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A Summary of Statutory and Case Law Associated With Contracting in the Electronic Universe

John M. Norwood*

I. INTRODUCTION

Contracting in the electronic universe, practically non-existent ten years ago, is now common practice. In response to a need for certainty regarding the particulars relating to such agreements, three different "codes" have been developed: the Uniform Computer Information Transactions Act ("UCITA"),¹ the Uniform Electronic Transactions Act ("UETA"),² and the Electronic Signatures in Global and National Commerce Act ("E-sign").³ The first two are state law based, and the third is governed by federal law. This paper describes the essential elements of all three codes. Following is a summary of recent judicial decisions involving electronic contracting. Surprisingly, none of the cases involved an application of any of the three Codes. They were all decided on the basis of general principles of common law, or Article Two (Sales) of the Uniform Commercial Code.⁴ Hence, these are discussed separately at the end of the paper.

II. UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT⁵

UCITA, described by its authors as "a commercial contract code for the computer information transactions," is the product of years of effort by the National Conference of Commissioners on Uniform State Laws.⁶ It was intended as an amendment to the Uniform Commercial Code, but was eventually introduced as a document to be considered independent of the Code. It is stated in the prefatory note that "Article Two served as both a model and a point of departure for

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⁵ http://www.ucitaonline.com
⁶ UCITA pref. note (2002).
It is a rather lengthy document: the articles plus the comments print out to over 280 pages. To date, UCITA has proven to be a tough sell, having been adopted only by Maryland and Virginia. However, some of its provisions have been replicated in the other major acts described in this paper (UETA and E-Sign), and so a review of the major provisions of the act is included here.

A. Scope

Section 103 provides that “this Act applies to computer information transactions.” The Comment provides further clarification:

This Act deals with contracts and not property law. It applies to computer information transactions. In a computer information transaction, the transferee seeks the information and contractual rights to use it. Unlike a buyer of goods, a purchaser (e.g., buyer, lessee, or licensee) of computer information has little interest in the diskette or tape that originally contained the information after that information has been loaded into a computer.

The Comment goes on to indicate that the scope of the Act “turns initially on the definition of ‘computer information transaction.’” Quoting from Section 102, the Comment notes that “[c]omputer information transactions’ are agreements that deal with the creation, modification, access to, license, or distribution of computer information.”

The Comment also states that “the mere fact that communications about a transaction, such as an application for a loan or employment, are sent or recorded in digital form does not place the transaction within this Act.” Hence, a contract entered into via electronic communications would not fall under the Act for that reason alone; the bargain itself would have to deal with the exchange of rights to computer information.

As indicated by the Comment, the Act does apply to contracts to create, develop, or modify software and computer information. According to the Comment, “the Act covers all software /development contracts, thus resolving conflicts in prior case law.”

7. Id.
8. Id. refs. & annots.
9. Id. § 103.
10. Id. § 103 cmt. 2 (2002) (emphasis added).
11. Id.
13. Id.
14. See id.
15. Id. § 103 cmt. 2a.
B. Opt-in or Opt-out

Section 104 gives the parties the option to agree that the Act does apply, or does not apply, to a given transaction. This Section assumes that a material part of the subject matter deals with computer information. The caveat is that in mass-market transactions, any term which changes the extent to which the Act applies must be conspicuous.

C. Relation of Act to Other Laws

Section 105 provides that “a provision of this Act which is preempted by federal law is unenforceable to the extent of the preemption.” Also, there is a clause at the end of Section 105 providing that: “the following laws govern in the case of a conflict between this Act and the other law. . .” At this point an individual state could indicate which laws would come ahead of UCITA. As explained in the Comment, this section “allows States with existing laws regarding digital signature, electronic signatures, and other similar statutes, which attribute acts or performance of a party in computer information transactions, to list any provisions of such statutes that the State desires to have prevail over this Act in the case of a conflict.” The Comment goes on to note that “it is not necessary to list UETA because, by its terms, that Act does not apply if UCITA applies.”

D. Electronic Records and Authentication

Section 107 contains the mandate that “a record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.” In Section 102 the term “authenticate” is defined as: “(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.”

The Comment to Section 102 provides further insight as to what is encompassed by this definition:

16. Id. § 104.
17. UCITA § 104(c) (2002).
18. Id. § 105.
19. Id. § 105(c).
20. Id. § 105 cmt. 6.
21. Id.
22. UCITA § 107(a) (2002).
23. Id. § 102.
Authenticate: This term replaces "signature" and "signed." A similar change in terminology is made in UCC Article Nine. In this Act, the term "sign" has the meaning used in UCC Sec. 1-201, except that it is not limited to authenticating a writing. The definition is technologically neutral. The definition makes clear that qualifying electronic systems fulfill former paper-based requirements. This is consistent with the policies of the federal Electronic Signatures in Global and National Commerce Act which precludes discrimination against electronic records and signatures solely because they are electronic in character. Any "signature" under other law is an authentication under this Act. In addition, authentication includes qualifying use of any identifier, such as a personal identification number (PIN) or a typed or otherwise signed name. It can include actions or sounds such as encryption, voice and biological identification, and other technologically enabled acts if done with proper intent.\(^2\)

In some cases authentication may have been accomplished by an "electronic agent." Section 102 defines this term to mean "a computer program, or electronic or other automated means, used independently to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance."\(^2\) With regards to such agents, Section 107 provides that "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."\(^2\) The Comment explains that actions of an electronic agent generally bind the principal, but only in those situations where the principal selected the agent.\(^2\) The Comment also indicates that "the electronic agent must be operating within its intended purpose. For human agents, this is often described as acting within the scope of authority. Here, the focus is on whether the agent was used for the relevant purpose."\(^2\)

**E. Manifesting Assent**

One of the most important sections in the Act is Section 112. This section describes what constitutes "assent" as follows:

\(^{24}\) Id. § 102 cmt. 4.
\(^{25}\) Id. § 102(a)(27).
\(^{26}\) Id. § 107(d).
\(^{27}\) UCITA § 107 cmt. 5 (2002).
\(^{28}\) Id.
CONTRACTING IN THE ELECTRONIC UNIVERSE

(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:

1) authenticates the record or term with intent to adopt or accept it; or
2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.

(b) An electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent:

1) authenticates the record or term; or
2) engages in operations that in the circumstances indicate acceptance of the record or term.\(^\text{29}\)

The expression "opportunity to review" is further explained later in the article. It is stated that:

With respect to opportunity to review, the following rules apply:
1) A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.
2) An electronic agent has an opportunity to review a record or term only if it is made available in a manner that would enable a reasonably configured electronic agent to react to the record or term.\(^\text{30}\)

The Comment provides additional guidance as to what would constitute the manifestation of assent. The Comment describes "assent by conduct" as occurring when a "person acts or fails to act having reason to know its behavior will be viewed by the other party as indicating assent."\(^\text{31}\) This section goes on to state the well known common law doctrine that assent is to be judged not subjectively, but rather by an objective indicia of assent.\(^\text{32}\) It also specifically notes that the reason to know standard "is not met if the computer information is sent to a recipient unsolicited under terms that purport to create a binding contract by failure to object to the unsolicited sending."\(^\text{33}\)

The Comment also provides guidance as to what would constitute assent by an "electronic agent." According to the Comment:

Assent may occur through automated systems ("electronic agents"). . . For electronic agents, assent cannot be based on knowledge or reason to know, since computer programs are capable of neither and the automated nature of the interaction may mean that no individual is aware of it. . . Assent occurs if the agent's opera-

\(^{29}\) Id. § 112.
\(^{30}\) Id. § 112(e)(5) (2005).
\(^{31}\) Id. § 112 cmt. 3b.
\(^{32}\) UCITA § 112 cmt. 3b (2002).
\(^{33}\) Id.
tions were an authentication or if, in the circumstances, the opera-
tions indicate assent. In this Act, manifesting assent requires a prior
opportunity to review. For an electronic agent, this opportunity oc-
curs only if the record or term was presented in such a way that a
reasonably configured electronic agent could react to it.34

The Comment also mentions that the use of “double assent” proce-
dures, although not required, is encouraged.35 Hence, if it is made
clear that the assenting party has an opportunity to confirm or deny
assent before proceeding, confirmation will meet the requiremen
t of the section.

