

■■■■■ Note: Only portions of the following UCC and UCITA sections relevant to the topic are included here. Parts not included are not denoted with ellipses.

SCOPE OF UCITA

UCITA

SECTION 103. SCOPE; EXCLUSIONS.

(a) [Scope in general.] This [Act] applies to computer information transactions.

SECTION 102. DEFINITIONS.

(a) [General definitions.] In this [Act]:

(10) "Computer information" means information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer.

(11) "Computer information transaction" means an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information.

CONTRACT FORMATION GENERALLY

Uniform Commercial Code

§ 2-204. Formation in General.



(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

UCITA

SECTION 202. FORMATION IN GENERAL.

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

OFFER AND ACCEPTANCE

Uniform Commercial Code

§ 2-206. Offer and Acceptance in Formation of Contract.



(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

§ 2-606. What Constitutes Acceptance of Goods.



(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection ([subsection \(1\) of Section 2-602](#)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

UCITA

SECTION 102. DEFINITIONS.

(a) [General definitions.] In this [Act]:

(6) "Authenticate" means:

(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.

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

SECTION 107. LEGAL RECOGNITION OF ELECTRONIC RECORD AND AUTHENTICATION; USE OF ELECTRONIC AGENTS.

(a) [Equivalency principle.] A record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.

(d) [Party bound by electronic agent.] 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.

SECTION 108. PROOF AND EFFECT OF AUTHENTICATION.

- (a) [Proving authentication.] Authentication may be proven in any manner, including a showing that a party made use of information or access that could have been available only if it engaged in conduct or operations that authenticated the record or term.
- (b) [Commercially reasonable attribution procedure.] Compliance with a commercially reasonable attribution procedure agreed to or adopted by the parties or established by law for authenticating a record authenticates the record as a matter of law.

SECTION 112. MANIFESTING ASSENT.

- (a) [How person manifests assent.] 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) [How electronic agent manifests assent.] 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.
- (d) [Proof of assent.] 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 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) [Agreement for future transactions.] The effect of this section may be modified by an agreement setting out standards applicable to future transactions between the parties.

SECTION 203. OFFER AND ACCEPTANCE IN GENERAL.

Unless otherwise unambiguously indicated by the language or the circumstances, the following rules apply:

- (1) [Manner of acceptance.] An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances.
- (4) [Electronic acceptance.] If an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed:
- (A) when an electronic acceptance is received; or
 - (B) if the response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.

SECTION 206. OFFER AND ACCEPTANCE: ELECTRONIC AGENTS.

- (a) [Formation by interaction of electronic agents.] A contract may be formed by the interaction of electronic agents. If the interaction results in the electronic agents' engaging in operations that under the circumstances indicate acceptance of an offer, a contract is formed, but a court may grant appropriate relief if the operations resulted from fraud, electronic mistake, or the like.
- (b) [Formation by interaction of individual and electronic agent.] A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes an action or makes a statement that the individual can refuse to take or say and that the individual has reason to know will:
- (1) cause the electronic agent to perform, provide benefits, or allow the use or access that is the subject of the contract, or send instructions to do so; or
 - (2) indicate acceptance, regardless of other expressions or actions by the individual to which the individual has reason to know the electronic agent cannot react.
- (c) [Terms of the contract.] The terms of a contract formed under subsection (b) are determined under **Section 208 or 209** but do not include a term provided by the individual if the individual had reason to know that the electronic agent could not react to the term.

SECTION 208. ADOPTING TERMS OF RECORDS.

Except as otherwise provided in Section 209, the following rules apply:

- (1) [Adoption of terms.] A party adopts the terms of a record, including a standard form, as the terms of the contract if the party agrees to the record, such as by manifesting assent.
- (2) [Later terms.] The terms of a record may be adopted after beginning performance or use if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins. If the parties fail to agree to the later terms and did not intend to form a contract unless they so agreed, Section 202(e) applies.
- (3) [Effect of terms.] If a party adopts the terms of a record, the terms become part of the contract without regard to the party's knowledge or understanding of individual terms in the record, except for a term that is unenforceable because it fails to satisfy another requirement of this [Act].

SECTION 209. MASS-MARKET LICENSE.

