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The Electronic Self-Help Provisions of UCITA: A Virtual Repo Man?, 33 J. Marshall L. Rev. 663 (2000)

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THE ELECTRONIC SELF-HELP PROVISIONS OF UCITA: A VIRTUAL REPO MAN?

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INTRODUCTION

Imagine an increasingly common scenario in which a small software company, known as Widgosoft, Inc., develops and mass markets its own licensed software.[1] Widgosoft is a small company of eleven employees that devotes a majority of its time and resources to a single software product. In accordance with industry practices,[2] Widgosoft provides a diskette, containing its licensed software, in advance to customers against a future payment of fifty dollars, either by check after invoicing or credit card payment. The amount is due on or before the thirtieth day following installation of the program.[3] Following Widgosoft's first large shipment, a substantial number of customers fail to pay for the software within the permitted time.[4] Taken individually, the fifty-dollar price tag on the software is so modest that it is not

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1. *See* Carol A. Kunze, *Electronic Disablement of Software in the Event of Breach of the Licensee* (visited Oct. 14, 1999) <http://www.2bguide.com/hbilsh.html> (discussing a similar hypothetical situation).

2. *Id.*

3. *Id.* Throughout this Comment, the term "customer" is used to represent both the licensee in a software agreement with a software company and any person or entity that has purchased a licensed software program from either a software company or a retail store. Such a licensee and a purchaser are represented by the same term because they are similarly situated under the law. When a person or entity purchases a licensed software program from a software company or retail store, the transaction does not involve a transfer of title to the information. Rather, only a limited right to use the information is transferred. Likewise, a licensee in a software agreement with a software company only obtains a limited right to use the information. Thus, whether the software was purchased or licensed, the right to use the software is limited and requires a continuing relationship between the software company and the customer. Therefore, there is no reason to differentiate between a purchaser of licensed software and a licensee in a software agreement in the context of this Comment.

4. *Id.*

worth Widgosoft's time and money to sue the defaulters.[5] However, unfortunately for Widgosoft, the aggregate amount of money lost is substantial and causes the company to declare bankruptcy.[6] Without the existence of a quick, low-cost remedy, software developers and vendors in this situation do not have an adequate, cost-effective means to enforce their agreements with defaulting customers.[7]

Now imagine the same facts with a slight variation. This time, Widgosoft has acted prospectively and anticipated such a problem. Prior to shipping its licensed software to customers, Widgosoft embeds a potentially crippling code into the software program. The code will lock up the software when the internal clock of the customer's computer reaches 12:01 a.m. on the forty-sixth day following installation of the program, unless an update is received.[8] If Widgosoft receives payment within thirty days of installation, it will timely distribute an update deactivating the potentially crippling code and allowing uninterrupted access to the program.[9] However, if Widgosoft does not receive payment within thirty days of installation, the program will trigger the crippling code on the forty-sixth day following installation to prevent the customer from accessing the program or any associated files.[10] A message will then appear stating "Please contact Widgosoft about your bill," when the customer next attempts to access the program.[11] This self-remedy affords Widgosoft a swift and economically viable answer to its problem of defaulting customers,[12] by encouraging the customer to pay the amount

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5. *Id. See generally* Edward L. Rubin, *The Code, The Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 21-36 (1997) (discussing the high cost of litigation in disputes over a small amount of money).

6. Kunze, *supra* note 1.

7. *Id.*

8. CORPORATE COUNSEL'S GUIDE TO SOFTWARE TRANSACTIONS 10.001 (William A. Hancock ed., 1998) [hereinafter SOFTWARE TRANSACTIONS] (discussing the use of embedded code in a software program set to lock out the user from access to the program when the computer's internal clock reaches a certain time on a certain date).

9. *See* Gary J. Edwards, *Self-Help Repossession of Software: Should Repossession Be Available in Article 2B of the UCC*, 58 U. PITT. L. REV. 763, 764-65 (1997) (discussing a software vendor's use of "logic bombs" or "time bombs" as a means of self-help).

10. *Id. See also* SOFTWARE TRANSACTIONS, *supra* note 8, at 10.001 (providing an example of embedded crippling code set to paralyze a computer program at a specific time on a specific date).

11. *See* SOFTWARE TRANSACTIONS, *supra* note 8, at 10.001 (illustrating a similar example of a vendor's use of electronic self-help).

12. *See* Celia R. Taylor, *Self-Help in Contract Law: An Exploration and Proposal*, 33 WAKE FOREST L. REV. 839, 847-48 (1998) (exploring the advantages of the self-help remedy). Self-help allows wronged parties to respond to problems more quickly by avoiding the delays traditionally involved

owed.[13] This private, non-judicial means of enforcing a contract is commonly referred to as electronic self-help.[14]

Individuals have employed self-help, as a private, non-judicial remedy, since the dawn of civilization.[15] Self-help is "one party's ability to take control of an item or sum of money in dispute without judicial intervention."[16] In recent years, as advances in technology have transformed the marketplace and reshaped the way business is transacted, dissatisfaction with conventional judicial processes has increased.[17] More than ever, traditional judicial remedies do not satisfy the needs of private, wronged individuals or companies.[18]

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in seeking a judicial remedy. *Id.* The non-judicial remedy of self-help also avoids the high costs of litigation. *Id.* *See generally* Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730 (1989) (discussing the economic justification for self-help).

13. *See* Scott, *supra* note 12, at 732 (arguing that self-help is an important tool in preventing customers from defaulting on their debts).

14. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.002.

15. Taylor, *supra* note 12, at 844. *See* Sniadach v. Family Finance Corp., 395 U.S. 337, 349 (1967) (Black, J. dissenting) (discussing the historical basis of self-help remedies). Justice Black agreed with the Wisconsin Supreme Court's observation that "[t]he ability to place a lien upon a man's property such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause, dates back not only to medieval England, but also to Roman times." *Id.* *See also* MARC BLOCH, FEUDAL SOCIETY 411 (L.A. Manyon trans., Univ. of Chicago Press 1961) (1939) (recognizing the traditional right of an individual to seek justice in a private, non-judicial manner).

16. *See* Rubin, *supra* note 5, at 36 (defining the non-judicial remedy of self-help). Self-help is also been defined as "legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong." Douglas I. Brandon ET AL., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 850 (1984). Another definition of self-help is the "[t]aking of an action in person or by a representation outside of the normal legal process with legal consequences, whether the action is legal or not." BLACK'S LAW DICTIONARY 1360 (6th ed. 1990).

17. *See* Brandon, *supra* note 16, at 851 (discussing the reasons why the use of self-help has increased).

