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# UCITA: HELPING DAVID FACE GOLIATH

by MICALYN S. HARRIS†

## I. INTRODUCTION

The Uniform Computer Information Transactions Act (“UCITA”)<sup>1</sup> seeks to provide clear, consistent uniform rules for the intangible subject matter involved in computer information transactions. It was originally conceived as part of the Uniform Commercial Code (“UCC”), and many of the over-arching principles, as well as structural characteristics, of the UCC, and particularly Article 2 of the UCC, have been preserved. Among these over-arching principles are preservation of freedom of contract, codification of current custom and practice in the affected industries, and articulation of default rules when parties clearly intend to form a contractual relationship, but fail to specify details which subsequently turn out to be needed in order to understand the rights and obligations of the respective parties and effect their intentions.

The purposes of UCITA are identical to those of the UCC, that is, to increase predictability and facilitate commerce,<sup>2</sup> but with particular fo-

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† © 2000, Micalyn S. Harris. Printed by permission. With warmest thanks to Carol A. Kunze for her generous assistance and invaluable contributions. Ms. Harris is Vice President, Secretary and General Counsel of Winpro, Inc., <<http://www.winpro.com>>, a software consulting, design and development company, with offices in Ridgewood, NJ, and New York City’s “Silicon Alley.”

1. The text of UCITA, dated February 9, 2000, is found at <<http://www.law.upenn.edu/bll/ulc/ucita/ucita200.htm>>. There are also some approved amendments at <<http://www.law.upenn.edu/bll/ulc/ucita/approveamend.htm>>. All sections references, unless otherwise stated are to the February 9, 2000 version of UCITA. The text when finally published will be accompanied by Official Comments that help to explain the text. The most recent version can be found at: <<http://www.law.upenn.edu/bll/ulc/ucita/ucitacom300.htm>>.

2. U.C.C. § 1-102(2) provides:

(2) Underlying purposes and policies of this Act are:

- (a) to simplify, clarify and modernize the law governing commercial transactions;
- (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.

*Id.*

cus on the computer information industry.

## II. BACKGROUND

Computers, and computer information, have existed for less than half the century; computer information has been widely available for general use for barely 20 years. During the last two decades, income from the domestic computer information industry has grown from tiny to nearly two billion dollars a year.<sup>3</sup> In 1997, the world packaged software market exceeded \$100 billion and that figure does not include custom and proprietary software provided to customers and clients by developers, system integrators, and consultants, nor does it include millions of dollars of access services like Bloomberg or NASDAQ.<sup>4</sup>

Rivalling and perhaps surpassing the magnitude of growth has been the spread and magnitude of technological change. Today's least expensive laptop computer has more computing power than the most expensive desktop computer of a decade ago, and at one-tenth the price.<sup>5</sup> Such explosive growth and technological change in an industry are unprecedented.

The legal framework supporting that growth has been based on the law of contracts; primarily contractual arrangements in the form of license agreements pursuant to which owners authorize use of a copyrighted work. The contracting model has worked well because it protects the ability of computer information providers to commercialize their creations while offering maximum flexibility—an essential quality in an industry in which change is rapid and constant.

UCITA provides statutory recognition of that contracting model, and supports it by providing uniform default rules to assist in increasing certainty regarding transactions in computer information when a contract is clearly intended to be formed but some elements of the agreement are omitted or unclear or performance is begun before the contract is fully drafted and signed. Because performance often proceeds on the basis of

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3. See Chart No. 917, U. S. Census Bureau, Statistical Abstract of the United States, 1999. According to the U. S. Census Bureau, the estimated gross domestic income in the information technologies industries for 1999 is \$199.282 billion. *Id.*

4. U.S. Industrial Trade Outlook '98, U. S. Dep't. of Com., 1998. According to the U. S. Department of Commerce, the world packaged software market was \$109.3 billion in 1996, of which \$50.4 billion was in the U.S. *Id.* The world packaged software market was expected to exceed \$125 billion in 1997. *Id.* Note that these figures reflect only *packaged* software. The scope of UCITA is not limited to packaged software, and therefore, UCITA will impact an even larger market.

5. See PC Mall vol. 28S. In 1985, an IBM PC/AT with 128KB RAM and 20MB hard drive cost about \$10,000. *Id.* (Mar. 30, 2000 Interview with Louis J. Cutrona, Jr., President, Winpro, Inc.) Today, a Toshiba laptop with 32MB RAM and 4.36GB (gigabyte) hard drive can be purchased for about \$1,000. *Id.*

incomplete or casually expressed agreements, such recognition, uniformity, clear default rules and the increased certainty they provide is particularly important to small businesses, which include individuals as well as small companies. There are thousands of these small businesses, which together make up the backbone of the computer information industry.<sup>6</sup>

### III. ANALYSIS

#### A. GENERAL BENEFITS

The overall benefit of UCITA is that licensors and licensees alike will know what the law is. In both writing, and if necessary, in enforcing an agreement in the courts, parties can approach the issues with greater assurance. Doubts over how to write a legally enforceable license and how to ensure that it becomes a binding contract between two parties will dissipate. UCITA provides a legal blueprint for reducing uncertainty and assuring enforceability so as to permit the intention of the parties to be realized.

Less legal doubt means reduced legal costs. When the law is clearer, fewer hours of attorneys' billable time is required to search for answers to issues such as the proper phrase to use to assure a particular outcome or to describe a desired outcome. UCITA also acts as a type of checklist of issues to be addressed in drafting a license. Writing a software license becomes easier, and the likelihood of assuring the intention of the parties is expressed and realized is increased, with reduced legal costs.

UCITA stands to be even more of a boon in reducing the amount and cost of litigation relating to computer information. In some cases, issues which today may act as threshold barriers because resolving them requires an investment of significant amounts of time and money and resolution is essential because the resolution has a significant impact on issues critical to the outcome of the case will simply disappear. For example, arguments over whether common law or the UCC should apply

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6. See Raymond T. Nimmer, *Images and Contract Law—What Law Applies To Transactions in Information*, 36 HOUS. L. REV. 1 (1999). With regard to the size and make up of the market for computer information, Mr. Nimmer notes:

an image of routinely subservient purchasers (licensees or buyers) does not accurately reflect practice. The nature of the information marketplace accentuates the degree to which the inaccuracy exists. Most vendors of information who provide works to publishers are individual authors dealing with relatively large corporate purchasers. Although there are large companies in the modern computer software industry, the average size of a computer software provider is fewer than twelve employees. These small companies routinely deal with large corporate clients (purchasers). For example, Walt Disney Corp. is seldom the unsophisticated party, especially in the many contracts in which it acquires services from small software development companies.

*Id.* at 25 (citations omitted).

will be eliminated. Conflict regarding whether a transaction is a sale or a license will be reduced regarding computer information because UCITA covers both.<sup>7</sup> Concerns as to whether a warranty applies or was properly disclaimed will be reduced. Parties involved in litigation regarding computer information will be in a better position to deal with these and other issues summarily, and to focus their time and effort on the factual controversy.

Another benefit particularly related to clarifying warranty rules is the ability to more reliably predict the financial risks involved in a computer information transaction, which will enable prices to be set accordingly. The ability to disclaim warranties gives computer information providers the ability to offer lower prices, thus permitting small providers to compete with less fear that they will be destroyed as a result of legal action by a customer or competitor with greater financial resources.

As with any legislation, where UCITA is adopted, there will be a learning curve. The curve, however, is likely to be relatively short and gentle, because so much of UCITA is codification of existing law and practice. Computer information has traditionally been licensed because, as intellectual property lawyers often say, the license of computer information is the "product." Thus, use of computer information has traditionally involved contracts. Adoption of UCITA will codify and clarify these contracts by providing some guidelines and default rules, but it will recognize, not seek to abandon or usurp, the existing legal framework.

Perhaps the greatest boon to small businesses, particularly licensors, in dealing with large corporate licensees, is that the default rules of UCITA will provide a different starting point for negotiations. For example, it is not unusual for a large licensee to draft its own software license for licensors much smaller in size to use, effectively dictating the terms of the license. With UCITA in place, a small business will be able to assert that the appropriate starting point for discussion is the balanced default rules provided by UCITA, and any proffered license will be measured by UCITA and the reasons for deviations from UCITA's rules will merit discussion and examination.

One intended function of UCITA is to provide default rules such that the outcome is the outcome that would be expected between commercial parties had they addressed the issue. As such, UCITA provides a standard of commercial practice, a yardstick against which to measure license terms, and support for even-handed contractual provisions. This potentially places small businesses in a stronger position in negotiating

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7. The sale or license distinction will still be relevant to the transaction, for instance if a copyright issue is at stake, but it will no longer be a factor in determining which body of contract law applies.

with larger companies with greater financial resources and possibly more and more specialized and sophisticated legal counsel.

### B. SOME KEY DEFINITIONS AND CONCEPTS

The sixty-five definitions of Section 102 may be divided into three categories. The first group consists of pragmatic descriptions of the meaning of a word. For example, the definition of "conspicuous" takes a practical view of what will constitute "conspicuousness," i.e., a visual impact which one "ought to have noticed" or in an electronic contractual setting, an inability to proceed without indicating a response to a particular contractual term.<sup>8</sup>

The second group of definitions is expansive, that is, words are defined to have broader meanings than might otherwise be anticipated. For example, "electronic" includes not only technology involving electricity, but also "digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."<sup>9</sup> Such expansiveness is designed to assure that the basic principles set forth in UCITA do not become obsolete or inapplicable because they must be applied to as yet unknown or undeveloped technologies. Also included in this group are the definitions for "licensee"<sup>10</sup> and "licensor,"<sup>11</sup> which refer to the transferee and transferor in any UCITA contract regardless of whether the contract is a license.<sup>12</sup>

The third group of definitions encompasses an entire concept or procedure. It is this last group which includes definitions of particular importance to small businesses. The first of this group is "authenticate," which is defined to mean:

(A) to sign; or

(B) 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.<sup>13</sup>

and a "record" is defined to mean:

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8. U.C.I.T.A. § 102(a)(14)(A)(B) (1999). Safe harbors are included in the definition. *Id.*

9. *Id.* § 102(a)(26).