- (a) [Limitation on terms.] Adoption of the terms of a mass-market license under Section 208 is effective only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information. A term is not part of the license if:
- (1) the term is unconscionable or is unenforceable under Section 105(a) or (b);
 - (3) under Section 113, the licensee does not have an opportunity to review the term before agreeing to it; or
 - (4) the term is not available to the licensee after assent to the license in one or more of the following forms:
 - (A) an immediately available nonelectronic record that the licensee may keep;
 - (B) an immediately available electronic record that can be printed or stored by the licensee for archival and review purposes; or
 - (C) in a copy available at no additional cost on a reasonable request in a record by a licensee that was unable to print or store the license for archival and review purposes.

(b) [Right of return and reimbursement.] If a mass-market license or a copy of the license is not available in a manner permitting an opportunity to review by the licensee before the licensee becomes obligated to pay and the licensee does not agree, such as by manifesting assent, to the license after having an opportunity to review, the licensee is entitled to a return under Section 113 and, in addition, to:

- (1) reimbursement of any reasonable expenses incurred in complying with the licensor's instructions for returning or destroying the computer information or, in the absence of instructions, expenses incurred for return postage or similar reasonable expense in returning the computer information; and
- (2) compensation for any reasonable and foreseeable costs of restoring the licensee's information processing system to reverse changes in the system caused by the installation, if:

- (A) the installation occurs because information must be installed to enable review of the license; and
- (B) the installation alters the system or information in it but does not restore the system or information after removal of the installed information because the licensee rejected the license.

(d) [Notice of refund.] In a case governed by subsection (b), notice must be given in the license or otherwise that a refund may be obtained from the person to which the payment was made or other person designated in the notice if the licensee refuses the terms.

GOOD FAITH

Uniform Commercial Code

§ 1-203. Obligation of Good Faith.



Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

UCITA

SECTION 116. SUPPLEMENTAL PRINCIPLES; GOOD FAITH; COMMERCIAL PRACTICE.

(a) [Supplemental principles.] Unless displaced by this [Act], principles of law and equity, including the law merchant and the common law of this State relative to capacity to contract, principal and agent, estoppel, duress, coercion, mistake, and other validating or invalidating cause, supplement this [Act]. Among the laws supplementing and not displaced by this [Act] are trade secret laws, unfair competition laws, and the law of fraud, misrepresentation, and unfair and deceptive practices, including application of such laws as they may deal with failure to disclose defects.

(b) [Good faith.] Every contract or duty within the scope of this [Act] imposes an obligation of good faith in its performance or enforcement.

ENFORCEABILITY

UCITA

SECTION 114. PRETRANSACTION DISCLOSURES IN INTERNET-TYPE TRANSACTIONS.

(a) [Scope of section.] This section applies to a licensor that makes its computer information available to a licensee by electronic means from its Internet or similar electronic site.

(b) [Sufficient opportunity to review.] In such a case, the licensor affords an opportunity to review the terms of a standard form license which opportunity satisfies Section 113 with respect to a licensee that acquires the information from that site, if the licensor:

- (1) makes the standard terms of the license readily available for review by the licensee before the information is delivered or the licensee becomes obligated to pay, whichever occurs first, by:

- (A) displaying prominently and in close proximity to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained; or
- (B) disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnishing a copy of the standard terms on request before the transfer of the computer information; and

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

(c) [Other methods of giving opportunity to review.] Failure to provide an opportunity to review under this section does not preclude a person from providing a person an opportunity to review by other means pursuant to Section 113 or law other than this [Act].

SECTION 109. CHOICE OF LAW.

(a) [Contractual choice and limitations.] 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.

(b) [Absence of enforceable choice.] 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:

- (1) [Access contracts and electronic delivery.] 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.

- (2) [Consumer tangible copies.] 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.

- (3) [All other cases.] In all other cases, the contract is governed by the law of the jurisdiction having the most significant relationship to the transaction.

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

(d) [Location of party.] For purposes of this section, a party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence.

SECTION 110. CONTRACTUAL CHOICE OF FORUM.

- (a) [Limitations on contractual choice.] The parties in their agreement may choose an exclusive judicial or arbitral forum unless the choice is unreasonable or unjust.
- (b) [When forum exclusive.] A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides.

UNConSCIONABILITY

Uniform Commercial Code

§ 2-302. Unconscionable Contract or Clause.



