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THE NEW LAWS THAT WILL ENABLE ELECTRONIC CONTRACTING: SURVEY OF ELECTRONIC CONTRACTING RULES IN THE UNIFORM ELECTRONIC TRANSACTIONS ACT AND THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

By Mary Jo Howard Dively[1]

A purchasing agent for a national building contractor wants to save time and money by contracting over the Internet for the company's requirements for nails and other fasteners. She enters into an electronic contract with the Internet vendor to supply the company's requirements for three years.

An entrepreneur sets up a website to match job seekers with companies seeking their services. Using Internet technology, all of the necessary "paperwork" can now be done electronically, resulting in significant savings and time--until the entrepreneur discovers that certain disclosures required under the federal Fair Credit Reporting Act cannot be validly made electronically.

A consumer attempts to download new software from the vendor's website. During the downloading process, there is a small hyperlink notice "Legal terms and conditions: Please read." The consumer, eager to get the software, decides to finish downloading and then go back and read the legal terms and conditions. When she returns to find the link, however, it is gone. When she receives the bill for the software she ordered, she sees that she has been charged for eleven copies, not one, and realizes that she must have pressed the "1" key twice by mistake when ordering.

A company emails a software manufacturer about acquiring a new business application. The manufacturer responds with its standard terms and conditions by email, and the company

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emails back its order, substituting its standard terms and conditions for those submitted by the manufacturer. The manufacturer emails back a response stating that it will not ship unless its terms are accepted by the buyer. The company emails back rejecting this proposal, but there's an Internet glitch that day, the email never makes it to the manufacturer and the manufacturer ships.

As recently as a few years ago, the transactions described in the foregoing examples would have been rare. Today, they are staples of the practice of law in electronic commerce. They also are replete with legal issues that cannot be resolved with certainty under existing law.[2] To the contrary, notwithstanding the widespread faith in the Internet's promise to make commerce more efficient and less expensive, electronic contracting under current law is filled with uncertainty. Unless these uncertainties are resolved, the promise of the Internet is likely to be at least stunted and at most, dramatically lessened, as more contracting disputes rise to the level of actual litigation.[3] Furthermore, the issues raised are important enough to deserve the consideration of varying policy choices that inform all good lawmaking, rather than allowing the market essentially to make the law. Fortunately, two new uniform acts have arrived to bring legal certainty and clarity just in time to answer the explosion of electronic commerce. They are the Uniform Electronic Transactions Act ("UETA") and the Uniform Computer Information Transactions Act ("UCITA").[4] This Article will examine the approach of each to the challenges

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[2]All of the referenced examples were drawn from the author's practice during the past year. Following is a brief list of the most obvious concerns raised in these examples: In the first example, under current law it is doubtful that an electronic contract for a term of three years would satisfy the statute of frauds. The second example illustrates the frustration of having to satisfy many different laws, some of which have been updated to allow for electronic contracting, and some of which have not. The third and fourth examples describe various traps for the unwary and other procedural pitfalls faced by the lawyer attempting to prepare enforceable electronic contracting procedures.

[3]Thus far, much of the Internet-related litigation has addressed broader themes, such as privacy and constitutional issues. Garden-variety contract disputes with an Internet twist will not be far behind as business becomes more comfortable with electronic contracting.

[4]UETA is sponsored by the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). It was approved by both bodies at their respective annual meetings in 1999. NCCUSL is a national, nonprofit organization whose members are practicing attorneys, law professors and judges appointed to represent each state. The ALI [insert description]. UCITA is sponsored by NCCUSL and was approved by it at its annual meeting in 1999. Revised Article 2 is sponsored by the ALI and NCCUSL and is anticipated to be approved by both bodies at their annual meetings in 2000. Following approval by the sponsoring bodies, each Uniform Act is then presented to the states for adoption. As of March, 2000 UETA had been adopted in two states, California and Pennsylvania and was on the legislative list in ten others; and UCITA had been adopted in one state, Virginia, and was on the

posed by electronic contracting, noting the differences in scope and policy choices in each Act.[5]

I. The Electronic Contracting Rules of the Uniform Electronic Transactions Act

UETA makes electronic transactions legally equivalent to paper ones. Its drafting process began in the shadow of federal electronic transactions legislation that was being considered simultaneously in Committees of the United States House of Representatives and Senate. The concern that uniform state electronic transactions legislation would be preempted by federal action informed the UETA Drafting Committee throughout its deliberations.[6] Whether this spurred the UETA Drafting Committee to work in a super-efficient fashion is not known, but what is clear is that they produced a remarkably clear and focused statute in under three years. They did so by understanding at the outset what was most important: to produce an understandable statute that accomplished the basic objective and avoided controversy so that it could be enacted swiftly in the states. They did not try to rewrite substantive law. That was left to other drafting committees.[7] As noted by UETA's Reporter, Professor Benjamin F. Beard, at the outset of the UETA project:

> At its most basic, this policy focuses on overcoming perceived bias against electronic records and signatures because of their ethereal nature and lack of concrete substance. The concern in this regard relates to the sense that something as seemingly fleeting as electronic "beeps and chirps" is insufficient to support and evidence commercial activities involving potentially large sums of money. Whether the concern manifests itself in the context of existing writing and signature requirements such as the Statute of Frauds, or evidentiary requirements to prove the existence and terms of a transaction, the concerns are real for many. Notwithstanding these concerns, however, the economic benefits of electronic commercial activity e.g. time, efficiency and storage savings, have caused many commercial actors to proceed with implementing electronic commerce in the face of these concerns. This is largely due to the recognition among commercial actors that electronic commerce is generally as reliable and safe as paper, and justifies

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legislative list in five others.

[5]This Article is not a comprehensive review of all laws applicable to Internet transactions; it focuses on UCITA and UETA, which will provide the basic transactional law that governs these transactions.

[6]See Reports of UETA Drafting Committee meetings found at www.webcom.com/legaled/ETAForum

[7]The Uniform Computer Information Transactions Act and the revisions to Uniform Commercial Code Article 2 (which is ongoing) were the principal efforts which were addressing similar issues at the same time.

the risks inherent in the legal uncertainty.[8]

The Drafting Committee recognized that existing substantive laws would be, in most cases, adequate to deal with electronic transactions if only the public could overcome its distrust of the media by which these transactions were implemented. Electronic records and signatures were not in 1997 widely thought to be as trustworthy as paper writings and inked signatures.[9] Indeed, based on the reaction of certain state legislatures to initial attempts to enact UETA in 1999 and early 2000, there still remains a bias against electronic media.[10] Still, the Drafting Committee's decision to focus its efforts on the *procedure* by which an electronic transaction is conducted rather than trying to create new substantive contracting rules for those transactions was wise. Eventually, the bias will go away, as more and more people participate in electronic transactions and become comfortable with the media. As that happens, it also will become clear to the majority of people, as it was to the members of the UETA Drafting Committee, that most substantive laws can be applied to electronic transactions with satisfactory results.[11]

Take, for example, a document that is commonly thought to require, without exception, a paper writing and an inked signature: the deed to transfer real estate. In fact, the reason that a paper writing and inked signature are thought to be necessary probably has more to do with the filing requirements of local recorders of deeds than with any actual unreliability of the electronic form. If, as in some states, the recorder is willing to accept for filing an electronic deed with electronic signatures, why shouldn't parties avail themselves of the efficiency and economies of the electronic form? Some might argue that the requirement for notarization precludes the ability to transfer real estate with electronic deeds, but if the notary has the means to verify that an electronic signature is that of the party it purports to be from and if an adequate electronic substitute can be found for the notarial seal (some exist today), then why should a paper notarization be required? The UETA Drafting Committee realized that in order for UETA to be truly effective, it had to lead people beyond artificial biases to a place where electronic and paper transactions could be compared, and recognized as legally equivalent.[12]

What does UETA cover?

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[8]Reporter's Memorandum dated August 15, 1997

[9]Id.

[10]See Impressions and Comments on California's Non-Uniform Changes to Uniform Electronic Transactions Act, Patricia Brumfield Fry, _____, 1999. And testimony before the Ohio House Financial Institutions Subcommittee on House Bill 488 (the Ohio version of UETA)

[11]*See* Uniform Electronic Transactions Act, Prefatory Notes, at page __.

[12]Drafting Committee Meeting Report, October 9-11, 1998, The ETA Forum, a website devoted to UETA found at www.webcom.com/legaled/ETAForum

UETA succeeds, not by creating new substantive rules for electronic contracting, but by validating the use of electronic media. In order to understand how it works, the reader must start with an understanding of its scope. UETA applies to electronic records[13] and electronic signatures[14] that relate to any transaction.[15] Beyond this basic scope, there is an additional test which must be met in order to determine whether UETA applies to a transaction: UETA expressly states that it applies to a transaction only where each party has agreed to conduct the transaction electronically.[16] Thus, it can be characterized as an "opt-in" statute, rather than a statute which requires parties to conduct transactions electronically. This agreement may be determined from the context and surrounding circumstances, including the conduct of the parties.[17]

The Drafting Committee recognized that the requirement for such an agreement, though one of the building blocks of UETA which reassures members of the public that they will not be forced into electronic transactions against their will or unwittingly, also could create uncertainty as to the procedures which must be used to obtain such agreement.[18] It could provide an open invitation to parties who desire later to avoid the effect of their electronic contracts by asserting that they had not really agreed to conduct a transaction electronically. Clearly, it imposes an additional requirement for the enforcement of electronic transactions, something the UETA Drafting Committee generally tried to avoid. A plaintiff seeking enforcement of its electronic transaction would have to prove first that the parties agreed to conduct the transaction electronically before getting to the proof of the substance of the transaction. Proof that a party "agreed" to conduct the transaction electronically may not be easy. Prudent parties may wish to add an extra step to their electronic contracting processes which confirms that the parties agree to conduct the transaction electronically and companies attempting to move their customers from

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[13]UETA defines "electronic record" to mean a record created, generated, communicated, received or stored by electronic means, and defines "record" to mean information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. UETA Section 2.