The illustrations given in the Comment provide further guidance as
to what constitutes assent under UCITA. In one hypothetical, a regis-
tration screen prominently states:

Please read the License. It contains important terms about your use
and our obligations. If you agree to the license, indicate this by
clicking the “I agree” button. If you do not agree, click “I decline.”
The on-screen buttons are clearly identified. The underlined text is
a hypertext link that, if selected, promptly displays the license. A
party that indicates “I agree” assents to the license and adopts its
terms.36

The second illustration given by the Comment involves an online
stock quote service which includes in small print the notation “terms
and conditions of service; disclaimers.” The customer’s attention is
not called to the sentence, and no reaction to it is mandated. Accord-
ing to the Comment, while there is a contract for the service provided,
there may be no agreement to the terms of the service and the
disclaimer.37

Finally, the Comment reinforces the necessity of a party having the
opportunity to review a document before a manifestation of assent
can occur. According to the Comment “A manifestation of assent to a
record or term under this Act cannot occur unless there was an oppor-
tunity to review the record or term. Common law does not clearly
establish this requirement, but the requirement of an opportunity to
review terms reasonably made available reflects simple fairness.”38

Further guidance as to what is required of a licensor with regard to
providing an opportunity to review is indicated in Section 211. The
section states that:

34. Id. § 112 cmt. 3c.
35. Id. § 112 cmt. 5.
36. Id. § 112 illus. 1.
37. UCITA § 112 illus. 2 (2002).
38. Id. § 112 cmt. 2.
A licensor affords an opportunity to review the terms of a standard form license which opportunity satisfies Section 112(e) 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... by: 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.\(^{39}\)

**F. Variation by Agreement**

Taking its cue from Sec. 1-102 of the UCC, Section 113 of UCITA provides that the effect of the provisions of the Act can be varied by agreement.\(^{40}\) However, obligations of good faith, diligence, reasonableness, and the like cannot be disclaimerd.\(^{41}\) Unlike Article One of the UCC, there is a detailed list of articles establishing specific rules which cannot be varied by agreement, except insofar as is allowed by the specific article in question. This includes such topics as: choice of law, choice of forum, requirements for manifesting assent and opportunity for review, limitations on mass-marketing licenses, and limitations on self help provisions.\(^{42}\)

**G. Statute of Frauds**

The magic number for UCITA is $5,000. Section 201 provides that contracts requiring payment of that amount or more are not enforceable by way of action or defense, unless:

1) The party against whom enforcement is sought has authenticated a record which reasonably identifies the copy or subject matter; or
2) The agreement is a license for a duration of one year or less, or which may be terminated at will by the party against which the contract is asserted.\(^{43}\)

This second part is new to UCITA. The effect is that for a license a record is required only if the dollar amount is $5,000 or more, AND the license grant is for more than one year. A license agreement which is agreed to be "perpetual" would be construed as more than one year and (if for more than $5,000) would have to be in writing. On the other hand, an agreement which can be cancelled at-will would be considered to be less than one year.

\(^{39}\) Id. § 112.
\(^{40}\) Id. § 113.
\(^{41}\) Id. § 113.
\(^{42}\) UCITA § 113 (2002).
\(^{43}\) Id. § 201.
Like Article Two, there is an exception as to a contract which involves a performance tendered by one party and accepted by the other, and also an exception as to admissions in court. Also, the "confirming letter doctrine" is retained in UCITA, with the change that the person receiving the confirming letter must object within a "reasonable time" (as opposed to ten days under Article Two).

H. Offer and Acceptance

Section 203 establishes the basic rules of when an offer and acceptance result in a binding agreement between the parties. Perhaps the most interesting aspect of this section is the statement that:

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.44

Hence, the famous mailbox rule is rejected by this section in favor of a "time of receipt" rule. There remains the issue of defining "receipt." According to Section 102(52), "receipt" means:

(A) with respect to a copy, taking delivery; or
(B) with respect to a notice: 1) coming to a person's attention; or
   2) being delivered to and available at a location or system designated by agreement for that purpose, or, in the absence of an agreed location or system...
   II) In the case of an electronic notice, coming into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise has designated or holds out, that place or system for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place.45

The Comment notes that under traditional common law, "arrival at an appropriate private post office box is receipt even if the addressee does not remove or read the message until later.46 Similarly, arrival at an appropriate electronic mail address is receipt by the addressee.47 The definition is met by arrival at a location only if the person holds

44. Id.
45. Id. § 102(52).
46. Id. §102 cmt. 47.
47. UCITA § 102 CMT. 47 (2002).
out that location or system as a place for receiving notices of the kind."\(^\text{48}\)

Section 214 reinforces this concept. It provides that "receipt of an electronic message is effective when received even if no individual is aware of its receipt."\(^\text{49}\) According to the Comment, "this time of receipt rule reflects both the relatively instantaneous nature of electronic messaging and places the risk on the sending party if receipt does not occur... The message is effective when received, not when read or reviewed by the recipient, just as written notice is received even if not read or acknowledged."\(^\text{50}\)

I. Offer and Acceptance by Electronic Agents

Section 206 involves the formation of contracts through the operation of electronic agents. UCITA recognizes this means of contracting as resulting in an enforceable bargain, but allows a court to grant appropriate relief "if the operations resulted from fraud, electronic mistake, or the like."\(^\text{51}\) The Comment provides further guidance as to the meaning of this component of the section:

Assent does not occur if the operations are induced by mistake, fraud or the like, such as where a party or its electronic agent manipulates the programming or response of the other electronic agent in a manner akin to fraud... Similarly, the inference is viti- ated if, because of aberrant programming or through an unexpected interaction of the two agents, operations indicating existence of a contract occur in circumstances that are not within the reasonable contemplation of the parties. Such circumstances are analogous to mutual mistake.\(^\text{52}\)

J. Determining Attribution

According to Section 102, an "attribution procedure means a procedure to verify that an electronic authentication, display, message, record, or performance is that of a particular person or to detect changes or errors in information."\(^\text{53}\) The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment.\(^\text{54}\) Section 212 deals with determining attribution. According to the Com-

\(^{48}\) Id.
\(^{49}\) Id. §214(a).
\(^{50}\) Id. § 214 cmt. 2.
\(^{51}\) Id. § 206(a).
\(^{52}\) UCITA § 206 cmt. 3 (2002).
\(^{53}\) Id. § 102(a)(5).
\(^{54}\) Id.
ment, "attribution to a person means that the electronic event is treated in law as having come from that person."\textsuperscript{[55]} The article itself provides that "an electronic authentication, display, message, record, or performance is attributed to a person if it was the act of the person or its electronic agent, or if the person is bound by it under agency or other law."\textsuperscript{[56]} The party relying on attribution has the burden of proof.\textsuperscript{[57]}

K. Electronic Error

Section 213 describes what constitutes "electronic error." This refers to "an error in an electronic message created by a consumer using an information processing system if a reasonable method to detect and correct or avoid the error was not provided."\textsuperscript{[58]} According to the Comment, "this section creates a statutory electronic error correction procedure for consumers that supplements common law concepts of mistake."\textsuperscript{[59]} The section goes on to provide that:

in an automated transaction, a consumer is not bound by an electronic message that the consumer did not intend and which was caused by an electronic error, if the consumer:

(1) promptly on learning of the error: (a) notifies the other party of the error; and (b) causes delivery to the other party or, pursuant to reasonable instructions received from the other party, delivers to another person or destroys all copies of the information; and

(2) has not used, or received any benefit or value from, the information or caused the information or benefit to be made available to a third party.\textsuperscript{[60]}