10. *Id.* § 102(a)(41).

11. *Id.* § 102(a)(42).

12. *Id.* § 102 cmt. 37. These terms are used because a license is the paradigm transaction for UCITA. *Id.* Sales of copies of computer information are also covered under UCITA, and in the case of such sales, the seller is considered the licensor where UCITA applies. *Id.* Sales of computer information may be covered by UCITA, but where federal laws, e.g. regarding sales of patents and copyrighted works, apply, they will take precedence. *Id.* Other federal laws, as well as state consumer protection statutes, may also take precedence over UCITA's rules.

13. *Id.* § 102(a)(6).

information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.<sup>14</sup>

In combination, these definitions presage confirmation of the validity of authenticated records to provide a foundation for describing the conditions under which electronic contracting will produce a valid, binding and enforceable contract, and thereby support the growth of electronic commerce.

A related concept, of particular significance to small business for the same reasons, is "attribution procedure" which is defined to mean:

a procedure to verify that an electronic authentication, display, message, record, or performance is that of a particular person or to detect changes or errors in information. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment.<sup>15</sup>

By giving legal recognition to an electronic record<sup>16</sup> and enabling enforcement when the party against whom enforcement is sought has indicated "manifest assent,"<sup>17</sup> UCITA supports competition and the

14. U.C.I.T.A. § 102(a)(54).

15. *Id.* § 102(a)(5).

16. *Id.* § 107. Legal Recognition of Electronic Record and Authentication; Use of Electronic Agents, provides:

- (a) A record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) This [Act] does not require that a record or authentication be generated, stored, sent, received, or otherwise processed by electronic means or in electronic form.
- (c) In any transaction, a person may establish requirements regarding the type of authentication or record acceptable to it.
- (d) A person that uses an electronic agent that it has selected for making an authentication, performance, or agreement, including manifestation of assent, is bound by the operations of the electronic agent, even if no individual was aware of or reviewed the agent's operations or the results of the operations.

*Id.*

17. *Id.* § 112. Manifesting Assent; Opportunity to Review, provides:

- (a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:
  - (1) authenticates the record or term with intent to adopt or accept it; or
  - (2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.
- (b) An electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent:
  - (1) authenticates the record or term; or
  - (2) engages in operations that in the circumstances indicate acceptance of the record or term.
- (c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.
- (d) Conduct or operations manifesting assent may be proved in any manner, including a showing that a person or an electronic agent obtained or used the information or informational rights and that a procedure existed by which a

growth of electronic commerce. Being able to rely on and maintain authorized records in electronic form is a boon to all, but especially important to small businesses, which are spared the considerable additional costs of producing and maintaining files of "hard copy." Being able to rely on electronic contract formation and electronic records enables small businesses to compete more effectively with larger companies to which the additional costs of telephone, fax and paper transactions and record keeping may be less significant.

Being able to choose the law applicable to its transactions is another key provision for small businesses. Section 109 permits individuals and small companies to become knowledgeable about laws of one state rather than fifty states, to have confidence that their contracts comply with the law of that state and that they will be binding and enforceable in accordance with their terms. Uniformity, combined with UCITA's choice of law provisions, thus permits small businesses to do business across state lines without having to analyze the provisions of their agreements under the laws of fifty different states.<sup>18</sup>

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person or an electronic agent must have engaged in the conduct or operations in order to do so. Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that reaffirms assent by electronic means.

- (e) With respect to an opportunity to review, the following rules apply:
  - a. A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.
  - b. An electronic agent has an opportunity to review a record or term only if it is made available in manner that would enable a reasonably configured electronic agent to react to the record or term.
  - c. If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record. However, a right to a return is not required if:
    - i. the record proposes a modification of contract or provides particulars of performance under Section 305; or
    - ii. the primary performance is other than delivery or acceptance of a copy, the agreement is not a mass-market transaction, and the parties at the time of contracting had reason to know that a record or term would be presented after performance, use, or access to the information began.
  - d. The right to a return under paragraph (3) may arise by law or by agreement.
- (f) The effect of provisions of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

*Id.*

18. *Id.* § 109. Choice of Law, provides:

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



The exception to UCITA's choice of law provisions is consumer transactions, to which UCITA's choice of law provisions may not apply. UCITA provides that its choice of law provision is not enforceable in a consumer contract "to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would (otherwise) apply."<sup>19</sup> As a result, UCITA's choice of law provision is unlikely to affect the choice of law for consumer transactions.

While consumer groups have seen this as a necessary protection for consumers, the longer range effect for consumers may be negative rather than positive. Faced with higher risks and greater uncertainties in consumer transactions, individuals and smaller companies will be compelled to reflect those factors in their prices, and respond by setting prices in consumer transactions higher than they might otherwise set them. In some cases, setting prices high enough to cover the additional risks may reduce demand to the point where it is no longer profitable to offer the computer information to consumers, in which event, consumer choice will be reduced.<sup>20</sup> (To the extent that limitations on legal liabilities are unenforceable under consumer statutes, individuals and small companies may decide that the risks of offering computer information to consumers are greater than the likely benefits, with the unintended result that choices offered to consumers are, in the long run, reduced. For example, residents in states with overly protective consumer laws that impose considerable additional risks on computer information providers may find notices on distributors' web sites to the effect that the distributors are not authorized to license the consumer information to residents of those states, i.e., to place the supplier in a position in which overly-protective state law may apply, with the result that the provider must bear considerable additional risks in supplying consumers in that state.)

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

- a. An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor was located when the agreement was entered into.
- b. A consumer contract that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.
- c. In all other cases, the contract is governed by the law of the jurisdiction having the most significant relationship to the transaction. . . .

*Id.*

19. *Id.* § 109(a). In the absence of a choice of law clause, UCITA's default rules on choice of law would determine jurisdiction and therefore the consumer law of the jurisdiction, which would apply.

20. See Micalyn S. Harris, *Is Article 2B Really Anti-Competitive?*, 3 CYBERSPACE LAWYER No. 8, Nov. 1998 available at <<http://www.winpro.com/articles/anticompetitive.htm>>.

UCITA's choice of forum provisions are less complicated than its choice of law provisions, and adhere to more traditional standards. The choice of an exclusive jurisdictional forum may be made in an agreement, and so long as exclusivity is expressly stated and the choice of law is not "unreasonable and unjust," the provision will be enforceable in accordance with its terms.<sup>21</sup> The section is significant for individuals and small businesses because it enables them to assure themselves that in the event of litigation, they will be able to avoid the expense of traveling to a distant place, or worse, numerous distant places, to respond to litigation.<sup>22</sup> For many, perhaps as important as the money involved is the fact that they will be able to remain close enough to home to continue to manage their business even if and when faced with litigation.<sup>23</sup> This can be critical for small businesses, which cannot afford to have their few multi-tasking human resources dedicated to dealing with lawsuits instead of the business.

By empowering small businesses to enter into binding contractual relationships regarding computer information, on paper and electronically, under a uniform set of laws, UCITA will make it possible for these entities to expand their business activities efficiently, at minimal cost, and thus enable them to compete more effectively with larger entities.

### C. DOES SIZE MATTER?

In the competitive world of the marketplace, size, and more specifically, financial resources matter. UCITA makes no distinction between entities of different sizes, and therefore recognizes the urgent importance of assuring evenhandedness and the need to protect individuals and small businesses on both sides of computer information transactions. UCITA does distinguish between "merchants"<sup>24</sup> and "consumers"<sup>25</sup> and between a "mass-market transaction"<sup>26</sup> and other types of transactions.

A consumer is defined as:

an individual who is a licensee of information or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for professional or

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21. U.C.I.T.A. § 110. Contractual Choice of Forum, reads: (a) The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust. *Id.* A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides. *Id.*

22. In the litigious American society, even the successful defense of a lawsuit can be prohibitively costly.

23. Any lawsuit takes management time, not to mention staff time explaining the product, business processes, acting as witnesses, etc.

24. U.C.I.T.A. § 102(45).

25. *Id.* § 102(15).

26. *Id.* § 102(44).

commercial purposes, including agriculture, business management, an investment management other than management of the individual's personal or family investments."<sup>27</sup>

In some cases, a "consumer" will have fewer financial resources than a licensor of computer information, but UCITA does not distinguish between a struggling college student using a computer program to manage a personal stock portfolio of \$10,000 and a wealthy individual using the same program to manage a personal stock portfolio of \$100 million. So long as both are using the program for personal or family investments, they are "consumers" as defined by UCITA.

A "mass-market license" is defined as "a standard form used in a mass-market transaction"<sup>28</sup> and a mass market transaction is defined as a "consumer contract"<sup>29</sup>, other transaction with an end-user licensee if "the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information"<sup>30</sup>, or is otherwise a typical retail transaction in a retail market.<sup>31</sup> Although a license is only a "consumer contract" if the licensor is a merchant,<sup>32</sup> the threshold to qualify as a merchant is fairly low.<sup>33</sup>

Specifically excluded from the definition of mass-market license are contracts for redistribution or public performance or display of a copyrighted work, transactions in customized or specially prepared information, site licenses, and access contracts.<sup>34</sup> The size of the parties, however, is not relevant to the analysis. A mass-market licensor may be an individual or a Fortune 100 company. The licensee may likewise be a

27. *Id.* § 102(15).

28. *Id.* § 102(a)(43).

29. *Id.* § 102(a)(44)(A).

30. U.C.I.T.A. § 102(a)(44)(B)(i).

31. *Id.* § 102(a)(44)(B)(ii). "[R]etail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market". *Id.*

32. *Id.* § 102(a)(16).

