

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 18
Issue 2 *Journal of Computer & Information Law*
- Winter 1999

Article 2

Winter 1999

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John A. Chanin

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Recommended Citation

John A. Chanin, The Uniform Computer Information Transactions Act: A Practitioner's View, 18 J. Marshall J. Computer & Info. L. 279 (2000)

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SYMPOSIUM

THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT: A PRACTITIONER'S VIEW

by JOHN A. CHANIN†

I. INTRODUCTION

The Uniform Computer Information Transactions Act¹ (“UCITA” or “the Act”) was promulgated at the 1999 annual meeting of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) meeting in Denver, Colorado. Thus ended the initial phase of what had been a long, circuitous and often contentious journey for this highly controversial drafting effort. UCITA began some seven years ago as part of the process for the systematic review of Article 2 of the Uniform Commercial Code. It had been determined that Article 2, *inter alia*, should address the new transactional environment evidenced by the increased use of the internet as a very real presence in the commercial world. Conceptually it was determined that a new up-dated Article 2 would have a core of principles addressing basic contract issues which would touch all areas of the business of transacting in “goods” and that this “hub” would have among its various “spokes” provisions addressing transactions arising out of the “cyber” environment. This “hub and spoke” concept endeavored to fill the void in this area for about a two-year period as part of the Article 2 drafting committee’s efforts.

† John A. Chanin is a Life Member of the Conference of Commissioner on Uniform State Laws, having chaired the Hawaii Delegation to the Conference for over twenty years. Mr. Chanin practiced law in Honolulu for 35 years, primarily in the commercial litigation and insolvency areas; he has taught numerous courses at the University of Hawaii School of Law and has written extensively in various areas of commercial law and theories of communication. He and his wife Johann have recently relocated to Alexandria, VA. Mr. Chanin has served on numerous NCCUSL drafting committees including the various committees dealing with privacy and public records issues, eminent domain, and most recently the UCITA drafting committee.

1. U.C.I.T.A. (2000)

In the midst of this effort, it became apparent that the “hub and spoke” approach was not going to be a particularly satisfactory solution. It was decided that a more realistic and comprehensive approach would be to have a separate committee, which would only deal with transactions in the computer information transactions area. A separate drafting committee was created and entitled “Article 2B” of the Uniform Commercial Code. This committee, chaired by Commissioner Carlyle C. Ring, had as its Reporter, Professor Raymond T. Nimmer. It was primarily because of the efforts of Ring and Nimmer that UCITA was successfully promulgated by NCCUSL. Structurally, the 2B approach fit well within the UCC, the precedent having been set by the enactment of UCC Article 2A, a separate section for equipment leasing transactions. However, after a number of years, dealing with the substance of the embryonic 2B, circumstances erupted which necessitated still another “re-birth” of UCITA.

Traditionally, the American Law Institute jointly sponsors NCCUSL projects involving the Uniform Commercial Code. Indeed, among the many participants in the 2B/UCITA drafting process, were representatives of ALI, whose input was invaluable in the drafting process. In that 2B was to be part of the UCC, this partnership moved ahead, albeit somewhat uncomfortably on occasion. Ultimately, it was determined that it might be best for UCITA to be separated from the UCC and promulgated as a separate, free-standing effort of NCCUSL without the involvement of the ALI.² Only a delving into the legislative history of the drafting efforts might provide some insight into the reasons for this decision. It was clear, however, that there were conceptual, philosophical and perhaps political factors, which led to the breach and the ultimate “re-birth” of 2B as “UCITA.”³

Of course one of the unfortunate, results of this divorce was the decision by the ALI advisors to end their involvement in the drafting committee process. However, in spite of this very real loss, the committee continued its efforts and ultimately came forth with an Act which is a portent of a whole new, and potentially most creative, approach to how we view the formation of agreements not only in the area of digital information transactions but in the entire area of contracts in general.⁴ It is

2. *The 2B Guide* (visited May 26, 2000) <<http://www.2bguide.com/docs/50799dad.html>>.

3. *Id.*

4. One of the more dramatic aspects of this effort is the realization that once again, the basic constructs lawyers use in the contract formation area are being challenged. Practitioners, taking their cue from traditionalists in the area, continue to find comfort in such concepts as “meeting of the minds” and the assumption that the parties execute agreements only after having read them, understood them and negotiated changes. Those assumptions have always been open to the challenge of reality. When standing in the rental

the goal of this writing to provide an analysis of the more significant, innovative and in some instances controversial provisions. This article addresses such issues as those relating to the scope of the Act as well as the manner in which UCITA deals with such concepts as the ability to opt-in or out of the Act, mixed transactions, variation of terms by agreement of the parties, the use of the concept of the "manifestation of assent," electronic signatures, the use of the electronic agent, as well as the introduction of the concept of the "mass-market." It is hoped that the following observations will be of assistance to the reader who is attempting to divine "true meaning" from this refreshing and highly innovative legislative effort. In the following analysis, the writer draws heavily upon the unofficial comments, which were created to assist in the interpretation and understanding of the sections of UCITA.⁵ In this regard the writer is indebted to the reporter, Raymond Nimmer, Committee Chairman Connie Ring, and the many advisers whose efforts were so integral to the drafting committee's efforts.

II. THE PROCESS:

The UCITA drafting committee met at various times during the years that the drafting effort proceeded. The working committee was

car line, feeling the breath of some twenty anxious renters on the nape of the incipient car renter's neck, while hoping to get to one's hotel as quickly as possible, the idea someone will carefully read, digest, negotiate and only then sign the tightly written, small print, multi paged rental contract, defies our basic sense of reality. There is no substantive meeting of the minds. Clearly there constructs (some would use the word "fictions") are convenient conventions allowing for the smooth movement through the commercial world. The introduction of the "shrink wrap" package, which creates the seeming anomaly of breaking open the package and thus becoming contractually bound before having read the terms and conditions of the contract conveniently located inside the package, again challenges these constructs. UCITA, by recognizing this dilemma, attempts to cope with it more or less in traditional ways by requiring that a copy of the terms be available for examination by the consumer before the product is purchased and the package opened. *See e.g.* UCITA sections 209, 211. It is submitted that this approach is merely a band-aid, temporarily addressing the problem, but bringing into bold relief the need for a complete examination of these clearly antiquated conceptual conveniences which will soon be unable to deal with these contract formation issues resulting from the dramatic change in the structure of how commercial contexts are occurring.

5. The Official Comments of the all Uniform Acts are extremely helpful in understanding the intent of the drafters and the meaning of the sections they address. The Comments are not considered part of the text. Often during the Conference's floor debate, the question is raised as to whether a particular proposed amendment should be put in a comment or is of sufficient import to be included in the text. Often times, floor debate is resolved by the insertion of a clarifying commentary. Comments are usually prepared on an on-going basis during the drafting process. They are normally the work product of the Reporter whose mandate is to accurately reflect the sentiments of the Drafting Committee. Whether the Official Comments appear is a state's final adopted version of a particular Act, varies from state to state.

made up of uniform laws commissioners, most of who were practitioners in the private practice of law. Specific expertise in the "computer law" area was provided by the Reporter, Professor Raymond T. Nimmer, whose function it was to provide specific insight into the area as well as to translate the ideas, insights and decisions of the committee into specific drafts, which were in turn considered at the next committee meeting. Perhaps the single most significant contribution to the drafting process came from the advisers to the committee. These were individuals, from varying commercial and industry backgrounds, all highly knowledgeable in the computer law area. Their insights and counsel at the drafting committee meetings were invaluable. Without exception, there were as many as one hundred advisors at each of the meetings. They came from all over the country and represented such commercial sectors as software, publishing, banking and finance, entertainment, industry and insurance and transportation.

At the annual NCCUSL meetings the draft (i.e., the work product of the committee for the preceding year) was read to the entire conference, line by line.⁶ It was debated and was subject to various motions as well as on-going discussion from the floor of the conference. As the result of the input from the floor, the committee returned to the drafting process and attempted to reflect the suggestions of the conference in the draft. Ultimately, the "final" draft was voted on state by state at the 1999 Denver Annual Meeting where it was passed and became a "uniform law" for consideration and presumably promulgation by the states.

III. AN OVERVIEW

Perhaps the best way to get a sense of what the drafters of UCITA hoped to accomplish would be to examine one of the extensive Prefatory Notes which was written with the objective of extolling the virtues of UCITA's, putting it's "best foot forward", as it were.⁷

In what appears to be the most extensive of the various Prefatory Notes to the Act, UCITA is referred to as a "cyberspace commercial statute, the goal of which is to "provide a firm basis for marketplace transactions" relating to computer information.⁸ UCITA sets out a variety of default contract rules, which are applicable in the event the parties fail to provide specific terms on a given issue.⁹ UCITA is viewed by many as

6. Section 8.1(a)(1) of the Constitution of NCCUSL requires all Acts being considered for final approval must be considered section-by-section by the Conference sitting as a Committee of the Whole, before the Act may be submitted for the final approval of the Conference.

7. See U.C.I.T.A., Prefatory Note.

8. *Id.*

9. *Id.*

having "the potential of establishing a uniform law for myriad computer-information-related transactions in the information age."¹⁰

The Prefatory Note which will be included as part of the final version of the Act, observes quite correctly that Computer information technologies have created a rapidly expanding multifaceted industry, which already exceeds goods manufacturing in the United States economy.¹¹ Transactions in intangibles of computer information have become a central focus of commerce and require newly tailored contract rules to fit computer information commerce. It is the recognition that "the law of toasters, televisions and chain saws is not appropriate for contracts involving online databases, artificial intelligence systems, software, multimedia and Internet trade in information," that led to the creation of this UCITA.¹²

In the committee's effort to explain the need for the Act, it observes that

until the promulgation of UCITA, transactions in computer information have been governed by a complex often inconsistent, uncertain blend of different aspects of state common law, rules of federal common law and various state statutes most of which were designed for other subject matter such as Article 2, focusing on the *sale of goods*, rather than on *licensing of computer information*.¹³

Whereas in the goods environment, the emphasis revolves around the transfer of ownership rights in tangibles primarily, in the computer information area, intellectual property law, dominated by copyright law controls.¹⁴ The copyright owner retains the exclusive right to reproduce, distribute or modify copies of the work.¹⁵ The purchaser of a copy of computer information for example, acquires the copy subject to the fact that the holder of the copyright retains control over most uses of the copy unless it licenses or sells some or all of its rights. Further distinctions are drawn from the fact that the transactions deal primarily with intangibles (e.g., the purchase of a software program is not triggered by the buyer's desire for the tangible floppy disk or CD, but rather for the information it contains).