[14]UETA defines "electronic signature" to mean an electronic sound, symbol or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. See id. The definition of electronic signature does not require the person giving the electronic signature to intend to identify himself or to be bound by any specific terms.

[15]UETA defines "transaction" to mean an action or set or actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. See id.

[16]See id. Section 5.

[17]See id.

[18]See UETA, Comment Nos. 2, 3 and 4 to Section 5.

paper-based transactions to electronic ones are advised to do so very carefully.[19] Further, it is possible that some parties, particularly consumers, might be able to argue with some success that unless they were presented with the opportunity to do business other than electronically they really did not "agree" to do business electronically but instead were forced to do so, and thus should be able to avoid UETA. While such uncertainly is likely to diminish as more people enter into electronic transactions, it exists today, and it is difficult to predict how courts will rule in these cases.[20]

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[19]It likely will not be sufficient, for example, to bury in the back of the boilerplate of a standard form a sentence stating that the relationship of the parties may be converted to an electronic basis at any time by the creator of the standard form. Pennsylvania included in its version of UETA a non-uniform provision which requires, for transactions with consumers, that such a provision to be separately signed by the consumer so that there is no chance that the consumer will not understand that, even though he is signing a paper document, the transaction might later be converted to an electronic one.

[20]The Official Comments to Section 5 recognize and deal with these concerns to a great extent. They state:

> 3. If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the requisite agreement, express or implied, must be determined from all available circumstances and evidence.
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> 4. Subsection (b) provides that the Act applies to transactions in which the parties have agreed to conduct the transaction electronically. In this context, it is essential that the parties actions and words be broadly construed in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct. The critical element is the intent of a party to conduct a transaction electronically.

The Official Comments to Section 5 provide several helpful illustrations of circumstances from which it may be found that parties have or have not reached agreement to conduct transactions electronically. These deal with matters as diverse as whether an email address on a business card enables the recipient to infer that the giver of the business card has agreed to communicate electronically (the Comments suggest the answer is "yes", but probably

Though the scope of UETA is broad, there are several areas which are expressly excluded from coverage by UETA: (a) wills, codicils and testamentary trusts; (b) transactions covered by the Uniform Commercial Code (other than Sections 1-107 and 1-206, Article 2, and Article 2A) including Articles 3, 4, 4A, 5, 6, 7, 8, or 9;[21] (c) transactions covered by UCITA[22]; and (d) transactions governed by other laws identified by each State.[23] These exclusions were developed following extensive investigation and Report dated September 21, 1998 by the Task Force on State Law Exclusions.[24]

Now that we know what UETA covers, what does it do?

UETA states that records or signatures may not be denied legal effect merely because they are in electronic form, and that contracts may not be denied legal effect merely

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not for matters beyond the scope of the business indicated by the card) to whether a buyer who executes a seller's standard form paper contract which has buried in the fine print an agreement for the buyer to receive all notices electronically has really agreed to accept such notices electronically (the Comments suggest the buyer has not, unless there are other indicia of the buyer's willingness to do so).

[21]The various named articles of the UCC, each contain electronic rules which are appropriate to their respective subject matter, and thus UETA is not needed to cover such subject matter. Until UCITA is adopted in a state

[22]Like the named articles of the UCC, UCITA contains electronic contracting rules which are appropriate to its subject matter, and thus UETA is not needed to cover such subject matter. Until UCITA passes in a state, however, UETA, if passed in that state, will apply to transactions in the subject matter covered by UCITA.

[23]UETA defines "State" to mean a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a State. Id. Section 2.

[24]Available at www.webcom.com/legaled/ETAForum. Prior to the work of the Task Force, it had been widely thought that the list of exclusions from UETA's scope would be longer. Upon review of the Report, however, the Drafting Committee concluded that no exclusions other than those that presently appear in UETA were warranted. The Drafting Committee recognized, however, that state legislatures working their way through enactment of UETA might be less comfortable about including certain categories of documents in UETA, and provided in the Comments a Legislative Note with an extensive discussion of both the Task Force's findings and the Drafting Committee's reaction thereto regarding specific areas of potential exclusion or special treatment. Among the areas treated are trusts (other than testamentary trusts), powers of attorney, real estate documentation and consumer protection requirements.

because an electronic record was used in the contract formation.[25] Furthermore, UETA states that if a law requires a record to be in writing or requires a signature, an electronic record or signature satisfies that requirement.[26]

These are the core provisions of UETA, and will be the basis for legal validation of millions of electronic transactions once UETA is fully enacted. It is important to note that the latter provision is intended to provide only that electronic records and signatures should not be treated *differently* than written records and manual signatures and *not* to provide that transactions using such electronic records or signatures are automatically enforceable. For example, a business may properly use an electronic signature in accepting an offer to supply goods, but whether or not a legally enforceable contract is formed depends on the compliance with the contract formation rules under the UCC, UCITA or other applicable law.

Does UETA contain any substantive rules?

Section 8

UETA contains a few substantive rules. The most important of these are found in Section 8. Subsection (a) of that Section provides that if parties have agreed to conduct a transaction electronically and a party is required by another law (such as a consumer protection law) to provide the other party with information in writing, the law is satisfied if the information is provided electronically as long as it is capable of being retained by the recipient when the information is received. This requirement may be problematic in that there are many real world situations in which such information is not given in a form capable of being retained, and also because it is not clear exactly what are the obligations of the sender to assure that a recipient can retain the information. UETA tries to be somewhat helpful on the latter point, putting in a reverse safe harbor of sorts which states that an electronic record is *not* capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record. UETA does not state, however, when information *will* be deemed capable of retention, or how long it must be capable of retention. Is it the recipient's obligation to print out the information at the time of the transaction, or must the sender keep the information available for subsequent electronic reference by the recipient? These are significant concerns for any entity that does substantial electronic business with consumers (who are most likely to be covered by such laws). The Official Comment to this section brings little clarity to the issue, stating that:

> 3. Under subsection (a) to meet a requirement of other law that information be provided in writing, the recipient of an electronic record of the information must be able to get to the electronic record and read it, and must have the ability to get

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[25] See UETA. Section 7.

[26] See id.

> back to the information in some way at a later date. Accordingly, the section requires that the electronic record be capable of retention for later review. The section specifically provides that any inhibition on retention imposed by the sender or the sender's system will preclude satisfaction of this section because electronic information may be given to a person in a manner which prevents the person from retaining a copy of the information. The policies underlying laws requiring the provision of information in writing warrant the imposition of an additional burden on the sender to make the information available in a manner which will permit subsequent reference. A difficulty does exist for senders of information because of the disparate systems of their recipients and the capabilities of those systems. Certainly, where the sender or sender's system imposes an inhibition on retention by the recipient, this section has not been satisfied. It is left for the courts to determine whether the sender has complied with this section if evidence demonstrates that it is the recipient's system which precludes subsequent reference to the information.

In particular, the Official Comments' emphasis on the recipient being able to make "subsequent reference to the information" is quite troubling, as it may be interpreted to suggest that senders are required to preserve such information electronically for an unlimited time and permit recipients to return to it. This is inconsistent with commercial practice, and would be both expensive and an administrative nightmare for senders.

Even if a business can figure out how to satisfy this requirement technically, some forms of business simply do not provide information in a form capable of being retained. An example would be certain airport kiosks which permit a user to purchase an electronic ticket, or accomplish some other electronic transaction. Another example, though not covered by UETA's scope, might be the notice on a proprietary ATM that advises an individual of a $1.00 charge for non-bank customers and requests that requires that individual to press "I Agree" in order to continue with the transaction. Banks are required by law to provide these notices in writing and to obtain agreement to the extra charge. Would such notices fail to satisfy the retention requirement unless the machines are reconfigured to provide a printout that an individual may retain? A better approach might have been one which, absent the capability of retention, would permit a presumption if a security procedure demonstrated that the information was provided, and that the individual pressed the "I Agree" button. Such an approach, while preferable from a commercial standpoint, would not have been as reassuring to the majority of people as an outright retention requirement, because it would not have guaranteed to recipients that they would be able subsequently to verify the terms to which they had agreed.[27]

The Drafting Committee's approach in this subsection is consistent with its guiding

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[27]A common complaint of consumers using the Internet to license software, for example, is that once they click "I Agree" upon reading the software license, they often cannot find the license again. It "disappears."

principle to produce a statute that was readily enactable and non-controversial, particularly for consumers. They took an important step to satisfy the business "senders" by providing that laws which require records to be "in writing" would be satisfied by an electronic record, but then protected consumers (and avoided a potential challenge by consumer representatives and state attorneys general) by providing that, in cases covered by the laws as stated above, the electronic record must be capable of retention by the recipient.

Section 8 contains two other important substantive rules. The first of these states that if a law other than UETA requires a record to be posted or displayed in a certain manner, to be sent, communicated or transmitted by a specified method or to contain information that is formatted in a certain manner, then the record must be posted or displayed in the manner specified in the other law, and except as limited by Section 8, must be sent by the method required by the other law, and must contain the information formatted in the manner specified in the other law. Inasmuch as the most likely "other" laws to be involved will be consumer protection laws, this section makes it clear that a state's consumer protection laws will trump UETA in almost all cases. This requirements of Section 8 may not be varied by agreement of the parties except to the extent permitted by the other law, but since many such laws will be consumer protection statutes, it is likely that most will not permit waiver of the writing requirement.