33. *Id.* § 102(a)(45). "Merchant" means a person:

- (A) that deals in information or informational rights of the kind involved in the transaction;
- (B) that by the person's occupation holds itself out as having knowledge or skill peculiar to the relevant aspect of the business practices or information involved in the transaction; or
- (C) to which the knowledge or skill peculiar to the practices or information involved in the transaction may be attributed by the person's employment of an agent or broker or other intermediary that by its occupation holds itself out as having the knowledge or skill.

*Id.*

34. *Id.* § 102(a)(44)(B)(iii).

small business or a Fortune 100 company.<sup>35</sup>

The result of extending extra protections to consumers and distinguishing between mass-market and other types of licenses is to impose on small businesses, which provide computer information the identical risks, obligations and responsibilities as those borne by large companies with substantially greater financial liquidity and resources. To the extent that providers of computer information are viewed as large, powerful companies, evaluation of the appropriate balance between providers and users is likely to be skewed toward users. To the extent that providers of computer information are viewed as bright people working in garages and basements with minimal financial resources to provide computer information in competition with large, well-financed competitors, evaluation of the appropriate balance when drafting provisions to protect computer information providers is more likely to reflect the realities of the marketplace and to preserve growth and effective competition in the industry.<sup>36</sup>

Small businesses must deal with the same risks as large companies offering computer information under mass-market licenses, but can also look to UCITA's definitions of consumer and mass-market license to limit the impact of the additional protections provided to consumers and to Fortune 100 companies under mass-market licenses.

#### D. ETHICAL OBLIGATIONS MAY NOT BE VARIED BY AGREEMENT

While preserving freedom of contract as an over-arching principle, and permitting parties to an agreement to establish standards by which performance obligations are to be measured, certain standards and obligations are imposed by UCITA which may not be varied by agreement.<sup>37</sup>

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35. See Holly K. Towle, *Mass Market Transactions in the Uniform Computer Information Transactions Act*, DUQ. L. REV. [hereinafter Towle] For a comprehensive discussion of mass market transactions under UCITA,

36. See Nimmer, *supra* note 7 at 1. For a discussion of the fact that "an image of routinely subservient purchasers (licensees or buyers) does not accurately reflect practice".

37. U.C.I.T.A. § 113. Variation by Agreement; Commercial Practice, provides:

- (a) The effect of any provision of this [Act], including an allocation of risk or imposition of a burden, may be varied by agreement of the parties. However, the following rules apply:
- (1) Obligations of good faith, diligence, reasonableness, and care imposed by this [Act] may not be disclaimed by agreement, but the parties by agreement may determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable.
  - (2) The limitations on enforceability imposed by unconscionability under Section 111 and fundamental public policy under Section 105(b) may not be varied by agreement.
  - (3) Limitations on enforceability of, or agreement to, a contract, term, or right expressly stated in the sections listed in the following subparagraphs may not be varied by agreement except to the extent provided in each section:
    - (A) the limitations on agreed choice of law in Section 109(a);

These obligations are basically ethical obligations. They include obligations of good faith, diligence, reasonableness and care. The traditional limitations on freedom of contract also apply. Thus, provisions, which are unconscionable and provisions that violate fundamental public policy are not enforceable under UCITA. The drafters of the statute have also included a convenient list of other sections of the Act, which limit enforceability of contractual terms.<sup>38</sup> A separate section provides additional guidance by confirming that principles of law and equity apply unless specifically displaced by the Act, and reemphasizes that every contract or duty within the scope of UCITA imposes obligations of good faith.<sup>39</sup>

#### E. CONTRACT FORMATION

One of the principle benefits of UCITA is that it provides a legal blueprint for forming an enforceable computer information contract, particularly in the form of a shrinkwrap license. There has been some uncertainty as to whether shrinkwrap licenses are enforceable. Recent court cases have begun to dispel this uncertainty, but the legal process moves slowly. Under UCITA, if certain steps are taken, a licensor can, with much more certainty, be assured of having written a license agreement which will a court of law will deem enforceable.

Before deciding whether to enforce a contract, a court must first determine that the party bearing the burden of proof has proved the existence of a contract. Where a statute of frauds applies, part of that proof is showing its requirements have been met because where a statute of frauds requires a writing, in the absence of the required writing a person may not bring a contract enforcement action.<sup>40</sup>

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- (B) the limitations on agreed choice of forum in Section 110;
  - (C) the requirements for manifesting assent and opportunity for review in Section 112;
  - (D) the limitations on enforceability in Section 201;
  - (E) the limitations on a mass-market license in Section 209;
  - (F) the consumer defense arising from an electronic error in Section 214;
  - (G) the requirements for an enforceable term in Sections 303(b), 307(g), 406(b) and (c), and 804(a);
  - (H) the limitations on a financier in Sections 507 through 511;
  - (I) the restrictions on altering the period of limitations in Section 805(a) and (b); and
  - (J) the limitations on self-help repossession in Sections 815(b) and 816.
- (b) Any usage of trade of which the parties are or should be aware and any course of dealing or course of performance between the parties are relevant to determining the existence or meaning of an agreement.

*Id.*

38. *Id.* § 113(a)(3).

39. *Id.* § 114(b).

40. *Id.* § 201(a). "A contract . . . is not enforceable by way of action or defense unless . . ." *Id.*

This can be a critical issue, particularly in the case of small software developers when work may begin before terms are reduced to a formal executed contract. If the project is halted prematurely, the parties will want to know what their respective rights to the computer information are, what obligations they have to one another, and which, if either, party may recover damages from the other and if so, for what and how measured.

UCITA blends and updates the requirement of a writing (for example, under the UCC) by combining setting a dollar value,<sup>41</sup> with the common law duration requirement. Thus, Section 201 mandates an "authenticated record"<sup>42</sup> for contracts which *require* payment of \$5,000<sup>43</sup> and which have a duration of more than one year.<sup>44</sup> The record must (1) be authenticated by the party against whom enforcement is sought, (2) be sufficient to indicate that a contract has been formed, and (3) reasonably identify the subject matter of the contract.<sup>45</sup>

The sufficiency of the writing is not a difficult standard to meet. It does not require a formal contract, a memorandum can suffice.<sup>46</sup> The terms do not have to be complete or precise.<sup>47</sup> The writing merely needs to provide some evidence that a contract exists (*i.e.*, that there was more than just negotiation) and a reference that reasonably identifies the subject matter. The purpose is simply to "afford a basis for believing that the offered oral evidence rests on a real agreement."<sup>48</sup>

It is important to note that in the case of copyrighted material, UCITA would not override any requirements under the Copyright Act that a transfer, such as a transfer of ownership in a copyright or an exclusive license, be in writing.<sup>49</sup> There is, however, no federal copyright law requirement for a nonexclusive license to be in writing.

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41. UCC § 2-201(1). UCC Article 2 requires that a contract for the sale of goods with a price of \$500 is not enforceable unless there is "some writing sufficient to indicate that a contract for sale has been made . . ." *Id.*

42. *See supra* text accompanying notes 13 and 14.

43. UCC § 2-201 cmt. 3. Section 201 emphasizes that the payment must be required - a royalty payment which "might (or might not) yield millions" would not be considered to *require* payment of \$5,000 unless there were a minimum payment of that amount or more. *Id.*

44. *Id.* § 2-201(a)(1) and (2).

45. *Id.*

46. *Id.* § 2-201 cmt. 3.b

47. *Id.* § 2-202(d). The standard for sufficiency for a writing to meet the authenticated record requirement in Section 201 should not be confused with the sufficiency necessary for a contract to have been formed. For instance, the record under Section 201 merely needs to reasonably identify the subject matter. However, if there is a material disagreement about a material term, the record may satisfy Section 201, but a contract may nonetheless not have been formed.

48. UCC § 2-201 cmt. 3.b.

49. Copyright Act, § 204(a).

Even if no formal contract is signed by the parties, and no authenticated record meets the requirements outlined above, under Section 201(c), a contract will still be enforceable if (1) there has been performance tendered or information made available and it has been accepted or accessed,<sup>50</sup> or (2) the party against whom enforcement is sought admits in court to facts indicating the contract.<sup>51</sup>

For example, if a software developer-licensor begins performance before formalizing an agreement and questions arise when there is partial performance but no writing, a contract may be found without a writing, but only if the developer's performance has resulted in some form of acceptance by the client-licensee.

Once the statute of frauds evidentiary requirement has either been determined not to apply or its requirements have been met, the party wishing to assert the existence and enforceability of the contract in accordance with UCITA must prove that a contract was actually formed under the UCITA formation provisions.<sup>52</sup>

Under UCITA, a contract may be formed in any manner that is sufficient to show agreement, including by the conduct of both parties, which recognize the existence of a contract.<sup>53</sup> Such conduct may proceed, and a contract may be formed, by two electronic agents.<sup>54</sup> If the parties so intend, a contract may be formed even if not all the terms have been specified.<sup>55</sup> Unless, however, there is conduct or performance by both parties indicating otherwise, a contract is not formed if there is a material disagreement about a material term.<sup>56</sup>

An offer invites acceptance in any manner reasonable.<sup>57</sup> A *definite* acceptance is effective, even if it proposes varying terms, unless the offer is materially altered.<sup>58</sup> Acceptance, which fails the definite test is deemed a counter-offer.

Once a court has determined that a contract has been formed by a valid offer and acceptance, the next step is to determine the terms of the contract. Where a standard form contract is presented, it is deemed accepted by the party to whom it is presented if that party agrees to the terms by manifesting assent.<sup>59</sup> Under UCITA, a standard form contract will be enforceable even if the terms are not presented until after pay-

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50. U.C.I.T.A. § 201(c)(1).

51. *Id.* § 201(c)(2).

52. *Id.* §§ 202-207.

53. *Id.* § 202(a).

54. *Id.* § 202(b).

55. *Id.* § 202(c).

56. U.C.I.T.A. § 202(d).

57. *Id.* § 203(a).

58. *Id.* § 204(b).