The Comment provides an example of the kind of mistake encompassed by this section. The Comment states that:

a consumer's mistake in erroneously entering "11" as the number of copies desired may be an error, but does not come within this section if the automated ordering system with which the consumer interacts requires confirmation of the quantity and reasonably allows the consumer to correct any error before sending the order. The rule thus provides an incentive to establish error-correction procedures in automated contracting systems and provides protection to the consumer where such procedures are not present.\textsuperscript{[61]}

\textsuperscript{55} Id. § 212 cmt. 1.
\textsuperscript{56} Id. § 212(a).
\textsuperscript{57} UCITA § 212(a) (2002).
\textsuperscript{58} Id. § 213(a) (emphasis added).
\textsuperscript{59} Id. cmt. 1.
\textsuperscript{60} Id. § 213(b).
\textsuperscript{61} Id. § 213 cmt. 2 (2002).
The Comment provides two contrasting illustrations. Illustration One involves the facts described above: the consumer intends to order one game from seller’s web site, but inadvertently types “11.” The seller delivers the games either electronically or by courier. The consumer then notices his mistake, and promptly notifies the seller, offering to return the items (at his own expense) and does not use the games. Under these conditions, there is no obligation for the eleven games. However, assume that the seller’s system asks consumer to confirm an order of eleven copies, and consumer confirms. “There is no electronic error. The procedure reasonably allowed for correction of the error. The conditions for application of this section are not met.” Note that Section 213 only applies if the seller did not provide to the consumer “a reasonable method to detect and correct or avoid the error.”

L. Satisfaction

Under common law, a contract to be performed to another party’s “satisfaction” might be subject to either an objective or subjective standard, depending upon the circumstances. According to Section 308, an objective standard is the norm in UCITA. The article provides:

Except as otherwise provided in subsection (b), an agreement that provides that the performance of one party is to be to the satisfaction or approval of the other party requires performance sufficient to satisfy a reasonable person in the position of the party that must be satisfied.

The “subjective” standard is to apply in the following circumstances:
(1) the agreement expressly so provides, such as by stating that approval is in the “sole discretion” of the party, or words of similar import; or
(2) the agreement is for informational content to be evaluated in reference to subjective characteristics such as aesthetics, appeal, suitability to taste, or subjective quality.

According to the Comment, “subsection (b)(2) presumes a subjective standard if the contract involves informational content evaluated on aesthetics, appeal, or the like... As the subsection makes clear, this refers to cases where evaluation reflects subjective criteria and judg-

63. Id.
64. Id. § 213 illus. 3.
65. Id.
66. Id. § 213(a).
67. UCITA § 308(a) (2002).
ment. A reasonable person standard in such cases is nonsensical since
the nature of the required evaluation presumes the exercise of per-
sonal judgment.\textsuperscript{68}

M. \textit{Implied Warranties}

Section 403 contains language similar to that of UCC Sec. 2-314. Under
this section a licensor provides an implied warranty that the
computer program is "fit for the ordinary purposes for which such
computer programs are used."\textsuperscript{69} There is a note that this section
does not result in an implied warranty as to informational content, although
such a warranty might arise under Section 404.\textsuperscript{70} The Comment
indicates that "merchantability does not require a perfect program, but
only that the subject matter be generally within the average standards
applicable in commerce for programs having the particular type of
use. The presence of some defects may be consistent with
merchantability standards."\textsuperscript{71}

1. Content

Section 404 deals with warranties of informational content made by
a person in a special relationship of reliance with a licensee. It might
be compared to the implied warranty of fitness for a particular pur-
pose under UCC Sec. 2-315. It basically provides that a person in a
position of reliance with a licensee regarding the collection or compi-
lation of informational content "warrants to that licensee that there is
no inaccuracy in the informational content caused by the merchant's
failure to perform with reasonable care."\textsuperscript{72} A "strict liability" stan-
dard is thus rejected by UCITA. The Comment indicates that "the
requirement of a special relationship of reliance is fundamental to bal-
ancing protecting client expectations while not imposing excessive lia-
bility risk on informational content providers."\textsuperscript{73}

2. Disclaimer

Section 406 allows merchants to disclaim implied warranties in a
manner similar to UCC Sec. 2-316. To disclaim the implied warranty
under Section 403, the language must mention "merchantability" or
"quality" or use words of similar import, and if in a record, must be

\textsuperscript{68} Id. § 308 cmt. 3.
\textsuperscript{69} Id. § 403(a)(1).
\textsuperscript{70} Id. 403(c).
\textsuperscript{71} Id. § 403 cmt. 3a.
\textsuperscript{72} UCITA § 404(a) (2002).
\textsuperscript{73} Id. §404 cmt. 3a.
conspicuous. To disclaim the implied warranty arising under Section 404, the language must mention "accuracy" or use a term of similar import. The expression "as is" is also recognized as disclaiming all implied warranties except those arising under Section 401 (warranty of noninterference and noninfringement).

N. Transfer of Contractual Interest

Section 503 is probably the most controversial of the UCITA provisions. It basically provides that in most cases "a term prohibiting transfer of a party's contractual interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective to create a contractual right in the transferee against the non-transferring party." It does stipulate that "a term that prohibits transfer of a contractual interest under a mass-market license by the licensee must be conspicuous." The Comment makes it clear that a prohibited transfer is completely ineffective, rather than merely a breach (as would be the case under common law). The illustration given by the Comment is as follows:

Assume a license for $5,000 that allows Small Licensee (a five employee company) to make "as many copies as needed for use in licensee's business;" the license is expressly not transferable. Small Licensee transfers the license to AT&T, a company with 300,000 employees. If the transfer is merely a breach, AT&T may be permitted to make as many copies as it needs for 300,000 employees until licensor learns of the breach and cancels the license against Small Licensee. The rule making the transfer ineffective preserves the original bargain.

Professor Ferrera, et al., provide an illustration of how these restrictions on transfer might operate to the disadvantage of consumers. The illustration used is the following:

Suppose that you buy a new computer from an online vendor, such as Dell Computer Corp. or Gateway, Inc. - one that comes fully loaded with operating system software, desktop software, office software, games, and everything else that you need to do whatever you do. Suppose, a year later that you want to sell the computer and buy a new one. You look at the licenses you signed for the software installed on the computer. Assume that all of them conspicuously forbid the transfer of the installed software to any third party.
party. If the UCITA applies, and you want to legally sell your com-
puter, you will have to strip off all of the software on the machine.78

O. Performance

Section 601 provides that a “party shall perform in a manner that
conforms to the contract.”79 The section requires a “material” breach
before the other party is discharged.80 The “perfect tender rule” of
UCC Sec. 2-601 is not incorporated into this section. According to the
Comment:

subsection (b) follows the Restatement (Second) of Contracts and
common law. It adopts the standard of material breach for deter-
mining the nature of the remedies available for breach by the other
party. The concept of material breach is applied throughout con-
tact law and has been relied on by courts for generations. It holds
that a minor defect in performance does not warrant rejection or
cancellation of a contract: the remedy lies in recovery of damages.81

Section 701 provides further guidance as what would constitute a
“material” breach. It states that a breach of contract is material if:

1) The contract so provides, or
2) The breach is a substantial failure to perform a term that is an
essential element of the agreement, or
3) The circumstances, including the language of the agreement, the
reasonable expectations of the parties, the standards and practices
of the business, trade, or industry, and the character of the breach
indicate that:
   a) the breach caused or is likely to cause substantial harm to the
      aggrieved party, or
   b) the breach substantially deprived or is likely substantially to de-
      prive the aggrieved party of a significant benefit it reasonably ex-
      pected under the contract.82

P. Cure

Section 703 permits a party in breach of contract to “cure” an other-
wise non-conforming performance, similar to UCC Sec. 2-508. The
Comment indicates that “cure is not an excuse for faulty performance,
but rather an opportunity to avoid loss and retain the benefits of the
contract for both parties. Cure does not eliminate a right to damages,
but prevents cancellation based on the cured breach.”83

79. UCITA § 601(a) (2002).
80. Id. § 601(b).
81. Id. § 601 cmt. 3.
82. Id. § 701(c).
83. Id. § 703 cmt. 3.
Q. Revocation of Acceptance

Section 707 is similar to UCC 2-608. Under this section:

a party that accepts a nonconforming tender of a copy may revoke acceptance only if the nonconformity is a material breach of contract and the party accepted it:

1. on the reasonable assumption that the nonconformity would be cured, and the nonconformity was not seasonably cured;
2. during a continuing effort by the party in breach at adjustment and cure, and the breach was not seasonably cured; or
3. without discovery of the nonconformity, if acceptance was reasonably induced either by the other party's assurances or by the difficulty of discovery before acceptance.\(^{84}\)

As under Article Two, revocation of acceptance is precluded if the victim does not take action within a reasonable time after discovery of the nonconformity.