18. *See* Sharon M. Roberts and Cem Kaner, *Self-Help Under UCITA*, (last modified July 25, 1999) <http://www.badsoftware.com/shelp.htm> (providing examples of situations where traditional remedies for breach of a contract do not satisfy the needs of software vendors). One example is where a software company obtains an injunction, but the customer refuses to recognize the injunction and resides in a foreign jurisdiction refusing to enforce the injunction. *Id.* Another example is where a customer's misuse of a software company's product causes personal injury, property damage, or seriously harms the software company's reputation. *Id.* To illustrate the latter situation, imagine that a small software company develops a program to perform mass mailings of e-mail. *Id.* The software agreement between the parties carefully provides a clear prohibition on the use of its product for spamming. *Id.* However, the customer disregards this prohibition and uses

Nowhere are the inadequacies of applying traditional remedies to modern wrongs more pronounced than in the rapidly changing technology market.[19] As a result, many software companies have developed a more sophisticated understanding of the privilege of self-help and have begun exercising it more frequently and in new ways.[20] The need for this new understanding of self-help arose because the antiquated purposes of traditional self-help repossession[21] failed to adequately address the problems encountered in the modern world of software and computer information transactions.[22]

The interests a software company seeks to protect through the use of self-help are far different from the interests a car dealer seeks to protect.[23] The software company does not want to repossess the item itself, which is the primary focus of a car dealer just as it was for earlier forms of private self-help.[24] Rather, the software company simply wishes to prevent the customer from using the software after failing to fulfill a contractual obligation, such as making a timely payment.[25] In order to better protect themselves from the repercussions of defaulting customers, software companies have used various technological methods of electronic self-help.[26]

Electronic self-help means "that instead of suing the [customer] for breach of contract for failure to pay [or fulfill some other contractual obligation], the software designer [or company]

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the product to perform unsolicited mass mailings. *Id.* The software company's name appears on the header of every message. *Id.* Within two months, the customer sends out an estimated one hundred million messages (with the software company's name on every one), which causes the software company to suffer irreparable harm to its reputation. *Id.*

19. *See supra* notes 1-7 and accompanying text (providing an example of the inability of traditional remedies to adequately address modern wrongs).

20. Esther C. Roditti, *Is Self-Help a Lawful Contractual Remedy?*, 21 RUTGERS COMPUTER & TECH. L.J. 431, 431-44 (1995); Edwards, *supra* note 9 at 763-64; Vicky H. Robbins, *Vendor Liability for Computer Viruses and undisclosed Disabling Devices in Software*, 10 NO. 7 COMP. LAW. 20, 21-22 (1993); *see also* SOFTWARE TRANSACTIONS, *supra* note 8, at 10.003 (describing new forms of self-help in software transactions).

21. *See* Edwards, *supra* note 9, at 771-72 (examining the purposes of traditional self-help remedies).

22. *See* Roditti, *supra* note 20, at 433 (examining the purpose of the electronic self-help remedy). *See also* Edwards, *supra* note 9, at 764 (listing the most important purposes for the use of electronic self-help).

23. *See* Pamela Samuelson, *Embedding Technical Self-Help in Licensed Software; Applying the Principles of Repossession*, 40 COMMUNICATION OF THE ASSOCIATION FOR COMPUTING MACHINERY, Sec. 10, at 13 (1997) (discussing the differences between traditional self-help and electronic self-help).

24. *Id.*

25. *Id.*

26. *See* SOFTWARE TRANSACTIONS, *supra* note 8, at 10.003 (discussing the different means by which electronic self-help may be accomplished).

reclaims its product by removing it from the customer's computer or preventing access to the data."[27] Once the customer fulfills its duties under the agreement, the company will fully restore the program and access to it.[28]

As the economy of the United States has moved from one centered on goods to one centered on information, software and other computer information transactions have become a major component of the future prosperity of our nation.[29] During the maturation of this economic trend, desire increased for the development of clear, uniform legal rules to govern these types of transactions.[30] Those favoring uniform rules initiated an effort to draft an end to the confusion and accompanying difficulties encountered in applying traditional contract law to the software and computer information transactions of today's business world.[31]

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27. *Id.* at 10.002.

28. *Id.*

29. *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act—ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of the U.C.C.*, Press Release, Apr. 7, 1999, available at <http://www.2bguide.com/docs/040799pr.html> (visited Oct. 14, 1999) [hereinafter ALI and NCCUSL]. *See also New Uniform Act Meets Immediate Needs of the Information Age*, Press Release, Aug. 2, 1999 (visited Feb. 2, 2000) <http://www. nccusl.org/pressrel/UCITA.html> (stating that information technology is the fastest growing component of the U.S. economy and currently represents one-third of the economic growth of the nation).

30. ALI and NCCUSL, *supra* note 29.

31. Raymond T. Nimmer, *U.C.C. Revision: Information Age in Contracts, The 1996 Computer and Telecommunications Law Update*, vol. 1, at 3 (Apr. 25-26, 1996). In 1991, the National Conference of Commissioners on Uniform State Law [hereinafter NCCUSL] and the American Law Institute [hereinafter ALI], which are the two organizations that drafted the U.C.C. and are also in charge of reviewing and amending it, set forth to amend Article 2 of the U.C.C. in order to bring clarity and uniformity to the laws governing software and computer information transactions. *Id.* They believed the lack of clarity and uniformity in this area created uncertainty, unpredictability, and high transaction costs. ALI and NCCUSL, *supra* note 29. However, after many years of cooperative effort to codify Article 2B of the U.C.C. [hereinafter U.C.C. 2B], the NCCUSL ultimately decided that the proposed codification in the U.C.C. did not adequately address the unique intricacies of software and computer transactions. *Id.* Therefore, on Apr. 7, 1999, the NCCUSL and the ALI announced that their combined efforts would not be promulgated as U.C.C. 2B, but would be promulgated by the NCCUSL alone as a freestanding act, known as UCITA. *Id.* The process by which the NCCUSL develops a uniform act is extremely lengthy, in part due to its openness. Martin F. Connor, *A Look at the Current Uniform Law Agenda of the NCCUSL*, THE METROPOLITAN COUNSEL, July 1999, at 42. Any interested party may attend and participate in the meetings and comment upon the proposed drafts. *Id.* When the drafting committee of the NCCUSL decides that it has a satisfactory draft, it submits the draft to the full membership for consideration and a vote, with each state getting one vote. *Id.* The full membership is composed of over three hundred attorneys, judges, and law professors, representing every state, in addition to the District of Columbia, Puerto Rico, and the U.S. Virgin

Part I of this Comment provides an overview of the history of self-help. Part II briefly examines the modern mechanisms of electronic self-help and the relevant case law dealing with the issue. Part III analyzes self-help under the Uniform Commercial Code (U.C.C.) and the limitations on its use. Part IV considers the chief objections to the electronic self-help provisions in early drafts of the Uniform Computer Information Transactions Act (UCITA) (formerly known as U.C.C. 2B). Part V evaluates the National Conference of Commissioners on Uniform State Law's (NCCUSL) treatment of these objections in the electronic self-help provisions of its final draft of UCITA. Part VI concludes that the NCCUSL's final draft of UCITA adequately addresses the objections of those opposed to its self-help provisions and actually provides more restrictions on a software company's use of electronic self-help, and therefore more consumer protection, than currently exists under the U.C.C.

I. THE HISTORY OF SELF-HELP

In various forms, self-help has been a familiar remedy in society since the initial stages of civilization.[32] Many scholars comment that it is a natural tendency of humankind to take justice into its own hands.[33] In support of this proposition, studies reveal early Greek and Roman legal systems took a favorable view of private self-help.[34]

In the classical period of Greek history, courts expected a person obtaining a court judgment over a debtor to privately

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Islands. *State Law Commission Adopts Uniform Act to Update Contract Law for the Digital Age*, Press Release, Aug. 3, 1999 (visited Nov. 11, 1999) <http://www.2bguide.com/docs/899prdcc.html>. Approval of the draft requires a majority vote. Connor, *supra*, at 42. On July 29, 1999, the NCCUSL approved the final UCITA draft by a vote of 43-6. Harvey Berkman, *A U.C.C. for E-Commerce Angers Some*, THE NAT'L L. J., Aug. 16, 1999, at A1. As a result, the final draft of UCITA will be presented to each state legislature in 2000 for consideration and adoption in 2000. Mary Jo H. Dively, *Overview of Uniform Computer Information Transactions Act*, 574 PLI/PAT 171, 174 (Oct. 7-8, 1999).