59. *Id.* § 208(1).

ment or performance starts, if (a) the assenting party knew that additional terms would be made available later, and (b) in the case of a mass market license or mere delivery of a copy, there is an opportunity to reject the terms and return the computer information.<sup>60</sup>

A mass-market computer information transaction is subject to additional limitations and requirements.<sup>61</sup> In contrast to a standard form contract where the terms may be made available after the computer information has been used for a period of time, in a mass market transaction, agreement to the terms of the license must precede or coincide with the licensee's initial use of the computer information. Also, while conduct such as opening up a shrinkwrap package may constitute assent, the conduct constitutes acceptance only if it comes after the terms of the license have been made available.<sup>62</sup>

A provision will not become part of any license if it is unconscionable, violates a fundamental public policy, or conflicts with terms to which the parties expressly agreed.<sup>63</sup> Where a customer takes rights to use under a mass-market license whose terms are only made available after payment has been made, the customer is, under UCITA, entitled to return the computer information and receive not only a refund of payment made, but also, compensation for the reasonable costs of effecting the return and compensation for the reasonable cost of restoring the computer system on which the computer information was placed if removal of the computer information does not restore the system to its prior state.<sup>64</sup> The theory behind these statutory provisions is that a customer is entitled to return licensed computer information if it has paid for that information prior to having an opportunity to review the license terms and on review, decides these terms are unacceptable.

The right to return computer information is limited to situations involving mass-market licenses whose terms are not made available prior to a customer making payment. The right to return does not apply if the terms are made available prior to payment; it is premised on rejection being made due to disagreement with the terms of the license, not for any other reason. Licensors may reduce risks and costs in this area by making license terms available prior to payment. If that is not conve-

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60. *Id.* § 208(2). See e.g. *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) and *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y.A.D. 1998).

61. See text accompanying notes 36 - 37.

62. U.C.I.T.A. § 209(a). The result is that diskettes or CD-ROMs containing computer information are often packaged in a separate "Read First" envelope which warns that opening the envelope indicates assent to the terms of the license agreement, found elsewhere in the package, for example, in a user's manual. Under such shrinkwrap arrangements, opening the envelope constitutes "manifest assent."

63. *Id.* § 209(a)(1) and (2).

64. *Id.* § 209(b).



nient, making license terms available (e.g., on a diskette or CD-ROM) prior to installation of the computer information can avoid the risk of triggering the right to compensation for the costs of system restoration. Such a two-step procedure can also assure that other terms of the license agreement, including limitations on liability, have been accepted and will apply.

If a licensee acquires computer information from a website, providing web site visitors with an opportunity to review license terms before delivery or payment by displaying the terms, or a link to the terms in close proximity to the description of the computer information, or by prominently disclosing the availability of the terms, will meet the requirement of an opportunity to review so as to avoid giving a right to return based on inability to review prior to payment provided no steps are taken by the licensor to prevent the downloading or copying of the terms.<sup>65</sup>

UCITA does not address the technical intricacies of digital signatures and certificates, public and private key infrastructures and the like. UCITA does state that attribution procedures adopted by the parties will be given their agreed upon effect if the procedure is commercially reasonable, and there was good faith acceptance and compliance with the agreed procedure. There are safety provisions, which can be invoked in the case of non-negligent fraud.<sup>66</sup>

While a procedure encompassing digital signatures and certificates could qualify under the provisions outlining "safe harbor" attribution procedures, and could therefore have the effect of legally attributing an electronic signature to a particular person, a less technology-driven procedure such as agreeing to include a password or code number in an e-mail order could also qualify.

In the case of a keystroke error by a consumer, the consumer will not be bound if (a) there was no reasonable method to correct the error, and (b) the party promptly gives notification and returns any computer information received. One of the purposes of this section is to encourage the use of "confirmation screens." Thus, to avoid consumer errors, a supplier may, and many do, provide the consumer with the online opportunity to confirm the original order.<sup>67</sup>

#### F. THE RULES OF CONSTRUCTION

UCITA's rules of construction have two objectives: to make contracts reliable in accordance with their terms, and to implement the intent of the parties. Where these objectives are in potential conflict, the rules

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65. *Id.* § 211.

66. *Id.* §§ 212, 213.

67. *Id.* § 214.

define a reasonable balance between them. Thus, where a record is intended as a final expression of agreement between or among parties, it may not be contradicted by evidence of prior agreement.<sup>68</sup> The provision is similar to the "merger" provisions typical of contracts, i.e., provisions to the effect that the agreement is the complete agreement of the parties and prior negotiations and agreements are merged into the final agreement. A balance is provided by prohibiting evidence of prior agreements, but evidence of course of performance, course of dealing and usage of trade to "supplement" an authenticated record is permitted, on the theory that the parties took those for granted when drafting their agreement.<sup>69</sup>

UCITA's merger provision may be seen as working in favor of larger entities with sophisticated legal counsel who are careful to include emphatic language stating that the record is the complete and exclusive agreement of the parties. Such language makes it difficult for a court to consider evidence of additional terms even when they are consistent with the terms in the governing record.<sup>70</sup> Small businesses, however, also receive the benefits and protections provided by making clear contract language reliable. The rule requires parties of all sizes to take responsibility for reading their agreements and providing the performance to which their agreements obligate them. The rule also assists in assuring parties that their agreements, with whatever protections and obligations they clearly include, will, within traditional ground rules for contractual relationships, be enforceable in accordance with their terms.

Additional protection for small businesses is found in Section 302(2)(c), which requires that the party offering evidence of course of performance, course of dealing or usage of trade in a proceeding give the other party notice sufficient to prevent "unfair surprise." To the extent that larger companies are more likely to have sophisticated counsel than smaller companies, and therefore that small businesses are more likely to be "surprised" by presentation of evidence beyond the four corners of a contract, this provision should operate to protect smaller companies.<sup>71</sup>

Under UCITA, agreements may be modified without additional con-

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68. U.C.I.T.A. § 301.

69. *See id.* § 301 cmt. 3.

70. *Id.* § 301(2).

71. *Id.* § 302. Practical Construction, states:

- (a) The express terms of an agreement and any course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. However, if that construction is unreasonable:
  - (1) express terms prevail over course of performance, course of dealing, and usage of trade;
  - (2) course of performance prevails over course of dealing and usage of trade; and
  - (3) course of dealing prevails over usage of trade.

sideration,<sup>72</sup> but an "authenticated record" is required. This is the electronic parallel of the typical provision in a written contract to the effect that "this agreement may be modified only by a written agreement signed by both parties"—a "no oral modification" clause. The difference is that UCITA permits "manifest assent" instead of manual signing, which is generally an advantage to small companies because (a) electronic transactions are often less costly than paper transactions, and therefore facilitate smaller companies' participation in complex commercial transactions and (b) the enforceability of contracts entered into electronically is important to all, but especially to smaller companies which often cannot afford to pursue enforcement through lengthy and expensive litigation.

With the exception of default rules for consumers, UCITA's default rules also permit providers of computer information to control the scope of their risks by establishing a mutually acceptable procedure for modification. Where successive performances are contemplated, partial performance under the original agreement will validate the original agreement, but terms may be changed with regard to future performances provided the changes are proposed in good faith and the other party is reasonably notified. In a mass market transaction, if a change is proposed, the other party may terminate as to future performances if the change alters a material term and the other party determines in good faith that the alteration is unacceptable.<sup>73</sup> Again, UCITA strikes a balance between (a) the needs of providers of computer information, which

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- (b) An applicable usage of trade in the place where any part of performance is to occur must be used in interpreting the agreement as to that part of the performance.
  - (c) Evidence of a relevant course of performance, course of dealing, or usage of trade offered by one party in a proceeding is not admissible unless and until the party offering the evidence has given the other party notice that the court finds sufficient to prevent unfair surprise.
  - (d) The existence and scope of a usage of trade must be proved as facts.

*Id.*

72. *Id.* § 303(a).

73. *Id.* § 303. Modification and Rescission, provides:

- (a) An agreement modifying a contract subject to this [Act] needs no consideration to be binding.
- (b) An authenticated record that precludes modification or rescission except by an authenticated record may not otherwise be modified or rescinded. In a standard form supplied by a merchant to a consumer, a term requiring an authenticated record for modification of the contract is not enforceable unless the consumer manifests assent to the term.
- (c) A modification of a contract and the contract as modified must satisfy the requirements of Sections 201(a) and 307(g) if the contract as modified is within those provisions.
- (d) An attempt at modification or rescission which does not satisfy subsection (b) or (c) may operate as a waiver if Section 702 is satisfied.

*Id.*

include being able, in undertaking successive performances, to rely on payment for the computer information, which has been priced accordingly, and (b) the concerns of users of computer information that the terms under which computer information is provided will not be materially altered without their permission, leaving them obligated to rearrangements which no longer meet their needs under acceptable terms. This balanced approach enables both sides to control their risks, which is important for any commercial venture, but particularly important for small companies.

Both sides are further protected by the fact that even though modifications need not be supported by "separate" consideration, if a modification alters subject matter, duration, scope, price or other "significant" terms, partial performance will not validate the modification. Such modifications satisfy statute of frauds and other applicable rules.

Unlike modification, waivers, and particularly inadvertent waivers, are most likely to occur as a result of a course of conduct. Where a party's conduct is inconsistent with a contract term, that party may be able to enforce the contract term by giving notice to the other party of its intention to rely on the contract term. Where, however, inconsistent conduct has induced the other party to rely on the conduct and the other party, in reasonable reliance, has changed its position, notice may not be sufficient to avoid the waiver.<sup>74</sup>

To the extent small businesses are less vigilant than large companies regarding compliance with written agreements, inconsistent conduct is more likely to occur, but to the extent that conduct inconsistent with contractual undertakings is permitted by either party, it is a trap for the unwary. Thus, large and small businesses alike will find it advantageous to run a "tight ship" and maintain authenticated records of contract modifications. The practice may require increased attention to record keeping—and the increased costs associated with record keeping. Encouraging careful record keeping, however, has benefits to the parties as well as to society as a whole, as it reduces the likelihood of misunderstanding and subsequent litigation. These benefits may be particularly important to small businesses because they are generally less able to support the costs of litigation than are larger companies.