The last of the substantive rules in Section 8 is found in subsection (c) which specifically states that if a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient. This is contrasted from the rule in subsection (a), which deals with the provision of information in writing.[28]

Attribution of Electronic Records

The next set of substantive rules are found in Section 9 and deal with attribution. UETA provides that an electronic record or electronic signature is attributable to a person if it actually was the act of the person. For example, if an officer of a company types her name on a purchase order (or if her employee does so on her authority or if her computer does so after being programmed to do so), then the electronic record and the electronic signature would be attributable to her.[29] Whether an electronic record or signature was actually an act of the person may be proved in any manner, including a showing of the efficacy of any security procedure--however, UETA does not provide examples or any meaningful guidance as to what is considered an effective security procedure.[30]

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[28]See Official Comment No. 4 to Section 8

[29]See id. Section 9.

[30]UETA broadly defines "security procedure" as a procedure employed for the purpose of verifying that an electronic signature, record or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. UETA also provides that

UETA falls short, in this regard, of what would be really helpful for commercial transactions in electronic commerce. Proving that an electronic act was actually the act of a person can be complex. It might require the testimony of a number of parties (and many more where the electronic transaction goes through the Internet). In some cases, it simply may not be cost-effective to undertake the proof. As discussed below, prior versions of UCITA recognized this and attempted to deal with it through a series of presumptions granted after both parties agree to use a commercially reasonable security procedure. The effect of such presumptions would have been to make such proof routine, while providing an opportunity for rebuttal in those cases where the electronic act really was not the act of the person. More importantly, requiring a commercially reasonable security procedure would have acted as an effective check on unscrupulous parties in a way that silence on the issue does not. Litigation costs would have been reduced and frivolous attempts of remorseful parties to later avoid being bound would have been chilled.

The Drafting Committee considered whether presumptions should be included in UETA several times throughout its drafting process. Its decision not to include them, while not the most helpful for transactions between commercial parties, likely will make UETA less threatening to consumers, and thus is consistent with the overall tone of the statute to welcome new parties to electronic commerce. Pennsylvania, in enacting its version of UETA, reexamined this issue and decided to make presumptions available for non-consumer transactions.[31] These provisions state:

> ***ATTRIBUTION OF RECORDS AND SIGNATURES***
> *Section 701. Use of security procedures.*
> *If there is a security procedure between the parties with respect to the electronic signature or electronic record, the following rules apply:*
> *(1) The effect of compliance with a security procedure established by a law or regulation is determined by that law or regulation.*
> *(2) In all other cases, if the parties agree to use or otherwise knowingly adopt a security procedure to verify the person from which an electronic signature or electronic record has been sent, the electronic signature or electronic record is attributable to the person identified by the security procedure if the person relying on the attribution satisfies the burden of establishing that:*
> *(i) the security procedure was commercially reasonable;*
> *(ii) the party accepted or relied on the electronic message in good faith and in compliance with the security procedure and any additional agreement with or separate instructions of the other party; and*
> *(iii) the security procedure indicated that the electronic message was*

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the term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures. Id. Section 2.

[31]Pennsylvania Electronic Transactions Act Chapter 7.

from the person to which attribution is sought.

(3) If the electronic signature or electronic record is not attributable to a person under section 305 but would be attributable to the person under this section, the electronic signature or electronic record is nevertheless not attributable to the person under this section if the person satisfies the burden of establishing that the electronic signature or electronic record was caused directly or indirectly by a person:

(i) that was not entrusted at any time with the right or duty to act for the person with respect to such electronic signature or electronic record or security procedure;

(ii) that lawfully obtained access to transmitting facilities of the person if such access facilitated the misuse of the security procedure; or

(iii) that obtained, from a source controlled by the person, information facilitating misuse of the security procedure.

Section 702. Effect of using security procedure to detect errors or changes.

If the parties use a commercially reasonable security procedure to detect errors or changes with respect to an electronic signature or electronic record, the following rules shall apply:

(1) The effect of a security procedure is determined by the agreement between the parties or, in the absence of agreement, by this section or any law establishing the security procedure.

(2) Unless the circumstances indicate otherwise, if a security procedure indicates that an electronic signature or electronic record has not been altered since a particular time, it is treated as not having been altered since that time.

Section 703. Commercial reasonableness.

The efficacy and commercial reasonableness of a security procedure is to be determined by the court. In making this determination, the following rules apply:

(1) A security procedure established by statute or regulation is effective for transactions covered by the statute or regulation.

(2) Except as otherwise provided in paragraph (1), commercial reasonableness and effectiveness is determined in light of the purposes of the security procedure and the commercial circumstances at the time the parties agree to or adopt the procedure.

Section 704. Inapplicability to consumers.

The provisions of this chapter shall not apply to any electronic transaction to which a consumer is a party.

Section 705. Variation by agreement.

Except as otherwise provided by statute or regulation, any provision of this chapter other than section 704 may be varied by agreement.

The availability of these rules for commercial parties, coupled with their lack of availability in consumer transactions, should make Pennsylvania at the same time the most welcoming for commercial electronic commerce, and the safest for consumer electronic

commerce.[32]

Errors in Electronic Records

In the event of a mistake in electronic contracting (for example, an individual accidentally orders 10,000 sweaters instead of 1, UETA includes provisions addressing changes or errors in electronic transmissions.[33] Under UETA, if a change or error occurs in transmission of an electronic record, and if the parties agreed to a security procedure to detect changes or errors and one party did not use the security procedure (where using the procedure would have caught the error or change), then the effect of the change or error may be avoided by the party who did conform to the security procedure. If a change or error occurs in an automated transaction involving an individual and an electronic agent/machine and the individual can avoid the effect of an electronic record that resulted from an error made by the individual in dealing with an electronic agent if the electronic agent did not provide the individual with an opportunity to correct or prevent the error, provided that the individual promptly notifies the other party that it does not intend to be bound, takes reasonable steps to return the consideration received from the other party, and not use or receive any benefit from the consideration.

Automated Transactions

Recognizing that many contracts may be formed through the interaction of machines, UETA provides basic contract formation rules for automated transactions[34], providing that a contract may be formed by the interaction of electronic agents (i.e., machines) of the parties even if no individual was aware of the electronic agents' actions or the resulting terms. This provision allows contracts to be formed by machines, inferring the requisite intent to contract from the programming and use of the machines by individuals. [35]UETA also provides that a contract my be formed by the interaction of an electronic agent and an individual if the individual performs actions that it is free to refuse to perform and which it knows or has reason to know will cause the electronic agent to complete the transaction or performance. It is important to note that the terms of the contract are determined by the substantive law applicable to it.

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[32]Ohio as of this writing has included similar attribution provisions in its version of UETA.

[33]See id. Section 10.

[34]UETA defines "automated transaction" to mean a transaction conducted or performed, in whole or in part, by electronic means or electronic record, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course of forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction. Id. Section 2.

[35]See id. Section 14.

Taken collectively, the minimalist rules of UETA provide a useful framework to welcome parties to electronic commerce, while not frightening them with more aggressive rules that are becoming the norm in commercial transactions, or burdening them with substantive rules that are better left to the substantive law that governs the subject matter of their transaction. A discussion of such a substantive law follows.

II. The Electronic Contracting Rules of the Uniform Computer Information Transactions Act

UCITA is a substantive contract law statute which develops a legal framework for computer information transactions that is similar to the framework established for sales of goods under Uniform Commercial Code Article 2. Like Article 2, all but a handful of UCITA's rules are default rules, meaning that they apply only when the parties have not otherwise agreed, and they can be varied by the parties' agreement. Most of the policy choices made by the UCITA Drafting Committee are similar to the policy choices made in current Article 2.

UCITA contains a progressive package of substantive electronic contracting rules which are designed to clarify many of the questions about electronic contracting that have arisen in the past few years. Indeed, one of the basic themes of UCITA is that a substantive framework for Internet contracting is needed to facilitate commerce in computer information.[36] It is important at this point to distinguish between UETA and UCITA. As noted in the Reporter's Prefatory Notes to UCITA:

> The advent of the Internet as a commercial information resource has highlighted the importance of "electronic commerce", including electronic contracting issues. UCITA has been one source of principles for development of state law rules on contract aspects of electronic commerce. These rules are coordinated with the Uniform Electronic Transactions Act. However, they go beyond the purely procedural rules in that Act and provide a general contract law framework for electronic transactions involving computer information, where a contract can be formed and performed electronically.[37]

In its development of appropriate electronic contracting rules, the UCITA Drafting Committee addressed three overarching issues: (i) that in order for electronic contracts to be validly made, electronic records and signatures must be equivalent to paper records and pen and ink signatures; (ii) that there must be substantive rules about how an electronic contract may be formed, and how the terms thereof are established; and (iii) that in order to provide greater legal certainty (in

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[36]See Prefatory Note to NCCUSL Annual Meeting Draft of UCITA by the Reporter, Professor Raymond Nimmer.

[37]Ibid.

conjunction with factual certainty) to electronic transactions, appropriate rules on attribution of electronic messages are needed. The Draft of UCITA which was presented to NCCUSL for approval broke important legal ground in all three areas; unfortunately due to a number of circumstances that will be discussed herein, some of these provisions narrowly missed approval by NCCUSL.