32. See *supra* note 15 and accompanying text.

33. *See generally* THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651) (recognizing the right to self-preservation). "[I]n the state of nature man's right of self-preservation included the right to do what was necessary both to protect one's life and to expand one's liberty." Taylor, *supra* note 12, at 844. *See also* SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, vol. II, at 100 (discussing the natural inclination of man to use self-help). "In primitive times the individual whenever he has the power or the opportunity, will help himself." *Id.*

34. For an excellent discussion of the history of self-help repossession see James R. McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58, 63-66 (1973).

enforce the judgment.[35] Greek courts were not in the practice of enforcing such judgments; they only rendered them.[36] Similarly, in the early Roman legal system, if a debtor defaulted on payment, a creditor had the authority to seize the actual person of the debtor without judicial blessing.[37]

The recognition of self-help as a private means of accomplishing justice continued into medieval English law.[38] In early medieval England and before the establishment of strong nation states, the law was weak and could not prevent violent self-help even if it tried.[39] Because medieval plaintiffs had no dependable courts to turn for help,[40] they were compelled to seek their own justice. This often led to breaches of the peace and even bloodshed.[41]

Concern over this lawlessness eventually led medieval rulers to develop strong legal institutions.[42] As these legal institutions

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35. *Id.*

36. *Id.*

37. *Id.*

38. SIR FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 574 (2d ed. 1923) [hereinafter POLLOCK & MAITLAND].

39. *See* McCall, *supra* note 34, at 67 (quoting POLLOCK AND MAITLAND, *supra* note 38, at 574). Pollock and Maitland stated that

> [h]ad we to write legal history out of our own heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory. For a long time, law was very weak and could not prevent self-help of the most violent kind. Nevertheless, at a fairly early stage in its history it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. Perhaps we can say that in its strife against violence it keeps up its courage by bold words. It would prohibit utterly what it cannot regulate.

Id. See also Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 40 (1997) (discussing the self-help remedy in the early medieval era). "[E]ach local count or baron had a group of armed vassals at his disposal, and self-help was a standard means of enforcing the law." *Id.*

40. POLLOCK & MAITLAND, *supra* note 38, at 574.

41. BLOCH, *supra* note 15, at 411.

> Violence entered into the sphere of law . . . partly on account of the principle of customary law which in the long run resulted in the legalization of almost every usurpation; and also in the consequence of the firmly rooted tradition which recognized the right, or even made it the duty, of the individual or the small group to execute justice on its own account.

Id. Further, Bloch states that public order was greatly threatened by people taking the law into their own hands because it caused much bloodshed. *Id.*

42. *Id.* "When the peace assemblies forbade the victim of a material wrong to indemnify himself by personally seizing one of the possessions of the offender, they knew that they were striking at one of the most frequent

emerged, private self-help increasingly began to be viewed unfavorably.[43] By the twelfth and thirteenth centuries, self-help resulting in a breach of the peace was viewed as contemptuous of the king and his court.[44] Courts considered self-help an enemy of law.[45] However, the courts were not sophisticated enough to distinguish between violent and non-violent forms of self-help.[46] Thus, instead of determining which types of private self-help were permissible, courts simply banned all forms of self-help.[47] During most of medieval English history, courts continued to view self-help with disapproval.[48]

Eventually English common law judges relaxed their opposition to private self-help in the fourteenth century.[49] By the close of the eighteenth century, courts consistently began to look upon self-help favorably.[50] Practically any exercise of self-help to regain chattels was lawful as long as the method of repossession employed by the rightful owner did not involve committing a felony.[51] Gradually, even this restriction was eased in practice.[52] Within the next one hundred years, self-help became a fully recognized and accepted means of private, non-judicial recovery.[53]

This accepting attitude towards private, non-judicial self-help

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sources of trouble." *Id.*

43. POLLOCK & MAITLAND, *supra* note 38, at 169.

44. *Id.* at 574. *See also* Taylor, *supra* note 12, at 844 (noting that self-help was regarded as contempt for the king and his court in the medieval era).

45. POLLOCK & MAITLAND, *supra* note 38, at 574. "The man who is not enjoying what he ought to enjoy should bring an action; he must not disturb an existing siesin, be it of land, of chattels, or of incorporeal things, be it of liberty, or serfage or of the marital relationship." *Id.* *See also* Taylor, *supra* note 12 (commenting that self-help was regarded as an enemy of law in the medieval era).

46. POLLOCK & MAITLAND, *supra* note 38, at 169.

47. *Id.* at 574. The government "will prohibit utterly what it can not regulate." *Id.*

48. McCall, *supra* note 34, at 66-67.

49. *Id.* at 67.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* McCall, *supra* note 34, at 67-68 (quoting Branston, *The Forcible Recaption of Chattels*, 28 L.Q. REV. 262, 275 (1912)).

> When recaption finally made its appearance in the course of the Nineteenth Century, it did so released from all the restrictions of former times, and it is suggested that just as the curtailment of the right was rendered necessary in earlier times by the inability of the law to regulate extra-judicial remedies, so the release of the right from all these limitations in the Nineteenth Century was due to the legal machinery of our courts and the power of the executive as represented by the police, to whom the maintenance of the public peace might safely be entrusted.

Id.

crossed the Atlantic into the United States.[54] From early times, our republic has regarded self-help to be an effective means of settling private disputes.[55] American courts were sophisticated enough to recognize that self-help was an efficient alternative to traditional judicial remedies, and it was later codified into various diverse areas of the law.[56]

Understandably, the legal recognition of such a potentially intrusive, non-judicial remedy would stir much heated debate among scholars and commentators. Surprisingly there has been little public debate over its use until recently. As the recent advances in technology have altered and increased the number of mechanisms by which self-help may be employed, the different scenarios where self-help has proven to be an applicable and effective remedy have similarly increased. The use of self-help, specifically electronic self-help, has become a highly contested area. One commentator referred to the current debate over electronic self-help and other controversial issues in software transactions by stating that "[a]n intergalactic war has broken out in cyberspace over extremely earthbound rules governing licensing of information . . . and don't expect peace anytime soon."[57]

II. ELECTRONIC SELF-HELP

Software companies have struggled to find solutions to the many unique problems posed by the changing nature of technology. As traditional remedies for breach of contract have failed to satisfy their needs, the industry has responded with new, inventive forms of these remedies. One response to the realities of the modern business world has been to redefine the manner in which traditional self-help is employed. Companies' use of new means of self-help has in turn led to an increase in the number of customers seeking a judicial determination of the legality of self-help. This section briefly examines the modern mechanisms of electronic self-help and the few attempts by the courts to adjudicate their legality.

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54. *See* G. H. TREITAL , REMEDIES FOR BREACH OF CONTRACT 3 (1988) (discussing the availability of self-help in all legal systems).

55. *See* McCall, *supra* note 34, at 81 (stating that courts in the United States have recognized self-help "virtually since the beginnings of the republic").

56. *See* Henry Gitter, *Self-Help Remedies for Software Vendors*, 9 SANTA CLARA COMP. AND HIGH TECH. L.J. 413, 415 (1993) (noting that self-help was codified into the areas of commercial, tort, self-defense, and landlord/tenant law).

57. Brenda Sandburg, *U.C.C. 2B is Dead—Long Live UCITA*, THE RECORDER, May 27, 1999, at 1.

A. Modern Mechanisms of Electronic Self-Help

Electronic self-help is not a rigidly defined term representing a specific legal remedy.[58] Rather, it is a term of art that describes "any method of self-help used by a software company to deny access to its software or to regain possession of its software, on either a temporary or permanent basis."[59] A company employs self-help if a customer fails to perform a contractual obligation, such as making a timely payment.[60]

While electronic self-help remedies may be known by various names and exist in many different forms,[61] software companies generally accomplish electronic self-help through three basic means:[62] (i) logic bombs;[63] (ii) termination by remote access;[64] and (iii) removal of source code.[65] Each method is a technological remedy giving a software company the ability to electronically enforce its contractual agreement with a customer in a quick, easy, and inexpensive manner.[66]

A logic bomb is the most frequently used method of electronic self-help.[67] Software companies use logic bombs for a variety of purposes.[68] A software company constructs a logic bomb by installing encrypted code into an original software program.[69] The

58. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.002.