Where a contract calls for successive performances, terms apply to all performances unless modified in accordance with the contract or UCITA,<sup>75</sup> which is what the parties would normally anticipate. Notification of a change in terms must comply with the procedure to which the parties agreed. Again, encouraging reasonable procedures to support commercially reasonable conduct, including communication between

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74. U.C.I.T.A. § 303(d); *cf.* § 702.

75. *Id.* § 304.

parties to an agreement, has benefits to the parties and society as a whole. The minimal additional costs of implementing such procedures are more than warranted by the benefits derived from reducing the likelihood of unsatisfactory contractual relationships culminating in soured commercial relations and litigation.

For mass-market transactions, additional protection regarding proposed modifications is provided by granting the party not initiating the change the right to terminate if the change "alters a material term and the party in good faith determines that the modification is unacceptable." Price changes are always material, but changes beneficial to the party not initiating the change do not give rise to a right to terminate. For example, an on-line information service gives a discounted price for a four year commitment to provide information access service eight hours a day, five days a week. After two years, it offers continuing service twenty-four hours a day, seven days a week. Under such a scenario, a user would have no right to terminate service early.

Such flexibility is essential to service providers, who must be able to adjust the information being provided and the technology for its delivery to meet competition and take advantage of increased efficiencies offered by new developments in technology. Thus, whatever their size, computer information providers will, for competitive purposes, generally reserve the right to add, delete and modify hours and databases. This may be a problem for small businesses relying on the availability of a database at particular times or in a particular format. If there is such reliance, the relying business will need to assure continuation of that availability by an express contract term. The issue here is not, however, size, but sensitivity to change, awareness and communication, the ability to adapt, and the cost of adapting.

The need for flexibility is also recognized by UCITA in its provisions regarding "layered contracting." Layered contracting occurs when the parties clearly intend to form an agreement, but some terms are to be specified in the future. UCITA provides that if these subsequent specifications for performance are made in good faith and within the limits of commercial reasonableness, including being made "seasonably," the contract will be enforced.<sup>76</sup> If however specifications are not seasonably provided and the lack of seasonably providing them "materially affects" the other party's ability to perform, the performing party is excused for any delay which results from the lack of seasonably providing specifications and has a choice: it may either perform, suspend performance, or regard the failure to specify seasonably as a breach of contract. Layered contracting thus permits performance to move forward, as it often does in the real world, without terms being fully specified. To the extent small

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76. *Id.* §§ 305 and 306.

businesses are aware of this provision and communicate their needs for specifications clearly, this provision can be extremely beneficial to them. It prevents a small business from being whipsawed by demands for performance according to a schedule when specifications have not been timely provided, and permits it, as the innocent party, to choose whether it will perform on a delayed basis, suspend performance, or treat the failure to specify as a breach of contract.

UCITA undertakes to specify requirements for grant of rights in a license agreement and provides guidance on what will be considered commercially reasonable in interpreting grants. Thus, UCITA provides that a license grants not only those rights specifically described, but also, rights needed in the ordinary course to exercise the rights described.<sup>77</sup> This provision protects both licensors and licensees against some of the risks of inadequate drafting, and assures them that they will receive what they reasonably expect. The Official Comments make it clear that statements in a license agreement should be construed reasonably and need not be overly precise. For example, a description which implies limitations need not include the word "only" in order to give effect to the implied limitations. Thus, granting a license for use at a particular site implies that use at another site is not included in the grant. A simple statement of grant "for use at site X" is sufficient to limit the grant. It is not necessary to state "for use at site X and only at site X" to assure that the intention of the parties is given effect.

There are, however, some "magic words" which have broad implications, and of which licensors need to be aware. For example, small businesses need to be aware that a grant of "all possible rights and for all media" will include a grant of rights for future known and unknown media.<sup>78</sup> Similarly, small businesses will need to be aware that the grant of an "exclusive license" excludes use by the licensor as well as by third parties for the duration of a license unless the licensor has explicitly reserved its rights to continue to use its computer information. Accordingly, if a licensor wishes to reserve its rights to use computer information which it created and for which it grants an "exclusive license" it must affirmatively and explicitly reserve its rights to use that computer information.<sup>79</sup> This provision may be a trap for the small business developer which expects that it will be able to continue to use whatever computer information it creates, at least insofar as such use does not compete with a licensee's use. (If a licensee is concerned about protecting its exclusivity, a reservation of rights by licensor in combination with a covenant not to compete with the exclusive licensee and

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77. *Id.* § 307.

78. *Id.* § 307 (f) (1).

79. *Id.* § 307(f)(2).

describing the area of the non-compete with particularity can provide protection for the parties' respective interests.)

Where an agreement does not specify a duration, the general default rule appears to be that the duration is a "reasonable" time, and that the license may be terminated as to future performance "by either party giving reasonable notice to the other party."<sup>80</sup> There are, however, a number of circumstances in which, subject to cancellation for breach and where a license does not include source code, the duration of the license will be deemed to be perpetual. These include circumstances in which: (a) a licensor transfers ownership of a copy of a computer program; (b) a licensor delivers a copy of the computer program for a total contract fee fixed at or before delivery; and (c) the license grants a right to a licensee to incorporate or use licensed information rights in combination with other information or informational rights for public distribution or public performance.<sup>81</sup> Such rights are for example, typically granted in connection with code libraries that the licensees will use repeatedly in computer information they provide to third parties. Both licensors and licensees anticipate such repeated use.<sup>82</sup>

As a practical matter, these circumstances describe such a broad range of likely scenarios that a licensor is well advised, if it wishes to grant a license of limited duration, to state its limitations explicitly and specifically.

Perhaps the words of which small businesses should be most wary are demands that performance be to approval "in the sole discretion" of the party to be satisfied.<sup>83</sup> The alternative language is an undertaking to perform "to the satisfaction or approval" of the other party.<sup>84</sup> Language "to the satisfaction or approval" of the other party sets forth an objective standard, that is, "requires a performance sufficient to satisfy a reasonable person."<sup>85</sup> Where approval at the "sole discretion" of the other party is requested, there is no requirement that discretion be exercised "reasonably."<sup>86</sup>

Agreement to a demand that approval of performance be at the "sole discretion" of the other party may be a trap for a small business which

80. U.C.I.T.A. § 308(1).

81. *Id.* § 308(2)(A) and (B).

82. Under copyright law, in the absence of a license agreement, such multiple use might result in the computer information becoming public domain. Licensing permits commercialization by imposing appropriate limitations on reuse, including preventing licensees from making and selling copies of computer information in competition with the licensor, but permitting unlimited copies to be made for appropriate purposes without the risk that the computer information might become public domain.

83. U.C.I.T.A. § 309(b)(1).

84. *See id.* § 309(a).

85. *Id.*

86. *See id.* § 309(b)(1) cmt. 3.

reasonably believes it can satisfy a prospective client, assumes that UCITA will enforce standards of commercial reasonableness, and prices its services based on an expectation that the client will be reasonable. "To the satisfaction" language should be acceptable to reasonable clients. Insistence on "sole discretion" language should be a warning flag to a small business that its prospective client does not want to be limited by standards of reasonableness. Small businesses may want to consider refusing any such basis for a commercial relationship, or in the alternative, establish a pricing structure which will assure them that profits are protected no matter how unreasonable the client chooses to be.

### G. WARRANTIES

As has been stated, one of the primary benefits of UCITA is that it clearly establishes default rules, that is, it establishes what constitutes the applicable law in the absence of provisions to the contrary. In the case of warranties, this function is enhanced by provisions that are appropriately tailored for computer information, and further enhanced by guidance, including some safe harbor language which may be used in connection with warranty provisions. UCITA also provides a checklist of warranty issues appropriate for inclusion in a computer information license.

The warranty provisions of UCITA deal with the infringement of third party intellectual property rights,<sup>87</sup> the creation of express warranties,<sup>88</sup> and implied warranties for computer programs,<sup>89</sup> informational content,<sup>90</sup> licensee's purpose and system integration.

#### 1. *Implied Warranties*

Because computer information must be "used" to be accessible to human beings, a fundamental concern of any licensee-user is that such use will be permitted. UCITA provides for a kind of implied covenant of quiet enjoyment in the form of an implied warranty of non-interference and non-infringement. A merchant-licensor<sup>91</sup> warrants that computer information is free of infringement claims.<sup>92</sup> A licensor warrants that no person holds a rightful claim in the information that arose from an act or

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87. *Id.* § 401.

88. *Id.* § 402.

89. U.C.I.T.A. § 403.

90. *Id.* § 404.

91. *Id.* § 401(a). This provision uses an expanded definition of a merchant by adding the requirement that the merchant must "regularly deal in information of the kind." *Id.*

92. *Id.* § 401(a) states: free of the rightful claim of any third person by way of infringement or misappropriation. *Id.* However, the licensor is held harmless from claims that arise out of specifications furnished by the licensee. *Id.*



omission of the licensor.<sup>93</sup> These warranties, however, may be disclaimed using the following safe harbor language:

There is no warranty against interference with your enjoyment of the information or against infringement.<sup>94</sup>

## 2. *Express Warranties*

Affirmations of fact, including those made in advertising, and descriptions of the information, constitute express warranties if they become a basis of the bargain.<sup>95</sup> The basis of the bargain requirement does not mean that a party has to show specific reliance on the statement, only that the statement played a role in the entire bargain.<sup>96</sup> Thus, statements regarding computer information of which the customer is entirely unaware will not become an express warranty.

Note that these are default provisions. Where a computer information license expressly grants a warranty, that warranty will be enforceable regardless of whether or not the customer was aware of it.