An even further break down occurs within the concept of information. Computer generated information unlike printed information can be copied perfectly. Indeed to use computer information one must copy it.¹⁶ This is not the case for print information and consequently there are con-

10. *Id.*

11. *Id.*

12. *See generally*, U.C.I.T.A., Prefatory Note

13. *Id.*

14. *Id.*

15. *Id.*

16. *See MAI Systems Corp. v. Peak Computer, Inc.* 991 F.2d 511, 517 (9th Cir. 1993).

tract issues relating to such problems as the wrongful use of a copy, which must be addressed.¹⁷ As is specifically noted in the Prefatory Comment to one of the earlier UCITA drafts:

The underlying property law and the ease of copying causes sharp differences in contracting practices between the computer information and the goods worlds. The differences are enhanced by the Internet and on-line services. Indeed in the modern market, while many users own machines that contain all the information resources they need, many systems use communications capabilities to allow a licensee to use software located thousands of miles away in "cyberspace."¹⁸

One of the key realizations of the committee was the fact that given the foregoing differences between the worlds of goods and computer information the paradigm transaction is not a "sale" but rather a "license." The committee observed that "[t]he functional elements of the prototypical license in the computer information context are (1) the conditional nature of the rights or privileges conveyed to use the information, and (2) the focus on computer information rather than goods."¹⁹

As the drafting committee points out, whereas "the sale of a car is a sale of a car," the license of a copy of information "transcends contract terms in sales of goods in that the license may confer entirely different rights upon a particular licensee e.g. the right to use/reproduce 100 copies, 10 copies or a single copy, even though each copy may be identical in each case."²⁰ A license, depending upon its terms may contain restrictions precluding commercial use of a database, limit a right to access, limit use to a specific computer, limit use to internal operations of the licensee, prevent distribution of copies for a fee, require distribution in a defined package of software and hardware and/or preclude modification of the computer information.²¹

The committee's enthusiasm for the project is further evidenced when it observes that perhaps one of the most exciting and innovative aspects of the UCITA drafting process is the recognition of the differences in the demographics of the market traversed by the "cyber" transaction.²² There are a significant number of small businesses in the computer information market place. Because of their small overhead and capital needs the technology enables the creation and dissemination of computer information products with out large capital investment. The fact that such small firms can engage in the development of computer information products that have significant commercial value has "geo-

17. *See generally*, U.C.I.T.A., Prefatory Note

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

metrically expanded with the advent of the Internet."²³

Consequently, the traditional image in the mercantile goods world of a large manufacturer dealing with small purchasers is often inverted in computer information transactions.²⁴ It has been observed that this market shift does not mean that economic leverage is balanced in all transactions, but simply that the direction of imbalance differs depending on the make-up of the particular transactions. UCITA attempts to maintain "the viability of small innovative licensors who often deal with large licensees."²⁵

What becomes apparent is that perhaps of even greater significance is the fact that UCITA recognizes that the traditional paradigm of the "consumer" defined in terms of "personal, family and household" needs to be re-examined in light of the fact that there are many market transactions in which there is a significant leverage imbalance experienced by the small business entity not at all dissimilar from that of the traditional "consumer."²⁶

Additionally, the "Conceptual Internet Shopping Mall" has completely changed the leverage issue in another context. The introduction of the concept that a buyer can shop online for the best price, thereby putting the buyer in a position of bargain choice not previously available will further revolutionize the view of the consumers bargaining position in the market place. This recognition, together with the need to re-examine the traditional ideas surrounding contract formation, "meeting of the minds" et al., created significant challenges for the drafters of UCITA.²⁷

The drafting committee, as it delved deeper into the project, also had to confront the question of impacting upon important social issues in our society such as the unfettered dissemination of information guaranteed by the First Amendment.²⁸ One of the major goals of UCITA is to foster, rather than inhibit the expansion of distribution of computer information and to recognize the social values associated with it.²⁹ The convergence of technology and the evolution of the information age reflect a fundamental shift in our society and in how people interact, trade and establish commercial relationships. "Informational content," which consists of sights, sounds, text and images that are communicated to people is important commercially. However, this does not diminish its political or social role.

23. See generally, U.C.I.T.A., Prefatory Note

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. See generally, U.C.I.T.A., Prefatory Note

In other words, "informational content does not become something entirely different if the provider or author distributes it commercially."³⁰ Commercialization is not inconsistent with the role of information in political, social and other venues. "These underlying values argue strongly for an approach to contract law in this field that does not encumber, but supports incentives for distribution of information and its distribution."³¹

Another significant element of the task facing the UCITA committee was the relationship and tension between contract law concepts and those of intellectual property law.³² Owners of intellectual property have, for years, contracted for the selective distribution of their property and limited contracted-for use.³³ Contract law enforces contract choices, subject to specific preemptive restrictions in federal property law, anti-trust, consumer or misuse law.³⁴ Among the issues, which had to be addressed in the context of a computer information statute was the recognition that digital technology and distribution systems change how and where information is made available and what rights or protections are appropriated for the new methods of distribution.³⁵ These technological changes have led to a wide ranging property law debate that ultimately goes to fundamental social policy issues about the use and distribution of information. Although UCITA can only take a neutral position on the ultimate resolution of these issues, which are best addressed by federal and international policy, it does provide a basis for a case-by-case resolution of the myriad issues.³⁶ UCITA does not attempt to change the law on the enforceability of any restrictive clause that entails copyright misuse or that offends fundamental First Amendment concerns.³⁷

As UCITA clearly recognizes, intellectual property law places some specific limits on contract.³⁸ These include restrictions on transferability, some recording requirements, a statute of frauds, and a rule that enforces property rights against good faith purchasers.³⁹ This interaction of state and federal law yields default rules that in some cases do not correspond to the treatment of analogous issues in the UCC.⁴⁰ These provisions reflect a policy of correspondent rules in addition to the simple

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See generally, U.C.I.T.A., Prefatory Note

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

recognition that federal law preempts contrary state law.⁴¹

The history of the commercial code reflects the over-riding principle of freedom of contract. UCITA continues that tradition. UCITA, like Articles 2 and 2A before it, provides a background and plays only a "default or gap-filling function."⁴² A default rule applies only if the parties do not agree to the contrary.⁴³ In UCITA, unless expressly indicated to the contrary, the effect of all of the rules in the Act can be varied by agreement.⁴⁴ The essential idea is that UCITA is to continue the tradition that uniform laws are meant to facilitate commercial practice.⁴⁵ Commercial practice is the appropriate standard for gauging contract law unless a clear countervailing policy indicates to the contrary or the contractual arrangement threatens injury to third-party interests which social policy desires to protect. UCITA does not over-ride or regulate contract practice. It attempts to support and facilitate it. As is noted in one of the Prefatory notes to the Act:

UCITA embraces this philosophy [of freedom to contract]. The best substantive rules lie not in a theoretical model, but in commercial and trade practice. This is not a simple faith in empirical sources for commercial law. It stems from the reality that we may not know how law interacts with contract practice but decisions about contract law will continue to be made. In those decisions, we should refer for guidance to the accumulation of practical choices made in actual transactions. The goal is congruence between legal premise and commercial practice so that the transactions between contracting parties achieve commercially intended results.

* * *

The approach [in UCITA] is not to draft rules that a party would negotiate tailored to each particular case, but to select an intermediate framework whose contours are appropriate but will often be altered by particular agreements . . . UCITA provides gap-filler rules that apply when the agreement of the parties or the trade and business practices between the parties do not provide applicable terms.⁴⁶

In addition to assuring that freedom of contract is maintained, UCITA is structured so as to facilitate continued expansion of electronic commerce in computer information.⁴⁷ The advent of the Internet has obviously highlighted the importance of "electronic commerce." One of the issues which must be dealt with in electronic commerce is to be facilitated is procedure and authorization. Electronic commerce entails the

41. *See generally*, U.C.I.T.A., Prefatory Note

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See generally*, U.C.I.T.A., Prefatory Note

use of computers to make and perform contracts.⁴⁸ A threshold issue involves whether electronic records and signatures satisfy applicable law that focuses on paper-based signatures and writings.⁴⁹ More than half of the United States has already adopted legislation authorizing electronic equivalents to writing requirements.⁵⁰ UCITA, together with the Uniform Electronic Transactions Act ("UETA") together with proposed amendments to Articles 2 and 2A of the UCC would establish state law principles that allow for electronic "authentication" as a form of signature and recognizes the equivalence of electronic "records" and paper writings.⁵¹

With respect to the establishment of contract terms (an area not addressed in UETA) UCITA adapts the common law concepts of manifestation of assent to contract terms to apply to electronic contexts.⁵² A manifestation of assent binds a party, having had an opportunity to review the terms; to the contract terms if in context the party had reason to know its acts would be treated as assent to the terms. For example an on-screen "click" acceptance is explicitly binding.⁵³ A safe harbor of a double "click" reaffirming assent is provided.⁵⁴ UCITA further provides that the actions of "electronic agents" can establish a contract.⁵⁵ The term "electronic agent" refers to automated devices such as computer programs, set out to achieve particular purposes, such as finding and acquiring information.⁵⁶ The contract formation rules of UCITA treat the acts of such agents as binding on the party using them, but also provide safeguards to rectify the consequences of any mistake of fraud.⁵⁷

Another legal concept addressed by UCITA is "attribution" i.e. to whom the "signature" message or performance is attributed in law.⁵⁸ UCITA places the burden of establishing attribution on the person seeking to benefit from such attribution.⁵⁹ However, UCITA recognizes and gives legal effect to a commercially reasonable "attribution procedure" used to identify a party.⁶⁰ Such a procedure is one agreed to or adopted by the parties, or created by law, to identify a party as responsible for an

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *See generally*, U.C.I.T.A., Prefatory Note

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See generally*, U.C.I.T.A., Prefatory Note

60. *Id.*

electronic signature, message or performance.⁶¹ However, this resulting attribution is only legally effective if the procedure is "commercially reasonable."⁶² UCITA provides the additional safeguard that the party who would normally be responsible as the result of attribution, may avoid responsibility by proving that the electronic event did not stem from areas under its control or for which it is responsible.⁶³

In summarizing this overview of the Act, it should be noted that in an information age in which transactions in computer information represent an increasingly large portion of the national economy, the need for a coherent contract law base tailored for the types of transactions and transactional subject matter that characterize this industry is apparent. UCITA marks an important step providing that basis by drawing on traditional commercial contract law principles and on modern practices in computer information.

IV. SCOPE: AN ATTEMPT AT ACCOMODATION AND THE HOPED FOR AVOIDANCE OF CONFUSION

Without much ado the Act announces almost at the outset that it applies to "computer information transactions."⁶⁴ Even if the transaction includes subject matter "other than computer information," the Act applies under the provisions spelled out in section 103(b).⁶⁵ Interestingly, although this section has been restructured from an earlier draft the primary purpose test has been retained so that in all cases not involving goods, where computer information or informational rights are the "primary purpose" of the contract then "this Act applies to the entire transaction."⁶⁶

UCITA is not intended to deal with computer information *per se*; its primary focus is with *agreements in computer information*.⁶⁷ The comments also announce that UCITA is not intended to deal with property rights in information.⁶⁸ It may not be apparent to the uninitiated, but this caveat about what is *not* covered (i.e., property rights, is part of the continuing attempt to assuage the concerns of the intellectual property interests).