59. *Id.*

60. *See* Robbins, *supra* note 20, at 21 (illustrating a situation in which a software company would employ electronic self-help).

61. RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY: RIGHTS-LICENSES-LIABILITIES 7-168 (3d ed. 1997). *See also* Robbins, *supra* note 20 (addressing the distinctions between the various forms of electronic self-help and computer viruses).

62. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.003. The form of electronic self-help selected by the software company may depend on the company's relationship with the customer and the purpose behind its use. *Id.*

63. *Id.* Logic bombs are also frequently referred to as time bombs because they are often programmed to activate at a specific time and date. *Id.*

64. *Id.*

65. *Id.*

66. *See* Roditti, *supra* note 20, at 432 (discussing the ease and low-cost with which a software company may employ electronic self-help).

67. *See* Robbins, *supra* note 20, at 22 (examining the use of time bombs as a means of electronic self-help).

68. Logic bombs are most commonly employed by software vendors to serve one of three main purposes: (1) to shut off temporally limited licenses, such as demonstration licenses or samples, at the termination date, (2) to lock the software to protect against reverse engineering, and (3) to prevent the end user from executing the software upon failure to make a timely license or maintenance fee payment. Edwards, *supra* note 9, at 764. This Comment primarily limits its focus of logic bombs to the last purpose.

69. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.003. The installation of the encrypted code may occur either before the software program is licensed or sold or afterward. *Id.* When a logic bomb is installed after the software has been purchased or licensed, it is often accomplished under the guise of servicing the computer. *Id.*

code is designed to render the software program dysfunctional when a predetermined event triggers the bomb.[70]

Termination by remote access is another common means of electronic self-help.[71] Software companies primarily employ this method when the company maintains a service agreement with the customer or has prospectively engineered the software to allow the company remote access to the customer's computer.[72] Such remote access affords a software company the ability to erase or terminate access to the software program without using logic bombs or going to the customer's premises.[73]

The third basic method of electronic self-help is removal of source code.[74] This technological method of self-help is actually a partial repossession.[75] In these situations, a software company may employ a logic bomb, use remote access, or physically go to the customer's premises to remove source code from the customer's computer.[76] While this means of self-help does not prevent the customer from accessing and using the program, it does prevent the customer from modifying the program.[77] Even though the software has not been fully repossessed, removal of source code can cripple a customer's business.[78]

B. Case Law on Electronic Self-Help

The software and computer information industry has exploded in terms of both size and revenue in the past decade.[79] While large companies such as Microsoft® or America Online® immediately come to mind when one thinks of growth in the computer industry, much of this growth is attributable to an

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70. Roditti, *supra* note 20, at 432. Examples of these pre-ordained events include, but are not limited to, a computer's internal clock reaching a specific time and date, such as the due date for a license renewal or payment, Edwards, *supra* note 9, at 764; a software program reaching a certain claim or order number, SOFTWARE TRANSACTIONS, *supra* note 8, at 10.003; and a software program that has run a predetermined number of times, Adam G. Ciongoli ET AL., *Ninth Survey of White Collar Crime: Computer Related Crimes*, 31 AM. CRIM. L. REV. 425, 427 n.10 (1994).

71. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.003.

72. *Id.* This remote access is usually accomplished through the use of a modem. NIMMER, *supra* note 61, at 7-165.

73. *See* Edwards, *supra* note 9, at 764 (discussing termination by remote access as a form of electronic self-help).

74. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.003. Source code is "the human readable documentation which explains how the programmer designed the program." *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* ALI and NCCUSL, *supra* note 29 (stating that the software and computer information industry now exceeds most other manufacturing sectors in size).

increase in small to medium-size companies.[80] Many of these companies devote their time and resources to a single software product that represents an overwhelming majority of their revenue and business.[81] With success directly linked to a single software product, any material breach of a software agreement by a customer can potentially cripple or even destroy the software company's business.[82] As exhibited by the Widgosoft illustrations, there is a real need for these companies to have a quick and cost-effective means to enforce their contractual agreements against defaulting customers. Software companies believe they have found this much-needed remedy in electronic self-help.

The heightened use of this non-judicial, technological remedy has caused courts to increasingly confront cases questioning the legality of electronic self-help.[83] Unfortunately, for both the software companies and customers, court decisions have been inconclusive and have not provided black letter law on this issue to date.[84] However, the limited judicial treatment of this issue appears to support the position that software companies may employ electronic self-help when the parties have previously agreed to its use in their software agreement.[85] Courts have

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80. *See* Carlyle C. Ring, Jr. and Raymond T. Nimmer, *Series of Papers on UCITA Issues* (visited Feb. 2, 2000) <http://www.nccusl.org/pressrel/UCITAQA.HTM> (recognizing that over half of all software companies have fewer than twelve employees). *See also* Connor, *supra* note 31, at 42 (stating that there are over one thousand software companies in New Hampshire and over six hundred in Iowa). *Id.* "According to 1995 California State Employment Development Department figures, there were 6,633 software companies in California alone, with an average number of 16 employees each." Kunze, *supra* note 1 (quoting Kaye Caldwell, *Software Forum, Silicon Valley Software Industry Coalition*, Jan. 10, 1997, letter to Article 2B Drafting Committee ("K. Caldwell")).

81. Kunze, *supra* note 1.

82. *Id. See, e.g.*, the Widgosoft hypotheticals at the beginning of this Comment (illustrating devastating effects of a breach of a software agreement on a small software company). *See also* Roberts and Kaner, *supra* note 18 (providing an illustrative example of a situation in which a customer's material breach of a software agreement can cripple or even destroy a small software vendor's business).

83. *See infra* notes 85 and 87 (discussing cases questioning the legality of electronic self-help).

84. *See* Robbins, *supra* note 20, at 22 (noting the computer industry's desire for precedent on the issue of whether electronic self-help is a valid, non-judicial remedy).

85. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.012. *See generally* American Computer Trust Leasing v. Jack Farrell Implement Co., 763 F. Supp. 1473 (D. Minn. 1991) (providing the best illustration of the rule allowing electronic self-help when the customer is given notice). In this case, the parties entered into a software license agreement, which provided that the licensor retained ownership of the software and could remotely access the customer's computer and deactivate the software, upon default by the customer. *Id.* at 1492. When the customer stopped making its payments, the

reasoned this provides adequate notice to the customer that the software company may use self-help as a private, non-judicial means of enforcing the contract.[86] However, courts have consistently invalidated a software company's use of electronic self-help to enforce a software agreement if a customer defaults in the absence of notice.[87]

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licensor notified the customer that it intended to deactivate the software on a certain date unless payment was received. *Id.* When payment had not been received by that date, the licensor, in addition to filing suit, deactivated the software. *Id.* at 1491-97. At trial, the customer argued that the software deactivation constituted extortion, but the court disagreed. *Id.* at 1492-93. The court held that the licensor had a legal right to disable the software pursuant to the terms of the software agreement because the customer had notice at the time the contract was entered into that the licensor would deactivate the software upon default. *Id.* at 1492-95.