UCITA's express warranty provisions do not apply to published informational content, but if other law creates an express warranty for this type of computer information, UCITA remedies may apply in the event of a breach of such warranty.<sup>97</sup>

One of the reasons UCC Article 2, which governs the sale of goods, is not appropriately applied to computer software or other computer information is that the warranty of merchantability under Article 2 requires that a product "pass without objection in the trade." The launch of any new major software product is greeted with critical articles in computer journals comparing it to similar products, and "bug" reports immediately appear in print and online, identifying defects discovered by users. If absence of such criticism is the standard for passing without objection in the trade, virtually no software passes without objection in the trade.

UCITA deletes the "passes without objection" requirement and substitutes another element in the existing merchantability standard for goods by providing that a "licensor which is a merchant with respect to computer programs of the kind"<sup>98</sup> warrants to the end user that a computer program is "fit for the ordinary purposes for which such computer programs are used"<sup>99</sup> and that it "conforms to any promises or affirma-

93. *Id.* § 401(a). There are additional warranties related to intellectual property rights that apply in the case of an exclusive license grant, *see* § 401(c)(2) and provisions which address the international context.

94. *Id.* § 401(d).

95. U.C.I.T.A. § 402(a)(1).

96. *See id.* § 402 cmt. 2.

97. *Id.* § 402(c).

98. *Id.* § 403(a)

99. *Id.* § 403(a)(1).

tions of fact made on the container or label.”<sup>100</sup>

### 3. *Additional Warranties: Special Situations*

Where a “licensor which is a merchant with respect to computer programs of the kind”<sup>101</sup> provides packaged computer information to a distributor, the merchant warrants to the distributor that (a) the program is adequately packaged and labeled as the agreement requires, (b) multiple copies are within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all the units involved, and (c) the program conforms to any promises or affirmations of fact made on the container or label.<sup>102</sup> The law for the sale of goods does not require that a warranty be issued. A product may be offered “as is”, that is, without a warranty. UCITA follows this rule for computer information.<sup>103</sup>

A merchant in a special relationship of reliance with a licensee warrants that there is no inaccuracy in informational content which is caused by the merchant’s failure to perform with reasonable care. This warranty does not apply to published informational content, or to a person who acts merely as a conduit of the information or provides only editorial services.<sup>104</sup>

If a licensor has reason to know of a particular purpose for which a licensee requires computer information, and that the licensee is relying on the licensor’s skill or judgment to develop or furnish suitable information, there is an implied warranty that the information is fit for that purpose.<sup>105</sup>

There is also a new warranty created for integrated systems. If an agreement requires a licensor to provide a system consisting of computer programs and goods, and the licensor knows it is being relied on to select those components, there is an implied warranty that the components will function together as a system.<sup>106</sup>

### 4. *Disclaimers and Modification of Warranties*

Words creating an express warranty and words of disclaimer must be construed as consistent wherever reasonable.<sup>107</sup> If a consistent con-

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100. *Id.* § 403(a)(3).

101. U.C.I.T.A. § 403(a).

102. *Id.* § 403(a)(2) and (c).

103. *Id.* § 403(a). See discussion *infra*, under the heading “Mass-Market vs. Non-Mass Market Licenses.”

104. *Id.* § 404(b)(1).

105. *Id.* § 405(a).

106. *Id.* § 405(c).

107. U.C.I.T.A. § 406(a).

struction is not reasonable, the disclaimer is inoperative.<sup>108</sup> UCITA provides some safe harbor language for effectively disclaiming various warranties (e.g., a disclaimer of the implied warranty of merchantability for a computer program must include the word "merchantability" or "quality" or similar words<sup>109</sup>) which will help to make warranty disclaimers more easily recognized and understood.<sup>110</sup> UCITA also requires that a computer program disclaimer of the implied warranty of merchantability be in a record and be conspicuous.<sup>111</sup>

Modifying a computer program invalidates express and implied warranties with respect to the modified program unless the modification is made using a capability of the program intended for that purpose in the ordinary course.<sup>112</sup> Modifying a computer program does not however invalidate any warranty regarding the performance of an unmodified copy of the program.<sup>113</sup>

#### H. TRANSFERS OF INTERESTS AND RIGHTS

Ownership of information rights must be transferred by an agreement. Transfer of a copy of information rights does not transfer ownership of the information rights.<sup>114</sup> This is true under copyright and other law.<sup>115</sup> UCITA simply provides a clear statement of the existing state of the law, i.e., that (a) there must be an agreement to transfer ownership of information rights and that (b) mere transfer of a copy of information rights will not transfer ownership.

Title to a *copy* of information rights is also governed by the parties' agreement,<sup>116</sup> but unlike transfer of ownership of information, transfer of title to a copy of computer information need not be explicit. Whether title to a copy is transferred depends upon the intent of the parties,<sup>117</sup> and under UCITA, intent may be found not only in express terms in a written agreement, but also in use of trade, course of dealing, or particu-

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108. *Id.*

109. *Id.* § 406(b)(1)(A).

110. *Id.* § 406(b), (c).

111. *Id.* § 406(b)(1)(A).

112. *Id.* § 407.

113. U.C.I.T.A. § 407

114. *See id.* § 501.

115. *See* Copyright Act § 117 and U.C.I.T.A. § 501 cmt.

116. *Id.* § 502.

117. *See id.* § 502(b)(2)(B). This is one of the few places in UCITA in which a distinction is made between delivery of a copy in electronic and other forms. Delivery of title to a copy may result in a "first sale" under federal law. In the absence of an explicit statement disavowing an intent to transfer title to a copy of computer information, small business licensors will have to rely on a favorable interpretation of the overall terms of their licenses to protect themselves from loss of commercial benefits resulting from assertions of rights to utilize computer information beyond the scope of their licenses under a "first sale" theory.

lar terms of the transaction.<sup>118</sup>

In general, where a license places restrictions on the use of information and those restrictions are inconsistent with the transfer of ownership of a copy, the license will not be seen as having transferred title to that copy.<sup>119</sup> There are, however, some risks in leaving a license agreement silent on whether title to a copy is intended to be transferred. Some of these risks relate to the question of whether, if title to a copy passes, the computer information is subject to the "first sale" doctrine under federal law.<sup>120</sup>

Although the rights to possession and use of a copy are not necessarily coterminous with title to a copy, whether a licensee has title to a copy can make a difference. For example, the issue has arisen in several cases in which clients wished to assert ownership of rights to a creator's work in progress, with mixed results.<sup>121</sup>

Some guidance on the issue is provided by the concept of "identifying" rights to information as one might "identify" goods to a particular contract. The Official Comments indicate that where a contract provides for transfer of rights in a completed program, "early drafts of working copies are not ordinarily 'identified' to a contract," although an agreement may provide to the contrary.<sup>122</sup>

In order to protect themselves, small developers can explicitly provide that they will retain title to all copies of their computer information. Alternatively, at a minimum, providers of computer information will want to assure that title even to a copy of the information vests in a transferee only after that transferee has performed all of its obligations. That result can be accomplished by explicitly providing that licensor retains ownership rights in all computer information including all copies of same, or that ownership rights in a copy, if granted, are contingent on transferor's receipt of consideration and performance of all of transferee's other obligations.

Parties may also wish to transfer contractual rights in information. A transfer of contractual rights in information presents different questions from those raised by transferring ownership rights in the information or a copy of the information. Under general principles of contract law, absent contractual provisions barring transfer, which are, under

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118. *See id.* § 501 cmt 3.

119. *See id.* § 502 cmt. 2.a. The Official Comment states: "in general, title does not vest in the licensee if the license places restrictions on use of the information on that copy that are inconsistent with ownership of the copy. DSC Comm. Corp. v. Pulse Comm., Inc., 170 F.3d 1354 (Fed.Cir.1999)" *Id.*

120. *See id.* §501 cmt 3.

121. *Compare* In re Amica 135 Bankr 534 (Bankr. N.D. Ill.1992) *with* In re Bedford Computer, 62 Bankr 555 (D.N.H. 1986).

122. *See* U.C.I.T.A. § 501 cmt. 3.

UCITA, enforceable,<sup>123</sup> contract rights are transferable.<sup>124</sup> Where, however, the information which is subject to the contractual interest is governed by federal copyright or patent laws, contractual (licensed) interests in computer information may not be transferable without the permission of the licensor. This is true not because of the provisions of UCITA, but because federal intellectual property law has been interpreted to preclude transfer of a copyright or patent license without the consent of the copyright or patent holder.<sup>125</sup>

UCITA requires that in a mass market license, a prohibition on transfer be "conspicuous" and imposes an additional limitation on transfer by prohibiting transfers which would cause material harm to the other party.<sup>126</sup> Thus, if the transfer materially changes the duty of the other party, or materially increases the burden or risk imposed by a contract or materially impairs the expectation of return performance, consent to the transfer will be required.<sup>127</sup> Where a transfer of contractual rights gives rise to "insecurity," the other (non-transferring) party has a right to demand additional assurances regarding future performance.<sup>128</sup> Assurance that contractual restrictions on transfer will be enforceable is important to all licensors but is particularly important to small businesses which have more limited resources, fewer clients, and therefore are more dependent on each of those clients. For small businesses, their ability to evaluate their clients and choose wisely so as to permit them to deal only with those with whom they choose to deal may be essential to their continued existence.

In general, a transfer of a contractual interest is effective, and the transferee takes subject to the license<sup>129</sup> "except as otherwise provided by trade secret law," although the transferee cannot acquire rights greater than his transferor was authorized to transfer.<sup>130</sup> This is, of course, what both parties can reasonably expect.

### I. FINANCING ARRANGEMENTS

UCITA's provisions regarding financing arrangements<sup>131</sup> coordinate with the provisions of revised Article 9 of the Uniform Commercial Code.

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123. *See id.* §§ 503 and 504(b)(2).

124. *Id.* § 503.

125. *See* *Everett Systems, Inc. v. CAD Track Corp.*, 89 F. 3d 673 (9th Cir 1996) and § 117 of the Copyright Act, which precludes lease, loan, and rental of a computer program by the owner of a copy without permission of the copyright holder.

126. U.C.I.T.A. § 504.

127. *Id.* § 503.