Presumably the first step one would take in determining what is intended to be covered by the Act is to determine what the term "computer information" means. Section 102(a)(10) defines the term to mean "infor-

61. *Id.*

62. *Id.*

63. *Id.*

64. U.C.I.T.A. § 103(a)

65. U.C.I.T.A. § 103(b)

66. U.C.I.T.A. § 103, Reporter's Note (d)(4).

67. U.C.I.T.A. § 103, Reporter's Note 2.

68. *Id.*

mation" (i.e., "data, text, images, sounds, mask works, or computer programs, collections and compilations of them;") "in electronic form, obtained from or through the use of a computer or which is capable of being processed by a computer."⁶⁹ Next one would want to determine what the term "electronic" means. It is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."⁷⁰ It is submitted that the average lawyer who may be "technologically challenged" is not going to derive any particular solace from these definitions. The murkiness may be further enhanced when the lawyer, seeking enlightenment looks to the definition of "computer," for after all it is *computer* information that is the subject of the exercise. "Computer" is defined as "an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions."⁷¹ This definition replaces an earlier version, which defined the computer as an electronic device "that can perform substantial computations, including numerous arithmetic operations or logic operations, without human intervention during the computation or operation."⁷² It is not clear whether either of these definitions provides any significant insight or clarity to one attempting to determine whether the particular computer information with which he is concerned is within the scope of the Act. Parenthetically, all may not be lost in that UCITA in Section 104 does allow the parties to opt in or out or the Act under certain defined circumstances, which will be examined in greater detail hereinafter.

At this point one would hope, undaunted, the reader, still seeking guidance and enlightenment looks to the definition of "computer information transaction" ("CIT").⁷³ "CIT" is defined as meaning "an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information."⁷⁴ The term includes a "support contract" under Section 612.⁷⁵ "The term does not include a transaction merely because the parties' agreement provides that their communications about the transaction will be in the form of computer information."⁷⁶

69. U.C.I.T.A. § 102(a)10.

70. U.C.I.T.A. § 102(a)(26).

71. U.C.I.T.A. § 102(a)(9).

72. Preliminary Draft Section 102(a)(11).

73. U.C.I.T.A. § 102(a)(11).

74. *Id.*

75. See U.C.I.T.A. § 612, Reporter's Notes 5. Support agreements are governed by the provisions of UCITA Section 612. See Reporter's Notes, Note 1 to Section 612. "A support agreement is an agreement to provide advice or consulting services relating to the information." *Id.*

76. U.C.I.T.A. § 103(a)(11).

If one breaks this definition of "computer information transaction" into its various components it does not necessarily provide much help. The definition of "agreement" is relatively straightforward.⁷⁷ However, the phrase "or the performance of it" creates confusion. Presumably this is an attempt to affirm that performance takes the agreement out of the Statute of Frauds. However, if this is the intent, it seems somewhat unusual to note this exception in a definitional section. The agreement must be one which "creates, modifies, transfers or licenses" computer information or *informational rights*.⁷⁸ "Informational rights" are those rights" . . . allowing the "right to control or preclude another person's use of or access to the information" based upon those rights.⁷⁹

It is important to note that the proposed comments to UCITA shed some light on the issue. It is observed that the term "computer information" focuses on information that is in an electronic form that is *accessible and useable by a computer*.⁸⁰ It is the intent of the drafters that the definition be open ended, so as not to preclude future technologies within the scope of computer information.⁸¹ For example, an earlier draft defined computer information in terms of "digital or *equivalent form*."⁸² Although this language did not find its way into the final draft, it is clear that the intent is to leave the door open for advancements in technology. The definition is not intended to cover information merely because it could be scanned or otherwise entered into a computer, but is limited to electronic information in a form capable directly of being processed in a computer. The term does not generally include printed information or other non-digital formats in which information is encompassed, but which are not directly useable in computer systems. Note, that the term is intended to include copies of the information such as diskettes containing "computer information." The term also includes "embedded computer" programs, providing a basis to distinguish between situations in which the computer information is merely incidental to goods.

In the case of "computer information transactions" it is the intent of the committee that the term refer to transactions the primary focus of which is computer information.⁸³ It is not intended to cover information that is merely incidental to a transaction. On the other hand, however, it is not necessary the computer information be the single purpose of the transaction for UCITA to be applicable.⁸⁴ Further, it is recognized that

77. U.C.I.T.A. § 102(a)(4).

78. U.C.I.T.A. § 102(a)(11).

79. See U.C.I.T.A. § 102(a)(38).

80. U.C.I.T.A. § 102, Reporter's Note 6.

81. *Id.*

82. Previous Draft § 102.

83. U.C.I.T.A. § 102, Reporter's Note 9.

84. *Id.*

in many cases aspects of a transaction focus on computer information while other aspects focus on goods or other contractual subject matter. Where there is a blend of goods and computer information the Act will apply to the computer information while Article 2 or 2A of the Uniform Commercial Code will apply to the goods portion of the transaction.

The mere fact that information related to a transaction is sent or recorded in electronic form is not in and of itself sufficient to be within the definition of "computer information transaction."⁸⁵ The creating, modifying or obtaining the computer information itself must be the primary purpose of the agreement.⁸⁶ Thus a contract for airplane transportation is not a transaction within the Act simply because an electronic ticket is purchased.⁸⁷ The subject matter is not digital information, but the service- air transportation from one location to another. The term does not apply to the many cases in which a person provides information to another for the purposes of another transaction such as making an employment or loan application.

As the comments note, a computer information transaction includes agreements such as software development contracts.⁸⁸ However, a transaction is not for the creation of computer information in the sense intended in the Act where the contracted for activities are merely secretarial or clerical in nature. The computer information must be produced through some business, professional, artistic, or imaginative effort. UCITA clearly does not cover contracts to create print books or articles since they do not focus on computer information.

The scope of UCITA obviously turns on the definition of "computer information transaction."⁸⁹ For a transaction to be included acquiring the computer information, access to it, or its use must be a focus of the transaction and not a mere incident of another transaction. Typically for a covered transaction, the contract is for the creation, use or distribution of the computer information itself. UCITA includes a license allowing a company to transform photographs into digital form for re-licensing to others.⁹⁰ It also includes a contract to compile in digital form a database of names for use as a product furnished as a mailing list. One must keep in mind that transactions in computer information focus on that information, rather than tangible media that contains the information (goods). The transferee seeks the information and contractual rights to use it. Unlike a buyer in goods, the purchaser (e.g. buyer, lessee, or licensee) of a copy of computer information has little interest in the original

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. See U.C.I.T.A. § 103, Reporter's Note 2.

90. See U.C.I.T.A. § 103, Reporters Note 4.

diskette, CD or tape that contained the information unless the computer information remains on the media and nowhere else. More often a purchaser of copies the information into a computer reads or prints it from a computer display, or transmits it from one computer to another location in all cases rendering the original media (if any) largely immaterial. As computer technology increasingly shifts to purely computerized use and distribution in many cases there is no tangible media involved at all.

UCITA specifically applies to contracts for the development or creation of computer information, such as software development contracts and contracts to create a computer database.⁹¹ Contracts of this type had been subject to inconsistent court rulings applying sale of goods or common law theories based on unclear distinctions. The Act covers all such transactions.⁹² UCITA does not, however, cover contracts for development or creation of motion pictures, sound recordings or broadcast programs.⁹³ These as well as contracts to create print books or articles are specifically excluded.

UCITA also applies to transactions involving the distribution or grant of the right to use a *computer program*.⁹⁴ These transactions are covered whether they involve a license or a sale of a copy. The difference between a license and an unrestricted sale of a copy, however, is relevant within the Act in that as reflected, a license often involves a more substantial retention of rights by the copyright owner.⁹⁵ In UCITA, some provisions apply to all computer information transactions (unrestricted sales or licenses) while others are limited to licenses.⁹⁶ Under copyright law an unrestricted sale of a copy gives the buyer of the copyrights to use.⁹⁷ Ownership of a copy, however, does not under copyright law grant the right to make copies for distribution to make multiple copies for simultaneous use, to rent, a copy or to publicly display it. A license can either reduce or increase those rights and, in some cases, may preclude a transfer of ownership of the copy.

The Act also covers transactions involving access to or information from a computer system.⁹⁸ This covers the Internet and similar systems for access to or use of computer information. Online information distribution is the single major new development in commerce in the last portion of the twentieth century. As defined in the Act, however, it does not

91. U.C.I.T.A. § 103, Reporter's Note 2a. "*Contracts to Create or Develop Computer Information.*"

92. *Id.*

93. *Id.*

94. U.C.I.T.A. § 103, Reporter's Note 2b "*Computer Programs.*"

95. *Id.*

96. *Id.*

97. 17 U.S.C. § 117.

98. U.C.I.T.A. § 103, Reporter's Note 2c "*Access and Internet Contracts.*"

include broadcast or similar distribution of programming or distribution of digital motion pictures, sound recording or the like and should not be applied by analogy to such transaction.⁹⁹

V. EXCLUSIONS FROM UCITA

It was the intention of the drafters of the Act to leave unaffected all transactions in the "core" businesses of other information industries such as print, motion picture, broadcast and sound recordings, whose commercial practices in their traditional businesses differ from those in computer software, online and data industries.¹⁰⁰ UCITA is not intended to apply to the print industries.¹⁰¹ Whether a magazine book or newspaper publisher can contractually limit purchases of copies and what contract liability applies to works distributed in that form is not addressed in the Act.¹⁰²

Section 103(d) specifies that the Act does not cover "financial service transactions," information contracts involving "audio or visual programming" provided by "broadcast, satellite, or cable," motion picture, sound recording or musical work or phonorecord, a compulsory license, a contract of employment other than an independent contractor, a contract that does not "require that information be furnished as computer information or in which the form of the information as computer information is otherwise insignificant with respect to the primary subject matter of the transaction."¹⁰³ Also excluded is "subject matter within the scope of [specified Articles of the Uniform Commercial Code]."¹⁰⁴

In the practitioner's attempt to divine what these exclusionary sections really mean, he may find that the suggested comments to the sections provide a degree of guidance. For example in analyzing "mixed transactions" the drafters indicate that as with transactions in goods, computer information transactions may present questions regarding the extent to which a transaction is governed by the Act, common law or goods-based law in Articles 2 or 2A of the UCC.¹⁰⁵ In modern commerce virtually all contracts are governed by multiple sources of contract law.¹⁰⁶ Thus, Article 2, common law, labor law and copyright law govern the consequences of a contract to produce a motion picture or distribute it.¹⁰⁷ The sale of a book is governed in part by Article 2 of the UCC,

99. U.C.I.T.A. § 103(d).

100. U.C.I.T.A. § 103, Reporter's Note 3.

101. *Id.*

102. *Id.*

103. U.C.I.T.A. § 103(d).

104. *Id.*

105. U.C.I.T.A. § 103, Reporter's Note 4.

106. *Id.*

107. *Id.*

consumer law, common law and copyright law.¹⁰⁸ UCITA hopefully provides clarity on the issues it addresses, but is supplemented by federal law, including copyright law, consumer law and common law.¹⁰⁹ As is specifically noted in one suggested comment to the section:

Since virtually contracts of all types involve "mixed" law, the scope issue is not whether multiple sources of contract law apply but to what extent this Act applies in lieu of another law. Subsections (b) and (c) decide the question based on the issue presented, the type of transaction, and applicable commercial policies.¹¹⁰

As it relates to the distinctions between computer information and "goods" it is clear the latter is still governed by Article 2.¹¹¹ It is suggested that given the proper analysis, there should be no overlap between the two. As the comment suggests in most cases, if goods and computer information are in a transaction, good-based rules apply to the goods, but UCITA applies to the computer information.¹¹² Some courts describe this as the "gravamen of the action" standard.¹¹³ Law applicable to any part of a transaction depends on whether the issue pertains to the goods or to the computer information. Each governs its own subject matter when both are in the same transaction; each applies to its own subject matter.