R. Measure of Damages

Section 807 prohibits the recovery of consequential damages in most cases. It also prohibits the recovery of damages that are speculative in nature. The illustration given by the Comment is as follows:

D distributes stock market information through newspapers and online for $5 per hour or $1 per copy. C reviews the online information and trades 1 million shares of Acme at a price that causes a $10 million loss because the data were incorrect. This is published informational content, and C cannot recover alleged consequential loss.\(^{85}\)

III. Uniform Electronic Transactions Act\(^{86}\)

UETA is also a product of the National Conference of Commissioners on Uniform State Laws. Unlike UCITA, it was never intended to be considered by the states as part of the UCC. The purposes of the Act were stated in the preface:

[T]he purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures. It is NOT a general contracting statute - the substantive rules of contracts remain unaffected by UETA. Nor is it a digital signature statute. To the extent that a State has a Digital

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84. UCITA § 707(a) (2002).
85. Id. § 807 illus. 1.
Signature Law, the UETA is designed to support and compliment that statute. UETA is a much more modest project than UCITA. It prints out at less than sixty pages. It has also proven to be more popular among the state legislatures; to date, it has been adopted by the legislatures of forty states plus the District of Columbia.

A. Scope

Section 3 of the Act indicates that the act applies to “electronic records and electronic signatures relating to a transaction.” Section 2 provides that “electronic record means a record created, generated, sent, communicated, received, or stored by electronic means.” An electronic signature is “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”

The Comment clearly indicates that a “signature” might include such things as one’s voice on an answering machine, one’s name in an E-mail, a firm’s name on a facsimile document, a mouse click on a web page, or a digital signature using public key encryption technology. The key element is intent. According to the comment, “it also may be shown that the requisite intent was not present and accordingly the symbol, sound or process did not amount to a signature... The definition requires that the signer execute or adopt the sound, symbol, or process with the intent to sign the record.”

Section 3 stipulates that certain kinds of transactions are not governed by the Act. This includes wills and trusts. It also includes the UCC, except for Article Two (Sales). If the state has adopted UCITA, then that Act controls over UETA. The Comment makes note of the fact that it may be important to differentiate between the legality of an electronic document between parties, and the legal obligations owed to third parties. For example, the Comment states that whereas an electronic document might suffice for purposes of entering...
into a contract involving real estate, a more traditional document might be needed for purposes of recordation.98

B. Necessity of Agreement

Section 5 states that the Act "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."99 The Comment provides the following examples of circumstances from which it may be found that the parties have agreed to conduct their transactions electronically:

EXAMPLE 1: Joe gives out his business card with his business E-mail address. It may be inferred that Joe has agreed to communicate electronically for business (not personal) purposes.100

EXAMPLE 2: Sally has several E-mail address (home, business, non-profit organization). It is reasonable to infer that Sally is willing to communicate electronically with regards to the activity associated with each E-mail address. It would NOT be reasonable to assume that an electronic communication with Sally unrelated to the individual E-mail address was authorized.101

EXAMPLE 3: At a business meeting one tells the other to send an E-mail to confirm a transaction. The requisite agreement to be bound electronically has been demonstrated.

EXAMPLE 4: Buyer executes a standard form contract in which an agreement to receive all notices electronically is included in the midst of other fine print. Buyer has never communicated with Seller electronically. This does NOT indicate a willingness to deal electronically. According to the Comment, "nothing in this Act prevents courts from policing such form contracts under common law doctrines relating to contract formation, unconscionability, and the like."102

C. Legal Recognition of Electronic Records

Section 7 establishes the basic rule of UETA - that electronic records and signatures are to be given equal status to traditional written documents. The Article provides that:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. . .
(c) If a law requires a record to be in writing, an electronic record satisfies the law.
(d) If a law requires a signature, an electronic signature satisfies the law.\textsuperscript{103}

According to the Comment, "this section sets forth the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance."\textsuperscript{104} The Comment gives an illustration involving the purchase of widgets via an exchange of E-mails for a price in excess of $500.\textsuperscript{105} The Comment states that "the transaction may not be denied legal effect solely because there is not a pen and ink 'writing' or 'signature.'"\textsuperscript{106}

D. Attribution

Section 9 deals with "attribution," a term which is not specifically defined in the Act. It relates to authority to contract. The section provides that:

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.
(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.\textsuperscript{107}

According to the Comment, this Article "does not alter existing rules of law regarding attribution. The section assures that such rules will be applied in the electronic environment. A person's actions include actions taken by human agents of the person, as well as actions taken by an electronic agent."\textsuperscript{108} The Comment goes on to give examples of situations in which attribution would have taken place:

\textbf{EXAMPLE 1:} A person types his/her name as part of an E-mail purchase order.\textsuperscript{109}

\textbf{Example 2:} The person's employee, with authority to do so, types the person's name as part of an E-mail purchase.\textsuperscript{110}

\textsuperscript{103} Id. § 7.
\textsuperscript{104} UETA § 7 cmt. 1 (1999).
\textsuperscript{105} Id. § 7 cmt. 3.
\textsuperscript{106} Id.
\textsuperscript{107} Id. § 109.
\textsuperscript{108} Id. § 109 cmt. 1.
\textsuperscript{109} UETA § 109 cmt. 1A (1999).
\textsuperscript{110} Id. § 109 cmt. 1B.
EXAMPLE 3: "The person's computer, programmed to order goods upon receipt of inventory information within particular parameters, issues a purchase order which includes the person's name or other identifying information."¹¹¹

The Comment then goes on to address the subject of the use of facsimile machines. It states that a facsimile may be attributed to a person as a result of information printed across the top of the page that indicates the machine from which it was sent.¹¹² With regards to whether such a document would satisfy a "signature" requirement, the Comment states:

Some cases have held that the letterhead actually constituted a signature because it was a symbol adopted by the sender with intent to authenticate the facsimile. However, the signature determination resulted from the necessary finding of intention in that case. Other cases have found facsimile letterheads NOT to be signatures because the requisite intention was not present. The critical point is that with or without a signature, information within the electronic record may well suffice to provide the facts resulting in attribution of an electronic record to a particular party.¹¹³

It would appear that the Comment is taking a neutral position on the issue of whether or not a facsimile is a "signature." In the case of Parma Tile Mosaic and Marble Co., Inc. v. Estate of Short,¹¹⁴ a New York court held that the automatic imprinting of a company's name on a facsimile did not satisfy the requirement that a contract be "subscribed" under New York's statute of frauds.¹¹⁵

E. Effect of Change or Error

Section 10 deals with issues associated with errors made via electronic contracting. According to part (2):

In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

A) Promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;
B) Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person, or if

¹¹¹ Id. § 109 cmt. 1C.
¹¹² Id. § 109 cmt. 3.
¹¹³ Id.
¹¹⁵ Id. at 527-28.
instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and
C) Has not used or received any benefit or value from the consideration, if any, received from the other person.116

The Comment notes that this section encourages the party acting through the electronic agent (normally the merchant) to build into the system a mechanism enabling the other party to detect and correct errors before they are sent to the merchant. According to the Comment:

For example, the electronic agent may be programmed to provide a "confirmation screen" to the individual setting forth all the information the individual initially approved. This would provide the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the electronic agent might receive the record sent by the individual and then send back a confirmation which the individual must again accept before the transaction is completed. This would allow for correction of an erroneous record. In either case, the electronic agent would "provide an opportunity for prevention or correction of the error, and the subsection would not apply. Rather the affect of any error is governed by other law.117

Thus, if the person using the electronic agent (usually the merchant) provides the other party an opportunity to correct the record and the other party does not do so, this section of the Act does not apply, and the other party would have to seek a remedy under general principles of common law. If no opportunity to correct was provided, then the other party may avoid the bargain by promptly notifying the merchant and returning (or destroying) the items received under the contract. This is similar to the rule set forth in Section 214 of UCITA (electronic errors).