128. *Id.* § 504(c).

129. *Id.* § 506(a).

130. *Id.* § 506(b).

131. *Id.* §§ 507-510.

Thus, if UCITA's conditions regarding transfer, as set forth in Section 503, are met, a financier may become a licensee.<sup>132</sup> Alternatively, even if the conditions of Section 503 are not met, if the licensor receives notice of the financial accommodation and the accommodated licensee becomes a licensee solely for the purpose of the financial accommodation and abides by the terms of the license, the transfer in connection with the financial accommodation will be recognized. More than a single transfer, however, requires the licensor's consent.<sup>133</sup> In addition, a term in the financial accommodation contract making the accommodated licensee's obligations to the financier irrevocable and independent is enforceable unless the accommodated licensee is a consumer.

As a result of these provisions, a licensor may, in connection with a financier's financial accommodation contract with a licensee, find itself dealing with an unwanted client. The attendant risk, however, is limited by the fact that (i) the financier's remedies are limited by and subject to the licensor's rights and the terms of the license agreement, and (ii) the financier's interest does not alter or attach as property rights to the licensor's interest unless the licensor expressly consents to the attachment "in a license or another record."<sup>134</sup>

#### J. PERFORMANCE

Part 6 of UCITA deals with various performance issues, such as a party not having a duty to perform if there is an uncured material breach by the other party, the licensor's obligation to enable use of the licensed information, delivery issues, special types of contracts—access contracts, support agreements, and contracts involving publishers, dealers and end users—issues relating to risk of loss, and termination.<sup>135</sup> Computer information transactions are also amenable to a special kind of performance limitation: the use of automatic restraints to enforce contractual limitations.

UCITA's provisions dealing with automatic restraints are designed to assist combating piracy of computer programs. Piracy has been recognized as a serious problem for computer information. The recently enacted Digital Millennium Copyright Act seeks to combat piracy by endorsing copyright management techniques and providing that attempting to tamper with such devices, except for specified purposes, constitutes copyright infringement.<sup>136</sup>

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132. U.C.I.T.A. § 508(a)(1)(A).

133. *Id.* § 508(a)(1)(B)(i).

134. *Id.* § 511

135. *Id.* §§601-618.

136. The DMCA and UCITA provisions can work together in the same way that copyright and contract law do. The DMCA seeks to protect against copyright infringement and

UCITA provides support for the Digital Millennium Copyright Act ("DMCA") and the piracy problems with which it attempts to deal by providing both helpful guidance and a framework within which a licensor may feel free to include automatic restraints (including software code which acts to restrict use of the software) to enforce contractual limitations which do not depend on or require a breach of contract in order to be effective.<sup>137</sup> (Such automatic restraints are different from electronic self-help, which is utilized, if at all, in the context of a breach of contract. Electronic self-help is discussed *infra*, under Remedies.)

An automatic restraint is a "program, code, device, or similar electronic or physical limitation the intended purpose of which is to restrict use of information."<sup>138</sup> A party which is "entitled to enforce a limitation of use of information"<sup>139</sup> may include an automatic restraint, and use it, if the restraint:

1. is authorized by a term in the license,<sup>140</sup>
2. prevents a use inconsistent with the agreement,<sup>141</sup>
3. prevents use after expiration of the stated duration of the license or the agreed number of uses,<sup>142</sup> or
4. prevents use after the contract terminates based on a reason other than the license term or agreed number of uses, if the licensor gives reasonable notice to the licensee.<sup>143</sup>

The restraint which "prevents a use inconsistent with the agreement" may only be a passive restraint. This allows a licensor to include a restraint which is not mentioned in the license, but the restraint may only prevent unauthorized use. If it does any more than that, such as deleting an authorized copy, it is not authorized under this subsection.<sup>144</sup> None of the restraints allowed under this program authorize a licensor to affirmatively prevent a licensee from accessing its own data through other means not involving use of the computer information at issue.<sup>145</sup>

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UCITA supports it by providing default rules in connection with remedies for contract breach. In some cases the two will overlap.

137. U.C.I.T.A. § 605. This Section is consistent with the DMCA's provisions relating to copyright management.

138. *Id.* § 605(a).

139. *Id.* § 605(b).

140. *Id.* § 605(b)(1).

141. *Id.* § 605(b)(2).

142. *Id.* § 605(b)(3).

143. U.C.I.T.A. § 605(b)(4).

144. *Id.* § 605(b)(2); *see id.* § 605 cmt. 3.b.

145. *Id.* § 605(c).

## K. BREACH OF CONTRACT

A breach of contract is defined as, "without legal excuse, failure to perform an obligation in a timely manner, repudiat[ing] a contract, or exceed[ing] a contractual use term" or otherwise fail[ing] to comply with a contractual obligation."<sup>146</sup> A breach need not be material to entitle the aggrieved party to its remedies, although a material breach gives rise to different remedies from a non-material breach. The concept that even a minor breach of contract can give rise to a claim for a breach of contract and attendant remedies is particularly important for small businesses to understand. One party might anticipate that the other party would look to its remedies only when a material breach occurs, that is, when a breach causes "substantial harm or substantially deprived or is likely substantially to deprive the aggrieved party of the significant benefit it reasonably expected under the contract."<sup>147</sup> A small-business might not anticipate assertion of remedies by the other party for an immaterial breach. As a matter of public policy however, contracts must be reliable and it is therefore important, especially for small businesses, to understand that even a minor breach of contract may entitle the other party to remedies.

The potential harshness of the rule is somewhat alleviated it by the fact that if a party accepts non-conforming performance without notifying the other party that it is reserving its rights regarding acceptance of such non-conforming performance, silence will constitute a waiver of the breach, even if it is a material breach.<sup>148</sup> Waivers need not be supported by consideration, but they do require either an authenticated record or acceptance of performance without notifying the other party of the breach. These provisions are both a protection and a pitfall for small businesses. What they require of parties on both sides is attention to detail, good management, and most importantly, good and prompt communication between the contracting parties.

If one claims performance is non-conforming, and wishes to refuse the performance, a general complaint along the lines of "this is not what I expected" is not a sufficient basis for refusal. The refusing party must identify defects ascertainable by reasonable inspection. Failure to so identify the defect waives the right to rely on it to justify refusal if the other party could have, with seasonable identification, cured the defect. In addition, between merchants, the nonperforming party may request a full and final statement of all defects<sup>149</sup> and if it does so, the party to receive performance waives the right to rely on defects not listed. These

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146. *Id.* § 701(a).

147. *Id.* § 701(b).

148. *Id.* § 702.

149. U.C.I.T.A. § 702(c)(2).



provisions provide an opportunity for small businesses to protect themselves from surprises, but they also require commercially decent behavior and a "road map" for instituting procedures to assure such behavior.

Another subtlety of which small businesses might not be aware is that waiver of one breach does not waive subsequent breaches unless the waiving party specifically so states.<sup>150</sup> Waivers may not be retracted as to the performance to which they apply,<sup>151</sup> but they may be retracted regarding executory performance "unless the retraction would be unjust in view of a material change of position in reliance on the waiver by that party."<sup>152</sup>

The essential message of these provisions is that parties are expected to communicate problems with one another promptly, clearly, and specifically. When a party reasonably relies on silence, and changes its position in reliance on that silence, the non-communicating party will be deprived of rights to complain about a breach which that non-communicating party might have, with timely communication, permitted the non-performing party to avoid.

Where breach is not material, a merchant delivering non-conforming performance, other than in a mass-market transaction, must attempt to cure the breach if it receives seasonable notice of the specific non-conformity and a demand for cure. Note however that while an attempt must be made, a merchant is not required to actually effect cure, and the cost to cure may not "disproportionately exceed" direct damages caused by the non-conformity.<sup>153</sup>

A party may not cancel or refuse performance because of a breach that has been seasonably cured, but notice of intent to cure does not preclude refusal of performance or cancellation.<sup>154</sup> Again, the provision seeks to strike a balance which requires communication, and a prompt attempt to cure, but also recognizes that the cost of cure may make performance commercially unreasonable. Note that a mere promise to cure, however, is not sufficient.

These provisions can be of assistance to a small business which is providing performance to a large entity because they require commercially reasonable behavior or on both sides, including seasonable communications and reasonable opportunity to cure. The provisions also provide protection to small business receiving performance because mere promise of cure, without actually effecting cure, leaves that small business with the right to refuse or cancel.

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150. *Id.* § 702(d).

151. *Id.* § 702(e).

152. *Id.* § 702(f).

153. *Id.* § 703(b)(2).

154. *Id.* § 703(c).

## L. MASS MARKET VS. NON-MASS MARKET TRANSACTIONS

Where tender of performance is defective, the default rules are different for mass-market and other transactions. In a mass-market transaction calling for tender of a single copy of computer information, a licensee may refuse tender which does not conform to the contract.<sup>155</sup> This requires all businesses offering computer information in mass-market transactions to make certain that their contracts accurately describe the computer information which is the subject of the transaction. Because the costs of litigation often loom larger to small companies than to large ones, it is particularly important for small businesses to review not only the license agreement and any descriptions it may contain, but also sales materials, to make certain that they do not conflict with or improperly expand the descriptions in the license agreement.

Refusal of a tendered copy must be made before acceptance or within a reasonable time after tender (including any permitted effort to cure) and by seasonable notification. The UCITA provisions parallel the provisions for refusing non-conforming performance under Article 2 of the UCC, and the result is the same: failure to communicate will make refusal of ineffective. Rightful refusal, however, will cancel the entire contract, but only if the breach was material to the entire contract or the contract so provides.<sup>156</sup> This provision offers protection for small business because if a licensor sends out information on the diskette which is defective and cures by replacing that defective diskette, a licensee cannot use the defective tender as an excuse for cancellation absent a contract provision permitting such a response.