What does UCITA cover?

A lengthy discussion of the scope of UCITA is not the subject of this article;[38] however, it is necessary to discuss UCITA's scope briefly in order to inform the reader's understanding of the electronic contracting provisions of UCITA. Though a much more extensive and substantive statute than UETA, UCITA' scope is limited to "computer information transactions." A computer information transaction is defined as an agreement a primary purpose of which is to require a party to create, modify, transfer or license computer information or informational rights in computer information. "Computer information" is information in electronic form that is obtained from or through the use of a computer or that is in digital or equivalent form capable of being processed by a computer. The term includes a copy of information in that form and any documentation or packaging associated with the copy. Therefore, UCITA applies to, inter alia, contracts for the licensing or purchase of software, contracts for software development, and contracts for access to databases through the Internet.

UCITA is limited by the definitions of "computer information" and "computer information transaction," which do not encompass things like sales or leases of goods, computers, televisions, VCRs, print books or other publications, or services contracts (except computer support and/or development agreements).[39] Generally, goods remain subject to UCC Article 2 or Article 2A.

Aside from those areas which do not fit into the definitions of "computer information" or "computer information transaction," UCITA expressly states that it does not apply to (a) financial services transactions;[40] (b) motion pictures or audio or visual programming, other than in (i) a

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[38]That subject is treated in [Connie Ring's article] [cite]

[39]UCITA Official Comment, § 103(3).

[40]"Financial services transaction" means a contract or a transaction that provides access to, use, transfer, clearance, settlement, or processing of:

> (1) deposits, loans, funds, or monetary value represented in electronic form and stored or capable of storage electronically and retrievable and transferable electronically, or other right to payment to or from a person;

mass-market transaction or (ii) a submission of an idea or information or release of informational rights that may result in making a motion picture or a similar information product; or sound recordings, musical works, or phonorecords, or an enhanced sound recording, other than in the submission of an idea or information or release of informational rights that may result in the creation of such material or a similar information product; (c) compulsory licenses; (d) employment contracts; (e) contracts that do not require that information be furnished as computer information or in which the form of the information as computer information is otherwise significant with respect to the primary subject matter of the transaction; or (f) subject matter within the scope of UCC Articles 3, 4, 4A, 5, 6, 7, or 8. [41]

Understanding UCITA's scope also requires the reader to understand how UCITA handles mixed transactions. In modern commerce, virtually all transactions are governed by multiple sources of contract law (e.g. Uniform Commercial Code, statutory consumer law, common law as reflected in cases). In such "mixed transactions," the issue to be resolved is: When two (or more) different sources of law provide conflicting results, how are each applied to the transaction?

With respect to UCITA, the main area in which the mixed transaction issue arises involves the sale of goods along with computer information (for example, the purchase of a computer with pre-loaded software). Usually, UCC Article 2 applies to the goods, but UCITA governs the "computer information" provides rules dictating the extent to which UCITA will apply where other laws are implicated. For example, in transactions involving (a) computer information and goods (which are covered by Article 2); or (b) computer information and subject matter that is governed by other articles of the UCC, UCITA adopts a modified "gravamen of the action" standard, meaning that the specific rules of each article will apply to the subject matter of each article, with certain exceptions.

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(2) an instrument or other item;

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

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

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

[41] See UCITA Section 103.

The first exception is that UCITA, not Article 2, applies to goods that are merely a copy, documentation or packaging of computer information covered by UCITA (for example, a computer tape or diskette).

The second exception is that if computer information is so embedded in and sold or leased as part of the goods that the computer information is merely incidental to the goods, then UCITA applies to the copy of the computer information (a) if the goods in which the computer information is embedded are a computer or a computer peripheral; or (b) if giving the purchaser access to the functional attributes of the software is a material purpose of the transaction. With respect to determining materiality, the Comments to UCITA Section 103 provide that factors are the extent to which the computer program is the focus and appeal of the product and the extent to which the computer program is subject to separate negotiations. To illustrate, examples provided in the Comments indicate that UCITA would not apply a computer program which operates the brake system in an automobile, where the functionality of the automobile was the focus, but would apply to contracts for the development for or supply of the computer program to a manufacturer.

UCITA further provides that in transactions involving computer information and other subject matter that is governed by other articles of the UCC, those other articles will control the aspects of the transaction applicable to their own subject matter.

With respect to transactions involving computer information and other subject matter that is not governed by the UCC, courts will follow general interpretation principles to determine the extent of UCITA's applicability. Generally, courts will apply a modified form of the "predominant purpose" test. If computer information is the predominant purpose of the transaction, then UCITA rules will apply to the entire transaction instead of other law (except, of course, as limited by the exclusions from UCITA). The comments to UCITA Section 103 provide a number of examples of the results which would be achieved in applying the predominant purpose test in a number of fairly common mixed transactions involving non-UCC subject matter. In this regard, the comments specifically note that decisions under prior law which held that a contract for software development was covered by Article 2 when the only "good" involved was the diskette on which the software was delivered, and the rest of the performance of the contract required development services, did not achieve the right result.

Like the UCC, UCITA is premised on freedom of contract. As a general rule, parties to a contract have the right to choose the law which will govern their transaction. UCITA does not preclude such right, but does provide guidelines on opting in or out of UCITA. For example, subject to certain restrictions, if a transaction includes computer information, parties may by agreement provide that all or part of UCITA governs the transaction in whole or in part ("Opting in"), or that other law governs the transaction in whole or in part ("Opting

out").[42]

In order to safeguard certain parties, however, opting in or opting out is subject to the following restrictions: (a) an agreement to opt out does not alter the applicability of the defense in Section 118 (a consumer defense for electronic error) or the limitations in Section 816 (relating to electronic self help), nor, in mass market transactions, the applicability of unconscionability, fundamental public policy or good faith; (b) the basic theme is that full opt out ordinarily should be enforced by the courts and the interests of the parties are properly safeguarded under the other law (UCC or common law) as a whole. The matters described in (a) above are so fundamental that their variance should not be permitted; and (c) an agreement to opt in does not alter the applicability of any otherwise applicable law that may not be varied by agreement; and in a mass market transaction does not alter the applicability of consumer protection law, or a law applicable to a tangible copy of information in print form.

The Opt-In and Opt-Out provisions of UCITA reflect a compromise position for many industries that did not want to be unintentionally dragged into UCITA; however, neither did they want to be kept out in matters where they might find it useful to be in. Thus, the opt-in, opt-out provision was born to accommodate the needs of those parties. If their transactions involve information, they may choose or not choose UCITA. In order to protect consumers, parties are not permitted to use the opt-in and opt-out provisions in a manner which would harm consumers.

Now that the scope is understood, what are UCITA's electronic contracting rules?

As mentioned above, UCITA's electronic contracting provisions can be divided into three areas: (i) procedural rules; (ii) substantive formation rules; and (iii) attribution rules.

Procedural Rules

Like UETA, UCITA includes the following general provisions relevant to contracting electronically: (a) enforceability may not be denied simply because a record or signature is electronic; (b) use of electronic records and signatures is not required; and (c) one who uses an electronic agent is bound by the actions of the electronic agent, even if no person was aware of the agent's operations or results.[43] UCITA also provides that in any transaction, a person may establish requirements regarding the type of authentication or record acceptable to it.

Substantive Formation Rules

UCITA's substantive formation rules contain the most important and groundbreaking

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[42]UCITA Section 104.

[43]See id. Section 107.

legal rules for electronic contracting. They include validation of parties' choices of law and forum in most cases (which is particularly important in Internet commerce, where the location of the parties often is not known), provisions on the manner in which an electronic contract may be formed, and the manner in which the parties may establish the terms of an electronic contract (including useful provisions on layered contracting), specific rules limiting the enforceability of of shrinkwrap and clickwrap contracts, provisions governing access contracts, [add something here when I remember] provisions limiting the ability of a licensor to exercise electronic self help

Choice of Law and Forum

In general, designations of governing law and forum contained in a contract are enforceable[44]. This is consistent with the practice of most lawyers and businesses, who routinely include choice of law and forum clauses in their contracts. It also is consistent with caselaw, which routinely enforces such choices in the absence of egregious circumstances. As discussed below, UCITA's provisions relating to choice of law and forum clauses are particularly important with respect to the growing area of e-commerce.

Relative to choice of law, UCITA generally permits parties to choose the applicable law,[45]with one important and appropriate exception: In a consumer transaction, a choice of law will not be enforceable to the extent that it varies a consumer protection rule which cannot be varied by agreement under the law of the jurisdiction whose law would apply in the absence of the agreement. Thus, UCITA guarantees that with respect to such matters, a state's consumer law will trump UCITA.[46] If parties fail to make a choice of law in their contract, UCITA provides default rules which reflect the different types of transactions that are covered by the statute. In an access contract, or contract providing for electronic delivery of a copy, the default rules provide that the contract is governed by the law of the jurisdiction in which the licensor is located when the agreement is made.[47] However, with respect to a

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[44]See *Medtronic Inc. v. Janss*, 729 F.2d 1395 (11th Cir. 1984); *Northeast Data Sys. Inc. v. McDonnell Douglass Computer Sys. Co.* 986 F.2d 607 (1st Cir. 1993)

[45]Id. Section 109.

[46]The UCITA Drafting Committee gave substantial consideration to whether UCITA should enact a substantive consumer protection rule in this regard rather than deferring to the laws of each state. Ultimately, it was concluded that given the varying approaches to consumer protection among the states, an approach which deferred to the states was preferable.