As the comments note however, there are various exceptions to the foregoing rule of "to each it's own." For example quite often computer information may be transferred on tangible media, which may be "goods." This raises the question as to what law applies to the plastic diskette or other media. When the media is the carrier of computer information, it is within the Act. The Act applies to goods that are a copy, documentation or packaging of the computer information.¹¹⁴ There are incidents of the transfer of computer information.¹¹⁵ UCITA covers both the software and the media on which the software is copies of documented.¹¹⁶

Further, in some cases, computer information is so embedded in and sold or leased as part of goods that the computer information is merely incidental to the goods. These cases are a narrow exception to the gravamen of the action test under this Act with respect to goods.¹¹⁷ If the computer information is embedded in and inseparable from goods that

108. *Id.*

109. *Id.*

110. *Id.*

111. See U.C.I.T.A. § 103, Reporter's Note 4b.

112. *Id.*

113. *Id.*

114. See U.C.I.T.A. § 103, Reporter's Note 4c.

115. *Id.*

116. *Id.*

117. *Id.*

are sold as goods, where this Act applies to the copy of computer information is determined by the rules contained in the definition of "computer information:"

This Act applies to the computer program and the copy of it if the goods in which the copy is embedded are a computer or a computer peripheral. The computer or peripheral often cannot function without the computer information (computer program). The computer information itself is *per se* important to the entire transaction.

* * * *

If a copy of a computer program is sold or leased as part of goods other than a computer peripheral, this Act applies to the program (and the copy) if giving the buyer or lessee of the good access to or use of the program is ordinarily a "material purpose" of this type of transaction. Materiality is ordinarily clear if the program is separately licensed as part of the transaction. A separately licensed program for a digital camera that enables the camera to link to a computer is within this Act.¹¹⁸

Is the program's processing capacity the material focus of the transaction? Factors suggesting whether it is include the extent to which the processing capabilities of the software is the dominant appeal of the product, the extent to which negotiation of the parties focused on that processing capacity, and the extent to which the agreement otherwise makes the processing capabilities a separate focus for the agreed terms. Thus while selecting channels on a television set may be controlled by a computer program, the purpose of buying the ordinary television set is to acquire the television and its reception. The sale of an ordinary television set containing a computer program today is not in the Act.¹¹⁹ Similarly, a computer program may operate some automobile functions; the car rather than the program that operates the brakes is the primary purpose of the transaction. On the other hand, upstream development of supply contracts for the program is within this Act.¹²⁰ Separately licensed software for a digital camera that enables the camera to be linked to a computer is within the Act.¹²¹

As it relates to the various Articles of the Uniform Commercial Code, the text and comments to the Act make the intentions of the drafters clear.¹²² A specific Article of the Code governs the subject matter of that Article.¹²³ This principle is preserved in Section 103(c)(3).¹²⁴

118. U.C.I.T.A. § 103, Reporter's Note 4c.

119. *Id.*

120. *Id.*

121. *Id.*

122. See U.C.I.T.A. § 103, Reporter's Note 4b.

123. U.C.I.T.A. § 103(d)(6).

124. U.C.I.T.A. § 103(c)(3).

Article 8, and not UCITA, deals with investment securities and rights or remedies with respect to that subject matter.¹²⁵ The same applies with respect to Article 4 and Article 4A: payment systems, checks and funds transfers. Similarly, under subsection (c) if a provision of Article 9 conflicts with this Act, Article 9 controls.¹²⁶

The drafters of UCITA both in the Act and the comments make it clear that when questions about scope do not involve goods or other subject matter of the UCC but do involve subject matter under the Act and other subject matter, courts should follow general interpretative principles to determine the extent of applicability of the Act.¹²⁷ In most cases, this will entail application of a "primary purpose" test judged as of the time of the contracting of the parties.

If "computer information" is the primary or predominant purpose of a transaction, the rules of UCITA apply, rather than common law except as to subject matter specifically excluded by the scope section.¹²⁸ Courts dealing with Article 2 where goods and services are both involved in the same transaction have applied the predominant purpose test for years.¹²⁹ Similarly, under Article 9, whether collateral is a consumer or business asset depends upon its primary intended use.¹³⁰ The test asks whether the subject matter of the Act (computer information) or other subject matter (e.g. services) is the focus of the contract. If it is, UCITA governs the aspects related to computer information and the other subject matter.¹³¹ If not, common law governs as to the "other" subject matter. For example, in a contract between a publisher and an author, the agreement is outside UCITA if the predominant purpose is to give the publisher the right of publication in book (printed) form or the right to motion picture use.¹³² The fact that information intended for redistribution in print form is delivered or to be delivered in electronic form does not make computer information the primary purpose of the transaction. Given the primary intended purpose, the mere fact that "electronic rights" are also covered, does not place the transaction in the ambit of the Act under the primary purpose test.¹³³ Similarly, a contract with a producer whose predominant purpose is to develop a motion picture for distribution as such does not come within the Act.¹³⁴ On the other hand,

125. See U.C.I.T.A. § 103(d)(6).

126. U.C.I.T.A. § 103(c).

127. See U.C.I.T.A. § 103(d), Reporter's Note 4c.

128. U.C.I.T.A. § 103, Reporter's Note 4c.

129. U.C.I.T.A. § 103, Reporter's Note 4b.

130. U.C.I.T.A. § 103, Reporter's Note 4c.

131. *Id.*

132. See U.C.I.T.A. § 103(d).

133. See U.C.I.T.A. § 103, Reporter's Note 4b.

134. See U.C.I.T.A. § 103(d).

a contract giving a software publisher the right to reproduce a photographic image in "software and other works" is governed by the Act if the predominant purpose is to allow use in computer information even though use in print form is also permitted.¹³⁵ Similarly, a license to acquire rights to use software by a motion picture studio, which may use the software as a tool in creating motion pictures is a computer information transaction, while a license to use digital scenes or images in a motion picture is excluded.

The predominant purpose test requires consideration of the type of transaction envisioned by the parties. For example, in a loan transaction, the loan officer might deliver a diskette containing interest rate calculations to the borrower. While the diskette is computer information, under the primary purpose test, no part of the transaction is covered by the Act.¹³⁶ The predominant purpose of the agreement is a loan. This approach is more appropriate than that of some courts which, under prior law applied sale of goods rules to software development transactions because even though the contract concerned software services, the program was delivered on a diskette or tape the proper analysis there is not whether in some way this is a sale of goods, but whether common law or the principles Article 2 of the UCC fit the transaction in fact better.¹³⁷ A more nuanced analysis is appropriate for new technology especially in light of the enactment of this Act.

While cases under Article 2 of the UCC provide some guidance about the scope of statutory and common law, it is appropriate to consider additional factors when UCITA is contrasted to common law. Courts should consider the extent to which the transaction as a whole corresponds to the framework involved in computer information transactions. If it does, the Act should apply to the entire transaction. Among the transactional factors that courts should consider are (1) the nature of the underlying intellectual property rights involved, including differences in the rights provided under the Copyright Act for different types of works, (2) the extent to which regulatory rules apply to the subject matter, and (3) the extent to which allocation of liability risk is a concern.

The same test applies at various levels of use or distribution, but the results of the test may differ at each level. For example, a courier company that licenses communications software from a software publisher is engaged in a transaction within the scope of the Act.¹³⁸ The subject matter of the agreement is a license of the software. If the courier company provides the software to customers to access data on the location of pack-

135. U.C.I.T.A. § 103, Reporter's Note 4b.

136. U.C.I.T.A. § 103, Reporter's Note 4c.

137. U.C.I.T.A. § 103, Reporter's Note 4b.

138. *Id.*

ages, the purpose may be the services that the courier provides. Even in such a case, however, if the software publisher enters into a license with the end user, that license is within the Act.¹³⁹

The predominant purpose test applies only if the parties do not otherwise agree. In the foregoing, for example, if the parties elect coverage under UCITA that agreement governs, as would an agreement that the Act should not apply at all.¹⁴⁰ The issue is whether UCITA supplants common law, leaving intact in any case, the rules of Article 2 and federal law. Agreement here, as elsewhere in the UCC, can be found in the express terms of the contract as well as in the usage of trade or course of dealing between the parties, or as inferred from the circumstances of the contract environment. In any event, coverage or non-coverage by UCITA does not *create* mixed contracts.¹⁴¹ They clearly exist regardless of the Act.

During the drafting process, it became apparent that certain transactions, for varying reasons did not lend themselves to coverage by UCITA, even though at first glance they would appear to be within the scope of the act.¹⁴² Some of the areas excluded are the following:

VI. CORE FINANCIAL FUNCTIONS

Subsection (d)(1) excludes "financial service activities."¹⁴³ This is intended to omit such activities as "core" banking, payment and financial services activities from the Act.¹⁴⁴ The section does not exclude banks or financial institutions as such. Modern technology and developments in digital cash and similar systems place many companies other than banks in direct competition. Regulations, such as Federal Regulation E on funds transfers, do not apply solely to banks, but to any holder of a qualifying account. To the extent that non-banks engage in the activities indicated in the exclusion, those activities are also excluded from the Act.¹⁴⁵ Modern banks engage in many activities identical to licensing, however. The online systems are within UCITA to the extent that they involve activities such as online shopping, database access, and other activities not within the exclusions.¹⁴⁶ As information industries converge, so too is the banking industry converging into information industries. The resulting non-financial transactions are covered by the Act.¹⁴⁷

139. *Id.*

140. *See generally* U.C.I.T.A. § 103, Reporter's Notes.

141. U.C.I.T.A. § 103, Reporter's Note 4.

142. *See generally* U.C.I.T.A. § 103, Reporter's Notes.