86. SOFTWARE TRANSACTIONS, *supra* note 8, at 10.012.

87. The first reported software disablement decision was *Franks & Sons, Inc. v. Information Solutions, Inc.*, No. 88-C-1474E (N.D. Okla. 1988) (a discussion of this case is found in COMP. INDUS. LIT. REP. (Andrews) 8889, 8927-35 (Jan. 23, 1989); Edwards, *supra* note 9, at 774; SOFTWARE TRANSACTIONS, *supra* note 8, at 10.013-14; Robbins, *supra* note 20, at 22; and Roditti, *supra* note 20, at 436-37). In *Franks*, a software vendor and a customer contracted for the purchase of a computer system, which included both hardware and licensed software. Roditti, *supra* note 20, at 436. Unbeknownst to the customer, the vendor had previously installed a drop-dead device, similar to a logic bomb, in the software program that was designed to deny the customer access to the software, in addition to information the customer had stored in the computer when the device was activated. *Id.* When a dispute over payment arose between the two parties, the vendor informed the customer of the drop-dead device and threatened to activate it unless payment was received. *Id.* The customer filed suit to enjoin the vendor from activating the device. *Id.* The vendor argued it had the right to install and activate the device as a legal means of self-help repossession under an Oklahoma commercial statute, similar to Article 9 of the U.C.C. Edwards, *supra* note 9, at 774. The District Court for the Northern District of Oklahoma granted the injunction primarily because the vendor had failed to inform the customer of the existence of the device at the time the contract was signed and it was not in the agreement. Robbins, *supra* note 20, at 22. The court stated, "If the Plaintiff had known about this device at the time it entered into the contract with the Defendant then the result would be different." SOFTWARE TRANSACTIONS, *supra* note 8, at 10.013-14. *See also* Art Stone Theatrical Corp. v. Technical Programming & Support Systems, Inc., 549 N.Y.S.2d 789 (N.Y. App. Div. 1990) (involving a situation in which a software vendor removes source code from a customer's software program, without the knowledge or consent of the customer, after a lengthy dispute over the quality of the software). This removal of source code prevented the customer from adjusting or modifying the program as needed. *Id.* at 790. Soon after this removal, the parties executed a general release in favor of the defendant and the vendor restored the source code. *Id.* The customer then filed suit for breach of contract to recover damages it incurred during the time it was unable to access the software. *Id.* The vendor filed a motion to dismiss arguing that the release barred any such suit. *Id.* The customer argued that the release was void because it was procured through duress. *Id.* While the trial court granted the defendant's motion to dismiss, the appellate court

reversed and remanded the case on the grounds that there was sufficient evidence of economic duress in the facts surrounding the execution of the release. *Id.* The court reasoned that the removal of the source code rendered the customer's system useless leaving the purchaser with no other choice but to sign the release. *Id.* at 791. *See also* Clayton X-Ray Co. v. Professional Systems Corp., 812 S.W.2d 565, 566-67 (Mo. 1991) (involving a software company's installation and activation of a logic bomb in a computer system without the knowledge and consent of the customer). When a dispute over payment arose, the software vendor, under the guise of updating the purchased computer system, installed a logic bomb designed to lock-up the computer system and deny the customer access to the system on a predetermined date. *Id.* at 566. When the customer had not paid its bill by this date, the logic bomb was triggered and prevented any further access by the customer to its files. *Id.* Any attempt to access a file resulted in a message on the computer screen stating, "Call Professional Systems Corporation About Your Bill." *Id.* The customer filed suit against the vendor for breach of warranty and conversion. *Id.* The jury found for the customer and the appellate court affirmed. *See also* Werner, Zaroff, Slotnick, Stern & Askenay v. Lewis, 588 N.Y.S.2d 960, 960-61 (1992) (providing another example of a court refusing to allow the use of electronic self-help as a private, non-judicial remedy when there was a lack of notice at the time of contract). In *Werner*, a computer consultant was contracted to correct problems in a computer system used by a law firm to keep track of insurance claims. *Id.* at 960. However, once the problems were corrected, the law firm refused to enter into a service agreement with the consultant. *Id.* Without the knowledge and consent of the law firm, the consultant programmed a logic bomb into the law firm's computer, designed to shut down the system when it reached claim number 56789. *Id.* at 961. The consultant installed this logic bomb with the hope that the law firm would again retain him to correct the problem. *Id.* The law firm sued the consultant for breach of contract and sought damages that arose during the time the system was shut down. *Id.* at 962. The court found for the law firm. *Id.* at 963. *See also* Revlon, Inc. v. Logisticon, Inc., No. 705933 (Cal. Super. Ct., Santa Clara Cty., complaint filed Oct. 22, 1990) (representing the most widely publicized case involving a software vendor's use of electronic self-help). This case is discussed in Edwards, *supra* note 9, at 778-79; Roditti, *supra* note 20, at 440-43; and SOFTWARE TRANSACTIONS, *supra* note 8, at 10.011-12. Media accounts of this case can be found in *Tiny Software Firm Cripples Giant Revlon in Pay Dispute*, L.A. TIMES, Oct. 25, 1990, at D4; EVELYN RICHARDS, *Revlon Suit Revives the Issue of "Sabotage" by Software Firms: Manipulation of Computer Programs Damages Credibility*, WASH. POST, Oct. 27, 1990, at C1; KEN SIEGMAN, *Software Supplier "Repossesses" Revlon's Computer System*, CHI. TRIB., Oct. 28, 1990, at C8. (For a long list of other media articles about Revlon, see Edwards, *supra* note 9, at 779 n.132). In *Revlon*, a small software company agreed to develop and install software system designed to control the customer's inventory systems. Edwards, *supra* note 9, at 778. Upon completion, the customer was not fully satisfied with the software and withheld payment. Roditti, *supra* note 20, at 441. After several months, the software company sent written notice to the customer informing it of its intention to electronically repossess the software. Edwards, *supra* note 9, at 778-79. On the following day, the software company dialed into the computer system and activated a disabling device that deactivated the software and caused it to stop functioning. *Id.* at 779. The customer sued the software company for intentional interference with contractual relations, misappropriation of trade secrets, and breach of contract. *Id.* This case was highly publicized and watched because many in

III. ELECTRONIC SELF-HELP IN THE U.C.C.

Although the use of electronic self-help lacks specific court approval, many software companies are currently including electronic self-help devices in their software programs to ensure protection against defaulting customers.[88] While both Article 2A and Article 9 of the U.C.C. provide strong support for the use of traditional self-help in contract law,[89] software companies principally rely on Article 9 for authorizing their use of electronic self-help.[90] Specifically, the software companies point to § 9-503, which provides that in some situations, repossession may be privately executed without judicial intervention.[91]

Under the U.C.C., self-help repossession is an acceptable private, non-judicial remedy, provided the repossession is accomplished without a "breach of the peace."[92] This restriction is the only meaningful limitation in the U.C.C. with respect to the right of a non-breaching party to use private self-help to enforce its contract with a defaulting customer.[93] The restriction reflects the common law.[94] Because the U.C.C. does not define breach of the peace, the definition must be found in the relevant case law.[95] In essence, repossession may not involve bodily force, threats, trespass, or trickery.[96] Generally, however, there is no prior notice

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the computer industry hoped for precedent on this issue of electronic self-help. Robbins, *supra* note 20, at 22. However, the parties settled the dispute out of court and refused to disclose the terms. *Id.*

88. Kunze, *supra* note 1.

89. *See* Gitter, *supra* note 56, at 416-24 (analyzing the current trend of treating software as goods under the UCC). *See* NIMMER, *supra* note 61, at 4 n. 6 (providing a list of cases treating software as goods under the U.C.C.).

90. Gitter, *supra* note 56, at 417.

91. U.C.C. § 9-503 provides:

> § 9-503. Secured Party's Right to Take Possession After Default.
> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

U.C.C. § 9-503 (1998).

92. NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS 181 (3d ed. 1995) [hereinafter REPOSSESSIONS].

93. *Id.*

94. ELDON H. REILEY, SECURITY INTERESTS IN PERSONAL PROPERTY, 18-16 (1999).

95. BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, 12-35 (1993). *See also* REILEY, *supra* note 94, at 18-16 (stating that breach of the peace must be defined on a case by case basis).

96. REPOSSESSIONS, *supra* note 92, at 181. *See id.* at 182 (providing a list

requirement for the use of self-help under the U.C.C.[97]

IV. CHIEF OBJECTIONS TO THE SELF-HELP PROVISIONS IN EARLY DRAFTS OF U.C.C. 2B AND UCITA

When the NCCUSL and the American Law Institute (ALI) began drafting U.C.C. 2B (currently known and hereafter referred to as UCITA),[98] virtually everyone agreed clarity and uniformity were needed in the legal rules governing software and computer information transactions.[99] However, many people disagreed with the approach initially taken by these two organizations.[100] The blanket objection to the early drafts of UCITA[101] was that the efforts of the NCCUSL favored large software companies at the expense of consumers.[102] While there were several provisions in these early drafts taking the brunt of the criticism, commentators have uniformly agreed that the electronic self-help provisions are the most controversial provisions in UCITA.[103]

Opponents of the early electronic self-help provisions in UCITA complained that it granted large software companies the

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of actions held to constitute a breach of the peace and the supporting case law).

97. *See id.* at 187 (stating that while Connecticut, Washington, D.C., Massachusetts, and the U.S. Virgin Islands do have a prior notice requirement ranging from five to twenty-one days, no notice requirement is required in virtually all of the other states). Notice after repossession is required in every state. *Id.*

98. *See supra* note 31 (relating the history of the drafting of UCITA).

99. *See* Connor, *supra* note 31, at 42 (stating that "[i]t is generally acknowledged today that there is need for clearer, more consistent contract rules to support the explosion of commerce in information and on the Internet.").

100. Carol A. Kunze, *Letters on Behalf of 24 State Attorney Generals to the President of NCCUSL*, available at <http://www.2bguide.com/docs/799ags.html> and <http:// www.2bguide.com/docs/799mags.html> (visited Nov. 11, 1999); Carol A. Kunze, *Letter in Opposition to UCITA From 45 Law Professors of Contracts and Commercial Law*, July 16, 1999, (visited Nov. 11, 1999) <http://www.2bguide.com/docs/ 799profs.html>. For a detailed list of the numerous individuals that have opposed UCITA (formerly U.C.C. § 2b), *see* Cem Kaner, *Some Organizations that have Opposed or Criticized UCITA*, available at <http://www.badsoftware.com/oppose. html> (visited Nov. 11, 1999).

101. *See* Carol A. Kunze, *UCITA & Prior U.C.C. 2B Drafts*, (visited Nov. 12, 1999) <http://www.2bguide.com/drafts.html> (providing hyperlinks to twenty-two prior drafts of U.C.C. 2b and UCITA, dating back to Dec. 1, 1995).

102. *See* Berkman, *supra* note 31, at A5 (stating that many oppose UCITA because they believe it favors the software companies over consumers).

103. Ed Foster, *The Gripe Line: How a UCITA Provision Let Software Vendors Secretly Help Themselves*, INFOWORLD, Aug. 16, 1999, at 113. *See also* Jessica Davis, *Licensing Time Bomb; Software-law Dispute Explodes as Enactment Draws Near*, INFOWORLD, May 31, 1999, at 32 (stating that "perhaps the most threatening provision [of UCITA] is vendor 'self-help,' or vendor repossession of software").

absolute right to use electronic self-help at the expense of consumer protection. Most notably, opponents claimed the electronic self-help provisions did not provide as much consumer protection as the U.C.C. currently affords.[104] Another common objection was that customers could consent to the use of self-help without actually knowing that they had done so.[105] A similar concern was that the electronic self-help provision did not require notice that the private, non-judicial remedy could or would be used.[106] Opponents were also apprehensive that the use of electronic self-help would result in economic blackmail.[107] An extremely important concern was the risk to human life that might occur if a software program used in a medical capacity was disabled.[108] Finally, opponents worried that vendors would be allowed to limit their liability for wrongful use of self-help, resulting in ruinous consequences for the customer.[109]

V. OBJECTIONS ADDRESSED IN THE FINAL DRAFT OF UCITA

A final draft of UCITA was accepted by the NCCUSL on July 29, 1999, and will be proposed to the legislatures of all fifty states for adoption in 2000.[110] Due to the open nature of the drafting and adoption proceedings, the members of the NCCUSL were aware of the enormous opposition to their efforts,[111] notably to electronic self-help provisions § 815[112] and § 816.[113] In its final draft of these

104. Samuelson, *supra* note 23, at 13.

105. *Id.*

106. *Id.*

107. Davis, *supra* note 103, at 32. Randy Roth, a member of the technology consumer group known as the Society of Information Managers (SIM) and an employee of Principal Financial Group, in Des Moines, Iowa stated that "[o]nce we have licensed a product and put it into mission-critical use, self-help becomes a blackmail tool. Customers have no negotiating power at all." *Id.* at 33. Additionally, Barney Kantar, another member of SIM and an employee at Dupont, in Wilmington, Del., stated "[t]he real danger of self-help is not so much that it will be invoked, but rather that it will be used as a threat hanging over licensees in order to extort compromises, concessions, and other payments that they would not otherwise agree to provide." *Id.*

108. Kunze, *supra* note 1. The concern is enhanced by the difficulties a medical facility faces coordinating its various departments that may be responsible for paying bills or receiving notices that could result in the inadvertent breach of a software agreement. *Id.*

109. *Id.*

110. Dively, *supra* note 31.

111. *Id.* Outgoing NCCUSL President Gene Lebrun stated that the process of drafting UCITA "regularly broke attendance records." Berkman, *supra* note 31, at A5. John McCabe, the legislative director for the NCCUSL stated that "[w]e have occasionally passed proposals that have been controversial, but the difference here is the number of well-financed opposition groups we have to deal with." *Id.* at A5.

112. Section 815 of UCITA provides:

§ 815. Right to Possession and to Prevent Use.

(a) Upon cancellation of a license, the licensor has the right to:
(1) possession of all copies of the licensed information in the possession or control of the licensee and any other materials pertaining to that information which by contract were to be returned or delivered by the licensee to the licensor; and
(2) prevent the continued exercise of contractual and informational rights in the licensed information under the license.
(b) Except as otherwise provided in § 814, a licensor may exercise its rights under subsection (a) without judicial process only if this can be done:
(1) without a breach of the peace;
(2) without a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information; and
(3) in accordance with § 816.
(c) In a judicial proceeding, the court may enjoin a licensee in breach of contract from continued use of the information and informational rights and may order that the licensor or a judicial officer take the steps described in § 618.
(d) A party has a right to an expedited judicial hearing on a request for prejudgment relief to enforce or protect its rights under this section.
(e) The right to repossession under this section is not available to the extent that the information, before breach of the license and in the ordinary course of performance under the license, was so altered or commingled that the information is no longer identifiable or separable.
(f) A licensee that provides information to a licensor subject to contractual use restrictions has the rights and is subject to the limitations of a licensor under this section with respect to the information it provides.

UNIFORM COMPUTER INFORMATION TRANSACTION ACT § 815 (Proposed Official Draft 1999) (official draft available at <http://www.law.upenn.edu/bll/ulc/ucita/citam99. txt>) [hereinafter UCITA §815].