[47]Critics of UCITA routinely point to this provision as evidence that UCITA is biased in favor of licensors. In fact, the Drafting Committee's reasoning for the adoption of this provision had nothing to do with preferring one party over the other; rather, consistent with its overall mandate, the Drafting Committee was attempting to fashion a rule which would provide certainty. In the electronic world, it often is not clear where a licensee is located. Although

consumer contract which requires delivery of a copy on a physical medium to the consumer, such contract is governed by the law of the jurisdiction in which the copy is delivered, ore should have been delivered.[48] The default rules provide that in all other cases, the contract is governed by the law of the jurisdiction with the most significant relationship to the transaction.[49] With respect to issues regarding foreign jurisdictions, the default rules provide that if the default jurisdiction is outside the US, the laws of that jurisdiction govern only if they provide substantially similar protections and rights to the party not located in that jurisdiction as are provided under UCITA. Otherwise, the laws of the jurisdiction in the US which has the most significant relationship to the transaction governs.

UCITA also allows parties to choose their forum in their contract, providing

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licensees who acquire software through a website usually are asked to type in information stating where they are, there is no current method to ensure that they tell the truth. Nodes can be "spoofed" to confuse the sender. It is not, however, easy for a licensor to misrepresent its headquarters location. This is a matter of legal record. It thus is understandable that the Drafting Committee, faced with selecting a default jurisdiction for these types of contracts, opted for the choice that would provide certainty.

[48]The Drafting Committee's adoption of this provision is further evidence of its overall decision to favor certainty in contracting. In these cases, it is clear where the software was acquired, and thus it makes sense to favor the consumer.

[49]The Drafting Committee could have chosen to allow this principle to govern access contracts as well, but that would have been, in the author's opinion, a mistake. The default rules covering access contracts are sorely needed to bring certainty to Internet contracting in computer information because in these types of transactions, where the entire transaction can be accomplished electronically, there often is no other touchstone. This can be contrasted with sales of goods over the Internet, where it always will be possible to establish the physical places from where the goods were sent, and to where the goods were sent. Where electronic computer information is the subject of the transaction, however, it may not be possible to establish the situs of either end of the transaction. Thus, if the parties do not make a valid choice of law in their contract, a court would be in a quandary, applying traditional choice of law analysis, to determine the law which would govern. The default rule provides a valuable and necessary guide for the court. Further, as noted in the Official Comments to Section 109, "this rule enhances certainty in a transactional context where, because of the distribution system, an on-line vendor, large or small, makes Internet access available to the entire world. The licensor's location does not depend on the location of the computer that contains the information. Any other choice of law rule would require that the information provider (small or large) comply with the law of all states and all countries since it may not be clear, or even knowable where the contract is formed or the information sent.

that these choices are not enforceable if they are unreasonable and unjust.[50] This also follows modern caselaw.[51] If parties wish their forum choice to be exclusive, UCITA requires the choice of forum clauses to state that expressly. Choice of forum terms are particularly important in electronic commerce. As noted in the Official Comments to Section 110, caselaw on the issue of jurisdiction in the Internet demonstrates the difficulty in knowing when doing business on the Internet will subject a party to jurisdiction in all states and all countries. As indicated in the Comment, this uncertainty has an impact on entities of all size which do business on the Internet, but may more heavily impact smaller businesses who may do more e-business than a traditional, large corporation.[52]

How Contracts are Formed and their terms established

UCITA deals separately with forming a contract and with the terms of that contract. UCITA's formation rules are contained in Sections 202 through 206. Section 202 sets forth the general formation rules; Section 203 provides the general rules governing offers and acceptances; Section 204 deals with offers and acceptances that contain varying terms; Section 205 covers conditional offers and acceptances; and Section 206 provides or the formation of contracts by electronic agents.

Once it has been determined, by applying Sections 202 through 206, that a contract has been formed, Sections 208 through 210 determine the actual terms of the contract. Section 208 is the basic provision which states that you adopt the terms of a record when you agree to that record, subject to certain exceptions; Section 209 contains those exceptions as they relate to mass market contracts; and Section 210 describes what terms are adopted when parties form a contract by conduct.

This structure is useful in the world of paper contracting, but it will be even more so as contracting moves more and more into the electronic realm. It is derived in large measure from current UCC Article 2, but several of the areas which have been prone to confusion under Article 2 have been clarified. Moreover, it recognizes the reality of modern contracting, particularly electronically, which is that parties' contracts increasingly tend to evolve, rather than to be made in a single piece of paper or event. Computer Information transactions, in particular, typically are ongoing relationships instead of one-time sales.

Deciding Whether a Contract Has Been Formed

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[50]Id. Section 110.

[51]See *Caspi v. The Microsoft Network, L.L.C. et.al.*, __ N.E.2d__ (J.J. Super. Ct. 1999); *Evolution Online Systems, Inc., v. Koninklijke Nederlan N.V.*, 145 F.3d 505 (2nd Cir. 1998)

[52]The analysis set forth at Footnote 48 applies equally to the choice of forum in electronic transactions.

UCITA provides that a contract may be formed in any manner sufficient to show agreement, including by offer and acceptance, by conduct of the parties or by operation of electronic agents which recognize the existence of a contract.[53] UCITA recognizes that even if one or more terms are left open, the contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.[54] If the parties intend to enter into a contract, therefore, the absence of certain terms will not negate the agreement. This provision provides the basis for the concept of layered contracting, which recognizes that contracts do not arise in one single point in time, but evolve over a period of time. Official Comment No. 4 to Section 202 states:

> This subsection lays a foundation for the layered contracting that typifies many areas of commerce and is recognized in Uniform Commercial Code Section 2-204 (1998 Official Text), as well as in the common law and practice of most states. The foundation laid here is further developed in Sections 208, 209 and 305. Any concept that contracts arise at one single point in time and that this single event defines all terms is not consistent with commercial practice. Contracts are often formed over a period of time, and terms are often developed during performance, rather than before any performance occurs. Rather than modifying an existing agreement, these are part of the agreement itself. Treating later terms as a proposed modification is appropriate only if the deal has, in commercial understanding of both parties, been closed with no reason to know new terms would be provided. If the parties did not intend to be bound to any contract unless terms were agreed to, subsection (e) gives guidance for unwinding the relationship.

Comment No. 4 also clarifies that during the time in a layered contract in which terms are to be proposed, it is not appropriate to apply UCITA's default rules, as that would presume that merely because a term had not been proposed, the parties had meant not to propose it and had

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[53]Official Comments to UCITA, Comment No. 2 to Section 202

[54]Official Comments to UCITA, Comment No. 4 to Section 202. The comment clarifies that what is necessary in this regard is the intent of the parties to be bound:

> If that intent exists, enforceability does not require certainty on all terms, what the parties were to do, what obligations they assumed, what acts they agreed to perform or what damages arise on breach. Rather, commercial standards can apply to these questions, reflecting the fact that in many contracts terms are defined over time, rather than on the occurrence of one specific event. Contract formation is a process, rather than a single event. Being bound at one point subject to changes and further agreement is a common circumstance in commerce. However, as a matter of fact, the more terms the parties leave open, the less likely it is that they intended to be bound.

intended for the default rules to apply. Comment No. 4 confirms that in layered contracting "the agreement is that there are no terms on the undecided issues until they are made express by the parties. Applying a default rule would be applying the rule despite contrary agreement, rather than when no such agreement exists."

Finally, UCITA outlines certain instances where the parties are not bound to a contract. For example, UCITA provides that in the absence of conduct or performance by both parties to the contrary, a contract is not formed if there is a material disagreement about a material term, including scope.[55] In addition, if a term is to be fixed by later agreement, and the parties intend not to be bound unless the term is so fixed, a contract is not formed if the parties subsequently do not agree to the term.[56]

Offer and Acceptance, Generally: Section 203

As under current UCC Article 2, UCITA provides that offer invites acceptance in any reasonable manner, and that shipment or the promise to ship is a proper means of acceptance unless the offer provides otherwise. For electronic messages and performances, the timing of formation is based on the time that the electronic acceptance is received or electronic performance is received, if acceptance is by performance.[57] This is appropriate in the context of electronic commerce.

Acceptance with Varying Terms: Section 204

Generally, UCITA provides that a definite and seasonable acceptance operates as an acceptance even if it contains terms which are different from the offer unless it materially alters the offer. An acceptance materially alters an offer if it contains terms that materially conflict with or vary the terms of the offer, or adds material terms not contained in the offer. If an acceptance materially alters an offer, then a contract is not formed unless all other circumstances, including the *conduct* of the parties, establish a contract. Again, this combines the flexibility needed for electronic contracting, with the certainty desired by parties.

Conditional Offers and Acceptances: Section 205

Offers or acceptances that because of the circumstances or the language are conditioned upon agreement by the other party to the terms of the offer or acceptance generally preclude formation of a contract unless the other party agrees to the exact terms but

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[55]UCITA, Section 202(d)

[56]UCITA, Section 202(e)

[57]UCITA differentiates between receipt of notice and receipt of performance. See Official Comment No. 48 to UCITA Section 102

if both the offer and acceptance are contained in standard forms, and one or both are conditioned on acceptance of their terms, then the party requiring the agreement to its exact terms must act in a manner consistent with those required terms, such as by refusing to perform, refusing to permit performance or refusing to accept the benefits of the contract until the proposed exact terms are accepted. Again, this is a commonsense rule that reflects modern contracting practices. You are not entitled to enforce your condition unless you abide by it.

If a party agrees to a conditional offer effective under the terms as outlined in the second part of the above paragraph, it adopts that terms of that offer under Section 208 or 209, except terms which conflict with any expressly agreed terms on price and quantity.