143. U.C.I.T.A. § 103, Reporter's Note 5a.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

VII. CORE ENTERTAINMENT, CABLE AND BROADCAST

Subsection (d)(2) excludes agreements relating to motion pictures, musical works, sound recordings, as well as broadcast and cable programming.¹⁴⁸ The exclusion covers the core activities of traditional industries. It reflects the existence of a regulatory overlay for some (cable and broadcast) and the different nature of transactional, liability and other issues in these industries as contrasted with software and data industries. Also, underlying property rights may differ (e.g., in copyright law, a first sale of a computer program or video game does not give the buyer a right to rent the copy to a third party). Overall, the differences lead to different transactional formats and participants in these industries believe that the general principles in UCITA should not apply to them.¹⁴⁹

The exclusion of motion pictures, sound recordings and the listed broadcast or cable activities leaves liability and other issues to general law, including when appropriate, Article 2 or 2A of the UCC.¹⁵⁰ Because these transactions differ from those contemplated by the Act, the principles set out in UCITA should not be applied to transactions in these traditional areas of practice.¹⁵¹

The terms "motion picture," "sound recording," "musical work," "digital sound recording" and "phonorecord" have the meanings associated with these terms in the Copyright Act.¹⁵² The Copyright Act and the registration system it enacts makes distinctions among and between various types of works, such as audiovisual works generally, video games, literary works, computer programs and motion pictures and sound recordings on the other.¹⁵³ These distinctions are part of accepted industry practice and are followed here.

The term "motion picture" includes traditional motion pictures regardless of how distributed (e.g., it includes digital video disk distribution of motion pictures for home or other viewing) even though there are digital works and may be distributed in a form that includes in the disk a computer program designed solely to enable display of performance of the motion picture. These digital products are not covered by UCITA.¹⁵⁴ Either Article 2 or Article 2A along with common law principles apply. The term "motion picture" does not include an interactive computer game, multimedia product, or similar work, nor does it include audiovi-

148. U.C.I.T.A. § 103, Reporter's Note 5b.

149. *Id.*

150. *Id.*

151. *See id.*

152. *Id.*

153. *Id.*

154. U.C.I.T.A. § 103 (d)(2)(B).

sual effects included in such interactive works. The term refers to the work as a whole and does not include images or visual motion within another work or software, such as the animated help feature of a work processing program or images or sequences of motion in an interactive computer encyclopedia.

Subsection (d)(2) also excludes contracts for audio and visual programming distributed by broadcast, cable or satellite. This excludes traditional broadcast and cable services, regardless of where transmitted in digital or another form, including excluding transmissions analogous to broadcast but made through the Internet. The Federal Communications Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by a television broadcast station."¹⁵⁵ "Audio programming" refers to audio programming comparable to radio broadcasts.¹⁵⁶ "Broadcast" and "cable" systems are defined in the Communications Act.¹⁵⁷ "Satellite transmissions" refers to satellite broadcast or cable.¹⁵⁸

VIII. MIXED TRANSACTIONS/AGREEMENT TO OPT-IN OR OPT-OUT

Section 104 of UCITA provides a vehicle whereby the parties to an agreement may decide that the Act "including contract formation rules" governs the transaction, in whole or in part. On the other hand, the parties may agree, "other law governs the transaction and [UCITA] does not apply."¹⁵⁹ The principle requirement for triggering the opt-in/opt-out decision is that a material part of the subject matter of [the] transaction include[s] computer information or informational rights that is "within the scope of the Act, or includes a subject matter within the Act under Section 103(b) or excluded by Section 103(d)(1) or (2)."¹⁶⁰ This provision, allowing the parties to determine which law shall control the transaction is in keeping with the basic philosophy of the Act and uniform law in general that the parties, absent public policy or similar considerations are free to contract as they see fit. The ability to opt in or out of the act will certainly provide a degree of comfort to parties who, being unfamiliar with the intricacies and nuances of UCITA, feel comfortable with common law or other statutory provisions until the fear of the "unknown" dissipates. Under section 104 the parties may choose to have the Act apply to the entire transaction, part of the transaction or none of the

155. 47 U.S.C. § 522 (20).

156. 47 U.S.C. § 271.

157. 47 U.S.C. § 153 & 602

158. 47 U.S.C. § 605

159. U.C.I.T.A. § 104.

160. U.C.I.T.A. § 104.

transaction. These choices of course deal with applicability of the Act and not with other law. Agreed choices are effective irrespective of the "primary purpose" of the transaction. An agreement to opt into or out of coverage renders the "primary purpose" test moot.¹⁶¹

In determining whether an agreement to opt in or out of coverage was formed, a court will ordinarily apply the contract formation rules of the Act. This is especially true if the transaction involves subject matter governed by UCITA. In this regard, agreement can be found in the express terms of the contract of the parties as in course of dealing, usage of trade, or as inferred from the circumstances.¹⁶²

For commercial parties, the ability to choose to be governed by UCITA or by other contract law gives an important opportunity to avoid uncertainty and to avoid potentially conflicting rules applicable under multiple bodies of state contract law. The Act does not apply to all transactions in information. On the other hand, in some contexts, there is a public interest to prevent over-reaching on issues that otherwise cannot be varied by agreement. This interest, of course, does not validly apply to contract rules that can be varied by agreement.

The basic principles of Section 104 are that the contract must be interpreted in light of its practical context, including such fundamental concepts as "course of dealing" "usage of trade" and the like.¹⁶³ In an attempt to avoid the over-use or misuse of these terms the Act defines them in the definitional sections.¹⁶⁴ "Usage of trade" means "any practice or method of dealing that has such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question."¹⁶⁵ The comments to that section clarify that the intent of the definition (derived from UCC section 1-205) is to allow for the interpretation of the contract based upon the fair and reasonable assumptions of the parties to the contract that the particular transaction, in a given locality and/or a given vocation or trade, will be performed as expected. The Comment does note that the Act "rejects cases which see evidence of 'custom' as representing an effort to displace or negate 'established rule of law.'"¹⁶⁶ A particular usage of trade must have the "regularity of observance" indicated in the text of the Act.¹⁶⁷ It is not required that a usage of trade be "ancient or immemorial," "universal" or the like.¹⁶⁸ "Under this definition, full rec-

161. *See generally id.*

162. *Id.*

163. *See generally id.*

164. UCITA §§ 102(a) (21)(65).

165. U.C.I.T.A. § 102(a)(65).

166. U.C.I.T.A. § 102, Reporter's Notes 5(b).

167. U.C.I.T.A. §102, Reporter's Note 56.

168. *Id.*

ognition is thus available for new usages and for usages currently observed by the majority of merchants, even though some do not."¹⁶⁹ Additionally, "there is [sic] room for appropriate recognition of usage agreed by the merchants in trade codes."¹⁷⁰

"Course of Dealing" is defined as being a "sequence of previous conduct between the parties to a particular transaction which establishes a common basis of understanding for interpreting their expressions and other conduct."¹⁷¹ Course of dealing relates to the anticipated performance of the contract based upon *prior* actions of the parties, whereas course of performance is described as still another attempt to derive understanding of contracts based upon "practical interpretation." In a previous draft of the Act, the comment to the definition notes that "the parties themselves know best what they meant by their agreement and their conduct is often the best indication of what that meaning was."¹⁷²

IX. VARIATION BY AGREEMENT

Another fundamental policy of the Act is that "freedom of contract" governs.¹⁷³ Again the idea found throughout the commercial uniform laws articulates the principal basis for the formation of contracts between parties (i.e., the parties and not the drafters of commercial law, know best what works in their particular arena). Consequently, the choice agreed on by the parties' controls unless some fundamental overriding policy considerations mandate restraints as stated in the Act, such as the doctrine of unconscionability.

In other words, the thrust of the Act is to allow the parties, with certain limitations based upon sound policy considerations,¹⁷⁴ to draft their contract as they see fit. There are however a number of areas where the contract may not be varied by the agreement of the parties. These exceptions include consumer defenses relating to electronic error (section 214) and electronic self-help (section 816). Also prohibited are variations from the provisions of the mass-market transaction relating to unconscionability, good faith and conspicuousness. The intent of the Act is to allow, in all other instances, complete freedom on contract including the ability to opt in or out the Act coverage. The rules of UCITA are considered to be "gap fillers" and "default" provisions, which apply only in the absence of contrary agreement.¹⁷⁵

169. *Id.*

170. *Id.*

171. U.C.I.T.A. § 102(a)(21).

172. See U.C.I.T.A. § 102, Reporter's Notes 20, 21 (Tentative Draft Oct. 15, 1999) (noting U.C.C. §§ 205 & 2-208).

173. See U.C.I.T.A. § 104, Reporter's Note 1.

174. See U.C.I.T.A. § 104, Reporter's Note 2.

175. See U.C.I.T.A. § 113, Reporter's Note 4.

It is the position of the committee that freedom of contract is especially important in a commercial world of converging industries and a richly diverse commercial practice. The exceptions to this freedom should not be sparingly applied. Such concepts as "manifest assent" and "opportunity to review" should not be altered by the parties. Obviously, such a prohibition is designed as a protection to persons who manifest assent. However, the parties are free to agree to *greater* protections when they so desire and in appropriate cases to provide lesser assent standards under an agreement with respect to future transactions as indicated in the section relating to the manifestation of assent.¹⁷⁶

It should be noted that normally variations from the default rules provided in the Act need not require specific reference to the particular default rule in question. However, there are certain instances where the variation must be "conspicuous" or agreed to by a clear "manifestation of assent" is required. The underlying premise is that such requirements exist only if made express in the Act or in requirements that might arise under consumer protection statutes.¹⁷⁷

X. THE MANIFESTATION OF ASSENT¹⁷⁸

This section spells out the manner in which the parties may evidence their agreement. The term is derived from *Restatement (Second) of Contracts Section 19*.¹⁷⁹ The manifestation of assent has several roles in contract law. It can be the way a party indicates agreement to a contract. It may also evidence the manner by which a party adopts a record as stating the terms of the contract. Most often the conduct of "manifesting assent" does both. Note that in the Act, there are certain instances where specific manifestation of assent to a particular term is required to make the term enforceable. In codifying this provision it was the intent of the drafters to avoid leaving the interpretation of the provision to the courts.¹⁸⁰ The section more fully explicates the concept than does the case law. Further, codification creates uniformity in terminology and application making an important contribution to commercial certainty.

Manifesting assent is fulfilled by a signature or specific language or assent, but it does not specifically require a "signature" in the traditional sense, nor does it require specific language or conduct.¹⁸¹ In the world of electronic commerce it is especially important to clarify the conditions under which conduct may establish contractual relationships and ex-

176. See generally U.C.I.T.A. § 104, Reporter's Note 2.

177. See U.C.I.T.A. § 105, Reporter's Note 4.

178. See generally U.C.I.T.A. § 112.

179. See U.C.I.T.A. § 112, Reporter's Note 2.

180. *Id.*

181. See generally U.C.I.T.A. § 112, Reporter's Note 3.

pressly to recognize the diverse alternatives that exist. The analysis of how the concept operates in the electronic environment is instructive. Determining whether a person manifests assent to a record or terms entails an examination of at least three specific issues.