113. Section 816 of UCITA provides:

§ 816. Limitations to Electronic Self-Help.
(a) In this section, "electronic self-help" means the use of electronic means to exercise a licensor's rights pursuant to Section 815(b).
(b) On cancellation of a license, electronic self-help is not permitted, except as provided in this section.
(c) A licensee must separately manifest assent to a term authorizing use of electronic self-help. The term must:
(1) provide for notice of exercise as provided in subsection (d);
(2) state the name of the person designated by the licensee to which notice of exercise must be given and the manner in which notice must be given and place to which notice must be sent to that person; and
(3) provide a simple procedure for the licensee to change the designated person or place.
(d) Before resorting to electronic self-help authorized by a term of the license, the licensor shall give notice in a record to the person designated by the licensee stating:
(1) that the licensor intends to resort to electronic self-help as a remedy on or after 15 days following receipt by the licensee of the notice;
(2) the nature of the claimed breach which entitles the licensor to resort to self-help; and

provisions, the Conference effectively addressed the chief apprehensions of the opposition.[114] As a result, the self-help provisions of UCITA do not grant software companies an absolute

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

(e) A licensee may recover direct and incidental damages caused by wrongful use of electronic self-help. The licensee may also recover consequential damages for wrongful use of electronic self-help. The licensee may also recover consequential damages for wrongful use of electronic self-help, whether or not such damages are excluded by the terms of the license, if:

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

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

(3) the licensor fails to provide the notice required in subsection (d).

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

(g) A court of competent jurisdiction of this State shall give prompt consideration to an application for injunctive relief and may, temporarily or permanently, enjoin the licensor from exercising electronic self-help even if authorized by a license term or enjoin the licensee from misappropriation or misuse of computer information, as may be appropriate, upon consideration of the following:

(1) grave harm of the kinds stated in subsection (f), or the threat thereof, whether or not the licensor has reason to know of those circumstances;

(2) irreparable harm or threat of irreparable harm to the licensee or licensor, as the case may be;

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

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

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

(h) Before breach, rights or obligations under this section may not be waived or varied by an agreement, but the parties, in the term referred to in subsection (c), may specify additional provisions more favorably to the licensee.

(i) This section does not apply if the licensor obtains possession of a copy without a breach of the peace and the electronic self-help is used solely with respect to that copy.

UNIFORM COMPUTER INFORMATION TRANSACTION ACT § 816 (Proposed Official Draft 1999) (official draft available at <http://www.law.upenn.edu/bll/ulc/ucita/citam99. html>) [hereinafter UCITA § 816].

114. *See supra* notes 112 and 113 (providing the text of the self-help provisions of UCITA).

right to employ electronic self-help. Rather, companies may only use self-help under limited circumstances that adequately ensure the protection of consumers.

The principal objection to the efforts of the NCCUSL was that UCITA afforded consumers less protection than currently exists under the U.C.C.[115] However, a closer look at U.C.C. § 9-503 (the section of the U.C.C. that software companies believe authorizes their use of electronic self-help) reveals that the only meaningful restriction on a company's ability to use electronic self-help is the breach of peace restriction.[116] The U.C.C. does not require prior notice.[117]

Due to the unique, non-confrontational nature of electronic self-help, it would be exceptionally rare for such self-help to fall under the breach of peace restriction in the U.C.C.[118] Still, UCITA adopted the breach of the peace limitation in its final draft.[119] Thus, even if the NCCUSL had included no further limitations, the self-help provisions of UCITA would provide as much consumer protection as currently exists under the U.C.C. However, the NCCUSL included more consumer protections. Under § 815(b)(2), a software company may not use electronic self-help when there is "a foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information."[120] This additional limitation on the use of electronic self-help does not presently exist in the U.C.C.[121] Further, although the U.C.C. does not require any notice before electronic self-help may be invoked,[122] UCITA requires that a software company must give a defaulting customer at least fifteen days notice of the nature of the breach and a direct means of reaching a contact person within the company.[123]

This notice requirement is a much-needed additional limitation on the use of electronic self-help. It provides that, in the event of a default by a customer, the software company must notify the customer of its intention to use the electronic self-help means authorized in the software agreement.[124] This notice affords the customer the opportunity to timely contact the software

115. Berkman, *supra* note 31, at A5.
116. U.C.C. § 9-503 (1998).
117. *Id.*
118. *See* CLARK, *supra* note 95, at 12-35 (defining breach of the peace through case illustrations).
119. UCITA § 815 (proposed Official Draft 1999).
120. *Id.*
121. U.C.C. § 9-503 (1998).
122. *Id.* Vincent Bryan, corporate counsel of Adobe Systems, argues that under current law, a software company could employ electronic self-help against a customer without any notice. Davis, *supra* note 103, at 3.
123. UCITA § 816 (proposed Official Draft 1999).
124. *Id.* at (d).

company and attempt to settle the dispute in a manner favorable to both parties. If such an attempt fails, the customer may use the remaining requisite time to either seek judicial intervention or, at a minimum, back up all of its files and perform any other mitigating procedures.

As for the concern that a customer would consent to the use of self-help without knowing it, § 816(c) provides that "[a] licensee must separately manifest assent to a term authorizing use of electronic self-help."[125] If a customer consents to the general terms of the software agreement,[126] UCITA requires additional, separate consent to the specific use of electronic self-help by the software company.[127] This requirement disposes of the concern of a lack of conscious consent, which the U.C.C. does not comparably contain.[128]

Addressing the concern of economic blackmail, the fifteen day notice requirement and § 816(g) affords the customer sufficient opportunity to seek judicial intervention. The U.C.C., which does not require notice, offers little consumer protection against a software company's threat of using self-help as a blackmail device. Even if a customer confidently believed that there was no breach of the software agreement, the customer might be coerced into paying any amount of money demanded by the software company to prevent a potentially devastating loss to its business. However, the NCCUSL created safeguards that dramatically reduce the likelihood of this form of blackmail. One safeguard is the fifteen-

125. *Id.* at (c).

126. *Id.* Increasingly, modern software agreements exist in the form of mass-market licenses, which are also referred to as click-wrap or shrink-wrap licenses. George L. Graff, *Controversial Computer Act Offers Major Innovations: A Proposed Uniform Statute for the Information Age is Approved*, COMPUTER LAW STRATEGIST, Aug. 1999, at 3. Click wrap licenses in this form consist of a set of standard terms and conditions displayed on a user's computer screen during the installation process. *Id.* The user is typically asked to click on either an "I agree" or an "I do not agree" button. If the former is selected, the agreement is completed and binding. If the latter is selected, the installation is terminated and the agreement is not binding. *Id.*

127. UCITA § 816 (proposed Official Draft 1999). Under the final draft of UCITA, if the end user selects the "I agree" button in the click wrap license, a second window is required to appear on the customer's computer screen asking whether they specifically agree to a contractual term authorizing the use of electronic self-help. *Id.* The term requires the customer to state the name of the person designated to receive notice that self-help will be exercised, the manner in which the customer prefers the notice be given, and the place to which the notice must be sent to that person. *Id.*

128. Requiring the customer to take this additional affirmative action also dispenses with the argument that terms authorizing the use of electronic self-help are often hidden in the middle or at the bottom of a lengthy, complicated click-wrap agreement.

day notice requirement.[129] It provides the customer with the requisite time to seek judicial intervention and prohibit such a feared, wrongful termination.[130] An additional safeguard is § 816(g), which provides that a court of competent jurisdiction shall "give prompt consideration to an application for injunctive relief and may, temporarily or permanently, enjoin the licensor from exercising electronic self-help even if authorized by a license term."[131] Together, these safeguards eradicate the threat of economic blackmail.