Offer and Acceptance; Electronic Agents; Section 206

Section 206 confirms that electronic agents (think: computers) can form contracts with individuals and with other electronic agents if they are used by the parties for that purpose, and if their actions indicate that a contract exists. The terms of the contract, like a contract formed solely by the actions of humans, are determined under Section 208 or 209. UCITA also confirms in this section that common law theories of mistake and fraud will and should be applied to contracts created in this manner.[58] A contract is not created if an electronic agent's operations are induced by fraud or mistake, such as if a party or its electronic agent manipulate the programming or response of the other electronic agent in a manner akin to fraud because the requisite assent cannot have been given in such cases.[59]

Contracts between electronic agents and human beings create a new group of questions. What should the legal rules be for the interaction of computers and individuals, where the computer may have most of the information, but the individual has free will and ability to bargain? UCITA generally answers these questions in a way that will seem almost intuitive to most people, and certainly is refreshing in its common sense approach. Without resorting to a laundry list, UCITA provides guidance on the elements that ought to be a part of such an interaction. Basically, what UCITA says is that the electronic agent must be programmed to make contracts, the individual must be free to refuse to make a contract, but that if the individual takes actions that she has reason to know will cause the electronic agent to provide the benefits of the contract, or otherwise accept, then the contract is made. Statements by an individual which the electronic agent is not programmed to react to are not legally effective.[60]

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[58]Official Comment No. 3 to Section 206 states that "Courts applying these concepts may refer to cases involving mistake or fraud doctrine even though an electronic agent cannot actually be said to have been misled or mistaken."

[59]Official Comment No. 3 to Section 206

[60]Official Comment No. 4 to Section 206 provides useful examples of this, of which one follows:

Establishing the terms of a contract.

Once a contract is formed, Sections 208 and 209 provide the basis for establishing the contract's terms. Except as provided in Section 209 (which contains certain protections for mass market contracts) a party adopts the terms of a record, including a standard form, if it agrees to the record.[61] Adoption of certain terms may occur after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or in part by a later record to be agreed but at the time performance or use commenced there would be no opportunity to review the record before performance or use began. If a party adopts the terms of a record, the terms become part of the contract without regard to a party's knowledge or understanding of individual terms in the records, except for a term that is unenforceable because it fails to satisfy another requirement of UCITA.[62]

Section 208 (and Section 209, see below) must be read, however, with an understanding of significant additional protections established by Section 105 of UCITA for

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> Officer dials the telephone information system using his company credit card. A computerized voice states: "If you would like us to dial your number, press "1", there will be an additional charge of $1.00. If you would like to dial yourself, press "2". Officer states into the phone that the company will not pay the $1.00 additional charge, but will pay $.50. Having stated these conditions, Officer strikes "1". The computer dials the number, having located it in the database. User's "counter offer" is ineffective. The charge to user's company includes the additional $1.00

[61]As noted in Official Comment No. 2 to Section 208:

> There is no difference between adopting terms of a customized record or of a standard form. Standard forms are commonly used in commercial practice and provide efficiencies for both parties. Treating them in law as less than other contracts would put commercial law in conflict with commercial practice and reduce the efficiencies. Standard forms will increasingly be not the province of only one party to the deal. This section rejects decisions and the rule of Restatement (Second) of Contracts Section 211(3) which hold that a term that is not unconscionable or induced by fraud may be invalidated because a court holds after-the-fact that a party could not have expected it to be in the contract. Absent unconscionability, fraud or similar conduct, subject to Section 209, parties are bound the by terms of the contractual records to which they assent.

[62]UCITA Section 208

licensees under both standard forms and mass market licenses. Section 105 provides that if a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract or limit application of the term so as to avoid a result contrary to public policy. The Comments to Section 105 recognize that the terms of mass market licenses "may not be available to the licensee prior to the payment of the price and typically are not subject to affirmative negotiations. In such circumstances, courts must be more vigilant in assuring that limitations on use of the informational subject matter of the license are not invalid under fundamental public policy.[63]

Special Rules for Mass Market Licenses (Shrinkwrap and Clickwrap contracts): Section 209

UCITA provides guidelines for the enforceability of contract terms in mass market licenses.[64] A party adopts the terms of a mass market license only by "manifesting assent" (see below for discussion of this concept) before or during the party's initial performance or use of or access to the information. A term is not part of the license if it is unconscionable or unenforceable under Section 105(a) or (b)[65], or, subject to Section 301, if it

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[63]Comment No. 3 to Section 105

[64]UCITA defines "mass-market license" to mean a standard form used in a mass-market transaction. A "mass-market transaction" means a transaction that is (a) a consumer contract, or (b) any other transaction with an end-user licensee if (i) the transaction is for information or for informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information, (ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market, and (iii) the transaction is not a contract for redistribution or for public performance or public display of a copyrighted work, a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose, a site license, or an access contract. See id. Section 102.

[65]These sections state:

> (a) A provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption.
>
> (b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the

conflicts with terms to which the parties expressly agreed.

UCITA provides that non-negotiable contract terms for a mass-market license which are presented after the price for the license has been paid (for example, a shrinkwrap or certain clickwrap licenses) are enforceable under UCITA *only* if the licensee obtains certain rights that licensees do not have under current law. UCITA states that if a licensee does not have an opportunity to review the terms of a mass market license prior to becoming obligated to pay, and does not agree to the license after having that opportunity, the licensee is entitled to a return under Section 112, and to reimbursement of reasonable expenses of return, compensation for reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation, if the installation occurs because information must be installed to enable review of the license and the installation alters the system or information in it but does not restore the system or information upon removal of the installed information because of rejection of the license.

The UCITA Drafting Committee spent many years and dozens of meetings debating what ought to be the proper approach for shrinkwrap, and, as electronic delivery of software became more prevalent, clickwrap licenses. (A shrinkwrap license is the printed form license routinely found inside a box of software, or on the screen when you boot up the software. A clickwrap license is the license you see on your screen when you sign up to purchase new software online. Typically, you do not see the license inside the box, or on the boot up screen, until after you have paid for the software, the license says that you agree to it if you break open the "shrinkwrap" or start to use the software. This form of license was developed by software manufacturers 20 years ago as a method of mass marketing software while protecting their valuable intellectual property interests. Clickwrap licenses sometimes are seen before payment, and sometimes after.) Some of UCITA's opponents have suggested that, under UCITA, for the first time these contracts will be legally enforceable. In fact, these contracts have been upheld in most courts across the country for years.[66]

The UCITA Drafting Committee was faced with a difficult decision: Ban these types of contracts altogether, or place some reasonable limitations on them. Given that shrinkwraps have been the paradigm contract form in this industry for twenty years, with relatively few problems or lawsuits, banning them outright would have been irresponsible. Still, the Drafting Committee recognized that protection was indicated in situations where parties, particularly consumers and retail purchasers, are not able to review the terms of the contract in advance. They considered many alternatives, from prescribing required terms for shrinkwrap licenses (which was rejected because, among other things, it was thought to be too technologically inflexible and regulatory for a commercial statute), to requiring that material terms be stated on the outside of the software

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term.

[66]ProCD cite

package (which was rejected because, among other things, the materiality of many terms also would change with technology, and there was a concern that unless the specific laundry list of terms was stated in the Act, interpretation would be problematic for the courts). Ultimately, they adopted an approach that was developed out of a suggestion by the American Bar Association Information Licensing Subcommittee. That approach, simply stated, puts the shrinkwrap licensee in the same position as he would have been in had he seen the terms of the contract before he made his decision to purchase. The reasoning of the ABA Subcommittee was that since the basic objection of many of the opponents was that shrinkwrap licensees did not have the chance to review the terms prior to payment, and since they might have decided not to purchase if they had seen the terms, then the statute should try to put them in that position legally, even if it could not do so practically.

Thus, basically, UCITA does not make shrinkwrap contracts enforceable; in fact, it makes them unenforceable unless they meet certain standards, all of which are improvements on current commercial practice. What are these standards? UCITA says that if you do not see the terms of a contract until after you pay, then you must have the absolute right to return the software for a full refund if you don't like any of the terms of the contract, together with the costs of return, AND if you have to install the software in order to view the license and it somehow damages your computer, then you must be paid for the damage to your computer as well. None of this requires that there be any flaw in the software; you have the right of cost-free return just because you do not like the terms of the contract. The reasoning, again, is that if the terms are so undesirable that you would have decided not to purchase the software had you seen them in advance, then you should not be required to keep the software and it should be easy for you to get your money back. All of this is overlaid on the significant new protections established by Section 105, which limits the ability of licensors to include certain types of provisions in their standard form contracts.[67] While this approach does not satisfy everyone, it seemed to be the most fair and the most akin to current commercial expectations out of the many alternatives considered.

Terms when Contract formed by Conduct: Section 210

If a contract is formed by conduct, UCITA provides that a court shall consider a list of factors to determine what terms are included: (i) the terms and conditions to which the parties expressly agreed; (ii) course of performance, course of dealing or usage of trade; (iii) the nature of the parties' conduct; (iv) the records exchanged; (v) the information or informational rights involved; (vi) the supplementary terms of UCITA which apply and all other relevant circumstances.

Manifesting Assent

"Manifesting Assent" has many roles in contract law. Two of its principal roles

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[67][cite to section 105 and earlier footnote.]

in UCITA are: (1) it is one way by which a party indicates agreement to a contractual relationship; and (2) it is one standard used to determine when a party adopts the terms of a records as the terms of the contractual relationship.[68] As the comments point out, most often the same act will both indicate agreement to a contractual relationship and indicate which terms of a record are adopted as the terms of that relationship. Manifesting Assent is intended to be particularly useful in electronic contracting situations.