First, the person must have had knowledge of the record or term or an opportunity to review it before assenting.¹⁸² This is implicit, but not stated in the *Restatement*. Opportunity to review requires that the record be available in a manner that ought to call it to the attention of a reasonable person.¹⁸³

Second, given an opportunity to review, the person must do something (i.e., words, conduct, appropriate in the context of the transaction, etc.) that indicates assent to the terms.¹⁸⁴ The person may "authenticate" the record or term, express assent, or engage in conduct with reason to know that in the circumstances the conduct indicates assent. Conduct manifests assent if the party intentionally acts with knowledge or reason to know that the other party would infer assent from its actions or words.¹⁸⁵

Third, the conduct, statements, or authentication must be attributable in-law to the person.¹⁸⁶ "General agency law and Section 213 provide standards for attribution."¹⁸⁷

XI. MANIFESTING ASSENT BY "AUTHENTICATION"

Traditionally, a party "signed" the agreement. In this Act, "authentication" replaces signature, although the concept remains the same. To "authenticate" one must "sign or with the intent to sign a record, otherwise to execute or adopt an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with, that record."¹⁸⁸ This term replaces "signature" and "signed," terms, which are more appropriate for paper transactions than for electronic transactions. The definition clarifies that qualifying electronic systems are adequate. However, any act that would be a signature under prior law is an authentication. The concept is not intended to alter general concepts about the use of signatures, initials, or the like, in which for example, a signature may be intended to establish or confirm the integrity of the content of the record. Authentication, like a signature, may express various effects.¹⁸⁹ The definition focuses on those ef-

182. See U.C.I.T.A. § 112, Reporter's Note 8.

183. *Id.*

184. See U.C.I.T.A. § 112, Reporter's Note 3b.

185. *Id.*

186. See U.C.I.T.A. § 112, Reporter's Note 2.

187. *Id.*

188. U.C.I.T.A. § 102(a)(6)

189. U.C.I.T.A. § 102, Reporter's Note 4.

facts, which are relevant to the provisions of the Act, namely: identifying the person, and adopting of a record or specific term(s). An authentication may have other functions such as confirmation of the content of the authenticated record. Omission of that function from the definition does not change law or alter the ability of the parties to use an authentication for the purpose. The intended effects of signatures, according to prior law, are determined by the context. Authentication may be on, logically associated with, or linked to the record.¹⁹⁰ The section follows the proposed *EU Directive on Electronic Signatures* and reflects the fact that, in digital technology, the analogy between "signing" a record electronically and signing a paper is not precise.¹⁹¹ "Logically associated makes it clear that the association between an authentication and record need not be physical in nature," it can be electronic.¹⁹² However, there must be a direct association such that it can be reasonably inferred that the authenticating party intends by that act to adopt or accept the associated record. The reference to "linked" captures a similar concept applicable to current technology in the Internet and similar systems, indicating that it is adequate to have an electronic connection such as a PIN number.

The definition is viewed as "technologically neutral." Technology and commercial practice are evolving and no specific standards of technological sufficiency are appropriate. Rather, procedures are subject to evidentiary scrutiny as to the requisite intent, proof that they were used, and assessment of whether the procedures are commercially reasonable.

Manifesting assent by conduct occurs if a party acts (or fails to act) or makes a statement, having reason to know the other party will infer this as assent.¹⁹³ Determining when this occurs requires attention to the circumstances. As in general common law, assent does not require proof of subjective intent, knowledge or purpose, but focuses on objective characteristics, including whether there was an act or a failure to act voluntarily combined with reason to know the inference of assent that would be drawn.¹⁹⁴ Assent does not require that a party be able to negotiate or alter terms. However, the assenting conduct or failure to act must be voluntary. This is satisfied if the alternative of refusing exists even if refusal would leave no alternative source for the refused transaction.

Actual knowledge that conduct constitutes assent suffices. More generally, factors indicating that a person may have "reason to know" that his acts indicate assent include: the context (including any language

190. U.C.I.T.A. § 102, Reporter's Note 4.

191. *Id.*

192. *Id.*

193. U.C.I.T.A. § 112, Reporter's Note 5.

194. *See* U.C.I.T.A. § 112, Reporter's Note 3(b).

on a package) a container or in a record; the fact that the actor can decline to engage in conduct and return the information, but decides not to do so; the information communicated to the actor before the conduct occurred; whether the conduct gave the actor access to and use of information that was offered subject to a contract; and the ordinary expectations of other persons in similar contexts, including standards and practices of the business, trade or industry; or other relevant factors.¹⁹⁵ As in the *Restatement*, failure to act constitutes assent if the party that fails to act has reason to know that this will create an inference of assent.¹⁹⁶

Section 102 recognizes the wide range of behavior and interactions that in modern commerce establish a contract and its terms. To encourage the use of duplicative consent procedures when appropriate, section 102 makes clear that if the assenting party has an opportunity to confirm or deny assent before proceeding to obtain or use the information, the confirmation establishes the existence of assent.¹⁹⁷ This sets out one method of meeting the criteria of the section. In many cases a single indication of assent by an electronic or other act such as by opening a shrink wrap container or commencing to use information, suffices if it occurs under circumstances giving the actor reason to know that this signifies assent. On the other hand, an act that does not bear a relationship to a contract or a record would fail under the general standard. Similarly, acts that occur in context of a mutual express reservation of the right to defer agreement do not assent to a contract that neither party intended.

The preliminary comments to the section provide two illustrations, which are instructive. Illustration No. 1: The registration screen for NY Online prominently states:

Please read this license. It contains important terms about your use and our obligations with respect to the information. Click here to review the **License**. If you agree to the license indicate this by clicking the "I agree" button. If you do not agree, click "I decline". The on-screen buttons are clearly identified. The underlined text is a hypertext link that, if selected, promptly displays the license.¹⁹⁸ A party that indicates "I agree" manifests assent to the license and adopts its terms.¹⁹⁹

Illustration No. 2:

The first computer screen of an online stock-quote service requires that the potential licensee enter a name, address and credit card number. After entering the information and striking the "enter" key, the licensee has access to the data and receives a monthly bill. In the center of the

195. *Id.*

196. *Id.*

197. See U.C.I.T.A. § 112, Reporter's Note 3(b).

198. U.C.I.T.A. § 112, Reporter's Note 5.

199. *Id.*

screen amid other language in small print, in the statement: **“Terms and conditions of service; disclaimer”** indicating a hyperlink to the terms. The customer’s attention is not called to this sentence nor is the customer asked to react to it.²⁰⁰ Even though entering name and identification, coupled with using the service, assents to a contract, there is no assent to the “terms of service and disclaimer” since there is no act indicating assent to the record containing the terms. A court would determine the contract terms on other grounds, including the default rules of this Act and usage of trade.²⁰¹

The manifestation of assent is determined by an objective standard. The concept requires that, from all the facts known to it, a reasonable person have reason to know that particular conduct will indicate that the actor assents to a record or term. Actions objectively indicating assent are effective even though the actor may subjectively intend otherwise. This follows traditional contract law doctrine of “objective” assent. This is especially important in electronic commerce where many transactions do not involve contact between individuals. Information providers and licensees must rely on objective *actions* indicating acceptance of contracts. Doctrines of mistake, supplemented by section 213 relating to electronic error and consumer defenses, as well as doctrines invalidating the effects of fraud and duress apply in appropriate cases.²⁰²

One of the most significant contributions of UCITA is the recognition of the use of electronic agents in the contract formation process.²⁰³ Assent may occur by automated systems. Electronic commerce entails rapidly increasing use of computer systems, which are programmed to search for (on behalf of a potential purchase) or make available (on behalf of a potential licensor) particular information under contractual terms or alternatives. Either or both parties (including consumers) may use electronic agents. The reduced transaction costs that come from a technology that enables broad comparative and electronic shopping are immense for consumers and for providers of information. However, as reflected in this section, when using an electronic agent, assent cannot be based upon knowledge (programs are not human).²⁰⁴ The issue is whether the circumstances clearly indicate that the operations of the system indicate assent.

The involvement of third party service providers comes into play as it relates to the assent concept. Assent requires an act by the party to be bound or its agents. In many Internet situations, a party is able to reach a particular system because of services provided by a third party commu-

200. *Id.*

201. U.C.I.T.A. § 112, Reporter’s Note 5.

202. *See* U.C.I.T.A. § 112, Reporter’s Note 6.

203. *See* U.C.I.T.A. § 112, Reporter’s Note 7.

204. *See Id.*

nication or other service provider. In such cases the service provider typically does not intend to engage in a contractual relationship with the provider of the information. While the "customer" activity may constitute assent to terms, it does not bind the service provider since the service provider's actions are in the nature of transmissions and making information access available, not assent to a contractual relationship.

UCITA makes it clear that service providers — providers of online services, network access, or the operation of facilities thereof — do not manifest assent to a contractual relationship simply from their provision of such services, including but not limited to transmission, routing, providing connections, linking or storage of material at the request or initiation of a person other than the service provider. If, for example, a telecommunications company provided the routing for a user to reach a particular online location, the fact that the user of the service might assent to a contract at that location does not mean that the service provider has also assented. The conduct of the customer does not bind the service provider.

Of course, in some online systems, the service provider has direct contractual relationships with the content providers or may desire access to and use of the information on its own behalf, and therefore, may assent to terms in order to obtain access. In the absence of these circumstances, however, the mere fact that the third-party provider enables the customer to reach the information site does not constitute assent to the terms at that site.²⁰⁵

XII. OTHER MEANS OF ASSENT

Manifestation of assent to a record is not the only way in which parties establish their bargain. UCITA does not alter recognition of other methods of agreement. For example, a product description can become part of an agreement without manifestation of assent to a record repeating the description; the product description can define the bargain itself. Thus, a party that markets a database of names of consumer attorneys can rely on the fact that the product need only contain consumer attorneys because this is the basic bargain it is proposing; the provider is not required to seek manifest assent to a record stating that element of the deal. Similarly, the licensee may rely on the fact that the database must pertain to consumer lawyers, not other lawyers. The nature of the product defines the bargain if the party makes the purchase of that basis. If a product is clearly identified on the package or in representations to the licensee as being for consumer use only, the terms are effective without requiring language in a record restating the description or conduct as-

205. See U.C.I.T.A. § 112, Reporter's Note 7.

senting to that record. Of course, if the nature of the product is not obvious and there is no assent to a record defining that nature or other agreement to it, such conditions might not become part of the agreement.