F. Retention of Electronic Records

Section 12 provides that "if a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information."118 This rule is consistent with the theme of the Act that electronic records are to be given the same effect as traditional written documents. Section 13 continues this theme by stipulating that "in a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form."119

117. Id. § 10 cmt. 5.
118. Id. § 12(a).
119. Id. § 13.
G. Automated Transactions

Section 14 deals with the increasing use of automated methods of contracting. It provides that "a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements." The Comment notes that "contracts can be formed by machines functioning as electronic agents for parties to a transaction. It negates any claim that lack of human intent, at the time of contract formation, prevents contract formation."121

H. Time and Place of Sending and Receipt

Section 15 outlines specific rules as to when an electronic message is considered to be "sent" and "received." However, the Section does not take a position on whether an acceptance is considered to be valid when mailed (the "mailbox rule"). Presumably, general principles of common law will still apply, to the effect that in most cases acceptances are valid when mailed. The Section provides that an electronic record is sent when it:

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;
(2) is in a form capable of being processed by that system; and
(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.122

As indicated in the Comment, "the critical element when more than one system is involved is the loss of control by the sender."123 Once the message leaves the system of the party in question, it is considered "sent." This is the electronic equivalent of a person dropping a letter in the mailbox. The Comment points out that the second portion of part (3) is intended to address those situations when both parties are using the same server (such as two professors at the same university).

120. Id. § 14(1).
121. For additional information regarding automated means of contracting, see the Data Interchange Standards Association home page at www.x12.org
123. Id. § 15 cmt. 2.
In such a case, "to qualify as a sending, the e-mail must arrive at a point where the recipient has control."\textsuperscript{124}

The Section goes on to address the issue of "received." It states that an item is "received" when:

(1) it enters an information processing system that the recipient has designated or uses for the purposes of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record. . . An electronic record is received. . . even if no individual is aware of its receipt.\textsuperscript{125}

The Comment elaborates upon this last portion of the Section. According to the Comment, the Section "makes clear that receipt is not dependent on a person having notice that the record is in the person's system. Receipt occurs when the record reaches the designated system whether or not the recipient ever retrieves the record. The paper analog is the recipient who never reads a mail notice."\textsuperscript{126} The Comment further explains the significance of the requirement that the recipient must have designated or used the particular processing system for the purpose of receiving the kind of messages involved in that particular transaction. The example given by the Comment is as follows:

[T]he recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes. . .\textsuperscript{127}

I. \textit{Transferable Record}

Section 16 permits a negotiable instrument under Article Three of the Uniform Commercial Code to be in electronic form. A person having control of such a record would be considered a "holder" under the UCC, and could qualify as a holder in due course.\textsuperscript{128} According to the Comment, "this section provides legal support for the creation, transferability and enforceability of electronic note and document equivalents."\textsuperscript{129}

\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} § 15(3)(b).
\textsuperscript{126} \textit{Id.} § 15 cmt. 5.
\textsuperscript{127} UETA § 15 cmt. 3 (1999).
\textsuperscript{128} \textit{Id.} § 16(6)(d).
\textsuperscript{129} \textit{Id.} § 16 cmt. 1.
IV. Electronic Signatures in Global and National Commerce Act\textsuperscript{130}

Signed into law by President Clinton in 2000, E-Sign gives electronic signatures and contracts the same validity as traditional written documents. It applies only in those states which have not adopted UETA. Unlike UETA and UCITA it does not contain "comments," making it somewhat more difficult to predict its intended application to specific situations. At only seventeen printed pages, E-Sign is considerably shorter than UETA and is less comprehensive than that document. The definitions of terms used in the Act are consistent with UETA. This includes:

*Electronic agent:* "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual..."\textsuperscript{131}

*Electronic record:* "a contract or other record created, generated, sent, communicated, received, or stored by electronic means."\textsuperscript{132}

*Electronic signature:* "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."\textsuperscript{133}

A. General Rule of Validity

Section 7001(a) provides that it is limited to transactions "affecting interstate commerce."\textsuperscript{134} It indicates that: "(1) A signature, contract, or other record relating to such transaction may not be denied effect, validity, or enforceability solely because it is in electronic form."\textsuperscript{135} The Section goes on to state that the Act does not "require any person to agree to use or accept electronic signatures."\textsuperscript{136} Hence, a person could easily prevent himself from being subject to electronic contracts by simply stating that such agreements were not to be recognized. However, notwithstanding this provision of the law, the Act goes on to indicate that if a statute or regulation requires information to be provided to a consumer in writing, the use of an electronic record to provide the information would be acceptable, provided the consumer

\textsuperscript{130} 15 U.S.C. 7001 (2005)
\textsuperscript{132} Id. § 7006(4).
\textsuperscript{133} Id. § 7006(5).
\textsuperscript{134} This is of course mandated by Article I, Sec. 8 of the U.S. Constitution, which gives Congress the right "to regulate Commerce... among the several states." U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{136} Id. § 7001(b)(2).
agreed to such use and had not withdrawn consent.\textsuperscript{137} It is also required that the consumer be notified of the hardware and software requirements for access to and retention of the electronic records.\textsuperscript{138} The Act also provides numerous details regarding preservation of consumer rights.\textsuperscript{139} Finally, the Act indicates that "an oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection."\textsuperscript{140} This would prevent an audio recording from substituting for a written agreement where such an agreement was required by law.

The Act also provides that notarization can occur electronically,\textsuperscript{141} that the Act applies to insurance contracts,\textsuperscript{142} and that electronic agents are recognized.\textsuperscript{143} This portion of the Act reads as follows:

A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.\textsuperscript{144}

1. Exemption to Preemption

Section 7002 provides that a state may supersede the provisions of the Act by enacting UETA.\textsuperscript{145} Alternative procedures or requirements are also permitted; provided they are not inconsistent with the general principle of E-Sign, which is to give recognition to electronic records and signatures.\textsuperscript{146}

2. Specific Exceptions

Section 7003 provides that certain kinds of arrangements are not covered by the Act. This includes: wills, trusts, adoptions, divorces, court orders or notices, and a few others.\textsuperscript{147} Also specifically excepted

\textsuperscript{137} Id. § 7001(c)(1) (2005). The Act also states that the consumer must have been provided with a clear and conspicuous statement informing the consumer of a right to have the notice provided in nonelectronic form. Id. § 7001(c)(1)(B).
\textsuperscript{138} Id. § 7001(c)(1)(C)(i).
\textsuperscript{140} Id. § 7001(c)(6).
\textsuperscript{141} Id. § 7001(g).
\textsuperscript{142} Id. § 7001(i).
\textsuperscript{143} Id. § 7001(b).
\textsuperscript{145} Id. § 7002(a). "As approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999..." Id.
\textsuperscript{146} See id. § 7002(a)(2).
\textsuperscript{147} Id. § 7003.
is any transaction governed by the UCC.\textsuperscript{148} However, Articles Two (Sales) and Two A (Leases) are subject to E-sign. Also, under Section 7021 a person "having control of a transferable record is the holder, as defined in section 1-201 (20) of the UCC, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the UCC."\textsuperscript{149}

\section*{B. Reported Cases Involving Electronic Contracting}

Most of the reported cases involving electronic contracting relate to the question of whether contractual terms initially presented to the consumer in either "shrinkwrap" or "clickwrap" format should be enforceable. Some of the cases involve the issue of limitation of liability; whereas others involve a forum selection clause or arbitration clause. While most of the reported decisions have upheld the validity of such agreements, a few have held to the contrary. Those courts which have refused to enforce a shrinkwrap/clickwrap agreement have relied primarily on UCC Sec. 2-207 (battle of the forms), holding that the seller and buyer entered into a contract prior to the time the shrinkwrap/clickwrap terms were made available to the buyer. Those terms thus became proposals for additions to the contract, and since they were material changes did not become a part of the bargain.