A licensor can secure additional leeway regarding claims that the computer information provided was non-conforming by including in the license agreement a statement that the information is provided "as is" or "with all its faults". In the absence of such language, the information provided will be required to be "merchantable" and the burden of showing what passes in the trade as "merchantable" will fall on the party providing the "non-conforming" information. While including "as is" language in a license or other governing contract has clear benefits, it may have unacceptable marketing repercussions. Thus, the additional margin of security offered by such language will have to be balanced against the possible adverse marketing impact.

Material breach regarding a copy, when the right to use computer information precedes or is independent of delivering a copy, will not result in a right to cancel the contract unless the breach cannot be seasonably cured and is material to the whole contract.<sup>157</sup> Again, the provision

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155. U.C.I.T.A. § 704(b).

156. *Id.* § 704(b).

157. *Id.* § 705.

protects reliability of contracts, and discourages peremptory, commercially unreasonable (arrogant) behavior.

In the event of rightful refusal, if the refusing party rightfully cancels, the procedures outlined in Section 802 apply and all contractual use terms continue.<sup>158</sup> If the refusing party does not cancel, both parties remain bound by all contractual obligations.<sup>159</sup> The procedure outlined for use after cancellation assures that a refusing party cannot continue to use information without paying for it, requires a refusing party to follow instructions for handling the information (similar to the provisions of Article 2 of the UCC), and permits the refusing party to take reasonable steps to reduce the loss being suffered.<sup>160</sup>

These provisions protect computer information, regardless of who is providing it, by seeking to assure that it is used within contractual terms regardless of whether or not a copy has been refused, even rightfully. The refusing party must act in good faith<sup>161</sup> and can rest assured that actions taken in good faith will not be deemed acceptance, will not be deemed conversion, and will not be used as a grounds for damages under the contract.<sup>162</sup> The provision is important to small business because, as a balanced provision, it provides protection in transactions which assures that that commercially reasonable behavior will not result in either party being taken advantage of.

The same standards of reasonable commercial behavior apply to exercising a right to revoke acceptance. The revoking party must act diligently. Such diligence includes giving notice of revocation within a reasonable time after the revoking party discovered or should have discovered the non-conforming tender.<sup>163</sup> For the same reason, one may not revoke acceptance after a "substantial" change in condition not caused by the defects in the information<sup>164</sup> or after receiving "substantial" benefit from the information which cannot be returned.<sup>165</sup> In other words, commercially reasonable behavior is required even when revocation is rightful.<sup>166</sup>

Commercially reasonable behavior includes an obligation, on the part of each party to a contract, not to impair the other's (or others') expectation of receiving due performance. Thus, when reasonable grounds for insecurity arise, the aggrieved party may demand adequate assur-

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158. *Id.* § 706(a)(1).

159. *Id.* § 706(a)(2).

160. *Id.* § 706(3).

161. U.C.I.T.A. § 706(b)(5).

162. *Id.* § 706(b)(5).

163. *Id.* § 707(c)(1).

164. *Id.* § 707(c)(2).

165. *Id.* § 707(c)(3).

166. *Id.* § 707(d).

ance of due performance in a record, and if it is commercially reasonable to do so, suspend performance until that assurance is received.<sup>167</sup>

This provision may be a benefit to small businesses providing computer information where they are not being timely paid for work done, and to small businesses licensing computer information where progress or performance appears to be lacking.

Small businesses are further protected by provisions stating that accepting improper delivery or payment will not impair the right to demand adequate assurance of future performance.<sup>168</sup> Again, parties are assured that commercially reasonable behavior, such as accepting partial payment or non-conforming information, will not prejudice their future position. Further protection is provided by requiring a response to a justified demand for further assurance "within a reasonable time not exceeding 30 days" with "teeth" in the form of a provision which states that the failure to provide such assurance will be considered a repudiation of the contract under the anticipatory repudiation provisions of Section 709.<sup>169</sup>

The anticipatory repudiation provisions<sup>170</sup> and the provisions regarding retraction of anticipatory repudiation<sup>171</sup> correspond to the anticipatory repudiation provisions in UCC Article 2. An Official Comment, however, warns that UCITA's provisions are to be interpreted in light of the different nature of computer information transactions.

#### M. REMEDIES

Part 8 of UCITA addresses remedies, including issues relating to the obligations of the parties in the case of cancellation, liquidated damages clauses, statute of limitations, how damages are measured, specific performance, etc. Of these provisions, the most controversial have been those relating to electronic self-help.

Much of this controversy has been centered around emotional appeals to the unfairness of surreptitious electronic self-help. Under UCITA surreptitious self-help is a breach of contract, which would potentially subject the licensor to both direct and consequential damages.<sup>172</sup>

Section 816, the primary self-help provision, severely restricts the extent to which a licensor may, without judicial intervention, electronically prevent the use of software or other computer information after the applicable license has been canceled for breach. Case law has upheld the

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167. U.C.I.T.A. § 708(a)(2).

168. *Id.* § 708(c).

169. *Id.* § 708(d).

170. *Id.* § 709.

171. *Id.* § 710.

172. *Id.* § 816(e)

use of electronic self-help in situations where the use is supported by the license, and/or notice is given. UCITA imposes greater restrictions than case law to date has required, and prohibits the use of self-help which does not conform to UCITA's requirements.<sup>173</sup>

Self-help, whether it is electronic or not, is restricted to use in situations in which it can be exercised (a) without a breach of the peace,<sup>174</sup> and (b) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information.<sup>175</sup>

Electronic self-help is further limited by UCITA to situations in which the licensee has separately agreed to a term in the license which authorizes it.<sup>176</sup> The authorizing term must provide for the notice mandated by UCITA<sup>177</sup> and "state the name of the person designated by the licensee to which notice of exercise of self help must be given and the manner in which notice must be given and place to which notice must be sent to that person."<sup>178</sup> Notice of the exercise of self-help must indicate that it will not be exercised before 15 days after receipt of the notice by licensee,<sup>179</sup> the nature of the breach must be stated,<sup>180</sup> and the name, title, address, direct phone number, fax number or e-mail address to which the licensee may communicate concerning the breach.<sup>181</sup>

Self-help may not be used, regardless of whether all requirements in this section are complied with, if the licensor has reason to know that it would result in "substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third persons not involved in the dispute."<sup>182</sup>

There are potentially substantial penalties for the wrongful use of electronic self-help. The licensee may recover for direct and incidental damages,<sup>183</sup> and may also recover for consequential damages, regardless of whether such damages are otherwise excluded by the license,<sup>184</sup> if

- a. within the notice period the licensee provides notice "describing in good faith the general nature and magnitude of damages;"<sup>185</sup>

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173. U.C.I.T.A. § 816(b).

174. *Id.* § 815(b)(1).

175. *Id.* § 815(b)(2).

176. *Id.* § 816(c).

177. *Id.* § 816(c)(1).

178. *Id.* § 816(c)(2).

179. U.C.I.T.A. § 816(d)(1).

180. *Id.* § 816(d)(2).

181. *Id.* § 816(c)&(d).

182. *Id.* § 816(f).

183. *Id.* § 816(e).

184. *Id.*

185. U.C.I.T.A. § 816(e)(1).

- b. the licensor has reason to know the substantial injury or harm described in subsection 816(f) will result;<sup>186</sup> or
- c. the licensor does not provide the required notice.<sup>187</sup>

To summarize, Section 816 requires assent, in the original license agreement, to a provision granting licensor the right of self-help. Such assent must be specifically agreed to; agreement to the license as a whole is not sufficient. In addition, UCITA permits exercise of self-help only after at least 15 days notice before exercise. Finally, under UCITA, the licensee has a right to consequential damages for any wrongful use of electronic self-help by a licensor, and a licensor may not require a licensee to waive the right to consequential damages. In the absence of meeting the requirements of Section 816, a licensor's "right" to self-help is not enforceable, and licensees could collect consequential damages for any harm suffered. Thus, UCITA gives licensees far greater rights and potential remedies than they enjoy under current law, and provides significant risks in connection with the exercise of self-help, as wrongful exercise can result in devastating damages to the licensor.

UCITA also provides that a court shall give prompt consideration to a petition by either party for relief relating to the exercise of self-help or the misappropriation or misuse of computer information and sets forth the issues that the court shall consider in ruling on such a petition.<sup>188</sup>

#### N. MISCELLANEOUS PROVISIONS

Part 9 of UCITA has only two substantive provisions, both of which are comparable to provisions routinely included in formal negotiated agreements. One is a "severability" provision stating that if any provisions of the Act are held invalid, the remaining provisions are to be given effect without the invalid provision.<sup>189</sup> The second is a statement to the effect that unless parties agree to be governed by UCITA, any contracts and rights of action which may have accrued prior to adoption of UCITA are to be governed by the law in effect before the effective date of UCITA.

The provisions assure that contracts negotiated under prior law will have the effect the parties are likely to have anticipated at the time of contracting, while permitting parties who wish to review their arrangements and have them governed by UCITA's default provisions may do so.

#### IV. CONCLUSION

UCITA is a balanced statute which provides statutory recognition of the legal framework on which the computer information industry has

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186. *Id.* § 816(e)(2).

187. *Id.* § 816(e)(3).

188. *Id.* § 816(g).

189. *Id.* § 901.

been primarily relying since its inception. In most respects, UCITA provides a clear articulation of currently existing industry practices. On general, it supports commercially reasonable behavior, which tends to encourage fair treatment for everyone, regardless of size and financial resources.

By supporting prompt and accurate communication in connection with computer information transactions and commercial problems which may arise in connection with them, UCITA is particularly supportive of smaller entities which may be given less attention in their dealings with larger ones. It requires of all parties, large and small, attention to the details of their contractual undertakings, the timing of performance, and conscientious commercial behavior. To the extent it promotes good commercial communication and reliable contracts and behavior in connection with those contracts, parties and society in general can expect to reap the benefits of smoother commercial relationships and reduced litigation costs.

UCITA is not perfect, but on balance, the industry, and in particular, small businesses in the industry, and society as a whole, are better off with it than without it. Accordingly, it deserves the support of all members of the industry, and of society as a whole.