In many cases, copyright or other intellectual property notices restrict use of a product, regardless of assent to contract terms. For example, common practice in video rentals, places a notice on screen of limits on the customer's use under applicable copyright and criminal law, such as precluding commercial public performances. The enforceability of such notices does not depend on compliance with this section.²⁰⁶

XIII. AUTHORITY TO ACT

The person manifesting assent must be one that can bind the party seeking the benefits or being charged with the obligations of restrictions of the agreement.²⁰⁷ If a party proposing a record desires to bind the other party, it must establish that it dealt with a person that had actual or apparent authority to do so or, at least, establish that the entity allegedly represented by that person accepted the benefits of the contract or otherwise ratified the individual's actions. If the person who assented did not have authority and the conduct was not ratified otherwise adopted, there may be no contract. If this occurs, both parties may be exposed: the licensor risks loss of its contract terms, while the licensee risk is that use of the information may infringe a copyright or patent.²⁰⁸

There must be a connection between the individual who had the opportunity to review and the one whose acts constitute assent. Of course a party with authority can delegate that authority to another. Thus, a CEO may implicitly sign up for legal materials online to install a newly acquired program that is subject to a screen license. Questions of this sort arise under agency law as augmented in the Act. In appropriate cases, rules in the Act regarding attribution play a role in resolving whether the ultimate party is bound to the contract terms.²⁰⁹ Section 213 deals with when, in an electronic environment, a party is bound to records purporting to have come from that party. Other law governs questions of agency.

XIV. ASSENT TO PARTICULAR TERMS

The section distinguishes assent to a record and if required by other provision of the Act, or other law, assent to a particular term. Assent to a record relates to the record as a whole, while assent to a particular term, if required, encompasses acts that relate to that particular term.

206. See U.C.I.T.A. § 112, Reporter's Note 9.

207. See U.C.I.T.A. § 112, Reporter's Note 6.

208. See *id.*

209. See *id.*

One act, however, may assent to both the record and the term if the circumstances, including the language of the record, clearly indicate to the party that doing the act is also assent to the particular term.²¹⁰

XV. PROOF OF TERMS

A party that relies on the terms of linked text or other electronic records must establish the content of the text at the time of the license's assent.²¹¹ One way of doing so is to retain records of content at all periods of time or maintain a record of changes and their timing. Issues of proof are matters of evidence law.²¹²

XVI. THE OPPORTUNITY TO REVIEW

Assent under UCITA cannot occur unless preceded by an opportunity to review the terms to which one assents.²¹³ Common law and reported cases are not clear on this requirement. Under section 112 of the Act for a "person" the 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. This requirement is met if the person actually knows or has reason to know that the record or term exists and the circumstances permit review of the record or term of a copy thereof. "For an electronic agent, an opportunity to review exists only if the record is one to which a reasonably configured electronic agent could respond."²¹⁴

The opportunity to review exists even if the person foregoes the opportunity. Contract terms presented in an over-the-counter transaction or made available in a binder are required for some transactions under Federal law create an opportunity to review even if the party does not use that opportunity. This does not change because the party desires to complete the transaction rapidly, is under external pressure to do so, or because the party has other demands on its attention, unless one party intentionally manipulates the circumstances to induce the other party not to review the record.

Obviously, the manner in which a record is made available for review differs for electronic and paper records. In both settings, however, a record is not available for review if access to it is so time-consuming or cumbersome as to effectively preclude review. It must be presented in such a way as to reasonably permit review. In an electronic system, a record that is promptly accessible through an electronic link or ordinarily

210. See U.C.I.T.A. § 112, Reporter's Note 3.

211. See U.C.I.T.A. § 112, Reporter's Note 5.

212. See U.C.I.T.A. § 213, Reporter's Note 3.

213. U.C.I.T.A. § 112, Reporter's Note 8.

214. See *id.*

qualifies. "Actions that comply with federal or other applicable consumer laws that require making contract terms or disclosure available, or that provide standards for doing so, satisfy this section."²¹⁵

In modern commerce, there are circumstances in which the terms of a record are not available until after there is a commitment to the transaction.²¹⁶ The standard "shrink wrap" packaging is an example of this type of setting.²¹⁷ This is also true in mail order transactions, software contracts, insurance contracts, airline ticket purchases and other common transactions. If the record is available only after that commitment, there is no opportunity to review unless the party can return the product (or in the case of a vendor that refuses the other party's terms, recover the product) and receive reimbursement of any payments if it rejects the record. This return right, which does not exist in current law absent agreement, creates an important protection for the party asked to assent.

This right is intended to provide a strong incentive for a provider of information to make the terms of the license available up-front if commercially practicable. Doing so avoids the obligations regarding return stated in the Act. In addition to that incentive, a decision to defer presentation of a license, without a commercial reason to do so, may have implications on application of other doctrines, such as the general concept of unconscionability where the terms are oppressive. It should be noted, however, that the return right exists only for the first user.

Failure to provide an opportunity to review or a right to a return in cases of records presented after the initial commitment to the transaction, does not invalidate the agreement, but means that the terms of the record have not been assented to by the party to which it was presented. The terms of the agreement must then be discerned by consideration of all the circumstances, including the general expectations of the parties, applicable usage of trade and course of dealing, and the informational property rights, if any, involved in the transaction. In such cases, courts should be careful to avoid unwarranted forfeiture or unjust enrichment regarding the conditions or terms of the agreement. An agreement whose payment and other agreed terms reflect a right to use solely for consumer purposes cannot be transformed into an unlimited right of

215. U.C.I.T.A. § 112, Reporter's Note 8b.

216. See U.C.I.T.A. § 112, Reporter's Note 8c.

217. "Shrink wrap" refers to the manner in which software is packaged. The package in which the software is enclosed is encased in a tight plastic or cellophane type wrapping. Once this material is broken open it is the seller's position that a contract has been formed even though the terms, conditions, limitations and restrictions are contained on a record inside the package, making it impossible for the purchaser to see them before the contract has been "formed."

commercial use by a failure of assent to the terms of a record.²¹⁸

It is important to note that this section relating to the availability of a record for review and the attendant consequences does not apply in all instances.²¹⁹ For example, the law on modification of an agreement or regarding the agreed right of a party to specify particulars of performance in unaffected by this section. Similarly, the provisions do not apply in those cases where the parties begin performance in the expectation that a record containing the contract terms will be presented and adopted later.

Finally, where applicable, the provision of section 102 cannot be altered by agreement because they are the means by which aspects of the agreement are established.²²⁰ Section 102, however, allows the parties by a prior agreement, to restructure what does and does not constitute assent with respect to future conduct. In most cases, of course, such a prior agreement will in context satisfy the requirement of the section in full even as to the subsequent transactions.

XVII. THE MASS-MARKET TRANSACTION

Perhaps one of the most unique and innovative concepts found in UCITA is the "mass-market" transaction. As defined in section 102(a)(44) the term refers to a transaction involving either a consumer or any other transaction in which the licensee is an "end-user."²²¹ The term "consumer" as defined in section 102(a)(15) retains the traditional standards of "personal, family or household purposes." The consumer must be a licensee of information or informational rights. The term specifically excludes "an individual who is a licensee for professional or commercial purposes, including agriculture, business management and investment management other than management of one's own personal or family investments."²²² Finally, to qualify as a mass-market transaction, it must be one that is "directed to the general public."²²³

The term "end-user" is not defined in the Act. However, the comments make clear that the concept includes groups other than consumers. The intended function of the mass-market concept is limited to "small dollar value, routine and anonymous transactions involving information directed to the general public in cases where the transaction occurs in a retail market available to and used by the general public."²²⁴

218. U.C.I.T.A. § 112, Reporter's Note 8.

219. *See id.*

220. U.C.I.T.A. § 112, Reporter's Note 10.

221. U.C.I.T.A. § 102(a)(44).

222. U.C.I.T.A. § 102(a)(15).

223. U.C.I.T.A. § 44(a)(B)(i).

224. U.C.I.T.A. § 102, Reporter's Note 38.

As the comment to the definition notes, “[t]he term includes all consumer contracts and *some transactions between businesses in the retail market.*”²²⁵ The concept is not intended to include ordinary commercial transactions between businesses using ordinary commercial methods of acquiring or transferring commercial information.

Generally, a “mass-market” transaction is characterized by (1) the *market* in which the transaction occurs, (2) the *terms* of the transaction and (3) the *nature* of the information involved.²²⁶ The market is a retail market where information is made available in pre-packaged form under generally similar terms to the general public as a whole and in which the general public, including consumers, is a frequent participant. The prototypical retail market is a department store, grocery store, gas station, shopping center, or the like. They are also characterized by the fact that while retail merchants make transactions with other businesses the predominant type of transaction involves consumers. In a retail market, the majority of the transactions involve relatively small quantities, non-negotiated terms, and transactions to an end user rather than a purchaser who plans to resell the acquired product. The products are available to anyone who enters the retail location and can pay the stated price.

“Mass-market” refers to transactions that involve information aimed at the general public as a whole, including consumers.²²⁷ This does not include information product for a business or professional audience, a subgroup of the general public, members of an organization, or persons with a separate relationship to the information provider. In determining when distribution is to the general public, courts should rely on the purpose of the definition that is to “avoid artificial distinctions among business and consumer purchasers in an ordinary retail market where the purchasers have relatively similar expectations shaped by the retail market.”²²⁸ The transactions covered are purchases of true mass-market information and do not include specialty software for business or professional uses, information for specially targeted limited audiences, commercial software distributed in non-retail transactions, or professional use software. The transactions involve information routinely acquired by consumers or that appeals and intends to appeal to a general public audience as a whole, including consumers. Generally, this is inconsistent with substantial customization²²⁹ of the information for a particular end user. The licensee does customization that is routine in mass-markets or that after acquiring the information does not take the

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *See id.*

information, and therefore, the transaction outside the concept of a mass-market transaction.

As noted in the comments, the transaction must be to an end user. An end user licensee "is one that generally intends to use the information or the informational rights in its own internal business or personal affairs." An end-user in this sense is not engaged in the business of reselling, distributing, or sub-licensing the information or rights to third parties, or in commercial public performances or displays of the information, or otherwise making the information commercially available to third parties.

The definition excludes a transaction for redistribution or for public display or performance of a copyrighted work. These are never considered mass-market transactions because they involve no attributes of a retail market. In online commerce it is important not to regulate transactions beyond consumer issues. This gives commerce room to develop while preserving consumer and quasi-consumer interests.

The analysis of the mass-market section as a whole is extensive and goes far beyond the immediately preceding definitional observations. Section 209 defines the circumstances under which a party's assent to a mass-market license adopts the terms of that record and places limitations on the effectiveness of the mass-market license.²³⁰ This section must be interpreted in light of the rules of contract formation and construction found in the Act. While most current mass-market licenses are presented by the licensor and accepted by the licensee, modern technology and contracting practices are not necessarily so limited and the section would also apply to a mass-market license presented by a licensee and accepted by a licensor in the mass-market.