In \textit{Step-Saver Data Systems, Inc. v. Wyse Technology, Inc.},\textsuperscript{150} the purchaser of computer software brought suit against the seller for breach of warranty.\textsuperscript{151} The seller defended on the basis of a disclaimer of warranties and limitation of remedies that appeared on the shrinkwrap packaging.\textsuperscript{152} The court held that the agreement between the parties was created as a result of telephone conversations, purchase orders, and invoices, none of which made reference to disclaimers.\textsuperscript{153} Since the disclaimer appeared only on the "box top" after the goods were delivered, these terms could not be part of the original agreement between the parties.\textsuperscript{154} At best these constituted a proposal for an addition to the contract under UCC Sec. 2-207.\textsuperscript{155} "Because the warranty disclaimer and limitation of remedies terms would mate-

\textsuperscript{148} Id. § 7003(a)(3).
\textsuperscript{150} 939 F.2d 91 (3d Cir. 1991).
\textsuperscript{151} Id. at 93.
\textsuperscript{152} Id. at 94-95.
\textsuperscript{153} Id. at 96.
\textsuperscript{154} Id. at 105-06.
\textsuperscript{155} \textit{Step-Saver Data Sys.}, 939 F.2d at 105-06.
rially alter the parties' agreement, these terms did not become a part of the parties' agreement."

In Arizona Retail Systems, Inc. v. Software Link, Inc., the purchaser received and used an evaluative copy of the software. The materials contained a shrinkwrap license similar to that of the previous case. The purchaser admitted that he read the license agreement, but thought that it was unenforceable since he had allegedly received specific representations from the seller's representatives. The buyer made many purchases from the seller over the next year. These were normally done via a phone call, with the goods being shipped together with invoices. Neither party made reference to the disclaimers, which were included only in the shrinkwrap. The court held that the parties had in fact entered into numerous separate contracts (one for each purchase). The court agreed with the seller that the first purchase was subject to the disclaimers, since the buyer had reviewed the evaluative disk as well as the disclaimers.

In essence, the contract was formed at the time the buyer agreed to retain the materials, which occurred after the disclaimer was known. However, the other purchases resulted in contracts at the time of the agreement between the parties (usually over the telephone), and the disclaimers only came later. According to the court:

[b]y agreeing to ship the goods, or at the latest, by shipping the goods, [the seller] entered into a contract with [the buyer].... The license agreement thus is best seen as a proposal to modify the contract between the parties, which, as the court has discussed, was not effective because [the buyer] never specifically assented to the proposed terms.

Hence, they constituted proposals for additions to the contract, and since they were material they would become part of the bargain only if specifically agreed to by the buyer. Since this did not occur, the disclaimers were not part of the bargain.

156. Id. at 106.
158. Id. at 761.
159. Id.
160. Id.
161. Id.
163. Id. at 761.
164. Id. at 763.
165. Id.
166. Id.
168. Id. at 765 (citations omitted).
Perhaps the most widely cited shrinkwrap case, ProCD, Inc. v. Zeidenberg & Silken Mtn. Web Services, Inc., the Seventh Circuit held that a shrinkwrap license included with software was binding upon a buyer. This particular contractual provision was printed hard copy in the box, on the CD-ROM disks, and appeared on a user’s screen every time the software ran. In this particular case it limited the use of the product to non-commercial purposes. The buyer allegedly violated this provision of the contract, and the seller sued. The trial judge issued a ruling in favor of the buyer, employing the reasoning of the two cases previously discussed (UCC 2-207). However, the Court of Appeals reversed. Basing its decision on both common law as well as the U.C.C., the court held the restriction enforceable. The court stated that “transactions in which the exchange of money precedes the communication of detailed terms are common.” A comparison was made to the sale of insurance, wherein the consumer pays first, and receives the details of the policy at a later date. Another comparison was to the purchase of a radio, where the box contains the terms of the warranty. The court stated its view that “so far as we are aware no state disregards warranties furnished with consumer products.” It then relied on UCC Sec. 2-204, which indicates that parties may contract for the sale of goods “in any manner sufficient to show agreement.”

Llan Systems, Inc. v. Netscout Service Level Corp. involved a classic shrinkwrap/clickwrap issue, and is colorfully described by the court in the first paragraph of the decision:

Has this happened to you? You plunk down a pretty penny for the latest and greatest software, speed back to your computer, tear open the box, shove the CD-ROM into the computer, click on ‘install’ and, after scrolling past a license agreement which would take at least fifteen minutes to read, find yourself staring at the following dialog box: ‘I agree.’ Do you click on the box? You probably do

169. 86 F.3d 1447 (7th Cir. 1996).
170. See id. at 1449.
171. Id.
172. Id.
173. Id. at 1448.
174. ProCD, 86 F.3d at 1448.
175. Id. at 1450. “Whether there are legal differences between ‘contracts’ and ‘licenses’ (which may matter under the copyright doctrine of first sale) is a subject for another day.” Id.
176. Id. at 1451.
177. Id.
178. Id.
179. ProCD, 86 F.3d at 1451.
180. Id. at 1452.
not agree in your heart of hearts, but you click anyway, not about to let some pesky legalese delay the moment for which you've been waiting. Is that 'clickwrap' license agreement enforceable? Yes, at least in the case described below.182

This case actually involved a license agreement between two merchants.183 The purchaser of the software was acquiring rights to the seller's software, and in turn it would rent the software to customers.184 The issue centered on whether the purchaser was entitled to the remedy of specific performance.185 The seller pointed out that the clickwrap agreement said that it was not.186 Alternatively, the seller argued that such a remedy was not available in the case under the UCC. The court expressed some doubt as to whether Article Two of the UCC would apply, since it did not actually involve a purchase, but only a license to use.187 Nonetheless, the court decided to at least examine the license agreement through the lens of the UCC.188 Noting that most states had not adopted UCITA, but that "business persons reasonably expect that some law will govern them," the court decided to use Article Two, since it was the inspiration for UCITA, and its provisions "better fulfill those expectations than the common law."189

The court stated that the clickwrap agreement could be analyzed either as forming a contract under UCC Sec. 2-204 (formation in general) or adding terms to an existing agreement under UCC Sec. 2-207 (battle of the forms).190 "If the proper analysis is pursuant to UCC Sec. 2-204, the analysis is simple: [the buyer] manifested assent to the clickwrap license agreement when it clicked on the box stating 'I agree,' so the agreement is enforceable."191 But if UCC Sec. 2-207 is used, the analysis is more complex.192

The court then went on to cite both the Step-Saver case and the ProCD case.193 The court indicated that ProCD was based on UCC Sec. 2-204, wherein the Seventh Circuit held that the absence of a

182. Id. at 329.
183. Id. at 330.
184. Id.
186. Id.
187. Id. at 331-32.
188. Id. at 332.
189. Id.
192. Id.
193. Id. at 337.
timely rejection by the buyer was sufficient to show assent.\textsuperscript{194} The court accepted this doctrine, which it described as "money now, terms later."\textsuperscript{195} The court stated as its reason the UCC's stated goal of allowing for the "continued expansion of commercial practice through custom, usage and agreement of the parties."\textsuperscript{196} The court concluded by saying:

To be sure, shrinkwrap and clickwrap license agreements share the defect of any standardized contract—they are susceptible to the inclusion of terms that border on the unconscionable—but that is not the issue in this case. The only issue... is whether clickwrap license agreements are an appropriate way to form contracts, and the Courts holds that they are.\textsuperscript{197}

In \textit{Caspi v. Microsoft Network, LLC},\textsuperscript{198} the clickwrap license contained a forum selection clause, stating that all disputes would have to be resolved in the state of Washington.\textsuperscript{199} The court held the agreement enforceable, stating that:

We discern nothing about the style or mode of presentation, or the placement of the provision, that can be taken as a basis for concluding that the forum selection clause was proffered unfairly, or with a design to conceal or de-emphasize its provisions. To conclude that plaintiffs are not bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented.\textsuperscript{200}

This case has been widely cited in support of the proposition that forum selection clauses in clickwrap agreements are enforceable provided the terms are not unreasonably buried in the fine print.