UCITA provides that one manifests assent to a record or term by, after having had an opportunity to review the record or term[69],

(1) authenticating it;

(2) In the case of a person, engaging in conduct or making statements that are intended, and which the person engaging in the conduct or making the statements knows or has reason to know that the other party may infer from such conduct or statements that the person assents to the record or term;

(3) in the case of operations of an electronic agent[70], engaging in operations that the circumstances clearly indicate constitute acceptance.

The authentication, statement or conduct must be attributable to the person. (See below for discussion of the importance of attribution to the person.)

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[68]Official Comment No. 1 to UCITA Section 112

[69]Official Comment No. 8 to UCITA Section 112 states:

> A manifestation of assent under this Act cannot occur unless there was an opportunity to review the record or term to which the assent is directed. Common law is not clear on this requirement, but it reflects simple fairness and codifies or adapts concepts preventing procedural unconscionability. For a "person", an opportunity to review requires that a record be made available in a manner that ought to call it to the attention of a reasonable person and permit review. . . . For an electronic agent, an opportunity to review exists only if the record is one to which a reasonably configured electronic agent could respond.

[70]UCITA defines "electronic agents" to mean a computer program, or electronic or other automated means, used by a person to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action, or response to a message or performance. See UCITA Section 102

As the Comments indicate, the basic principle of manifesting assent is that words are not the only means of indicating assent to a contract, and that conduct can convey assent as clearly as words.[71] This concept is present in UCC Article 2 and in the Restatement. In UCITA, it is the perfect, flexible vehicle for the demands of electronic commerce. UCITA sets forth overall standards which are necessary for a valid manifestation of assent, and then allows the parties to utilize the appropriate form for the particular agreement involved. Conduct or operations manifesting assent may be proved in any manner, including by showing that a procedure existed whereby a party must have engaged in conduct that manifested assent in order to proceed further with the use it made of the information or informational rights (e.g. striking a key to get to the next screen). Proof of assent depends on the circumstances. There is a safe harbor provided[72]. Moreover, if UCITA or other law requires assent to a specific term (such as with respect to permitting a licensor to exercise electronic self help under Section 816), then the manifestation of assent must relate specifically to the term (e.g. this may require "clicking" specifically on that term).

Attribution in Electronic Transactions

The Draft of UCITA which was submitted to the 1999 NCCUSL Annual Conference contained important and groundbreaking attribution rules. These included a provision which allowed parties to agree that, if they agreed up front to use a commercially reasonable attribution procedure[73], then, if they used that attribution procedure in their dealings with one another, and the attribution procedure showed that a particular message came from one of the parties, it would be in fact deemed to have come from that party.[74] Similarly, if the attribution procedure indicated the content of a particular message, then that message would be deemed to have had the content sent.[75]

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[71]Official Comment No. 2 to UCITA Section 112

[72]Subsection 112(d) states that "Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that reaffirms assent by electronic means". Official Comment No. 12 to Subsection 112 makes it clear that this encompasses "doubleclicking" or similar forms of duplicative consent procedures.

[73]Attribution Procedure means a procedure to verify that an electronic authentication, display, message, record or performance is that of a particular person or to detect changes or errors in informational. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment.

[74]Draft of UCITA submitted to the 1999 NCCUSL Annual Conference, Section 215

[75]Draft of UCITA submitted to the 1999 NCCUSL Annual Meeting, Section 216

Put into practical terms, here is the effect of such provisions: Company A and Company B decide to undertake a series of electronic transactions. Company A wants to know that the messages which seem to come from Company B actually do come from Company B, and that what they say is what Company B in fact wrote. Company B wants to know the same about the messages that come from Company A. From a practical standpoint, Company A and B want to know these things because they are dealing with each other in a series of transactions and each needs to be able to rely at each step on what the other has done. The most common way that parties solve this problem now is to agree up front to use a particular attribution procedure. These can take many forms, passwords, complex algorithms, etc. The point is that whatever form of security procedure is chosen, it must be commercially reasonable in light of the transaction being done[76]. For example, an eight digit password might be thought to be commercially reasonable for access to a commonly available commercial database, but not for the transfer of millions of dollars electronically. Going back to the example, Company A and B decide to use particular attribution procedures. Neither can send or view information to or from the other without using the agreed upon attribution procedure. If Company A uses the attribution procedure, and it indicates that the message came from Company B, and that the content of the message is what Company B sent, then Company A is entitled to rely on that and Company B is

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[76]Section 214 of the Draft of UCITA which was submitted to the 1999 NCCUSL Annual Meeting stated:

> The commercial reasonableness of an attribution procedure is determined by the court. In making this determination, the following rules apply:
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> (1) An attribution procedure established by statute or regulation is commercially reasonable for transactions within the coverage of the statute or regulation;
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> (2) Except as otherwise provided in paragraph (1) commercial reasonableness is determined in light of the purposes of the procedure and the commercial circumstances at the time the parties agree to or adopt the procedure.
>
> (3) A commercially reasonable attribution procedure may use any security device or method that is reasonable under the circumstances.

bound by it.. If, however, and this is an important point, Company B can demonstrate that it did not send the message, or that the content Company A received is not what Company B sent, then Company B is not bound by it.

Why should the law include these types of provisions? Because they will promote certainty in electronic contracting, chill frivolous litigation by remorseful parties who wish they hadn't undertaken a particular transaction and now are looking for a way out, and encourage parties to use appropriate, commercially reasonable security procedures by rewarding them when they do.

Unfortunately, these provisions were not well understood at the NCCUSL Annual Meeting (not surprisingly, given the magnitude of information digested by the Commissioners that week) and the Conference ultimately voted not to include them in the final UCITA by a narrow vote of 63 to 60.[77] Since then, provisions similar to these have been considered in another setting: the Commonwealth of Pennsylvania. As noted above, Pennsylvania considered provisions similar to these when they deliberating the enactment of UETA in Pennsylvania in the fall of 1999. It was decided that these provisions had significant value for the reasons discussed herein, and ultimately they were included in Pennsylvania's Electronic Transactions Act. This decision already has resulted in the attraction of new electronic commerce companies to Pennsylvania, and it seems likely that other states may follow suit, either as they consider UETA or UCITA.

Without such provisions, the current UCITA includes a section which discusses when an electronic message is attributed to a particular person. UCITA provides that a party relying on attribution of an electronic authentication, display, message, record, or performance to another person has the "burden of establishing" attribution.[78] A "burden of establishing" means "the burden of persuading the trier of fact that the existence of a fact is more probably than its non-existence."[79] However, as discussed above, the prior version of UCITA contained a much more comprehensive attribution provision, which, inter alia, provided means by which the "burden of establishing" could be met and included a requirement that an attribution procedure be commercially reasonable. UCITA now generally states that the act of a person may be shown in any manner, including a showing of the efficacy of an attribution procedure.

UCITA also contains a section which provides that if an attribution procedure exists to detect errors or changes in an electronic authentication, display, message, record, or performance, and one party conformed to the procedure and the other party did not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming

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[77]Minutes of 1999 NCCUSL Annual Conference

[78]See id. Section 213.

[79]See id. Official Comment, Section 213.

party may avoid the effect of the error or change.[80] This section is useful as far as it goes, but it would have been much more useful if it had established an affirmative basis upon which parties could rely on the content of an electronic message (as did the prior version of UCITA) rather than just an ability to avoid the error if a party did not conform. The latter is obvious and intuitive, and it seems unlikely that any court would have trouble reaching that conclusion. The former would have provided guidance and certainty to courts and contracting parties.

Electronic Error--Consumer Defenses

UCITA provides special rules for electronic errors in consumer transactions. In an automated transaction, a consumer is not bound by an electronic message that the consumer did not intend and which was caused by an electronic error if the consumer promptly on the earlier of learning of the error notifies the other party of the error; and delivers all copies of any information it receives to the other party or delivers or destroys all copies pursuant to reasonable instructions received from the other party; and has not used or received a benefit from the information or caused the information or benefit to be made available to a third party.[81]

Access Contracts

What should be the legal role and liability of Internet Access Providers? Courts, state, federal and international, have been attempting to sort this out for the past several years. UCITA provides significant clarity in this regard. In every potentially relevant provision, UCITA addresses the effect on the access provider, whether in the blackletter or a Comment.[82] It describes reasonable default rules that reflect current commercial expectations and guides parties who are attempting to contract with or through such providers. UCITA's default rules include the following provisions which address the obligations of access providers under access contracts (e.g., a contract to electronically gain access to the information processing system of another--a common example would be a subscriber's contract with America Online): [83]

1. Access must be made available at times and in a manner either conforming to the express terms of the agreement or, if there are no such terms, then in

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[80]Section 213(d) of UCITA

[81]Section 214 of UCITA

[82]A partial list of the sections which affect and/or specifically consider the concerns of access providers: 102, 105, 107, 108, 109, 112, 113, 202, 203, 206, 208, 209, 211, 212, 213, 214, 215, 304, 307, 308, 404, 406, 602, 611, 617 and 814.

[83]See id. Section 611.

a manner reasonable for the particular type of contract in light of ordinary standards of the business or industry.

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

3. Unless subject to a contractual restriction, information obtained by the licensee is free of any use restriction other than a restriction resulting from the informational rights of another.

4. If the access contract provides access over time, the licensee's access rights are as modified and made commercially available by the licensor during that time.