(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

UCITA

SECTION 111. UNCONSCIONABLE CONTRACT OR TERM.

(a) [General rule.] If a court as a matter of law finds a contract or a term thereof to have been unconscionable at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable term, or limit the application of the unconscionable term so as to avoid an unconscionable result.

NOTICE

Uniform Commercial Code

§ 2-316. Exclusion or Modification of Warranties.



(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

UCITA

SECTION 406. DISCLAIMER OR MODIFICATION OF WARRANTY.

(b) [Implied warranties: disclaimer or modification.] Except as otherwise provided in subsections (c), (d), and (e), to disclaim or modify an implied warranty or any part of it, but not the warranty in Section 401, the following rules apply:

(1) [Disclaimer of Section 403 and 404 warranties.] Except as otherwise provided in this subsection:

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

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

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

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

(4) [Disclaimer or modification pursuant to other law.] A disclaimer or modification sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of merchantability is sufficient to disclaim or modify the warranties under Sections 403 and 404. A disclaimer or modification sufficient under [Article 2 or 2A of the Uniform Commercial Code] to disclaim or modify an implied warranty of fitness for a particular purpose is sufficient to disclaim or modify the warranties under Section 405.

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

(d) [Effect of precontract examination.] If a licensee before entering into a contract has examined the information or the sample or model as fully as it desired or has refused to examine the information, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed to the licensee.

(e) [Effect of commercial context.] An implied warranty may also be disclaimed or modified by course of performance, course of dealing, or usage of trade.

(f) [Terms apply to all performances.] If a contract requires ongoing performance or a series of performances by the licensor, language of disclaimer or modification which complies with this section is effective with respect to all performances under the contract.

Uniform Commercial Code

§ 1-201. General Definitions.



(a) [General definitions.] In this [Act]:

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

UCITA

SECTION 102. DEFINITIONS.

(a) [General definitions.] In this [Act]:

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

(A) with respect to a person:

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

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

(iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display; and

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

(Comments) **12. "Conspicuous."** This definition follows *Uniform Commercial Code § 1-201(10)* (1998 Official Text), but is updated for electronic commerce. Whether a term is conspicuous is determined by the court. Section 117. The definition of "conspicuous" does not change requirements of other law that specify the content, timing or location of disclosures or warnings. If such requirements exist, they govern. Sections 104 and 116. Section 104 specifically provides that a standard of conspicuousness in an applicable consumer protection law applies with respect to that law.

In contexts governed by this Act, a term is conspicuous if it is so positioned or presented that the attention of an ordinary person reasonably ought to have been called to it. Conspicuous terms are often contained in a record, but the concept includes oral or automated voice presentations that meet the standard. For electronic records, whether a term is conspicuous is gauged by the condition of the message as it would be received or first viewed by a person using a system that the parties adopted for such records, a system that the sender knows the recipient is using or, in the absence of the foregoing, an ordinary system or method of receiving or reviewing such messages. For an electronic agent, presentation of the term must be capable of invoking a response from a reasonably configured electronic agent.

As in *Uniform Commercial Code Section 1-201(10)* (1998 Official Text), this Act describes several methods of making a term conspicuous. The illustrations are not exclusive. For cases outside their terms, the general standard governs.

The definition adapts the U.C.C. standard to cover electronic commerce. Paragraph (A)(ii) contemplates setting off a term or label by symbols so that conspicuous formatting can be reliably transferred electronically (font size, color and other attributes might not always be transferable). Paragraph (A)(iii) deals with hyperlinks and related Internet technologies. It contemplates a case in which a computer screen displays an image or term or a summary or reference to it, and the party using the screen, by taking an action with reference to it, is promptly transferred to a different display or location wherein the contract term is available. To be conspicuous, the image, term, summary or reference must be prominent and its use must readily enable review of the actual term. The access must be from the display and not require taking other actions such as a telephone call or driving to a store. When the term is accessed, it must be readily reviewable. The fact that an entire contract is prominently referenced does not automatically mean that a particular term in it is conspicuous.

Paragraph (B) is independent of paragraph (A). It recognizes a procedure by which, without taking action with respect to the term or reference, the party cannot proceed. Thus, a screen that states: "There are no warranties of accuracy with respect to the information" in a manner that precludes the user from proceeding without assenting to or rejecting this term, suffices.