\textit{Forrest v. Verizon Communications, Inc.}\textsuperscript{201} involved a forum selection clause that was contained in an "agreement" which totaled thirteen pages and could be read through a scroll mechanism on the computer.\textsuperscript{202} At the top of the agreement was printed the following: "PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY."\textsuperscript{203} The forum selection clause was in the final section of the agreement in regular type.\textsuperscript{204} The court held that under these circumstances the consumer was given adequate notification of the forum

\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id}. \textit{Llan Sys.}, 183 F. Supp. 2d at 338.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 529.
\textsuperscript{200} \textit{Id.} at 532.
\textsuperscript{201} 805 A.2d 1007 (D.C. 2002).
\textsuperscript{202} \textit{Id.} at 1010.
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Id.}
selection clause, and hence the agreement was enforceable.\textsuperscript{205} The court stated that "we are not persuaded that notice would have been sufficient only if the clause was in all capital letters or was placed in the section entitled 'Limitations of Liability and Remedies' rather than 'General Provisions.'"\textsuperscript{206}

In \textit{Hughes v. McMenamon},\textsuperscript{207} a multi-page agreement contained a forum selection clause.\textsuperscript{208} The court stated that "[t]he prevailing view towards contractual forum-selection clauses is that 'such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.'"\textsuperscript{209} "Forum selection clauses of the type used by [American Online], sometimes referred to as 'clickwrap' agreements, have been upheld as valid and enforceable."\textsuperscript{210}

\textit{Celmins v. America On Line}\textsuperscript{211} was a per curiam ruling, where the Florida Court of Appeals held that a forum selection clause in a clickwrap agreement was enforceable.\textsuperscript{212} Arguments relating to unequal bargaining power and general unconscionability were rejected.\textsuperscript{213}

\textit{Barnett v. Network Solutions, Inc.}\textsuperscript{214} was another forum selection clause case. There, the consumer had to scroll through the contract to read the terms of the agreement, and then click "I agree."\textsuperscript{215} The court upheld the forum selection clause.\textsuperscript{216} The argument that the clause was hidden in the agreement was rejected.\textsuperscript{217}

\textit{M. A. Mortenson Co. v. Timberline Software Corp.}\textsuperscript{218} involved the purchase of computer software.\textsuperscript{219} The purchaser claimed that a defect in the software caused it to submit an inaccurate bid.\textsuperscript{220} The plaintiff sued for consequential damages, which were not permitted according to the shrinkwrap contract.\textsuperscript{221} In this case the license agree-

\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Forrest}, 805 A.2d at 1010-11.
\textsuperscript{207} 204 F.Supp.2d 178 (D. Mass. 2002).
\textsuperscript{208} \textit{Id.} at 180.
\textsuperscript{209} \textit{Id.} at 181 (quoting Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 387 (1st Cir. 2001)).
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} 748 So.2d 1041 (Fla. Dist. Ct. App. 1999).
\textsuperscript{212} \textit{Id.} at 1041.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} 38 S.W.3d 200 (Tex. App. 2001).
\textsuperscript{215} \textit{Id.} at 202.
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.} at 203-204.
\textsuperscript{218} 998 P.2d 305 (Wash. 2000).
\textsuperscript{219} \textit{Id.} at 307.
\textsuperscript{220} \textit{Id.} at 309.
\textsuperscript{221} \textit{Id.} at 316.
ment was printed on each diskette pouch and the inside cover of the instruction manual.\textsuperscript{222} In addition, the first screen that appeared when the program was used referenced the license.\textsuperscript{223} The court applied Article Two to the transaction.\textsuperscript{224} In holding that the shrinkwrap contractual provisions were enforceable, the court reasoned that the purchase order was not intended to be a fully integrated contract.\textsuperscript{225} The court pointed to the fact that certain details of the agreement were not fully outlined, and, in addition, there was no "integration clause."\textsuperscript{226} Consequently, the shrinkwrap/clickwrap agreements were deemed to be part of the bargain.\textsuperscript{227} The \textit{Step Saver} case was distinguished in two respects: 1) In \textit{Step Saver} the purchaser had not been an end user, and had been assured (allegedly) that the license agreement did not apply to him, and 2) In \textit{Step Saver} the seller had twice asked the buyer to sign an agreement comparable to their disputed license agreement, but the buyer refused.\textsuperscript{228}

The court in \textit{Morgan Laboratories, Inc. v. Micro Data Base Systems, Inc.}\textsuperscript{229} did not enforce the forum selection clause, but its decision was not based on unequal bargaining power or general unconscionability.\textsuperscript{230} In this case there was a formal license agreement signed by both parties.\textsuperscript{231} That agreement contained language indicating that any amendments to the agreement had to be signed by both parties.\textsuperscript{232} The forum selection clause appeared later in the shrinkwrap.\textsuperscript{233} Applying UCC Sec. 2-209 to the transaction, the court held the clause unenforceable.\textsuperscript{234} The court also rejected the "course of dealing" argument, stating that this would have required some prior conduct relating to the specific issue in question (forum selection).\textsuperscript{235} Since this was the first time this issue had been raised, the course of dealing doctrine could not be used.\textsuperscript{236} There was no discussion of the question whether or not Article Two should be applied to "license" contracts.

\textsuperscript{222} \textit{Id.} at 313.
\textsuperscript{223} \textit{M.A. Mortenson Co.}, 998 P.2d at 313.
\textsuperscript{224} \textit{Id.} at 310.
\textsuperscript{225} \textit{Id.} at 311.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{M.A. Mortenson Co.}, 998 P.2d at 312 (citing Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 102-103 (3d Cir. 1991)).
\textsuperscript{229} 39 UCC Rep.Serv.2d 319 (N.D. Cal. 1997)
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{Morgan Labs., Inc.}, 39 UCC Rep.Serv.2d at 319.
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Id.}
The purchaser of a computer and scanner, in Klocek v. Gateway, Inc., brought an action against the seller, alleging that the seller had made false promises of technical support as well as a failure to notify the buyer that the scanner was incompatible with certain computers. In the box which contained the equipment the seller had included a copy of "Standard Terms." At the top of the first page was a conspicuous notice stating that by keeping the computer beyond five days the consumer agreed to the terms. One of the terms required that all disputes be resolved by arbitration. Applying the UCC to this transaction, the court noted that "[s]tate courts in Kansas and Missouri apparently have not decided whether terms received with a product become part of the parties' agreement." The court also said that "[i]t appears that at least in part, the cases turn on whether the court finds that the parties formed their contract before or after the vendor communicated its terms to the purchaser." The court noted that in Hill v. Gateway an arbitration clause under similar circumstances (except that the time period was 30 days) was upheld. However, the court in this case declined to follow the indicated precedent. It gave as its reason its belief that the cited case did not give adequate consideration to UCC Sec. 2-207. Applying the given article, the court noted that since the buyer was not a merchant additional terms in the seller’s acceptance would not be binding unless and until they were accepted by the buyer. Hence, the arbitration clause was not enforceable.