Many mass-market licenses are presented and agreed to at the outset of a transaction; some, however, are presented afterwards. Section 209 deals with both. The costs of return provided for in the section hopefully, provide strong incentives for terms of the license to be presented at the outset when practicable. Many mass-market transactions involve three parties and two contracts. The three party arrangements are also addressed in Section 613 of the Act.²³¹

The general mass-market rules provide a number of ways in which the terms of a mass-market or other contract can be specified. This can and does often occur by a general agreement of the parties unrelated to any record containing specific terms. In other cases, the parties may agree that the terms or particulars of performance may be specified at a later point in the transactional process.²³² Under Section 305, the later

230. U.C.I.T.A. § 209.

231. U.C.I.T.A. § 209, Reporter's Note 1.

232. U.C.I.T.A. § 209, Reporter's Note 2.

provided terms are enforceable without further agreement to them if the terms are proposed in good faith and within the bounds of commercial reasonableness. Section 209 deals with a third method of deriving the terms of a mass-market agreement, obtaining assent to a record containing those terms either at the outset of the transaction or shortly after it is initially formed.²³³

Three limiting principles govern adoption of mass-market licenses regardless of when the license is presented and agreed to by the assenting party.²³⁴ Obviously, fundamental public policy will limit enforceability of mass-market terms in some cases.

The first principle coming into play in the mass-market transaction is the concept of assent and agreement. A party adopts a record only if it agrees to the record by manifesting assent or otherwise. A party cannot manifest assent unless it has had an opportunity to review the record before that assent occurs. This means that the record must be available for review and called to the person's attention in a manner such that a reasonable person ought to have noticed it. A manifestation of assent requires conduct, including a failure to act, or statements, indicating assent and that the person has reason to know that in the circumstances this will be the case.

If the terms of a record are proposed for assent by a party only after it commences performance of the agreement, the terms become effective under these sections only if the party (in most instances the licensee) had reason to know that terms would be proposed after the initial agreement. Even if reason to know exists, this section requires that the terms be presented not later than the initial use of the information and that, if the mass-market license was not made available before the initial agreement, the person is given a right to a return should it refuse the license.²³⁵

The second basic principle involved in the mass-market transaction relates to unconscionability and fundamental public policy. Even if a party adopts the terms of a record, a court may invalidate unconscionable terms pursuant to section 111 of the Act. The unconscionability doctrine invalidates terms that are bizarre and/or oppressive as well as those hidden in boilerplate language. The basic principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. For example, a term in a mass-market license that defaults on the mass-market contract for \$50.00 software triggers a default of all of the commercial licenses between the parties may be unconscionable if there was no reason for the

233. *See id.*

234. *See id.*

235. U.C.I.T.A. § 209, Reporter's Note 2a.

licensee to anticipate that breach of the small license would constitute breach of the unrelated larger license negotiated between the parties. Similarly, a clause in a mass-market license that grants a license back of trademarks or trade secrets of the licensee without any discussion of the issue between the parties would ordinarily be considered unconscionable. A court may refuse to enforce a term of contract if it violates a fundamental public policy.²³⁶

Still another basic principle involved in the mass-market transaction, deals with the on-going problem of conflicting terms. In addition to unconscionability, the mass-market section provides that standard terms in a mass-market form cannot alter the terms expressly agreed between the parties to the license. A term is expressly agreed if the parties discuss and come to agreement regarding the issue and the agreement becomes part of the bargain. For example, in a consumer contract where the consumer requests software compatible with a particular system and the vendor agrees to provide that compatibility, the standard terms cannot alter the agreement with the consumer to provide compatible software. As is true with express warranties, this is subject to traditional parol evidence concepts, which bear on the provability of extrinsic evidence that varies the terms of the writing.²³⁷ Additionally, the terms of any publisher's license cannot alter the agreement between the end user and the retailer unless expressly adopted by them as their own agreement.

This section preserves the essential agreed bargain of the parties. For example, if a librarian acquires educational software for children from a publisher's retail outlet under an express agreement that the software may be used in its library network, a term in the publisher's license that limits use to a single user computer system conflicts with and is over-ridden by the agreement for a network license. The section rejects the test in *Restatement (Second) of Contracts*, which has been adopted by a small minority of States and poses significant uncertainty in ordinary contracting.²³⁸

If a mass-market license is presented before a price is paid, the Act follows general law that enforces a standard form contract if the party assents to it.²³⁹

The fact that license terms are non-negotiable or that the contract may constitute a "contract of adhesion" does not invalidate it under general contract law or the Act. "A conclusion that a contract is a contract of

236. U.C.I.T.A. § 209, Reporter's Note 2b.

237. U.C.I.T.A. § 209, Reporter's Note 2c.

238. U.C.I.T.A. § 209, Reporter's Note 2c.

239. See, e.g. *Storm Impact v. Software of the Month Club* 13 F. Supp. 2d 782, 791 (N.D. Ill. 1997) (noting that an on-screen license prevents waiver of copyright and precludes fair use claim).

adhesion may, however, require that courts take a closer look at contract terms to prevent unconscionability."²⁴⁰ It should be recognized, however, that this Act's concepts of manifest assent and opportunity to review address concerns often relevant to such a review. Nevertheless, where applicable, the closer scrutiny followed in general contract law may be appropriate here.

The existence of a license is important to both the licensor and the licensee. In digital commerce, the license terms often define the product. For example, in distinguishing between single use and network use, consumer use and commercial use, and ordinary private use or rights to public display or performance.²⁴¹ Market choices of this type provide an important commerce in this field. Often the license and its enforcement benefit the licensee, giving it rights that would not be present in the absence of an enforceable license.

In the mass-market, licenses are sometimes presented after initial general agreement between the ultimate licensee and either the retailer or the licensor-publisher. The contracting format allows contracts between end users and remote parties that control copyright or other interests in formation. Enforceability of the license is important to both parties. A sale of a copy of a copyrighted work does not give the copy owner a number of rights that it may desire.²⁴² It does not convey a right to make multiple copies, to publicly display the work, to make derivative works from the copy, or, in the case of computer programs, to rent the copy to others.²⁴³ The enforceability of the license is also important for the rights owner because the terms of use and other conditions of the license help define the product it transfers. There are also general market place benefits in that the licensing framework allows price and market differentiation that allows product priced for and tailored to market demands of various forms, such as in distinguishing pricing of a consumer as compared to a commercial or educational license.

XVIII. TIMING OF ASSENT

Agreement to a mass-market record can occur before, but must occur no later than during the initial use of the information.²⁴⁴ This places an outside limit on layered contracting in the mass-market and acknowl-

240. U.C.I.T.A. § 209, Reporter's Note 3. See e.g. *Kloss v. Polske Linie Lotnicze*, 133 F.3d 164 (2d Cir. 1998); *Fireman's Fund Insurance v. M.V. DSR Atlantic*, 131 F.3d 1336 (9th Cir.1998); *Chan v. Adventurer Cruises, Inc.*, 123 F.3d 1287 (9th Cir. 1997).

241. See e.g. *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

242. See e.g. *Kloss v. Polske Linie Lotnicze*, 133 F.3d 164 (2d Cir. 1998); *Fireman's Fund Insurance v. M.V. DSR Atlantic*, 131 F.3d 1336, 1339-40 (9th Cir. 1998); *Chan v. Adventurer Cruises, Inc.*, 123 F.3d 1287 (9th Cir. 1997).

243. U.C.I.T.A. § 209, Reporter's Note 5a.

244. See *id.*

edges customary practices in the software and other industries applicable to the market. Of course, this limitation does not prevent subsequent modification of the license at any other point in time or performance by a party that defines terms pursuant to agreement.

XIX. COST FREE RETURN

Subsection (b) of Section 209 involves assuring the licensee an opportunity to review and an effective choice to accept or reject a license presented after initial payment.²⁴⁵ It creates a return right that places the end user in a situation whereby it can exercise a meaningful choice regarding licenses presented after initial agreement. The Act refers to a return right, rather than a right to a refund, because it recognizes that in the mass-market, under developing technologies, the concept of requiring this right may apply to either the licensee or the licensor, whichever is asked to assent to a record presented after the initial agreement.

In cases where the form is presented to the licensee after it becomes initially obligated to pay, it must be given a cost free right to say no.²⁴⁶ This does not mean that the end user can reject the license and use the information or that the user can return damaged or altered information or documentation. What is created is a right to return to a situation generally equivalent to that which would have existed if the end user had reviewed and rejected the license at the time of the initial agreement. The return right does not apply if the licensee agrees to the license.²⁴⁷ It is not a means by which a party may rescind an agreement to which it has assented, but rather a method of ensuring that assent in this setting is real. Thus, if after having an opportunity to review the license, the licensee manifests assent to it such as opening the package holding software with reason to know that such an action will constitute assent, the return right does not apply.

This return right also does not arise if there was an opportunity to review the license before making the initial agreement.²⁴⁸ In subsection (b) the exposure to potential liability for expenses of reinstating the system after review creates an incentive for licensors to make the license or copy available for review before the initial obligation is created. The subsection does not apply to transactions involving software obtained on-line if the software provider makes available and obtains assent to the license as part of the ordering process. On the other hand, in a mail order transaction, if the license is first received along with the copy of the information that was ordered, the subsection applies. The return right

245. U.C.I.T.A. § 209(b).

246. U.C.I.T.A. § 209, Reporter's Note 5b.

247. *See id.*

248. *See id.*

under this section is cost free in that the end user receives reimbursement for reasonable costs of return and, in a case where installation of the information was required to review the license and caused adverse changes in the end user's system, to reasonable costs in returning the system to its initial condition. The fact that this section states an affirmative right in the mass-market to a cost free refund does not affect where under other law outside this Act, a similar right might exist in other contexts.

The subsection contemplates that the distribution method requires assent to a license after the initial agreement, there is an obligation to reimburse the licensee if it rejects the license. The expenses incurred in return of the subject matter of the rejected license must be reasonable and foreseeable. The costs of return do not include attorney fees or the cost of using an unreasonably expensive means of return, lost income or the like unless such expenses are required by instruction of the licensor. The expense reimbursement refers to ordinary expenses such as the cost of postage.

Similarly, in cases where expenses of restoring the system are incurred because the information was required to be installed in order to review the license, expenses chargeable to the licensor must be both reasonable and foreseeable. The reference here is to actual out-of-pocket expenses and not to compensation for lost time or lost opportunity. The losses here do not encompass consequential damages. Moreover, they must be foreseeable. A party may be reasonably charged with ordinary requirements of a licensee that are consistent with others in the same general position, but is not responsible for losses caused by the particular circumstances of the licensee of which it had no reason to know. A twenty-dollar software license provided in a mass-market should not expose the provider to significant loss unless the method of presenting the license can be said ordinarily to cause such loss. Similarly, it is ordinarily not reasonable to provide recover of disproportionate expenses associated with eliminating minor and inconsequential changes in a system that do not affect its functionality. On the other hand, the provider is responsible to cover actual expenses that are foreseeable from the method used to obtain assent.

XX. CONCLUSIONS

Obviously, UCITA will be the subject of considerable scrutiny by legislative bodies, the courts and a multitude of commentators as the States considers the Act for adoption. The Act is an attempt to draw the commercial law area into a world the significance of which is now readily apparent. UCITA represents the beginning of what will certainly be a most exciting and creative adventure into an increasingly "cyber domi-

nated" commercial environment. It is the seeming duty of every one involved in this process to recognize, understand and assimilate these changes and (albeit although not in the eyes of some) advancements in the way business is to be conducted in the twenty first century.