The risk to human life posed by the use of electronic self-help is justifiable, but UCITA directly nullifies this concern. Section 816(f) provides that "electronic self-help may not be used if the licensor has reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties not involved in the dispute."[132] UCITA essentially eliminates the likelihood that electronic self-help would pose a risk to human life.

Opponents also argue that early drafts of UCITA granted software companies the absolute right to employ electronic self-help and provided an absolute ability to limit their liability for wrongful use.[133] Admittedly, this would be a terrifying proposition. However, the restrictions and safeguards in the final draft of UCITA prevent software companies from having an absolute right to employ electronic self-help. Additionally, there are severe restrictions on the ability of a software company to limit its liability for wrongful use. Section 816(e) provides that a customer may recover direct, incidental, and consequential damages from the software company, even if these damages are specifically excluded by the terms of the software agreement, in certain situations.[134]

As the rapid growth in technology has transformed the face of modern business, "the need has grown dramatically for coherent and predictable legal rules to support the contracts that underlie that economy."[135] States increasingly recognize the need for software and computer information legislation in dealing with

129. UCITA § 816 (proposed Official Draft 1999) at (d).
130. *Id.*
131. *Id.* at (g).
132. *Id.* at (f).
133. *See supra* note 107 (discussing the opposition's fear of a software company's wrongful use of electronic self-help and ability to limit its liability).
134. UCITA § 816 (proposed Official Draft 1999) at (e). Under prior drafts of UCITA, the opposition feared that a software company could limit a customer's recovery to the purchase price of the software, even where a software company's wrongful use of electronic self-help had caused a customer to lose thousands, or even millions, of dollars. *Id.*
135. ALI and NCCUSL, *supra* note 29.

these issues,[136] as even the smallest local businesses now use computers to conduct their daily operations. However, creating such legislation has proven to be extremely challenging due to the rapidly changing direction of technology. The NCCUSL met this challenge with its final draft of UCITA.

Uniformity in state law is essential because of the ever-changing nature of issues in the software and computer information industry.[137] Without uniformity, it will be a nightmare for a national industry, such as the software and computer information industry, to transact business across state lines.[138] Because this Comment does not focus on UCITA in its entirety, it would be inappropriate to conclude whether the individual states should adopt the entire Act. However, it is notable that the purpose of the Act, to end the confusion over laws governing software and computer information transactions,[139] is universally endorsed.[140] This purpose would be frustrated if the Act were not adopted by a reasonable number of states.

When UCITA is finally proposed to each state for consideration and adoption in 2000, there will again be much impassioned debate. Although state governments routinely rubber-stamp bills approved by the NCCUSL,[141] even supporters acknowledge that UCITA "faces a long, uphill war."[142]

While the opposition has loudly proclaimed UCITA to be a wish list of what large software companies want, specifically giving them blanket permission to use electronic self-help,[143] a closer look reveals that this is not the case. Because of concern over the potential abuses of electronic self-help, the NCCUSL "bent over backwards" to provide safeguards and restrictions on its use.[144] Despite the claims of the opposition, UCITA aims to benefit the small software company and the consumer, not the large software company.[145] The NCCUSL sought a middle ground on a

136. Connor, *supra* note 31, at 42. *See also* Sandburg, *supra* note 57, at 2 (quoting Raymond Nimmer as saying "[i]f UCITA 'can't get adopted in a large number of states, it would be much less valuable.'"). Raymond Nimmer serves on the drafting committee and as the reporter for the NCCUSL. *Id.*

137. Connor, *supra* note 31, at 42.

138. *Id.*

139. Nimmer, *supra* note 31.

140. Connor, *supra* note 31, at 42.

141. Davis, *supra* note 103, at 32.

142. *See* Sandburg, *supra* note 57, at 1 (quoting John McCabe, the legislative director for the NCCUSL). McCabe commented that getting states to adopt the Act is "not exactly beer and skittles." *Id.* at 4. He further stated that "[w]e are going to have a heck of a time with this one." Berkman, *supra* note 31, at A5.

143. Davis, *supra* note 103, at 32-33.

144. Foster, *supra* note 103, at 113.

145. Davis, *supra* note 103, at 32-33. Vincent Bryan, corporate counsel for Adobe Systems, maintains that UCITA's self-help provisions are designed to

software company's use of electronic self-help.[146] They attempted to balance a small software company's need for a quick, cost-effective remedy with consumer protection.[147] Many initial critics now acknowledge the efforts of the NCCUSL to be fair to both sides and admit that the final UCITA draft tightens the restrictions on a software company's use of electronic self-help.[148]

Electronic self-help occurs right now without any type of regulation.[149] Although some are concerned,[150] the final draft of UCITA voids any prior justification for apprehensions. UCITA provides far more safeguards and restrictions on the use of electronic self-help than currently exist in the law. If a reasonable number of states adopt the self-help provisions of UCITA, the resulting law would be uniform, predictable, less confusing, and provide more consumer protection, not less. The small software company has a real need for a quick, cost-effective remedy, as illustrated in the Widgosoft examples in the beginning of this Comment.[151]

CONCLUSION

Soon the legislatures of all fifty states will consider whether to adopt UCITA in its entirety.[152] They would be wise to do so. However, if any state decides to draft its own legislation to solve

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provide software consumer protection. *Id.* at 33. A public relations representative at Microsoft agreed that the electronic self-provision is designed to enhance consumer protection. *Id.*

146. Davis, *supra* note 103, at 33. The legal counsel and legislative director of the NCCUSL called the electronic self-help provision a middle ground and said, "We are not banning this; we are not requiring judicial permission. We are just putting parameters around it." *Id.* Vincent Bryan also stated that "[w]hat [the self-help provision] attempted to do was to reach a compromise between what [the Society of Information Managers] wanted—which was that you had to go to court and trial before a small licensor could get paid." *Id.*

147. Connor, *supra* note 31, at 42.

148. *Id. See also* Roberts and Kaner, *supra* note 18 (stating that UCITA § 816 is a laudable attempt by the drafters to be fair to both sides).

149. Kunze, *supra* note 1.

150. Roberts and Kaner, *supra* note 18.

151. *See supra* notes 1-13 (illustrating the need for a quick, cost-effective remedy).

152. At the time of publication of this Comment, several states have taken action with regard to UCITA. *See* Carol Kunze, *What's Happening to UCITA in the States*, (visited Mar. 19, 2000) <http://www.ucitaonline.com/whathap.html> (listing the current status of UCITA in all 50 states). Virginia was the first state to adopt UCITA. *Id.* The governor of Virginia signed UCITA into law on Mar. 14, 2000. *Id.* The effective date is July 1, 2000. *Id.* Maryland became the second state to adopt UCITA, when its governor signed the law on Apr. 25, 2000. *Id.* The effective date is Oct. 1, 2000. *Id.* Additionally, the District of Columbia, Hawaii, Illinois, and Oklahoma have all introduced UCITA in their respective legislatures. *Id.*

problems in the software and computer information industry, instead of adopting UCITA in its entirety, it is critical that they adopt the self-help provisions of UCITA at a minimum and incorporate them into their own legislation. Such action will protect the individual consumers in their state, in addition to the software companies.

Paul Sleven's lyrical commentary on the UCC 2B (now known as UCITA) debate provides an appropriate ending to this Comment: "2B or not 2B, that is the question . . . . Whether 'tis nobler in the mind to suffer the slings and arrows of outrageous common law decisions, Or take arms against a sea of uncertainties and by legislating end them."[153] This Comment strongly proposes the latter action.

153. Samuelson, *supra* note 23, at 13.