5. If the access contract allows the licensee access at times of its own choosing, an occasional failure to have access available during those times is not a breach of contract if it is:

   a. consistent with ordinary standard of the business, trade or industry for the particular type of contract; or

   b. caused by scheduled downtime, reasonable needs for maintenance, reasonable periods of equipment, software or communications failure, or events reasonably beyond the licensor's control and the licensor exercises commercially reasonable efforts under the circumstances.

UCITA also addresses the sensitive issue of when access providers may cut off access. The decision to cut off access to a subscriber, and therefore to a stream of revenue paid by that subscriber obviously is not made lightly by an access provider. Indeed, in a perfect world, the access provider would prefer never to have to cut off a subscriber. At times, however, this becomes necessary, particularly in cases where the subscriber is violating the terms of the Service or taking actions which would harm third parties, such as by circulating child pornography, or where circulation of other material violates the law of a jurisdiction in which the Service can be accessed. At those time, the access provider needs to be able to cut off service immediately. Sections 617 and 814 provide this right to the access provider. Under Section 617(b), an access contract may be terminated without giving notice, but except on the happening of an agreed event, termination requires giving reasonable notice to the licensee if the access contract pertains to information owned and provided by the licensee to the licensor. This protects licensees in database contracts. Section 814 gives the access provider the right to discontinue access on

material breach of an access contract or if the agreement so provides.[84]

Moreover, UCITA makes clear that an access provider does not manifest assent to a contractual relationship simply by their provision of access services.[85] This issue clarifies an important concern of access providers: whether they are somehow liable for, or in a contractual relationship with those who utilize their service to provide and exchange information to and with other users of their service.

Finally, UCITA preserves current law for published informational content.[86] As noted in Official Comment No. 8 to Section 402, it does not change express warranty rules for published informational content, but does not preclude the imposition of any obligation under other law or the creation of an express contractual obligation.[87] UCITA also clarifies the relationship between certain implied warranties and access providers. UCITA makes it clear that the implied warranty of merchantability does not apply to informational content, another important issue for access providers. There is created by UCITA a separate implied warranty for informational content which provides that a merchant in a special relationship of reliance with a licensee collects, complies, processes, provides or transmits informational content warrants to that licensee that there is no inaccuracy in the informational content caused by the merchant's failure to perform with reasonable care.[88] This warranty does not arise, however, for a person that acts

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[84]Section 814 must be distinguished from Section 816, which provides severe restrictions on the ability of licensors to exercise electronic self help to disable a licensee's ability to use computer information. Section 816 will apply in the more traditional business software setting, but not to access contracts.

[85]See Official Comment No. 7 to UCITA Section 112.

[86]"Published Informational Content" means informational content prepared for or made available to recipients generally, or to a class or recipients, in substantially the same form. The term does not include informational content that is:

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

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

UCITA Section 102(51)

[87]See Joel R. Wolfson, Express Warranties and published Informational Content under Article 2B: Does the Shoe Fit? 16 John Marshall Journal of Computer and Information Law 384 (1997).

[88]UCITA Section 404

as a conduit, or provides no more than editorial services in collecting, compiling, distributing, processing, providing or transmitting informational content that under the circumstances can be identified as that of a third person.[89] This is an important clarification for access providers who have repeatedly been the subject of actions attempting to hold them liable for content provided by third parties and merely distributed over their networks.[90]

Electronic Self-Help

One of the most controversial provisions of UCITA has been Section 816, which limits the rights of licensors to exercise electronic self help. At the outset, it must be noted that UCITA does not create the right of electronic self help; it LIMITS it. Under current law, self help generally can be exercised in a variety of transactions (not just software--self help has been around in the law for a long time), as long as there is no breach of the peace. UCITA's drafters were faced with a choice: (1) ban self-help entirely; (2) say nothing about self help and thus implicity approve its unfettered use; or (3) put reasonable restraints on the its use. They chose Option No. 3, because they thought there were good reasons for the use of electronic self help to not be entirely unchecked, yet, they also felt that there was not anything so different about computer information transactions that a complete reversal of existing law was warranted.

UCITA's drafters came up with the following restraints, **all** of which must be met before a licensor may exercise electronic self-help:[91]

(1) There must be a **material breach of the contract** (in other words, the Licensor cannot use electronic self-help in minor disputes)

(2) The software license agreement (or other contract) must contain a **separate term which specifically authorizes the Licensor to use electronic self help**, and the **Licensee must separately agree** to that term--**so there is no way that such a term could be "slipped by" an unwitting licensee. If the licensee does not agree to the term, the licensor cannot lawfully exercise electronic self help.**

(3) The Licensor must provide 15 days' advance notice before exercising electronic self-help. (This alone would enable most licensees to move any mission critical software out of harm's way). The notice must include both a description of the alleged breach and the name and contact information of someone at the Licensor's office that the Licensee can contact to object to the use of electronic

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[89]UCITA Section 404(b)(2)

[90][cite]

[91]UCITA Section 816 contains all of the described provisions.

self-help. Moreover, the Agreement must state exactly to whom this notice must be sent, so there is no danger that the wrong person at a company would receive the notice and not know what to do about it.

(4) No Licensor can use electronic self help if doing so would be likely to result in physical harm to any person or property (other than the licensed information) or to the public interest, no matter what the contract says. **Thus, using electronic self help being used to shut down the air traffic control system, or patient care systems in hospitals, or the like, (as is often stated in popular press accounts of UCITA) simply is not permitted by UCITA.**

(5) If a Licensor uses electronic self help wrongly, or without providing the required notice, UCITA expressly states that **the Licensor is liable for steep damages, including consequential damages**. UCITA does not permit these to be waived up front--thus the Licensor can do nothing to escape them.

(6) UCITA gives licensees the right to seek expedited relief in court to stop the use of electronic self help.

(7) UCITA expressly states that licensees may include in contracts a term which prohibits the use of self help by the licensee.

(8) UCITA does not permit these restrictions on the licensor to be varied by agreement; in other words, large licensors may not use their superior bargaining leverage to force licensees to give up the benefit of these provisions.[92]

Very few licensees would have the commercial leverage to negotiate all of these protections into their software license agreements--and if they could, they likely would have to give up significant other concessions to get them. UCITA does this work for them. Furthermore, UCITA eliminates the possibility that electronic self-help may be exercised against licensees who are not particularly sophisticated in the negotiation of computer information transactions, and who thus may not know to ask for protection against electronic self help. By requiring the contract to contain a term permitting it before it can be used, UCITA ensures that licensors must inform their licensees about the possibility, and secure their agreement up front. In general, the restrictions are so heavy and the potential liability so great, that it is unlikely that many licensors will feel comfortable using electronic self help after UCITA is passed. These provisions create a substantial new benefit for licensees, and for innocent third parties.

Conclusions.

A purchasing agent for a national building contractor wants to save time and money by

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[92]UCITA Sections 104 and 113

contracting over the Internet for the company's requirements for nails and other fasteners. She enters into an electronic contract with the Internet vendor to supply the company's requirements for three years.

Fortunately for this purchasing agent, UETA makes her electronic contract as valid as a paper one, thus allowing her to validly contract electronically for a period of time that in most jurisdictions would require a signed writing.

An entrepreneur sets up a website to match job seekers with companies seeking their services. Using Internet technology, all of the necessary "paperwork" can now be done electronically, resulting in significant savings and time--until the entrepreneur discovers that certain disclosures required under the federal Fair Credit Reporting Act are not authorized to be made electronically.

UETA makes enforceable all of the entrepreneur's contracts with jobseekers and employers. It may not affect the ability to make valid electronic disclosures under the Fair Credit Reporting Act, but at least provides a legal basis to assert that disclosures made electronically are as valid as those made on paper.

A consumer attempts to download new software from the vendor's website. During the downloading process, there is a small hyperlink notice "Legal terms and conditions: Please read." The consumer, eager to get the software, decides to finish downloading and then go back and read the legal terms and conditions. When she returns to find the link, however, it is gone. When she receives the bill for the software she ordered, she sees that she has been charged for eleven copies, not one, and realizes that she must have pressed the "1" key twice by mistake when ordering.

UCITA protects the consumer in this instance by making it clear that the website's process for providing that consumer with an opportunity to review the terms and conditions of the license and then to obtain the consumer's assent to the terms thereof are not sufficient to bind the consumer. Further, UCITA contains a provision which expressly protects consumers who make mistakes in electronic ordering. UCITA also serves the vendor, however, by setting forth procedures which can be easily adopted by any vendor, and which, when followed, will result in enforceable electronic contracts.

A company emails a software manufacturer about acquiring a new business application. The manufacturer responds with its standard terms and conditions by email, and the company emails back its order, substituting its standard terms and conditions for those submitted by the manufacturer. The manufacturer emails back a response stating that it will not ship unless its terms are accepted by the buyer. The company emails back rejecting this proposal, but there's an Internet glitch that day, the email never makes it to the manufacturer and the manufacturer ships.

UCITA's thoughtful approach to the "battle of the forms" in cases where the Internet is

the battlefield, gives all concerned the ability to analyze their contracting procedures to be certain that they will not unwittingly agree to terms and conditions.

Like UCC Article Two before them did for transactions in goods, UETA and UCITA provide guidance to parties, practitioners and courts alike as to how electronic transactions should be structured and interpreted. Without UETA and UCITA, the promise of the Internet to transform the way we do business cannot be fully realized. With them, this promise can be achieved in a manner that considers the interests of all contracting parties, allows them the freedom in most cases to contract as they see fit, and provides protection where it is most needed.