The plaintiff in Lively v. Ijam, Inc. was a resident of Oklahoma and the defendant corporation was located in Georgia. The plaintiff purchased a computer from the defendant, and later returned it for warranty work. Not only was the warranty work not completed by the seller, the computer was never returned to the buyer.

238. Id.
239. Id. at 1334.
240. Id. at 1335.
241. Id.
243. Id. at 1338.
244. Id. (citing Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148-50 (7th Cir. 1997)).
245. Id. at 1340.
246. Id. at 1339.
248. Id. at 1342.
250. Id. at 489.
251. Id. at 490.
252. Id.
lawsuit was brought in the state of Oklahoma.\textsuperscript{253} The defendant sought a ruling from the trial court that jurisdiction could not be had in Oklahoma.\textsuperscript{254} The trial court refused to issue such a ruling and the defendant appealed.\textsuperscript{255} On appeal the trial court's ruling was reversed.\textsuperscript{256} The appellate court did not base its decision on the presence of a forum selection clause.\textsuperscript{257} The court's stated reason was that the forum selection clause only appeared on the back of the invoice, and "we find that a contract of sale existed between [d]efendants and Lively [plaintiff] prior to the receipt of the invoice."\textsuperscript{258} The Klocek case was cited with approval.\textsuperscript{259} However, the appellate court reversed and denied personal jurisdiction on the basis of the fact that the defendant did not have sufficient contacts with the state of Oklahoma.\textsuperscript{260} The mere existence of a web site used by Oklahoma residents was held to be legally insufficient.\textsuperscript{261} The court stated that "[i]f we were to hold that the ability of an out-of-state resident to access a website was enough to establish jurisdiction, personal jurisdiction could almost always be found in any jurisdiction in the country."\textsuperscript{262} Instead a court should analyze "a foreign business's activity directed at the state of Oklahoma."\textsuperscript{263} As the plaintiffs had failed to introduce evidence on this issue, personal jurisdiction could not be found.\textsuperscript{264}

\textit{DeJohn v. The .TV Corporation International}\textsuperscript{265} involved a dispute over a domain name.\textsuperscript{266} The plaintiff, a resident of Illinois, tried to purchase a number of domain names for fifty dollars each from the defendant, The .TV Corporation International.\textsuperscript{267} The application was rejected on the basis of the claim that the price (promoted by the domain name registrar Register.com, Inc. (also a defendant) was too

\begin{itemize}
\item \textsuperscript{253} \textit{Id.} at 489.
\item \textsuperscript{254} \textit{Lively}, 114 P.3d at 490.
\item \textsuperscript{255} \textit{Id.} at 491.
\item \textsuperscript{256} \textit{Id.} at 499.
\item \textsuperscript{257} \textit{Id.}
\item \textsuperscript{258} \textit{Id.} at 492.
\item \textsuperscript{259} \textit{Lively}, 114 P.3d at 492. As in Klocek, the court noted that if the buyer was not a merchant he would have to accept the seller's proposed new terms in order for them to be binding. \textit{Id.} If both parties were merchants the proposed new terms would still not be part of the final contract, as the new terms constituted a material change. \textit{Id.}
\item \textsuperscript{260} \textit{Id.} at 499.
\item \textsuperscript{261} \textit{Id.} at 497.
\item \textsuperscript{262} \textit{Id.}
\item \textsuperscript{263} \textit{Id.}
\item \textsuperscript{264} \textit{Lively}, 114 P.3d at 497.
\item \textsuperscript{265} 245 F.Supp.2d 913 (N.D. Ill. 2003).
\item \textsuperscript{266} \textit{Id.} at 914.
\item \textsuperscript{267} \textit{Id.}
\end{itemize}
low. The plaintiff claimed that the defendant's actions violated certain deceptive practices acts. All of the defendants were non-residents of the state of Illinois. The plaintiff (and all other customers) was required to click an icon stating that they agreed to the terms of the contract described on the web. One of the provisions of the contract was a forum selection clause limiting jurisdiction to the state of New York. In upholding the forum selection clause, the court noted that a party seeking to avoid such a clause must show that:

(1) it is the result of fraud or overreaching;
(2) the party will be deprived of his day in court as the result of the "grave inconvenience or unfairness of the selected forum;"
(3) the party may be deprived of a remedy due to the "fundamental unfairness of the chosen law;" or
(4) the clause contravenes a strong public policy of the forum state.

As there was an absence of evidence that any of these factors were present, the forum selection clause was upheld, and the case was dismissed for lack of jurisdiction.

In Specht v. Netscape Communications Corp., the plaintiffs downloaded free software provided by the defendant, but later claimed that usage of the software resulted in an electronic surveillance in violation of federal law. Access to the software was linked to a license agreement which contained an arbitration clause. The plaintiff did not wish to be bound to the arbitration requirement, and brought suit. The court held that the arbitration clause was not legally enforceable. The court described the system employed by Netscape as "browse-wrap." The downloading could be started by

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268. Id.
269. Id.
270. DeJohn, 245 F.Supp.2d at 915.
271. Id.
272. Id. at 916.
273. Id. at 921 (citing Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993)).
274. Id. The court also indicated that "because the case can readily address the merits of the other counts directed at the defendants and has already familiarized itself with them, it will further judicial efficiency for this court to resolve those claims now instead of transferring this entire matter to New York." Id. at 921. Among other things, the court dismissed the claims associated with Illinois consumer fraud claims, as the contract stated that New York law would govern any dispute associated with the contract. Id. at 922.
276. Id. at 587.
277. Id. at 588.
278. Id.
279. Id. at 596.
280. Specht, 150 F.Supp.2d at 596.
clicking on an icon, but the sole reference to the license agreement was in a text visible only by scrolling down the page.\textsuperscript{281} The consumer was told to "[p]lease review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software."\textsuperscript{282} In refusing to enforce the arbitration agreement, the court stated that under California law the offeree "is not bound by inconspicuous contractual provisions of which he was unaware."\textsuperscript{283} In this case the court held that "downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating 'I assent' has no meaning or purpose other than to indicate such assent."\textsuperscript{284}

In \textit{Comb v. PayPal, Inc.},\textsuperscript{285} a United States District Court invalidated the arbitration clause that was contained in PayPal's consumer contract.\textsuperscript{286} The court held that the arbitration clause was invalid on the basis of both procedural and substantive California law.\textsuperscript{287} Among other things, the court ruled that this was an adhesion contract, and the provision for arbitration was not something that the ordinary consumer would expect to be contained in such an agreement.\textsuperscript{288}

\textbf{V. Summary}

The tremendous increase in the number of contracts entered into through electronic means has resulted in a challenge to the legal system to ensure that the law applicable to such transactions is both clear and just - or at least as clear and just as laws applicable to contracts executed through more traditional means. Towards this end a number of statutes have been proposed and adopted which are even more precise that those which have changed through the evolutionary process of the common law. With regards to judicial decisions involving electronic contracts, courts have had no trouble applying well known legal principles to electronic contracts. As stated by the court in \textit{Specht v. Netscape Communications Corp.}:

\begin{itemize}
  \item \textsuperscript{281} \textit{Id.}
  \item \textsuperscript{282} \textit{Id.} at 589.
  \item \textsuperscript{283} \textit{Id.} at 595 (citing Windsor Mills, Inc. v. Collins & Aikman Corp., 101 Cal.Rptr. 347 (Cal. Ct. App. 1972)).
  \item \textsuperscript{284} \textit{Id.}
  \item \textsuperscript{285} 218 F.Supp.2d 1165 (N.D. Cal. 2002).
  \item \textsuperscript{286} \textit{Id.} at 1177.
  \item \textsuperscript{287} \textit{Id.}
  \item \textsuperscript{288} \textit{Id.} at 1173
\end{itemize}
Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the internet.\textsuperscript{289}

While cases applying the uniform statutes which have been promulgated by the legislative branch are scarce, there is little doubt that courts will continue to apply both the statutory law and well established legal principles to contracts which are executed through the electronic universe.

\textsuperscript{289} 150 F.Supp.2d at 587.