a) Specific performance may be ordered:

15 (1) if the agreement provides for that remedy, other
16 than an obligation for the payment of money;

17 (2) if the contract was not for personal services
18 and the agreed performance is unique; or

19 (3) in other proper circumstances.

20 (b) An order for specific performance may contain any
21 conditions considered just and must provide adequate
22 safeguards consistent with the contract to protect the
23 confidentiality of information, information, and
24 informational rights of both parties.

25 Section 812. Completing performance.

26 (a) On breach of contract by a licensee, the licensor
27 may:

28 (1) identify to the contract any conforming copy not
29 already identified if, at the time the licensor learned
30 of the breach, the copy was in its possession;

31 (2) in the exercise of reasonable commercial

1 judgment for purposes of avoiding loss and effective
2 realization on effort or investment, complete the
3 information and identify it to the contract, cease work
4 on it, relicense or dispose of it, or proceed in any
5 other commercially reasonable manner; and

6 (3) pursue any remedy for breach that has not been
7 waived.

8 (b) On breach by a licensee, both parties remain bound
9 by all contractual use terms.

10 Section 813. Continuing use. On breach of contract by a
11 licensor, the following rules apply:

12 (1) A licensee that has not canceled the contract
13 may continue to use the information and informational
14 rights under the contract. If the licensee continues to
15 use the information or informational rights, the licensee
16 is bound by all terms of the contract, including
17 contractual use terms, obligations not to compete, and
18 obligations to pay contract fees.

19 (2) The licensee may pursue any remedy for breach
20 which has not been waived.

21 (3) The licensor's rights remain in effect but are
22 subject to the licensee's remedy for breach, including
23 any right of recoupment or setoff.

24 Section 814. Discontinuing access. On material breach
25 of an access contract or if the agreement so provides, a
26 party may discontinue all contractual rights of access of the
27 party in breach and direct any person that is assisting the
28 performance of the contract to discontinue its performance.

29 Section 815. Right to possession and to prevent use.

30 (a) On cancellation of a license, the licensor has the
31 right:

1 (1) to possession of all copies of the licensed
2 information in the possession or control of the licensee
3 and any other materials pertaining to that information
4 which by contract are to be returned or delivered by the
5 licensee to the licensor; and

6 (2) to prevent the continued exercise of contractual
7 and informational rights in the licensed information
8 under the license.

9 (b) Except as otherwise provided in Section 814, a
10 licensor may exercise its rights under subsection (a) without
11 judicial process only if this can be done:

12 (1) without a breach of the peace;

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

16 (3) in accordance with Section 816.

17 (c) In a judicial proceeding, the court may enjoin a
18 licensee in breach of contract from continued use of the
19 information and informational rights and may order the
20 licensor or a judicial officer to take the steps described in
21 Section 618.

22 (d) A party has a right to an expedited judicial hearing
23 on a request for prejudgment relief to enforce or protect its
24 rights under this Section.

25 (e) The right to possession under this Section is not
26 available to the extent that the information, before breach
27 of the license and in the ordinary course of performance
28 under the license, was so altered or commingled that the
29 information is no longer identifiable or separable.

30 (f) A licensee that provides information to a licensor
31 subject to contractual use terms has the rights and is
32 subject to the limitations of a licensor under this Section
33 with respect to the information it provides.

1 Section 816. Limitations on electronic self-help.

2 (a) In this Section, "electronic self-help" means the
3 use of electronic means to exercise a licensor's rights under
4 Section 815(b).

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

9 (c) If the parties agree to permit electronic self-help,
10 the licensee shall separately manifest assent to a term
11 authorizing use of electronic self-help. The term must:

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

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

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

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

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

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

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

32 (e) A licensee may recover direct and incidental damages
33 caused by wrongful use of electronic self-help. The licensee
34 may also recover consequential damages for wrongful use of

1 electronic self-help, whether or not those damages are
2 excluded by the terms of the license, if:

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

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

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

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

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

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

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

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

33 (4) that all of the conditions to entitle a person
34 to the relief under the laws of this State have been

1 fulfilled; and

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

7 (h) Before breach of contract, rights or obligations
8 under this Section may not be waived or varied by an
9 agreement, but the parties, in the term referred to in
10 subsection (c), may specify additional provisions more
11 favorable to the licensee.

12 (i) This Section does not apply if the licensor obtains
13 possession of a copy without a breach of the peace and the
14 electronic self-help is used solely with respect to that
15 copy.

16 PART 9
17 MISCELLANEOUS PROVISIONS

18 Section 901. Severability. If any provision of this Act
19 or its application to any person or circumstances is held
20 invalid, the invalidity does not affect other provisions or
21 applications of this Act which can be given effect without
22 the invalid provision or application, and to this end the
23 provisions of this Act are severable.

24 Section 902. (Blank.)

25 Section 903. (Blank.)

26 Section 904. Previous rights and transactions.
27 Contracts that are enforceable and rights of action that
28 accrue before the effective date of this Act are governed by
29 the law then in effect unless the parties agree to be

1 governed by this Act.